

## Access to Information in Africa

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# Access to Information in Africa

Law, Culture and Practice

*Edited by*

Fatima Diallo  
Richard Calland



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Fatima Diallo & Richard Calland  
June 2012



## LIST OF ACRONYMS AND ABBREVIATIONS

ACCU	Anti-Corruption Coalition Uganda
ACHPR	African Charter on Human and Peoples Rights
ADP	Assemblée des Députés du Peuple
AFIC	Africa Freedom of Information Centre
AIPPA	Access to Information and Protection of Privacy Act
AN	Assemblée Nationale
ANC	African National Congress
ANOI	Agence Nationale de l'Organisation de la Conférence Islamique
ANSA	Affiliated Network for Social Accountability
APIOs	Assistant Public Information Officers
ATI	Access to Information
AU	African Union
CAB	Cabinet
CDF	Constituency Development Fund
CDHR	Committee for the Defence of Human Rights
CEDEAO	Communauté Economique des Etats de l'Afrique de l'Ouest
CHRI	Commonwealth Human Rights Initiative
CLO	Civil Liberties Organization
CNLCC	Commission Nationale de Lutte contre la non transparence, la Corruption et la Concussion
COFI	Coalition on Freedom of Information
COST	Construction Sector Transparency Initiative
CSC	Conseil Supérieur de la Communication
DCI	Direction de la Communication et de l'Information
DFID	Department For International Development
DPR	Department of Petroleum Resources
ECT	Electronics Communications and Transactions
EFCC	Economic and Financial Crimes Commission
EITI	Extractive Industry Transparency Initiative
FCT	Federal Capital Territory
FGN	Federal Government of Nigeria
FHRI	Foundation for Human Rights Initiative
FOI	Freedom of Information

FOIA	Freedom of Information Act
HRNJ	Human Rights Network for Journalists
HRW	Human Rights Watch
HURINET-U	Human Rights Network-Uganda
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPC	Independent Corrupt Practices and Other Related Offences Commission
ICT	Information and communications technology
IDRC	Canadian International Development Research Center
IGG	Inspectorate General of Government
IP	Integrity Pacts
ITU	International Telecommunications Union
J.O.	Journal Officiel
JSC	Judicial Service Commission
JVC	Joint Venture contract
KBC	Kenya Broadcasting Corporation
MDA	Ministries Departments and Agencies
MIS	Market information services
MISA	Media Institute of Southern Africa in the Southern Africa region
MKSS	Mazdoor Kisan Shakti Sangathan
MPAN	Newspapers Proprietor's Association of Nigeria
MRA	Media Right Agenda
NCPRI	National Campaign for People's Right to Information
NDDC	Niger Delta Development Commission
NEITI	Nigerian Extractive Industries Transparency Initiative
NGE	Nigerian Guild of Editors
NGO	Non-Governmental Organization
NNPC	Nigerian National Petroleum Corporation
NRM	National Resistance Movement
NSA	National Security Agencies
NSWG	National Stakeholder Working Group
NUDIPU	National Union of Disabled Persons of Uganda
NUJ	Nigerian Union of Journalists
OAS	Organization of American States
ODAC	Open Democracy Advice Centre
ODAF	Open Democracy Advice Forum

ODCG	Open Democracy Campaign Group
OGP	Open Government Partnership
OMPADEC	Oil Mineral Producing Area Development Commission
OPTS	Oil Producers Trade Section
OSJI	Open Society Justice Initiative
PAIA	(South African) Promotion of Access to Information Act
PAIR	Programme for African Investigative Reporting
PCC	Public Complaints Commission
PENCOM	Nigerian Pension Commission
PIOs	Public Information Officers
PIT	Public Internet Terminals
PM	Prime Minister
PNBG	Programme National de Bonne Gouvernance
PPA	Power Purchase Agreement
PSAs	Production Sharing Agreements
PSC	Production sharing contract
PSC	Public Service Commission
PWYP	Publish What You Pay
R2K	Right to Know
RAAG	RTI Assessment & Analysis Group
RIA	Regulatory Impact Assessment
RTI	Right to Information
SADC	South African Development Corporation
SAHR	South African Human Rights Commission
SAISA	Stratégie d'Accès à l'Information au Sein de l'Administration
SANEF	South African National Editors Forum
SEC	Securities and Exchange Commission
SENELEC	Société Nationale d'Electricité.
SEP	Société des Editeurs de Presse
SIG	Service d'Information du Gouvernement
SMS	Short messaging service
SONATEL	Société Nationale des Télécommunications
TI	Transparency International
TNC	Transnational Corporations
UAF:	Universal Access Funds
UDHR	Universal Declaration of Human Rights
UEB	Uganda Electricity Board
UETC	Uganda Electricity Transmission Company
UMDF	Uganda Media Development Foundation

UN	United Nations
UNDD	Union Nationale pour la Démocratie et le Développement
UNHRC	UN Refugee Agency
UNICEF	United Nations Children's Fund
UWONET	Uganda Women's Network
WAP	Wireless Access Protocol

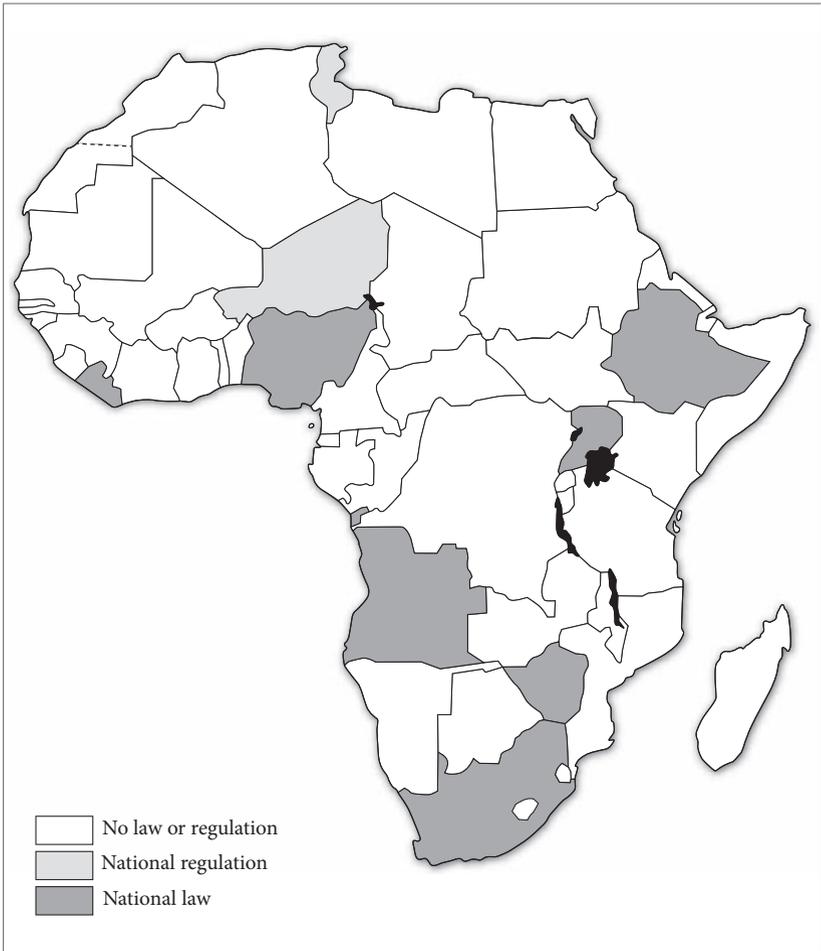
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National Laws and Regulations on the Right to Information in Africa

Source: <http://www.article19.org/maps/>.

INTRODUCTION:  
NAVIGATING THE TRANSPARENCY LANDSCAPE IN AFRICA

Richard Calland & Fatima Diallo

This book is a record of advances in African jurisdictions towards guaranteeing the right of citizens and others to access state information (hereafter access to information or ATI). It is set against the backdrop of the significant global developments that have occurred in the area of transparency law, policy, and practice in the twenty years between 1992 and 2012, and especially in the later part of this period. For the first time, a collection of African academics and practitioners have been provided with an opportunity to bring their own analyses to bear and to contribute to the fast-growing body of scholarship that is now accumulating internationally in response to the global evolution of ATI rights. This is, therefore, an African account of progress made and setbacks suffered, but also an account of challenges and obstacles that confront both policy-makers and practitioners, challenges that must be overcome if ATI is to make a distinctive, positive contribution to the continent's democratic and socio-economic future.

CONTEXTUALIZING AFRICAN 'EXCEPTIONALISM'

In Africa and elsewhere, the ATI debate has been mostly articulated in terms limited to 'advances' by legislation alone. Such an approach focuses on efforts to put in place specific legislation imposing on the state the duty to facilitate access to public information. Vleugels (2011) lists nine African countries with such laws, though few scholars or practitioners would be easily convinced that Zimbabwe's 2002 Access to Information and Privacy Protection Act is anything other than an ATI law in name alone, given the oppressive use to which it has been put by the Mugabe government. Five of the other eight countries passed legislation that came into effect in 2010 or 2011, so it is perhaps understandable that some observers have spoken of Africa as 'lagging behind' the global trend.

Part of the reason for seeing Africa as laggard may be that, behind the small number of ATI laws, African states are often characterized as weak, collapsed, or failed (Zartman 1995; Rotberg 2003). With inefficient

bureaucracies, “the politics of the belly” practised by their governments (Bayart 1993), and largely illiterate populations, such countries cannot easily accommodate the requirements of a legislative regime requiring public information disclosure. Consequently, both the legal principles underlying ATI and the institutional framework for its implementation as a universal value are likely to be weak. Legislation, in other words, is unlikely to have much of an impact.

This juridical approach to ATI has embedded in it an ideological dimension. Many different political hypotheses about power and institutions, for example, underlie failed-state theory. Similarly, the common normative view of diffusion of ATI is based on an acceptance of liberal values, within the broader context of human rights’ discourse (Calland & Newman 2007). The strategy, continental in scope, is driven mainly by specialist international NGOs, often working closely with local or national partners who share their ideological predisposition (Darch & Underwood 2010: 51). Yet, the rejection by many scholars of the failed-state hypothesis (Call 2008; Hagmann & Péclard 2011; Titeca & De Herdt 2011) demonstrates that the shifting paradigm that tends to move from democratic conditionality to informational conditionality will eventually be exposed by actual conditions on the ground.

Darch & Underwood (2010) have critiqued much of the dominant thinking that informs the global ATI movement, and in a later paper, Darch (2011: 3) went on to pose the following question:

What does it mean to say that African countries have not engaged with the issue of ATI, that they lack political will, have weak legal-administrative systems and are poor at implementing and enforcing the law?

This formulation goes some way towards providing a basis for this volume’s primary objectives: to escape a formulaic response to Africa’s ostensibly weak stance on ATI; to provide a more nuanced and profound assessment of the political, social, administrative, and economic conditions that prevail; and to identify a more diagnostically authentic as well as legitimate set of implications for both analysis and activism.

There is a general failure in ATI discourse to recognize the significance of the diversity of legal traditions in post-colonial African countries. If ATI is in fact a complex process involving representation, interaction, and negotiation between citizens and their representatives, then the ATI debate cannot be dissociated from that concerned with the institutional development and democratic transformation of African states, although some caution about the ‘plurality of Africa’ is necessary (Balandier & Adler

1986). There are real divergences between Francophone and Anglophone administrative traditions, and much of ATI work pays insufficient attention to the question of what ATI might really mean to a Francophone African bureaucrat. In French-speaking Africa, ATI is viewed primarily as a question of access to 'administrative documents' and consequently as part of a public-sector reform. Such reform of the bureaucratic framework is directed much more towards forging administrative democracy than towards protecting the citizen's right of ATI. The two objectives are related, of course, but this is a critical difference in approach and must be taken into account, since it guides the whole process of ATI implementation. By analogy, at this stage we have little in the way of context for an analysis of ATI in Africa's five Portuguese-speaking countries, which are not analysed in this volume and have been less prominent in regional ATI debates but which may have valuable lessons to teach us.

Despite the emphasis on the failure of African countries to join the rush to legislate ATI, there has been remarkably little scholarly analysis of what this signifies, especially given the existence of well-organized campaigns in such countries as Uganda, Ghana, and Nigeria. Furthermore, even in the global North, where the legislation process seems to have been more successful, closer examination shows that the state has moved to counter ATI and there have been defeats and setbacks. In this sense, South Africa's recent 'secrecy bill' is unexceptional, and can be compared to reversals in the developed world that governments attempt to justify by reference to concerns about terrorism and national security, as well as by the use of legislative 'back doors'.<sup>1</sup>

Without playing down the difficulty of domesticating ATI in African jurisdictions, the contributors take account of recent political changes and the debates on government openness, as well as emerging new practices. For African scholars, practitioners, and advocates this is an opportune moment to reflect on the future of ATI on the continent. This may require us to develop a new kind of praxis, one that avoids the fixation of a model based solely on ATI law. New developments hold out promise: a different instrumental understanding of the duty of information-holders to make raw data available proactively (the open data movement) and the spread of voluntary information regimes (such as the Extractive Industries Transparency Initiative [EITI] and the Construction Sector Transparency

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<sup>1</sup> See Information Commissioner Office (2010), *Upholding information rights in a changing environment*, Information Commissioner's Annual Report 2009/10, London: The Stationery Office.

Initiative [COST]). Both of these approaches to ATI tilt away from the idea of a generally applicable, non sector-specific, ATI statute at national level.

#### MAPPING ATI IN AFRICA

Commissioned by the ATI Working Committee of the African Network of Constitutional Lawyers (ANCL), the chapters in this volume wrestle with the implications for African countries of global developments in ATI, and contribute constructively to the debate by presenting in-depth analyses from African scholars and practitioners. The texts include theoretical contributions as well as case and country studies that draw on a variety of disciplines—legal anthropology and political philosophy as well as law. The volume is organized in three sections, including 12 chapters. The first section discusses theoretical perspectives, the second section comprises three thematic studies, while the last section contains five regional and country studies.

In the first chapter, Calland presents a summary of the global ‘state of the art’, which he represents as both dynamic and complex. He explains what he regards as the primary paradigm shift that has occurred internationally in the understanding of ATI by using an Indian example, examining both who uses ATI laws and why. This shift, emerging from the practice of a ‘newer democracy’ and a developing country, articulates a notion of the right of ATI as a ‘power right’ that has the potential to shift power relations between different actors, providing an opportunity for less powerful actors to engage meaningfully with more powerful actors in their deliberation over political choices that will impact on the interests of the former.

Darch, in the second chapter of this volume, builds on his previous work and argues that ATI is a quintessentially constitutionalist idea. The author suggests that it is crucial to link ATI to the debates on constitutionalism, the highly contested concept of citizenship, and, if a model has to be followed, the emerging international jurisprudence on ATI based on the ‘rights claim’, which, he argues, needs to be applied creatively and innovatively in African contexts.

In the third chapter, following on from the questions about state, society, and citizenship in post-colonial African nations, Diallo examines Senegal’s legal institutional framework from a socio-anthropological perspective. She identifies some of the characteristics of the state model inherited from the colonial period that serve to marginalise, and in

many cases overwhelm, attempts to introduce transparency to public administration.

In the fourth chapter, Adeleke focuses on the ground-breaking South African and Kenyan decisions to extend the scope of the ATI right into the private sector, when access is required for the exercise or protection of another right. He argues that such an extension of the scope of ATI represents an unprecedented opportunity to impose accountability and transparency on private power. This is a conceptual exposition that is entirely consistent with the application of the Hohfeldian theoretical approach to rights and duties referred to in other chapters.

In the second, thematic section, a second contribution by Darch—on ATI statistics and indicators—adds to the theoretical dimension of the volume. He recognizes that quantitative analysis is useful when applied, for instance, to the assessment of compliance with their legal obligations by state bodies, service quality, and levels of user satisfaction. However, in many contexts, especially in under-developed countries, data collection is poor. Darch goes further by highlighting the ambiguity and subjectivity hidden behind many kinds of statistical indicators. He argues that this explains how the artificial problem of African ‘backwardness’ in ATI arose, discounting the possibility that ATI rights can be satisfied in non-judicial ways. He criticizes reliance on the quantification of state compliance by showing how data can suggest formal compliance yet disguise underlying obstructionism. Such situations, probably not unique to Africa, undermine the idea that strong causal links can be constructed between ATI policy and the improvements in accountability measured.

Idemudia’s thematic case study describes an approach to ATI based on voluntary disclosure, inviting the re-thinking of a link between transparency and accountability by drawing from the experience of EITI in Nigeria. His conclusion, which hangs on the notion of a ‘governance failure complex’ in African countries, chimes with Darch and Diallo’s observations about the post-colonial state earlier in the volume, and draws attention to the inevitable limitations imposed on the successful application of the theory of change to practice. The experience of Nigeria’s participation in EITI, Idemudia argues, is that increased (and in this case, voluntary) transparency may lead to greater accountability. However, it will not necessarily result in more equitable and effective socio-economic development or the overcoming of the resource curse.

Ten years ago Klaaren (2002) mischievously asked whether there was “a right to a cell phone”, in a volume that argued for ATI generally as a critical component in the realization of human dignity. A decade later, after the

exponential expansion of mobile information and communications' technology, he might be taken more seriously. Ownership of a cell phone and connection to the Internet may already be necessary. This volume would be incomplete if it were not to encompass a consideration of the relationship between ATI as a right to digital information as well as to paper records. Accordingly, Adeleke and Lasseko Phooko's chapter takes the theoretical features of contemporary thinking on ATI to a logical conclusion. ATI, the authors argue, is a fundamental human right; and, since digital information delivered over electronic networks is the predominant form in which information is currently available, the right would be denuded of much of its meaning and usefulness were it not *explicitly* extended to include online digital information. As a result, they conclude that any future assessment of how best to give effect to the right to ATI in Africa needs to take full account of this imperative, and national policy frameworks must be designed accordingly.

Aside from theoretical and thematic perspectives, this book offers accounts of the state of ATI in Burkina Faso, Kenya, Malawi, Namibia, Nigeria, Senegal, South Africa, Uganda, and Zimbabwe – a range of countries that spans Southern, East and West Africa.

Opening the third section, Lasseko Phooko's chapter seeks to identify the key factors in enforcing ATI regulations, by comparing Malawi, Namibia, and Zimbabwe. It is already well established in the ATI literature that strong demand is a pre-requisite for good supply (Calland & Neuman 2009). Lasseko Phooko, in turn, invites citizens to undertake an even more important and demanding assignment: to litigate their ATI right in a creative and assertive fashion, notwithstanding the uncertainties and asymmetries in both domestic and regional legal frameworks relating to enforceability and justiciability. Additionally, she calls for an investment in the sensitization of African judiciaries to international norms and standards on ATI, in order to encourage a progressive and activist judicial philosophy when such cases come before their courts.

Four more country studies provide further evidence of both progress and obstacles to progress, in Uganda, Kenya, Burkina Faso and Nigeria. In the first country study, Ngabirano shows how the Ugandan ATI campaign, sometimes described as the most successful in Africa, now seems to be bogged down in the mud. He explains how civil society organizations came to develop an ATI campaign in a post-colonial state that suffered through fierce power struggles, civil strife, and dictatorship in the early days of independence. The campaign pushed successfully for the

adoption of ATI legislation, which was passed in 2005, with the regulations for its implementation gazetted five years later. But because of low levels of awareness and understanding about ATI among public servants, a situation attributed to the elitism and urban character of the campaign, demand has now slowed to near collapse, both among civil society organizations and citizens. Ngabirano concludes by offering solutions for the unblocking of such bottlenecks.

In the Kenyan country study, Abuya identifies the key issues that concern primary stakeholders. The public faces obstacles in asserting its ATI rights, including complex requirements for disclosure, a general lack of information, and a culture of secrecy. ATI criteria are absent, as is an appeals' framework that might enhance both the operation and the justifiability of the right.

In the following one, Sango describes the preliminary advances in ATI that have taken place in Burkina Faso through a wide range of legislative measures. Further progress is circumscribed by the wide powers of discretion attributed to public administrators, who can decide what to disclose and what not to disclose. Sango argues that even though the understanding of ATI tends to privilege the media, investigative journalism has declined since the iconic Norbert Zongo case, which was widely reported across French-speaking Africa.

In the concluding chapter, commenting on the most recently enacted ATI legislation in Africa, Nigeria's Freedom of Information Act (FOIA) of May 2011, Adebayo and Akinyoade describe how the new law aims to correct the shortcomings of previous legislation by introducing statutory provisions that recognise, ensure, protect, and encourage the exercise of a public right to state information. They conclude that a kind of 'state of information sacredness' persists in public agencies and discuss the impossibility of achieving the Act's objectives without a public acceptance of collective responsibility for demanding and ensuring transparent governance. As a consequence, awareness and enlightenment programmes should be organized frequently, to create a participatory platform for members of the public. The judiciary must also play an active watchdog role, and the legislature has an obligation to ensure that the Act is kept up-to-date by regular reviews.

We hope that this selection of country studies, which are descriptive as well as analytical and comparative, will also shed light on the larger questions of state and citizenship, incentives, and the law that are raised in the earlier parts of the book.

## IRREVERSIBLE ADVANCES IN AN UNFINISHED PROCESS

It is inaccurate to portray the progress of African countries in the area of ATI as a narrative of unadulterated success, given the range and depth of obstacles and setbacks that have been suffered. Nevertheless, it is now reasonable to suggest that there is a critical mass of knowledge, understanding, and data, as well as networks of activism and advocacy, and substantive legislative and other administrative reform. This suggests that African countries are developing their own ATI 'narratives' and that they are irreversible though unfinished.

More scholarly analysis is needed as a necessary part of this general advance, for there are difficult issues of conceptualization, of measurement and data, and of interpretation and analysis to contend with. ATI is an intricate concept, not easily reduced to simple numbers or laws; it requires complex shifts in power relations and bureaucratic culture for it to take root and flourish. This volume offers what, we submit, is an appropriately multi-dimensional perspective on the state of ATI in African jurisdictions, from which different stakeholders and role-players will obtain insights that can contribute to their own praxis—a praxis that will entail a genuine *domestication* of the ATI right.

Even if one accepts the claim to universality of the ATI concept, a quick-fit, one-size-fits-all bolting-on of an ATI practice imported from somewhere else is unlikely to advance in African nations, or indeed anywhere else in the world. The process of implementing ATI in Africa will inevitably be one of negotiation and navigation, given the particular challenges that prevail. However, this will, in turn, produce an authentic and legitimate ATI, one that will be, in the longer term, much more resilient.

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PART ONE

ACCESS TO INFORMATION:  
THEORETICAL CHALLENGES IN THE AFRICAN CONTEXT



## CHAPTER ONE

### THE RIGHT OF ACCESS TO INFORMATION: THE STATE OF THE ART AND THE EMERGING THEORY OF CHANGE

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#### ABSTRACT

*As the number of ATI laws has grown exponentially over the past 10–15 years, so knowledge about the practice of ATI, especially in newer democracies and developing countries, has increased. From this new body of knowledge, fresh perspectives are emerging about both theory and praxis. International case law has now secured the moorings of the argument that ATI is a fundamental human right. Moreover, in theorizing the new practice of ATI in developing country contexts, it can be described most appropriately as a ‘power right’ (when applying Hohfeld’s typology), of instrumental value in helping to redefine power relations between different social and governmental actors. From this, an emergent theory of change can be identified. It is through an appreciation of the multi-dimensional character of ATI that an understanding of the possibilities and limits of ATI as a force for socio-economic change emerges. Thus, the political and economic considerations that impact on the implementation and enforcement of ATI can be recognized as no less important than the legal and bureaucratic (procedural) aspects and perhaps more so. To illustrate this paradigmatic shift in conceptual understanding of ATI, the chapter draws from the experience of both an African country—South Africa—and more so, another country of the global South—India. Concerns about the political commitment to ATI remain—accompanied by persistent ‘downward’ pressures on transparency—and so, along with anxieties about the precise, measurable impact of ATI, encourage a sense of urgency: that scholarly thinking and research should catch up with the new fields of practice and experience around the world, including Africa, which is making its own distinctive contribution to the state of the art.*

#### CONCEPTUAL AND PARADIGMATIC STARTING POINTS

The global right of access to information picture has changed greatly since 1992; there has been an ‘explosion’ of laws providing for a right of access to

information (Ackerman & Ballesteros 2006). At that point, only 15 countries had ATI laws—and with two exceptions (Columbia and Philippines), all were developed countries/mature democracies (Vleugels 2008). Since then, at least 70 countries have added their names to the list; as at October 2011, Vleugels' list had increased to 88 national ATI laws (with 175 sub-national laws).<sup>1</sup> Of those countries with ATI laws, the great majority (around 65) could comfortably be described as either 'developing economies' and/or 'new democracies'. As a result of this exponential increase in the volume of ATI legislation, there is concomitant increase in the amount of information about the operation and impact of ATI law and, moreover, how it operates in a very diverse range of socio-economic and political contexts.

The increase in knowledge about ATI and especially about how ATI operates in different socio-economic, political, and cultural settings can be categorized in different ways. First, there is a new body of knowledge of the legal considerations—issues pertaining to scope and application, to exemptions, to procedural obligations on information holders, and to appeals against denials. The second category relates to conceptual and theoretical issues. What is ATI? What is its character? What value does it bring and to whom? The third category relates to the politics of transparency and ATI. And last, fourth, is the category related to issues of implementation and enforcement of ATI.

The emerging literature on ATI tends to span these four categories. The aim of this chapter is, first, against this background of exponential growth in ATI law and knowledge, to attempt to summarize the 'state of the art' globally—or, at least, to offer one version of it (this writer's)—so that the wider context can be better appreciated and understood, and second, to provide one (again, this writer's) articulation of a 'theory of change' that is emerging from the new scholarship and from the body of evidence of impact that is accruing from around the world. It does not, therefore, attempt to cover all the ground, and save for a brief discussion of the human rights' law genealogy of ATI, does not encompass the legal or procedural considerations. Nor does it examine in any depth the implementation challenge, other than to recognize that a major preoccupation for practitioners now is with how best to ensure that ATI works in practice, whether it is enshrined in law or not.

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<sup>1</sup> [www.right2know.org/resources./publications.ati-laws\\_fringe-special\\_roger-vleugels\\_2011-oct](http://www.right2know.org/resources./publications.ati-laws_fringe-special_roger-vleugels_2011-oct) (accessed on 14 March 2012).

In the academy, there is considerable debate about what the right of ATI constitutes, and indeed what purpose it serves. As Snell & Sebina (2007: 62) describe it:

The problems of access to information are not new nor are they uncatalogued. Yet our tools in identifying the problems, understanding their causes and devising solutions whether short term or long term seem deficient. With a few exceptions, we have approached access regimes—their performance, evaluation and reform—with a heavy concentration on the legislative architecture and have often accepted that the failures or problems are isolated instances or exceptions to the norm. We need to find a theoretical framework that accepts that the access to information process is a complex system, one that necessitates a mixture of approaches by administrators and users.

The starting point in responding to this challenge has been to assess ATI's genealogy and integrity as a 'right'. A valuable element of Darch and Underwood's contribution to the debate was to throw sceptically cold water on the enthusiastic assertion that accompanied much of the activism and advocacy of the global ATI movement in the 1990s that ATI is a 'fundamental human right'. Others have, with good cause, commented on the 'evangelist' tone that has characterized much of the advocacy in favour of ATI and transparency generally in the past decade or more. Birchall (2011: 4), for example, has noted that "[m]ore than a political doctrine, transparency has taken on the identity of a political *movement* with moral imperatives", while Hood (2006a: 3) writes: "Like many other notions of a quasi-religious nature, transparency is more often preached than practiced, more often invoked than defined".

These observations are important not so much because of what they reveal about the personality of the ATI advocacy movement, but because they serve to help remind us that ATI is fundamentally a matter of politics and political economy rather than law and bureaucratic, administrative practice. Birchall's critique of transparency is more convincing than her averment in defence of a progressive utilization of secrecy—thinking through, she says, what a "secrecy of the left" might be or "recuperating secrecy", as the final part of her essay is entitled. Her main complaint about transparency is its complicity with neo-liberalism: that access to information has been used to 'open up the state' as a part of a political strategy of undermining the state and diminishing its scope and power—because of the "close relationship between transparency and neoliberalism, the Left is at risk of echoing Liberal celebratory rhetoric around transparency" (Birchall 2011: 6).

Certainly, this critique is useful in pointing to the ‘pan-ideological character’ of ATI—that it can serve to create political space for all, and not just some, which is why ATI legislation in the United States has been used more by business to defend its interests, and increasingly so in South Africa too, than by citizens to advance theirs. “If transparency is only offered to reinforce the beliefs of half the country, it is not a tool of democracy but a tool of ideology, conformity and moralism” (ibid. 12). But Birchall partly answers this herself, by acknowledging that ATI is a means to an end, rather than an end in itself. Only the most extreme advocates of ATI would claim that it is a panacea for all democratic ills. Far from it: ATI can only serve a progressive democratic project if is accompanied by a whole panoply of other democratic reforms and institutions.

Birchall’s critique fails to avail itself of paradigmatic shifts that have their roots in the global South and to this extent falls into the trap of looking at transparency through the eyes of a Western progressive sceptic who sees the progressive political project suffering by virtue of its confused relationship with liberal tenets, such as ATI. This ignores the emerging practice and theory of change in the developing world, which sees ATI as less an individual right and more a collective right to be used to advance community interests against more powerful actors, whether in the state or in the private sector—shifts in understanding which this chapter returns to a little later. The short point on which to end this brief introductory section is to recognize that ATI may be pan-ideological but it is not *un*-ideological or *supra*-ideological. While some will see ATI as a purely legal and/or technical exercise, concerned with the procedural niceties of bureaucratic arrangements in the state, a more rewarding and—in the African context where state administrative weakness is often found alongside or close to political oppression—a more apt approach to ATI is to recognize it as a profoundly political subject, concerned with power relations between different social actors.

#### ATI AS A HUMAN RIGHT

The assertion that ATI constituted a fundamental human right derived from a hopeful interpretation of the meaning of Article 19 of the Universal Declaration of Human of Rights, which, until the ground-breaking decision of the Inter-American Court of Human Rights in the Reyes case in 2006, lacked any substantive international jurisprudential basis. As Darch notes in his chapter in this volume, Reyes does set an important precedent

in that it does elevate to international law level the proposition that not only is ATI a fundamental, justiciable human right, but that it imposes specific duties on the state, including the need to respond to any request from a citizen who seeks—the word used both in Article 19<sup>2</sup> and in Article 13 of the Inter-American Convention on Human Rights which was the focus of the Reyes litigation—information from the government or other state agency.

Thus, thanks to the Reyes decision, there is now a much sounder foundation upon which to assert that ATI is a fundamental right and goes a substantial way towards answering Underwood and Darch's question, as Darch acknowledges in this volume. However, it is not the end of the matter for several reasons. First, asserting a right of ATI in Africa on the basis of its international law pedigree may not be a simple exercise. For one, many African jurisdictions may not embrace international jurisprudence with the same enthusiasm that, for example, the South African Constitutional Court does.<sup>3</sup> Second, as Darch notes in this volume, the African Charter on Human and People's Rights is parsimonious in its articulation of the right to ATI; unlike Article 19 and Article 13, it does not use the word 'seek' and speaks only of a "right to receive information".

Alongside the notable increase in the number of ATI laws globally, there has also been what this writer has described elsewhere as a "paradigm shift" in understanding of ATI that has emerged from the practice of ATI, especially in the newer democracies and particularly in the developing country context (Calland 2009). In essence, the shift was discernible from an examination both of who was using the new ATI laws and for what purpose. Central to this shift in thinking was the influence of the Indian experience, especially that of the Organization for the Empowerment of Peasants and Workers (MKSS) in the Indian state of Rajasthan, which has developed a totemic or iconic place in the global ATI movement, with its compellingly evocative strap-line or slogan 'The Right to Know is the Right to Live'. Instead of ATI being used by corporations or middle-class citizens

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<sup>2</sup> Article 19 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers", G.A. Res 217A, U.N. GAOR, 2d Sess., 1st pen. Mtg., U.N. Doc A/810 (Dec 12, 1948). Available at: <http://www.un.org/en/documents/udhr/> (accessed 25 May 2012).

<sup>3</sup> The South African Constitution requires that the courts take into account international law (Section 39 of the Constitution of the Republic of South Africa Act 1996).

to protect their interests, or by journalists to uncover the dealings of ‘palace politics’ within government—as it had traditionally been in many developed democracies that had ATI laws—the Rajasthan example invited the ATI movement to conceptualize the legal right to ATI as a means to an end, to be deployed by communities as a collective right, as a ‘leverage right’ as Jagwanth later called it (Jagwanth 2002), and which Adeleke’s chapter in this volume builds on with its assessment of how ATI can be seen, and in some cases is used, as a tool for realizing socio-economic rights in the southern Africa region.

Indeed, an appreciation of the relationship with socio-economic rights is pivotal to this new paradigm, and the practice that was developed by MKSS positioned ATI as an instrument to claim socio-economic rights or to expose the denying thereof. MKSS’s most significant innovation was to “develop a novel means by which information found in government records could be shared and collectively verified: the *jan sunwai* (public hearings)” (Jenkins 2007: 60). This writer has observed such *jan sunwais* on three separate occasions, during two visits to India (in January 2004 and March 2012). Two hearings were held in the state of Rajasthan, the other in India’s capital city, Delhi. The first occasion concerned the local village’s hospital and the availability, allocation, and cost of medicines dispensed by the hospital staff; the second was in a much smaller rural village and concerned the state government’s distribution of rations to the poor by individuals holding state-awarded licences;<sup>4</sup> and the third, in a local municipality ward of Delhi, concerned public disclosure of information about the allocations of the municipality’s budget and the choices that had been made therein.

Although the subject matter was very different, in all three cases the same methodology was employed: a system of triangulating information. One source of information was the government’s own stated policy—for example, the basis on which rations should be allocated to qualifying indigent people. The second was from records obtained through the state or the federal right of ATI Act—for example, the records of the licence-holding ration-dealers, setting out their account of rations distributed. The third was the direct evidence of the supposed beneficiaries—for example, the villagers who had received rations from the state-licensed ration-dealers. The information gleaned from the first two sources are read aloud to

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<sup>4</sup> For one account of this *jan sunwai*, which was held in the village of Kelwara in January 2004, see Roberts (2006), *Blacked Out: Government secrecy in the information age*, Cambridge University Press, pp. 1–3.

the assembled crowd of citizens, who are then invited to comment or give their own account of what has transpired. As another observer describes the social auditory methodology: “Those with direct knowledge of the specific government projects under investigation are invited to testify on any apparent discrepancies between the official record and their own experiences as labourers on public-works projects or applicants for means-tested anti-poverty schemes” (Jenkins 2007: 60).

In Delhi, on 6 March 2012, in front of the federal Access to Information Commissioner, who had convened the meeting with the National Campaign for Peoples’ Right to Information—the Delhi-based urban counterparts to MKSS—local citizens gave evidence about how some of the repairs to local roads that were recorded as completed projects on the municipality’s budget, which were displayed on large canvasses around the community hall as a result of an order made by the Commissioner a year previously, had either not happened at all or else had been performed so ineptly that within weeks the road was in disrepair once again.<sup>5</sup> As the hearing proceeded, there were two other main complaints: some of the notices of the local authority’s budget allocations had been written in chalk and washed away in the rain, uselessly. Second, there was anger about the amount of money that had been spent on “fancy lights” in the local park. As one woman citizen explained in her evidence: “We don’t need parks ... we don’t have time to walk in parks. We don’t even know where our next meal is coming from”.<sup>6</sup>

Through this direct form of ‘social audit’, many people discovered that they had been listed as beneficiaries of anti-poverty schemes, though they had never received payment. Others were astonished to learn of large payments to local building contractors for works that were never performed. (Goetz & Jenkins 1999: 606)

Other organizations, such as the Open Democracy Advice Centre in South Africa, sought to emulate the example of the MKSS, by using the South African ATI law as a means to help communities to claim the rights to clean water or access to adequate housing or healthcare, which are enshrined in the South African Constitution’s Bill of Rights. In these efforts, there has been success, but it is clear that the model relies heavily on the presence of professional, specialist, intermediary organizations

<sup>5</sup> Public hearing attended by the writer, 6 March 2012, Delhi, India.

<sup>6</sup> “Bihar Shows the Power of Accountability”. Calland, R., Contretemps, Mail & Guardian newspaper, 16 March 2012.  
<http://mg.co.za/article/2012-03-19-bihar-shows-the-power-of-accountability> (accessed 12 June 2012).

(Bentley & Calland 2012), and so it has not been easy to match the mass-based activist approach to claiming ATI rights that MKSS modelled in India.<sup>7</sup>

Yet, in South Africa a 'Right to Know' campaign has emerged in recent years that can be described as both multi-class and cross-sectoral in character.<sup>8</sup> It contains within its leadership members of traditionally well-resourced NGOs such as the African democracy institute Idasa, the Institute for Security Studies, and the Open Democracy Advice Centre, whose core mandate is transparency and ATI. But the campaign also contains a large number of members of community organizations whose primary missions are not ATI but who recognize that a proposed Protection of State Information Bill (successfully re-branded as the 'secrecy bill' by the Right to Know campaign) is a threat to their work and to the interests of their communities because it will make it easier for government to cover up corruption and malign use of information.<sup>9</sup>

#### THE MULTI-DIMENSIONAL CHARACTER OF ATI

In seeking to present this global 'state of the ATI art', it would be misleading to suggest that this notion of a 'leverage' right enunciated above is the only conceptual formulation of the right to ATI or that it has wholly subsumed other conceptions of how ATI should and does function. On the contrary, as this writer has noted elsewhere, part of the contemporary understanding of ATI is to acknowledge its theoretical and conceptual intricacy: that it has a multi-dimensional character, a multi-functional character, and also a multi-rationale character (Calland & Jonason 2011). Framed like this, the evolution of the right of ATI can be better understood: to be one where the right is seen to have both positive and negative

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<sup>7</sup> Allan (2010) and Bentley & Calland (2012) cover some of the case studies of attempts in South Africa to emulate the Indian model of using ATI to protect or exercise socio-economic rights.

<sup>8</sup> <http://www.r2k.org.za/>.

<sup>9</sup> The South African Bill is one further example of the international trend which has exploited a perceived 'terrorist threat' to justify limitations in ATI by many governments around the world, although as Roberts points out: "[i]n the United States, the process of rebuilding these walls of secrecy had begun before the terror attacks of September 11, 2001" (Roberts 2006: 36). Despite the many advances around the world, there can be no doubt that, encouraged by security concerns, government resistance to ATI is also an important part of the 'state of the art' of ATI globally, although it is not one that falls within the scheme or compass of this chapter's approach to the topic.

elements ('sword' and 'shield') and a collective as well as an individual character (its multi-dimensional character); to be one that serves different democratic objectives, from holding public servants to account, to increasing participation by citizens, to enhancing their dignity through their acquisition of a deeper range of information (its multi-functional character); to be one, lastly, with a multi-rationale character, whereby different actors in different places, depending on history, national priorities, and socio-economic conditions, will likely articulate its *raison d'être* in different ways—as an instrument of democratic deliberation or as a 'lever' for socio-economic rights, for example.

This multiple character is reflected in the literature as much as in ATI's history and genealogy. As Ackerman and Sandoval-Ballesteros note: "[i]t is no coincidence that the first [ATI] act [Sweden's] also assured the freedom of the press. Access to government information and freedom of expression are intimately connected" (2006: 88). As state and society have changed, so too has an understanding of ATI's conceptual and instrumental underpinning. Bovens (2002: 317), for example, has argued that with the rise of the information society, a right of access to information should constitute a fourth great wave of citizens' rights, to be added to the list of civil, political, and social rights, distinguishing it from what he calls the "public hygiene" purpose of transparency:

[T]he information rights are most of all an element of citizenship. They concern first and foremost the social functioning of citizens, not only in relation to the public authorities, but also in their mutual relations and their relations with private entities. Information rights should be part of the civil rights chapters of constitutions, together with the other individual rights. (ibid. 327)

The 'new' paradigm offered above brings together the two elements—the 'public hygiene' and the active citizenship—and does so with a contextual understanding of the relative power relations. In this respect, the use of Hohfeld's classic taxonomy of rights, in particular his formulation of rights as powers, has proved helpful in untangling the theory or theories underpinning ATI, as a theory of change or set of theories has begun to emerge from the development of these sorts of conceptual musings. The understanding of a right as a power is one 'incident' in Hohfeld's classic exposition of the four so-called 'jural relations' constituted by rights: claims, liberties, powers, and immunities (Hohfeld 1919). Building on Darch and Underwood's first use of Hohfeld (Darch & Underwood 2010), Bentley & Calland (2012: x) present the point as follows:

It is suggested that rights are usually understood exclusively as claims and liberties, the former applying to social and economic rights, and the latter to civil and political rights. However, access to information is a different species of right. It has as its object (the thing which it is a right *to*) neither concrete thing (such as healthcare or housing) nor the duty of forbearance on the part of the State and others (the hallmark of classic rights as freedoms). Rather it changes the relationship between the parties—it empowers the right holder (the subject of the right) to demand information from the duty-bearer (in this case the State) about how the right in question is being delivered. By empowering the right holders in this way, it creates a *liability* on the part of the duty-bearer. It changes the balance of power between them such that the right holder can hold them to account as to *how* they are delivering on their other obligations (relevant to other rights).

So it was that Sumalee Limpa-ovart, a single mother whose daughter Nattanit was denied admission to a prestigious school in Thailand, was able to challenge the school (Roberts 2006: 4). Having initially refused to provide access to the examination results, Limpa-ovart took her complaint to an Official Information Board, which had been newly established under Thailand's Official Information Act 1998. The school felt compelled to reveal the examination results, but with the names of the students removed. Later, the Supreme Court ordered the disclosure of the names, which revealed that one-third of the students who had 'won' places at the school came from the families of the *dek sen*, a privileged elite, with connections that enabled them to access the best publicly funded facilities and services, irrespective of merit—a story that like those from India has a profound resonance for the many millions of citizens in Africa who suffer daily injustices at the hands of those in power and whose human dignity is summarily denuded by chronically high levels of poverty and socio-economic inequality.

As a result of Limpa-ovart's determination, a major government reform of school admission procedures was announced, to try and curb the discriminatory nepotism and cronyism. This case captures not only the nexus between active citizenship and good public administration but the relationship between the micro and the macro: how one case involving one citizen and his or her rights may evolve into a case involving major systemic considerations.

Of course, the 'system' has got ever more complex. One of the major changes of the past 20–30 years has been the increase in what has been referred to as the 'structural pluralism' of the state.<sup>10</sup> As public power has

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<sup>10</sup> The expression, and idea of, 'structural pluralism' was first employed in Giddens (2000) and deployed in relation to ATI in Roberts (2001).

'seeped' to the private realm, so the case for extending the right of ATI has received more attention, not least because of an increasing demand by environmental and other activists for greater corporate accountability (Calland 2007).

Adeleke's argument in this volume, namely that the South African, and now Kenyan, decision to extend the constitutional and statutory scope of the right of ATI to privately-held information where access is required for the exercise or protection of a right represents an unprecedented opportunity to impose accountability and transparency on private power and is, thereby, a conceptual exposition that is entirely consistent with the application of Hohfeldian theory considered above. Yet, there is little or no consensus internationally about whether as a matter of a principle, or to what extent, privately held information should be publicly disclosable. Where the information is held by a private body that is performing a public function, the issue is relatively uncomplicated: by looking not at the form but the function of the body, it is easier to identify the basis upon which the duty to disclose is placed on the information holder. But where there is no such public function and/or no public funding involved in the affairs in which records are sought, the argument is more complex and more controversial. These questions are a very significant part of the 'state of the art' internationally; thanks to the South African legislation, there is some important initial evidence from the experience of one (African) country's attempt to extend the right of ATI to (purely) privately held information.

#### A THEORY OF CHANGE?

From this discussion of some of the main theoretical and paradigmatic debates one emergent theory of change can be detected and articulated: that the right of ATI should be seen as a 'power' right that has the potential to shift power relations between different actors, providing an opportunity for less powerful actors to engage meaningfully with more powerful actors in their deliberation over political choices that will impact on the interests of the former. This theoretical framing would appear to have an obvious resonance in any society that has suffered from an authoritarian past, where notions of citizenship are only vaguely secured in the political consciousness or traditions, or where socio-economic conditions are so meagre and wealth inequality so extreme that the capacity of poor communities to assert their interests is slender.

The multi-character conceptualization of the right to ATI discussed earlier appears to be matched by the praxis. One study sheds especially

useful light on the reasons why people claim a right to ATI, listing the interests that they seek to protect when requesting records, all of which veer heavily towards what one might describe as the ‘micro’ rather than the ‘macro’ (RAAG 2009): people are generally less concerned about the systemic causes of the problems that they face and are more focused on the immediate—“why is my street lighting not working?”, “what are the credentials of my child’s swimming coach?”, “why has my welfare benefit been cut?”, and so on.

It is in this context that those who have invested heavily in ATI over the past decade or more (especially the donor community) have been asking more questions about the impact of ATI. For example, a study commissioned by the so-called Bellagio group of donors (that included the Open Society Foundations, DFID, and the Ford Foundation) has investigated the extent to which there is evidence of change arising directly from ATI reform; the studies concluded that while there is evidence, much more work is needed, based on a methodologically sound approach and underpinned by a clearer theory of change (McGee & Gaventa 2011).

#### SOME FURTHER CONSIDERATIONS

Concerns about the fulsomeness of the evidence impact are just one of a number of issues that continue to bedevil the advance of ATI. The global movement for ATI has tended to exaggerate the benefits of ATI in its proselytizing advocacy, with claims that ATI reform would ‘encourage inward investment’, ‘defeat corruption’, and ‘build trust in government’, when, in fact, there is little or no evidence that it does any of these things. ATI may serve these objectives, especially at a micro level, but the making of such sweeping meta-level claims has probably done more harm than good to the cause of ATI.

There are several other issues that have emerged in the past decade or more and which now inform many current debates about the future trajectory of ATI. These include, primarily, concerns about the practical implementation of ATI law and, relatedly, the enforcement of ATI rights (see Calland & Neuman 2007)—and under-pinning both, an anxiety about the fragility of the political commitment to transparency and ATI.

Notwithstanding these considerations, and the uncertainties about impact, enthusiasm for transparency and ATI does not appear to be waning. New initiatives arise, such as the Obama-led Open Government Partnership (OGP), to which nearly 50 countries have now signed up and

have prepared country-level strategic action plans.<sup>11</sup> New approaches are also emerging—whether in the form of a different instrumental understanding on the duty of information-holders to proactively publish information (the so-called ‘open data movement’)<sup>12</sup> or the increase in voluntary information regimes (such as the Extractive Industries Transparency Initiative [EITI] and the Construction Sector Transparency Initiative [COST]), both of which turn away from a national ATI law-based approach to giving effect to the right—a topic that is canvassed in Idemudia’s thematic case study in this volume, which invites a re-think of the link between transparency and accountability based on the experience of the EITI in Nigeria.

### CONCLUSION

As more countries have sought to enshrine a right of ATI in law, so more becomes known about the obstacles to success—many of whose characteristics are identified and canvassed during the course of this volume, and the majority of which point towards the political and socio-economic rather than the technical and legal dimensions of the challenge of giving effect to such a right. The academy is struggling to keep up with these many developments in the theory and practice of ATI. However, a new, and rich, literature is emerging. The ATI environment is a dynamic one, with new, positive developments emerging regularly despite the many ‘downward’ pressures against transparency and ATI. Africa is a part of this narrative, with its own distinctive contribution to make to the unfolding story.

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<sup>11</sup> <http://www.opengovpartnership.org/>.

<sup>12</sup> See Darbshire H., Proactive Transparency: The Future of the Right to Information? The World Bank Institute. Available at: [http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire\\_Proactive\\_Transparency.pdf](http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire_Proactive_Transparency.pdf) (accessed 30 May 2012).

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## CHAPTER TWO

### THE PROBLEM OF ACCESS TO INFORMATION IN AFRICAN JURISDICTIONS: CONSTITUTIONALISM, CITIZENSHIP AND HUMAN RIGHTS DISCOURSE

Colin Darch

#### ABSTRACT

*This chapter interrogates the idea that African countries are lagging behind the rest of the world in adopting access to information (ATI) practices. The commonly cited indicator for this is the absence of ATI legislation in all but a handful of African countries. But the evidence shows that ATI laws have produced mixed results in other parts of the world, and claims for the benefits have been exaggerated. Three key elements are identified that influence the adoption of ATI behaviours in African countries. These are: commitment to constitutionalism, defined as the acceptance by government that there can be legally defined and freely adopted limits to power; the contestation over citizenship, all too often seen and used as a political weapon to silence or marginalize critics or opponents of government; and the rights-based nature of emerging international jurisprudence, which may make it less likely that ATI will gain a firm foothold in African tribunals. The chapter closes by pointing to the patrimonial nature of many African political systems, with bureaucracies valued for their loyalty more than for their independence or predictability, and concludes that genuine administrative reform may be a more urgent precondition for transparency in governance than the passing of an ATI law.*

#### INTRODUCTION: THE 'AFRICAN FAILURE'

There are various ways of classifying systems of government, but one of the most important and useful is the distinction between *constitutionalist* and *arbitrary* regimes.<sup>1</sup> The most significant change in South African

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<sup>1</sup> This chapter is based in part on a paper presented to the First Global Conference on Transparency Research, Rutgers University, New Jersey, 19–20 May 2011. I am grateful to

governance after the collapse of the apartheid system in the early 1990s, to cite a relevant example, was the shift from parliamentary supremacy to constitutionalism, a system (or perhaps more accurately a world view) in which the power of the state is limited by a fundamental law, a rule-set that lays down both citizens' rights and the state's duties and which is enforceable in law. To be a constitutionalist state, however, is not the same as having a constitution, a point to which we shall return below. In a parliamentary system, by contrast, there are effectively no limits on what the state may do: in this sense the power of government may be exercised arbitrarily, and in the case of South Africa in the days of apartheid, clearly was so exercised. Indeed, in an often-quoted passage from a 1934 judgement, the South African Chief Justice James Stratford wrote that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway and ... it is the function of courts of law to enforce its will" (quoted by Chaskalson 2009: 26). And so, step by step, the legal framework for apartheid was put into place.

The ATI idea is quintessentially constitutionalist. At its very core is the notion that governments *must* comply with a sub-set of rules that lay down the limited conditions (the exemptions) under which they may legitimately refuse to allow citizens access to state documents and files. These exemptions—to do with privacy, to do with national security, and so on—can themselves ideally be boiled down to one simple rule: if harm will result from the release of the information into the public domain, then it must remain secret. Otherwise, it must be made available. The critical point is that ATI is always and everywhere seen fundamentally as a rule-set, and this is the principal reason why ATI advocacy tends to measure the success or failure of its campaigns by the benchmark of whether a law was passed—in other words, whether the rules were agreed to. This core constitutionality of the ATI concept has not been made much of in the recent literature, with few exceptions. Making a case twenty years ago for a wider and more nuanced African constitutionalism based on the treatment of rights as programmatic *and* normative, and their broadening to include the collective or communal, Shivji argued—almost in passing—for ATI's status as a basic constitutional right:

[The right to information has] to be constitutionally entrenched ... The right to information or the right to know is of very wide purport but includes the

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right to demand and receive information from state organs ... [G]overnment secrecy, the standard ploy of the state to keep the citizenry ignorant of state affairs, has been severely attacked. (Shivji 1991: 43)

He went on to cite Indian jurisprudence from the early 1980s in support of this position and its relevance to the African situation.

The problem with this general legislative approach, however—and here is the rub—is that it focuses on the means and runs the risk of losing sight of the end. If ATI systems and transparent governance systems are fundamentally *instrumental*, then their only goal is government *accountability*, the building of a state that is answerable to civil society, to the citizenry. But the mere existence of a rulebook—in this case ATI legislation—tells us little about how accountable a regime actually is in practice, as the examples of Angola and Zimbabwe clearly show. Both have ATI laws in place, but the effect of the legislation has been negligible.

The problem becomes even more serious when the same simplistic approach is applied uncritically to the African continent as a whole. If success is measured *only* by the yardstick of whether an ATI law is in place, then the inescapable conclusion is that African countries are generally performing poorly (Banisar 2006; Vleugels 2008). This would be true even if some kind of general constitutional promise were to be regarded as an acceptable indication of good intentions. Consequently, commentators—and not only foreigners—have repeatedly taken African governments to task for their supposed failure to join what was once described as a “veritable wave of freedom of information laws sweeping the globe” (Mendel 2003: vi). There is “very little ... activity ... on the African continent” (Dimba 2008: 1); African countries are “lagging behind” (Baglo 2009: 31–32); “the African region lags far behind the rest of the world” (Carter Center 2010a); and “Africa lags behind other regions around the world in granting citizens the right to information” (Open Society Foundation 2011).

Ironically, it seems that even those African countries with constitutional guarantees and enabling laws in place have not really managed to bridge the legislative gap effectively. In a declaration issued at the end of an ATI summit in Ghana in 2010, for example, the Carter Center held them to an even higher standard:

Where regional instruments, constitutional provisions and national laws exist often they have inadequately advanced the right of access to information due to factors such as insufficient political will, weak legal and administrative guidelines, and ineffective implementation and enforcement. At their worst, some national legal frameworks have even repressed rather than enabled the right of access to information. (Carter Center 2010b: 2)

But this formulation is more descriptive than analytical. To say that political will is absent does not tell us why politicians do not want ATI. To say that legal and political enforcement is weak does not explain the causalities at work. So, what are the deeper reasons for the reluctance of African governments to pass laws that, if other countries are anything to go by, can be safely left to sink into oblivion on the statute book? There are times, as Karl Marx wrote in 1857, when “the only possible answer [to a question] is a critique of the question and the only solution is to negate the question” (Marx 1973: 127). This chapter suggests that African governments are not ‘lagging behind’ in some normative sense because they are slow to adopt ATI laws; rather, we may be interrogating the problem in the wrong way. A considerable body of literature exists on the post-colonial state and on contestations of citizenship in various parts of Africa, but ATI activists and scholars have by and large not referred to these lines of analysis in their attempts to understand why transparent and accountable governance has been slow to take root in African jurisdictions.

Additionally, much writing and research on ATI embeds inbuilt normative assumptions—about the primacy of legislative solutions, about the character of diffusion of innovation, and about the appropriate location of ATI in human rights discourse. The difficulty is that as a basis for advocacy in specific jurisdictions this creates expectations that are rooted in the normative claims made for ATI—that it improves democratic behaviour, or that it helps to eliminate corruption. When observable reality diverges from the expectations implicit in such claims, most ATI writers and commentators, as we have seen, search for pathological conditions within the polity; hence, political will is lacking or administrative systems are weak, and, eventually, African countries are seen as laggard. This is nothing new; it is 25 years since Crowder (1987: 11) first commented that “contemporary judgements about the so-called failure of Africa are really judgements made in terms of a Eurocentric dream ... in which liberal democracy would be the norm”.

But what does it really mean to say that African countries have not engaged with the issue of ATI, that they lack political will, have weak legal-administrative systems, and are poor at implementing and enforcing the law? Is it true that the most appropriate response is to push for more legislation similar to that adopted elsewhere, despite the fact that many of the claims regarding outcomes seem to have been exaggerated? Is it possible that using the idea of ‘Africa as laggard’ as *the point of departure for analysis* is another manifestation of what has been called the “long tradition of Western perspectives on Africa as a problem that needs to be

fixed”? In this tradition, which sees African countries as potential objects of developmental intervention “rather than as serious political actor[s]” the assumption that “neo-liberal orthodoxy ... and the policies of economic reform [are a] panacea for the problem continent” is all too easily arrived at (Hoehn 2005: 1)?

In the following sections, I will argue that there are three key theoretical elements to understanding the present situation of ATI in African countries. These are, first, the question of constitutionalism and the post-colonial state in Africa; second, the highly contested concept of citizenship in African countries; and last, the rights-based nature of emerging international jurisprudence on ATI, coming mainly from a Latin American context, which may make it less likely that ATI will gain a firm foothold in African tribunals.

#### ‘CONSTITUTIONALISM’ AND THE POST-COLONIAL STATE

The question of the role of the constitution and its implications for constitutionalism in post-colonial African governance is a key issue in the analysis of ATI in African jurisdictions. The history of constitutions in colonial and post-colonial Africa can be and often is divided into three or four periods—the period immediately following the ‘independences’ of the 1960s; the period of decline into one-party rule or militarism; and the so-called ‘third wave’ of democratization from the 1990s onwards. This is a familiar story but is worth rehearsing briefly here because of its importance for the analysis of ATI.

What sort of state possesses the characteristics that make a rule-based, adversarial ATI system workable and ATI practices and behaviours achievable? The short answer is and must be, of course, the liberal state. The key elements of the classical liberal project for an economically developed nation-state are an individual “desire for liberty from the coercive power of others—an element that may be almost universally shared ... [and] the absence of desire to exert power over others” (Buchanan 2000: 117, emphasis added). The project is globalizing in nature (Young 1995: 527–529), a characteristic derived in large part from its claims to represent universal values and to be ideologically neutral, claims that are reproduced in human rights discourse and hence much of ATI discourse as well.

Consequently and first of all, workable ATI needs a bureaucracy *and institutions* competent enough to manage political information effectively in the form of retrievable records (documents or digital files), and

disinterested or professional enough to concede that ATI practices may have benefits that outweigh its short-term interests as an elite group. Second, fractions of the political class must be genuinely dependent both electorally and in terms of policy-making on the agreement of ‘civil society’—in other words, hegemonic in the Gramscian sense of ruling by consent as well as by force or the threat of force. It is clear that many countries of the global North, the so-called ‘developed world’, are able to meet these pre-conditions only in a partial and incomplete manner, even with strong traditions of bureaucratic independence and stable political institutions.

Many African polities do not command such resources or political traditions at all. African post-colonial states are, by and large, ‘weak’ states, and hence to some degree unstable. Some countries such as Liberia (1989–2003), Sierra Leone (1991–2000) and most notably Somalia (1991 to the present) have endured conditions of the near-total collapse of central state authority for long periods. Although the state is supposed to possess a monopoly of violence, African armies were and remain poorly organized, trained, led, and equipped. Nevertheless, or perhaps because of this, military intervention has been common. Some 40 of the 53 countries of Africa have been subjected to military rule, in some cases for protracted periods. Ghana had 5 military coups in 50 years of independence; Nigeria suffered 6 military regimes lasting over 28 years in a period of 48 years after independence. In 1992, only 18 countries in sub-Saharan Africa were under civilian rule (Saine 2009: 15). In most African countries, ‘society’ is completely dominated by the powerful institutions of state power, and indeed is more or less ‘obliterated’ by them:

... the interventionist state of liberal cosmology [presumes] a separation between the state and civil society ... the authoritarian state has spread its tentacles throughout every facet of social relations. The organizing principle of the organs of the state has the concentration of power in the executive, the military or personalized rule, rather than the separation of powers decreed by liberalism. (Adelman 1998: 81)

The paucity and weakness of civil society organizations attempting to influence policy is both a symptom and the consequence of this concentration of power. It is fair to say that “liberalism in Africa is still struggling to create a satisfactorily liberal political space. In Africa, liberalism remains a project to be realized” (Young 1995: 534). The same, of course, applies to the conventional idea of constitutionalism, and by extension to the conventional rights-based concept of ATI.

The weakness of the post-colonial state has many root causes, not least the arbitrary nature of the colonial borders agreed between the European

powers in the late-nineteenth century. Generations later, this process created geographical and demographic problems that are structural in nature. African rulers struggle to “project authority over inhospitable territories that contain relatively low densities of people”, hampered by the diversity of populations and by ecological factors, with “coastal, forest, savannah, or near-desert” regions often found in proximity to each other (Herbst 2000: 11–12). Capital cities built in the colonial period were located not at the existing centres of African power but for the convenience of the European rulers, which often meant that they were located on the coast for ease of communication with the metropole (ibid. 16). The relationship between the new centres of power and their rural hinterlands after independence was often weak and distorted. African nationalism in the 1950s and 1960s, except in southern Africa, was primarily urban in character, and after independence “even the most basic agents of the state—agricultural extension workers, tax collectors, census takers—[were] no longer to be found in many rural areas” (ibid. 19).

At independence, complex democratic constitutions were imposed on these structurally challenged polities, along liberal principles largely determined by the departing English and French (the Portuguese left later and in different circumstances). But the new governments had emerged from a context of autocratic and *dirigiste* colonial rule, and their leaders had little experience of pluralism or formal democratic behaviours. They were also highly voluntaristic and triumphalist, promising instant prosperity and well-being to the citizenry (Okoth-Ogendo 1991; Dore 1997; Fombad 2007a). At independence, these elites

appropriated all the assumptions of Western modernity in both their national and international forms. The newly independent African states were run by people who looked to essentially Western visions of modernity and progress. The need to catch up often legitimated socialist versions of modernization, but everywhere the new state was seen as central to bringing about rapid progress ... Economic and political mobilization, *by overtly authoritarian means*, became the order of the day. (Young 1995: 535, emphasis added)

To the “overtly authoritarian” in government, the ‘independence constitution’ soon came to be seen as a liability, an unwanted constraint on the making of policy in pursuit of development and nation-building, encouraging disunity. As a result, governments began actively to seek ways of subverting the constitution as the basic law; the methods that they found were both the cause and the outcome of the emergence of the ‘imperial presidency’, the diminution of political space, and the

assertion of discretionary power (Okoth-Ogendo 1991: 13). The process was facilitated by what has been called the “fragility and technical deficiency” of the independence constitutions, which made it all too easy for governments—often untrammelled by opposition—simply to change objectionable provisions at will (Fombad 2007b: 59). This in turn created a climate of insecurity:

... political and constitutional instability during Africa’s first three decades of independence was caused by the ease with which post-independence African leaders subverted constitutionalism by regularly amending their constitutions to suit their selfish political agendas. (ibid. 28)

As “all aspects of public order law” were strengthened ostensibly in pursuit of development agendas, human rights such as the right of assembly and free expression were whittled away, and of course with them any idea of ATI (Okoth-Ogendo 1991: 13).

In the early 1990s, the Soviet Union vanished and the socialist-bloc countries abandoned Marxism, the Cold War came to an end, and a ‘third wave’ of democratization passed across the African continent; as far as constitutions were concerned, attempts were made to correct some of the earlier errors. The so-called ‘Washington Consensus’ of the 1990s, although fundamentally interested in neo-liberal economic policy, pushed political concepts such as governance, transparency, and accountability as well (Saine 2009: 18). It may not be necessary to go as far as Canfora (2004), who argues that democracy consists essentially in the exercise of power by those without property and dismisses the identification of democratic practices with mere institutional arrangements, to realize that many of these buzzwords have taken form, but lack content, as Adelman (1998: 74–75) has argued:

... whatever their apparent diversity, African constitutions are increasingly mere variations on a Western theme and, as such, appear to encourage pluralism while producing its exact opposite ... This confusion of form and content diverts attention from enduring and intransigent national, regional and international problems ... it also straitjackets constitutional debate by circumscribing the possibility of local, pluralist responses to the crisis.

Progress in what has been termed the ‘domestication’ of democratic practice has thus been slow and uneven (Owusu 1997: 121). This process ideally involves not the simple transplantation of a Western institutional structure for democratic practice—pluralism, elections, and so forth—but their integration with the core cultural and social systems of particular countries, insofar as these have survived the colonial period unscathed:

Domesticating democracy in the African context amounts to a dynamic and continuous process of institutionalization in which democratic ideas, beliefs, values, practices, actions and relationships, and new forms of political behaviour gain acceptance and popular support in society and become successfully integrated with other features of the culture and society, endowing them with popular legitimacy. The challenging question is how do these democratic institutions and practices fit into changing indigenous social and political practices and beliefs, modifying or transforming them, and then how are they in turn modified or changed by pre-existing forms? (ibid. 121)

This is an issue that Fatima Diallo addresses in more detail in her chapter on the social anthropology of ATI in African countries in this volume. Caution is certainly necessary, since much of what passes for 'traditional' leadership is neither traditional nor democratic but a self-serving parody of the constructed mechanisms of colonial indirect rule (see, for example, Ntsebeza 2005).

In the 1990s, the nature of the 'power map' that a constitution delineates began to show signs of having changed, with recognition that its authority is not arbitrary but derives from the citizenry. A constitution, in such a framework, "derives its whole authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed" (Fombad 2007a: 6). Nevertheless, in many countries the shift to pluralism has been formal rather than effective. Parties have been formed, and elections have been held and frequently declared free and fair; but even so "the chances of an opposition political party winning election ... have progressively diminished" (ibid. 4). That said, it is necessary to recognize that formal democratization is better than most of the alternatives and that in many African states a framework has been established in which struggles over such issues as ATI are both meaningful and important:

... any movement towards constitutionalism and the rule of law that calls for state structures to be reorganized so as to institutionalize the principles of the division and check of power must be welcomed as a step towards democratization. (Mamdani 1990: 366)

With its overtly constitutionalist dispensation, South Africa is usually considered the continent's most committed country, a commitment manifested most obviously in the proceedings of the Constitutional Court, which has the power to declare legislation null and void if it violates the provisions of the constitution. There is already a body of jurisprudence

from the court, which shows that it is very much a fully functioning institution. This whole situation is sometimes represented as in some sense exceptional:

the construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. (Makau wa Mutua 1997: 65)

As it turns out, the political commitment of the ruling African National Congress (ANC) to formal constitutionalism may be more fragile than previously believed. The ANC has argued that in a developmental state, constitutional jurisprudence must be aligned with the aspirations of improving the well-being of all citizens, in what might perhaps be seen as a shift in underlying philosophy towards a version of legal realism. In practice, several controversies have illustrated this emerging trend. One of the most important was over the contentious ‘secrecy bill’ (more formally, the Protection of Information Bill), which was passed by Parliament in late 2011 (South Africa 2011b). This occurred despite a lengthy public campaign of opposition in the media and by a range of civil society organizations, of which the most prominent was the Right to Know Campaign (R2K no date). The absence of a public-interest defence and excessively broad powers for the classification of government information were two of the major issues raised by opponents, who saw (and see) the legislation as representing a fundamental threat to ATI in South Africa.

Second, the South African government has shown signs of an increasing lack of patience with Constitutional Court and other judgements that it sees as limiting its power to make and execute policy. President Jacob Zuma has dropped several hints that he regards the judgements of the court as amounting to unwarranted political interference. In a speech to the third Access to Justice Conference in Pretoria in July 2011, he hinted that some judgements were driven by oppositional political motives:

... we seek to respect the powers and role conferred by our constitution on the legislature and the judiciary, [and] we expect the same from these very important institutions of our democratic dispensation. *The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can.* ... Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, *simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country.* (Zuma 2011, emphasis added)

In February 2012, Zuma created a further stir when he criticized court judgements because they included dissenting opinions. The government intended to review the powers of the Constitutional Court, he said in a newspaper interview, because “some of the decisions are not decisions that every other judge in the Constitutional Court agrees with ... there are dissenting judgements ... the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case? That’s what has made the issue to become the issue of concern” (Monare 2012). At the same time, the Ministry of Justice published the ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state’, already cited above (South Africa 2011a). It remains to be seen how deeply entrenched South Africa’s constitutional regime actually is. In the meantime, let us turn to an examination of the importance of a broad concept of citizenship to the success of an ATI system

#### ATI AND CONTESTED CITIZENSHIP

The state creates, obtains, or holds information in the form of permanent records, and then the citizenry demands or requests access, which is granted or refused, according to the rules or arbitrarily as the case may be. The character of a particular state—patrimonial or legal-rational—and its political class, the competence of its bureaucracy, and the state–civil society relationship: all these factors *partially* determine how such ATI transactions play out. The other determinant aspect in this asymmetrical relationship is the contested concept of what constitutes citizenship and who can legitimately claim it. At one end of the spectrum are generously broad and cosmopolitan interpretations—usually in stable democracies—which take the mere idea of nationality and expand it inclusively. At the other end are legally or politically enforceable definitions—especially in some African polities—that are so narrow that they even exclude people from different localities in the same country, a point to which I shall return.

There are two types of citizenship *theory*, the normative and the empirical (Bellamy 2008: 27). In normative theory the citizen is an almost entirely abstract being, innocent of age (more or less), race, gender, ethnicity, class, and sexual orientation. But of course, if citizenship is contested, these qualities matter—and so empirical theory, by contrast, deals with concrete historical manifestations of citizenship (ibid. 28). The story

of citizenship and human rights in Africa is in many ways the story of these two competing theories.

But broad or narrow definitions of who qualifies for citizenship are not really the heart of the problem. Regardless of definition, citizenship in contemporary African politics is a hotly contested category: citizenship is denied or revoked to silence the opposition, expel troublesome individuals, and persecute and remove specific groups of people. This naturally helps to create instability. When asked for his reason for taking up arms, a fighter in the recent conflict in Côte d'Ivoire responded that he wanted an ID card, without which he could do nothing (Manby 2009: 1). The record shows that even the exercise of the ATI right, in those African countries which have laws in place or under consideration, often depends on the possession of citizenship. In 2003, the former Nigerian President Olusegun Obasanjo famously rejected a draft ATI bill because it would have granted the access right to non-Nigerians (Odemwingie 2003: 17). More recently, a Kenyan court has ruled that the country's recently passed ATI legislation grants access rights only to Kenyan citizens (Ayaya 2012).<sup>2</sup>

Contestation over citizenship and categories of citizenship is to a large extent the toxic legacy of colonial practice. During the colonial period in most parts of Africa, England, France and Portugal deliberately used categories of citizenship and non-citizenship as part of the machinery of oppression and for control of the colonized populations. Race, ethnicity, language, and gender were all used to divide the population into settlers, *assimilados*, 'natives', 'foreign natives', and other classifications (Manby 2009: 4). Vital events' demography—the requirement that births, marriages, and deaths be registered—often did not apply at all to those categorized as mere 'natives', with the result that many middle-aged African citizens alive today have no documentary proof of their parentage or their date and place of birth. The situation is not improving: UNICEF estimates that today over half of African children under five have not been registered, predominantly among rural populations, where the percentage is of course higher (quoted by Manby 2009: 115).

Mamdani's work (1996) on the division of African populations by late colonialism into citizens (mainly white settlers) and subjects (members of local 'tribal' communities administered through indirect rule) has illustrated how local discriminations have led to the denial of full citizenship. In many African countries citizenship really is a means of accessing rights

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<sup>2</sup> This is not a uniquely African problem; the issue has also played out in the United States between state jurisdictions (Desai 2006).

and hence such resources as equal educational opportunity, employment, and basic social services. Membership, belonging, rootedness have to be competed for over and over again, often violently. These contestations take many forms, but the common theme is always some variant of *autochthonie*, or rootedness in the land. The processes of democratization, in the absence of a strong sense of state and nation, and of 'imagined community' have strengthened the sense of *local* rather than national identity and fuelled emotional rhetoric around 'us', the ones who belong here, the *autochthones*, and 'them', the foreigners, the strangers, the ones with no rights, the *allogènes*.

In theory, international law should make the revocation of citizenship very difficult, strictly limiting the circumstances in which it can happen and requiring a proper court hearing in which an individual can challenge the state's decision. But there are plentiful examples to show that African practice differs sharply from legal theory. In Tanzania, the outspoken publisher and journalist Jenerali Ulimwengu had his citizenship revoked despite having been born in the country; other Tanzanian journalists have been stripped of citizenship as well (Manby 2009: 137–138). In the 1990s, to cite another instance, the then Zambian president, Frederick Chiluba (1943–2011, in power 1991–2002), barred people with foreign parents from candidacy for the presidency; he then attempted to deport his predecessor, Kenneth Kaunda (b.1924, in power 1964–1991), on the grounds that he was Malawian (Kaunda's father was born in Malawi). Chiluba later faced accusations from opponents that he also was not Zambian, but Congolese. In some cases, a formal offer of naturalization has been made, but this is a lengthy and complex process with an uncertain outcome. In Senegal, only 12,000 successful applications have been made in the half-century since independence in 1960. Under a 2004 law, the DRC requires a presidential decree to finalize a naturalization process; Sierra Leone requires 15 years of permanent residence; Ethiopia until recently demanded proof of 'perfect' mastery of Amharic, the national language. South Africa, by contrast, granted 25,000 certificates in 2006–2007 alone (ibid. 141–142).

But the rights of difficult individuals are not the only focus of contestation. Côte d'Ivoire is home to large populations of immigrants from neighbouring countries in the Muslim north, who share ethnic ties with local northerners. Southerners, on the other hand, are mainly Christians. Under President Felix Houphouët-Boigny, northerners participated in political life without too much concern about their origins. After Houphouët-Boigny died in 1993, however, the question of citizenship became a political issue in the struggle to succeed him but was inadequately addressed in

a succession of negotiated peace agreements (Bah 2010: 599). By 2010 the rhetoric of *autochtonie* had become frighteningly bloodthirsty:

Daughters and sons of the Greater West, link hands together, the hour has come for us to be heard. The hour has come to kill the Akans and chase them from our lands. The hour has come to recuperate our land. The hour has come to clean our villages and towns of the Dioulas (Mossi) and the Akans.... (Marshall-Fratani 2006: 10)

To make matters worse, the father of Alassane Ouattara (b. 1942), the presidential candidate of the main opposition party, was born in what is now Burkina Faso, and the son was thus disqualified by the electoral code from running on several occasions. The outcome was eventually the violent overthrow of President Laurent Gbagbo in April 2011. These problems, or variants, are to be found not only in Côte d'Ivoire but also in Cameroon, the DRC and elsewhere (Cutolo 2010; Page et al. 2010).

A few African jurisdictions have formalized the idea of 'internal citizenship', which has caused considerable distress and instability. Ethiopia has implemented the concept of a federation of ethnically or linguistically determined territorial units, with significant population displacement as a consequence (Manby 2009: 112–114). The secession of Eritrea in 1993 also resulted in considerable dislocation of populations and disputes over who was or was not Ethiopian or Eritrean. In Nigeria, the existence of sub-categories of citizenship limits access to rights and resources in a formalized way that appears to contravene the country's constitution (ibid. 110–112). All Nigerians are required to acquire a 'certificate of indigeneity' to show that their ethnic and family origins are rooted in the original community of their place of origin. If they are living in that community, they are 'indigenes'; if they are resident somewhere else, they are 'non-indigenes' and may be refused employment in the public service of the state where they are living; their children may not have access to scholarships for higher education and may in fact be charged higher tuition fees (Human Rights Watch 2006: 1–2). Non-indigenes may even lose the right of some kinds of political participation, an absolutely fundamental component of modern democratic citizenship (Bellamy 2008: 4). The end result is that

these discriminatory policies and practices effectively relegate many non-indigenes to the status of second-class citizens, a disadvantage they can only escape by moving to whatever part of Nigeria they supposedly belong in ... A Nigerian who cannot prove that he is an indigene of somewhere ... is discriminated against in every state of the federation and is barred from many opportunities at the federal level as well. (Human Rights Watch 2006: 1–2)

What is almost completely absent from these narratives is any manifestation of the idea of ‘cosmopolitan citizenship’—an idea that would take into account the rights of the refugee, the migrant worker, or the urbanized and detribalized proletariat, and on which a meaningful human rights and hence ATI practice might most securely rest. A working definition of what such a modern and inclusive citizenship might consist of is that it is mainly the right to have and claim rights, although citizens as social actors clearly also have duties both in relation to the state and in relation to each other. The difficulty that arises is that of defining what rights belong to the citizen as citizen, and can therefore be denied to, say, visitors, refugees, or illegal immigrants. The South African solution has been to limit only four rights to citizens of the republic—namely, citizenship itself, the right to vote and be a candidate for office, the right of free residence, and free employment rights. All other rights by implication belong to everybody, including refugees and even illegal immigrants (Manby 2009: 149). This constitutes recognition that, at a normative level, human rights are rooted in the dignity of the human person and therefore adhere to all humans regardless of their membership of a particular national or political community.

It is precisely at the interface between the broadly-defined citizen (a member of the political community but not necessarily the national one) and the state (the political community in the exercise of its power) that rights are claimed and the duties to respect, protect, and fulfil must and do operate. It is the state that must not interfere with the exercise of rights; it is the state that must prevent third parties from interfering; and it is the state that must create the conditions (such as providing information) that will facilitate the exercise of rights even in the absence of any active interference. Built implicitly but unavoidably into this human rights paradigm, and hence into the existing model of ATI systems, is an inclusive and cosmopolitan concept of citizenship. The handful of examples of international jurisprudence concerning ATI, which are examined in the following section, demonstrates exactly these characteristics as both strength and weakness, as we shall see.

#### INTERNATIONAL ATI JURISPRUDENCE

Activists have long asserted that ATI is a ‘fundamental human right’, and a significant proportion of the literature arguing for the necessity of ATI relies on what might be termed the ‘rights argument’, often to the virtual exclusion of any other justificatory rationales (e.g. Mendel 2003: iii; Article

19 2000: 4). This creates a difficulty that is usually ignored. Human rights discourse has been subjected for some time to a range of critiques, not so much for its actual content as for its claim of universality, its emphatic individualism, and its Eurocentrism—the “damning metaphor ... that depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other” (Makau wa Mutua 2001: 201).

The rights argument as set out has rested largely on a specific reading of Article 19 of the venerable Universal Declaration of Human Rights (UDHR 1948) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR 1966), as well as on other, subsequent international and regional instruments. The original UDHR Article 19 reads as follows, and most of its derivatives use very similar language:

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

In the early years of the ATI movement, little effort was made to examine the theoretical foundations of the rights claim, other than reference to the texts of the international instruments, and there was no jurisprudence either. This situation is now changing, with some involvement of African interests, as we shall see. We are fortunate to have both the beginnings of an international jurisprudence on this question, as well as a more sophisticated theoretical understanding of the relationship between the right and the duty of states to ‘fulfil’ it, derived from the application of Hohfeldian analysis to ATI, first put forward by Darch & Underwood (2010; Hohfeld 1919).

First of all, a brief summary of the theoretical argument: early in the twentieth century the North American legal scholar Wesley Hohfeld (1879–1918) developed a typology in which all rights (held by citizens) have correlative duties (usually but not always held by the state). The right-duty axis was seen essentially as a relationship between two actors, to be constituted in four ways, of which the most important for our purposes are the claim-right with a justiciable remedy, and the privilege-right or freedom with a null correlative (ibid.). The holder of a claim-right could demand that the state act to respect, protect, and fulfil his or her rights; the holder of a privilege-right could only demand that neither private nor state power be used to limit his or her liberty. Hohfeld’s essentially conservative theory remains influential, especially with regard to the duty end of the equation, which has been further elaborated by other scholars (for

example, Shue 1979). The state's duty towards the citizen—an individual who has the right to have rights—can be divided into the duty to respect, or not to interfere with people's rights; the duty to protect, or to prevent interference by other individuals or entities; and the duty to fulfil, or to create the necessary conditions for rights to be enjoyed. Without an ATI right, it is hard to see how this last requirement for the necessary conditions to be created for the enjoyment of other rights can be said to have been satisfied. When the state makes available information about shelter, housing, education, elections or how to pursue a court case or obtain legal advice, it is in fact keeping its end of an Hohfeldian bargain by making it possible for rights connected with these things to become genuinely justiciable, even if ATI mechanisms are not involved, but most especially when they are.

The beginnings of an international jurisprudence of ATI can be traced to the 2006 judgement by the Inter-American Court of Human Rights in the case of *Claude Reyes and Others v. Chile*. This was the first case to derive an absolute right of access to information from the 'seek' language of Article 19 as reproduced in Article 13 of the regional American<sup>3</sup> Convention on Human Rights (OAS 1969; IACHR 2006: 41, paragraph 76). The judgement was described at the time as ground-breaking, pioneering, and historic. For the first time in international jurisprudence, a duty of the state to provide information even in the absence of specific ATI legislation was established and, by extension, a citizens' right to seek and receive information. The court based its judgement on the language of Article 13 of the American Convention on Human Rights, which is closely modelled on Article 19 of the Universal Declaration of Human Rights, already cited above. Article 13 of the American convention states that

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (OAS 1969)

The court argued that the words "seek and receive information" must be read as meaning that the state has a "positive obligation" to provide it, that there is no requirement that an individual prove "direct interest or personal involvement" in order to legitimize a claim, and that once received,

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<sup>3</sup> Note that the word 'American' is used here in a pan- or inter-American sense, not in reference to the United States, which is not in fact a signatory.

information enters the public domain and may “circulate in society” (IACHR 2006: 41, paragraph 77).

Several years passed before another case advanced the cause of ATI further. In 2010, the same Inter-American court decided in *Gomes Lund and Others v. Brazil* that an amnesty law designed to protect the perpetrators of gross human rights violations during a period of military dictatorship had no force, because it contravened the public right to know about the conditions that permitted such abuses. There was significant South African involvement in this case; the Open Society Justice Initiative filed an *amicus curiae* brief together with the Commonwealth Human Rights Initiative of India and two South African activist organizations, the Open Democracy Advice Centre and the South African History Archive. South African interest derived from the national preoccupation with “non-judicial truth processes in countries emerging from decades of state repression”, with obvious parallels in several South American historical experiences, including Brazil’s (Open Justice Initiative and others 2010: 9). The brief was effective:

The court relied in part on arguments contained in [the] brief ... The brief argued that the right to the truth—for the victims or their family members as well as the general public—is now well established in international law and state practice. It is a broad right that guarantees the public’s right to know about the underlying conditions that led to past abuses ... In its ruling, the court, echoing arguments made by the Justice Initiative and its partners, recognized for the first time that the right to information contained in Article 13 of the American Convention undergirds a legally enforceable right to the truth for victims and for society as a whole. (Open Society Foundations 2011)

In addition and most recently, in no. 34 of its series of thematic ‘General Comments’, the United Nations Human Rights Committee unambiguously stated in 2011 that Article 19 of the UDHR refers to and embraces

a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. (UNHRC 2011: xx)

Unfortunately, the utility of both the Hohfeldian theory and the case law developed in the Americas remains ambiguous in an African context. It is unclear whether African administrations would regard arguments from a rights perspective as especially compelling, and outside South Africa local jurisprudence requiring recognition of such a right, whether internationally mandated or locally legislated, is emerging only slowly. At the

continental level, the African convention equivalent to the American one, the so-called Banjul Charter (the African Charter on Human and People's Rights), adopted by the Organization of African Unity in 1981, uses comparatively cautious language when describing information rights:

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

This language differs significantly from that of other international and regional instruments in its omission of any mention of 'seeking', an important word in the reasoning of the Reyes decision. Additionally, even if an unambiguous right-duty pairing could be derived from the language, it seems unlikely that any African counterpart to the Reyes decision will be handed down anytime soon.

This may not be an insuperable problem since, happily, later African regional instruments use much clearer language. The African Union Convention on Preventing and Combating Corruption, which was adopted in Maputo in July 2003 and entered into force in August 2006, includes an Article 9 on 'Access to Information', which states that "each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences"—a broad mandate in several respects (African Union 2003: 12). The African Charter on Democracy, Elections and Governance was adopted in Addis Ababa in January 2007 but has not entered into force, as it awaits ratification by the required minimum of 15 states. It mentions access to information twice. Article 2(10) requires states to "promote the establishment of the necessary conditions to foster ... access to information", among other things; Article 19(2) obliges states to allow electoral observer missions "free access to information" (African Union 2007: 3, 8).

The arena in which this issue might play out is the African Court on Human and People's Rights. This tribunal was legislated by the Organization of African Unity in 1998, and it was first established in 2004, but it remained inactive for several years while it merged with the African Court of Justice. This prompted some criticism, and a report published in 2008 complained bitterly that

States are obliged to live up to the promise that they made to their people a decade ago ... it is in their interest to do so: an effective Court will help to anchor democracy on the continent, ultimately creating stronger and more prosperous nations. The old legal adage is 'justice delayed is justice denied'.

Ten years is long enough. The African Court on Human and Peoples' Rights must start its work. (Wachira 2008: 2)

The court has, however, finally taken up its cudgels, and delivered its first judgment on 15 December 2009, turning down an attempt to bring former Chadian president Hissein Habré to trial (African Union 2009). It remains unclear whether there is currently any pressure from civil society organizations for the court to take cases in such specialized areas as ATI rights. In the meantime, local case law continues to develop within African jurisdictions, from the bottom up as it were. Examples include the Zambian case of *Mulundika and Others v. the People* (1996), in which the Supreme Court held that right to participate in public gatherings was inherent in the right to freedom of expression and to receive information without interference; and the more recent Kenyan case of *Kariuki v. Attorney General* (2011), in which it was decided that army salaries were not secret. Neither case relied explicitly on ATI legislation.

The question remains whether an exclusive reliance on the rights-based character of ATI is the most effective strategy in what might be described as 'hostile environments'—where political systems are largely patrimonial, bureaucracies have low capacity, and politicians are largely not accountable to the citizenry. Tactically, an unwavering emphasis on the rights' character of ATI does not necessarily advance the cause in all and every circumstance, and there are signs that some organizations in African countries are aware of this. In the late 1990s, for instance, Nigerian activists apparently made a conscious decision, in a changing political climate, to shift the campaign focus away from human rights issues:

... the revelation of the staggering amounts allegedly stolen by the Abacha family meant that transparency concerns *shifted from human rights to corruption and lack of accountability*. (Obe 2007: 154, emphasis added)

The Nigerian groups saw issues of corruption as easier to mobilize around. Analogously, in post-conflict Sri Lanka ATI activists currently choose to emphasize the administrative efficiencies achieved by accountable and transparent government at all levels, rather than pushing ATI as a 'human right' in a context where officials may equate rights-talk with the risk of being accused of wartime violations (Private communication, 2010). The successful MKSS (Mazdoor Kisan Shakti Sangathan or Organization for the Empowerment of Workers and Peasants) campaigns in Rajasthan in the 1980s and 1990s arose from what were formulated as concrete livelihood issues rather than specific human rights problems (Jenkins and Goetz 1999); and in South Africa the Open Democracy Advice Centre has

had some ATI successes around issues of service delivery such as potable water.

At the strategic level, the familiar critique of the universality-claims and the individualism of human rights discourse must also be taken into account:

... human rights and Western liberal democracy are virtually tautological. Although the two concepts seem different from a distance, one is in fact the universalized version of the other; human rights represent the attempted diffusion and further development at the international level of the liberal political tradition ... the human rights corpus [is] the moralized expression of a political ideology ... the specific philosophy on which the current 'universal' and 'official' human rights corpus is based is essentially European. This exclusivity and cultural specificity necessarily deny the concept universality. (Makau wa Mutua 1996: 592–593)

If this critique has any force, then logically it is also a critique of the largely implicit normative claims of ATI activism within human rights discourse. In other words, the idea that there is or might be a single 'best-practice' model that can be reproduced around the world with only minor adjustments is probably mistaken, with serious implications for ATI campaigns in Africa.

An alternative approach that is beginning to be explored theoretically by some scholars relies on the use of administrative or civil service reform as the conceptual framework for building ATI practices. Such reform programmes were heavily backed by the World Bank in the 1990s, with a strong emphasis on reducing wage bills, rationalizing promotion policies, and increasing efficiency, but achieved mixed results (Lienert 1999). Nevertheless, in countries with administrative systems tending towards the patrimonial, such reform is seen by international multilateral institutions as a fundamentally necessary component of the future success of their development programmes; certainly, it is hard to see ATI practice becoming securely rooted without it. But there are significant obstacles. Reforms frequently fail because they are "blocked outright or put into effect only in tokenistic, half-hearted fashion" (Polidano 2001: 346). They can also fail because they are wanted by donors but not necessarily by government officials themselves (*ibid.* 350).

#### CONCLUSION: ATI AND SOCIAL CHANGE

What, then, are the prospects of embedding ATI behaviours—one way or another—in African states? Formally at least, politics in the developed

world is about processes of developing policy, and the fundamental role of bureaucracy is to implement these policies. All this is achieved through identifiable public institutions—political parties, election commissions, parliaments, ministries, and government departments. ATI is conceived in such circumstances as a formal response to the dangers of bureaucratic and political secrecy and relies *inter alia* on the existence of an approximately Weberian legal-formal bureaucracy that is predictable and efficient in its behaviour, relies on precedent, keeps records efficiently, and is politically independent. It is not surprising that African bureaucracies have not followed the same historical trajectory as those of Europe and North America. This was true in colonial times and remains true today. Significant parts of the colonial archive were created by foreigners “as the working memory of a process of domination” (Hanretta 2009: 121) and thus do not even approximate an accurate or ‘truthful’ record; rather, they are full of ‘gaps and silences’. Hanretta’s study of the Sufi community of Yacouba Sylla in French West Africa in the 1940s shows how actively misleading such documentation can often be: “official prejudices and assumptions were heterogeneous and contradictory, often sending officials in opposite directions as they sought to interpret events and gather more information about them” (ibid. 123). This is a powerful heritage that has not yet been entirely shaken off.

It is generally accepted that from the 1970s onwards the bureaucracies—and hence the archives—of many post-colonial African states began to lose such capacity and autonomy as they possessed:

Bureaucracy at independence was vulnerable to office-holders who had not yet imbibed a distinctive esprit de corps. The bureaucracy degenerated into patrimonial administration unless the political leadership shielded it from patron-client politics ... presidents treated the public administration as their personal property. They and their lieutenants arbitrarily filled the expanding ranks of the state apparatus with political appointees [and] selected the top administrators on the basis of personal loyalties ... the bureaucratic virtues of *hierarchical authority, expertise, neutrality, predictability, and efficiency* eroded. (Sandbrook 2000: 91, emphasis added)

Even in South Africa, quite possibly the African country whose public service most closely approximates a Weberian ideal, there is a lack of “administrative and management capacity ... and, in many cases, adequate, ingrained processes and systems”—processes and systems which are both the creators and the creatures of methodical record-keeping (Calland 2006: 67).

However, the formal state structures and their inefficiencies are not the whole of the problem, because political activity in many post-colonial states is primarily about patronage (access to resources: clientelism and neo-patrimonialism) and in such circumstances

the institutions that count are largely *informal* rather than *formal*. Formal institutions ... are publicly honoured, and often privately circumvented. The informal institutions structure political behaviour and expectations, even though they are publicly unacknowledged or even condemned. (Sandbrook 2000: 59, emphasis in original)

In such systems, an ATI regime that is focused on accessing the documented record of formal civil service activity is probably missing the point on several levels. The formal institutions will likely have poor record-keeping practices because the effort involved would be pointless—decisions are not guided by precedent, and many key decisions are taken in other ways. The records would be empty of meaning, of semantic content. It is also improbable that public servants would be consistently held accountable for their actions. As for the informal institutions, they will likely have no record-keeping practices at all, but for different reasons. They may be covering their tracks, but since they have no legal status as far as ATI legislation is concerned, they have no compelling reason other than immediate need for creating or keeping documents.

It is clear that the problem of what happens after a discovery law has been adopted—the questions of managing demand, of implementation, and so on—is being treated seriously by activists and academics alike in the African ATI community. Nevertheless, we fall all too easily back into modes of thought about ATI that do not necessarily help us understand the concrete reality of the circumstance in which we work. ‘Governance’ and ‘access to information’ rights are not necessarily seen by the political class, the public service, or even all African analysts through the prism of Western liberal values. Two Zambian academics, to take a recent extreme example, concede that, yes, the “free flow of information is an essential right of every citizen of any country” (Chitumbo & Kakana 2010: 185). Nevertheless, they also believe that censorship (and hence, presumably, secrecy) “based on the public interest, public morality, public order, public security and national harmony” is necessary to avoid instability, and it is “justifiable to censor speeches, words or art of an author that are likely to cause harm” (ibid. 190).

The most obvious flaw in measuring commitment to ATI values and behaviours by looking for a law is that it tells us almost nothing about

context, nothing about levels of use of the right, and nothing about levels of satisfaction with outcomes. Correlation—to cite the statisticians' cliché—is not causality. If the core purpose of ATI is to help to enforce accountable governance, then legislation must be accompanied by genuine administrative and bureaucratic reform. If the core purpose of ATI is to act as a leverage right for the claiming of other rights—to access social services, for example, or to implement development projects—then we may be moving into the sphere of a new kind of interactive participatory governance, which may require us to develop a new kind of praxis. Favareto et al. (2010: 243) have argued that “social movements can develop different styles of activism, even when functioning in the same sorts of institutional frameworks”. It does seem likely that a nomothetic approach to ATI issues based on the experience of either developed countries or other parts of the global South is unlikely to yield satisfactory results in African contexts. Indeed, the fact that the African campaigns for legislation *per se* have either lasted for decades or failed to get off the ground at all may be evidence that the wrong tree is being barked up. Local circumstances may need to be taken into account more seriously and new strategies and models developed. More work, both theoretical and practical, needs to be done if the activist and academic ATI community in Africa is to identify and implement appropriate strategies that are not merely attempts to implement a model that has had, at best, mixed success in other parts of the world.

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## CHAPTER THREE

### TRANSPARENCY AND POWER RELATIONS: SOCIO-ANTHROPOLOGICAL PERSPECTIVES ON THE RIGHT OF ACCESS TO INFORMATION

Fatima Diallo

#### ABSTRACT

*This paper looks at the Senegalese case and argues that the legal-institutional framework that has been established to introduce transparent and democratic governance through an ATI framework remains largely marginalized. In Senegal, the model of the state inherited from colonialism has been refined by decades of 'new policies' but is unable to overcome informal practices that undermine ATI implementation. Using a socio-anthropological approach, the paper addresses structures of power relations that interrelate with any project targeting ATI effectiveness. It also argues for a historical understanding of a model of transparency that is established alongside informal structures and traditional systems, with which it must co-exist. This approach to and understanding of these features, which are characteristic of the post-colonial state, best explain the diversity of governance models and the impact on transparency issues.*

Regardless of the apparent opacity around the other ..., what matters most is how to bring the other into the transparency which we experience: we either assimilate it or destroy it.

Edouard Glissant, 1990  
*Poétique de la relation*, pp. 61–62.

#### INTRODUCTION: THE LEADEN WINGS<sup>1</sup>

The Ibrahim Index on Governance in Africa issued in October 2010<sup>2</sup> revealed that in Senegal between 2008 and 2009, the level of corruption in

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<sup>1</sup> This chapter is a revised version of a presentation delivered at the First Global Conference on Transparency Research, Rutgers University, New Jersey, on 19–20 May 2011. I am indebted to Colin Darch, Philemon Muamba, Odon Kawayaya Meya, and Abdou Seck for their very helpful comments.

<sup>2</sup> <http://www.moiibrahimfoundation.org/en/section/the-ibrahim-index> (accessed 12 June 2012).

public administration and in rural areas and the lack of accountability and transparency increased. Generally speaking, the country has been downgraded in the ranking of the 53 African countries on accountability and corruption, backsliding from the 12th place it had reached in 2000—thanks to its democratic regime transition—to 21st place in 2008. This leads us to interrogate the state of transparency and good governance in Senegal and prompts us to wonder why the country faces difficulties in implementing transparency despite the existence of a suitable institutional framework.<sup>3</sup>

The effectiveness of the law as it is applied in Senegal is often cause for critique and questioning because of its implementation through the adopted liberal model imported from the West. With globalization, the process of copying from the West, rather than being a rejected practice, has become an “institutional and political standardization” (De Gaudusson 2009). Imported models of governance constitute an impediment to transparency and access to information. Beyond being an issue of adaptation, there is the question of ‘governance’ based on transparency, which requires inclusive mechanisms in order to establish responsible citizenship.

Based on this fact, we will discuss the difficulties in adaptation that affect the implementation of transparency, especially related to ATI, owing to socio-cultural realities that are at the basis of power-holding. We will also discuss, as an interrelated issue, the problematic term ‘governance’, considering the notion of transparency as a critical aspect in the implementation of inclusive mechanisms for the affirmation of responsible citizenship. This affirmation is part of the additional power which citizens use to access information. Will power-holders resist such access because of the consequences for their own power? In addition, does the behaviour of stakeholders (policy-makers, civil society, and citizens) predict their orientation toward transparency?

The aim of this chapter, therefore, is neither to reject the efforts toward adaptation nor to reject the democratic values which have been rooted in socio-cultural realities in Africa for many centuries (Diagne 2011), values which Africans and Africanists have been trying to restore, at least in academia.<sup>4</sup> This contribution aims at showing how ancient heritages are different from the modern one in terms of models and power relations,

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<sup>3</sup> For more insights on the concept of transparency, see Birchall (2011), pp. 7–25.

<sup>4</sup> The debate around the century-old Charter of the Mande is a good example on the prevalence of democratic ideas in pre-colonial Africa.

and how their clash brings about tensions which hamper public policy attempts despite hybridization.

#### THE NORMATIVE ADVANCEMENT OF A SINGULAR AFRICAN STATE?

As an exception in the African context, Senegal has been able to stay safe from coup attempts, and from military, despotic, and genocidal regimes. In its first period as the ‘democratic window’ of black Africa, the Senegalese state was able to preserve its image, indentifying itself as a “quite remarkable success story” (Cruise O’Brien 1978) and a “semi-democracy” (Coulon 1988). In contrast with the prevalent single-party system in most African countries, Senegal’s image was evident as soon as the country became independent under the leadership of the Socialist Party led by President Senghor, with the establishment of a multi-party system in 1974<sup>5</sup> and a stable constitutional order. The organization of free and regular elections as the single mode of power transition was institutionalized. The ‘Senghorian Socialism’ which became the philosophy for national unity-building (Debène 1986) preserved the country from ethnic conflicts and serious violation of human rights. In 1981, Senghor devolved his power to his successor, his former Prime Minister Diouf. Those political gains led the country on to a particular political trajectory, despite the “difficult times of Abdou Diouf’s reign” (Diop & Diouf 1990), which were marked by a political crisis leading to an apparent closure of the nationalistic compromise (Diouf 1994: 47). The apex of this special democratic status may have been the 2000 regime change, with the victory of the historic leader of the liberal opposition Abdoulaye Wade over the socialists, who had tried hard to stay in power.

The post-regime-change period was marked by an apparent will for good governance and transparency. Many legal and institutional measures were initiated, among which was the creation in 2003 of the National Commission against Non-Transparency,<sup>6</sup> whose objective was to eradicate corruption and promote good governance. With the new liberal democratic ideology, transparency appeared to be encouraged along with access

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<sup>5</sup> In 1974, Senghor accepted what is known as “limited multi-partyism”, which allowed four political formations to engage in political competition. This multi-partyism became unlimited by 1978, when any party constituted according to the national regulation was allowed to run for power.

<sup>6</sup> The National Commission against Non-Transparency, Corruption and Concussion (CNLCC) was created through Law No. 2003-35 (adopted 24 November 2003).

to information as the essential means toward an effective implementation of decentralization in the decision-making process, participative management, and accountability. Senegal, more than just looking like an old democratic laboratory, became more and more like a country without a legal void in terms of transparency. In this period, transparency was seen as a principle which involves, through publicity, sharing information with citizens and making public all political and administrative decisions and transactions. These rules of transparency allowed citizens to control the management of public affairs, hence making leaders accountable (Gueye 2003: 40).

In this sense, information becomes therefore a tool for the political analysis of the state's management, similar to Mikhail Gorbachev's *glasnost*. This definition is limited, however. First of all, rather than dealing with reality, it prioritizes its proactive nature, which reveals an ideal for the mode of functioning of the Senegalese political system by focusing on information sharing and publicizing. In addition, it can be illusory to establish an almost mechanical relationship between the availability of information and a greater effectiveness of citizens' ability to ensure accountability. In many cases, citizens' access to information does not lead to watching over decision-makers. Rather, it is mainly geared toward the access of various benefits and resources, especially in the attainment of socio-economic rights.

For a more neutral definition, we consider therefore that transparency is the availability of information based on reactive and proactive processes regardless of their functions, with a general objective to reduce opacity in the management of public and private affairs. Based on this objective, the constitutional observance of the "right to access to plural information"<sup>7</sup> symbolizes the legal evolution of that right in the post-regime-change period, though Law No. 81-02 (passed on 2 February 1981) on administrative transparency was actually the first step toward legislation for ATI. However, this constitutional safety net does not preclude issues of formulation. What does the term 'plural' mean in the Constitution? What should we understand by plural information? By that, should we understand general and varied information, which would mean that there is a right for all citizens to access all information that can serve for their intellectual, economic, environmental, cultural, and social development? Or should we look at it from the perspective of Law No. 92-57 (passed on

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<sup>7</sup> Article 8 of the 2001 Constitution of Senegal.

3 September 1992) on the ‘pluralism’ of radio and television, which is the text that defines the concept of ‘information plurality’?

However, in terms of legal consecration, the right to access information seems to be reinforced by the primatorial<sup>8</sup> Regulation No. 2202 (passed on 15 February 2000), which allows for the creation of a national commission on access to information and on the protection of personal information under the presidency of the Mediator of the Republic.<sup>9</sup> Law No. 2006-19 (passed on 30 June 2006) on archives and administrative documents updates this legislation as it relates to technological progress and the concerns of the National Programme on Good Governance. This law on access to administrative documents gives every citizen the right to have access to any administrative document<sup>10</sup> that has been declassified. Ten years earlier, the Local Collectivities’ Code stated in its Article 3 that “[e]very citizen or taxpayer has the right to ask, at his expense, complete or partial copies of minutes from regional council, municipal or rural meetings, as well as budgets and accounts”.<sup>11</sup> The recent elaborations<sup>12</sup> on the laws related to the information society stress the importance of ATI in many respects, with two points relevant to our topic. On the one hand, they deal with the right to access information through cyberspace, with the obligation for public institutions to ensure that “public information is easily available in cyberspace while ensuring the accurateness of that information and its useful dissemination”. On the other hand, they deal with providing for the electronic transmission of administrative documents.

#### A NON-UNIQUE POLITICAL CONTEXT

In the early 2000s, Ngaindé stated that “the analysis of these legal instruments still confirms that Senegal is not yet an administratively democratic state” (Ngaindé 2002). Ngaindé’s statement is still debatable as it holds

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<sup>8</sup> A primatorial regulation in Senegal is a regulation issued by the Office of the Prime Minister [Fr. *première: office of the prime minister*].

<sup>9</sup> In French-speaking countries, the Mediator of the Republic acts as the equivalent of an ombudsman.

<sup>10</sup> The legislator defines administrative documents as “all documents produced or received by administrative authorities on duty, namely working for the State, local collectivities, public offices, national companies, companies participating in public life or private organizations that handle public services or entrusted with a mission of public service”.

<sup>11</sup> See Article 7 of the Orientation Law on the Information Society.

<sup>12</sup> Law No. 2008-08 (passed 25 January 2008) on electronic transactions, implemented through Decree No. 2008-719 (passed on 30 June 2008) on electronic communication.

that administrative democracy is dependent upon the sole issue of citizens' access to information. The modifications in the legal landscape after the political leadership change in 2000 have been important, but to what extent have the practices differed? One thing is certain: the democratic model of the 1990s (Diouf 1994) was increasingly eroded through the last years of Abdoulaye Wade's mandate (Dia 2005; Coulibaly 2006). In fact, with regime change euphoria, the country was losing its attractiveness as a democratic model. Serious contradictions indicate that the country is prone to certain ills which are found in political systems throughout Africa. Growing bad governance and corruption along with the deterioration of institutions have become challenges for the Senegalese political system. These ills, which were at the basis of vigorous contestations with the previous socialist rulers, have quadrupled with the arrival of new rulers that took place on 19 March 2000. The weakness of the National Assembly, attempts to muzzle political rivals, and frivolous changes in the Constitution are unfortunate illustrations (Diallo 2011). Having access to information became even more difficult as the Wade regime drew near its end. Sensitive information—such as that related to the Casamance conflict, to the army, to jails, to budgets in certain sectors dealing with national defence, intelligence, or military research—is all cloaked in secrecy, hidden from the sight of citizens. Other information—such as that related to issues of a financial and economic nature, the management of political parties, the negotiation processes on the electoral code and the audit of the national electoral voting list, the tariff system for service providers such as SENELEC<sup>13</sup> and SONATEL,<sup>14</sup> or information related to the Kedougou violent clashes or the sinking of *Bateau le Diola*<sup>15</sup>—is inaccessible to a great extent.

Furthermore, for example, the political success of Macky Sall, the new President of Senegal, confirms the rule of opacity as the model of government of the ruling class. In fact, after having been a close ally to President Wade as a minister and later Prime Minister, Sall decided in 2008 to break loose from the regime. As a result, he was demoted to the position of President of the National Assembly. In this new position, Sall ordered the

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<sup>13</sup> National Electricity Company.

<sup>14</sup> National Telecommunications Company of Senegal.

<sup>15</sup> This ship wreck caused the death of 1,953 people, hundreds more than the famous Titanic casualties. But not much information on the real causes and the responsibility of people was known until the French issued a report and a law suit was filed by 20 French families.

son of President Wade to be audited for his management of the funds for infrastructural projects through the National Agency for the Organization of the Islamic Conference (ANOCI). In reaction to this bold move, President Wade pushed the National Assembly, which he controlled with a majority of seats, to pass a law that reduces the term of its presidency from five to one year and to implement it retroactively. This episode confirmed the inability of the opposition to play its role as the centre of a 'checks and balances' political system during the post-regime-change period. However, the waves of change began on 23 June 2011 with the uprising of the youth, leading to the M23 movement against the frivolous practice of revision of the Constitution. The youth, backed by other social movements such as Y'en A Marre [lit. "Enough of this!"] and the more experienced civil society organizations along with opposition parties, succeeded in catalyzing a social revolt against injustice and bad governance. Taking advantage of the situation, Macky Sall won the elections and became the new President on 25 March 2012, thus inheriting a regime that is politically weak despite many signs of hope.

A political system becomes dysfunctional when there is a weakness of mechanisms for a dynamic public sphere, an absence of freedom of opinion, and a lack of transparent debate around government policies. In this respect, we note that the obligation for accountability for the service rendered and for effectiveness involve the accessibility of information. This chapter, therefore, argues that the debate around ATI should be centred on the power relations and the socio-political realities of the system within which people interact—hence the legal-anthropological approach taken by this study, which identifies the playing field, the players, and the rules of the game.

#### THE LEGAL-ANTHROPOLOGICAL APPROACH TO ATI

An approach based on the history and anthropology of the law highlights some of the obstacles in the implementation of transparency in African contexts. The aim of the anthropological approach is to shed light on sociological and cultural differences and perceptions of administration and transparency pertaining to Senegalese society and interfering in political power relations. The norms for administrative transparency blur the reality and hide the consequences of power exercise in Africa. Getting to this realization has never been easy for 'development agents' and analysts, especially positivist law specialists, who generally play an important

role in the understanding and the implementation of the normative architecture of countries. Acknowledging this difficulty, Carlson Anyangwe (1997: 29) wrote:

This is an interesting and intriguing phenomenon and it is something of a surprise that African constitutional lawyers appear so far not to have adverted their minds to it. The state in Africa is an amalgam of diverse nation chiefdoms and a situation now exists where the controversial and conservative, but very important, traditional chieftaincy institution exists within an overarching republican system, albeit both systems appears to be antithetical.

The empirical basis of this chapter involved extensive research on the right to access information in Senegal. This research was undertaken through a partnership between the African Freedom of Information Center (AFIC) and the African Network of Constitutional Lawyers between August and November 2010 as fieldwork, with a sample of 74 public and private institutions and 108 citizens living in the following three cities in Senegal: Dakar, Saint Louis, and Ziguinchor. Most of our interlocutors during the fieldwork demanded the availability of public information. Many of them had called the state's attention to many aspects of their rights that are in total opacity and that can quickly become 'non-rights' whereby people's dignity can easily be trampled upon. In this context of massive support for the establishment of a transparent system, what could justify the lack of involvement of some stakeholders in the availability of this public information? It appears that there is an important discrepancy between the general practice and what the civil servants interviewed say, as they often use the official discourse, which they consider acceptable because it is 'politically or socially correct'. In fact, agents working in state or private entities or in civil society generally argue that the lack of efficiency of the right to access information is because of the citizens who do not use that right. The high level of illiteracy is quickly pointed out as the reason. The lack of responsiveness on the part of information-providing services, coupled with the weakness of people's requests, are also at the basis of the right to access information's lack of effectiveness. It is therefore safe to say that both problems are consequences of the prevailing culture, as was stated by some interviewees.

To better situate and interrogate stakeholders' arguments, we will analyze the administration which serves as a platform for the debate on transparency but also as the backbone for information access in Francophone countries in general and Senegal in particular. Then, we will make a critical analysis of the debate on transparency, in order to decipher those

'blind spots' which are not central to the debate but which play a critical role in the implementation of policies on governance. Our tentative conceptual framework implies a particular relationship between governance, transparency, and access to information—in the sense that governance, which should be characterized by consensual management, requires the decentralization of decisional power through procedural transparency vis-à-vis the public. Finally, we will look at the socio-cultural problems which hamper the effectiveness of information access and transparency in the Senegalese context.

#### RETROSPECTIVE ON THE MODEL OF 'SOVEREIGNTY ADMINISTRATION'

In general, law in Africa, and particularly in Senegal, is a colonial heritage. Legal institutional graft was the preferred mode of implementation in the political regimes of newly independent states. However, the choice of model in Senegal quickly became an issue. As early as 1990, intellectuals drew the government's attention to the cold relationship between the administration and citizens. The author Zouankeu (1991: 13) wondered:

This institution which we have imported from France is not the right instrument to administer this country [Senegal]. What if our difficulties derive from the fact that we try to accomplish a task with a tool that is not adequate?

We can underline two problematic aspects in Senegal's administrative evolution without going into all aspects of the inadequacy of administration, state management, and even democratic models which were conceived in an exogenous context. One is related to the administrative system inherited from colonization, while the other derives from the post-independence perpetuation of political models through legal and institutional mimicry.

A closer look reveals that the administrative model in essence was flawed from the outset. In fact, the relationship between administrators and administered was not meant to be balanced during colonization. In the eyes of the colonists, this was supposed to be a 'subject'-to-'master' relationship, a model of administrative governance marked by power abuse, corruption, and cronyism. This had a lot to do with the origin of administrators: under the command of the Governor, who was at the helm of the administrative hierarchy, the colonial system in Senegal relied on the administrators of the main territorial provinces who were in the French armed forces, administrators "whose extreme competence was

synonymous with power abuse and even despotism” (Sow 1972). The same goes for the civil administrators who came after them. In fact, the colonial administration also recruited ‘self-made men’, who were generally the ‘black sheep’ of aristocratic or bourgeois families and who came to “make a career in the colonies” (ibid. 45). The implementing personnel were generally recruited on the basis of cronyism, whereby the provision of positions was determined by the degree of loyalty toward the colonial system already in place. In these conditions, the personnel, whether they were from France or were just an ‘assimilated element’,<sup>16</sup> were not able to free themselves from that spirit of domination. This practice did not stop in the post-independence period. It is in this context that Léopold Sedar Senghor (1967) stated:

This inherited colonial mentality whereby the ‘indigenous’ civil servant felt that he or she did not participate in the administration of the state was quite prevalent in developing countries.

About this ‘colonial mentality’, he added:

We are neither mentally nor politically decolonized. It has been difficult for us to get rid of the old mentality of the civil servant who is not completely cured from the colonial complex: always insolent, nonchalant and demanding.

The fact that the colonial administrative framework was maintained—along with the normative and institutional features marked by its oppressive tendencies—did not help in bringing about fundamental changes.

However, the slight difference of the framework has been based on the nationalistic surge of newly independent states. This surge was reflective of the mantra ‘One nation, One state, One party’, which led to the concentration of power around one demi-god. This resulted in the wholesale politicization of the administration and its subordination to political power (Degni-sigui 2000).

The situation was to the detriment of the administered, as the civil servant felt obligated to his or her labour union or political clan “for a safe career advancement ... unless more prosaically he wants to protect a friend or parent out of nepotism” (Senghor 1967). These incriminating statements came from a former President of the Republic, under whose reign came about the ‘presidentialization’ of the political regime, resulting in the estrangement of citizens from the decision-making process (Gueye

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<sup>16</sup> This is a term used for those Senegalese who had a certain level of education or some proximity to the Europeans during the colonial era.

2003: 27). With Senghor's regime, the administration was subject to presidentialization, which caused the development of the widespread practice of clientelism and networks in the administration. According to Babacar Gueye (*ibid.* 28):

The Senegalese heads of state made sure that people loyal to them were placed in key positions in the administration. Such a monopoly was guaranteed to the President of the Republic by the Constitution, especially for major administrative offices, national companies, and other public services. This helped them weave networks of collaborators who held a parcel of the power and the wealth. These designated leaders reproduce in turn the same linkage scheme so much so that the administration becomes to a great extent a cascade of networks coordinated by the President of the Republic.

These same networks are in charge of ensuring transparency and making access to information efficient, notions which seem to be unknown to them. This prompted Mamadou Diouf (2002) to state that “[t]he fish will not vote for a budget meant for the purchase of hooks”. This rather patrimonial system is to a great extent ‘non-bureaucratic’. It is, therefore, incapable of maintaining a solid institutional apparatus for the conservation of documents and archiving.

In addition to this institutional inheritance—which has been further affected by non-bureaucratic and politicized arrangements since independence—administrative reforms in Senegal geared towards either formal or substantial changes have always been undertaken based on the French model. Because of this mimicry, the country often finds itself dealing with transposed administrative reforms that are outdated, hence giving the impression that present-day Senegal is just a pale copy of ‘old France’, owing to the repeated attempts to reproduce the historical trajectory of the former colonial empire. A good illustration of this mimicry was the codification of the old French administrative jurisprudence, which gave meaning to the “code of administrative obligations”<sup>17</sup> in Senegal, although the ‘old France’ model was just as imperfect (Sabourin 1978; Laveissiere 1988). The existence of two worlds in ‘old France’s’ public administration<sup>18</sup> is described well by Professor Raphaël Draï, who is quoted by Zouankeu (1991: 12) for the Senegalese context:

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<sup>17</sup> Law No. 65-61 (passed on 19 July 1965) modified by the Law No. 2006-16 (passed on 30 June 2006).

<sup>18</sup> As the main source of inspiration for the law in Senegal, and unlike many Western countries, France before the 1978 reforms did not have a code for administrative and dispute procedure. In contrast, since 1946 in the United States, interactions between the

The administration on one side, the administered on the other side. ... 'Request' on one side, 'answers' on the other. But is there a real dialogue in those words that are shared at counters—this place, this symbol—which at the same time unites and separates both poles of the administrative relationship?

These symptoms of a self-centred administration are still prevalent in the Senegalese administration. The image of the administration in the eyes of the public is not at all flattering: people in a 1990 survey claimed that it was "incompetent and ineffective". They complained that answers to their requests usually took more than a month to receive.<sup>19</sup> They found it clumsy and complicated. For them, the administration treated rich and influential people better than ordinary citizens.<sup>20</sup> They found that the number of civil servants was very high in some sectors while insufficient in others such as hospitals.<sup>21</sup> Summarizing the situation, Moustapha Ngaidé noted in 2002 that "Senegal today looks more like France before the 1978 reforms".<sup>22</sup> Before these reforms the political argument for not divulging information to citizens was that they are necessarily informed by their representatives at the parliament (Laveissiere 1988).

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administration and the administered have been regulated by a specific procedure, which provides guarantees for the protection of individuals' rights in the same way as they would be protected in legal proceedings. There, citizens have access to official documents, thanks to the law passed on 4 July 1966 on the freedom of information. The same goes for European countries (Austria, Sweden, and Germany) which have an administrative procedural code as the norm. In Germany, a law passed on 25 May 1972 guarantees the right to all citizens to be informed and compels the administration to give justifications for its decisions and to communicate the relevant files (Lemasurier 1980: 1243).

<sup>19</sup> The deadline for an administrative response used to be three months, but it has been reduced to two. See Article 73-1 of Law No. 2008-35 (passed on 7 August 2008) on the creation of the Supreme Court.

<sup>20</sup> This fact is even more obvious with services such as those dealing with the public provision of water, electricity, and telephone, where rich and influential people do not have to queue and do enjoy a better treatment. The same happens in passport services or other administrative services: favouritism, delays, and unequal treatment according to people's social status.

<sup>21</sup> "The Senegalese administration provides 90% of formal jobs with an excess staff of 10%", said A. Agboton in his article titled 'Communication in the Senegalese Administration', published as part of the 6th Colloquium on 'The Relationship between the Senegalese Administration and the Public', organized by RIPAS in Dakar, 10–14 December 1990, p. 33.

<sup>22</sup> Prior to 1978, the law did not recognize citizens' right to information. French jurisprudence confirmed this position of the legislature using two reasons: first, the lack of a general text that guaranteed that right to the administered; and second, the professional confidentiality to which the administration was subject. The jurisprudence defended the lack of a requirement to explain administrative decisions, and this lack could not be used to justify any annulment of these decisions.

Copying from the outdated French legal system explains the growing gap between Francophone and Anglophone countries when it comes to ATI legislation diffusion. The latter seem to understand better the virtues of a law for free access to information—that is, ‘a comprehensive law on access to information’. This phrase shows the ‘incompleteness’ of those laws for ATI, the sole purpose of which is to guarantee *administrative* transparency. The Francophone systems have centred the debate on the improvement of information access specifically on the effort to establish administrative transparency through laws that develop the relationship between the administration and the administered.<sup>23</sup> This tradition is widespread in former French colonies. This is true even for Mali, whose law is partly inspired by the Anglophone model, especially in its emphasis on institutional development through SAISA<sup>24</sup>—almost the same title as the French Law No. 78-753 (passed on 17 July 1978).<sup>25</sup> The Mali Law No. 98-012 (passed on 19 January 1998) defines the relationship between the administration and the users of public services and was implemented by a Presidential Decree in 2003. As a result, ATI is limited *only* to access to documents related to the administration’s decisions. Such a law “was not conceived to cover the entire domain of access to information and cannot be considered as such”.<sup>26</sup>

In this context, ATI ‘diffusionism’ has been led by some key international organizations or under some external pressure that first directly deployed their strategy in Anglophone countries where local civil society was better organized around the issue of transparency. At this time, the Francophone countries were at a stage of improving the relationship between the administration and the public (as was the case in Mali with its 1998 law) and their ‘access to administrative documents’ strategy (the

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<sup>23</sup> This is true of the fact that the right to access information in the French Law No. 2000-321 (passed on 12 April 2000), on the rights of citizens in their relationship with the administration, was meant to complete the law No. 78-753 (passed on 17 July 1978), whose results were not satisfactory.

<sup>24</sup> Strategy of Access to Information in the Administration.

<sup>25</sup> The French law is entitled “Law related to diverse measures for the improvement of the relationship between the administration and the public and diverse provisions of administrative, social and fiscal nature”, and the Malian Law is entitled “Law No. 98-012 of 19th January 1998 regulating the relationship between the administration and the users of the public services”.

<sup>26</sup> These statements are from the team of Mrs. Laura Neuman, Principal Programme Associate, Carter Center, Atlanta, Georgia, USA and Professor Richard Calland, then Executive Director at the Open Democracy Advice Centre, Cape Town, South Africa. The project was coordinated by the Carter Centre upon the invitation of the Malian president of the time with the aim of developing a system of free access to information in Mali.

Senegalese 2006 law). Both of these approaches have been initiated by government with the purpose of enhancing the administrative transparency landscape and not because of any large civil society campaign for providing a legal guarantee of ATI as a human right, as has often been the case in the English-speaking countries.

In this context, it will also be almost illusory to contemplate freedom of access to information, because in the “non-bureaucratic” system that characterized many of the Francophone countries, one can request and even receive documents but still not receive the information sought.

In addition to the deficiencies of the legislation, “[n]o one can quickly wipe away the administration of secrecy which is protected by the public powers and which determines the relationship between the administration and the citizens” (Ngaidé 2002). This is easily seen in the strategy used by those who conceived the legal framework on ATI in Senegal. In 2006, Senegalese legislators decided to change the legal regime for archives and administrative documents. Although this was a notable advance in the treatment of administrative documents, filling as it did a legal gap; it was far from being a true evolution.

In fact, the decrees that were meant for the regulation of the organization and the functioning of the commission for access to information had no effect. Decree No. 2006-596, which states the principles of access to administrative documents, was given the title ‘Organization and Functioning of the Office of the Archives in Senegal’. This title, focussing merely on technical organization, hid the true meaning and contents of the decree, concerning which Title 2, Chapter 1 (“On access to administrative documents”) and Article 21 set the member nomination rules and the composition of the National Commission on Access to Administrative Information and the Protection of Personal Information, as well as setting out the appeals’ procedure and deadlines. This titling has brought much confusion, as many stakeholders—expecting separate regulations that will deal with the modalities of access to administrative documents—continue to believe that no decree setting the rules for access to administrative information and establishing the commission has been adopted. On this basis, the new draft ATI bill, initiated by a coalition of civil society organizations,<sup>27</sup> includes the creation of such a commission. The fact is that even if the existing commission held some meetings and public conferences between 2008 and 2009 that made it somewhat visible in the

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<sup>27</sup> This coalition includes Article 19 and Forum Civil.

public space, it does not function properly despite its members having been appointed. Nevertheless, the non-effectiveness of an institution does not mean its legal non-existence.

The attitude behind this confusing decree title raises some questions: Are we dealing here with a gimmick aimed at passing the law and passing the decree without creating friction with other segments of the administration? Or is it that those who brought about the legislation did not really intend to provide a good framework for ATI?

Although we do not have the answers to these questions, we can still say that this naming of the decree is neither a mistake nor an oversight. This is because, according to the Archives Office, which claims to be the initiator of the law, the implementation process of the law was a consensus whereby many public bodies were consulted, especially the Council of State, which—with a certain degree of political will—could have drawn attention to this defect in naming. Here, it is clear that the idea of ATI seems to put the administration in an uncomfortable position. This explains the rather ‘technical’ priority which it set on the treatment of archives to the detriment of the issue of citizen’s access to administrative documents, the consequences of which access have become more political.

This strategy reveals the administration’s lack of political will toward making visible to the public the existence of a legal framework that demands transparency. Our legal audit and fieldwork and the different critiques on the administrative relationship which we encountered confirmed that the administration’s strategy has, unfortunately, worked. The colonial heritage which Senghor describes is still prevalent in the opinions which the interviewees hold about the agents of the state. In fact, many citizens feel that the administration is “corrupt” and “inefficient”. They also feel that civil servants are not conscious of their responsibility as a bridge between the state and the citizens and that they have no notion of public service.

Aside from bureaucratic delays, citizens decry the politicization of the administration. The policy of “gradual transformation of the state’s services into agencies”, which was officially initiated in order to improve performance through “a greater decentralization of public service management” (Gueye 2003: 13), has, according to citizens, become an instrument for the ruling party to reward loyal friends. This politicization deeply affects the administrative architecture. The multiplicity of services, mostly created to favour political cronies, is one of the major traits of successive regimes. The administration is subject to ‘informalization’ and

continually moves further from the rules of public management meant for its efficiency.

This type of administration is generally not apt to accommodate transparency. In fact, an administration that has not internalized the notion of public service as “a collegial functioning of the administrative apparatus geared toward citizens’ interests” (Brachet 1995) finds it difficult to open up to the ‘general public’, though being a ‘window’ of the general management remains the main objective of transparency. A majority of citizens deplore the blockages and obstacles in the way of the free flow of information. Some of them criticize civil servants’ lack of competence, while others denounce the will to cover up the illegal practices which undermine the Senegalese administration. Therefore, it is too ambitious to expect that a simple use of normative discourse will move the state administration systematically toward transparency without tough resistance from agents whose responsibility is scrutinized in this study.

#### INTER-NORMATIVITY IN GOVERNANCE AND ADMINISTRATIVE TRANSPARENCY IN SENEGAL

As is the case for democracy and development policy in almost all developing countries, transparency discourse—which fundamentally informs the debate on ATI—takes place in a rather normative way in its public action. The objective of this type of approach is to look for societal change through the state by simply implementing legal frameworks and institutions that will lead the way. This starting point is flawed because of the complexity of the stakes and the power exercise at play.

The process of implementing a transparent political and administrative system seems to take place without taking into account the reality of a weak state authority. Even if this fact has drawn the attention of most people, it is particularly worth noting that this pertains to African societies in the sense that the state and its administrative institutions have either superseded the pre-existing traditional powers (Baum 2008) or were created to replace the other, older forms of legitimacy (Zucarelli 1973). In most cases, those institutions which have a ‘traditional’ status are nothing but colonial fabrications (Lan 1952; Chanock 1985). Their ‘traditional’ status often covers up a true modernity (Hobsbawm & Ranger 1992; Geschiere 1995; Cameroff 1999), and regardless of their origin, they only add to the multiplicity of legal discourse debates (Chanock 2005).

Policies focus mainly on objectives. As a result, the achievement process of transparency does not give enough consideration to elements that intervene in its practice, such as citizens' participation in the decision-making process or at least their role as watchers of the public arena. Any undertaking that aims at citizens' participation and a more democratic approach while ignoring political commitment is very unlikely to be convincing. In other words, transparency ideals do not consider a certain number of obstacles that have already been identified through 'critical approaches' to liberal democracy in Africa (Lumumba-Kasongo 2005) and by the anthropology of governance (Blundo & De Sardan 2007). The anthropological approach to governance, which rejects the formal and normative orientation of governance, underlines the 'multiplicity' of intervening elements in the regulation area. This plurality of centres of authority emanates not only from the new debate on governance; it is also very old in the African context.

African states have attempted in the past to reduce the influence of traditional chiefs, arguing that their mode of government was incompatible with republicanism and democracy. However, the chieftaincy mode of governance cooperates officially or officiously with the state system in the management of the administration, particularly at the local level (Anyangwe 1997). We subscribe to Olivier de Sardan's point of view, according to which one the main traits of African countries is the coexistence of many modes of local governance. In this regard, he (2009: 10) opines that

the process of 'superposition' of these types of powers is generalized in local arenas: the establishment of new political entities (by the state or development agencies) did not entail the end of already existing entities. Rather, they coexist. This is where 'polycephaly' which pertains to 'village powers' finds its roots.

The ongoing new discourse on governance in Africa—through the promotion by development policies of principles such as subsidiarism, privatization, and associationism (De Sardan 2009)—does nothing but reinforce the old phenomenon of the pluralism of power. It creates a sort of intertwinement of various stakeholders such as traditional or religious chiefs, party leaders, influential traders, etc. (Totte et al. 2003), each playing their role in the daily management of public affairs. This is even more apparent in the notion of development governance, which is hinged upon a multi-sectorial approach generated by multi-actor interactions. This explains the fact that the mode of state governance cannot be dissociated from the

developmentist mode. The same goes for the communal mode, which cannot exist without the associative and chieftaincy modes.

In the Senegalese context, religious powers have always interacted with politicians and enjoy a preeminent status in development advancement (Markovitz 1970). Thanks to this interaction, Muslim brotherhoods are central to the social contract—“a contract that links society to the political power of the central state of Senegal” (O’Brien 1992)—hence giving birth to the definitive Islamo-Wolof<sup>28</sup> model, within which occurs “the development of national integration” (O’Brien & Diouf 2002: 10). In some parts of the country, such as Casamance, traditional chieftaincies still wield considerable power over the population, who seem to adhere more to the traditional system as ‘subjects’ than to the state system within which they enjoy only a ‘hypothetical citizenship’. The continuing strength of chieftaincies, be they traditional or religious, and other sources of authority in the public sphere all remodel power relations on a daily basis. Citizens as well as the state agents are also part and parcel of these different spheres of governance. However, transparency rules generally target agents who are entrusted with a public service mission and who are regarded as ‘outside stakeholders’, while in the context where human rights are respected, on the other hand, citizens are regarded as though they have no responsibility for the preservation of corrupt systems. This approach conceals the extent to which different parts of society, regardless of their conflicting objectives, are considered and integrated in the model of governance of the ‘norms’. This approach leads to many consequences, some of which have a very important impact on the management of the administration.

The state agent is on a public service mission and is expected to act with transparency, while simultaneously this agent is subjected to the norms of various entities. He or she is caught in a game of interactions, which demands reciprocal solidarity and involves retribution and support. In African societies, solidarity is seen in terms of ‘sentimentalization’, and this solidarity is not a free exchange but rather an obligation which creates a social linkage that ensures one’s belonging to a group.

Seen as the will to create an instituted and institutionalized social linkage, the most visible impact of this solidarity is the collective tolerance

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<sup>28</sup> The Wolofs are the main ethnic group in Senegal. The Islamo-Wolof model refers to the social contract based on values brought from this ethnic group and Islam, the dominant religion of Senegal. See Diouf (2001), *Histoire du Sénégal: le modèle islamo-wolof et ses périphéries*, Paris: Maisonneuve & Larose.

of parallel relations based on filial and clientele connections within the bureaucratic machinery.<sup>29</sup> This solidarity is at the basis of a ‘debtor-creditor’ relationship, turning the agent—thanks to whom petty corruption thrives at a collective level—who will not obey this cultural arrangement into a ‘social fool’. The reply of a Senegalese politician who was accused of embezzling funds supports this point of view. According to the politician, if those funds did not serve for providing services and building the infrastructure for which they were officially budgeted, it was because they informally financed special events (naming ceremonies, funerals, daily expenses, etc.) and these are also social demands from members of the community.

Therefore, it seems more likely that public resources help maintain relationships with political customers, friends, and parents, who—in return—provide a safety net against any attempt to enforce accountability or the firing of the agent. It is clear that the use of public funds for the management of informal exchanges is not limited only to commercial relations in African societies which adhere to a logic of “affective economy”, as described by Hyden in his analysis of rural attitudes (1983). In reality, it impacts *all* kinds of power relations in the structure of a complex dependency. But in the domain of public resource management,

[t]here is degradation of the state when decision makers fail to make the distinction between what belongs to everyone and what is theirs. The distinction between the public and the private is the backbone of a state institution. (Gueye 2003: 41)

In the above case of the politician and ‘collective responsibility’ for bad practices, transparency does not mean much, either for the main culprits or for the beneficiaries. Therefore, for whom is transparency? Can we expect that citizens, who may also be indirect beneficiaries, will be willing to use their legal rights to access information on local management and hold their leaders responsible for the sake of transparency?

Uncertain responses to these questions lead to scepticism in the effective exercise of the reactive disclosure model<sup>30</sup> of access to information.

<sup>29</sup> Such tolerance often entails ethnic instrumentalization, justifying in most cases the ethnicization of politics and administration on the continent.

<sup>30</sup> A reactive disclosure is when the initiative of access to information comes from a citizen who engages by himself in the process of accessing information. This model is predominant in the adversarial approach to ATI. It is the opposite of the proactive model evoked in Gueye’s definition of transparency stated above, which is based on a public body’s own initiative in disclosing information.

Moreover, these issues reveal another difficulty in the implementation of transparency in the Senegalese context. In fact, the very notion of governance demands the involvement of different stakeholders in the management rules, rules which are meant to ensure the strategic and responsible orientation of any action toward collective interest. Governance appears to be a balancing process between interacting stakeholders, supposedly for the common interest—a preoccupation that is clearly seen in the notion of ‘stakeholderism’, which involves all those who have stakes in the implementation of the rules of management for collective affairs. One of the first controversies about governance in the Senegalese context arises from this approach aimed at the ‘collective’, at ‘public interest’, at the ‘common good’ in the general conception of the ideal nation-state. Although the African continent is known for ‘communitarism’, there is a specific conception of the general interest which is linked to an ‘abstract nation’ that is hardly identifiable. The ‘general interest’ remains that of the community to which one belongs (confessional, ethnic, professional, cast, class, etc.). In most cases, therefore, the fight for transparency draws people’s interest only when opacity acts against the individual’s interest or that of one’s community or of one’s class.

Furthermore, if the difficulties of implementing legal guarantees are tied to power relations in the administration and throughout Senegalese society, we should also realize that cultural traits such as secrecy will always stand in the way, at least as far as the liberal conception of transparency is concerned.

#### SECRECY AND POWER: THE ‘DEMYSTIFICATION OF THE STATE’ THROUGH TRANSPARENCY

Secrecy is not a simple trait or a propensity specific to Africa. Rather, secrecy is an integral component of human behaviour. As a sociological phenomenon, secrecy in an administrative system is just part of the “pleasure” of offices (Crozier 1963). It just happens to be more pronounced in some societies than in others (Simmel 1906; Birchall 2011). In Africa, secrecy, which is a reality in most communities,<sup>31</sup> is quite noticeable in many ritual expressions preserved by traditional authorities in rural areas and rather subtle in urban contexts. This is why experts in information

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<sup>31</sup> For example, the patriarchal system may, in some contexts, keep women far from public deliberations and therefore obstruct their right of access to information.

access who drafted the Africa Action Plan for the Advancement of the Right to Access Information, and who met in Accra in early 2010, declared that “there is a disturbing lack of transparency at the level of some traditional authorities who control funds and resources, especially the land which is kept in the name of public interest”.<sup>32</sup>

In Senegal, power representatives have an impact on authority practices from the family level to the organized community at large. The culture of secrecy is linked to the sacred conception of power. The exercise of power has been largely kept secret by closed societies, in sacred forests, and in other restricted circles. The revealing of information is limited to the minimum in this type of society inherited from traditional models. The case of Casamance,<sup>33</sup> which is one of the territories where the colonial project for the implantation of an administrative chieftaincy failed (Baum 2008) and where the integration of a post-colonial administration was difficult (Darbon 1988), is quite instructive on this type of socialization. Talking about the people of Casamance, Ferdinand de Jong (2007: 1) writes:

Modernization has not at all diminished their involvement in secrecy, as is witnessed by their reactions to violations of their secrets. Indeed, it is no exaggeration to state that politics in Casamance is shrouded in secrecy ... Practices of secrecy also provide the inhabitants of Casamance with a certain amount of leverage over the state.

In this context, the issue is not just to pass decrees—as does the Accra Action Plan in its efforts to put a check on opacity in traditional management—“that traditional chiefs should be taken into account in the conception of instruments for information access related to the management and use of public resources”.<sup>34</sup> The reality is much more complex in this context, where citizens are generally subjected to the traditional system to which they adhere more than to the state system. Expecting the state to impose transparency on traditional leaders means losing sight of

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<sup>32</sup> See Regional Conclusions and the Africa Action Plan for the Advancement of the Right to Access Information, Accra, Ghana, February 2010, Carter Center. Available at: <http://www.cartercenter.org/resources/pdfs/peace/americas/conference2010/ATI-Africa-Plan-full-fr.pdf> (accessed 30 May 2012).

<sup>33</sup> My choice here of Casamance should not be seen as a stigmatization of the region or as a special case; rather, it is because this area has been my anthropological field of investigation for many years. My doctoral thesis fieldwork is based on Casamance, and therefore I have ample empirical information from this area.

<sup>34</sup> See Regional Conclusions and the Africa Action Plan for the Advancement of the Right to Access Information.

the fact that the chiefs, in fact, have the upper hand over politicians, because the chiefs are empowered by their disciples or subjects, who represent an important part of the electorate. This situation will continue as long as there is a “social discontinuity of the state” (Sall 1996: 176) caused by a lack of ideological, financial, and material instruments, instruments which are necessary for a complete social immersion of the state. As Markovitz (1970: 87) emphatically says,

a large proportion of the population of Senegal is highly committed and tightly organized on the basis of personal charismatic relationships built on irrational emotional appeals.

These established relations, however, should not be seen as simple irrational emotions; rather, they often constitute the force occupying a void left by the state, a force which consequently creates different forms of non-state and social alternatives (Sall 1996: 171).

Moreover, the opacity of traditional management permeates that of the state and the administration. In this regard, De Jong (2007: 1) argues that “[t]here is a flip side of secrecy: the state and the market economy both penetrate the realm of secrecy, resulting in a continuous process of domains being interlocked”. It is common in rural Senegal to see that the administration agent is at the same time the ‘agent’ of a chieftaincy mode of governance, which is generally based on secrecy and various traditional rules. This situation has become particularly prevalent now that the development of decentralization has generated ‘influential stakeholders’ from the old regimes of governance who are repositioning themselves in communities’ deliberative circles, in order to retrieve a part of the authority which the involvement of the state at the local level has been threatening. In the city of Oussouye, for instance—one of the communes in Ziguinchor—the *hounil* (a kind of village council on traditional laws) makes decisions on prohibitions and obligations which are applied to all ‘subjects of the kingdom’. Those who participate in the *hounil* have traditional responsibilities and are the same people who preside over the deliberative circles which are a product of the decentralization laws. Such is the case of the mayor of the commune, who is from a family that traditionally managed the village’s land. The state has entrusted the mayor with the task of handling the management of the local land, and there is no doubt that he applies all the acquired know-how which he has inherited on traditional land management. Should we then expect that the management of local collectivities will conform with the rules of transparency as prescribed by the state law, when those who adhere to the chieftaincy model

of governance, which relies on secrecy, are the same people who, through elections, occupy the space meant for communal governance? In this case, the relations among users of communal services do not meet the requirements of the republican model upon which the administration is based. Rather, these relations are based on the current values of other spaces and modes of governance, to which belong municipal agents and in which these agents participate.

It is worth noting that the values and the representative systems of these spaces were not conceived according to the model of necessary transparency based on the liberal conception. Decisions of the *hounil* are, in fact, taken within the 'sacred forest', where only initiates are authorized to participate. At the end of secret deliberative meetings, information related to the management of the social equilibrium is taken to the population in the form of orders, the non-respect of which entails sanctions that are much graver than those of the state.

One of the leaders of a Ziguinchor-based women's association (*Kabonketoor*) of the sacred forest explained in these terms how social rules within the Diola<sup>35</sup> traditional system work:

Information which the Diola calls *niey-niey* [prohibited] is never made public to the ordinary Diola, let alone other communities or ethnic groups. In the Diola milieu, when someone tells you that this is *niey-niey*, you should just leave it at that. You should neither ask further questions nor look for other ways to know. Those *niey-niey* are not good for other ordinary people to know. Consequences can go from sickness to even death. (Rita Diémé,<sup>36</sup> Ziguinchor, 2010)

There are rites that always remind the Diola that

the group's livelihood depends on the observance of prohibitions which link the Diola to their ancestors. Non-initiates are strangers to certain realities which they are not ready to know or to experience. They are ordered to only live with the visible world. (Kizerbo 1997: 30)

In the community, the legal framework ensures citizen's participation in the municipal council's deliberations. But leaders refuse citizens' access to deliberative assemblies, especially access by journalists.<sup>37</sup>

<sup>35</sup> The Diola are one of the main ethnic groups in Casamance.

<sup>36</sup> We have changed names of our informants to protect their identity, except for those who are used to expressing themselves in the public sphere on the issue of information access and transparency. Their positions are already known to the general public.

<sup>37</sup> Testimony from the head of Oussouye's Kabisseu FM Radio, October 2009, during our thesis fieldwork.

Propensity to secrecy is perpetuated through magic and religion in order to justify information access restrictions in Casamance, while in the Islamicized part of the country, religious leaders use sacred texts to justify the obligation of the disciple to preserve opacity. As related by a leader of an internationally influential Muslim movement:

Not everybody needs all information. The Prophet prohibits us in a hadith from being interested in knowing what does not concern us. Therefore, we only have to give information that concerns people. That is how it is. This is how we were trained and educated within the movement. (Massamba Diakhité, Dakar, 2010)

Socialization based on Holy Scriptures such as the Qur'an is made use of in order to inculcate the secret nature of power. In this particular case, adherence to norms of secrecy is incumbent upon an individual once he or she accepts the hierarchy within the movement, which in turn may or may not justify information retention. This invocation of sacred texts is easily instrumentalized. In this context, a citizen readily accommodates secrecy around the temporal power of modern administration because he or she evolves in the Senegalese context, where traditional and religious governance spaces are important spheres of socialization enforcing the general belief that power and its concomitant knowledge (access to information) are sacred.

In fact, it is not rare to hear citizens like our interlocutor explain that the access and sharing of information with citizens would cause the demystification of the state, which would consequently find it hard to impose itself. This is why the state should be shrouded in mystery: so that its institutions remain feared and respected by everyone. (Thiéba Socé, Ziguinchor, 2010)

In the minds of citizens, the state, like any other power, can and should surround itself with mystery in order to inspire fear as the consequence of its monopoly of violence and its being the agent of repression *par excellence*. Such a conception creates an appropriation on the part of the state sphere in the sense that

[t]he state manipulates the fact that the law is little known. It entertains some sort of mystery which allows it not to be reached. ... This situation is well maintained and reinforced. People tend to give a sacred nature to things they do not know. (Tidiane Kassé, Dakar, 2010)

Does this correspond to Derrida's point of view according to which the possibility to remain secret grants the right to singularity, while appropriating a parcel of secrecy grants the right to avoid falling into

totalitarianism as a result of resisting transparency along with all its surveillance? Clare Birchall (2011: 12) analyses Derrida's point on the 'right to secrecy' in these terms:

A regime that embraces transparency will only ever be able to go so far before it tips over into totalitarianism because of its parallels with surveillance, particularly when extended to citizens. ... But if the regime doesn't go far enough, if it shrinks back from applying transparency to its own actions, the regime meets the charge of totalitarianism coming the other way (for acting covertly, autonomously and without an explicit mandate). Hence, an infinite hesitation, a radical undecidability, within any democracy that counts transparency among its operating principles. Hence, too, the prospect of a debate between transparency and secrecy that will never be concluded, because far from being inimical to each other, they are symbiotic.

Rather than secrecy, what causes problems in the rule of law is the distance which is deliberately maintained between power-holders and citizens. Even if secrecy is *de rigueur* under certain circumstances, anything that directly influences the lives of citizens should be subject to transparency. As long as secrecy and transparency have to coexist, the relationship between these two notions at the representative level will depend on the way Senegalese people conceive of power.

#### CONCLUSION

Implementing citizens' right of ATI remains an ambitious project in Senegal, and more so because of the triumphalism which is invested in its advocacy. But is a value important just because a society follows a logical, legal prescription that is at times exogenous or copied and even though members of that society may not confer on it the same importance as outsiders do? The answer to this question depends on one's position toward the universality of human rights, a universality that seems to be rooted in the ideological model of liberal democracy. In fact, these rights need to be contextualized. Even the normative nature of a constitution may not ensure the fundamentality of a right if social values do not recognize in it that same fundamentality. To define internal relationships and who should hold administrative authority are matters for an individual society—not for exogenous actors—and, if these definitions are ever to work in practice, they must be in accordance with the society's own conceptions and values. The diffusionism that characterizes the worldwide campaign for ATI should, beyond triumphalism, take on board that each law, specifically in Africa, will have to push through the obstacle of entrenched

mentalities and habits in the relevant societies. It is our conviction that the ATI research agenda should not only look at the issue through a legal lens but also give specific space to historical and socio-anthropological perspectives to highlight the administrative practices around ATI in specific contexts.

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#### INTERVIEWS

- Rita Diémé, Ziguinchor, 2010  
 Massamba Diakhité, Dakar, 2010  
 Thiéba Socé, Ziguinchor, 2010  
 Tidiane Kassé, Dakar, 2010

## CHAPTER FOUR

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

Fola Adeleke

#### 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.<sup>1</sup> 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.<sup>2</sup> These are rights as claims, liberties, powers, and immunities. The holder of a right as

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<sup>1</sup> 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.

<sup>2</sup> 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.

claims can demand that the state act in a certain way, and the claim is usually enforceable or justiciable in law (Darch & Underwood 2010: 138). A privilege right is a liberty or freedom which means others have no ability to use private or state power to prevent the right-holder from acting in a certain way or from being in a particular position (*ibid.*). This is the form in which the notion of freedom of information has been historically understood but has now developed into the present-day right of ATI (*ibid.*), understood in the third interpretation of rights as powers, defined as the legal ability to change a legal relation (Jones 1994: 22). The defining feature of such a right is its ability to empower the right-holder to do something which could otherwise not have been done in the absence of the relevant enforceable right (Calland 2010: 12). It is a right in this sense that may be useful for understanding the precise nature of the right of ATI. The fourth type of rights are immunities. These rights consist of things that a person is immune from because there is no legal provision for the conduct (*ibid.* 13).

Calland has used the above theory to argue that there are a number of features of the right of ATI understood in the sense of the right being a legal power (*ibid.* 6). He argues that the right to information is not a right to any specific concrete thing. According to him, the right to information does not guarantee that the object of the right will materialize. He argues further that the right changes the relationship between the parties because it empowers the right-holder who is the subject of the right to demand information from the state, the duty-bearer, about how the right in question is being delivered (*ibid.*). The right of ATI thus viewed in this sense is an enabling tool, a legal power, as it were, that allows Africans to use the right in a pro-active manner to challenge and demand from African governments what legitimately belongs to them in their pursuit of social, political, and economic equality.

#### DRIVING INFLUENCES ON THE RIGHT TO INFORMATION IN AFRICA

As stated earlier, the notion of the right of ATI has in recent times been favoured over the term freedom of information. The distinction characterizes ATI as a right that imposes a duty on the state to provide information, in contrast to the notion of freedom of information, which draws on the idea of imparting information as a component of freedom of expression (Bentley & Calland 2010). It supports the proposition above that ATI levers the social, political, and economic equality of Africans. Both terms are used in this paper to broadly refer to the right to information.

The right of ATI takes different forms in the various constitutions of the world. The first freedom of information law was passed in 1766 in Sweden, and since then there has been an increasing global recognition of the right. The United Nations (UN) in 1946 adopted Resolution 59(1), which stated that “freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated”. The African Charter on Human and People’s Rights in 1981 also adopted the right of ATI in Article 9 of the Charter, which states: “Every individual shall have the right to receive information”. In Africa, 11 countries have expressly guaranteed the right to information in their constitutions, and an additional 13 countries have protected the right to information within the context of the broader right to freedom of expression.<sup>3</sup> There are two factors that are relevant to why the right to information is gaining some ground in the new constitutions of emerging democracies in Africa. Firstly, the importance of ATI is now well-established, with international and regional instruments articulating clear principles on the right. The United Nations, African Union, and other regional bodies like the Southern African Development Community and Economic Community of West African States all have provisions in their instruments, recognizing the principle of freedom of information.<sup>4</sup> Secondly, developing democracies have internalized the notion that information is needed as a tool to hold governments accountable and ensure public oversight of government (Peled & Rabin 2011: 372). The corruption that had characterized and currently characterizes some African states has created a lack of faith by the citizens in their governments. The guarantee of access to information held by the authorities is now perceived as an essential tool for exercising human rights while limiting government power.

While the international recognition of the right to information and the relevance of the right for government accountability have aided the spread of this right in developing democracies, there are other factors responsible

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<sup>3</sup> The countries are in the Southern Africa Development Community (SADC) (Democratic Republic of Congo, Madagascar, Malawi, Mozambique, South Africa, and Tanzania); two in East Africa (Uganda and Kenya); and three in West Africa (Cameroon, Ghana and Senegal). The countries protecting under the freedom of expression right are eight in the SADC region (Angola, Botswana, Lesotho, Mauritius, Namibia, Swaziland, Zambia and Zimbabwe), one in East Africa (Tanzania), two in West Africa (Nigeria and Sierra Leone), one in North Africa (Morocco), and Ethiopia.

<sup>4</sup> These include Article 9 of the African Charter on Human and People’s Rights, and Article 9 of the African Union Convention on Preventing and Combating Corruption and Other Related Offences. At a sub-regional level, SADC has several Protocols that recognize the right to information. These include the SADC Protocol against Corruption and the Charter of Fundamental Social Rights of the SADC.

for driving this growth. Darch & Underwood (2010: 51) suggest that the diffusion of the freedom of information idea around the world is largely driven by a group of specialist international NGOs, often working closely with local or national partners who share their ideological predisposition. These specialist NGOs, according to these authors, share a commitment to Western liberal values, working within the broader context of a human rights' discourse and also forging important alliances with civil society at the local level (*ibid.*).<sup>5</sup> The diffusion of the freedom of information idea has also been the result of the influence of Western governments and other international organizations (*ibid.* 52). Some of these organizations are developmental agencies and international financial institutions, where governments, in an attempt to obtain debt relief or join an inter-governmental organization, will pay lip-service to freedom of information principles.

Three social and infrastructural preconditions that are necessary for the successful implementation of the right to information are identifiable. The first is political stability, whereby political leaders enjoy sufficient confidence such that they are not averse to openness or citizen involvement in governmental decision-making (Arko-Cobbah 2007: 3). Secondly, it is necessary to develop the ability of government departments to efficiently generate and store records in a manner that they can be easily accessed when requested by a member of the public. Thirdly, a judiciary that is independent, impartial, and informed is expected to ensure the realization of a just, honest, open, and accountable government (*ibid.*). These three conditions are often lacking in most African countries, a fact which will no doubt hamper the realization of the right to information. Without these conditions in place, the question that arises is this: does the domestication of the right to information have any meaningful value for African countries?

It is important to note that although there are common trends in the adoption of the right to information, local specific conditions and histories are largely responsible for the adoption of the right to information in each country. For instance, in South Africa and Kenya, both countries have extended the right of ATI to the private sector, and this is discussed below in the next section.

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<sup>5</sup> This view was also expressed by Calland & Newman while discussing the campaign process for access to information legislation in South Africa in Florini A., ed., (2007) *Making the Law Work: The challenges of implementation, in The Right to Know: Transparency for an open world*, Columbia University Press, 184.

## EXTENSION OF THE RIGHT OF ATI TO THE PRIVATE SECTOR

Corporations are bureaucracies and as such are prone to adopt a culture of secrecy, as a matter policy (Calland 2007: 216). Secrecy has been regarded by managers and directors as a major power resource in maintaining a competitive advantage over rival organizations (Stevenson 2001: 17). It is important to recognize that secrecy may serve not only the interests of a corporation but also the interests of society. Some degree of corporate secrecy is necessary to protect interests that benefit the society, interests which include incentives for innovation, the functioning of the market, and personal privacy (*ibid.*). Certainly, it is not expected that the trade secrets of companies or personal information of employees should be disclosed, but basic financial, safety, and environmental information should be accessible by the public.

The conventional human rights framework imposes the obligation of the protection of human rights on the state, and the role of the private sector in broadly protecting these rights has often been overlooked. A departure from this conventional framework is taking place owing to the increasing role of the private sector in public functions, a role which has arisen in the wake of privatization. Because freedom of information laws have evolved in the conventional human rights framework, which imposes obligations for human rights primarily on the state, most countries have applied the freedom of information laws to government information only (Siraj 2010: 215). The International Council of Human Rights (ICHR) has identified some constitutional rights that can be subject to direct violations by private corporations. These include non-discrimination, women's rights, liberty and physical integrity of the person, labour rights, health, and environmental rights. Other common law rights are also subject to possible violations by private bodies. Recognizing the extent of the influence of the private sector on the rights of individuals, the Commission on Transnational Corporations has formally recognized the right of individuals to information for the protection of consumer rights in relation to their consumption of goods, products, and services produced and delivered by the private sector.<sup>6</sup>

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<sup>6</sup> The 1983 Code by the Commission on Transnational Corporations states: "Transnational corporations shall/should disclose to the public in the countries in which they operate all appropriate information on the contents and to the extent known on possible hazardous effects of the products they produce or market in the countries concerned by means of proper labeling, information and accurate advertising or other appropriate methods".

In order to enable a better regime of openness in the private sector, there is a need to develop a broader understanding of the different transparency frameworks that govern corporate entities. This analysis will be restricted to South Africa and Kenya because both countries are unique in guaranteeing the right of ATI from private bodies in their respective constitutions.

### THE RIGHT OF ATI AND PRIVATE BODIES IN SOUTH AFRICA

Section 32 of the South African Constitution of 1996 states:

Everyone has the right of access to (a) any information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The section affirms the fundamental right of ATI and seeks to promote a culture of transparency and accountability both in the public and private sectors.

Section 32 offers one of the most advanced formulations of the protection of the right of ATI, with everyone enjoying access to every item of information held by government subject to the exceptions provided in the Promotion of Access to Information Act as well as information held by another person, so long as that information is necessary for the exercise of the subject's other rights. During the public participation process of the Constitutional Assembly,<sup>7</sup> the Open Democracy Campaign Group<sup>8</sup> argued for an open-ended right to public information and the inclusion of a right to private information (Calland 2007: 231). Representatives of the ruling African National Congress (ANC) in the Constitutional Assembly committees embraced this argument as they were cognizant of the fact that their own government was embarking on a course of privatization (ibid. 232).

Despite its potential, usage of the South African Act has been limited in relation to private records. Awareness of the legislation generally is poor, as is understanding of the potential in relation to the private sector.

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<sup>7</sup> The Assembly tasked with the drafting of South Africa's Constitution.

<sup>8</sup> This group was composed of NGOs, public interest organizations, and academics who lobbied the constitutional assembly on several issues during the constitution-making process.

## THE RIGHT OF ATI AND PRIVATE BODIES IN KENYA

Article 35 of the Kenyan Constitution which was promulgated in August 2010 states:

Every citizen has the right of access to

- (a) Information held by the State; and
- (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

The activists and policy makers in Kenya may have recognized the structural changes in State power and the increasing influence of private power and drawn similarities between what was taking place in South Africa and Kenya and decided to shape their right of ATI after Section 32 of South Africa's Constitution. Privatization of government-owned corporations and allegations of mismanagement in these entities are some of the factors that have been cited for the extension of this right to the private sector in Kenya. The question arises of whether these entities are fully private and carry out public functions, or whether they can still be regarded as public entities. The public/private nature of these entities is important as it determines whether the information sought from them needs to be justified as required for the protection of other rights. Kenya has no case law that deals with this issue, and South African jurisprudence is helpful in this regard.

The body of case law that has dealt with Section 32 (b) has far-reaching implications for corporate transparency in South Africa and in other countries grappling with similar issues. The application of the right in these cases articulates a potentially different legal and political paradigm from the one on which the foundation of corporate secrecy was built, to end what has become a false divide given the blurred lines between the public and private sector and the transfer of power, functions, and responsibilities from public institutions to private institutions (Calland 2007: 239). A recent case in South Africa had to determine whether a company which alleged it was a private body and not a public one was indeed so and which sections of the Promotion of Access to Information Act (PAIA) were applicable to it.

In *M & G Limited v 2010 FIFA World Cup Organizing Committee (LOC)*,<sup>9</sup> the applicant (an editor and investigative journalist) submitted a public

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<sup>9</sup> 09/51422.

body request in terms of PAIA for access to certain records relating to the procurement or tender processes applied by the company responsible for organizing the 2010 soccer World Cup in South Africa. The public body request was refused on the basis that the LOC was not a public body. In order to expedite the process, the applicant then submitted a private body request on the basis that the records were required for the exercise of the right to media freedom and to vindicate the right of the public to receive information on matters of public interest. The private body request was also refused.

The applicant launched a court application and the main issue the court had to decide was whether the LOC was a public or a private body. In a PAIA request of a public body, the onus is on the public body to show why the records cannot be released—i.e. in order to refuse a request, the LOC would have to rely on a recognized ground of refusal. In a PAIA request of a private body, the requester has to show that he or she requires the record “for the exercise or protection of any rights”.<sup>10</sup>

The court held that all companies limited by guarantee are deemed to be public companies for the purposes of the Companies Act, and case law establishes that whether an institution qualifies as a ‘public body’ under PAIA will depend on the nature of the powers and functions it performs.<sup>11</sup> Although the level of State control of these powers and functions may be relevant to the question of classification, it is not decisive, the court held.<sup>12</sup> Also, the court held that because a functionary or institution like the LOC disbursed public funds, even though that functionary may in all other respects be a private one performing an act or acts which are in no other way governmental in character or origin or under governmental control, it surely is performing a public function or exercising a public power.<sup>13</sup>

A further reading of the judgment in this case appears to show that the requirement of exercise or protection of a right in seeking access to information from a private entity is one that extends to both common law and constitutional rights, and no justifiable grounds exist to limit the exercise of the right from private entities outside the limitations prescribed by PAIA in granting access.

While South Africa’s PAIA lists a number of exemptions that limit the broad right of access to information from private bodies separate from the

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<sup>10</sup> (s 50 of PAIA).

<sup>11</sup> Para 48 and 158.

<sup>12</sup> *Ibid.* para 158

<sup>13</sup> *Ibid.* para 272

constitutional limitation of “exercise or protection of a right”, Kenya’s provision does not prescribe a law to be enacted to give effect to this right. The other limitations that would subsequently apply only to Kenya’s Article 35 would be the general limitation of rights in Article 24, the limitations’ clause of the Constitution. This provision is also similar to the provision in South Africa’s Constitution and provides that the right of ATI can be limited by law “only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”.<sup>14</sup>

The circumstances surrounding the adoption of a broad right of information access in South Africa was a unique one given the support it received from a strong labour movement and the freedom movement that fought apartheid. The probability that the formulation of this right would be replicated was unimaginable; but Kenya has subsequently followed suit, and Angola’s law also extends the right to access information to private bodies exercising public functions. While it might be impossible to impose on the private sector a statutory scheme that grants ATI similar to the one in the public sector, South Africa and Kenya have, however, laid a new path for transparency advocates to take the campaign for openness a step further.

As transparency advocates continue to lobby for ATI frameworks across the African continent, it is important that they recognize that not only public entities operate in the regulatory regimes of these countries and that transparency mechanisms also need to be extended to the private sector. Transnational companies will continue to operate in African countries and Africans will continue to ask questions about the involvement of these corporations in their countries. While the broad extension of the ATI right from private bodies as it exists in South Africa and Kenya might not occur in other countries, mobilization for sector-specific openness frameworks needs to be at the forefront of freedom of information campaigns. For instance, in Kenya, where there is no specific legislation

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<sup>14</sup> These factors are:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

that gives effect to the constitutional right to access information from private bodies, some sector-specific laws allow information access from private bodies. The Political Parties Act discussed below is an example.

It is estimated that there over 47 duly registered political parties in Kenya. The enactment and implementation of the Political Parties Act 10 of 2007 has been a significant step in the democratic development of the country. Apart from establishing a political parties' fund to be distributed among duly registered parties, the Act in Sections 33–36 provides for proactive publication of information about political parties' operations, expenditures, and sources of funds. It also, in Section 34 (2), makes a provision for any citizen to apply for any information as long as they have paid the prescribed fees. This is in stark contrast to the South African situation where political parties in a court judgement were deemed to be private bodies and any information sought from them must be based on the condition that the information is needed for the exercise of protection of a right.

In *IDASA v ANC*,<sup>15</sup> the applicant, a public interest organization, made a series of requests under PAIA for records of private donations made by the 13 largest companies in South Africa to the 13 political parties represented in the National Assembly. None of the parties granted the request and the applicant launched proceedings under PAIA against the four largest political parties, claiming the right of the public to know about private donations in order to make an informed choice during elections.

The applicants, in emphasizing the public nature of political parties, stated that in terms of the Constitution, political parties are institutionalized within the legal system of the State.<sup>16</sup> They submitted that this central role of political parties in the process of governance is prescribed and determined by the Constitution, both expressly and implicitly.<sup>17</sup> They stated further that political parties are the main constitutive element of the democratic process, the legislature and consequently the executive.<sup>18</sup>

The respondents, on the other hand pointed out that, although political parties both in South Africa and in other democracies have very high public profiles and play very prominent public roles, they are voluntary associations, which are created and regulated by their own constitutions and not by legislation.<sup>19</sup> They also argued that the fact that a political party's

<sup>15</sup> 2005 (5) SA 39 (C)

<sup>16</sup> *Ibid.* para 24

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* para 25

actions may on occasion attract widespread public interest does not make its functions ‘public’ in the legal sense.<sup>20</sup>

The court held that the records being sought from the respondents related exclusively to their fundraising activities, and such activities, insofar as they relate to the private funding of political parties, are not regulated by legislation.<sup>21</sup> The court held further that in receiving private donations, the respondents are not (a) exercising any powers or performing any functions in terms of the Constitution; (b) exercising a public power or performing a public function in terms of or any legislation; or (c) exercising any power or performing any function as a public body.<sup>22</sup> They simply exercise common law powers which, subject to the relevant fundraising legislation, are open to any person in South Africa.<sup>23</sup> In the result, the court held that for purposes of donations records, the respondents are not public bodies, as defined by PAIA, but private bodies.

The *IDASA* case prompted the ruling party in South Africa to implement regulation for disclosure of donated funds to political parties. With this kind of unique development, transparency advocates in Kenya can use strategic litigation on Article 35 of the Constitution to influence the development of transparency regimes in different targeted private sectors.

The focus of the next section is to understand the extent to which ATI has achieved its lofty objectives in the case of South Africa and Kenya.

#### THE CASE OF SOUTH AFRICA

ATI is a constitutionally entrenched right in the Constitution of South Africa, with national legislation—the Promotion of Access to Information Act (PAIA)—giving effect to this right. One of the objectives of the Act is to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights”. As a result, the Act can be used to exercise and protect socio-economic rights in the Constitution, which include the right to have access to adequate housing, the right to have access to healthcare services, sufficient food, water and social security, and the right to basic education. The 1996 Constitution of South Africa, in its Preamble, “lays the

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* para 30–31

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law". The Constitution in its founding provisions requires a "democratic government to ensure accountability, responsiveness and openness".

The broad right of ATI is not a unique right in South Africa's Constitution; this right has been in existence in older democracies, in the case of Sweden for over 250 years. However, Section 32 of the Constitution offers one of the most advanced formulations of the protection of the right of ATI, with everyone enjoying access to every item of information held by government, subject to the exceptions provided in the PAIA, as well as information held by another person, so long as that information is necessary for the exercise of the subject's other rights. This section affirms the fundamental right of ATI and seeks to promote a culture of transparency and accountability both in the public and private sectors.

During the public participation process of the Constitutional Assembly,<sup>24</sup> the Open Democracy Campaign Group<sup>25</sup> argued for an open-ended right to public information and the inclusion of a right to private information (Calland 2007: 231). This was embraced by the drafters of the Constitution; and with the broad articulation of the right of ATI in place, there has been a robust development of the ATI regime through the jurisprudence of the courts whenever enforcement of the exercise of this right is sought.

#### CHALLENGES OF IMPLEMENTATION IN SOUTH AFRICA

The right of ATI is regarded as a change process that needs to be managed in its social circumstances, rather than a simple constitutional act (Darch & Underwood 2005: 78). This process involves both the analysis of compliance behaviours by the state and an examination of the demand for ATI by the citizenry (*ibid.*), as well as the usage of released information for the enforcement of other rights. In South Africa, levels of both demand by the public and compliance by the state are disappointingly low. The annual surveys on compliance by government institutions conducted by the Open Democracy Advice Centre (ODAC), an NGO in South Africa, and the annual reports of the South African Human Rights Commission (SAHRC),

<sup>24</sup> The Assembly tasked with the drafting of South Africa's Constitution.

<sup>25</sup> This group consisted of NGOs, public interest organizations, and academics who lobbied the constitutional assembly on some issues during the constitution-making process.

the body tasked with monitoring compliance and implementation of the PAIA, show that the compliance levels of PAIA have consistently been in the range of 30–40 per cent in the past 10 years, accompanied by an alarmingly low level of awareness and usage of the Act by the public.<sup>26</sup> In 2010, the SAHRC and ODAC assessed 82 government institutions, with only 26 institutions responding to the requests. They recorded a 31 per cent response result, which is significantly lower than the 2009 and the 2008 results, where they recorded a response of 40 per cent and 39 per cent respectively from the sampled institutions (Adeleke 2010). Core South African national departments tasked with key service delivery issues, such as the departments of Home Affairs, of Human Settlements, and of Education, had consistently failed to respond to requests for information from the SAHRC since 2006 (*ibid.*).

There is a need to unravel the complex causes of the barriers to realizing the objectives in the cases of both the commitment of the government and the demand of the public. As far as government is concerned, the level of internal administrative readiness is a key barrier because most public institutions do not put mechanisms in place that will meet the demand for information when requested. The weakness and in some cases non-existent policies on accessing information by the public, poor records' management across all levels of government, and the lack of designation of government employees as information officers in departments—a legislative requirement which the SAHRC cannot enforce in the absence of provisions penalizing non-compliance—have permitted a number of government institutions to treat their obligations in terms of the PAIA with impunity (Kisoon 2010: 6). This situation exists despite the PAIA's mandatory reporting obligations—in order to monitor compliance with the Act—to the SAHRC by a public department.

Aside from this lack of commitment by public institutions to promote ATI, the exercise of this right by the general public and community groups also hardly exists, owing to a lack of knowledge on the usefulness and relevance of the right and, in some instances, lack of awareness of the existence of the right (*ibid.* 7). This has been caused largely by the SAHRC's handicap in effectively carrying out its statutory responsibilities to promote the right and the perception that to question the government will be seen to be antagonistic, in addition to inherent tensions between some

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<sup>26</sup> While the author worked for ODAC, a national department in South Africa responded to a request for access to information exactly one year later, indicating they were still in the process of implementing PAIA procedures, and hence the request could not be granted.

aspects of African traditional customary law and practices (*ibid.* 8). This is indeed an unfortunate situation, as ATI, as is often theorized, is a means that can be used to achieve the realization of socio-economic rights, a need that is very grave in South Africa. When Section 32 came into force, freedom-of-information advocacy groups within civil society in South Africa visited India to learn from the rich success of India (in using their own law to assist community groups), in an attempt to replicate such success in South Africa. Unfortunately, this success has been minimal in South Africa, and ATI is still perceived as a luxury right of no value to ordinary people (*ibid.* 9).

It is not only the general public and community groups that are not utilizing the right of ATI. It is naturally expected that ATI will aid the work of the media as a force that holds government accountable, but in practice the right is rarely exercised by the media in South Africa. This is attributable to the bureaucratic process of accessing information from government and the habit of public bodies to use the law to frustrate access through reliance on frivolous exemptions.<sup>27</sup> The statutory requirement that allows a public body to seek an additional extension of 30 days over and above the prescribed 30 days' requirement to deal with requests for information is also an obstacle to exercising the right of ATI.<sup>28</sup>

Another important barrier to exercising the right of ATI is the model of enforcement in South Africa, which is judicially based. Enforcement powers rest with the courts; and, given the harsh economic realities not only in South Africa but generally across the continent, an infringement on the right of ATI will most likely go unchallenged by requesters of information because, while the doors of the courts remain open, high legal fees and long time-delays bar recourse to the courts.

#### THE CASE OF KENYA

As stated previously, Article 35 of the Constitution of Kenya (promulgated in August 2010) guarantees the right of ATI and is modelled in exactly the

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<sup>27</sup> See *M & G v President of the Republic of South Africa* (1242/09) and *M & G v 2010 Local Organising Committee* 2007 (1) SA 66 (SCA), where the government departments relied on exemptions to granting access which the courts subsequently overturned as inapplicable.

<sup>28</sup> In *Stefaans Brummer v Minister of Social Development* 2009 (6) SA 323 (CC), the journalist who made an initial application for access to information in 2009 is still in court challenging the refusal of access to documents.

same way as the South African provision. In the context of the previous Kenyan Constitution (1969), this right was contained in the general provisions that governed freedom of expression. Section 79 of the former Constitution granted every person in Kenya the freedom to hold information as well as receive ideas and information without interference.<sup>29</sup> This right was limited, however, on grounds of public health and national security or safety.<sup>30</sup>

The right of ATI in the 2010 Constitution is also limited. Firstly, it extends the right only to citizens of Kenya. Secondly, a limitation is contained in the general limitations' clause of the Constitution in Article 24, which is also modelled in the same way as Section 36, the limitations' clause of the South African Constitution. This section provides that the right of ATI can be limited by law "only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors".<sup>31</sup> The Kenyan Constitution does not provide for any legislation to be passed to give effect to the right; thus, the right is not qualified by any exceptions to be found in any other law, and Kenyan citizens have to rely directly on the Constitution to assert this right. The entrenchment of the right of ATI in the Bill of Rights means that, on the one hand, legislation restricting access to official information is a limitation on the right and would be unconstitutional and invalid unless justifiable in terms of the limitation clause of the Constitution (Currie & De Waal 2005: 685). On the other hand, it also reveals that Article 35 will supersede any other law granting ATI. Before the PAIA was passed in South Africa, there were numerous cases that sought to rely on the right of ATI. In *Ingledeu v Financial Services Board*,<sup>32</sup> the central constitutional question before the court was whether two rights which are compatible, a right under the rules of court and a right

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<sup>29</sup> Section 79(1) of the former Constitution of Kenya.

<sup>30</sup> Section 79(2) of the former Constitution of Kenya.

<sup>31</sup> These factors are:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

<sup>32</sup> 2000 (4) SA 491 (T).

under the Constitution, can be invoked at the same time. The applicant sought information from a government agency regarding a law suit that had been brought against him. At the time of the application, the PAIA had not yet come into operation and Section 32 of the Constitution still applied. The court held that the applicant had a right capable of protection by Section 32. The court did not decide the constitutional question but considered precedents where the court was concerned with the appropriateness or otherwise of granting relief directly under the Constitution and held that “these cases cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned”.<sup>33</sup>

The challenges faced by South Africa discussed earlier will also confront the Kenyan ATI government if measures are not put in place to learn from South Africa’s decade-long experience. Some of the ways for accelerating compliance and implementation of the realization of the right of ATI which countries like Kenya can learn from include the following: measures to train government personnel in responding to the information needs of the public; improved records’ management systems; a simple and uniform way of making information requests, unrestrained by bureaucratic processes and articulated in an accessible government policy; reduced timelines for government departments in responding to requests for ATI; an enforcement mechanism similar to an information commission in countries like the UK and India, to provide cheap and timely remedies for disputes related to ATI; and, finally, a concerted effort on the part of government to promote the right and link it with other tangible rights which are important to the citizenry in terms of its realization. According to Kisoorn, “changing attitudinal barriers and orientation will be achieved only over a period of time, but, at a minimum, government can begin by auditing its levels of readiness and commitment to promoting transparency” (Kisoorn 2010: 10). As government develops the conditions for the realization of the right of ATI, there is a corresponding duty to educate the people about the usefulness of the right and how it can serve as a platform to take a political stance in a non-violent manner through dialogue, because the struggle for information is a struggle for power (Calland 2002).

The South African and Kenyan constitutional right represents an unprecedented opportunity to extend accountability and transparency to

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<sup>33</sup> Para. 24.

private power. Through trade liberalization and privatization, governments gave up power in favour of greater power for the private sector in which the phenomenon of the transnational company was propelled forward with consequences for the global economy (Calland 2001: 4). The South African and Kenyan constitutions allow records to be accessed from transnational companies located elsewhere but which do business in Africa. This is a form of internationalization of constitutionalism, and champions of ATI on the continent are beginning to recognize the effect of internationalization on the right to information. However, the applicable social contexts for African countries are different from Western contexts, and ATI cannot be introduced into a system without justifying the relevance and need for the right as vital to the pursuit of political, social, and economic equality of African citizens. Without this justification, ATI will continue to be perceived as a luxury right of no urgent importance in Africa.

The next section seeks to justify the need for ATI by establishing the link between ATI and the realization of socio-economic rights.

#### ACCESS TO INFORMATION AND THE REALIZATION OF SOCIO-ECONOMIC RIGHTS

Socio-economic rights are generally regarded as requiring some positive action on the part of government and are therefore considered as positive rights.<sup>34</sup> The enforcement of socio-economic rights and consequently their justiciability have been questioned (Article 19 2007: 13). Some scholars and even governments have argued that socio-economic rights are not human rights, and others have argued that they are human rights but are non-justiciable (Liebenberg 2010). The idea of social and economic justice has been tested in the Constitutional Court of South Africa and has been found to be justiciable. In the case of *Government of South Africa v. Grootboom*,<sup>35</sup> the Constitutional Court found that the failure of the government's housing programme to provide relief for those in need fell short of the obligation imposed upon it by Section 26 of the Constitution, which

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<sup>34</sup> The primary international treaty governing economic, social, and cultural rights (ESCR) is the International Covenant on Economic, Social and Cultural Rights. The following are recognized as ESCR: the right to work, the right to social security, the right to adequate food, the right to adequate housing, the right to health, the right to a healthy environment, and the right to education.

<sup>35</sup> 2000 (11) BCLR 1169 (CC).

guarantees the right of access to adequate housing. The court highlighted the relationship between civil and political rights on one hand and socio-economic rights on the other. It held that the values of the Constitution, such as human dignity, freedom, and equality, are denied to those who have no food, clothing, or shelter. The court ordered the state to devise and implement, within its available resources, a comprehensive and coordinated programme to realize the right of access to adequate housing.

There is the tendency to view the various rights protected in a constitution as protecting isolated interests. However, there can be multiple rights' violations arising from the same claim of social injustice. The inclusion of socio-economic rights in constitutions enables a more integrated approach, in which close attention is paid to the interrelation of rights. The distinction between civil and political rights on the one hand and socio-economic rights on the other has traditionally been premised on the fiction that civil and political rights exclusively impose obligations of restraint and non-interference with people's liberties on the state, which are negative obligations, while socio-economic rights impose positive duties (*ibid.* 54).

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that

[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The UN's three-tier system of obligations to respect, protect, and fulfil also complements the reporting requirements under the ICESCR. The obligation to respect is the negative obligation that requires states to refrain from doing something, while the obligations to protect and fulfil are the positive obligations that require states to take measures to protect the rights of individuals within the state (Article 19 2007: 22).

The obligation to protect imposes a positive duty on the state to prevent socio-economic rights from being violated by private actors (*ibid.* 23). The obligation to fulfil requires the state to take appropriate measures to provide for each person within its jurisdiction opportunities to obtain a realization of needs which cannot be secured by personal efforts (Eide 1989: 42). Darch & Underwood (2010) adapt four further "interrelated and essential features" that characterize the duty of the state to respect, protect, and fulfil. These features are as follows: availability (presence of

resources to satisfy the rights), accessibility (knowledge and affordability of the resource), acceptability (tailored to the cultural and linguistic circumstances), and adaptability (must respond to environmental changes).

The obligations to respect, protect, and fulfil are not only UN requirements but also recognized in national constitutions such as in South Africa where the Constitutional Court as discussed above also recognizes the duty of the state to progressively deliver on socio-economic rights. The right of ATI takes centre stage in ensuring and monitoring the realization of these rights. It is only through the exercise of the right of ATI that the public can, by accessing information, demand the respect, protection, and the fulfilment of their rights. It is through the exercise of the right of ATI that the public can determine whether resources are available and acceptable in realizing a right. This can be achieved through, for example, making requests for budget-related information and implementation plans for a project. The exercise of the right of ATI has the potential of assisting the public to determine whether the implementation plan for the delivery of a particular socio-economic right by government will meet the needs of the public that requires it.

It is important for the implementation measures by the state to advance and realize socio-economic rights to be communicated to the citizenry, and in instances where the state fails to do so, the public can through their right of ATI have access to information from government about plans, policies, and processes that are being put in place by the government to effect necessary measures for the effective realization of socio-economic rights. The right of ATI serves as a useful and important accountability tool to demand such responsiveness from government in complying with both their positive and negative obligations. The postulation that access to information will assist people in realizing their socio-economic rights cannot be achieved through education and awareness-raising alone; a directed effort by information champions is required to clearly link ATI with the realization of socio-economic rights. Currently, the right of ATI in Article 37<sup>36</sup> of the Malawi Constitution is being used to enforce the right to basic education in Malawi by attempting to challenge the current quota-system policy of government, which gives preference to one ethnic group over another in terms of admissions into higher education institutions in Malawi. Access to the information sought in Malawi is expected to

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<sup>36</sup> "Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights".

be used to prove the discriminatory effect of the quota-system policy, which will subsequently be used in litigation to ensure that the right to basic education for a minority group in Malawi is safeguarded.

There are other ways through which ATI can be used to enforce socio-economic rights. In the USA, freedom-of-information advocates have used freedom of information to advance the rights of indigent people and uphold the responsibilities of government agencies. Some of the ways they have been able to achieve these serve as useful lessons for other countries.

One way of achieving the enforcement of socio-economic rights is to use the accessed information to inform public officials about regulations and policies that they may not be aware of which will change their approach to the services they render to the public (Calland & Tilley 2002). Another way of ensuring socio-economic rights' enforcement by exercising the right of ATI is through the collection of evidence in similar instances, to establish the existence of a practice in government and thereby either discontinue or replicate such practice within other communities (*ibid.*).

There are crucial roles that must be played by interested stakeholders to achieve the objective of using ATI to enforce socio-economic rights. The political will of the government must be kept strong by having 'champions of the right' who will facilitate government-community partnerships. Given these developments, it may be time for freedom-of-information advocates in Africa to rethink some of the strategies that have been used to promote ATI on the continent. They need to decide whether their goal of advocating for the adoption of ATI laws ought to remain the key objective of their campaigns, or perhaps recognition must now be taken of the fact that the ultimate goal is entrenchment of openness and transparency in the conduct of public affairs (Dimba 2011: 3). Domestication of the right of ATI and realization of socio-economic rights is not an end in itself but one of many tools for promoting transparency in government.

#### CONCLUSION

The spread of constitutional democracy in African countries has occurred at the same time as the explosion of international human rights' instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and a growing number of other instruments. It is almost without exception that the constitutions

fashioned during this period have expressed a core set of human rights. As I have shown in this paper, while the right of ATI is useful in realizing other constitutional rights, the struggle for openness and accountability does not stop at the domestication of the right. Champions of ATI such as members of civil society, ATI academics, and researchers must continue to lobby governments for the implementation of, and compliance with, freedom-of-information principles that will empower us as citizens living in a constitutional democracy.

I have attempted to demonstrate how the right of ATI can be used to effectively realize socio-economic rights. I argued that the right of ATI is a form of legal power that empowers the right-holder to demand information from the state about how particular socio-economic rights are being delivered. It is the responsibility of relevant and interested stakeholders such as civil society, academics, and government officials to ensure, to the most reasonable extent possible, that African governments comply with their obligations under their respective constitutions to deliver on the constitutional promises that will improve the lives of their citizens.

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PART TWO

THEMATIC STUDIES:  
STATISTICS, INTERNET, EITI AND ATI



CHAPTER FIVE

STATISTICS, INDICATORS, AND ACCESS TO INFORMATION  
IN AFRICAN COUNTRIES

Colin Darch

ABSTRACT

*In common with most social science disciplines and subject areas, studies of ATI remain generally unsophisticated in their use of quantitative data. This chapter critiques statistical positivism and argues for a more critical approach, using qualitative methods to contextualize and interpret available data. Two main categories of statistical data in the field are identified. These are rules-based (for example, how many countries have ATI legislation?) and outcomes-based (for example, do government departments comply with the law; are citizens and organizations satisfied with the information that they receive?). Focusing on the second of these categories, the chapter criticizes current legislation for imposing a heavy burden of data collection on government agencies—which in African jurisdictions are often simply unable to comply—and for the frequent ambiguity of definitions in such laws. Only a handful of studies have attempted to assess user satisfaction and have produced preliminary but disenchanting results. There are methodological problems with all these data collection activities, but there are also epistemological difficulties, and these need to be taken seriously. They are not unique to ATI, and work already done in fields such as transparency and human rights is likely to be of use to scholars researching ATI.*

... today's statisticians ... probe data in the search for structures and patterns, and ... peel back the layers of mystification and obscurity, revealing the truths beneath ... Modern statistics enables us to see through the mists and confusion of the world about us, *to grasp the underlying reality.*

(Hand 2008: 1–2, emphasis added)

For anyone educated in an 'advanced' technological society, it is practically impossible to imagine that our ideas of *objectivity* and *factual accuracy*, and the basic place of *numbering* or *quantification* in our world-view, are historical products rather than eternal principles of analysis.

(Young 1979: 63, emphasis in original)

## INTRODUCTION

The deployment of statistical data about ATI practices is important for various reasons.<sup>1</sup> Different data *may* give us information about the following: the extent to which state bodies are complying with their legal obligations; levels of user satisfaction with the information that is made available; service quality; and the validity of claims made for the many benefits of ATI systems. They may also provide evidence of particular outcomes to satisfy donors who are supporting governance reforms, or be used to show that the investment climate in a particular country is attractive for foreign entrepreneurs.

There is a caveat; statistical data *may* provide evidence in these circumstances, but they do not *necessarily* do so, or do so robustly. The purpose of this chapter is to raise in a preliminary fashion some of the technical and epistemological problems associated with ATI indicators and statistics in particular, and with governance and transparency indicators and statistics in general, as well as to sound a note of caution about the uses to which the data may legitimately be put.<sup>2</sup>

ATI is often regarded as an important and perhaps essential *component* of 'good governance' planning and assessment, as the government of the Philippines, for example, has explicitly recognized: "the pursuit of greater public access to information is an integral element of the ... Good Governance and Anti-Corruption Plan for 2012 to 2016" (Philippines Dept. of Budget and Management 2012). It follows that what applies to the broader area as far as indicators and statistics are concerned may well also apply to the narrower field; the problems and even the solutions may be the same or similar, in terms of what questions are asked and what is measured and quantified. For example, in Africa, as in the rest of the global South, a key question has been what effect governance policies may have on development and economic growth. It was already being argued ten years ago that there was a "strong positive correlation" between governance policies and income at a general level (Kaufmann & Kraay

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<sup>1</sup> This text was developed from a presentation entitled 'ATI Statistics: What Can They Teach Us?', presented at the joint Africa Freedom of Information Centre-African Network of Constitutional Lawyers Workshop on Research and Access to Information, Munyonyo, Uganda, 24–25 November 2010. I am grateful to Akinyinka Akinyoade and Yuko Kasuya for commenting on a draft of this chapter; remaining errors of fact and interpretation are my own responsibility.

<sup>2</sup> The term 'indicators' is used in this chapter to denote statistical data that are used in analytically significant ways, or to summarize characteristics or trends within systems.

2002: 169). What is more difficult is to link specific and often complex outcomes, such as an improvement in ‘democracy’ or even ‘freedom’, to the adoption of a particular subordinate policy, such as ATI (Kaufmann & Kraay 2008: 10). Difficult it may be, but in the absence of technically reliable statistical data, it becomes next to impossible.

The ATI literature—in common with other areas of governance—focuses essentially on two kinds of indicators (*ibid.* 2). The *first* kind are rules including constitutional provisions guaranteeing ATI, implementing legislation, matching up legislation to some ‘model law’ with a specific number of essential features (for example, provision for an independent information commissioner). At the most fundamental level, the compilations of Banisar (2006) or Vleugels (2008) measure rules-based indicators; so does the practice of the Article 19 organization in publishing a model law against which it tests the adequacy of new legislation from various jurisdictions. The reports on ATI in Ghana, Liberia, Nigeria, and Sierra Leone prepared recently by Media Rights Agenda restrict themselves almost entirely to “rules-based” indicators (2010a, 2010b, 2010c and 2010d): indeed, the methodology is described as consisting of “research to identify the laws with access and non-access to information clauses [and] compilation of the access and non-access to information clauses in those laws”, followed by “analysis of these clauses to determine their scope, purpose, subject area and applicability” (Media Rights Initiative 2010a: 3). This appears fairly unproblematic, as far as it goes. However, rules-based indicators can mask ambiguity and subjectivity, as Kaufmann & Kraay (2008: 6) have pointed out:

In Kenya in 2007, for example, a constitutional right to access to information faced being undermined or offset entirely by an official secrecy act and by pending approval and implementation of the Freedom of Information Act. In this case, codifying even the legal right to access to information requires careful judgment as to the net effect of potentially conflicting laws. Of course, this drawback of ambiguity is not unique to rules-based measures of governance: interpreting outcome-based indicators of governance can also involve ambiguity ... There has been less recognition, however, of the extent to which rules-based indicators also reflect subjective judgment.

It is the strong focus on the importance of this ‘rules-based’ data that has created the somewhat artificial problem of African ‘backwardness’ in ATI (see Chapter 2 in this volume). Only a handful of African countries have passed ATI laws, and there are some scattered campaigns at both national and continental levels, but ATI is generally not high on most political agendas on the continent (as discussed throughout this volume). Despite

the rapid spread of ATI laws elsewhere and the claims made for their influence, there is nonetheless an emerging ‘rough consensus’ in the scholarly (as opposed to activist) literature that most legislation, on its own, is fairly ineffective and that there is wide variation in uptake and compliance (McLean 2011: 1). As far as it is possible to tell, even in the developed and industrialized countries of the global North, formal ATI activity remains in absolute terms at an extremely low level, with almost certainly less than one percent of total national population making use of ATI provisions in a given year (Hazell & Worthy 2010: 354). Still, the absence of legislation is widely but questionably seen as a problem and as an example of African underdevelopment, yet another case of Africa “lagging behind” (Baglo 2009: 31–32). If ATI is indeed a ‘fundamental human right’, as is often claimed, then in many parts of Africa it is either being satisfied in non-judicial ways, or it is a right on which citizens do not routinely place high value.

The *second* kind of indicator focuses on outcomes, and the remainder of this chapter will focus mainly on this category. The most obvious example is compliance reporting, which is often required by the legislation itself. How many requests were received, how many were acceded to, and how many were refused? Compliance is important, and *properly contextualized* compliance data can tell us much about bureaucratic and political willingness and capacity. The interpretation of such apparently simple sets of data as the number of requests is more complex than it appears: in an open society, ATI may be a last resort, while in a more secretive society citizens may turn to such formal procedures more readily. In addition, it is not hard to imagine ways in which ATI rules might be complied with at a formal level, but the citizen’s needs and expectations are not met—by handing over such a quantity of documentation that the needed information is effectively hidden, for example. Consequently, more-or-less sophisticated attempts have been made—initially in India and the United Kingdom—to measure end-user satisfaction as well, and to answer such questions as, again for example, whether ATI increases public trust in government (RaaG 2009; Hazell et al. 2010). In the Indian study, nearly 40,000 people were interviewed either individually or in focus groups, creating a pool of data that is large in absolute terms although still a small sample of the total population of the country. Nevertheless, both rules-based and outcomes-based indicators share common problems, of which the most obvious are the difficulties involved in isolating the variables and establishing strong causal links between the policy adopted and the improvement measured.

There are two often quoted—and fundamentally irreconcilable—dicta regarding the trend towards the quantification of almost everything. The first states that “you can only manage what you can measure” (quoted by Arndt & Oman 2006: 21). But Albert Einstein also reminded us that “not everything that can be counted counts” (quoted by Kaufmann & Kraay 2008: 1). The trick is to find ways of distinguishing what counts, what matters, what indicates something useful, and then to focus energy on quantifying that. Before analysing the types of problems that can contaminate the data, a summary of some kinds of available ATI data that might count is presented below.

#### OUTCOMES-BASED INDICATORS: COMPLIANCE DATA

It is common, if not universal, for ATI legislation to require state structures such as ministries, departments, and municipalities to quantify levels of activity in detail. Quantification of compliance is possible in situations such as the number of requests granted and refused, the particular exemption relied upon in the case of refusals, appeals and their outcomes, and so on. These compliance data are to be regularly submitted, depending on the jurisdiction, to the ombudsman (Ethiopia), to the attorney general (Nigeria), to a human rights commission (South Africa), or to an information commissioner, and are then made available to members of the public to make sense of as they will. In some countries, such as Nigeria, there is a requirement that the disaggregated reports should also be published. These reporting requirements are formulated in the context of a generalized desire to *quantify* complex social phenomena. The question remains whether the data on ATI so painstakingly compiled can be used, in conjunction with qualitative methodology, to illustrate something meaningful about the success or failure, or less judgmentally about the impact, of ATI legislation on the behaviours and practices of the political class, the bureaucracy, and the citizenry.

What statistical data are typically required? To start at the highest level of generalization, Article 19's well-known *Model Law* contains a Section No. 21, laying down a procedure to be followed for statistical reporting (Article 19 2006: 13). A more recent ‘draft model law’ for African countries, yet to be adopted by the African Union and so still fairly abstract in conceptualization, specifies the reporting requirements on compliance in its Section 75, in considerable—indeed staggering—detail:

- (1) The information officer of each public body and relevant private body must annually submit to the oversight mechanism a report stating in relation to the body:
  - (a) the number of requests for access received;
  - (b) the number of requests for personal information;
  - (c) the number of requests for access granted in full;
  - (d) the number of requests for access granted in terms of the public interest override in section 36;
  - (e) the number of requests for access refused
    - (i) in full; and
    - (ii) in part;
  - (f) the number of times each provision of Part IV was relied on to refuse access in full or part;
  - (g) the number of cases in which the periods stipulated in section 13 were extended in terms of section 14;
  - (h) the number of internal appeals lodged with the relevant authority;
  - (i) the number of internal appeals lodged on the ground that a request for access was regarded as having been refused in terms of section 16;
  - (j) the number of cases in which, as a result of an internal appeal, access was given to information;
  - (k) the number of appeals referred to the oversight mechanism and the outcome of those appeals;
  - (l) the number of appeals referred to the appropriate court and the outcome of those appeals;
  - (m) a description of the steps or efforts taken by the head of the body to encourage all officers of that body to comply with the provisions of this Act;
  - (n) any facts which indicate an effort by the body to administer and implement the spirit and intention of the Act according to its submitted plan;
  - (o) particulars of any penalties issued against any person under this Act;
  - (p) particulars of any disciplinary action taken against any person under this Act;
  - (q) particulars of any difficulties encountered in the administration of this Act in relation to the operations of the body including issues of staffing and costs; and

- (r) recommendations for reform, or amendment of this Act, other legislation, common law, sector regulation or practise relevant to the optimal realization of the objectives of this Act.
- (2) The oversight mechanism may impose penalties on public bodies and relevant private bodies which do not comply with the annual reporting obligation. (Centre for Human Rights 2011: 34–35)

Such a detailed reporting burden is clearly far from trivial, but in a model law this is not necessarily a fatal weakness; it remains to be seen, in the event that African Union endorsement for the model is forthcoming, how much of this translates into enforceable regulations. However, for legislation that is actually in effect, the feasibility and usefulness of such requirements may become real problems. Section 32 of South Africa's Promotion of Access to Information Act of 2000 contains nine sub-paragraphs specifying the data that the "information officer of each public body must annually submit to the Human Rights Commission" (PAIA 2000: 21). Section 84 of the same legislation then requires the Human Rights Commission in its turn to "include [all the reported data] in its annual report to the National Assembly", with each category stipulated for a second time (*ibid.* 42). This type of imprecise legislative drafting can have a range of consequences, including overlapping data, duplication of effort, and above all incomplete or incorrect statistical information in which researchers can have only a low level of confidence.

The Freedom of Information Act passed in mid-2011 in Nigeria is just as demanding in its specification of the statistical data that must be compiled by each public institution and submitted annually to the Attorney General. Given that Nigeria is a federation, and that many if not all of the country's 36 states may pass local versions of the Act, it is clear that this is another example of a heavy reporting burden. Section 30 requires that "on or before February 1 of each year, each public institution shall submit to the Attorney-General of the Federation a report which shall cover the preceding fiscal year" and then proceeds to list in eight paragraphs the detailed statistics that must be collected and compiled (Nigeria 2011).

Reference to these requirements gives a sense of their extent and the work involved. In addition, in some cases as in South Africa, the definitions are ambiguous, creating problems both for government departments and potential users of the data (Sorensen 2004: 4–5). For example, Section 32 (d) of the South African law requires that state bodies record the "number of times each provision of this Act was relied on to refuse access in full or partially". This has been interpreted by the bodies themselves and

accepted by the Human Rights Commission (which publishes the data) to mean that a single total of all refusals, whether full or partial, satisfies the requirement. Sorensen argues, however, that the intention of the drafters must have been to tabulate the number of times each *individual* permitted exemption was relied upon.

The potential importance of this apparently trivial point of interpretation is illustrated by a recent controversy in India, described by Venkatesh Nayak of the Commonwealth Human Rights Initiative (CHRI) in an e-mail alert dated 7 February 2012. The Indian government was proposing new legislation that would effectively “add a new exemption on nuclear and radiation safety matters” to the country’s RTI law, mainly for security reasons. Various organizations, including the CHRI, objected to this. By recourse to the detailed statistical record of exemptions that had previously been relied upon in refusing to release this kind of information, the CHRI was able to muster compelling evidence that security had not previously been seen as an issue. For example, India’s Atomic Energy Regulatory Board received 43 information applications in 2010–11, and rejected none. The Department of Atomic Energy received 280 applications during the same period, and rejected 33. Of these, 28 relied on the parliamentary privilege and 5 on the fiduciary relationship exemptions. None were rejected under provisions relating to strategic or defence issues (Nayak 2012). The government’s argument was thus exposed as weakly founded. Clearly, such a use of statistical evidence would be impossible in South Africa, where data about the specific use of particular exemptions is not aggregated.

#### OUTCOMES-BASED INDICATORS: USER SATISFACTION AND IMPACT SURVEYS

Usually government bodies are legally required to collect only statistics that show that their ATI practices have been in compliance with the law. This is a minimalist approach to quantification which tells us little or nothing about what citizens are getting out of ATI, either individually or collectively through civil society organizations. The collection of data on and the numerical analysis of the extent to which ATI practice has brought *satisfaction* to citizens and civil society organizations have been left largely to independent researchers, who, it must be said, have only just begun to take up the challenge. But it is worth remembering that user satisfaction is an important indicator:

The only criteria that count in evaluating service quality are defined by customers. Only customers judge quality; all other judgments are essentially irrelevant. (Zeithaml et al. 1990: 16)

Of course the relationship of the citizen to the state is not entirely equivalent to that of a customer and a service provider; but the point is nonetheless an important one. Although this type of research is still in its infancy, two important studies have been conducted in Great Britain and India respectively, both of which contain elements of satisfaction surveys, although that was not their main focus.

The British study attempted to test what it termed the “ambitious set of expectations about what FOI [i.e. ATI] can deliver” as well as the “exaggerated set of fears” about it against the reality of its functioning in the UK (Hazell et al. 2010: 3). The authors argue that there have been three fundamental types of impact study in the ATI literature. These were, first, the aggregated governance indicators approach; second, comparative surveys across jurisdictions; and third, studies using standardized ATI requests. There was also a focus on whether the legislation achieves its self-defined objectives, and whether it changes civil service behaviours. These authors used semi-structured interviews with government officials, an online survey instrument,<sup>3</sup> and media analysis, and reach the conclusion that ATI—in the UK at least—has neither realized the wilder claims made for it by its advocates, nor turned out to be the complete disaster predicted by its opponents (ibid. 2010: 252–256). Importantly, transparency and accountability in government were indeed strengthened; but decision-making did not improve, and public participation and trust remained unaffected (ibid. 253).

The second study was carried out across India by the RTI Assessment and Analysis Group (RaaG) and the National Campaign for People's Right to Information (NCPRI), together with 11 other collaborating institutions and 11 state coordinators. The study involved 18,918 individual interviews and 630 focus groups across 10 Indian states and Delhi. Researchers analysed more than 25,000 RTI applications, filed another 800 requests, and extracted 5,000 case studies of particular narratives. This makes the RaaG study the largest single research project carried out on the impact and effect of a juridical ATI regime.

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<sup>3</sup> The study collected 109 usable (from a total of 350) responses to the online survey, from a known 30,000 ATI requests in 2008. This is an exceedingly small sample (Hazell et al. 2010: 275).

The RaaG study covered a wide range of topics: public awareness of ATI, the number of applications filed, social profiling of applicants, constraints on the filing of applications, success rates, impact (i.e. was the applicant's objective satisfied?), and so on. The revised executive summary report (RaaG 2009) lists 15 major findings, mainly to do with compliance issues, with recommended corrective action steps. Some of the findings will have surprised nobody, as for example, finding I: "there is poor awareness about the RTI Act, especially in the rural areas" (ibid. 35). Others are specific to the Indian situation, for example, finding III that there are a possible 114 sets of rules in different states and territories plus branches of government. Among rural survey respondents, 40 per cent reported that getting the requested information did *not* help them to achieve a desired outcome; among city dwellers, this figure fell to 20 per cent. The report does not speculate as to what the reasons for this might be (ibid. 14). Nevertheless, the study found encouragement in the fact that its

... case studies show myriads of citizens using the Act in previously unknown ways ... there are extremely encouraging stories of RTI success by individuals or groups that are generally stonewalled by the Government ... Many people's movements, citizens' groups, and non-governmental organizations now rest their work heavily on the Right to Information Act, using it for broader societal purposes. (RaaG 2008: 14)

However, it may be that the real point of the RaaG study lies not in the details of the findings, many of which confirm already existing anecdotal evidence, nor the size of the research project, but the fact that for the first time independent researchers carried out large-scale data collection using conventional social science techniques and methodology. Although there has been some discussion of the feasibility of carrying out a similar survey in those African jurisdictions where ATI legislation is in place, this would be complicated by its cross-jurisdictional character, among other factors.

#### PROBLEMS OF METHODOLOGY AND CAPACITY

Statistical data are conventionally regarded as having two principal aspects, namely the *objects* enumerated and their *characteristics*. The *objects* of official statistics on freedom of information are typically requests for information, while the *characteristics* (or more commonly, *variables*), are whether the requests were refused partially or fully, or were met; in satisfaction studies, variables might include expectations as well as a scale of outcomes. Broadly put, the thinking behind some of the early surveys

was that by gathering data on such ATI objects and their associated variables, it would be possible to assess the extent to which state bodies are complying with the law, and hence what impact the legislation has had in promoting accountability and transparency (for example, Open Society Justice Initiative [2006]). There are two sets of problems with this process, the first of which has to do with the question of data quality (clean or messy), and the second to do with the epistemological issues already referred to above.

Data collected in South Africa in the so-called ‘Section 32’ reports that are submitted by all public bodies to the South African Human Rights Commission (SAHRC), exhibit serious difficulties. These data, which are certainly experimental rather than observational, are incomplete (not all public bodies in fact report), as well as probably incorrect (some of the definitions in the Act are ambiguous and are probably being interpreted in different ways). The SAHRC is not involved in any pre-processing of the disaggregated data, simply taking what is submitted and tabulating it.

The gathering of these figures is evidently the expression of a commendable desire to measure the degree to which state bodies are complying with the law by providing requested information to citizens. Underpinning this desire, however, is the positivist assumption that statistical data do in some sense constitute an objective representation of reality. The reports—when they are published—are seen as reflecting, however crudely, the *actual willingness* of public institutions to comply with the legislation. Indeed, the SAHRC is quite clear on this point when it complains that the total number of

... public bodies submitting ... reports continues to remain low ... the result of the Commission not obtaining a greater number of reports is that *the extent of use of PAIA by the public cannot be accurately and comprehensively ascertained*. (SAHRC 2005: 85–86, emphasis added)

This statement clearly implies that had all public bodies submitted reports, then it would be possible to ascertain “accurately and comprehensively” the extent of public use of ATI. There are both epistemological as well as technical reasons why this is unlikely. First of all, by the SAHRC’s own admission, no pre-processing or cleaning up is carried out on the data before they are published, even when it is known with certainty from independent sources that the data set is incomplete:

Resource constraints have meant that the veracity of reported statistics cannot be tested. This inability to test the accuracy of reports means that many public bodies submit reports reflecting zero returns, *despite evidence from*

*civil society organizations that requests had indeed been lodged with the specific public body.* Such limitations defeat the objectives of the legislation and the monitoring of compliance. (SAHRC 2010: 150, emphasis added)

The SAHRC has no remedy if a public body fails to return a report or returns a report that is manifestly inaccurate. It seems likely that other African countries will also face similar difficulties in collecting compliance data, especially in circumstances where poor compliance is the result of opposition to the law, making the assessment of ATI impact even more difficult. This is a matter that merits serious and urgent investigation.

#### STATISTICAL POSITIVISM IN ATI

The expression statistical positivism refers to the idea, expressed in the quotation at the head of this chapter, that by quantifying things, researchers are uncovering an ‘underlying reality’ in a more or less unproblematic way. Popular cynicism towards statistics is encapsulated in such clichés as ‘lies, damned lies and statistics’ and ‘you can prove anything with statistics’. But to believe that statistical data are invariably suspect is just as naively positivist as to believe that they can always be relied upon as neutral, factual, and free from ideological taint. What is required, and especially in the field of ATI, is a systematic methodology that analyses distortions that aggregated ATI statistical data can disguise. The concern is not so much that statistical data are *never* to be relied upon, but that *even when social scientists command sufficient technical skill to adopt a critical attitude to quantification*, they too often fail to do so. As Irvine et al. have pointed out, “the complex statistical end-product is ... more in need of being explained than either being taken for granted or dismissed” (1979: 3).

This is not the place to rehearse in detail the history of the epistemological debate, first around positivism itself in the social sciences, and second about the specificities of statistical methodology within it. However, some key points of reference need to be indicated. In the late 1970s a vigorous critique of what Hindess (1973: 10) famously called “the vulgar positivism” of “orthodox methodology” in statistics began to emerge. The orthodoxy referred to consisted of two related epistemological components: the idea that the social sciences must appropriate methods from, for example, physics and chemistry (methodological naturalism); and a concept of science based on the identification of universal laws, the

ability to predict outcomes, observation through the senses, and the collection of theory-neutral data (Keat 1979: 75–78). Statistical data, quantification, numbers: all these served to support the claim that the social sciences were in reality as *scientific* as any other disciplines:

... it is easy to see how the use of statistical data and techniques in the social sciences *could come to be seen as actually demonstrating their scientificity*. (Keat 1979: 78, emphasis added)

Historically, the critique of statistics developed within the broader movement for recognition that science and technology are social products (Griffiths et al. 1979: 339–378). It has been particularly but not exclusively associated with the journal *Radical Statistics*, which is still being published, and has covered the uncritical use of statistical data not only in sociology but also in other disciplines such as geography. The points made were often of general application:

The positivist approach is suited to and often assumes a closed system and does not consider the difficulties of quantitative modelling of open systems ... [T]here are two conditions that must both be satisfied for a closed system to exist. These are that there must be no change in the object possessing the causal powers and that the relationship between the causal mechanism and those of its external conditions must also be constant. From this definition it is clear that social science research involves open systems because humans have the capacity to change and human actions have the capacity to alter the configuration of systems ... (Marshall 2006)

Locating work with ATI statistical data in the broader framework of a relatively sophisticated analysis of ways in which they are not neutral, not given, and problematic requires a level of technical statistical competence from social science practitioners. However, in countries such as the United Kingdom, it has been clear for some years that quantitative methods are often regarded with suspicion by sociology students and are inadequately taught in the social sciences generally (Williams et al. 2008). The problem can therefore be broken into two closely-linked aspects: social science analysts are frequently not critical enough *epistemologically* about their data; and second, they lack the high level of technical numeracy needed to adopt such a critical stance effectively. Given that truly *local* social sciences are some distance from being realized in African universities and research councils, it is clear that deficiencies in quantitative method that affect the metropolitan countries are likely to reproduce themselves in the peripheries.

## CONCLUSION

What does all this mean in the field of ATI statistical analysis, especially in African countries? What is to be measured, and how effectively can measurement be done? Several problems related to the definition and measurement of 'success' under an ATI regime have been recognized for some time. Indeed, an entire working group session was devoted to the theme at the International Conference on the Right to Public Information, held in the United States in 2008. Among the questions posed were the following:

Some ATI laws identify various policy objectives ... others simply refer to guaranteeing access to information ... Should we even attempt to assess how ATI laws are operating in practice and what their various impacts have been? What if we are not measuring the right impacts, or not capturing positive impacts other than those originally identified? ... [but] if we do not undertake some sort of assessment, how do we know that ATI laws are ... delivering on their promise of access to information? ... how do we counter complaints that ATI regimes are costly, resource-intensive and complicated to administer if we cannot demonstrate that the benefits justify and even outweigh the costs in a democratic society? ... can we identify a shared definition or understanding of what constitutes a 'successful' ATI regime? ... what are useful indicators and measurement techniques for assessing impact? (Horsley 2008: 1)

This goes right to the heart of the difficulty: the claims made for the effect of ATI legislation impose a responsibility on those making them to demonstrate the effect. But the responsibility is not an easy one to satisfy. ATI indicators, even relatively straightforward ones such as compliance statistics, are made up of a complex matrix of objective and subjective factors; outcomes are especially hard to measure and quantify. This is true of political rights in general (Thede 2001: 260). As we have seen, there are both methodological and theoretical problems in compiling and using statistical data on ATI, especially in African countries, and it is essential that caution be exercised before easy conclusions are drawn. The usefulness of ATI quantitative indicators lie in their deployment within contextual, qualitative analyses of conditions within specific African jurisdictions: the numbers, most assuredly, do not and cannot speak for themselves. In addition, the same "combinations and types and sources of data" cannot easily be used to construct comparative studies across, for example, Francophone and Anglophone countries: the variables in specific jurisdictions are simply too many and too complex (Thede 2001: 259). Statistics "are not *collected*, but *produced*; research results are not *findings*, but *creations*" (Irvine et al. 1979: 3, emphasis in original).

The absence of theoretical work on exactly how ATI compliance and ATI behaviours can be turned into something measurable (and hence, presumably, manageable) is partly the outcome of the often adversarial relationship between advocacy campaigns and government institutions, and partly a feature of a larger problem faced in the quantification of concepts such as democracy, transparency, accountability, and human rights. As Thede (2001: 265) has pointed out:

There appears to be no general agreement even on what an indicator is. The UN ... defines an indicator as 'a variable or measurement, conveying information which may be qualitative or quantitative, but consistently measurable'. In practice however, we find not measurable indicators at all but rather factors or phenomena that require rigorous unpacking in order to arrive at anything that could conceivably be consistently measurable.

This is a warning that researchers in the field of African ATI will do well to heed. Scholars and activists need to develop and deploy a much more sophisticated understanding of basic statistical techniques and the capacity to both read and critique numerical data before embedding it in qualitative analyses as evidence for specific theses.

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## CHAPTER SIX

### THE EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE AND CORRUPTION IN NIGERIA: RETHINKING THE LINKS BETWEEN TRANSPARENCY AND ACCOUNTABILITY

Uwafiokun Idemudia

#### ABSTRACT

*The identification of corruption as the development problem in resource-rich African countries has in recent years led to the emergence of a dominant perspective that suggests the link between transparency and accountability as a strategy to address corruption and other aspects of 'the resource curse'. This idea informed the establishment and the promotion of the Extractive Industry Transparency Initiative globally and its subsequent adoption locally in Nigeria in the form of the Nigerian Extractive Industry Transparency Initiative (NEITI) to fight corruption. However, since the adoption of NEITI in 2004, limited efforts have been made towards ascertaining the effectiveness of NEITI or assessing its implications for the purported link between transparency and accountability. Drawing on a critical examination of the experiences in Nigeria, this paper suggests that the NEITI has at best been ineffective in the fight against corruption in Nigeria, and the assumed association between transparency and accountability is based on a misdiagnosis of the governance failure complex in Nigeria, an underestimation of the problem of structural formalism, and an unfounded expectation of the capacity of civil society groups to demand accountability in the country. The paper concludes by considering the theoretical implications for using transparency as a vehicle to deal with the problem of corruption in Africa.*

The main reason for persistent widespread poverty in Nigeria is lack of transparency and accountability. Therefore, revenue transparency and accountability will contribute to poverty reduction and eventual eradication.<sup>1</sup>

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<sup>1</sup> Otive Igbuzor, Country Director, ActionAid Nigeria (see Taiwo 2007).

INTRODUCTION<sup>2</sup>

The correlation between natural resources and negative political, economic, and social consequences in Africa has come to define what is often referred to as the 'resource curse' (see Auty 1993; Ross 1999; Auty & Gleb 2001; Sachs & Warner 2001). While critics and proponents of the resource curse thesis continue to debate its merit,<sup>3</sup> there is now some consensus that the quality of the 'governance structures' around resource extraction and processing and the management of generated revenues determine whether natural resources will turn out to be either a curse or a blessing for a country (Mehlum et al. 2006; Alao 2007; Kolstad 2009). Consequently, efforts to address aspects of governance failure seen as crucial for ameliorating the resource curse in Africa have come to define international policy responses.<sup>4</sup> For example, there was the institution of the Kimberly Process Certification Scheme to help regulate the international trade of conflict diamonds, which are generally believed to have contributed to and prolonged the conflicts in Democratic Republic of Congo, Angola, and Sierra Leone.<sup>5</sup> Similarly, as part of this international response to the resource curse, a key question has been how revenue from natural resource extraction can be efficiently utilized for sustainable development (see Haufler 2010). For example, Gary & Karl (2003) noted that if oil revenue management is based on transparency, accountability, and fairness, oil revenue will become a source of blessing for oil-producing African countries. This assertion is informed by the simple assumption that the greater the transparency around natural resources revenue earned by African states, the greater the opportunity and possibility for these governments to be held more accountable for the use of such revenues by their citizens. This is because transparency relates directly to power, as it aims to democratize information and empower the powerless by providing them with access to and control over information and knowledge that can then be used to demand accountability (Mol 2010). This strategy informed the institution and promotion of the extractive industry transparency initiative (EITI) by Western governments, some governments of developing countries, and transnational corporations as a core strategy to address

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<sup>2</sup> The author acknowledges financial support for his research from the Social Sciences and Humanities Research Council (SSHRC) of Canada.

<sup>3</sup> See Cramer (2002), Rosser (2006) and Brunnschweiler & Bulte (2008) for details of the debate.

<sup>4</sup> See Turner (2006) for detailed discussion of different initiatives.

<sup>5</sup> See Le Billion (2001); Pugh et al. (2004); Arnson & Zartman (2005).

corruption and other problems associated with the resource curse. Haufler (2010) notes that this strategy of linking transparency with accountability is underpinned by the expectation that transparency will lead to three inter-related benefits. First, transparency will lead to less corruption, more equitable distribution of revenues, less waste and fraud, more economic development, and less violence. Second, the processes of disclosure of natural resource revenues will lead to the mobilization and empowerment of civil society, which can use the information disclosed to better police and hold government accountable. Third, by facilitating the ability of the powerless to hold powerful actors accountable, the disclosure of information will ultimately enhance trust and legitimacy in ways that improve the relationship between civil society and the private sector, and government. Given these expectations of EITI—and given the fact that Mol (2010) now sees the quest for transparency as having some permanency since it is structurally embedded and increasingly institutionalized within the wider development of global modernity (see also Gupta, 2010)—it is imperative that assumptions linking transparency with accountability are carefully re-examined and that the extent to which EITI in particular has been able to deliver on its promise is considered. The objective of this paper is thus to critically examine, by focusing largely on Nigeria, this transparency–accountability strategy as a vehicle for promoting the efficient use of natural resource revenue to meet sustainable development goals in Africa.

#### AN OVERVIEW OF NIGERIA'S OIL INDUSTRY

The oil industry in Nigeria has predominantly been dominated by two of its three key stakeholders, that is, the Federal Government of Nigeria (FGN) and foreign oil companies. The consideration of the host communities as a stakeholder in the Nigerian oil industry is a relatively new phenomenon. However, the reality remains that the host communities are still relegated to the background in decision-making processes within the oil industry. This is partly because the FGN, by virtue of a number of decrees and laws (such as the 1978 Land Use Act and the 1969 Petroleum Act), remains the only legitimate authority that can enter into negotiation and grant concessions for oil exploration to international and local oil firms, since ownership of crude oil has been vested in the Nigerian state.

Oil exploration and marketing takes place in Nigeria through complex joint-venture (JV) partnership agreements and production sharing-

contracts (PSC) between the FGN and the oil companies. In addition, since ownership of crude oil is vested in the state, taxes and royalties accrue to the FGN directly. Hence, the FGN is in effect both a direct 'stockholder' as well as a 'stakeholder' in the Nigerian oil industry. The FGN also has the responsibility for regulating the activities of the oil companies, through the Nigerian National Petroleum Corporation (NNPC). The NNPC was established in 1977 and charged with the responsibility of regulating and supervising the oil industry on behalf of the Nigerian government. The NNPC has therefore been the sole superintendent of the oil sector, dictating the pace and direction of activities in the industry. As the federal government's proxy in the oil business, the NNPC holds an average of 57 per cent in the JV partnership arrangements with the multinational oil exploration and production companies in Nigeria

The private sphere of the Nigerian oil industry is dominated by foreign oil companies, and they can be relatively classified into first- and second-generation oil companies, on the basis of the date they went into full independent concessional agreement with the FGN. The first generation of oil companies account for about 90 per cent of the total crude-oil production in Nigeria. Among the first-generation oil companies, Shell is the largest and accounts for roughly half of Nigeria's total oil production. Frynas et al. (2000) argued that the first-generation oil companies in Nigeria have been able to maintain their dominance in the oil industry by virtue of 'first mover advantage'. On the other hand, the second-generation oil companies are confined to areas that were either left behind by the first-generation oil companies or to newly discovered oil blocks.

With respect to the third group of stakeholders in the Nigerian oil industry (that is, local communities), there are an estimated 3,000 communities, which comprise over 40 different minority ethnic groups, speaking over 250 different languages and dialects in the Niger Delta area (Figure 6.1), where the bulk of Nigeria's oil is extracted. Agim (1997) has divided communities in the region into three principal groups, each of which claims equal rights to the oil extracted from their land. These are:

- a) Producing communities: communities in which onshore oil exploration take place;
- b) Terminal communities: coastal communities on whose territory terminal oil-related facilities are located, sometimes because oil exploration takes place offshore; and
- c) Transit communities: communities through whose territory transit pipelines pass.

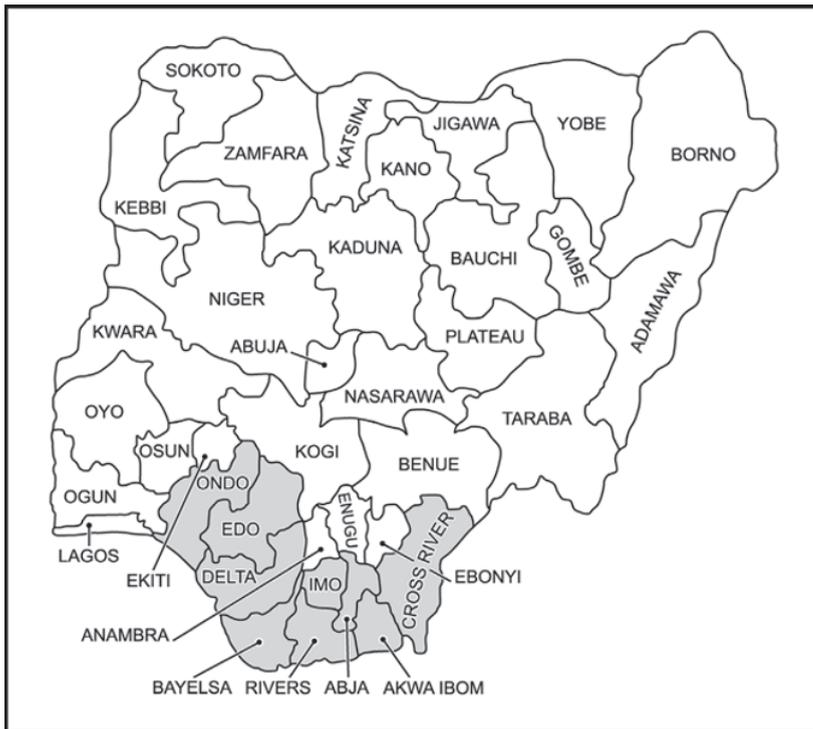


Figure 6.1. Map of Nigeria Showing the Niger Delta States (shaded).

However, despite the region's major contribution to national wealth, poverty and unemployment levels in the Niger Delta are higher than the national average, and 70 per cent of its people live in rural areas with no access to basic social amenities like tap water, good roads, electricity, and healthcare facilities (NDDC 2004).

#### NIGERIA, OIL: RENTERISM AND THE RESOURCE CURSE

The 1914 forced amalgamation of the southern and northern protectorates, driven by the British colonialist political and economic interests as opposed to the concerns or aspirations of the indigenous people, marked the birth of the modern Nigerian state. The nature of this amalgamation, and its political and economic basis, has had significant ramifications for

post-colonial state–society relations. Unfortunately, this issue is often ignored by the resource-curse literature. For example, Watts (2005a) criticized the resource-curse literature for failing to consider how oil's contribution to violence in the Niger Delta built on pre-oil political dynamics.

The discovery of oil in 1956 and its subsequent extraction in 1958 has, over the past 30 years, transformed the Nigerian economy from an agriculturally based economy to an economy essentially dependent on oil. For example, between 1960 and 2012, oil output exploded from just over 5,100 barrels per day to 2.6 million barrels per day (see Idemudia 2012), and government revenue also rose from N66 million naira in 1970 to over N10 billion in 1980 (Watts 2007). Today, the fact that oil accounts for 40 per cent of its GDP, 95 per cent of exports, and 83 per cent of government revenue is emblematic of the rentier status of the Nigerian state. This centrality of oil in national politics against the backdrop of pre-oil politics facilitated the full manifestation of the resource curse. In economic terms, over the period 1965–2004, per capita income fell from US\$250 to US\$212. Between 1970 and 2000 the number of people subsisting on less than US\$1 a day grew from 36 per cent to more than 70 per cent, from 19 million to approximately 90 million (*ibid.*). Income distribution deteriorated, such that 90 per cent of oil revenue accrues to 1 per cent of the population, while between 1960 and 1999 the country lost as much as \$380 billion to corruption and waste (HRW 2007). Indeed, Watts (*ibid.*) noted that in 2003, 70 per cent of the country's oil wealth was either stolen or wasted. Today, Nigeria is ranked 156th out of 187 countries in the UNDP's human development index.<sup>6</sup> Politically, oil wealth transformed the state into an effective tool for primitive accumulation.<sup>7</sup> Consequently, military coups and counter coups with military dictatorships have been the dominant form of government in Nigeria for over thirty years, between 1960 and 1999. For example, while the administration of Babangida, who ruled between 1985 and 1993, saw the disappearance of US\$12.2 billion, General Abacha's regime is believed to have embezzled US\$1 to 3 billion dollars. In addition, the advent of democracy in 1999 has seen the 'instrumentalization of disorder' as a means of winning elections and holding on to power. Indeed,

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<sup>6</sup> [http://hdr.undp.org/en/media/HDR\\_2011\\_EN\\_Tables.pdf](http://hdr.undp.org/en/media/HDR_2011_EN_Tables.pdf) (accessed 12 May 2012).

<sup>7</sup> By primitive accumulation I mean the use of rent-seeking and patronage strategies as well as corruption for self-aggrandizement.

Idemudia and Ite (2006) have noted that conflict in the Niger Delta, where oil is mainly extracted, has increased both in intensity and scale. Incidence of oil bunkering, kidnapping and ransom demand, electoral violence, and inter/intra-community violence now occur almost on a daily basis. As one analyst puts it, the question today in the Niger Delta is no longer whether there will be violence; rather, it is a question of when and where (Ibeanu 2000). Nevertheless, oil has also been the organic glue holding the country together. The centralization of oil revenue and the subsequent overdependence of all other tiers of government on the centre (that is, the federal government) essentially allow the federal government to purchase compliance from the various state governments. Hence, the federal government has been able to enforce some degree of political cohesion within the fragile federation.

Efforts to address the resource-curse dysfunction in Nigeria have generally focused on the creation of two types of new institutions. The first sets of institutions are those designed to address the specific grievances of the Niger Delta people by directing more oil monies to the region. Examples of such institutions include the Oil Mineral Producing Area Development Commission (OMPADEC) created in 1992, the Niger Delta Development Commission (NDDC) created in 2000, and the Ministry of the Niger Delta created in 2008. While Frynas (2000) has described OMPADEC as a tool of public relations and for the siphoning off of oil monies, Omotola (2007) asserts that the NDDC has been a failure. The second sets of institutions are those set up to fight corruption. Notable examples include the Independent Corrupt Practices and Other Related Offences Commission (ICPC) in 2000, Economic and Financial Crime Commission (EFCC) in 2002, and the Nigerian Extractive Industry Transparency Initiative (NEITI). For example, the EFCC claims it has successfully prosecuted more than 82 people on charges of corruption and fraud and recovered more than US\$5 billion in stolen money (HRW 2007). Despite these efforts to fight corruption having yielded some dividend, the HRW noted that success has so far been limited and corruption continues to remain rampant at all levels of government. Today, Nigeria still ranks 143rd out of 182 countries in the 2011 Corruption Perceptions Index of Transparency International.<sup>8</sup>

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<sup>8</sup> See [http://www.transparency.org/whatwedo/pub/corruption\\_perceptions\\_index\\_2011](http://www.transparency.org/whatwedo/pub/corruption_perceptions_index_2011) (accessed 9 May 2012).

THE EMERGENCE OF THE EXTRACTIVE INDUSTRY TRANSPARENCY  
INITIATIVE (EITI) AND THE NIGERIAN EXTRACTIVE INDUSTRY  
TRANSPARENCY INITIATIVE (NEITI)

The emergence of EITI is best understood through the lens of Polanyi's "dual movement"—that is, capitalism automatically provokes the impulse to protect (see Polanyi 1957). In this case, the recognition that globalization and economic liberalization were altering the balance of rights and obligations of Transnational corporations (TNCs) in ways that meant TNCs were now enjoying new rights, powers, and freedoms without a commensurate increase in obligations and responsibilities, especially towards developing countries, reinvigorated the old tension between capitalism and regulation (Utting 2005; Turner 2007). On one side was the coalition of NGOs that constituted the Publish What You Pay (PWYP) campaign launched in 2002, which demanded a mandatory disclosure of taxes, fees, royalties, and other payments made by TNCs to government and other agencies. In contrast, critics of the rigour and mandatory form that the proposal of the PWYP campaign took adopted an accommodating and legitimating strategy,<sup>9</sup> which meant that the entire demands of the PWYP coalition were not completely rejected. Instead, they were sufficiently modified to better reflect the interest of the pro-capitalist movement, in the form of EITI (also launched in 2002) (see Gillies 2010). In contrast to the PWYP proposal, EITI promotes a voluntary approach to disclosure and a shift in emphasis to government and TNCs' disclosure. The central tenet of the EITI is the idea that the opacity that marks business–government relationships in the extractive industry facilitates greed, the mismanagement of natural resource revenue, and the inability to hold government accountable. Hence, EITI is an attempt to sever the nexus of revenue opacity, corruption, poverty, and the propensity for violence in resource-dependent countries (Hayman & Crossin 2005).

Nigeria in 2007 became the first candidate country with a statutory backing for the implementation of EITI. The willingness of the Nigerian government to commit to EITI in 2003 and then subsequently launch the NEITI in 2004 can be attributed to internal and external factors. The first factor comprises global actors and discourses that pushed transparency issues to the forefront of global policy response to the resource curse by

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<sup>9</sup> Indeed, Utting (2005) points out that a remarkable characteristic of businesses is their capacity to accommodate opposition and resistance and to deal with crisis conditions and contradictions by developing new institutions.

highlighting the negative impact of corruption on social, economic, and political development in Africa. For example, Transparency International's consistent ranking of Nigeria as one of the most corrupt countries in the world presented the new civilian regime in 1999 with both an opportunity and a challenge. The challenge was the need to address the negative international reputation of Nigeria, and the opportunity was that the 'war on corruption' provided a useful mobilization tool for the new administration to gain some legitimacy. For instance, the war on corruption was instrumental to the ability of President Obasanjo's regime to secure some US\$18 billion debt relief from Paris Club creditors as well as gain some local support. The internal factors were largely driven by populist disenchantment with decades of military rule, which saw not only the embezzlement and mismanagement of public resources but also the institutionalization of corruption to the detriment of nationalist development goals. The interaction of these two factors is reflected in a background paper on NEITI, which noted that "the federal government has recognized that improvements in the transparency of petroleum revenue data are needed for the effective management of public resources and to improve the image of Nigeria at home and abroad".<sup>10</sup>

The NEITI Act was passed into law in 2007, and its governing body is the National Stakeholder Working Group (NSWG), which consists of representatives from civil society, government, oil companies, representative of communities from the six geo-political zones, and the media. The primary objectives of NEITI<sup>11</sup> are:

- a) To ensure due process and transparency in the payments made by extractive industry companies to the federal government and its agencies;
- b) To ensure accountability in the revenue receipts of the federal government from extractive industry companies;
- c) To eliminate all forms of corrupt practices in the determination, payments, receipts, and posting of revenue accruing to the federal government from extractive companies.

In view of these objectives, NEITI undertook the first financial, physical, and process audit for the period between 1999 and 2004 in the country.

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<sup>10</sup> See <http://www.neiti.org.ng/sites/default/files/publications/uploads/background-paper-neiti.pdf> (accessed 11 June 2012).

<sup>11</sup> See <http://www.neiti.org.ng/sites/default/files/documents/uploads/neitiact.pdf> (accessed 11 June 2012).

While the initial report suggested that the discrepancies between revenues paid by oil companies and those received by government agencies amounted to US\$300 million, subsequent auditing suggests that only about US\$6 million is unaccounted for. The director of communications with NEITI attributed the initial discrepancies to sloppy book-keeping, improper labelling, and inadequate communication between companies and various governmental agencies (see Taiwo 2007). In addition, NEITI has also been able to boost governmental oil-revenue earnings by ensuring that proper payments are made by oil companies. For example, the Chairman of NEITI, Dr Siyan Malomo, noted in 2007 that NEITI was about to recover over N130 billion from oil companies in the country between 2004 and 2006 by identifying lapses that traditionally lead to loss of oil revenue for the government.<sup>12</sup>

However, while Nigeria has undergone its EITI validation,<sup>13</sup> HRW (2007) notes that the government has failed to push through key pieces of legislation that would have complemented its participation in EITI by making government expenditure at all levels more transparent. For example, the government has yet to pass into law the fiscal responsibility bill, which would introduce new measures of integrity, transparency, and uniformity of budget-making and government expenditure at all levels. At any rate, there is no doubt that the present local and international efforts to address the resource curse via emphasis on transparency and accountability have yielded some benefits—and continue to face serious challenges. However, the real danger lies in the fact that the present approach seems to also be diverting attention away from the real political, economic, and social constraints enabling the manifestation of the resource curse in Nigeria and other African countries. Unfortunately, it is these underlining political, economic, and social problems that inform the *governance failure complex* driving the full manifestation of the resource curse in Nigeria and other resource-rich African countries.

#### EFFECTIVE USE OF NATURAL RESOURCE REVENUES: BEYOND TRANSPARENCY AND THE NEED FOR COMPATIBLE CULTURAL DEMOCRACY

There is no doubt that EITI (that is, NEITI in Nigeria) opens a new space of engagement among different stakeholders and offers new possibilities for

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<sup>12</sup> See Adesami (2007); Binniyat (2007).

<sup>13</sup> A quality assurance mechanism designed to foster dialogue and learning at country level as well as maintain the EITI brand (see <http://eiti.org/Validation> [accessed 28 May 2012]).

strengthening accountability (see Garuba & Ikubaje 2010). However, EITI also suffers from some inherent shortcomings that undermine its effectiveness as a vehicle for making accountability work for sustainable development. These shortcomings are largely rooted in a limited diagnosis of the *governance failure complex* in Africa. The misdiagnosis of the nature of the *governance failure complex* in Africa is manifested in the fact that:

- a) EITI is often treated as ideationally neutral and as if it is devoid of power relations. For example, while transparency is called for with regard to payment made by oil TNCs to the government of Nigeria, the fact that the government cannot independently determine outside figures presented by the oil TNCs for the amount of crude oil pumped per day from their territory is not covered in the initiative. In addition, EITI does not address the problem of safe havens provided in Western countries by Western banks for stolen natural resource revenue. Surely addressing the problem of safe havens in Western countries for stolen revenue from Africa is just as important as transparency in government revenues.
- b) The ahistorical nature in which EITI is often presented is yet another problem. It is as if with the adoption of EITI, all the underlining reasons behind the demand by the Publish What You Pay (PWYP)<sup>14</sup> campaign, as well as its concern about the effectiveness of a voluntary initiative like EITI, have all simply disappeared.
- c) The tendency for EITI to emphasize government revenue earning with limited focus on governmental expenditure. For example, NEITI has so far identified and published discrepancies between government accounts of oil revenue earning and oil TNCs' record of payment. In contrast, the monitoring of actual governmental expenditure of oil revenue has so far been limited.
- d) EITI places enormous faith on civil society to be able to demand for accountability, yet little attention is paid to the nature, character, and capacity of civil society in Africa.
- e) EITI is essentially a top-down process with little or no space for the voices and ideas of the poor and marginalized in whose name the initiative has been undertaken in the first place.
- f) EITI does not directly address the nature of the rentier economic context within which it is to be implemented.

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<sup>14</sup> Hayman & Crossin (2005) point out that while there is a tendency to conflate or confuse the PWYP campaign with the EITI, the two initiatives are very different in character and focus.

The above stated shortcomings have meant that EITI (and thus NEITI) appears to be more of an attempt to create accountability for accountability's sake, as opposed to an attempt to create accountability for sustainable development in Africa. This is because, while greater transparency and less corruption could increase government revenue, the crucial question with regard to sustainable development is what happens to governmental expenditure (Jenkins 2005). Hence, any effort to connect accountability to sustainable development in Africa requires a more critical but holistic diagnosis of the *governance failure complex* in Africa. Such an approach will reveal that the problem of inefficient utilization of natural resources' revenue is not rooted in the lack of accountability *per se*; rather, the mismanagement of resource revenue and the lack of accountability are in fact emblematic of the *governance failure complex* in Africa. This *governance failure complex* is a result of Africa's unique colonial history, its weak position in international political economy, its poor leadership, its heterogeneous society, and its overdependence on natural resources. These factors interact in different ways to ensure the lack of an enabling environment for the equitable redistribution and efficient utilization of natural resource revenue in Africa. For example, the Nigerian state is a state-nation rather than a nation-state,<sup>15</sup> and as such from its creation it has faced a legitimacy crisis. Indeed, Chief Obafemi Awolowo referred to Nigeria as a mere geographic expression (see Olojede et al. 2007). In addition, given its multi-ethnic constituents and religious diversity, essentially reified during the colonial era (Bremner 1998; Idemudia & Ite 2006), it has also meant that nationalism had to be enforced top-down. According to Rejia & Enloe (1969), this process of top-down cultivation of nationalism is due in part to the pre-existence of a state which is trying to bolster its own legitimacy, as well as deliberately quell upward development of nationalism, out of fear heterogeneity.<sup>16</sup> In addition, given that Nigeria was predominantly under military rule that relied largely on coercion, the state has therefore been essentially historically alienated

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<sup>15</sup> According to Rejia & Enloe (1969), given the process of state formation in Europe and America, African states are state-nations as opposed to nation-states. This is because in nineteenth century Europe, the nation preceded and created the state, whereas in Africa this relationship is reversed, so that the state is creating the nation. Similarly, Chabal (2002) referred to African states as nothing more than a relatively empty shell.

<sup>16</sup> In this case the experience of a Nigerian civil war essentially along ethnic lines represents one such fear of heterogeneity.

from its citizens.<sup>17</sup> Furthermore, in the post-colonial Nigerian state's competitive, communalism-dominated national politics, the three major ethnic groups have each been suspicious of one another as well as seeking to maximize their share of the 'national cake' (see Tamuno 1970; Ayoade 1973; Afigbo 1991). Hence, there was never a coalition of nationalist elites capable of developing and pursuing nationalist development goals free of politics.<sup>18</sup> In the following years, pressure to adopt multi-party politics and structural adjustment programmes, together with inept self-interested leadership, effectively allowed for the total metamorphosis of competitive communalism<sup>19</sup> into a better-structured and more exclusive neo-patrimonial relationship. Since, under the neo-patrimonial relationships that dominated national politics, emphasis was on feeding clients as opposed to pursuing the common good, institutions and traditional African norms of co-operation, co-existence, and accountability were effectively subjugated, and those of corruption, inefficiency, and the so-called '*Big Man syndrome*' became dominant. For example, Awe's (1991) analysis of the history of governance structures suggests that while governance in pre-colonial Nigeria ensured participation and accommodation of common interest, governance structure in the post-colonial Nigerian state does not provide room for the same. To make matters worse, the forced integration of a pre-capitalist Nigeria into the world capitalist system and its eventual overdependence on oil, which essentially made Nigeria a mono-commodity rentier state, further undermined the state–society relationship. This is because, as inhabitants of a rentier state, the average Nigerian citizens increasingly became irrelevant to the state and its ability to continue to reproduce itself. On the other hand, decades of governmental disappointment meant the average Nigerian either displayed apathy towards the state or saw the state as merely a tool for primitive accumulation (by the elite). These structural and systemic factors effectively ensured

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<sup>17</sup> Ake (1993) points out that the cycle of coercion and alienation under military regime worsened the prospect of development, which also led to yet more coercion and alienation.

<sup>18</sup> The politicization of national development goals meant that effective and efficient development planning and implementation were often sacrificed to political expediency. For example, while oil extraction takes place mainly in the Niger Delta (i.e. southern Nigeria), a major oil refinery was located in northern Nigeria for reasons not associated with economic efficiency but rooted in ethnicity politics.

<sup>19</sup> Ake (1993) indeed described the state as a contested terrain on which contending primary groups fight for the appropriation of what is supposed to be the common wealth. See also Idemudia & Ite (2006).

that a developmental state capable of equitably redistributing and efficiently utilizing natural resource revenue has never existed in Nigeria. It is these structural and systemic inadequacies inherent in African states and their societies that inform the *governance failure complex* in Nigeria and are manifested in the form of inefficient use of oil revenue, lack of accountability, bottleneck bureaucracies, and ineffective government.

CONNECTING NATURAL RESOURCE REVENUES THROUGH TRANSPARENCY  
WITH SUSTAINABLE DEVELOPMENT BENEFITS: FAULTY ASSUMPTIONS AND  
LIMITED POSSIBILITIES IN NIGERIA

While there is no doubt that the Nigerian example described above has its idiosyncrasies, similar trends are discernible in most resource-rich African countries. Hence, to effectively address the question of how natural resources' revenue can be efficiently utilized for sustainable development in Africa, there is the need to pay attention to these structural and systemic problems. Such an effort would mean emphasizing how to generate, sustain, and drive an enabling environment for efficient use of resource revenue. To foster an enabling environment for the effective use of natural resource revenue (and address other aspects of the resource curse) would require going beyond tackling the symptoms of *governance failure complex*—and going beyond using only a piecemeal approach as is the case with EITI or EFFC or ICPC—to dealing with the root cause (that is, structural deficiencies of the states in Africa) and the proximate cause (that is, systemic inadequacies in its societies).

The failure to directly take into consideration the structural and systemic dimensions of the *governance failure complex* in the design and implementation of NEITI has meant that NEITI is likely to suffer the same fate as other failed anti-corruption initiatives. For instance, a core challenge that has confronted other efforts to address corruption in Nigeria is the problem of structural formalism, given the country's rentier economy (Idemudia et al. 2010). The problem of *structural formalism* refers to the idea that since anti-corruption agencies and laws are managed and implemented by government officials that benefit from corruption, their implementation is often uneven and subject to governmental interest and capture (Aina 1982). This problem undermines the ability of NEITI to deliver on its promise in two interrelated ways. First, the fact that NEITI is a government-owned and -funded institution makes it directly susceptible to 'rentier elite' captures and thus limits its ability to deliver in the fight

against corruption. For example, the composition of the National Stakeholder Working Group (NSWG), which oversees NEITI, is structured in a way that ensures power over decision-making is firmly under governmental control. The implication is that while there is room for civil society participation, its ability to effectively affect decision-making is significantly constrained, and thus the ability of NEITI to serve as an independent corruption watchdog insulated from rentier politics is negligible. Indeed, Haufler (2010) has noted that the formation of multi-stakeholder groups under EITI can often be the case of the triumph of form over results, with power remaining fully in the hands of government and corporate elites. Second, corruption in a rentier context like Nigeria is not simply the preoccupation of rentier élites alone, as corruption is effectively a democratized practice (see Smith, 2001). Hence, since NEITI operates within the Nigerian institutional context, it is not surprising that there have been a number of allegations and counter-allegations of corruption at the NEITI secretariat in Abuja. Indeed, a director of service at NEITI was sacked over his complicity in a corrupt practice. These improprieties mean NEITI is likely to face a credibility crisis that detracts from its core function.

Furthermore, the scope and focus of NEITI activities at present is also problematic. The NEITI secretariat suffers from limited resources and a shortage of institutional and technical capacities that go with the present focus of NEITI in Nigeria on the federal government alone, without a similar focus on state and local governments. This has meant that transparency at the federal level will not necessarily translate into sustainable development in local communities. This is because oil revenues that are not mismanaged at the federal level are effectively being misused or stolen at the state or local government levels. For example, despite significant increases in oil revenue to the state and local governments in the Niger Delta, there has been no tangible gain either with regard to community development or poverty reduction in the Niger Delta region (Annej 2004; HRW 2007).

Other major challenges that undermine the capacity of NEITI to achieve its goal are the taken-for-granted assumptions about the ability of civil society groups in Nigeria to demand accountability or mobilize ordinary citizens. While civil society groups in Nigeria have been active and have made some progress in clamouring for more effective disclosure, limited institutional resources and lack of technical capacity have also undermined their ability to effectively engage with the NEITI audit processes. In addition, a majority of civil society groups do not have the technical manpower required to sufficiently understand the nature of the oil business

and thus be able to independently verify information provided by key stakeholders. Similarly, internal wrangling among civil society groups over competition for external funding, squabbles over ego, and clashes of personalities are other major factors that undermine the ability of civil society groups to put significant pressure on government to meet its NEITI obligations. For example, Publish What You Pay Nigeria (PWYP) (a coalition of NGOs and a core driver of the NEITI process in Nigeria) suffered from significant internal wrangling, which led to its partial fragmentation and the emergence of a rival group called the Coalition for Accountability and Transparency in Extractive Industry, Forestry and Fisheries in Nigeria (CATEIFEN). In fact, Garuba & Ikubaje (2010) noted that PWYP Nigeria listserv reflected incessant quarrels over allegations and counter-allegations of financial impropriety, and while some representatives of the members of the organization quietly eased themselves out of the campaign, others directly accused David Ugolor (the then national coordinator) of corrupt practices and left the campaign. According to them the consequence was that the strength of PWYP Nigeria in terms of collective action was significantly diminished. Although this issue has since been resolved, the crisis has unavoidably undermined the effectiveness of the campaign in Nigeria. Similarly, the internal wrangling among civil society groups, issues of credibility and legitimacy, and the fragmentation of civil society groups often mean that the NEITI secretariat struggle to identify the appropriate legitimate representatives of civil society. This problem of legitimate representation has meant that government has been able to use this argument to nominate allied civil society groups to the NSWG, to the dismay of a broad section of the civil society groups in Nigeria. The implication is that civil society participation in NEITI can effectively be subjected to governmental interest capture.

Finally, in a rentier context like Nigeria, where the state is more allocative than productive in its outlook, decades of over-emphasis on the distribution and consumption of oil rent often means weakened institutions, ineffective bureaucracy, and excessive dependence on patron-client relationships to hold on to senior management positions in public institutions. The implication, therefore, is that there are inherent vested interests in maintaining the enabling environment for corruption. This means any efforts geared towards fighting corruption are bound to meet with implicit opposition or deliberately uncooperative behaviour by different interest groups. For example, a major finding of the two NEITI audit reports that have so far been produced in Nigeria is the inability of the Nigerian government to accurately and independently determine how much oil is

pumped from its oil fields, transported through its flow stations, and finally exported. This problem allows for the manipulation of payments and the likelihood of discrepancies between what oil companies claim they paid and what the Nigeria government claims it received. As a result, the Nigeria government potentially loses significant amounts of oil revenue on a daily basis. To address this problem, former president Musa Yar'Adua requested technological assistance from the Norwegian government. However, despite support for this initiative from the NEITI secretariat, deliberate and systematically un-cooperative behaviour by both the NNPC and the DPR essentially sabotage this effort (Aburudu & Garuba 2011). Similarly, Abutudu & Garuba (2011) noted that even if oil companies were to concede to metering, the fear of potential loss of jobs would mean that such an initiative would likely not get the full support of the oil industry workers. The implication is that the centrality of oil to Nigeria means the ability of NEITI to achieve its goal is predicated on cooperative behaviour of other governmental agencies, over which NEITI has no control. Besides, the multiple powerful interest groups in the Nigerian oil industry, such as the Oil Producers Trade Session (OPTS) at the Lagos Chamber of Commerce, the Petroleum and Natural Gas Senior Staff Association of Nigeria, and others, have their interests more secured under opacity than under transparency. These problems have made the work of NEITI difficult and its impact at best limited.

#### CONCLUSION

The paper suggests that while the transparency–accountability strategy in the form of EITI (or NEITI in Nigeria) offers the opportunity for the demand for accountability, it does not sufficiently allow for the translation of the demand for accountability into sustainable development goals. This was attributed to the misdiagnosis of the *governance failure complex* in Africa. The *governance failure complex* in Africa is due to the dynamic interactions of the structural inadequacies inherent in the African state-nation and the systemic anomalies in its society. Hence, it was suggested that a focus on tackling the *governance failure complex* in Africa offers a better comprehensive approach for linking natural resource revenue with sustainable development goals. This is because it is the *governance failure complex* that informs the lack of an enabling environment for the emergence of a developmental state that can equitably redistribute and efficiently utilize natural resources revenue in Africa. It was therefore

suggested that there is a need to generate, sustain, and drive an enabling environment in Nigeria for the effective use of natural resource revenue. Fostering such an enabling environment would require the pursuit of compatible cultural democracy, the strengthening of the institution of checks and balances and effective collaboration among civil society groups. In addition, there is a need for the international regulation of the socio-environmental impacts of the activities of transnational corporations in Nigeria.

The paper makes two inter-related contributions to the literature on transparency. First, the paper suggests that while the quest for transparency is to be welcomed, the strategy of linking transparency and accountability as a cure for the resource curse is both problematic and potentially misleading. This is because this strategy might be diverting attention away from core structural reforms that are needed to overcome the resource curse. By conceptualizing the multitude of intervening variables linking natural resources and the resource curse consequences in terms of a *governance failure complex* in Africa, the paper offers an opportunity to consider the role of socio-historical forces and external political and economic environments in shaping developmental outcomes in resource-rich countries. These issues have traditionally been neglected in the discussion of EITI. The combination of the structural and material with the cultural and cognitive in the analysis of the *governance failure complex* in Africa potentially offers a useful framework that can better enhance our understanding of why some resource-rich countries like Botswana are able to avoid or overcome the resource curse, and others, like Nigeria, are not.

Secondly, Mol (2010) points out that a core challenge confronting the analysis of transparency—and therefore its usefulness—is whether the assumed link between transparency and actual improvement on the wide range of issues for which it is often adapted on the ground is incorrect. Analysis here suggests that NEITI has at best led to marginal improvement on the ground, and a core explanation for this lies in the faulty assumptions that underpin the linking of transparency with accountability and the expected outcomes of the EITI process. This finding is thus consistent with similar studies on other issues—such as Fung et al. (2007), Auld & Gulbrandsen (2010), Dingwerth & Eichinger (2010), and Manson (2010)—that have argued that the ability of transparency to deliver on the ground has been poor. Crucially here, it is the misdiagnosis of the *governance failure complex* that has led to the over-estimation of the capacity of transparency and the institutions that are to enable transparency to deliver on their promise.

Finally, it was demonstrated that NEITI is no panacea and that it cannot alone initiate transformative change but must work in conjunction with other practices and outcomes of governance to do so (Gupta 2010). However, the NEITI process needs to be strengthened if it is to move beyond being just a default option and achieve its transformative potential. First, there will need to be efforts geared towards moving away from mainstreaming civil society into the NETI process and instead re-embedding NEITI processes into civil society. For example, the ability of civil society groups to shape decisions and activities of NEITI needs to be dramatically improved. This can be achieved by changing the current NSWG structure in a way that gives more voice and power to civil society groups. For example, there should not only be more civil society group representation on the NSWG, but also these representatives should be elected directly by civil society groups. Similarly, the technical and human resource capacities of civil society groups in Nigeria need to be strengthened to facilitate active as opposed to passive involvement in the NEITI process. In addition, the NEITI Act needs to be amended to allow for prosecution or punishment for oil TNCs and governmental officials found wanting in any aspects of the audit process. This is because without such a modification NEITI will remain a toothless institution that is perceived to have been captured by interests of the oil TNCs at the expense of true transparency and accountability.

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## CHAPTER SEVEN

### TOWARDS REALIZING THE RIGHT OF ACCESS TO INTERNET-BASED INFORMATION IN AFRICA

Fola Adeleke & Matilda Lasseko Phooko

#### ABSTRACT

*The right of ATI is increasingly being accepted as a human right. What remains unclear is the manner in which states should implement it. The right provides persons with a legal claim to access information that is held by the state. Where a state, in embracing its responsibility to provide the public with ATI, puts this information online, there arises an obligation on it to take positive steps towards enabling the public to access such Internet-based information. This paper demonstrates the developmental value that ATI has in the context of a developing country and the role that access to Internet-based information can play in the developmental goals of African states. Recommendations are made on how African governments can move towards increasing their peoples' right of access to Internet-based information.*

#### INTRODUCTION

We live in an age where information technology is not a luxury but a need for our daily existence. It is not a truism to say information is power and an enabler for the assertion of other rights. The means through which information is accessed in the twenty-first century has increasingly become the Internet. According to International Telecommunications Union (ITU) data, at the end of 2009 there were an estimated 1.8 billion Internet users globally, a quarter of the world's population, and in developed countries, the share of Internet users in 2009 accounted for 72 per cent of the population, while in developing countries, only 18 per cent of the population used the Internet. A survey of African countries that evaluated a cross-section of households rather than a specific focus on poor communities concluded that in relation to the Internet, disturbingly few people know what the Internet is and even fewer people are using it (Gillwald & Stork 2008).

While usage of the Internet is slowly gaining ground on the continent, the opposite is the case with regard to the right of ATI where adoptions of ATI laws have increased substantially in the last decade. The purpose of this paper is to make the argument that the right to Internet access is embedded within the right to access information. A component of the right to information is the character of information as a socio-economic resource (Klaaren 2002). As a result, matters of form and substance are inextricably intertwined, and just as the right of access to water involves the provision of pipes and taps, the socio-economic dimension of the right of ATI is a right to access a mechanism—the Internet in this case—to access information (Klaaren 2002). This paper will begin with a narrative on the nature of the right of ATI and Internet access in Africa and how this broad right embeds the notion of the right of access to Internet and can be used as a tool to aid social development. The justiciability of access to Internet as a human right and the corresponding obligations on government to give effect to this right will be explored. Furthermore, this paper will address some of the strategies that developing countries can put into effect that can help in realizing the right to Internet. This paper will address some specific techniques that have been employed in the past to stimulate industrial expansion in developing countries. Finally, the paper will make observations about some of the difficulties that might be encountered in pushing for a right to Internet and recommend some solutions.

#### SETTING THE SCENE: ACCESS TO INFORMATION AND INTERNET ACCESS IN AFRICA

In Africa, 11 countries have expressly guaranteed the right to information in their constitutions.<sup>1</sup> An additional 13 countries have protected the right within the right to freedom of expression, which includes the right to 'seek, receive and impart information'.<sup>2</sup> There are two reasons why the

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<sup>1</sup> Six countries in the Southern Africa Development Community (SADC) (Democratic Republic of Congo, Madagascar, Malawi, Mozambique, South Africa and Tanzania); two in East Africa (Uganda and Kenya); in two in West Africa (Ghana, and Senegal) and one from Central Africa (Cameroon).

<sup>2</sup> These include eight in the SADC region (Angola, Botswana, Lesotho, Mauritius, Namibia, Swaziland, Zambia, and Zimbabwe), one in East Africa (Tanzania), two in West Africa (Nigeria and Sierra Leone); one in North Africa (Morocco); and Ethiopia, whose constitution recognizes the right to information within the broader right to freedom of the press, mass media, and artistic creativity.

right to information is gaining ground in the constitutions of emerging democracies in Africa. Firstly, the importance of the right to information is now well-established globally with clear principles on this right in international and regional instruments. The United Nations, African Union, and other regional bodies like the Southern African Development Community and Economic Community of West African States all have provisions in their instruments recognizing the principle of freedom of information.<sup>3</sup> Secondly, democracies, which usually succeed authoritarian governments, now recognize that information is needed to ensure public oversight of government. The corruption that characterizes African states has created distrust by citizens in the public administration and the governing regime. The guarantee of access to information held by government is now seen as an essential tool for protecting other human rights as well as aiding social development. It currently appears inconceivable that any act of writing a new constitution in Africa today would be initiated without guaranteeing the constitutionality of this right. This is the case with Kenya, whose 2010 Constitution guarantees the right to information, as well as the clamour that the Zimbabwean Constitution currently being drafted should do the same.<sup>4</sup>

In all but eight African countries, legislation that gives content to the right of ATI does not exist.<sup>5</sup> As such, the process of seeking information from any government department tends to be an informal affair, with neither standards nor guidelines to regulate the manner in which the information holders respond to a request for access to information that is in their possession. This poor statistic makes it clear that though the notion of right to information is gaining ground, mechanisms for the assertion of this right have not been fully embraced. To advance the argument that the right to information plays an enabling role and is therefore a means to an end for the realization of other rights, it is prudent to understand the nature of the right to information.

The right of ATI places two main obligations on the state: an obligation to respond to requests for information from the public, and an obligation

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<sup>3</sup> These include Article 9 of the African Charter on Human and People's Rights and Article 9 of the African Union Convention on Preventing and Combating Corruption and Other Related Offences. At a sub-regional level, SADC has several Protocols that recognize the right to information. These include the SADC Protocol against Corruption and the Charter of Fundamental Social Rights of the SADC.

<sup>4</sup> Article 35 of the 2010 Kenyan Constitution guarantees the right of access to information.

<sup>5</sup> South Africa, Uganda, Angola, Ethiopia, Liberia, Niger, Nigeria, and Zimbabwe have legislation that gives effect to the constitutional right.

to make information public at the initiative of public bodies, without a request being filed. The former is known as reactive disclosure, whereas the latter is known as proactive disclosure (Access Info Europe 2011: 69). Various means can be used to achieve proactive disclosure, including posting information on the Internet via a public body's website. For the public, proactive disclosure of information held by their government through the Internet means the automatic availability of information online, timely access to it, and removal of the need to file requests for information (*ibid.*).

Several African governments, in seeking to involve their citizens electronically in the democratic process, have tried to make information available online (Riley 2000: 101). They have attempted to achieve this by systemizing user-friendly access to government information, generally referred to as e-governance (*ibid.* 116). The South African Constitution, through Section 15 of Promotion of Access to Information Act,<sup>6</sup> requires proactive disclosure by information holders. This is often achieved by government departments through web pages on the Internet.<sup>7</sup> However, what is the value of elaborate websites and the information contained therein if the majority of the population cannot access it? Kenya has recently adopted proactive disclosure as a government policy. This was achieved by the Kenyan government's recent launch of an Open Data portal, the first African country to make government data accessible to the ordinary citizen on an Internet-based platform. The portal will allow users to compare information at national, province, and county levels. Users will also create maps and other visualizations and directly download data to their computer or mobile phone. The portal uses published data from various ministries on indicators like government spending at national and county level, Constituency Development Fund budget allocation and the status of projects in the county, data from the national census capturing demographic and development information, as well as the location of key infrastructure in the county, such as health facilities and schools.<sup>8</sup> While

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<sup>6</sup> This Section relates to "Voluntary disclosure and automatic availability of certain records".

<sup>7</sup> A brief visit to [www.homeaffairs.gov.za](http://www.homeaffairs.gov.za) demonstrates the potential that Internet-accessible information holds for a member of the public. For all the negative media coverage this government department often receives, it has a very useful website. Links such as 'track and trace' enable one to check the status of one's application, and pages such as 'ID yourself' provide information on the process of applying for an ID document.

<sup>8</sup> Kenya allows public online access to government data at <http://www.theeastafrican.co.ke> (accessed 11 July 2011).

Kenya and South Africa may, based on this, claim that they have fulfilled their constitutionally mandated obligation in terms of providing public access to information through proactive disclosure, we argue that they have not. They will not have fulfilled this obligation until they take proactive steps to enable the population to actually access that information.

If information were to be disclosed proactively online, the disadvantaged members of the population, who are most in need of the information proactively disclosed through the Internet, would be further socially excluded from public participation, not only because of the lack of access to the Internet but also their lack of literacy in general and computer literacy in particular. This further exacerbates their social exclusion.

A study in South Africa aimed at exploring whether the mobile Internet may be a viable option for addressing social exclusion (including political exclusion and economic exclusion) in a developing country context showed that usage of mobile Internet amongst socially excluded individuals is low. This is mainly because Internet-capable cell phones are still beyond their reach, and there is limited awareness of what mobile Internet is and what it can achieve (Chigona 2009). Though limited to the use of mobile Internet, this finding can be said to be representative of the situation with regard to the use of the Internet through other media. In Rwanda, for instance, 90 per cent of the market for Internet usage is located in the capital, Kigali, and the balance in six towns, with diffusion of infrastructure to rural areas extremely limited (Nsegiyuma & Santiago 2007: 85). Even within the government, the use of the Internet is mostly by higher-ranking officials, but limited nonetheless (*ibid.* 85). This illustrates the existing digital divide.<sup>9</sup> Tanzania, which is estimated to have more cybercafés than any other African country, has most of them located in the urban town of Dar es Salaam. Aside from these cybercafés and other public access points, Internet access is limited to several large companies, central government departments, and key government parastatals (Miller 2007: 138).

Darch & Underwood (2010: 140) argue that the function of the right to information is based on the interest theory, which maintains that the function of a right is to advantage holders in some way by advancing their interests. A person requesting information from the state does so because

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<sup>9</sup> Digital divide refers to the gap between individuals, households, business, and geographic areas at different socio-economic levels, with regard both to their opportunities to access information and communications' technologies (ICTs) and to their use of the Internet for a wide variety of activities.

the information may be used for the assertion of other rights. Calland (2010) argues that this changes the balance of power between the state and citizen such that the right-holder can hold the government to account as to how they are delivering on their obligations (relevant to other rights). This is significant for the realization of other socio-economic rights. Access to information has been theorized to be a tool for social development, and there is actual practice in South Africa that demonstrates the social relevance of this right.<sup>10</sup> This makes it possible to relocate the right to information in its social context and to recognize it as a social obligation to all rather than only to those who have the resources and inclination to assert the right.

Darch & Underwood (2010: 46) considered the four most important claims for freedom of information—that the right promotes economic development and democracy practice and eliminates corruption—to be sometimes false, overstated, and vague. They could not, however, refute the fourth claim that the right to information is important as a leverage right for the assertion of other rights (*ibid.*). The interaction of the right to information and social rights can be highly instructive of a government's attitude towards the realization of human rights in general (Belski 2007: 17). Information is important for learning about the existence and protection of social rights. Individuals should know about public policies and measures that the government has taken in relation to these rights, in order to control the development of such policies. They should also be aware of the content of said policies so as to analyse how measures are considered in the budget and how budgetary commitments are delivered (Belski 2007). Without information about the scope and content of rights, citizens are unable to determine whether their rights are being respected.

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<sup>10</sup> For instance, in the KwaZulu-Natal Province of South Africa is the small hamlet of Emkhandlwini. The villagers there noticed that their neighbours in nearby villages were receiving water from municipal tankers, but their hamlet was not. They heard of an NGO called the Open Democracy Advice Centre (ODAC), which is a specialist law centre on ATI litigation in South Africa. They complained to one of the fieldworkers of ODAC about their need to know why their community was excluded from access to water. The fieldworker decided to ask for the minutes of the council meetings where the municipality had decided on their programmes for the provision of water. He also asked for the council's Integrated Development Plan (IDP) and its budget. Upon receipt of the information, it was discovered that there were both short- and long-term plans to provide water in the region. A phased plan over a period of years to provide piped water to all the communities was in place. In the meantime, those waiting for taps would have water brought to them by tanker. A serious flaw was found in the public participation process that explained why the villagers in Emkhandlwini were in the dark about water services. Owing to this inquiry from the community, the municipality felt pressured and quickly implemented their short-term plan of using tankers to supply water to the community.

Klaaren (2002) has argued that ATI is also a socio-economic right. According to him, ATI has a socio-economic dimension because it includes 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 (*ibid.*). How accessing online information plays a role in the social and developmental objective is discussed next.

#### ONLINE INFORMATION AND ITS SOCIAL RELEVANCE

The term information and communications' technologies (ICTs) reflects the seamless convergence of digital processing and telecommunications (Labelle 2005).<sup>11</sup> The Internet and mobile devices are an important part of ICTs. As Klaaren (2002) theorizes, ICTs are not an end in themselves. Like the broad right of ATI, which is a leverage right to empower citizens for the realization of other rights, ICTs are the mechanism through which ATI can be realized and in turn other socio-economic rights can be realized. ATI helps to set the agenda of a society; it helps people identify and seize opportunities to grow and develop; and it facilitates participation in society both in the economy, in government, and in the development process itself.

According to Wolf (2011: 10), from an economic development perspective, information has become in recent years an important feature in promoting and facilitating trade. He argues:

Contact or exchange of information between producers, exporters and consumers helps to improve trade performance by creating mutual awareness of products, quality and market conditions. Therefore, access to information is an important determinant to create competitiveness by effectively reducing transaction costs. Though not in isolation, the application of the new ICTs, and especially the Internet, offer increased effectiveness, for they encourage and facilitate direct communication between trade partners.

The Internet has now become a key means by which individuals can exercise their right to freedom of opinion and expression (*ibid.*). Two decades ago, the struggle to establish multi-party democracy in Kenya gave rise to opportunities and demand for Internet use. The Internet proved to be a relatively safe forum for pro-democracy activists to express dissenting

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<sup>11</sup> Information technology means all equipment, processes, procedures, and systems used to provide and support information systems (both computerized and manual) within an organization and those reaching out to customers and suppliers.

views against the existing autocratic government and its state-run institutions (Muiruri 2007: 65). This state of affairs may have been replicated in the recent uprising in Egypt against the 40-year rule of President Hosni Mubarak. It has been widely acknowledged that online social networks such as Facebook and Twitter were the main media used to disseminate information around the protests.<sup>12</sup> Months before the uprising, the Internet had been used by civil society and human rights' activists to disseminate videos on the human rights' violations being perpetrated by the Egyptian state machinery (Ali 2011). These campaigns in Kenya and Egypt arose out of demands for government accountability; but online information has not only aided these kinds of campaigns, it has also been helpful for developmental purposes. To understand the role that ICTs can play as a developmental tool, an understanding of the social context of the people who are to benefit from the introduction of ICTs is needed and of how access to Internet can address the specific needs of the unique circumstances in Africa. Some of the positive impacts of Internet-based information access can be demonstrated by two selected experiences in Africa.

In Senegal, Internet-based information access has been used to stimulate increased income within a fishing community. This was achieved through a project initiated in January 2003 by MANOBI, a private mobile data services' operator, in partnership with three local fishing unions, two telecommunications companies (Alcatel and Sonatel), and the Canadian International Development Research Center (IDRC). This project uses Wireless Access Protocol (WAP) and short messaging service (SMS) technology via cell phones to provide fishermen with up-to-date weather and market price information. Fishermen are also able to use interactive technology to input fish stock information for marketing purposes and to log their departures and estimated times of return as they set out to fish. The latter information enables local fishing unions to be alerted if fishing boats fail to return on time (Batchelor 2003: 34). Since the launch of this program in 2003, many successes have been recorded. A major success of the project is the installation of a cell phone base station in the areas where this project operates, which now provides cell phone coverage up to 14km from the shore, allowing fishermen to access the MANOBI data services

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<sup>12</sup> <http://www.fastcompany.com/1722492/how-social-media-accelerated-the-uprising-in-egypt> (accessed 21 May 2011); [http://www.jadaliyya.com/pages/index/612/egypts-revolution-2.0\\_the-facebook-factor](http://www.jadaliyya.com/pages/index/612/egypts-revolution-2.0_the-facebook-factor) (accessed 21 May 2012); <http://www.wired.com/epicenter/2011/02/egypts-revolutionary-fire/> (accessed 21 May 2012).

while at sea (Roberts & Kernick 2006). Fishermen with cell phones log their departures and estimated times of return, so that local fishing unions can be alerted if fishing boats fail to return on time. Access to real-time weather reports has also improved the safety of the artisan fishermen (*ibid.*).

It has been argued that the proliferation of ICT-based market information services is greatest in Africa where rapid penetration of cell phones has created interest in the opportunities that exist in applying ICTs in agriculture. A recent study for the International Development Research Centre shows that there are 34 agricultural projects that currently apply ICT components in Kenya (Munyua 2008). An example of this is the Kenya Agricultural Commodity Exchange and DrumNet in Kenya. This project used mobile phones and a computer-based platform to link the various value-chain actors with production and market information regarding technical specifications of producing the crop, credit, and a market for their produce (Okello & Ndirangu 2010: 5). In a recent study that examined how the socio-economic, physical, and legal environment within ICT-based MIS projects affect their performance, it was concluded using DrumNet as an assessment that such projects have benefits to farmers in that they link such farmers to better markets and facilitate trade and improve the efficiency of agricultural markets (*ibid.* 15).

Though one may validly wonder whether civil wars, hunger, malnutrition, disease, lack of jobs, and unequal distribution of income in the developing nations are a more important challenge than the daunting task of connecting all persons to the Internet (Afeman 2000: 22), these goals need not be mutually exclusive. As demonstrated from the selected instances mentioned here, through increased use of information on the Internet, several of the challenges faced by developing states can more easily be addressed and thereby lead to improvement of the lives of the economically disadvantaged. A key challenge facing Internet-based ATI is the digital divide that exists in terms of access to and proficiency in ICTs. Benjamin Barger is quoted as stating:

[T]he age of information can reinforce extant inequalities ... making the resource- and income-poor the information-poor as well. The irony is that those who might most benefit from the net's democratic and information potential are least likely to have access to it, the tools to gain access or the educational background to take advantage of the tool. Those with access, on the other hand, tend to be those already empowered in the system by education, income and literacy. (Smith 2009: 148)

The Internet, as a medium by which social and economic development can be attained, can properly serve this purpose only if states undertake

and effect a commitment to develop effective policies to attain universal access to the Internet. Without concrete policies and plans of action, the Internet will become a tool that is accessible only by the privileged. To achieve this universal access, recognizing Internet access as a human right is essential. This is discussed below.

#### RECOGNIZING ACCESS TO INTERNET AS A RIGHT IN AFRICA

Rights accrue to a person for various legally recognized grounds. As there are rights which will accrue as a result of contractual obligations, there are rights which accrue as common-law rights. Human rights, on the other hand, accrue merely by virtue of being human. As people continue to interact with each other, rights and their legally recognized reciprocal obligations will continually develop.

Access to the Internet can be shown to be linked to the realization of various other existing and legally recognized human rights. Whether or not this implies that the right of access to Internet is a human right in and of itself is a question which is beyond the scope of this paper. However, where a state specifically guarantees its citizens a human right that directly requires the provision of Internet access to enable the proper exercise of the human right in question, it has for all intents and purposes an obligation to provide Internet access. Be that as it may, some economically developed states recognize Internet access as a right. Some recognize it as a human right, others as other forms of a legally protected right.

The Parliament of Estonia passed legislation in 2000 declaring Internet access a basic human right (UN 2010: 18). The constitutional council of France effectively declared Internet access a fundamental right in 2009. This highest court in France made this groundbreaking declaration when it ruled that the web is “an essential tool for the liberty of communication and expression”.<sup>13</sup> In this case, the court found that a piece of legislation which proposed to automatically shut down the Internet access of individuals who illegally download material repeatedly from the Internet to be unconstitutional as it contravened their right of access to Internet. In terms of the law, persons who pirated copyright material from the Internet would be given three emailed warnings before their connection to the Internet was automatically shut off.

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<sup>13</sup> Internet access fundamental human right rules French court. Available at: <http://www.dailymail.co.uk/news/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html> (accessed 10 July 2011).

The constitutional court of Costa Rica reached a similar decision in 2010 (UN 2010). It held that lack of access to the Internet can affect various other rights, such as access to government, freedom of expression, equality, and many other fundamental rights. The court reached these conclusions upon accepting that access to the Internet is necessary for the realization of other rights and should therefore be recognized at the same level as these other rights.<sup>14</sup> Going a step further, Finland passed a decree in 2009 stating that every person was entitled to Internet connection at a speed of at least one megabit per second (broadband level). The law obliges all telecommunications companies to provide all residents with broadband lines that can run at the stated minimum (UN 2010).

The right to Internet access is protected in Greece as a constitutionally guaranteed human right. Article 5A of the Constitution provides that:

All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of Articles 9, 9A and 19.15

Where a right exists, there is a reciprocal duty on someone else to ensure the right is realized. In each of the specific forms of guarantees of the right to Internet access cited above, the right created a different obligation on the state in question. A case is made that Internet access is a human right by Michael Best when he argues that the Internet should be a human right in and of itself (Best 2011: 24). According to Best, “the Internet has become the standard mode of distance communication for all media ... Thus to be excluded from this information technology is, effectively, to be excluded from information”. As information is a human right, this is the direct conclusion (*ibid.*).

Given the rapid development of information technology and the centrality of the Internet to our daily lives, the assertion by Best quoted above no longer sounds outrageous. The recent report of the UN Special Rapporteur on freedom of expression, published in 2011, illustrates this. The report brings access to Internet a step closer to being recognized by the UN as a human right.

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<sup>14</sup> Costa Rican court declares the Internet as a fundamental right. Available at: <http://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right> (accessed 12 July 2011).

<sup>15</sup> The Constitution of Greece, as revised by the parliamentary resolution of 27 May 2008 of the VIIIth Revisionary Parliament. Available at: <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (accessed 12 July 2011).

It is in acknowledging this challenge of access to Internet-based information that the case is made in this paper that there is an obligation on the state to provide access to the Internet. This argument is made not because access to Internet is a stand-alone human right, but because it is a necessary tool for the exercise of another human right—the right of ATI—which African governments are taking steps towards realizing. As some African governments are already making information available freely on the web for public consumption, there is an obligation on them to provide tools that will enable the public to exercise their right in accessing this information. It is only logical to say that the public have a human right to access online information, and in fulfilling its obligation, governments must enable public Internet access. The human right obligation here is a duty to enable the public's exercise of their right of ATI.

To meet this duty, there are several challenges that would need to be addressed. Firstly, there is a need to recognize the idea of a digital divide, which relates to those who have access to Internet and those who do not. While costs of Internet-enabled mobile phones and charges need to be affordable and while the range of services available needs to widen, the potential for Internet-enabled mobile phones is apparent in how it can bridge the digital divide. While low literacy levels and lack of finances are major contributors to the digital divide, Riley (2004: 25) posits that apart from economic circumstances, a lack of interest or willingness to use new technologies contributes to lack of Internet access. The lack of economic and human resources as well as poor infrastructure also hamper information technology on the continent. In some cases in Africa, basic connectivity is a problem in the urban areas; and in both urban and rural areas in most West African countries, lack of access to reliable power or telecommunications' infrastructure is the prevalent norm.<sup>16</sup> Aside from the existence of basic infrastructure, high poverty and illiteracy levels are other factors that will affect the implementation of a strategy for universal access (UN 2010: 3). Tackling these factors also increases the cost to governments in Africa in meeting this objective. In addressing these challenges, two solutions are proposed: the development of policy and legislation, and public–private partnerships.

Klaaren (2002) makes two important points that are relevant to the solutions being developed in this paper. Firstly, he states that ATI viewed

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<sup>16</sup> In Nigeria, an economic giant in Africa with the largest population on the continent as well as the highest number of users of mobile telecommunications, reliable electricity supply has been elusive since the dawn of independence.

in terms of having a socio-economic component justifies the extension of ATI to the private sector in South Africa (2002). Secondly, Klaaren, while quoting Sandra Liebenberg, states that the phrase “access to”, which qualifies the socio-economic rights in the South African Constitution, restricts the state’s responsibility in respect of those specific rights to those people and groups who encounter difficulties in gaining access to various rights (ibid.). These two points will be developed in this paper on how both the public and private sector can play a role through strategic partnerships in realizing the right to Internet and, through that, limit the resource weight that the state would have to bear.

### *Governance Framework*

The Electronics Communications and Transactions (ECT) Act exists to provide a legal framework for the implementation of the ICT vision and strategy of South Africa. One of the main objectives of the ECT Act of South Africa is to promote “universal access” primarily in underserved areas (Act 2 of 2002). “Universal access” is in turn defined in the Act as “access by all citizens of the Republic to Internet connectivity and electronic transactions” (Act 2 of 2002).

The national e-strategy prescribed in the ECT Act to achieve this objective sets out, among other factors: i) programmes and means to achieve universal access, existing government initiatives directly or indirectly relevant to or impacting on the national e-strategy, and, if applicable, how such initiatives are to be utilized in attaining the objectives of the national e-strategy; ii) the role expected to be performed by the private sector in the implementation of the national e-strategy and how government can solicit the participation of the private sector, including time frames within which the objectives are to be achieved; and iii) the resources required to achieve the objectives provided for in the national e-strategy (Act 2 of 2002). Section 6 of the Act provides:

In respect of universal access, the national e-strategy must outline strategies and programmes to

- (a) provide Internet connectivity to disadvantaged communities;
- (b) encourage the private sector to initiate schemes to provide universal access;
- (c) foster the adoption and use of new technologies for attaining universal access;
- (d) stimulate public awareness, understanding and acceptance of the benefits of Internet connectivity and electronic transacting.

While legislation is a necessary step to bring about change in business practices, the law alone is not enough. Practical strategies in achieving the objective of universal access are necessary.

As it stands in South Africa, the government's attempts in realizing Internet access have been largely unproductive. The Department of Communications in a report identifies 5,000 Public Internet Terminals (PiTs) that are needed for the disadvantaged areas in South Africa.<sup>17</sup> These PiTs offer government information and forms, email service, Internet access, a business section, and educational services, and there are about 700 PiTs that are fully operational.<sup>18</sup> The establishment of the PiTs is, however, not a true realization of Internet access for citizens since they involve access at one specific point to service a large segment of the population.

African governments are beginning to recognize the importance of adopting e-governance as a government policy. The recent development in Kenya is an example of this emerging trend. Kenya became the first African country to launch the open data government portal whose objective is to make core government development, demographic, statistical, and expenditure data available in a useful digital format for researchers, policymakers, ICT developers, and the general public.<sup>19</sup> The Kenyan government promotes the need for e-governance on the following basis:

1. It is a platform for innovation that will generate economic and social value: from savings and efficiencies within government, service delivery improvements and citizen feedback systems to new wealth and jobs generated in the private sector.<sup>20</sup>
2. It enables data-driven decision making: parliamentarians, policy makers, civil society organizations and individuals can see progress and make accurate informed decisions on issues that affect people's lives.<sup>21</sup>
3. It is the foundation for improving transparency and accountability: the data includes detailed, timely information on the operations of government, the results of the work it does and the opportunities that exist for improving the country.<sup>22</sup>

The importance of access to Internet as a tool to lever the social, economic, and political equality of citizens cannot be overstated, and it is

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<sup>17</sup> [http://www.services.gov.za/services/content/Home/ServicesForPeople/informationfromgovernment/publicinformationterminal/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/informationfromgovernment/publicinformationterminal/en_ZA) (accessed 11 July 2011).

<sup>18</sup> Ibid.

<sup>19</sup> <http://www.data.kenya.org> (accessed 11 July 2011).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

imperative that African governments begin to introduce policies that will achieve affordable access to Internet for most citizens in Africa. Such tailored policy interventions are needed in several areas, including the following: (a) enhancing access to ICT infrastructure, especially wireless technology; (b) making ICT access affordable; (c) promoting relevant content and services' development; (d) strengthening the ICT sector; and (e) improving links between ICT and enterprise policies and poverty reduction strategies (UN 2010: 128).

Techniques need to be implemented in order for the introduction of Internet facilities into developing countries to occur as smoothly as possible. It is hoped that African governments will either encourage third-party businesses to be the service providers for Internet access or institute the industry themselves. Based on this, laws would need to be put in place that will (i) regulate the industry, or (ii) stipulate exactly how the public-private partnership will be established, either through its introduction into corporate governance codes or as a condition for licensing requirements.

#### *Public-Private Partnerships*

A public-private partnership is no doubt needed to achieve the realization of the right of access to Internet. In a recent report, the United Nations Conference on Trade and Development identified factors that can affect the implementation of Internet access. These include absence of a regulatory framework, lack of local language content, and the involvement of the private sector (UN 2010). The report identified several ways to promote ICT development in Africa. One of the measures proposed is the Universal Access Funds (UAF). These are funds that collect revenue from service providers in order to provide telecommunications' access to previously disadvantaged areas that were considered to be less profitable (*ibid.*). Telecommunications' access and telecommunications' companies are crucial role-players in realizing Internet access.

In the past, there have been a number of specific strategies put in place that have provided systemic support to the process of introducing new industry such as Internet access into developing countries. Using the Regulatory Impact Assessment (RIA), as was done in the case of Uganda, can help government support new business in the developing world.

RIA is designed to increase the information brought to bear on the policy-making process and is an important contributor to rational, evidence-based policymaking. It provides politicians with better information on which to base their decisions and therefore can contribute to better governance for

citizens and to a business environment that is conducive to enterprise-led growth and poverty reduction. (Welch et al. 2005)

The use of mobile phones to access the Internet is growing rapidly and is becoming more pronounced in developing nations. According to Opera, a company that provides a web browser for mobile phones, it had 46 million users in December 2009; 6 of the top 10 countries using its browser were developing countries, and another 2 were economies in transition.<sup>23</sup> The number of Opera browser users increased by 159 per cent in 2009 and the number of web page views rose by 223 per cent (UN 2010).

In East Africa, Internet access via mobile phones far exceeds fixed Internet subscriptions. In Kenya, for example, 99 per cent of its total Internet subscriptions in June 2009 were accessing the Internet from mobile phones, and in Uganda there were more than 10 times as many mobile Internet subscriptions (310,058) in June 2009 as fixed Internet connections (27,590) (*ibid.* 42). These statistics underscore the potential of mobile phones to transform Internet access in the developing world. Giant South Africa mobile telecommunications' company MTN is the largest investor in mobile telephone technology in Africa, with the company having brand recognition and presence in over half of the 54 countries in Africa. The potential role of such a company in realizing universal access in Africa cannot be over-stated.

The above examples illustrate how mobile phones have been an important part of the realization of access to Internet-based information. A partnership by the state with telecommunications companies that can supply affordable Internet-enabled mobile phones and services is therefore an important way of realizing the objective of 'universal access' for all. Without this partnership, a burden is placed on the state to realize this right independently, which will most likely result in neglect owing to the various interests that are competing for the resources of the state.

## CONCLUSION

The idea of mobile Internet access that is subsidized by both government and the telecommunications' companies with some amount of free data is

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<sup>23</sup> Opera Software, State of the Mobile Web, December 2009. <http://www.opera.com/smw/2009/12/>. The top ten countries, according to Opera Mini usage, are the Russian Federation, Indonesia, India, Ukraine, China, South Africa, the United States, Viet Nam, Nigeria and the United Kingdom.

what is needed. The national e-strategy that the ECT Act prescribes, setting out the implementation plan for the achievement of “universal access” in South Africa, does not appear to have been developed yet, eleven years after the promulgation of the Act. At the time of writing this paper, the information request sent to the Department of Communications for access to the national e-strategy has not yet been responded to. The purpose of the request for the national e-strategy was to assess the implementation plan of government on how it hopes to achieve ‘universal access’. In the absence of a clear implementation plan from government, this paper recommends a partnership between government and the private sector in achieving the objective of universal access to Internet.

A funding mechanism to meet the cost of universal access has to be discussed and negotiated by private institutions with a stake in achieving this access and government institutions responsible for implementing this objective. Operators should be expected to contribute to the cost of rolling out access as part of their obligations under the licensing agreements they have signed with the national regulatory authority of the government. As already demonstrated, it is likely that mobile telephones will be the primary way of meeting universal access obligations because mobile phones have had such success in Africa. The rise of the ‘mobile Internet’ presents opportunities for delivering a host of applications and services to people (*ibid.*).

The question of affordability is one that also needs to be addressed. Affordability can relate to the entry costs to enable access to the service. For example, an expensive mobile phone and high usage charges may act as a constraint. Emphasis should also be placed on expanding access by increasing telecommunications’ coverage in rural areas. Steps in this direction include licensing additional operators, using regulatory tools such as coverage requirements and universal service funding to encourage service in rural areas, and subsidizing not only the cost of mobile phones but also some amount of free Internet data to users every month. While coverage, affordability, and electricity remain major concerns as barriers to ICT development, education and awareness are other challenges that Africa faces. Lack of skills inhibits better use of the Internet, especially among the poor and in rural areas. Governments should facilitate demand by promoting digital literacy. Regulatory frameworks have significant influence on commercial viability and can therefore be important factors that encourage or discourage new network investments (*ibid.* 53). Regulators have begun to move away from technology-specific to technology-neutral licensing, giving operating companies greater freedom to

choose the technologies that they consider most appropriate for particular environments (Batchelor 2003).

There is evidence that Internet use can strengthen social and human capital skills (UN 2010: 82). The impact of Internet use in subsistence-based agriculture enterprises, as shown in this paper, is particularly relevant. Some farmers are also beginning to appreciate new mobile applications to obtain weather reports.<sup>24</sup> Mobile applications for the delivery of financial transfers are being commercially implemented, with infrastructure and service platforms available for all types of enterprise to receive money or to make payments (*ibid.* 14). The possibility of spreading access to Internet to developing countries would greatly improve the standard of life for citizens of a nation. It can also serve as a way to usher the developing country into the First World. Access to Internet is a necessary right and not a luxury, and it is high time African governments began to recognize it as such. States, through acknowledging the need for Internet access to enable other human rights, must invest in encouraging wider access to Internet services in the continent. More particularly, states that have guaranteed their citizens the right of access to information have a general obligation to secure access to Internet for their people.

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<sup>24</sup> In Kenya, for example, within one month of its launch, 9,500 farmers had subscribed to a new weather index insurance scheme and another 40,000 are expected to join.

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PART THREE

ATI REGIONAL CONTEXT AND COUNTRY STUDIES



## CHAPTER EIGHT

### AN ACTIONABLE CONSTITUTIONAL RIGHT OF ATI: THE CASE OF SOUTHERN AFRICA

Matilda Lasseko Phooko

#### ABSTRACT

*The non-existence of a constitutional guarantee of ATI does not preclude a government from enacting an all-embracing ATI legislation which gives effect to an enforceable legal right of access to government-held information. Neither does it prevent citizens from utilizing other laws within its legal system to obtain the benefits of having a right of access to government-held information. However, in order to validly obtain the benefits of having a right of access to government-held information which is constitutionally guaranteed, such a constitutional right must be recognized as being actionable. The scope of this paper is limited to constitutional provisions that can be enforced to effect ATI. Accordingly, this paper seeks to consider the extent to which constitutional provisions with the potential to protect the right of ATI in the region are in fact justiciable within their domestic courts. It considers the legal basis for such actions. The countries examined are South Africa, Zimbabwe, Malawi, and Namibia. The constitutional provisions that are said to protect the right of ATI in these countries will be analyzed.*

#### INTRODUCTION

The press and media rights' groups have been at the forefront of the freedom-of-information campaign. Examples of groups that have had key roles in the campaign for the right of ATI are the Nigerian Guild of Editors (NGE) in Nigeria and the Media Institute of Southern Africa (MISA) in the Southern Africa region, and the South African National Editors' Forum (Sanef) in South Africa. As a result, the right of ATI is considered by many a media right. There is, however, more to this right than the press, media, and freedom-of-expression aspects. It represents an effective weapon available to any citizen in his or her dealings with the

state (Beukes 2003: 17). The right of ATI is one that has the potential to make a drastic difference in the day-to-day life situations of African people. The only way to realize this potential, however, is through advocating for it as a right that is separate and distinct from the right to media/press freedom.

In India, for example, the exercise of the right of ATI as provided for in its enabling legislation has uncovered cases of truant public service health workers and the sale of food rations meant for the poor for personal gain, helped people get houses due to them through a government benefit programme, and resulted in the timely payment of pensions. These successes, to name a few, concisely demonstrate the benefits of an enforceable right of ATI. The exercise of the right of ATI that is envisaged here is that of ordinary citizens having a legally enforceable right to approach a relevant government body and demand to be granted access to records containing information which is likely to result in a positive change in their daily living circumstances.

The availability and content of the right of ATI in Southern Africa varies throughout the region. South Africa, Mozambique, Malawi, the Democratic Republic of Congo and Madagascar have direct constitutional guarantees for the right of ATI. Angola, Botswana, Lesotho, Mauritius, Namibia, Swaziland, Zambia and Zimbabwe, through their protection of the right to freedom of expression, include the right to seek, receive and impart information. While it may be said that this does not necessarily include a right to actively seek access to information held by government, this paper attempts to illustrate that it does. To be in a position to validly obtain the benefits, as exemplified by the examples from India, of having a right of access to government-held information, this right has to be recognized as an actionable constitutional guarantee, regardless of other possible legal protections of the right.

The power of our domestic courts to adjudicate a case on the right of ATI and to decide it by making an authoritative and binding decision in a jurisdiction with no seemingly direct constitutional provision entrenching ATI as a right brings to the forefront the principle of justiciability (Gutto 1998: 81). Although there is no universally accepted definition of the term justiciability, at the very least it contemplates the resolution of issues involving rights accruing to one party as against obligations imposed on the other, the dispute over which raises a case or controversy. It therefore depends on whether there is a right or obligation known to the law and capable of being protected and enforced by the courts (Okpaluba 2003: 612).

Accordingly, this paper considers the extent to which constitutional provisions said to protect the right of ATI in the region are in fact justiciable within their domestic courts. The paper looks at the legal basis for such an action by considering whether the domestic courts are able to locate relevant legal principles within the applicable law in their jurisdiction, in order to enforce this right.

The countries that will be examined are South Africa, Zimbabwe, Malawi and Namibia. These states have been selected out of the 15 possible nations that are members of the South African Development Community (SADC). They demonstrate the broad variety of possible legal frameworks within which the right of ATI may be judicially enforced. South Africa is a state that has both a direct constitutional protection of the right of ATI, together with a piece of legislation that gives life to the constitutional guarantee by making provisions that give effect to the right. Zimbabwe has a right of ATI provided for within an Act of Parliament. It also has a constitutional provision that is phrased in terms that may be interpreted as including the right of ATI. Malawi, whilst not having legislation for the implementation of the right of ATI, has a constitutional guarantee for the right. Namibia has neither a piece of legislation protecting the right of ATI, nor a constitutional provision that seems, at face value, to protect this right.

In an attempt to determine if they can be the basis of a course of action before a court, the constitutional provisions and the judicial interpretation of these clauses that are said to protect the right of ATI will be analyzed. The status of international treaties guaranteeing this right within these jurisdictions as well as their application by the courts will also be considered. A conclusion as to whether the right of ATI is actionable within these jurisdictions as a constitutional guarantee will then be reached.

#### JUSTICIABILITY

A case is said to be justiciable if the subject matter involves the interpretation of the constitution or statute or the application of existing law (Okpaluba 2003: 430). The question of justiciability in this context arises owing to the absence, for the most part, of clear and direct laws providing persons with a right of ATI within the region.

By the term “justiciability” we mean, in broad outline, the ability to judicially determine whether a person’s right has been violated or whether the

state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfil a person's right (Scott & Macklem 1992–93: 17).

Bendor distinguishes two levels of justiciability: normative and institutional. Normative justiciability, he says, “is what determines whether there exists legal criteria sufficient to determine a dispute presented before the court”. Institutional justiciability, on the other hand, “comes to answer the question whether the court is the appropriate authority to determine a particular dispute, or whether it is more appropriate that the dispute be decided by another institution such as the executive authority” (Bendor 1996–97: 315–6).

There are instances where the courts will decline to consider a dispute for judicial review through the principle of justiciability. In attempting to outline the many reasons given in turning down a dispute for judicial review for non-justiciability, Okpaluba identifies these as instances, though not an exhaustive list, where a matter may be non-justiciable: lack of standing on the part of the complainant; principle of non-reviewability of matters within the domain of the legislature, which are issues that the court will deem as requiring political or executive decisions and therefore not amenable to the judicial process; ripeness of the cause of action; exhaustion of internal procedures or domestic remedies; mootness; whether the complaint raises issues involving rights accruing to one party as against obligations imposed on the other; and where a judgment could be obtained based on an ordinary legal remedy in civil or criminal law, that course should be pursued without directly seeking to attack the problem from a constitutional angle (Okpaluba 2003: 430).

In light of the task of determining the justiciability of constitutional guarantees of the right of ATI, the instances raised above of non-justiciability seem to be criteria that must be determined on a case-by-case basis, as the determination will be heavily dependent on the facts of the particular case presented before a court. That the complaint raises issues involving rights accruing to one party as against obligations imposed on the other as a requirement for justiciability is, however, one that can be considered in an abstract manner.

For any dispute to be entertained by domestic courts there must be a clear indication that judicial intervention in the particular instance has a constitutional foundation, or that the jurisdiction of the court, and hence its authority to bring the judicial machinery into action, is supported by an Act of Parliament, a law made by the Provincial Legislature, a by-law of a municipality, a ministerial regulation, or the common law. One can objectively determine this question (*ibid.* 388–9). The rights and obligations

that would be the basis of a cause of action would have to be objectively determined based on the existing law, be it constitutional, statutory, common law, international law, or otherwise. This paper proceeds to consider objectively whether a complainant in the countries sampled can bring an action against the government for violation of his or her right to access state-held information, basing the claim on the constitutional provision for ATI.

#### AN INTERNATIONALLY RECOGNIZED HUMAN RIGHT

It is accepted that there exists a general right of every citizen to have access to information that the state holds.<sup>1</sup> This is seen as a necessity for the principle of open governance, as open government requires that the citizenry be granted access to government records when it is necessary for meaningful public debate on the conduct of the government institutions.<sup>2</sup> Over the years, the principles in support of this right have been debated and ironed out (Emerson 1976: 1; Perritt & Lhulier 1997: 899). We now find, with the increased enactment by states of constitutional and statutory protections of this right, that the right exists is no longer in dispute. This section proceeds to demonstrate a trend that recognizes the right of ATI nationally and internationally.

The fact that so many countries have afforded this right constitutional status is noteworthy and provides support for strengthening the status of the right under international and regional law.<sup>3</sup> Kenya, which promulgated her Constitution in August 2010, is the most recent addition to this list, having included the guarantee for the right of ATI in her Constitution.

The International Bill of Rights protects the right of ATI under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) in an identical formulation (Kravchenko 2009: 229). Article 19 of the ICCPR provides that:

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<sup>1</sup> Access to information laws in the Commonwealth: comparative table. Available at [http://www.humanrightsinitiative.org/programs/ai/rti/international/comparative\\_table\\_cth\\_rti\\_legislation\\_international\\_law.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/comparative_table_cth_rti_legislation_international_law.pdf) (accessed 1 October 2012).

<sup>2</sup> Ontario (Public Safety and Security) v Criminal Lawyers' Association 2007 ONCA 329. Available at: <http://scc.lexum.umontreal.ca/en/2010/2010scc23/2010scc23.html> (accessed 10 November 2010).

<sup>3</sup> Constitutional protections of the right to know. Available at: <http://www.Right2Info.org> (accessed 9 December 2010).

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

This provision has been for years the primary source of authority for advocates of the right of ATI in lobbying for the recognition of this right, and as indicated above a number of countries have adopted similar clauses, indirectly making provision for the right of ATI. It is argued, however, that in absorbing the right of ATI, the right to freedom of expression in the ICCPR not only gives rise to the impression that they are not two separate and distinct rights but has also impeded the recognition of the right of ATI as a self-standing and independent right (Beukes 2003: 20).

Adopting a broad interpretation of the phrase “right to ‘seek’ and ‘receive’ information” was accepted by the Inter-American Court of Human Rights in determining the case of *Claude Reyes v Chile* (Kravchenko 2009: 230). The court interpreted Article 13 of the Inter-American Convention on Human Rights as follows:

[B]y expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to state-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information *and the positive obligation of the State to provide it*, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.<sup>4</sup> [emphasis added]

Within the African human rights’ system, Article 9 of the African Charter on Human and Peoples’ Rights (African Charter or ACHPR) provides that “every individual shall have the right to receive information and every individual shall have the right to express and disseminate his opinions within the law”. The African Commission of Human and Peoples’ Rights (the African Commission) in a Resolution confirmed that the right of ATI is a component of the fundamental right to freedom of expression and is indeed covered by the mandate of the Special Rapportuer on Freedom of

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<sup>4</sup> Marcel Claude Reyes et al. v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R. Available at: <http://www1.umn.edu/humanrts/cases/60-03.html> (accessed 14 January 2011).

Expression and Access to Information (ACHPR/Res 122(XXXXII) 07). Though there has been no communication before it on the right to access information, the African Commission has pronounced on Article 9 of the ACHPR in the case of *Constitutional Rights Project and Others v Nigeria*, where it stated, after laying out the provisions of Article 9, that

“freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of public affairs in his country. Under the African Charter, this right comprises *the right to receive information* and express opinions”.<sup>5</sup> [emphasis added]

Whether and to what extent the “right to receive information” envisages a right to actively seek information from government and a reciprocal duty on the African Union state parties to provide the information is yet to be pronounced upon. However, should the African Commission be tasked with making this determination, it is bound by Articles 60 and 61 of the African Charter that state the wide variety of applicable principles that can be used as interpretive tools by the African Commission. Article 60 of the ACHPR provides that:

The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61 provides that:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

The African Commission is therefore likely to consider the interpretation given in the Inter-American Court on Human Rights in the *Claude Reyes v*

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<sup>5</sup> *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) 232 at para. 35–6.

*Chile* case. The African Commission has on occasion referred to decisions by other regional human rights judicial bodies, including the European Court on Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission of Human Rights (Viljoen 2007: 345).

In light of the African Commission's Declaration of Principles on Freedom of Expression in Africa, the body is likely to make a decision in line with its American counterpart. In this Declaration the Commission under Principle 4 provides:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
  - secrecy laws shall be amended as necessary to comply with freedom of information principles.<sup>6</sup>

Further indication of the recognition of the right of ATI at the AU level is the existence of several recently adopted AU instruments, which include provisions on ATI, such as the Convention on Preventing and Combating Corruption, the African Charter on Democracy, Elections and Governance, and the African Charter on the Principles and Values of Public Administration.

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<sup>6</sup> ACHPR/Res 122(XXXI) 07: Resolution on the expansion of the mandate and re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information. Available at: <http://www.achpr.org> (accessed 9 December 2010).

At a sub-regional level, SADC has several Protocols that include provisions intended to facilitate the exercise and promotion of the right of ATI. These include provisions contained in the following: the SADC Protocol on Culture Information and Sport; the SADC Protocol against Corruption; the SADC Protocol on Fisheries; the SADC Protocol on Forestry; the SADC Protocol on Mining; the SADC Protocol on Wildlife Conservation and Law Enforcement; and the SADC Protocol on Transport and Communication. However, at the time of writing, most of these treaties had not been ratified by the requisite number of state parties needed to bring them into force, making them unenforceable against state parties. Be that as it may, the recognition of the right of ATI within them demonstrates recognition in the region that it is a right necessary at least as a requisite for an open and accountable democratic society.

#### JUSTICIABILITY OF THE RIGHT OF ATI AS PROTECTED IN SELECTED SADC CONSTITUTIONS

From the abovementioned, it is clear that the right of ATI is recognized as a human right in international law and in domestic law through statutes and constitutional provisions. The key question in this section is: where one alleges violations of his/her constitutional right of access to state-held information, can this violation form the basis for a cause of action before the domestic courts? In such an action, the court would be called upon to determine whether a person's constitutionally guaranteed right of ATI has been violated and whether the state has failed to comply with a constitutionally recognized duty to respect, protect, or fulfil this right. This question is answered here by determining whether the domestic courts under consideration are able to locate relevant legal principles within the applicable law of the country to reach such a conclusion.

#### *South Africa*

In the SADC region, South African courts have the most developed jurisprudence on the right of ATI. It is therefore of tremendous value in providing a comparative perspective for the other three jurisdictions considered in the paper. South Africa offers the right of ATI advocates ideal working grounds, as it has a direct constitutional guarantee as well as a piece of legislation for the enforcement of the right. The law makes it clear that the right of ATI that is guaranteed therein is not merely the right of the media and the press to access information. The South African Constitution

makes direct provision for the right of ATI under Section 32(1), which provides as follows:

Access to information

32. (1) Everyone has the right of access to—

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

In the *First Certification* judgment the Constitutional Court held that:

The Constitution required Parliament to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involved detailed and complex provisions *defining the nature and limits of the right and the requisite conditions for its enforcement*.<sup>7</sup> [emphasis added]

This constitutionally entrenched right has been given effect through the enactment of the Promotion of Access to Information Act 2 of 2000 (PAIA). It is a well-established constitutional principle that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution, unless challenging that legislation falls short of the constitutional standard as entrenched in the provision in the Bill of Rights.<sup>8</sup> This effectively means that the right of ATI, as has been the practice in the country, is justiciable through the provisions of the PAIA. In the case of *MEC for Education, KwaZulu-Natal, and Others v Pillay*, Langa CJ held that:

This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to ‘fail to recognize the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights’. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.

The South African Constitution also has a separate clause recognizing the right to “receive” or “impart” information or ideas, as part of the right to

<sup>7</sup> In *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (First Certification Judgment) 1996 10 BCLR 1253; 1996 4 SA 744 (CC) para. 83.

<sup>8</sup> See *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at para. 40; *SANDU v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para. 123; *Gcaba v Minister for Safety and Security and Others* 2001 (1) SA 238 (CC) at para. 37.

freedom of expression which is recognized under section 16(1)(b) and reads as follows:

Freedom of expression

16. (1) Everyone has the right to freedom of expression, which includes [...]

(b) *freedom to receive or impart information or ideas.* [emphasis added]

It has been asserted that this provision is not a right of ATI as protected under Section 32 of the Constitution (Currie & de Waal 2005: 369). This section specifically protects freedom of the press and other media as a supporting right, in that it gives scope and meaning to the general right to freedom of expression and the right to press freedom (Burns 2001: 290). In the South African context, therefore, the freedom to “receive” or “impart” information does not provide an ordinary citizen the right to demand information from the information-laden state. This is set forth in Section 32 of the Constitution.

### *Zimbabwe*

The Constitution makes provision for the right of ATI under Section 20(1), which provides as follows:

20 Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and *to receive and impart ideas and information without interference*, and freedom from interference with his correspondence. [emphasis added]

Whether this provision contains within it a right of ATI has been determined by the courts. In the High Court case of *Matabeleland Zambezi Water Trust v Zimbabwe Newspapers (1980) Ltd and Another*,<sup>9</sup> the court held that there is no right of ATI within Section 20(1). The respondent in this case had, in its publication, made allegations of fraud against several of the applicant’s un-named employees. The applicant applied to the court for an order compelling the respondent to disclose the names of employees who were the subject of allegations of fraud as published in the respondents’ newspapers. The applicant’s counsel based his client’s right to the relief of ATI as contained in Section 20(1) of the Constitution. The High Court judge held that:

In my view, s 20(1) does not create a right of access to information. Whilst freedom of expression incorporates the right to publish or withhold

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<sup>9</sup> 2002(1) ZLR 12 (H).

information from publication, it does not include a right to receive information, let alone a positive right like access to information in the possession of another.

The Supreme Court considered this point on appeal in the case of *Matabeleland Zambezi Water Trust v Zimbabwe Newspapers (1980) Ltd and Another*.<sup>10</sup> The court addressed the question of whether Section 20(1) of the Constitution creates a right of ATI and held that the right to demand information in terms of Section 20(1) of the Constitution can arise under certain circumstances. It stated:

[W]here there is a right to receive certain information, it is that right which should not be interfered with. The one who claims under the section should first of all establish such right, then show that such right is being interfered with.

The court's reasoning here is that the right of ATI only accrues to a person after they have demonstrated that in their particular circumstances, they do have a right to demand access to the specific information. Only then does the court have the power to vindicate this right. This position is contrary to international standards. As an internationally recognized human right, the right of ATI does not accrue to persons on a case-by-case basis. In fact, an individual does not, in seeking access to state-held information, even need to explain why it is they want access to that information.<sup>11</sup>

The jurisprudence on constitutional interpretation emanating from the Supreme Court in *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and Others* states:

[A] Constitution is considered a document that is *sui generis* requiring special guidelines of interpretation. These guidelines or principles include: the Constitution must be interpreted as a living Instrument; the Constitution must be given a generous and purposive construction; [...] ratified treaties should provide a legitimate guide in interpreting constitutional provisions.<sup>12</sup>

In this case the learned judge declared that he “appreciate[s] the need to ascribe to Section 20 of the Constitution a liberal interpretation in order to breathe life into a Constitution with a declaration of rights in great need of rejuvenation”.<sup>13</sup>

<sup>10</sup> Civil Appeal No. 28/02 2003.

<sup>11</sup> See the generally accepted Principles of Freedom of Information Legislation at <http://www.article19.org> (accessed 9 December 2011).

<sup>12</sup> (162/2001) [2003] ZWSC 65 12.

<sup>13</sup> (162/2001) [2003] ZWSC 65 12.

Although the right of ATI as guaranteed in international and regional treaties cannot be directly relied on to found a cause of action within the domestic courts in Zimbabwe, they can be persuasive in supporting an interpretation of Section 20(1) of the Constitution as including a constitutional protection of ATI. A treaty that has been signed and ratified but not enacted into local law is binding on Zimbabwe only at the international level. The dualist nature of application of international law here curtails the direct application of the right of ATI at the domestic level. However, in terms of the case of *Kachingwe and Others v Minister of Home Affairs NO and Another*,<sup>14</sup> the Supreme Court ruled that domestic courts can derive guidance in determination of cases before them from international norms. The court proceeded to extensively rely on decisions of the European Court on Human Rights, the Inter-American Court on Human Rights, the African Commission, and provisions of international and regional human rights' treaties in its decisions.

While the language in the Constitution does not give a direct guarantee for the right of ATI, Access to Information and Protection of Privacy Act Chapter 10:27 (AIPPA) is a piece of legislation enacted to enable people in Zimbabwe to exercise their right of ATI. It asserts in its Preamble that it is an Act "[to] provide members of the public with a right of access to records and information held by public bodies". The extent to which AIPPA creates or facilitates the exercise of the right of ATI is in question, and it is argued that the Act in fact limits the right of ATI contained in Section 20(1) of the Constitution (Hondora: 131). Similar to PAIA in South Africa, this legislation contains, *inter alia*, guidelines on how to request information from government and provides timelines and avenues for recourse and redress when access is denied. However, in contrast to the South African PAIA, AIPPA was not specifically enacted to give life to a constitutional right. Therefore, a person in Zimbabwe seeking to bring an action to protect their right of ATI as guaranteed under the Constitution can rely directly on the provisions of Section 20(1) and is not limited to relying on the provisions of AIPPA.

#### *Malawi*

The Constitution of Malawi has a specific protection for the right of ATI under Section 37, which provides as follows:

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<sup>14</sup> (17/03) [2005] ZWSC 134.

## Access to information

37. *Subject to any Act of Parliament*, every person shall have the right of access to all information held by the State or any of its organs at any level of Government *in so far as such information is required for the exercise of his rights*. [emphasis added]

The formulation of this constitutional provision seems to grant persons in Malawi a right to access information that is subject to two clawback clauses, the first being that the right is subject to any Act of Parliament, and the second being that the right to access information can be claimed only where a person can demonstrate that they require the information for the exercise of their rights.

The condition that ostensibly makes the right of ATI subject to any Act of Parliament is in fact not a clawback clause that qualifies the right. It can be raised only as a defence by the state when seeking to justify its refusal to provide a person with information requested. For the government to validly exercise this constitutional justification for limiting the peoples' right of ATI, the Act of Parliament in question would have to be in line with Article 44 of the Constitution, which provides for limitation of rights. Article 44(2) and (3) provide that:

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those *prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society*.

(3) Laws prescribing restrictions or limitations *shall not negate the essential content of the right or freedom in question*, and shall be of general application.<sup>15</sup> [emphasis added]

From this analysis, all persons in Malawi are granted the right of access to information/records held by the government. The state can refuse this access only when it can base its refusal on legislation passing the limitation test under Article 44.

We now turn to what seems to be the second condition on the right of ATI in terms of Section 37 of the Constitution. A person who seeks to launch a court action based on the violation by the state of his or her right to access information can do so only if they feel that the information or records being sought are required for the exercise of their rights. This is a subjective determination. Only then does the state have a reciprocal duty

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<sup>15</sup> See *Malawi Law Society and Others v President and Others (2002) AHRLR 110 (MWHC 2002)* on limitation of rights.

to provide the information, making the right justiciable. This opinion is informed by the South African jurisprudence on this issue.<sup>16</sup>

The formulation used under Section 37 of the Constitution of Malawi is similar to that used in the South African Constitution under Article 32(1) (b), which grants everyone the right of access to any information that is held by a private person where it is required for the exercise or protection of any rights. The Supreme Court of Appeal ruled on the meaning of “required” for the exercise of protection of a right as contemplated here in *Clutchco (pty) Ltd v Davis*.<sup>17</sup> In this case, it was held that “useful and relevant” was not enough to satisfy the requirement; the court held that the applicant must show “substantial advantage or an element of need”. In *Unitas Hospital v Van Wyk and Another*,<sup>18</sup> Brand JA stated that “[g]enerally speaking, the question whether a particular record is ‘required’ for the exercise or protection of a particular right is inextricably bound with the facts of that matter”.

As this paper is limited to the justiciability of the constitutional provisions, for an applicant in Malawi to be in a position to launch a court action to protect the right entrenched in Article 37 of the Malawi Constitution, he or she simply needs to be satisfied that the information they seek is going to give them a substantial advantage or that there is an element of need for the information in order to protect their rights. As this is a determination that is bound with each specific scenario, the test is a subjective one. As such, a person in Malawi can certainly found an action within the domestic courts by relying directly on the provision for ATI as guaranteed under Section 37 of the Constitution. Much as the courts in Malawi are guided by foreign case law and norms of public international law,<sup>19</sup> a court action on this legal question will bring more understanding on the test the courts in Malawi will use to determine that an applicant does in fact have the right to access the information as it is required for the exercise of their rights.

### *Namibia*

The government of Namibia has adopted a *policy of transparency and accountability* to guide the development of Namibia's democracy, which

<sup>16</sup> *Clutchco (pty) Ltd v Davis* 2005 (3) SA 486 (SCA).

<sup>17</sup> *Clutchco (pty) Ltd v Davis* 2005 (3) SA 486 (SCA).

<sup>18</sup> *Unitas Hospital v Van Wyk and Another* (2006 (4) SA 436 (SCA).

<sup>19</sup> See the Attorney General v Fred Nseula and Malawi Congress Party MSCA Civil Appeal No. 32 of 1997.

has led to the Namibian public administration becoming more open.<sup>20</sup> Despite this, Namibia has no direct protection of the right of ATI either in her Constitution or through legislation. The Constitution of Namibia guarantees the right to freedom of expression under Section 21(1)(a), which guarantees every person “the right to freedom of speech and expression, which shall include freedom of the press and other media”. This provision, unlike that in Zimbabwe’s Constitution, is not formulated so as to protect the right of any person to seek and receive information.

Namibia is, however, a monist state in that international law becomes applicable law within its jurisdiction upon ratification of international legal instruments. By virtue of Article 144 of the Constitution, with the exception of treaties that are in conflict with the Constitution, legislation, and those that enter into force through mere signature, all treaties duly ratified are automatically incorporated.<sup>21</sup> Article 144 of the Constitution provides that “[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”. This has been held to be the position by the Supreme Court in the case of *Government of the Republic of Namibia and Others v Mwilima and Other*,<sup>22</sup> where the court held that

the State not only has an obligation to foster respect for international law and treaties as laid down by Article 96(d) of the Constitution but it is also clear that the International Covenant on Civil and Political Rights is binding upon the State and forms part of the law of Namibia by virtue of Article 144 of the Constitution.

Namibia is a party to the African Charter as well as the ICCPR, which both guarantee the right of ATI. By virtue of Section 144 of the Constitution, one can rely directly on the provisions of the right of ATI within these international treaties in launching an action within the Namibian courts. The right of ATI is thus justiciable in Namibia through relying directly on these provisions.

An alternative avenue to bring before a court for judicial review an unfavourable decision by a government official not to grant ATI is through

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<sup>20</sup> G.D. Elliot, Statement on provisional policy framework on the development of access to information legislation for Namibia: 18 August 2008 Administrative Justice Conference, 1.

<sup>21</sup> G.M. Geraldo & I. Skeffers (2007), *Researching Namibian law and the Namibian legal system*. Available at:

<http://www.nyulawglobal.org> (accessed 14 December 2010).

<sup>22</sup> (SA 29/01) [2002] NASC 8 (7 June 2002).

relying on the constitutionally guaranteed right to administrative justice. A symbiotic relationship between ATI and just administrative action exists, as ATI is the tool or instrument available to ascertain whether, when action is taken by any organ of state against a person, such action was lawful, procedurally fair, and reasonable (Beukes 2003: 34). Article 18 of the Constitution provides for administrative justice. It provides that

[A]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

In the case of *Gunther Kesi, Heimaterde CC & Martin Joseph Riedmaier v Ministry of Lands and Resettlement and Others*, the High Court endorsed a view expressed in the case of *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181 (HC) that “a Court of law will examine the discretionary power of the decision-maker to determine whether his decision was fair and reasonable”.

A person in Namibia who seeks to launch a court action to vindicate his right of ATI, as protected in Namibia through the provisions of international law instruments, can rely on his right to just administrative action as his cause of action. He will seek to review the decision to deny him ATI as being contrary to the state's legal obligations in terms of the ACHPR and the ICCPR and, therefore, in violation of his right to just administrative action.

#### CONCLUSION

Having considered the broad variety of possible legal frameworks available for the enforcement of the right of ATI in the region, one can find within the SADC region constitutional provisions that do protect the right of ATI and that are in fact justiciable within their domestic courts. The paper looked at the legal basis for such an action by considering whether the domestic courts are able to locate relevant legal principles within the applicable law in order to enforce this right.

Although there may not be specific pieces of legislation on the right of ATI or even explicit constitutional recognition in most of the countries in the SADC region, it is possible for persons in these countries to claim their right of access to information held by the state and proceed to the courts to enforce these rights. The legal criteria to determine such cases do exist.

However, as was noted earlier in the paper, justiciability of rights before domestic courts is additionally dependent on other factors which are to be determined on a case-by-case basis.

A key consideration that cannot be ignored in determining this question is the Executive's influence on the court processes in some African countries. Were a court in these countries to be called upon to decide on whether the phrase "to receive ... information without interference" in a Constitution creates an obligation on the government to give information upon demand by a person for their individual consumption, it is likely to be dependent on the type of information being sought by the applicant. The courts in several African countries have shown a tendency, in resolving legal issues, to take the position that will not clash with the demands of the Executive arm of government. As such, depending on the type of information being sought by the applicant, the matter may be rendered non-justiciable on the principle of non-reviewability of matters which the court deems as requiring political or executive decisions and, therefore, not amenable to the judicial process (Okpaluba 2003: 430).

It would be prudent for civil society groups to adopt, as a strategy, working with the existing legal frameworks within their jurisdictions in pushing for court cases that will result in jurisprudence on the nature and extent of the right of ATI and the reciprocal duty on the state in this regard, based on the constitutionally guaranteed right to access information. The right of ATI advocated for here is that of ordinary people having a legally enforceable right to approach a government body and demand to be granted ATI, which is likely to result in a positive change in their living situations. Litigation can be, for the average person, an expensive process. Civil society groups with the needed resources to support such cases should do so.

Time and monetary and other resources should also be invested in sensitizing the judiciary on the right of ATI as a separate right from the press and media aspect of it. It is a right that can be used, through judicial activism, to bring about social development in the region. As seen from the analysis of Namibia, Malawi and Zimbabwe, should such court cases be brought before the local courts, there will be a need for the courts to resort to guidance from international law norms in interpretation of these provisions. A judiciary well equipped to take such arguments into consideration when argued before them, or even to address them in their decisions at their own volition, will go a long way in helping to realize the full potential that the right of ATI possesses.

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## CHAPTER NINE

### THE UGANDA FREEDOM OF INFORMATION CAMPAIGN: STUCK IN THE MUD?

Dan Ngabirano

#### ABSTRACT

*For a long time, Uganda's Freedom of Information (FOI) campaign was hailed as the most successful in Africa and indeed made significant gains in its initial stages. Nonetheless, following enactment of the Access to Information Act there has not been as much activism among civil society, and the enacted law is seemingly very limitative. Yet the country can only escape rising tides of corruption in the public sector and overcome fears of mismanagement of the recently discovered oil if citizens are able to access information and hold government accountable. This can happen only where civil society becomes more active and reclaims its steering role in the campaign. This paper therefore discusses the progress of Uganda's FOI campaign. It starts with a general introduction to the right to access information, while underscoring benefits of FOI generally. Part Two of the paper traces the evolution of the right to information in Uganda. Part Three analyses the status of the Ugandan FOI campaign, highlighting present challenges and opportunities. Part Four draws important lessons from the Indian and South African FOI campaigns. Finally, the paper proposes key strategies and recommendations for active rejuvenation and furtherance of the FOI campaign in Uganda.*

#### INTRODUCTION<sup>1</sup>

##### *Access to Information as a Right*

ATI has gained international prominence as one of the basic tenets of democracy and good governance. Access to timely and accurate

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<sup>1</sup> An earlier version of this paper was presented at the OSIEA East African Regional Meeting on Freedom of Information in Dar es Salaam, Tanzania on 3 May 2012.

information is critical in the defence of all other rights, including civil and political rights on the one hand and economic, social, and cultural rights on the other hand. ATI also promotes accountability, transparency in government (Oloka 2010), and sound environmental management (Mwebaza 2003: 37). It is therefore not surprising that as early as 1946, the United Nations General Assembly proclaimed: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated”.<sup>2</sup> Subsequently, the right found its way into several international and regional treaties, including the Universal Declaration of Human Rights (UDHR),<sup>3</sup> International Covenant on Civil Political Rights (ICCPR),<sup>4</sup> and the African Charter on Human and Peoples Rights (ACHPR).<sup>5</sup> Uganda is a signatory to both the ICCPR and the ACHPR and is enjoined to respect, promote, and fulfil the right to access information in possession of the state.<sup>6</sup>

#### *A Historical Perspective of the Right to Information in Uganda*

Uganda was declared a British Protectorate in 1894 (Pakenham 1991). Subsequently, as was the case in all other British colonies, the colonial government applied British laws in the administration of the new colony.<sup>7</sup> Importantly, most of the laws inherited from the British were not only Victorian but were also designed to economically and strategically exploit the colonized entities and the subjugated masses for the benefit of the colonial government. Secrecy was the preferred mode of operation in the circumstances, and a good dose of secrecy laws was among the laws imposed on colonial Uganda.<sup>8</sup> The country’s initial legal framework therefore did not have any sufficient provisions on information disclosure by the state. Regrettably, most of these colonial laws were inherited by post-independence governments to perpetuate their stay in power. Remarkably, even the 1962 Independence Constitution and the 1967 Republican

<sup>2</sup> See GA Res. 59(1), 65th plenary meeting, 14 December 1946.

<sup>3</sup> Universal Declaration of Human Rights (UDHR), 1948, General Assembly Resolution 2127 A (iii).

<sup>4</sup> Article 19, International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>5</sup> African Charter on Human and Peoples’ Rights, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>6</sup> Uganda ratified the ICCPR on 21 June 1995 and the ACHPR on 10 May 1986. See <http://www1.umn.edu/humanrts/research/ratification-uganda.html>.

<sup>7</sup> See Section 15 of the 1902 Order in Council.

<sup>8</sup> Some of these laws include the Official Secrets Act cap. 302 and the Evidence Act cap. 6.

Constitution, the country's first governing documents, were dominated by individual political considerations rather than national interests (Kanyeiamba 2002). Rights and freedoms were relegated to a secondary position, and even where provision for individual rights and freedoms was made, they were subject to several claw-back clauses.<sup>9</sup>

Post-independence Uganda was therefore heavily characterized by power struggles, civil strife, dictatorship, and bloodshed at the hands of the regimes in power.<sup>10</sup> It was not until 1986 that the country regained a semblance of political stability with the coming into power of the incumbent NRM government.<sup>11</sup> The new regime promised to restore rule of law, democracy, and good governance. A Constitutional Review Commission, chaired by Justice Benjamin Odoki, was formed to gather the views of all Ugandans across the country and to formulate recommendations for the new constitution (Odoki 2005). The findings of the Commission were debated by the people's elected representatives in the Constituent Assembly, leading to promulgation of a new constitution in 1995.<sup>12</sup> The 1995 Constitution was largely a result of national consensus and is very progressive in as far as it incorporates a comprehensive Bill of Rights in its Chapter Four. The scope of rights included in the Constitution entail a broad spectrum of rights, ranging from civil and political rights to economic, social, and cultural rights. The right to access information in possession of the state or its agencies was one of the new generation of rights included in the new Constitution.<sup>13</sup> During the Constitution-making process, the Odoki Commission observed that "[t]he fundamental freedom of expression and the *right of every person to information* are vitally important rights, at the centre of the struggle for the defence of human rights and democracy"<sup>14</sup> [emphasis added]. Ultimately, the Commission recommended as follows:

The freedom of expression which includes freedom to research, receive, hold and impart opinions, *information* and ideas without interference should apply to all individuals, groups and the media;<sup>15</sup>

and

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<sup>9</sup> Kanyeiamba (2002).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> See Article 41 of the Constitution of the Republic of Uganda, 1995.

<sup>14</sup> Report of the Uganda Constitutional Commission: Analysis and Recommendations, UPPC, Entebbe, 1993, p. 169, para. 7.130 (hereinafter the Odoki Commission Report).

<sup>15</sup> Ibid. para. 7.131(a). The recommendation is a rephrasing of Article 9 of the ICCPR.

Public officials should be free to disclose *information* they come across in the course of their duties, provided it is not classified.<sup>16</sup>

This recommendation formed a basis for subsequent legal provision for the right to access information in various laws of the land, including the Constitution and subsequently some of the laws in the environmental sector.<sup>17</sup>

## LEGAL FRAMEWORK ON THE RIGHT TO INFORMATION IN UGANDA

### *Constitutional Protection of the Right to Information*

As observed above, Uganda is party to a number of international and regional treaties that protect the right to access information.<sup>18</sup> The country is therefore obligated to domesticate these treaty provisions and to guarantee the right to access information in its national legislation. Against this backdrop and following the recommendations of the Odoki Commission, the drafters of the 1995 Uganda Constitution included a right to access information in the national Constitution, substantively making Uganda one of the few African countries with a constitutional provision on ATI.<sup>19</sup> Article 41 of the Uganda Constitution guarantees the right in the following terms:

- (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.
- (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

### *The Access to Information Act, 2005*

Article 41(2) of the 1995 Uganda Constitution enjoined Parliament to enact a law prescribing categories of information accessible by the public and

<sup>16</sup> Ibid. para. 7.131(j)

<sup>17</sup> These include, for example, the National Environment Act cap. 153 and the National Forest and Tree Planting Act, 2003.

<sup>18</sup> *Supra* Note 6.

<sup>19</sup> Some of the other African countries with an ATI provision in their national constitutions include: the Democratic Republic of Congo, Madagascar, Malawi, Mozambique, South Africa, Tanzania, Kenya, Cameroon, Ghana, Senegal and Morocco. See <http://right2info.org/constitutional-protections-of-the-right-to>.

outlining the procedures for accessing such information. This notwithstanding, it took Parliament close to ten years to fulfil this task. The Uganda Access to Information Act was passed only in 2005, making Uganda one of the four African countries with an ATI-specific law at the time, the others being South Africa, Angola, and Zimbabwe.

The period between the promulgation of the 1995 Constitution and the enactment of the Access to Information Act is one that may be described as the most active in the Ugandan campaign for freedom of information. The Constitution merely guaranteed the right of citizens to ATI but did not specify what information would be accessible or the procedures for accessing such information. This was expected to be sufficiently addressed by an ATI law, which unfortunately did not come into effect as soon as was expected. It therefore made information access not only problematic but complex and taxing. It is against this background that civil society actors mounted a campaign to have a Freedom of Information (FOI) Law enacted by Parliament. In 2002, the Anti-Corruption Coalition (ACCU), then hosted by the Human Rights Network-Uganda (HURINET-U), ran a successful anti-corruption campaign where the right to information featured prominently as one of the most critical tools that could be used to rid the country of corruption.<sup>20</sup> Recognizing that fully fledged citizen ATI would be very difficult without a specific law in place, civil society formed a working group that was tasked to come up with a draft law.<sup>21</sup> Later, a Coalition on Freedom of Information (COFI) was formed and would steer the campaign for many years. Some of the founding members of the coalition, which has since expanded, include Human Rights Network-Uganda (HURINET-U), Uganda Women's Network (UWONET), Anti-Corruption Coalition Uganda (ACCU), and the Uganda Association of Women Lawyers (FIDA).<sup>22</sup> COFI was at the forefront of efforts using different strategies to compel Parliament to fulfil its constitutional duty to pass an ATI law. By 2005, the coalition had a draft law on ATI, which was widely circulated and reviewed by prominent international organizations working on FOI, including the Commonwealth Human Rights Initiative (CHRI) and

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<sup>20</sup> Interview with Patrick Tumwine, Advocacy, Research and Information Officer, Human Rights Network-Uganda, 20 November 2011.

<sup>21</sup> Some of the members of this working group included Advocates Coalition on the Environment (ACODE), Uganda Women's Network, Human Rights Network-Uganda, Anti-Corruption Coalition (ACCU), and Transparency International.

<sup>22</sup> Other members of the coalition include PANOS-Eastern Africa, Human Rights Network for Journalists (HRNJ), Uganda Media Development Foundation (UMDF), and National Union of Disabled Persons of Uganda (NUDIPU).

Article 19.<sup>23</sup> It was this law that was bought to Parliament by Hon. Abdu Katuntu, a Member of Parliament, as a private member's Bill. Subsequently, the Bill was 'hijacked' by the government and was eventually passed in 2005 with a few modifications.<sup>24</sup>

*An Analysis of the Access to Information Act, 2005*

Enactment of the Access to Information Act 2005 is by far one of the greatest achievements of the Ugandan FOI campaign. It is therefore not surprising that by 2006, Uganda's FOI campaign was seen to be among the most successful on the continent. Significantly, the law reiterated the right of citizens to access information in possession of government, while also clarifying what information would be readily disclosed.<sup>25</sup> Another positive attribute introduced by the law was the designation of information officers and the requirement of compilation of a manual of functions and index.<sup>26</sup> The law also provided for mandatory disclosure where public interest overrides the harm in disclosure and where a serious public health or environmental risk exists.<sup>27</sup> Finally, the law required ministers to submit an annual report to Parliament detailing their designated ministry's compliance with the Act.<sup>28</sup> On the face of it, these were very progressive provisions, but as it turned out later some were impractical to implement, while others have been used to stifle citizen's access to information in possession of the state. This is due to the fact that the Access to Information Act in itself has many inherent limitations on free exercise of the right to access information. The Act establishes a very wide exemption regime that makes it extremely difficult to access information in possession of the state. The broad range of information exempted from access in the Act includes the following: Cabinet records,<sup>29</sup> information relating to privacy of a person,<sup>30</sup> commercial information of a third party,<sup>31</sup> and information prejudicial to safety of persons and property.<sup>32</sup> The other exceptions under this part of the Act include records privileged from production in legal

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<sup>23</sup> *Supra* Note 20.

<sup>24</sup> *Ibid.*

<sup>25</sup> See Sections 2 and 5 of the Act.

<sup>26</sup> Sections 7 and 10 of the Act.

<sup>27</sup> *Ibid.* See Section 34.

<sup>28</sup> Section 43.

<sup>29</sup> See Section 25, Access to Information Act.

<sup>30</sup> See Section 26, Access to Information Act.

<sup>31</sup> See Section 27, Access to Information Act.

<sup>32</sup> Section 29, Access to Information Act.

proceedings,<sup>33</sup> records pertaining to operation of public bodies,<sup>34</sup> and security-sensitive information.<sup>35</sup> The breadth and depth of these exemptions make it almost impractical to access any information in possession of the state which the state is not willing to disclose.<sup>36</sup> Observably, the exemptions regime as it is now does not establish a sufficient harm test and cannot pass constitutional muster. This is because under Article 41 of the Constitution, which guarantees the right to access information, the only exceptions to the right are two: these include instances where the disclosure of the sought information would prejudice state security or sovereignty, and instances where disclosure interferes with another person's right to privacy. The Act therefore goes far beyond the provisions of the Constitution.

Besides the wide exemption regime, the Access to Information Act also omits to put in place a body to promote and enforce the Act, unlike the case in other countries with progressive ATI regimes.<sup>37</sup> Last but not least, the Act establishes appeals at two levels—internal appeals and appeals to the Chief Magistrate Court—but does not clarify which of these take precedence in the event of a complaint arising. In relation to this, no attempt is made to fully develop an internal appeal mechanism (Ikoja-Odongo 2006: 333).

*The Access to Information Regulations, 2010*

Following enactment of the law, several other unanticipated challenges emerged. The most immediate of these was the delay in enactment of the regulations.<sup>38</sup> The Act provided for enactment of regulations which would, among other things, specify the procedure for access, fees payable, accessible information, and forms for access.<sup>39</sup> Despite their immediate need, the Access to Information Regulations, 2010 were passed only five years after the enactment of the Act. This affected citizens' efforts to access

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<sup>33</sup> Section 30, Access to Information Act.

<sup>34</sup> Section 33, Access to Information Act.

<sup>35</sup> Section 32, Access to Information Act.

<sup>36</sup> Interview with Kenneth Kakuru, Executive Director, Greenwatch Uganda, on 7 December 2012.

<sup>37</sup> In the case of South Africa, Section 2 of the Promotion of Access to Information Act, 2000 entrusts the South African Human Rights Commission with the role of promotion of the Act. Among the tasks to be performed is encouraging public participation in ATI programs as well as training and education of the public.

<sup>38</sup> Tumwine interview, *op. cit.*

<sup>39</sup> Section 47, Access to Information Act.

information in two ways. Firstly, most citizens thought they could access information only with the regulations in place, and for this reason they did not demand information from public bodies. Secondly, in many instances citizens were unable to access certain information for which fees were required to be paid since there was no guidance in the law as to fees payable.<sup>40</sup> It should also be observed that when the Regulations were finally passed, they did not fulfil most of the expectations contemplated in the Access to Information Act.<sup>41</sup>

The Regulations are very narrow in scope and provision and leave a broad range of issues untouched. Many procedural issues are not catered for under the Regulations, making enforcement of some parts of the Act very problematic. A clear example is under Section 47 of the Act, which provides for Regulations that establish uniform criteria for proactive disclosure and further directions on interpretation of the Act.<sup>42</sup> The Regulations in their present form also do not sufficiently provide for administrative and procedural matters necessary to give effect to the Act as envisioned in Section 47(1)(g). Furthermore, Section 25 of the Act enjoins the Minister to prescribe, in the Regulations, categories of Cabinet information that will be accessible and those that will not be accessible to the public. The present text of the Regulations does not reflect these categories, and in effect all Cabinet information remains inaccessible. Finally, the Regulations set a general fee to access information at Ushs. 20,000 (twenty thousand Uganda Shillings) which is almost an equivalent of 8 US\$. This is way beyond the means of most Ugandans, the majority of whom live on less than 1 US\$ a day.

Most provisions of the Access to Information Act and the Regulations passed thereunder therefore remain a major bump in the FOI campaign. It is not surprising that as a result, citizens and activists have fallen back upon litigation, a strategy that was key before the law was enacted. In the most recent case, *Charles Mwanguhya & Andrew Izama v. AG*,<sup>43</sup> two Ugandan journalists appealed against the decision of the permanent secretary in the Ministry of Energy which denied them information on Production Sharing Agreements (PSAs) before the Magistrates Court.

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<sup>40</sup> Interview with Gilbert Sendugwa, Coordinator, Africa Freedom of Information Centre (AFIC), held on 13 January 2012. Some of the public institutions utilized the situation to charge considerably high fees to provide citizens with information. See also Tumwine interview op.cit.

<sup>41</sup> Ibid.

<sup>42</sup> ATI Act, Sections 47 (1)(e) and 47 (1)(f) respectively.

<sup>43</sup> Misc Cause No. 751 of 2009.

The sought PSAs in this case had been entered into by the Ugandan government and the various oil exploration companies. The journalists contended, among other issues, that they were entitled to access this information as a matter of right and that it was in the public interest to have this information disclosed. On the latter point they argued that the information disclosure would encourage public participation in oil management. On the opposing side, the state contended that the PSAs contained confidentiality clauses that required the consent of the companies before any information could be disclosed. Agreeing with the petitioners, the court stated that citizens had a right to access information in the oil sector, although in the circumstances the petitioners had failed to prove that the public interest was greater than the harm contemplated in the disclosure. On this ground alone, the petition was dismissed, marking yet another major blow to the FOI campaign.

The outcome of this case brings a number of lessons. The clearest is that the lower courts have not been as progressive as the higher courts in advancing FOI. Notwithstanding the fact that the High Court, Constitutional Court, and Supreme Court had on similar occasions upheld citizens' uninterrupted right to access information in possession of the state, the Magistrates Court in this case took a different direction.<sup>44</sup> Secondly, there is a need for civil society to re-strategize and re-organize their efforts to consolidate the gains so far made. At the time of determination of the Mwanguhya case, two other petitions concerning access to information rights in the oil sector had been lodged.<sup>45</sup> The Mwanguhya decision has also been appealed, and this brings the total number of FOI petitions presently before the courts to three. The question that arises at this point then is whether it is strategic in terms of advocacy to have three petitions on the same issue at the same time.

#### THE PERIOD PRIOR TO ENACTMENT OF THE ACCESS TO INFORMATION ACT

##### *Litigating for Access to Information*

As has been stated, prior to the coming into force of the Act, the process of accessing information in state hands was riddled with various complexities. In the event of information denial, recourse was largely to courts of law, as there were neither clear procedures to seek access nor internal

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<sup>44</sup> See Tinyefuza, Zachary Olum, and Greenwatch cases in Part III of this paper.

<sup>45</sup> See Tumwine interview op. cit. See also Kakuru interview op. cit.

systems of appeal to deal with information denials (Onoria 2005). Prior to the enactment of the Act, a number of petitions were brought before the Constitutional Court, the High Court, and the Supreme Court either challenging laws inconsistent with the right to access information under the Constitution or challenging information denials. Some of the laws that were challenged before the courts include the National Assembly (Powers and Privileges) Act, the Official Secrets Act, and the Evidence Act.<sup>46</sup> Litigation as a strategy helped build pressure for enactment of an ATI law. On many occasions the courts, while emphasizing the cardinal importance of the law, reawakened Parliament to fulfil its constitutional mandate and have an ATI law enacted.

*Major General Tinyefuza v. Attorney General*<sup>47</sup>

The petitioner in this case, an army officer, was denied resignation from the army and approached the Constitutional Court, contending among other issues that the acts of the army authority infringed his constitutional rights and freedom not to be required to perform forced labour. In support of his case he sought to rely on radio messages, relayed to him and other members of the High Command, forcing him to remain in service. Section 121 of the Evidence Act, on the other hand, required any person seeking to use any unpublished records of government in evidence to seek leave of the head of department, which was not sought in this case. The Constitutional Court stated, among other things, that he was entitled to access and use the said radio messages in support of his case under Article 41 of the Constitution, which guarantees the right of access to information in possession of the state. The court stated further that Section 121 was inconsistent with the exercise of this constitutional right.

On appeal the Supreme Court affirmed the decision of the Constitutional Court, stating among other items, that Section 121 of the Evidence Act was archaic and in contravention of various provisions of the Constitution, including Article 41, which guarantees the right of access to information. The court further stated that Article 41 of the Constitution overturned the unfettered discretion of the head of department under Section 121 of the Evidence Act, and it was no longer up to the head of department to decide as he thought fit. Finally, the court observed that the right to access

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<sup>46</sup> National Assembly (Powers and Privileges) Act cap 249, Official Secrets Act cap 306, and Evidence Act cap 6.

<sup>47</sup> Constitutional Petition No.1 of 1997 (Supreme Court) (unreported).

information included a right to use information in a court of law in support of a citizen's claim.

*Zachary Olum and Anor v. Attorney General*<sup>48</sup>

The petitioners were Members of Parliament who challenged the legality of the Referendum Act 2000 before the Constitutional Court, asserting that the law had been passed without the requisite quorum. In support of their petition, they sought to rely on the Hansard and video recordings of Parliamentary proceedings. However, under Section 15 of the National Assembly (Powers and Privileges) Act, Members of Parliament and certain employees of Parliament who sought to rely on proceedings of Parliament in evidence required leave of the Assembly or Speaker of Parliament when the Assembly was not in session. The petitioners contended that this was counter to the spirit of the Constitution in Article 41, which protected the right of every citizen to access information in possession of the state.

Referring to its own decision in Tinyefuza's case, the court found that Section 15 of the Evidence Act granted unfettered powers to an authority over release of information in possession of the state which unjustly limited the rights of citizens to access information within the meaning of Article 41. To that end, the section was found unjustifiable in a free and democratic society.

*Greenwatch v. Attorney General and Uganda Electricity Transmission Company*<sup>49</sup>

The petitioners, an NGO and company limited by guarantee committed to environmental protection, unsuccessfully approached the government of Uganda for details of the Power Purchase Agreement (PPA) entered into between AES Nile Power and the then defunct Uganda Electricity Board (UEB). They challenged the acts of the Ministry of Energy in denying them information before the High Court on the grounds that the government was under obligation to afford information in its possession to citizens pursuant to Article 41 of the Constitution. In the High Court, the state contended that the PPA was a comprehensive document with many technical and commercial details of the sponsor and was therefore confidential. Furthermore, the 1st respondent argued that they were not parties to the PPA and were therefore not a proper party. On their part, the 2nd

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<sup>48</sup> Constitutional Petition No. 6 of 1999 (Constitutional Court) (unreported).

<sup>49</sup> HCCS No. 139 of 2001 (HC) (unreported).

respondent, UETCL, a successor of UEB, argued that it was a limited liability company and not a government organ; Article 41 of the Constitution, therefore, did not apply to them in this case, being limited to the state or its agencies. Both respondents also contended that the applicant was not a Ugandan citizen, yet enjoyment of the right of access to information was limited to citizens. The main issue before the court, therefore, was whether the PPA was a public document and therefore accessible to citizens under Article 41.

The court found that the PPA was part of the Implementation Agreement signed by the Minister of Energy on behalf of the Uganda government. Since the Implementation Agreement, itself a public document, was so intertwined with the PPA, the latter was also a public document and therefore accessible to citizens. Furthermore, it was stated that the state did not have to be a party to the PPA and it was sufficient that it was in possession of the PPA, as was the case. The court also expressed the view that a company/NGO was capable of being a Ugandan citizen under Article 41 of the Constitution if it was incorporated in Uganda and with Ugandan shareholders. For that matter, a company could enforce rights under the Bill of Rights unless the particular right is exclusively limited to natural persons. Finally, the court stated that a limited liability company may be a state agency, depending on the circumstances. In the instant case, UEB, which entered into the agreement with AES Nile Power, was a government agency, and hence the successor, the 2nd respondent, was equally an agent of the government.

The above decisions illustrate the determination on the part of the judiciary, and more so the higher bench, to jealously guard the right to information in Uganda. At the time of litigation, there was no freedom of information law, and courts played the unique role of determining what categories of information were available under the Constitution and who could access that information. Even more important was the fact that the cases exposed the lack of a freedom of information law and created a pressing need for one. Activists capitalized on this to push for a right to information law, which was eventually passed in 2005. Finally, in two of the cases, the court expanded the meaning of the right to information to include the right to use such information in court. It is not surprising that a few years after the law was passed and found to be limitative, activists still trusted the courts to uphold the right to information, which explains the re-adoption of the litigation strategy by most actors.

*Using Sector Laws to Seek and Access Information*

Besides litigation, activists utilized and still make use of provisions in various sector laws to seek and receive information in the possession of the state. Most of these laws are to be found in the environmental sector. Section 85 of the National Environment Act (NEA), for example, provides for the right of everyone to access information on implementation of the Act submitted to the lead agency or authority [National Environment Management Authority]. The Act also contains provisions for proactive disclosure of certain environmental information.<sup>50</sup> It should be noted that the NEA, unlike the Constitution and the Access to Information Act, does not limit the right to access information to Ugandan citizens and for this reason may be said to be more progressive. The National Forestry and Tree Planting Act also provides for the right of citizens to access information in almost similar terms as the NEA.<sup>51</sup>

The Leadership Code Act, which seeks to regulate the conduct and behaviour of leaders, equally contains ATI provisions.<sup>52</sup> Under the Act, wealth declarations made by public officials are treated as public information and therefore accessible to members of the public, on application to the Inspectorate General of Government (IGG).<sup>53</sup> In the absence of an ATI law, therefore, sector laws played a crucial role in furtherance of citizens' right to access information in the possession of public bodies. It should also be mentioned that many activists, especially those in the environment sector, still prefer to use provisions of sector laws rather than the ATIA.<sup>54</sup>

## POST-ATIA ENACTMENT CAMPAIGN EFFORTS

Soon after the Access to Information Act was enacted, there was much excitement and jubilation among civil society actors—but not for long. In 2006, Foundation for Human Rights Initiative (FHRI) organized a round-table meeting on ATI, marking the first such initiative after the enactment of the ATIA. While several strategies for implementation of the law, including enactment of FOI Regulations, were mooted at the meeting,

<sup>50</sup> Section 86, National Environment Act cap 153.

<sup>51</sup> Section 91, National Forestry and Tree Planting Act 2003.

<sup>52</sup> Leadership Code Act cap. 168, Laws of Uganda 2000. See also Long Title to the Act

<sup>53</sup> Section 7.

<sup>54</sup> Kakuru interview op.cit.

no adequate follow-up was pursued. Some civil society organizations fell away from the campaign, while others relaxed their efforts and energies on FOI between the years 2006 and 2008. This partly explains why it took so many years to have the FOI Regulations passed, notwithstanding that they were needed for operationalization of the Act.<sup>55</sup>

It was not until 2008 that the campaign to have the regulations passed was reinitiated. Under the stewardship of HURINET-U, the Coalition on Freedom of Information (COFI) was recomposed to constitute a few of the founding members and newly admitted members.<sup>56</sup> In the same year, HURINET-U in partnership with the Open Society Justice Initiative (OSJI), Open Society Initiative for East Africa (OSIEA), and the World Bank Institute organized an 'East Africa and Beyond' conference, drawing experts from the region and across Africa.<sup>57</sup> In 2009, for the first time COFI in collaboration with the Directorate of Information organized the first ever Right to Know Day celebrations in the country and have since organized the event twice, in 2010 and 2011.<sup>58</sup> In the same year, HURINET-U and the Affiliated Network for Social Accountability (ANSA) converged a meeting of ATI experts from East and Southern Africa, and the Ugandan Minister of Information was invited to give a keynote speech.<sup>59</sup> On both occasions, the lack of Regulations was much decried and the government was asked to fast-track the process of introducing the Regulations. As the Minister had promised, they were finally passed in 2010. Unfortunately, as has already been pointed out above, the Regulations as passed have many limitations and inadvertently do not clarify a number of aspects in the Act.

Surprisingly, even with the Regulations in place—narrow as they may be—citizens and even civil society have yet to file information requests more regularly as was expected.<sup>60</sup> This is attributable to the fact that not

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<sup>55</sup> See interview with Cissy Kagaba, Executive Director, Anti-Corruption Coalition of Uganda (ACCU), on 9 January 2012. See also Tumwine interview *op.cit* and Sendugwa interview *op.cit*.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> See Report of the Access to Information Public Dialogue; Access to Information as an Engine for Development. Available at: [http://www.africafoicentre.org/index.php?option=com\\_docman&Itemid=559&limitstart=5](http://www.africafoicentre.org/index.php?option=com_docman&Itemid=559&limitstart=5) (accessed 30 May 2012).

<sup>60</sup> Interview with Monica Kalemba, Directorate of Information, Uganda Government, on 17 January 2012. See also interview with Sylvia Birahwa, Directorate of Information, Uganda Government, on 17 January 2012. See also HURINET-U, Survey Report on the Requests for Public Information, May 2010.

so many Ugandans know about provisions of the Access to Information Act and their right to demand information.<sup>61</sup> Secondly, most information officers know little about the right of ATI generally and their roles under the Act.<sup>62</sup> Some members of civil society actors have also been found not to understand the right to access information.<sup>63</sup> This is partly attributed to the high elitism and urbanization of the campaign.<sup>64</sup>

Overwhelmingly, there is no political will to open up government to public scrutiny. This makes it very difficult to access certain information, even for the most vigilant activists.<sup>65</sup> At the same time, individual information officers are inhibited from providing certain information in the absence of political will.<sup>66</sup> One such category of information that is continually denied by the state is information surrounding the oil sector. It is not surprising that even Members of Parliament, who are the peoples' elected representatives, were recently denied access to the oil Production Sharing Agreements (PSA).<sup>67</sup> Fully fledged citizen access to information in possession of the state and its agencies is therefore yet to be meaningfully achieved.

#### EXPERIENCES FROM OTHER COUNTRIES: INDIA AND SOUTH AFRICA

While Uganda now has an ATI law in place, it has clearly fallen short of achieving the envisaged results. Seemingly, the law has not fully fulfilled the objective of enhancing the right of citizens to access information in the possession of the state. In a bid to brighten this reality and put the country back on track, it is important that activists reflect on successful experiences from other countries, including India and South Africa.

##### *India*

The right of citizens to access information in India was first recognized by the Indian Supreme Court in 1975. In its ruling, the Supreme Court

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<sup>61</sup> See Kagaba interview op.cit.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> See interview with Dickens Kamugisha, Executive Director, African Institute for Energy Governance (AFIEGO), on 23 January 2012. Kagaba interview op.cit.

<sup>65</sup> Ibid.

<sup>66</sup> See Tumwine interview op.cit.

<sup>67</sup> Don Binyina Bwesigye; Secrecy, Lack of Regulation Undermining Oil Industry, Daily Monitor, 8 April 2011. See also Frank Tumusiime, Oil Contracts Secrecy and Call for Transparency, Daily Monitor, 11 November 2011. See also John Njoroge, Bill Gates advises Uganda on Oil Cash, Daily Monitor, 3 November 2011.

observed that much as the Indian Constitution did not expressly provide for citizen's right to access information, it was implicit in the right to freedom of speech and expression protected in Article 19(1)(a) of the Indian Constitution.<sup>68</sup> On this basis, by 1990 grass roots communities in the state of Rajasthan, under the mobilization of a local NGO, the Mazdoor Kisan Shakti Sangathan (MKSS), began demanding information on village accounts, including information related to welfare of workers (Puddephatt 2009: 23). With growing demands from the people and increased media attention, MKSS began focusing on having an ATI law passed. In 2000 an ATI law for Rajasthan was passed, creating the much-needed impetus for a national law.<sup>69</sup> Some other states followed the Rajasthan path and enacted a right-to-information (RTI) law, and eventually a national law was passed in 2002. To the disappointment of most RTI activists and information users, most provisions in the law were watered down and found insufficient to guarantee fully fledged access to publicly held information.<sup>70</sup> To this end, in 2005 the law which had not been implemented was replaced with much stronger legislation, following a successful civil society advocacy campaign. The 2005 Right to Information Act (RTIA) gives effect to the citizens' fundamental right to access information from public bodies in India. While it is notable that there were several genuine information requests even before the law was passed, enactment of the law diversified opportunities for activists in many ways and to a great extent enhanced the campaign.

For instance, Section 5(1) of the law enjoins every public authority to appoint Public Information Officers (PIOs), whose role is to deal with and make decisions on information requests.<sup>71</sup> The law demands prominent display of PIOs' names, designation, and contact.<sup>72</sup> The work of PIOs is further complemented by Assistant Public Information Officers (APIOs) at sub-divisional or sub-district level.<sup>73</sup> PIOs and APIOs are further

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<sup>68</sup> See State of U.P.V. Raj Narain & Ors, 1975 AIR 865 / 1975 SCR (3) 333. Also available at: <http://www.indiankanoon.org/doc/438670/> (accessed 30 May 2012).

<sup>69</sup> Ibid.

<sup>70</sup> Interview with Venkatesh Nayak, Coordinator, Access to Information Programme, Commonwealth Human Rights Initiative (CHRI), on 17 January 2012.

<sup>71</sup> Section 7(1).

<sup>72</sup> Section 4(1) (b). In one of the states, Gujarat, the names of PIOs and APIOs are displayed on the state website. See CHRI, Navaz Kotwal & Venkatesh Nayak Etaal, eds, (2009), *Compliance with the Right to Information Act, A Survey*, p. 25. Available at:

[http://humanrightsinitiative.org/publications/rti/compliance\\_with\\_rti\\_act\\_survey.pdf](http://humanrightsinitiative.org/publications/rti/compliance_with_rti_act_survey.pdf) (accessed 30 May 2012).

<sup>73</sup> Section 5(2).

required under the law to be trained.<sup>74</sup> This not only breaks the strongly grounded culture of secrecy in the public service but also enhances their understanding of the law and the right to access information in general. Information officers are critical nodes in receiving and returning information requests, and their appointment constitutes a very important step. Similarly, the law places an obligation on the central and state governments to carry out public education on people's rights to information, with particular emphasis on the disadvantaged segments of society.

The Indian RTIA further provides for proactive disclosure in respect of 17 categories of information.<sup>75</sup> This includes a public authority's organizational structure, duties and responsibilities, employees, and budget.<sup>76</sup> Some states have also developed templates to guide information officers to comply with this obligation. Proactive disclosure reduces costs incurred by citizens to access information, while at the same time promoting public awareness of the functioning of public authorities. It has thus enhanced citizens' access to information created by public authorities as well as that of private bodies obtained in the performance of regulatory functions.<sup>77</sup>

Finally, the RTIA requires every public authority to submit information on compliance with the Act to the respective ministries.<sup>78</sup> The required information includes statistics on the number of information requests, the number of those refused, the reasons for refusal, and the fees collected from requests. This information constitutes what is collectively referred to as the 'RTI Register' and is a major accountability mechanism for public authorities.

The law has therefore enabled activists to demand information related to allocation of public land, welfare services, employment, free education, food, and housing, among other categories. These are important issues that matter to the most impoverished, who constitute the majority of the population. In the same way, it encourages activism at grass roots level, adding further stimuli to the campaign. In the less economically developed state of Bihar, it is estimated that over 100,000 requests were made in

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<sup>74</sup> Section 26(1)(d), The state of Gujarat on its part appointed the Sadar Patel Institute of Public Administration (SPIPA) as its implementing agency responsible for all training and public education programs. See Capacity Building for Access to Information (CBAI) Project. Available at: <http://www.rti.org.in/Documents/Publications/CBAI%20a%20case%20study.pdf> (accessed 30 May 2012).

<sup>75</sup> Section 4 of the Act.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Section 25.

2009 alone.<sup>79</sup> This has put some FOI activists and information users at great risk. One example is that of an activist, Shashidhar Mishra, referred to by many as “the news man”, who was killed in February 2010 in Baroni in the northern state of Bihar.<sup>80</sup>

It is hereby concluded that the most unique attribute of the Indian freedom-of-information campaign is ownership at the grass roots and constant civil-society interaction with the poor and indigent at communal levels. From the beginning the process was owned by Indian citizens, and it is not surprising that when the law was eventually passed there was increased reliance on its provisions to demand information, as well as increased vigilance to ensure maximum compliance. It is for this reason that the initial law passed in 2002 was replaced with a much stronger law in 2005. The growing number of users and supporters has steadfastly opposed attempts of the government to curtail the transparency regime through retrogressive amendments. These are critical lessons for Uganda in her freedom-of-information campaign.

### *South Africa*

Inspired by the dark history of apartheid, the South African Freedom of Information Campaign is heralded as the most successful on the continent. The apartheid regime thrived on secrecy in a bid to stifle opposition and to shut out international criticism for violations committed against the majority black population. The fall of the apartheid regime witnessed increased demands for democratic reforms, including transparency and accountability of government.<sup>81</sup> The right to access information therefore became very significant in this regard, stimulating the need for its legal recognition. As such, the South African Constitution expressly provides

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<sup>79</sup> Ibid.

<sup>80</sup> See J. Burke (2010), Dying for Data, Indian activist Killed for Asking Too Many Questions, *The Guardian*, Monday 27 December 2010. Available at: <http://www.guardian.co.uk/world/2010/dec/27/india-rti-activists-deaths> (accessed 30 May 2012). Shashidhar had been very active in seeking and obtaining information on unlicensed stalls erected on public land, mistreatment of animals in a government-run dairy, illicit land dealings by local council officials, and electricity blackouts in a health facility. At the time of his death he had initiated an information request on resurfacing a market road, and it was discovered that over 80,000 British Pounds had been paid out for work that was never carried out. It is reported further that at least ten activists have been killed, including a stallholder, pharmacist, and sugar-cane farmer. Also see Daniel Pepper (2010), In India, Deadly Backlash Against Freedom of Information Activists. Available at: <http://www.csmonitor.com/World/Asia-South-Central/2010/0310/In-India-deadly-backlash-against-freedom-of-information-activists> (accessed 30 May 2012).

<sup>81</sup> Puddephatt *Supra*.

for a right to access publicly held information.<sup>82</sup> Under the Constitution, anyone has a right to access information in the possession of the state or even a private body, where the sought information is necessary for the protection of rights and freedoms.<sup>83</sup>

Significantly, upon the coming to power of the new majority government in 1994, a five-man team headed by the then Deputy President's legal advisor was tasked to draft an enabling legislation.<sup>84</sup> In 1995 the team came up with a draft legislation: the Open Democracy Bill, modelled on freedom-of-information laws of other countries around the world, including Canada, Ontario, the United States and Australia.<sup>85</sup> The Bill was eventually passed as the Promotion of Access to Information Act (PAIA) five years later in the year 2000.

The South African civil society was very influential in the process leading to enactment of the Act. Following a successful campaign against apartheid, civil society embarked on consolidation of democratic gains made during the struggle. An ATI law was therefore critical to guard these gains, and in 1995 civil society constituted an Open Democracy Advice Forum (ODAF) to monitor the legislative process. ODAF did not live long and was no more by 1997. Nonetheless, another group of civil society organizations emerged soon after under the umbrella of the Open Democracy Campaign Group (ODCG). The latter was much more successful and played a significant role in shaping the PAIA. Oftentimes ODCG approached and advised members of the legislature on the draft law, cementing a good working relationship.<sup>86</sup> This way civil society input was incorporated into the new law, ensuring maximum provision for access to publicly held information. Finally, to consolidate its work the ODCG agreed to establish a permanent entity that would closely monitor implementation of the law, and to this end the Open Democracy Advisory Centre (ODAC) was born.<sup>87</sup>

At present, ODAC is involved in monitoring the implementation of the PAIA as well as several community interventions aimed at identifying communities' social and economic challenges and how they can be solved using the right to access information. A research unit in ODAC has also

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<sup>82</sup> See Article 32.

<sup>83</sup> *Ibid.*

<sup>84</sup> R. Calland & M. Dimba (2002), *Freedom of Information Law in South Africa*, A Country Study, p. 5.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Puddephatt *Supra*.

been established to provide institutional support to other entities across Africa working on access to information issues.<sup>88</sup>

Importantly, it should be recognized that the success of the freedom-of-information campaign was favoured by post-apartheid democratic reforms and commitment of civil society to actualizing the right to access information as part of consolidation of these reforms. The campaign also borrowed largely from the experiences of countries with information laws, as well as grass roots mobilizations like MKSS in India. The enactment of the Protected Disclosures Act, aimed at protecting employees in both the public and private settings who disclose information concerning corruption and unlawful acts, was yet another milestone.<sup>89</sup> Indeed, it is not surprising that the PAIA has provisions for citizens to access information in the hands of private bodies.<sup>90</sup> Finally, the economic rights' campaign in South Africa made the right of ATI even more relevant to citizens and propelled the campaign further.<sup>91</sup> Although the South African PAIA is yet to be fully implemented to the extent of the Indian Act, in Africa it remains the most implemented freedom-of-information law, notwithstanding recent threats posed by passage of the Protection of State Information Bill into law.<sup>92</sup> One important lesson from South Africa remains that political will is a prerequisite for the success of any freedom-of-information campaign.

## CONCLUSION

Uganda's ATI campaign is not as vigorous as it was ten years ago when it was initiated. Civil society groups initially exerted extreme dedication and solidarity in campaigning for an ATI law. Soon after the law was passed, much of this died out, and there has been less traction among civil society actors to have the law fully implemented. While most civil society organizations maintain their advocacy programs, most of their efforts are rather

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<sup>88</sup> See Open Democracy Advice Centre: <http://www.opendemocracy.org/za/access-to-information/> (accessed 30 May 2012).

<sup>89</sup> Protected Disclosures Act (PDA) No 26 of 2000.

<sup>90</sup> See Part 3 of the Promotion of Access to Information Act. See also D.T. McKinley (2003), *The State of Access to Information in South Africa*, Centre for the Study of Violence and Reconciliation.

<sup>91</sup> Puddephatt *Supra* 30.

<sup>92</sup> FOI Advocates Condemn Passage of SA Secrecy Law. Available at: [http://www.africafoicentre.org/index.php?option=com\\_content&view=article&id=1583:foi-advocates-condemn-sa-secrecy-law-&catid=293:afic-news&Itemid=561](http://www.africafoicentre.org/index.php?option=com_content&view=article&id=1583:foi-advocates-condemn-sa-secrecy-law-&catid=293:afic-news&Itemid=561) (accessed 30 May 2012).

disjointed and sporadic. Besides this, there is inconsistency among some civil society groups insofar as advocacy on the right to information is concerned.<sup>93</sup> This is largely as a result of high dependency on development partners and inability to sustain freedom-of-information activities on their own.

In addition, while unlike many other African countries Uganda has an ATI law, in practice the law has proved problematic. There was much hope and expectation when the Access to Information Act was passed which has since faded. The law is too limitative to fully advance tenets of openness and transparency as intended by FOI actors. At the time of enactment, most activists did not envisage what the real effect of some of the provisions would be, and it is unsurprising that recent experiences have revealed that the law may be used to achieve a completely different purpose. The secrecy around the oil sector manifest in various confidentiality clauses in oil agreements concluded so far is telling in many respects. That not even Members of Parliament are able to freely access this information is even more troubling.

It is therefore important for FOI advocates to reorganize and craft a joint approach to save the increasingly threatened right of ATI. Such an effort would involve a campaign to have the Access to Information Act 2005 amended to make it more functional in advancement of FOI, just as was the case in India. The Act presently has a wide exemption regime, which goes far beyond the scope of limitations envisaged in the Constitution. There is also no mention of a specific body with a mandate to promote the Act and monitor its implementation. These and other glaring gaps in the Act pointed out earlier should be the focus of efforts to have the Act amended. Similarly, the Access to Information Regulations 2010 should be amended and broadened to encompass all procedural matters envisaged under the Act. Specifically, the cost or fees payable to access information in the possession of the state should be revised downwards to reflect the living standards of most Ugandans.

Coupled with the above, archaic and unprogressive laws that limit citizens' rights to access information in the possession of the state should be repealed immediately. As has been pointed out, the country retains laws on its statute books that impede access to information. These include the Evidence Act, Official Secrets Act, and National Assembly (Powers and Privileges) Act. This is notwithstanding that some of the provisions found in these laws have been struck down by the courts. Further caution and

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<sup>93</sup> Kagaba interview *op.cit.*

vigilance should be exercised to ensure that the laws being hatched encourage and promote openness. The proposed Petroleum (Exploration, Development, Production and Value Addition) Bill 2010 is the most immediate of these. All these efforts call for strong partnership with members of the legislature. As already seen above, this strategy was very significant in the South African campaign. Besides this, civil society should seriously consider and adopt strategic impact litigation as a strategy to have these archaic laws struck down.

Beyond legal reform, efforts to popularize the law should be bolstered and given due consideration. The public should be encouraged to use the law in their day-to-day lives. This calls for making the law relevant at all levels, as has been the case in South Africa and India. Unless the common man owns the campaign, efforts to have it functional will remain empty. Public awareness therefore remains a very formidable strategy that will uplift the campaign to greater levels, while at the same time promoting citizens' access to information. The recent success of the Bushenyi case, involving pursuit for information surrounding contract awards and expenses incurred in building a municipal stadium, is great testimony that where information is made relevant to the common people, they get deeply involved and interested in pursuing such information.

For all these to succeed, it is very important that Ugandan civil society is not only vibrant but consistent and well-coordinated. As has been observed above, a vibrant and united civil society in South Africa and India played a critical role not only in the enactment of a law on ATI but also in its implementation. Similarly, Ugandan civil society should unite and collectively plan and strategize on rejuvenating the campaign. This will not only ensure coherency in the campaign but will also allow a harmonized and systematic approach in the pursuit of freedom of information. It is then that Uganda will once again be elevated to the enviable position it once occupied soon after it passed the Access to Information Act. The recent relocation of the African Freedom of Information Centre (AFIC), a regional FOI resource centre in the country, makes this even more urgent and necessary and presents an opportunity for the country to present itself as a model on the continent.

In sum, increased openness will foster transparency and accountability especially at a time of increased corruption allegations against government officials. The country is presently in the middle of a crisis, with widely reported endless corruption scandals in health, education, allocation of public markets, security, and most recently the nascent oil sector. If there was a time that a fully operational, efficient, and effective ATI law

was necessary, it is now. Unfortunately, the ATI campaign is at its very nadir at the moment and should be reinvigorated if this objective is to be met. This is not an easy task, yet is very necessary. Citizens must be empowered to demand information and to use such information to hold their leaders accountable. They must be able to do this at grass roots level. In this way corruption will become a matter of history, especially with the renewed anti-corruption crusade in Parliament.

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## CHAPTER TEN

### REALIZING THE RIGHT OF ACCESS TO INFORMATION IN KENYA: WHAT SHOULD STAKEHOLDERS BE ON THE LOOKOUT FOR?

Edwin Abuya

#### ABSTRACT

*Drawing on fieldwork, this chapter evaluates the factors that stakeholders need to take on board in the quest to observe, respect, protect, promote, and fulfil the right to receive information that is held by the state and its agencies. The article, which uses Kenya as a case study, demonstrates that the public faces several difficulties in the quest to enjoy this fundamental right, including prohibitive requirements for disclosure, lack of information, and the culture of secrecy as well as the absence of criteria and an appeals framework. It is in the interest of stakeholders to take steps towards meeting these concerns. Accordingly, this chapter makes specific legal and policy recommendations that could alleviate these obstacles.*

#### INTRODUCTION<sup>1</sup>

Information is power. Indeed, there are several benefits that accrue if the right information is available to the public. Primarily, access to the right information has an impact on the enjoyment of other fundamental entitlements that are due to human beings (see also International Commission of Jurists 2006: 1), including life, health, and education. Without this right, it would be difficult for any individual to realize any entitlement, as he or she may not be aware of its existence in the first place. The provision of accurate and timely information provides individuals with the data and knowledge that they require to participate effectively in the democratic

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<sup>1</sup> Thanks to Richard Calland and the reviewers of this chapter as well as seminar participants at the University of Nairobi Law School Colloquium (September 2010) and Global Conference on Transparency Research (Rutgers University, Newark, USA, May 2011: Access to Information as a Catalyst for Social Change in African Countries stream) for their constructive comments. Thanks are due, too, to the African Network of Constitutional Lawyers for funding this study.

process in any political society.<sup>2</sup> In many ways this promotes the right to participate in elections.<sup>3</sup> In addition, information enables individuals to make informed choices about their lives and livelihoods,<sup>4</sup> thus promoting the fundamental right to life, among other rights. Furthermore, an informed public is likely to contribute to the development of any society compared with a public that is ignorant. Makali (2003: 121) argues that when information is withheld, the public becomes “ignorant of their rights”. Contribution by the public could be in the form of ideas and other resources. An informed, unlike an ignorant, public could also act as a safeguard against corruption, both within and outside government. As the International Commission of Jurists (2006: 7) observes, the right to know is a useful “tool for fighting corruption”. Access to correct information is likely to promote peace and tranquillity within any society, in the sense that it can act as a check against rumours and half-truths which can trigger violence (see also Sirleaf 2010: 93–102). Moreover, information sharing is also beneficial as it is likely to save on resources and time that would otherwise be spent looking for data.

For the public to participate effectively in the management of the affairs of a country, they need to have information. Thus, it is imperative for the public to be provided or allowed access to the requisite information that will allow them to take part in policy formulation as well as critique government strategies on, among other areas, health, education, infrastructure, and employment. As noted above, ATI can also check corruption and promote accountability on the part of public officials, as they become aware that their actions are subject to scrutiny. Accordingly, in the absence of the requisite information, it would be very difficult for any member of

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<sup>2</sup> Henry, an official who works at the Government Complaints Office, described information as the “life-blood of democracy”. Interview with Henry, 24 July 2010.

<sup>3</sup> This right is well known at the domestic and international levels. See, for instance, Tanzanian Constitution, Section 5; Zambian Constitution, 1996, Section 113(e); African (Banjul) Charter on Human and People’s Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force 21 October 1986) (Banjul Charter), Article 13; Convention on the Rights of Persons with Disabilities U.N. Doc. A/61/611 (6 December 2006), 660 U.N.T.S. 195 (entered into force 12 May 2006), Article 29; International Covenant on Civil and Political Rights G.A. Res. 2200 (XXI) U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976) (ICCPR), Articles 2(3) and 25; International Convention on the Elimination of All Forms of Racial Discrimination G.A. Res. 2106(XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 January 1969), Article 5(c); Universal Declaration of Human Rights U.N.G.A Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948) (“UDHR”), Articles 8 and 21.

<sup>4</sup> According to Henry, the right of ATI is important as it could “save lives”. Interview with Henry, 24 July 2010.

the public to participate meaningfully in the management of any state. Without information, the public would not have an insight into the functioning of the state or participate in its decision-making processes (Makali 2003: 122).

Since 2008 Kenya has been undergoing a constitution review process. A draft constitution was published in May 2010 and voted for overwhelmingly in a referendum in August 2010.<sup>5</sup> For the first time in its history the right to access information is contained in the bill of rights of the Constitution. Article 35 guarantees every citizen the right to “information held by the State” or any “person” that is “required for the protection of any right or fundamental freedom”. However, this right is not absolute. Rather, Article 24, the general limitation clause, limits its operation. To pass constitutional muster the limitation must be “reasonable and justifiable in an open and democratic society based on human dignity as well as equality and freedom”. In theory, Kenya has taken great strides in the area of providing, promoting, and protecting the right of ATI, which is fundamental in any society that is governed by the rule of law. As governments hold information in trust for the public,<sup>6</sup> it follows that the public have the right of access to this information (O’Brien 1981: 2; Powe 1991: 256).

This research seeks to provide an understanding of ATI in Kenya as well as evaluate considerations that must be taken into account for the advancement of this right in practice. The paper reports the results of a survey that was conducted in the country from July to October 2010. The research sought to:

1. Evaluate the existing legal framework for ATI in Kenya.
2. Analyze current practices in respect to the supply and provision of information by various (selected) government departments.
3. Determine the level and factors influencing demand for information by Kenyan residents.
4. Assess government responsiveness to ATI practices (whether proactive or otherwise).

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<sup>5</sup> For the results of this election, see Interim Independent Election Commission of Kenya, Interim Independent Election Commission 2010 Final Referendum Results. Available at: [http://www.iiiec.or.ke/sites/default/files/COMPREHENSIVE%20IIEC%20FINAL%202010%20REFERENDUM%20RESULTS%2009\\_08\\_10.pdf](http://www.iiiec.or.ke/sites/default/files/COMPREHENSIVE%20IIEC%20FINAL%202010%20REFERENDUM%20RESULTS%2009_08_10.pdf) (accessed 24 October 2010).

<sup>6</sup> See also *R v Minister of Finance and Another Ex P Nyong'o and 2 Others* [2007] eKLR (noting government holds “power in trust for people”); Section 2.2(b) of the Liberian Freedom of Information Act (underlining that “[p]ublic bodies hold information not for themselves but as custodians of the public good”).

5. Identify major opportunities and constraints for the promotion of ATI in Kenya.
6. Provide recommendations for measures that could be taken to advance ATI agenda in Kenya and elsewhere.

In-depth interviews were conducted in Nairobi, the main administrative centre in Kenya, with 16 interviewees (8 government officials and 8 non-officials). The study examined issues surrounding public access to government-held data. Open-ended questions were used in the survey. This gave interviewees an opportunity to explain their views in more detail. Some interviewees were identified through the process of snowballing—once an informant, who had been contacted directly by the author, had been interviewed, the individual introduced the author to other interviewees who met the selection criteria. Others were accessed through previous personal interaction that the author had had with the interviewees. All interviews were conducted in English; hence, there was no need for translators. Interviewees were drawn from state and non-state officials. A review session was held in Nairobi with stakeholders to share the initial findings and get feedback.

Based on the sample size, the findings of this research do not represent a comprehensive reflection of the ATI situation in Kenya. However, they do provide valuable insights into the scope and nature of this right as well as challenges faced by persons seeking state-held information and measures that could be taken to mitigate these challenges. As such, the study contributes to the existing literature on the law and practice of ATI primarily because its insights are drawn from empirical work. This study cannot also hope to cover every aspect of these issues. Rather, its objectives—as mentioned above—are to provide a conceptual overview of some of the key issues raised by the survey, identify the main factors that need to be taken into account in order to realize this right in practice, and begin an evaluation of recommendations for reform.

Section II reviews the legal framework that governs ATI in Kenya. It demonstrates that, although the process seems straightforward in theory, several hurdles are faced in reality. Section III examines the concerns that should be taken on board in the quest to “observe, respect, protect, promote and fulfil”<sup>7</sup> the right of ATI. Measures that could be taken to mitigate these obstacles are discussed in Section IV. To conclude, Section V contends that real steps must be taken in Kenya for this entitlement to be enjoyed.

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<sup>7</sup> Article 21(1) of the 2010 Constitution.

## THE LEGAL FRAMEWORK

The right of ATI in Kenya is contained in the Constitution, as well as several other pieces of legislation. In the context of the Constitution this right was first contained in the post-independence Constitution. It is also found in the new Constitution that was promulgated in Kenya in August 2010. In the context of the previous Kenyan Constitution, this right was contained in the general provisions that governed freedom of expression. Section 79(1) of the former Constitution granted every person in Kenya the freedom to “hold information” as well as to “receive ideas and information” “without interference” from the state or non-state agencies. This right was not absolute. Section 79(2) limited this right on grounds of public health and national security or safety. To put it in another way, the state, upon whom the burden of proof fell, had to demonstrate that national safety, health, or security were threatened before it could seek to limit an individual’s right to receive and transmit information.

The 2010 Constitution, like its predecessor, also contains provisions that govern the right of ATI. Under the terms of the new constitutional order, this right is limited. To put it in another way, the right of ATI is not absolute. It is limited in the sense that this right is available to Kenyan citizens only. This is unlike the situation with the previous constitutional order, which did not discriminate (expressly or by implication) between citizens and non-citizens. Section 35(1) of the current Constitution bars non-nationals from enjoying the right of access to any information that is held by the state or non-state actors.

The second limitation is contained in Article 24 of the current Constitution. This section provides that the right of ATI can be limited by law:

only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The entrenchment of the right of ATI in the Bill of Rights means that legislation restricting access to official information is a limitation on the right

and would be unconstitutional and invalid unless justifiable in terms of the limitation clause of the Constitution (Currie & Wall 2005: 685).

Several domestic pieces of legislation reinforce the right of ATI. These statutes govern information that is transmitted by print or electronic media. In the context of electronic media the Kenya Broadcasting Corporation Act (1998) establishes the Kenya Broadcasting Corporation (KBC). The preamble to this Act stipulates that the KBC is a government institution that is charged with the responsibility of “producing and broadcasting programmes ... by sound or television”. Other statutes such as the 2007 Media Act underscore in Sections 4(b) and 35(1) as well as the Second Schedule the importance of promoting and protecting the freedom and independence of the media. This piece of legislation also seeks to promote in Section 7(1) the “constitutional freedom of expression”, and, by extension the right of the public to receive information. Films and plays are another powerful tool for promoting the right of ATI. Thus, the Films and Stage Plays Act (1998), which was designed to control the making and exhibiting of films and plays, contains provisions that govern ATI by the public.

Despite this legal framework, those who seek information from the state face several hurdles. The remainder of this paper evaluates these difficulties. Measures that could be taken to meet these challenges are also explored.

#### CONCERNS TO WATCH

Although the right of ATI is guaranteed in Kenya, fieldwork noted several limitations. Experience on the ground suggested that several difficulties are faced by those seeking information from government agencies, including prohibitive requirements, the lack of information, absence of set criteria, and the culture of secrecy. This section reviews these difficulties.

#### *Prohibitive Requirements*

Notably, there are a number of grounds that can be invoked in Kenya to exclude information from being disclosed to the public. National security is one of these. Several pieces of legislation, including the Official Secrets Act (1970),<sup>8</sup> the 1998 National Assembly (Powers and Privileges) Act,<sup>9</sup> the

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<sup>8</sup> See Section 3(1).

<sup>9</sup> Section 18(2).

Films and Stage Plays Act (1998),<sup>10</sup> the National Security Intelligence Service Act, No. 11 of 1998 (NSIS Act), the Preservation of Public Security Act (1987),<sup>11</sup> the Service Commissions Act (1985), and the Penal Code (1985)<sup>12</sup> prohibit any person from obtaining and transmitting any information that, in the opinion of the state, will compromise its internal security. Failure to comply with this requirement will lead to prosecution, and, if one is found guilty, he or she will be liable to a fine or a term of imprisonment.<sup>13</sup> Public policy is another ground that public officials can use to refuse to disclose any information in their custody. Sections 131 to 133 of the Evidence Act (1989) give officials wide discretion to decide whether (or not) the release of any information that they hold could be prejudicial to public policy.

Consent of government officials must first be sought before any information can be released. Without this, an interested party will not be able to receive any information that the person requires from the applicable government agency. Under Section 18(2) of the National Assembly (Powers and Privileges) Act (1998), public officers can release information relating to “correspondence of any naval, military or air force” or correspondence relating to “any civil department or to any matter affecting the public service” only with the permission of the President. Furthermore, under the terms of the Service Commissions Act, any communication between the Public Service Commission (PSC) and the Judicial Service Commission (JSC) or between members of these commissions and other government agencies are privileged. These data, according to Sections 7 to 9, cannot be disclosed or produced in any proceeding, except with the written consent of the President. Those who sit on parliamentary committees as well as members and officers of the National Assembly are also prohibited by Section 19 of the National Assembly (Powers and Privileges) Act from disclosing any information that comes to their knowledge in the course of their work, without the Speaker’s consent.

The procedural framework also presents a number of hurdles. Firstly, the law is silent on the steps that should be followed by those who are seeking data. This raises a number of fundamental questions. Should a person lodge an application directly with the Office of the President or the Speaker? Should the application to the President in particular be sent to

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<sup>10</sup> Sections 9 and 11–13.

<sup>11</sup> Section 3.

<sup>12</sup> Section 52.

<sup>13</sup> See, for instance, Section 32 of the Films and Stage Plays Act.

the Head of Civil Service, the Ministry, or government department that holds the information, with a request that it forward it to the President for consideration for approval? Although this study did not meet any individual who had lodged an application for consent from the President, it is apparent that the lack of a clear procedural framework by itself curtails the right of ATI. This uncertainty could expose the process to abuse or corruption. The experience of Pauline, an official of a legal aid organization, underlines the challenges that face those who wish to obtain consent from the Speaker:

I was running a case and we wanted to see how counsel had conducted cross-examination in the proceedings, which were heard by a committee of Parliament. I called our contact, and the official arranged for us to enter Parliament. When I informed him of the purpose of my visit, the official made it clear that we had to first obtain permission in writing from the Speaker before we could obtain a transcript of these proceedings. We explained to the official that the proceedings had in fact been covered by the media, but the person refused to allow us access to the transcript. Eventually, I gave up as, owing to past experience, I doubt whether the Speaker could have exercised his discretion in our favour. (Pauline, Nairobi, 2010)

The requirement that consent lies with the President or Speaker is also problematic in the sense that there is no guidance on the form that an aggrieved person (such as Pauline in the above example) should apply to challenge an unfavourable decision of these public officials. Arguably, one could apply for the remedy of judicial review, as provided for under Order 53 of the Civil Procedure Rules 2010. On the substantive front, the applicant would need to challenge “the content of the outcome of the decision made” (Loveland 2006: 503). Procedural grounds of review, in contrast, address the question of the way in which a decision has been arrived at (*ibid.*). However, for one to challenge effectively a decision, reasons—particularly for rejected applications—would also have to be provided. It is doubtful whether an application reaches finally the President or Speaker, he or she will set out any ground. Simply put, this framework does not comply with due process requirements.

Granted, there should be a restriction on the access and circulation of any information that is likely to threaten the security of any state. Indeed, this practice is not unique to Kenya.<sup>14</sup> However, the requirement, where security issues are involved, that, without presidential consent, a member

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<sup>14</sup> See, for instance, Section 4A(2) of the Official Secrets Ordinance (Tanzania); Sections 3 to 9 of the State Security Act (Zambia).

of the public cannot access information that is held by the public service or any civil department is difficult to understand. So too are the restrictions that are placed on information that comes to the knowledge of key institutions like the National Assembly, PSC, or JSC. Like the National Assembly and its committees, the PSC and JSC, which were/are constitutional bodies under the terms of the old and new constitutions,<sup>15</sup> respectively, play a central role in the management of government affairs. In particular, the PSC is charged with the responsibility of appointing, disciplining, and removing public officials from office.<sup>16</sup> A similar power is vested in the JSC although it focuses on appointment and removal of judicial officers.<sup>17</sup> Against this background, it is difficult to understand why the information that comes through these public agencies cannot be easily accessed by members of the public. If information on any wrongdoing on the part of an official came to the knowledge of any of these publicly funded commissions, would it not be in the interest of the public or the concerned person to be allowed access to this data?

Contrary to rules of fair hearing,<sup>18</sup> the law does not contain any provision for review for dissatisfied parties. Granted, the NSIS Act, in Section 24, outlines a complaints mechanism for those who have been aggrieved by the way the service discharges its functions. However, an individual whose application for access to any information has been rejected cannot follow this route. The fact that police officers are not obliged under the terms of the Films and Stage Plays Act to assign any reason for their decision also sits uncomfortably with due process requirements, which require any decision-maker to provide a substantive basis for his or her finding.<sup>19</sup>

### *Lack of Information*

Despite the several advantages to allowing the public access to state-held information that were noted earlier, the situation on the ground is somewhat disturbing. Fieldwork noted several instances where the public were hardly involved in decisions that were likely to affect them. This is highly

<sup>15</sup> See Sections 106 of the old Constitution and 233 of the new Constitution (on the PSC), and Sections 68 of the old Constitution and 171 of the new Constitution (on the JSC).

<sup>16</sup> See Section 107 of the old Constitution and Article 233 of the new Constitution.

<sup>17</sup> See Section 69 of the old Constitution and Article 172 of the new Constitution.

<sup>18</sup> See, for instance, Articles 14(5) and 7 of the ICCPR and Banjul Charter, respectively.

<sup>19</sup> Article 14(5) of the ICCPR; and Article 45 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome, 4 November 1950, 213 UNTS p. 222 (entered into force 3 August 1953).

undesirable in any democratic society. One area of concern lies in the funding of projects at the local level. In 2003, the Kenya government established the Constituency Development Fund (CDF). The 2003 Constituency Development Fund Act (CDF Act) governs the operation of this fund. According to Section 6 of the CDF Act, the fund was designed to provide financial support to projects at the constituency/local level and, thereby, spur growth at the local level. This is unlike the situation previously, in which a top-down model was employed and the central government initiated and managed all forms of development. The CDF framework has adopted a bottom-up approach. Two per cent of the total revenue that the government generates in every financial year is allocated to the fund.<sup>20</sup> In other words, this kitty is well-resourced. Indeed, the idea behind establishing this fund, which targets community-based projects, is laudable.<sup>21</sup> Without the CDF, all projects would have to wait for direct funding from the central government—a process that was lengthy, slow, and unpredictable. Accordingly, the CDF initiative was mooted to ensure that community-based projects would receive funding expeditiously. One would also assume that because management is at the local level, the projects that would be funded or undertaken would be those that the community, not an individual or a few members of the community, deemed appropriate to its needs.

Several problems were noted with regards to the operation of the CDF. The first problem lies in the composition of the committee that is charged with the mandate of running this fund. According to Section 23(1) of the CDF Act, members of the committee are drawn from the following persons in the constituency: the elected member of Parliament (MP), two councillors, one district officer, two persons representing religious organizations, two men and women, one youth representative, and a representative of an “active” non-governmental organization. This committee is intended to have broad-based representation. It was designed to “reflect the face of the constituency in terms of needs and diverse groups”.<sup>22</sup> However, in reality its operation is limited. This is because the power to appoint lies with MPs, in accordance with Section 23 the CDF Act. Practice suggests that the appointment process is unfair. The positions are hardly advertised. The public is, thus, completely locked out of the recruitment

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<sup>20</sup> Ibid. Section 4(1).

<sup>21</sup> Some contend that “in some parts of the country the CDF has done wonders”. Interview with Arnold, 28 August 2010.

<sup>22</sup> Interview with Arnold, 28 August 2010.

process. Rather, MPs usually appoint their friends, relatives, or party officials to fill slots available in this vital institution. As the Kenyan High Court (Justice Warsame) underlined in *John Oyoo and Others v Zadock Syongo and Others*:<sup>23</sup>

The [CDF] Act gives sweeping powers to the area [MP] to appoint the persons who would serve in the CDF committees, which means it is a legislation which is friendly or advantageous to the current member of Parliament in order to shut out perceived or real rivals in the control, use and management of the funds allocated to a particular constituency.<sup>24</sup>

Herein lies the second problem, which relates to the discharge of the committee's mandate. Because of its composition, experience suggests the projects that receive funding are those an MP has approved, despite the requirement for community participation in the management of projects from start to finish. Granted, members of the constituency are required by Section 23(3) of the CDF Act to draw up "a list of priority projects", which should be submitted to the committee. Section 23(4) of the Act requires the committee to "deliberate on project proposals" that have been submitted and "draw up a priority list" containing "immediate and long term" projects. Fieldwork found that this process is not always followed. Some argue that although the committee consults, it is but a "public relations exercise. Ultimately, the projects that receive funding are those that the MP has selected" (Arnold, Nairobi, 2010).

Because sitting MPs chair the committee,<sup>25</sup> it is difficult for other members to challenge their choices. The public is rarely involved, either directly or through representatives, in the decision-making process. As they say, two heads are better than one. Although the community is mandated by Section 38 of the CDF Act to be involved in the running of any project, this rarely occurs, because of the lack of access to requisite information in the first place. On the contrary, some committees inform the public of the projects that will be undertaken in the constituency and at what cost. Clearly, this state of affairs is out of step with the spirit and intention of the CDF Act, which envisaged an all-inclusive decision-making process and, thereby, the promotion of the right of the public to be involved in community-based projects. Arnold (Nairobi, 2010), who worked as a programme manager with a non-governmental organization specializing in local governance in Kenya, reiterated these challenges:

<sup>23</sup> [2005] eKLR.

<sup>24</sup> *Ibid.* at 8.

<sup>25</sup> Section 24(5) of the CDF Act.

In reality [members of the CDF committee] are appointees of the MP. Thus, when they get to office they serve the interest of the MP. Community interests are hardly taken into consideration. Further, in most constituencies there are no local-level public monitoring mechanisms to put checks on the work of this committee.

Research conducted in other parts of the country reported similar results. In her study of Mwingi and Dagoretti constituencies, Gikonyo (2010: 52) found that the community was “completely locked ... out of the CDF operations”. Kenyan courts and regional tribunals have reaffirmed the right of the public to be involved in any decision affecting them. In *Maya Indigenous Communities of the Toledo District Belize*<sup>26</sup> the Inter-American Commission on Human Rights argued that “at a minimum, ... all of the members of the community [must be] fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives”. Justice Muchelule of the Kenyan High Court in *Ibrahim Osman v Minister of State for Provincial Administration and Internal Security and Others*<sup>27</sup> also underscored the value of public participation in matters that could affect them.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) provides a useful yardstick for gauging public participation. According to Article 6(2)(d) of this convention, the following information must be made available to the public:

- The date of commencement of the process;
- The opportunities for the public to participate;
- The time and venue of any envisaged public hearing;
- An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public; and
- An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions.

In other words, the public must have “effective access to the relevant documents concerning”<sup>28</sup> projects undertaken by the state. Applying

<sup>26</sup> Report No. 40/04, case 12.053 (12 October 2004).

<sup>27</sup> eKLR [2011] at 8.

<sup>28</sup> K.H. and Others v Slovakia, European Court of Human Rights, Application No. 32881/04 (delivered 28 April 2009), p. 11.

these criteria to the CDF example, it is apparent that adequate or appropriate measures were not taken to ensure the law was complied with.

Urgent measures must thus be taken to bridge the information gap and, thereby, ensure that this development plan meets its objectives, as originally envisaged. Kenneth Kaunda, a former president of Zambia, argues that for “any development scheme” to work, data must be disseminated “to the masses of the people” (Legum 1966: 30). The purpose of making data available to the masses is to enable them to prepare to participate effectively in the decision-making process (Nwapi 2010: 197). They should participate “freely at all levels in the formulation, implementation and evaluation” of these projects.<sup>29</sup> Members of the public must, thus, be allowed access to records on the amount of funding available. Specific criteria for recruiting members to the committee should also be outlined at the outset.<sup>30</sup> To safeguard the process, all positions must be advertised widely. Professional recruitment firms could be used to ensure that qualified/suitable personnel are hired to run the fund. Interviews should be conducted by a panel, not an individual, to make the entire process objective. These measures require an amendment to the CDF Act. Section IV discusses this theme further.

Holders of public office are obligated not only to “fellow citizens”, as Rawls (1972: 113) asserts, but to the wider public that they serve. In the discharge of their mandate, they must act in a way that will instil confidence and trust in those to whom they owe a duty. Additional steps must thus be taken to ensure that the management of the CDF fund meets this key test. An independent and impartial review framework must be established. Details on where to lodge applications and the grounds for so doing must be set out. Information on criteria used to fund projects must also be provided, along with information on how decisions were made about priority areas and the yardstick that was employed to identify these. Historical data must also be provided. The public should be informed of previous projects that have been funded, dates of commencement of these projects, and the amount of funding spent thus far. A regular update on the status of implementation is also of utmost importance. For justice to be

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<sup>29</sup> Report of the committee set up to examine the representation alleging non-observance by Columbia of the Indigenous and Tribal Peoples’ Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT) and the Columbian Medical Trade Union Association, para. 61.

<sup>30</sup> The Kenyan Court of Appeal has also made this point. In *Ouko v R* [2007] 2 EA 380, pp. 385, the court (Omolo, Waki and Devereil JJA) argued that the criteria to be “considered or followed in determining suitability” of any official must be set out at the outset.

seen to be done, all decisions, rejected or allowed, should be communicated in writing. Sufficient reasons should also be provided (Abuya 2007: 91–92). Forums where the public can pose questions regarding the operation of this fund need to be held regularly. An open system is beneficial because it would remove any suspicion on the running of the fund as well as promote its smooth running.<sup>31</sup>

Whereas the CDF was designed to serve the interest of the community, experience suggests that in many instances it is used as a tool to promote the influence of sitting MPs. As Justice Warsame reiterated in the Oyoo case, the CDF Act gives them “unlimited and unchecked executive powers in [its] implementation”.<sup>32</sup> Furthermore, the fact that the public does not participate in the process is also highly problematic. The information gap makes it impossible for the public to evaluate projects (Beauchamp & Bowie 2004: 402). The fact that the sitting MP is the one who ultimately decides which projects will be funded and the amount of funding that will be allocated also raises serious problems. This experience reinforces Katebire’s (2008: 52) argument that “restricting sections of society from access to information too often opens up avenues to manipulate information for exclusion, marginalization and exploitation”.

It can be argued that the ideas the committee receives and works with are limited; hence, this leads to curtailing of development in the constituency in particular and the country at large. It is also questionable whether these committees serve public interests. The fact that the public cannot engage meaningfully in the design and implementation of projects creates an avenue for corruption. Arnold (Nairobi, 2010) also made this point:

The public are denied information [on the specific amount of money that is in the CDF kitty] deliberately. Even committee members do not share this information. They are not open to the public. They cannot give you facts or figures. There is nowhere else to get ... information ... on the planning, implementation and evaluation [of projects, as this] is locally based. The problem is that the information is at the hands of the committee who are cronies of the MP. .... [As] there is no accountability, prices of projects are often escalated.

Access to information would also promote transparency. The International Commission of Jurists (2006: 7) notes that the right to know is thus a useful tool for minimizing “waste of public resources”. In the context of the

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<sup>31</sup> See also Preamble to the Aarhus Convention (underlining that public participation improves accountability and strengthens “public support”).

<sup>32</sup> John Oyoo and Others v Zadock Syongo and Others [2005] eKLR (footnote 52).

fight against graft it is imperative for those who are charged with this responsibility to be able to retrieve all the data they need, considering the crucial role these officials could play in countries, such as Kenya, which are struggling to deal with corruption.<sup>33</sup> Indeed, it ought to be in the interest of all stakeholders to ensure that graft is fought against full-force. However, lack of access to relevant information is likely to frustrate these efforts. Fieldwork found several instances where individuals were unable to combat this ill effectively because of the barriers that custodians of information had erected. Unfortunately, even those who were mandated by law to fight graft were not spared. Alice (Nairobi, 2010), an official of the national Anti-Corruption Agency, noted the barriers she experienced in her efforts to obtain evidence from other government agencies for potential use in court:

[The Tax Authority] claim the information [they hold] is classified. But for tax [-related offences to be combated effectively] we need this information. They take us round [in circles] when we do investigations. I have cases that I have shelved because I cannot complete investigations. ... It is difficult to pursue economic crimes [under these circumstances]. We hardly make much progress. ... I have had a similar experience with other government departments that deal with energy and medical facilities. ... I was once investigating a [corruption] claim that involved Parliament. They cooperated [eventually] and gave us the information. [But] they behaved like gods and took us round and round.

In order to surmount the hurdles captured above, one's station in society appears to be crucial. Alice (Nairobi, 2010), for example, was able to get information in the last example because of her position: "Anyone else would not be able to get the information [from Parliament]. I am able to get the information because I work for the anti-fraud agency". Personal contacts also come in handy. Mark (Nairobi, 2010), who works in the area of communication, explains:

It is based on who you know. There is no formal access. We are usually helped by informal channels. For instance, there is once that we had to go to investigate an issue in a prison. We used our personal contacts, as we could not trust their formal counterparts to deliver.

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<sup>33</sup> A survey Transparency International conducted in 2010 on corruption in Kenya established that just under one half of the respondents (N=1,001) had paid a bribe to receive attention from a government official. See Transparency International, *Global Corruption Barometer 2010*, p. 46. Available at: [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2010/results](http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results) (accessed 10 January 2012).

Etimgeta (Nairobi, 2010), who once chaired a national commission, and Pauline (Nairobi, 2010), as a human rights officer, expressed similar sentiments. Both reiterated that personal contacts were of utmost importance. While this approach may have worked for these interviewees as well as the author of this paper, this state of affairs is highly undesirable. The implication is that those without contacts have very little chances of accessing state-held information. Overall, this could hinder, rather than promote, the fight against corruption. The absence of a mechanism to verify the information that has been supplied also stifles this battle. It is also doubtful whether this state of affairs promotes efficiency and honesty in the public service, as required by Section 8 of the 2003 Public Officer Ethics Act.

#### *Absence of Criteria and an Appeals Framework*

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal [controls] on government would be necessary (Ball 2006: 252, quoting Madison).

As Madison underlines above, guidelines are essential to any organization. There are several advantages that are likely to accrue to an institution that has a clear set of standard operating procedures. In addition to promoting the smooth running of a system (efficiency), rules play a central role in the effective management of an organization (Venter 2003: 287). Guidelines are also crucial because they spell out to employees as well as management and other users the rules of the game. In other words, they set boundaries by delineating what can be done and what cannot be done (Hoege 2002: 3) and, thus, check instances of abuse. They also outline the consequences of particular conduct as well as available channels for seeking recourse. Accordingly, this framework can enhance confidence in an organization, as individuals are aware of the rules, the consequences of non-compliance, and the avenues available for any aggrieved person to seek relief. As long as they perform, individuals would thus not need to place a lot of emphasis on being in the good books of management or colleagues in order to keep their jobs (see also Venter 2003: 288). Guidelines are therefore an important tool for promoting productivity and enhancing staff morale. They also inform employees of the objectives, the mission, and the vision of an organization, as well as the role they can play to realize these. This information can influence the manner in which other players deal with the organization.

It is reasonable to assume that, like any objective organization, any serious government would like to benefit from these advantages. Accordingly,

operating procedures are of central importance. In order to achieve its goals, a government must have a clear set of guidelines, which must be communicated to all its employees and made available to the general public. They must be reviewed periodically to ensure the procedures keep pace with global, local, and regional changes.

As of April 2012, the Kenyan Parliament had yet to legislate comprehensively on issues surrounding access to information. Pauline (Nairobi, 2010), an official who works for a rights organization, noted that there were efforts a few years ago by the state to draft a freedom of information policy. Interestingly, the work of the body that was mandated to carry out this exercise was not made public. The output of this sound initiative remains unclear. Simply put, as of January 2012, there were no official guidelines in Kenya on issues surrounding access to information.

As noted earlier, under the terms of the old and new constitutions, the right of access to information was provided. But for this constitutional promise to be fulfilled comprehensively, there is need for domestic law to flesh out the entitlement. In keeping with international standards, the legislation should, among other things, outline the application procedures and circumstances under which information will be released or denied. It should also establish an appeals framework that aggrieved applicants can follow. Many interviewees whom this study met expressed concerns with the lack of policy guidelines.<sup>34</sup> Under the terms of the old constitutional order, it was quite difficult for one to access government-held information because, among other reasons, there was “no legal obligation to release information” (Mark, Nairobi, 2010). There was also no criterion for storing data. Thus officials are left to decide on which route they will follow. Gaines and Kappeler (2005: 256) assert that this kind of discretion “holds the potential for abuse”. Henry (Nairobi, 2010), a government official, observed that many chose to err on the side of caution: “There are no guidelines to guide civil servants on what should be released or what should not be. The safe position is not to release”. Similar sentiments were expressed by others. Pauline (Nairobi, 2010), for example, lamented that there is no “boundary on what sensitive information is and what it is not. Even where documents are declared public they do not become public”.

The absence of the rules effectively renders the test for disclosure subjective, not objective. Considerable power is vested in officials. They alone

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<sup>34</sup> For instance, Henry (interview on 3 July 2010), Daniel (interview on 5 July 2010), Mark (interview on 9 July 2010), and Pauline (interview on 30 June 2010).

decide the circumstances under which information can be released or withheld from the public. Starling, who worked for the Parliament, noted:

The former Speaker used to decide on a case-by-case basis. Lawyers would write to the Clerk of the National Assembly [with specific requests for the information that they required for the cases that they were running]. The Speaker would then decide based on his discretion. Quite a number of requests were declined. ... The current Speaker is receptive to ideas. [However, in one instance] a law firm wanted a list of members from Province in Parliament for use in court. This request was rejected. I am not sure whether any reasons were given. (Starling, Nairobi, 2010)

Clifford (Nairobi, 2010), an official of the government Public Records Office, also underlined that the director of the department<sup>35</sup> had “power to expand or reduce [the] classification period” of any record held by the government archives. According to this official, the director does not act “unilaterally”. Rather, consultations were usually conducted with the creator of the document—and with security agents, if need be—before any decision was made on whether or not to classify a record:

Sometimes the maker [of the document] could insert a clause that a document be classified. The director could also consult security agents depending on the nature of the document. Any person who wishes to see the document must apply to the director. If he refuses, an applicant can appeal to the Minister for National Heritage. I believe that there is a provision for this in the Public Archives and Documentation Act [(Cap 19, Laws of Kenya)], but I am not sure.

Pauline and Clifford’s sentiments reinforce Kravchenko’s (2010: 254) argument that, without “detailed guidance and procedures”, “civil servants may continue to deny [applicants information] that they request”. A wide discretion of this nature is undesirable because officials can abuse it. A mechanism of checks and balances could also promote greater participation among people in matters of social interest.<sup>36</sup> Accordingly, a set of rules to guide operations of state officials is of the utmost importance.

Due process requires procedures to establish an independent appeals/review mechanism that can be invoked by any person who is dissatisfied with a decision.<sup>37</sup> The United Nations High Commissioner for Refugees (2001, Paragraph 43) points out that “a key procedural safeguard deriving

<sup>35</sup> Established under Section 3 of the Public Archives and Documentation Service Act.

<sup>36</sup> *Palamara-Iribarne v Chile*, Inter-American Court of Human Rights (Judgement of 22 November 2005), para. 83.

<sup>37</sup> See the Banjul Charter, Article 7; ICCPR, Article 14; UDHR, Article 10; 2010 Kenyan Constitution, Article 50.

from general administrative law and essential to the concept of effective remedy has become that the appeal be considered by an authority different from and independent of that making the initial decision". The lack of standards in Kenya makes it somewhat difficult for a dissatisfied party to challenge the decision of an official and, thereby, obtain an effective remedy. Eventually, one would have to rely on general principles of fair hearing. But that is just one of the areas of concern. The general lack of an appeals framework is also disturbing. Contrary to Clifford's belief, there are no provisions for appeal under the Public Archives and Documentation Act (1966), which is the governing legislation for public records.<sup>38</sup> Even if one existed, would it not fail the test as decisions on appeals would apparently rest with the Minister, not an independent body? In Pauline's experience with the National Assembly (detailed above), it is a pity that the information could not be provided, despite its seemingly harmless nature. The next section carries this theme further. Assuming appeals lie with the Minister, the Act is silent on the procedures that an aggrieved person should follow in order to access this forum. Possible grounds of appeal against the decision of the Minister are also not specified. The absence of these procedures and specifications is highly undesirable in a society that is governed by the rule of law.<sup>39</sup> Can justice really be achieved within this framework? Let us now look at the next challenge: the culture of secrecy.

### *Culture of Secrecy*

At the moment, the country runs on informal sources of information because of the culture of secrecy (Evan, Nairobi, 2010).

The fourth challenge facing access to information in Kenya is the culture of secrecy. The sentiments of Evan (above) capture the current trend. Unfortunately, this practice is not unique to Kenya.<sup>40</sup> A number of

<sup>38</sup> According to the Preamble to this statute, it was designed "to provide for the preservation of public archives and public records".

<sup>39</sup> See the Preamble to the 2010 Constitution, which states that one of its objectives is to establish "a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law".

<sup>40</sup> Similar trends have been noted elsewhere. See Stone, R. (2004), *Textbook on Civil Liberties and Human Rights*, Oxford: Oxford University Press, p. 260 (arguing that the culture of secrecy "has traditionally pervaded government in the United Kingdom"); Mol, A.J.P., H.E. Guizhen & L. Zhang (2011), Information disclosure in environmental risk management: developments in China, *Journal of Current Chinese Affairs* 3: 163–192, p. 178 (noting "a considerable number of [officials use] secrecy of data as an [excuse] for their inability to provide ... information"); Lane, E., F. Schwarz & E. Berman (2010),

interviewees that the author met during this study noted the difficulties of obtaining information from the government, because of reluctance by officials to release data which was in their possession.<sup>41</sup> The situation is complicated by the fact that some pieces of legislation prohibit officials from communicating with the public. For instance, Regulation G6(1) of the 2006 Code of Regulations bans public officials from communicating with the media. Clearly, this kind of legislation dilutes significantly the right of ATI. History suggests that the government has not always been keen to release information that is in its custody (Makali 2003: 122). “There was a blanket ban. They classified information per their culture”, asserted Evan (Nairobi, 2010). A complete ban on disclosure is inconsistent with the duty of disclosure.<sup>42</sup> Rather, decision-makers must consider:

[b]oth the degree of likelihood that harm will occur, and the gravity of the harm if it does in fact occur. To say that harm must be certain would in my opinion pitch the test too high, since future events cannot be predicted with complete confidence, but a powerful combination of likelihood and seriousness of harm [must be assessed].<sup>43</sup>

Threats to national security are often cited to justify withholding information.<sup>44</sup> The lack of criteria to guide the information that could be released or withheld has aggravated the situation, as officials are apparently unclear on how to handle requests. Information is “closely guarded” (Henry, Nairobi, 2010). Based on his experience dealing with other government departments, Henry (Nairobi, 2010), a government official, contended that the general attitude is that data:

[s]hould not be shared by civil servants. The safe position is not to give information. There is no obligation to release. ... The risk of giving information is greater than not giving information. So government officials decide to err on the side of caution. Therefore, they end up not giving information.

Kennedy (Nairobi, 2010) attributed the reluctance to provide information or reasons for not sharing information to the lack of trust as well as uncertainty on the side of officials: “people are afraid of being quoted. They are

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Too Big a Canon in the President’s Arsenal: Another Look at *United States v. Nixon*, *George Mason Law Review* 17(3): 737–788.

<sup>41</sup> Interviews with Morgan, Nairobi, 2010; Evan, Nairobi, 2010; Henry, Nairobi, 2010.

<sup>42</sup> *Re D and Another (minors)* (adoption reports: confidentiality) (1995) 4 All ER 385 at 392.

<sup>43</sup> *Ibid.*

<sup>44</sup> Clifford, for instance, observed thus: “If your father was cited as a Home Guard in the Mau Mau era and [it comes out] that he participated in the death of my dad, I would take a machete and chop your head”. Interview with Clifford, 1 July 2010.

afraid of being the source". Evan (Nairobi, 2010), who works for a rights agency, confirmed these sentiments. He explained that, in his experience, "people would rather not release information, as [they were afraid] that it would be used against them". Daniel (Nairobi, 2010), an official who works with a government security agency, stated:

Our department received a questionnaire from a student based in a foreign university. He wanted to know Kenya's position on [the area that the student was researching]. He had all the documentation from his institution as well as a letter from [the applicant's] embassy. The questionnaire first came to my superior and, subsequently, it was passed to me, with a request that I advise on the way forward. I discussed it with my superior and we decided not to complete the questionnaire, as some of the information that was being sought was in our assessment a bit sensitive. The student has since sent us two reminders to complete the questionnaire, but we have not responded. I guess he will get tired and move on.

This narrative raises a number of fundamental questions. Is this conduct by public officials reasonable? Secondly, does it promote "public confidence" as required by Section 9(a) of the 2003 Public Officer Ethics Act? This experience underscores the reluctance on the part of officials to release any information that is in their custody. It could be argued that the sensitive nature of the information sought justified its non-release. However, if this was the real reason, why did the official find it difficult to communicate this to the applicant? It is apparent that there are no boundaries to what is sensitive or not. The test, as earlier noted, is subjective. A lot of power is vested in officials. In this example, they decided not to exercise their discretion in favour of the applicant. Unfortunately, this was not an isolated situation, as this study found. Pauline (Nairobi, 2010), who works for a non-government organization, also stated that she was unable to obtain "judgments from the Children's Court" for an audit of the judiciary that her organization was conducting. Applicants rarely receive any response on the status of their requests (such as the applicant in Daniel's situation) or grounds for refusal. For example, in Pauline's application the refusal was based on the fact that her organization was not party to any proceeding. Other interviewees confirmed this state of affairs. Alice (Nairobi, 2010) observed that court proceedings "are restricted to parties. [Anyone else] must show his or her interest [in order to be granted access]". These experiences affirm Locke's assertion that in a "State of perfect Freedom" people act "depending upon the[ir] will" (Laslett 1988: 269). They also reinforce the argument that officials are generally nervous of being mentioned as the source of information. Thus, and as Henry noted

(Nairobi, 2010), they prefer to “err on the side of caution”. Sadly, this practice is widespread.<sup>45</sup>

Interestingly, this unofficial ban applies not only to sharing information between the government and the public; curiously, it is also found in the context of correspondence between government agencies. Various government departments rarely communicate. According to Daniel (Nairobi, 2010), “different agencies do not speak”. Clearly, this is unfortunate. How is the government, which is designed to function as a single unit,<sup>46</sup> expected to deliver? Indeed, it is unclear how any institution can discharge its mandate effectively or efficiently under these circumstances. The success or failure of any organization depends on the extent to which various departments communicate (Guffey et al. 2003: 21–22). Eventually the current state of affairs is likely to affect not only operations of government but service delivery—a crucial responsibility of any serious state—to the general public as well.<sup>47</sup>

Fortunately, not all government officials have embraced this culture. Some have embraced “a culture of justification”.<sup>48</sup> Rather than be guided by the prevailing practice in government, some officials have heeded their professional calling. Girmo (Nairobi, 2010), a lawyer by profession and who at the time of the field study worked for Parliament, was emphatic that he was ready to “appear in any court to release any document that relate[d] to a committee that [he] was sitting [on], as [he is] an officer of the court”. One would only hope that the trend of openness is embraced across the board. Perhaps this change in attitude could be attributed to the argument by some that “competent personnel” (Starling, Nairobi, 2010) had been hired to work for this institution. For the benefits associated with ATI to be realized in the country, this—hiring of competent personnel—is one of the strategies that could be employed. Granted, there is no hard evidence to support the assertion that professionals perform better than their non-professional counterparts. That said, there is a need to embrace any strategy that is likely to bring about positive change. The next section evaluates other strategies that could promote the right of ATI.

<sup>45</sup> Interviews with Pauline, Nairobi, 2010; Mark, Nairobi, 2010.

<sup>46</sup> See Preamble to Kenya’s 2010 Constitution (the country is expected to function “as one indivisible sovereign nation”).

<sup>47</sup> See Preamble to Kenya’s 2010 Constitution (expressing commitment to nurture and protect the “well-being of the individual, the family, communities and the nation”).

<sup>48</sup> President of the Republic of South Africa and Others v M & G Media Limited, South African Constitutional Court, Case No. 570/2010 (delivered 14 December 2010) (Nugent, van Heerden, Maya, Cachalia, JJA and Bertelsmann AJA).

## MITIGATING THE IDENTIFIED OBSTACLES

This paper examined issues surrounding ATI in Kenya. It identified some of the obstacles that were encountered by those who sought information from the government. These hurdles denied the country and members of the public the benefits of disclosure. In this section some of the solutions to these challenges are explored.

Although Kenya is party to international treaties that govern freedom of information and its current Constitution provides for the right of ATI, there is still no comprehensive domestic legal instrument to regulate the obligation to disclose information. Legislation is required to flesh out this entitlement,<sup>49</sup> with a view towards translating the constitutional promise into a real right. Drafters should draw on experience in other states that have passed freedom of information laws,<sup>50</sup> the historical record (see, for example, Dragos & Neamtu 2006: 12–24; McCrann 2007: 1–17), and empirical data in order to draft legislation that is informed by reality on the ground. In terms of content, the legislation should cover the following aspects: an obligation to provide information, not merely documents; targets for responding to requests; procedures for seeking information; charges, if any; exemptions; grounds for refusal; a requirement for reasons; the supervisory authority and qualifications of members who sit on it; and the question of review. The goal should be towards maximum disclosure (Kravchenko 2010: 228; Pauline, Nairobi, 2010). Any exception should be narrowly construed (Alice, Nairobi, 2010). However, merely setting out the procedural framework is by itself insufficient. In order to comply with standards, the process must set out objective criteria.

To be effective the criteria must make it mandatory for decision-makers to provide reasons for their decisions. Article 47(2) of the Constitution requires “written reasons” to be provided by any person who claims that his or her rights have been “adversely affected” by an “administrative action”. The yardstick for determining whether a statement in law satisfies

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<sup>49</sup> See also Article 3(1) of the Aarhus Convention (requiring state parties to pass domestic ATI laws).

<sup>50</sup> For a discussion of the benefits of borrowing from other systems, see Yeh, J.R. & W.C. Chang (2011), The emergence of East Asian constitutionalism: features in comparison, *The American Journal of Comparative Law* 59: 805–839; Rosenkrantz, C.F. (2003), Against borrowing and other non-authoritative uses of foreign law, *International Journal of Constitutional Law* 1(2): 269–295; and Zongwe, D.P. (2010), Equality as No Mother But Sisters: The Preference for Comparative Law Over International Law in Equality Jurisprudence in Namibia, in M. Killander, ed., *International Law and Domestic Human Rights Litigation in Africa*, Pretoria: Pretoria University Press, pp. 123–147.

the requirements of a decision is whether the reasons clearly demonstrate that a decision-maker has applied legal principles<sup>51</sup> to the issue at hand. In order to meet due process requirements, the reasons must be in writing, clear, and in easy-to-understand language (see also Everson 2007: 49). Practice would thus need to be changed in order to ensure that the constitutional requirement is met. Statutes such as the National Assembly (Powers and Privileges) Act, Preservation of Public Security Act, Service Commissions Act, The Evidence Act, and the Official Secrets Act must be amended to fit within the constitutional order. The blanket ban should be removed, as it affects the enjoyment of this right (see also Klareen & Penfold 2006: 62-10). Several commentators have made this point. Stone (2004: 258) underlines that for the freedom of information law to operate effectively, “all the legal controls operating against” it must be removed. Courts have also expressed similar sentiments. The South African Constitutional Court in *Shabalala v A-G*<sup>52</sup> argued that blanket exclusions were inconsistent with the right of ATI. Due process standards require judicial scrutiny of all applications using set criteria.

Granted, the new constitutional dispensation provides explicitly for the right of ATI. However, it is unclear when comprehensive legislation will be passed. The Fifth Schedule to the Constitution, which outlines the key priority legislation to be passed, is silent on the timelines within which Parliament should pass domestic legislation.<sup>53</sup> This implies effectively that, without any consequence, it could take its time before passing this vital piece of legislation, which has a huge impact on the management of affairs in the country. It is notable that under the terms of the draft of the January 2010 Revised Harmonized Draft Constitution of Kenya that was produced by the committee of experts—charged with drafting the constitution—the Fifth Schedule set a one-year time limit on Parliament to come up with the requisite legislation. Unfortunately, this requirement was removed from the legislation as it underwent the review process. It is unclear why the drafters saw fit to delete it. According to Pauline (Nairobi, 2010), it was “a deliberate attempt [due to] fear of accountability” on the part of government.

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<sup>51</sup> On language, see also Neyroud, P. & A. Beckley (2004), *Policing, Ethics and Human Rights*, Devon: Willan Publishing, p. 190 (arguing that “inaccessible language” could lead to “apathy by its intended audience”).

<sup>52</sup> (1994) 4 All SA 583, pp. 790–791.

<sup>53</sup> By contrast, a time specification has been given—by the Fifth Schedule to the Constitution—for other rights, such as freedom of the media (three years), fair hearing (four years), family (five years), and fair administrative action (four years).

Kenyan laws have a high requirement for the disclosure of information, in the sense that individuals must first obtain consent from high-ranking public officials before they can gain access to certain categories of information. There are two routes that could be followed to surmount this hurdle. The requirement for consent, which is a key obstacle, could be removed altogether from the statutes by amending Sections 18 and 19 of the National Assembly (Powers and Privileges) Act as well as Section 27 of the Service Commissions Act. The second measure also involves amending these sections of the law, but this time round by outlining the procedure that those seeking these data must follow. Venter (2003: 290) argues that for the process to realize its objectives, it should be “comprehensive and complete”. The responsibility of altering laws, by amending or repealing, lies with Parliament, as provided by Article 94 of the Constitution. Even so, other stakeholders—namely, non-governmental agencies, media houses, lawyers’ organizations, courts, faith-based organizations, and the general public, as well as academics and experts in this area of study—must be involved in order to ensure that Parliament discharges this obligation in keeping with due process standards.

Currently, there is no review process for those whose applications for access to information have been rejected. In the Oyoo case, the High Court deplored the fact that the CDF Act does not provide an avenue for any person who is “aggrieved by the list of projects submitted by a particular Member of Parliament”.<sup>54</sup> Clearly, this is inconsistent with due process requirements. Meeting this shortfall requires the inclusion of a review process in the assessment framework. An independent and impartial court or tribunal should hear applications for review lodged by any dissatisfied individual. As required by Article 47 of the Constitution, claims must be heard expeditiously and efficiently. The requirement for reasons could go a long way towards strengthening the review framework. Notably, the time for lodging as well as the grounds of review would need to be set out by the amending or comprehensive legislation.

Fieldwork established that vital information is sometimes withheld from the public, thereby frustrating any meaningful public participation in the management of affairs. In other words, the government is not proactive in issues surrounding ATI. The CDF example confirms this position. The measures that have been discussed in this section (above) would contribute a great deal towards improving the current status of the running of

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<sup>54</sup> John Oyoo and Others v Zadock Syongo and Others [2005] eKLR (footnote 52).

this fund, particularly at the constituency level. In addition, there is a need to divest MPs of this process by amending Section 23 of the CDF Act, as part of the problem lies in the appointment process. This will not be an easy task, considering the political capital that MPs gain by being in effective control of this fund. All “powerful forces” (Legum 1966: 30) will thus have to pull together and push for a change in law. This is not an easy task, considering the power to make and amend laws lies with Parliament. Minimum criteria for members of the Constituency Development Committee should be established. These should be consistent with Article 73 of the Constitution, which requires public officials to demonstrate the following attributes: integrity, competence, impartiality, honesty, and discipline. For the fund to be run professionally, officials must be recruited via an independent and transparent process.

Kenya’s new constitutional dispensation also embraces the concept of public participation at all levels. Article 118 of the Constitution requires Parliament to “facilitate public participation and involvement” in all its affairs. Furthermore, Article 119 of the Constitution guarantees “every person” the right to petition Parliament “to consider any matter within its authority”. Although these provisions are yet to be tested, they are fundamental steps in the right direction on aspects relating to ATI.

The culture of secrecy in Kenya makes it difficult for one to receive information from the state. Rooting out this attitude is not an easy task. There are no easy, quick solutions. Although similar cultures of secrecy have been noted in other countries, Kenya cannot take comfort in this fact. Legal measures by themselves cannot resolve the problem. As Aristotle (Everson 2007: 49) observes, a “change in a law is a very different thing from a change in an art”. A combination of tools is thus required to ensure that this trend is reduced to a minimum. Continuous training and re-training on ethics<sup>55</sup> and best practices, as well as prayers, are some of the steps that could be adopted to meet this goal. In addition, those who lead organizations must embrace excellent leadership habits. It is to be hoped that these traits will trickle down to the rest of the team. Setting realistic performance targets is also one way of ensuring officials comply with their legal mandate. All those who engage in corrupt or improper

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<sup>55</sup> Section 9(g) of the Public Officer Ethics Act, 2003 requires public officers to discharge their responsibilities in a “professional manner”. See also Ross, Y. (2001), *Ethics in Law: Lawyers’ Professional Responsibility and Accountability in Australia*, Sydney: Butterworths, p. 24 (noting the importance of continuous training on ethical issues). For the benefits of ethics, see Ferrell, O.C., J. Fraedrich & L. Ferrell (2008), *Business Ethics: Ethical Decision Making and Cases*, Ohio: South-Western, pp. 18–22.

practices, irrespective of rank, must face the criminal justice system. Montesquieu (2002: 117) contends that, without this, “every other correction” is likely to be “useless”. In order to ensure that information is easily available to the public and other government agencies, there should be a requirement that each department establishes the office of an Information Officer.<sup>56</sup> Among other things, this office should coordinate all aspects of ATI within the relevant department. Public education is key to ensuring that the community is aware of the entire content of the right of ATI (Arnold, Nairobi, 2010).

Lastly, the constitutional requirement that the right of ATI is limited to citizens is problematic. If Kenya is to attract direct foreign investment, this right must be extended to non-nationals. In addition to “financial information” (Wang & Wang 2009: 44), a potential investor would be interested in knowing all other aspects of the institution that he or she would like to invest resources in. Indeed, “markets thrive on information” (Evan, Nairobi, 2010). Secrecy, by contrast, which tends to place crucial information “in the hands of a few” (Siraj 2010: 216) individuals, can lead to corruption, especially if the custodians of information engage in unprofessional conduct. In any event, if the right of ATI is not extended to non-citizens, what would prevent an individual from using a local to gain information? In the globalized world that we live in, one can send and receive information with relative ease electronically. For these reasons, it is difficult to sustain the claim that the right of access to data should be restricted to citizens. Regional courts have underlined the value of embracing this wide approach. In *Claude-Reyes et al v Chile*, the Inter-American Court of Human Rights argued that government actions:<sup>57</sup>

[s]hould be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately.

Simply put, it is in the interest of the country to accord non-nationals this right. The fear of this information being used for terrorist purposes<sup>58</sup> is a

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<sup>56</sup> This is the trend in several countries that have ATI laws. See, for instance, Article 8 of the Liberian Access to Public Information Act (2010); Section 10 of the Ugandan Access to Information Act (2005); Section 7 of the Irish Freedom of Information Act (1997).

<sup>57</sup> Delivered 19 September 2006, at para. 86.

<sup>58</sup> Some interviewees—for instance Zena (interview on 23 June 2010)—made this point.

weak argument, particularly if the legislation adopts the recommendations proposed. After all, Article 46 of the Constitution, which gives consumers the right to “information necessary for them to gain full benefit from goods and services”, does not discriminate between nationals and non-nationals. Accordingly, Article 35 of the 2010 Constitution must be amended. This would bring Kenya into the same league as other states that have comprehensively provided for the fundamental right of ATI by passage of domestic legislation.

#### CONCLUSION: TOWARDS THE NEXT FRONTIER

This paper has demonstrated that although Kenya’s Constitution provides an unqualified right of access to any and all information in the hands of the state and to any information that is in private hands, there are several hurdles to be surmounted for the promises that are contained on the books to be translated into real practice. States have a duty to “protect human rights”.<sup>59</sup> But this obligation cannot be left solely to the government. In Kenya, Article 20 of the Constitution underlines that the Bill of Rights binds “all State organs and all persons”. Thus, all stakeholders must take a proactive role in the implementation of the operational law, if the ‘good’ that Aristotle (Everson 2007: 11) envisages is to be achieved in the country in particular and the ‘community’ at large. Laws that protect whistle-blowers could go a long way towards reinforcing this right (see also Powe 1991: 173; Alice, Nairobi, 2010). Lessons from elsewhere must also be embraced if national legislation is to bear fruit, particularly in its application. As Timothy (Nairobi, 2010) observes, “practical examples” from other jurisdictions could enrich the implementation of the new law in Kenya. There is also a need for hard evidence to support the positive impact of ATI. A systematic approach to this would contribute immensely towards implementation of the law. Granted, a lot of ground has been made up.<sup>60</sup> That said, there is still a lot of work to be done by all stakeholders. That is the challenge ahead.

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<sup>59</sup> *Ximenes-Lopes v Brazil*, Inter-American Court of Human Rights (delivered 4 July 2006), para. 81.

<sup>60</sup> For instance, Zubira observed that “a lot has changed since [she] joined government in 1990” (Interview with Zubira, 11 November 2010).

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## INTERVIEWS

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## CHAPTER ELEVEN

### THE RIGHT TO INFORMATION IN BURKINA FASO: AN UNFINISHED QUEST

Abdoul Karim Sango

#### ABSTRACT

*Since the democratic renewal which took place in 1990, the Constitution of Burkina Faso drafted on 2 June 1991 guarantees the right to information to all citizens. The law legislatively regulates the implementation of this right. Apart from national legislation, the country has signed regional conventions that encourage states to put in place legislation that guarantees the right to information. However, such laws bear many inconsistencies in their implementation, which makes the information right ineffective in Burkina Faso. Aside from legal obstacles to the right to information, there are also socio-cultural factors that are not conducive to the exercise of that right.*

#### INTRODUCTION

The expression of democracy obviously relies on the ability to speak, choose, elect. That ability, however, has no meaning if it is not hinged upon the access to substantial information relevant to the public sphere, the *res publica*, the Republic. (Henri Brun 2005: 91)

This quotation helps us understand the importance of the accessibility of information in a democratic system, for which public information is indispensable. Every citizen has a sense of ownership on the government and expects therefore to be legitimately accounted to. The right to information can be defined in a broader sense as a legal and institutional prerogative for citizens and allows them to be informed on everything that the government is doing. In a more narrow sense, it can be defined as the obligation for decision-makers to make public their decisions and actions which are taken within the framework of their professional duties.

Representative democracy has been regarded as a universal model since the 1990s. Zaki Laïdi (2001: 272) talks about the worldwide triumph of this form of democracy, stating that “time in the world produces values, norms that compel all stakeholders in the international system to conform

to them". African states have joined in the move towards this universal model, for internal as well as external reasons.<sup>1</sup>

In June 1991 Burkina Faso passed a liberal constitution which guarantees the freedom of the press and the right to information.<sup>2</sup> So did many other African countries. The Constitution in its preamble evokes the country's attachment to the democratic rule of law and its adherence to the International Charter of Human Rights<sup>3</sup> and the African Charter on Human and Peoples' Rights.<sup>4</sup> The right to information is covered in many regional or international conventions which Burkina Faso has signed.<sup>5</sup> Because of this, such conventions have become part and parcel of the state's law, as prescribed by the Constitution.<sup>6</sup> From the normative (legal) point of view, the right to information appears to be in effect thanks to the existence of a legal framework that is relatively favourable. Nevertheless, there are limitations which jeopardize the effectiveness of this right.

I will examine in this study the issue of the right to information as one that has been largely observed (Part I), but also as a right that is not sufficiently guaranteed (Part II).

#### THE RIGHT TO INFORMATION IN BURKINA FASO: A RIGHT THAT IS LARGELY OBSERVED

The right to information in Burkina Faso is largely observed. In fact, this right is observed both constitutionally (A) and legislatively (B). Both aspects will be looked at in this study.

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<sup>1</sup> Externally, the reasons are the fall of the Berlin Wall, the disintegration of the Soviet bloc, and the Baule Speech made on 20 June 1990 by the French President, François Mitterrand—and internally, people's increasing aspirations for freedom and democracy. Rallies were organized almost everywhere in Africa by political parties, trade unions, and associations.

<sup>2</sup> Article 8 of the Constitution of Burkina Faso, passed by referendum on 2 June 1991 and promulgated by the Kiti No. AN-VIII-330/FP/PRES of 11 June 1991.

<sup>3</sup> It deals, in this particular Article, with the Universal Declaration of Human Rights and the International Pact on Civil and Political Rights. Article 19 of both major texts refers to the right to expression. Although both texts do not refer specifically to the right to information, we can deduce this from Article 19, which explicitly mentions the public's freedom to search for and receive information.

<sup>4</sup> See Article 9.

<sup>5</sup> It suffices to mention only two of these regional conventions: the African Charter on Democracy, Elections and Governance adopted by the African Union (30 January 2007) and ratified by Burkina Faso on 26 May 2010, and the Protocol A/SP 1/12/01 on Democracy and Good Governance added to the Protocol on Mechanisms for Conflict Prevention, Management and Resolution, Peace Keeping and Security (21 December 2001). Both documents were ratified by the Parliament of Burkina Faso.

<sup>6</sup> "Treaties and agreements normally ratified or approved take precedence as soon as they are published, as long as they are implemented by the other party".

*The Constitutional Observance*

The June 2011 Constitution of Burkina Faso<sup>7</sup> states in Article 8 that “[t]he freedom of the press, of opinion and the right for information are guaranteed”. Even if the original constituent power provides for the freedom of the press and opinion and the right to information in the same Article, it is important not to confuse these notions, however, which are similar but different and complementary.<sup>8</sup>

A fundamental difference between the freedom of the press and opinion and the right to information resides in their respective legal nature. The former are considered as rights and freedoms in their implementation, which is directly and exclusively linked to citizens as soon as they are recognized (Rivero 1974: 120). But the legal nature of the right to information is not clear. Does it derive from rights claims? Rights claims are rights that can only be observed after the creation of an apparatus that responds to specific exigencies. J. Rivero maintains that “rights claims give the state an extremely large discretionary right, so much so that the object of the right remains virtually undefined until the legislator makes the necessary choices” (ibid. 121). The rights to work, to health, and to education are also part of that category. These rights are part of the second generation of human rights. One aspect of the doctrine does not consider the right to information among rights claims. Nathalie Mallet-Poujol categorizes these rights among what she calls “the rights of the third-generation human rights” (2004: 2420). The right to information, according to her, cannot be more than a right that feeds convictions and struggles. She argues, therefore, that “the right to information should remain a right based on a programme, a public freedom that does not give birth to a subjective right” (ibid. 2427).

Should we consider the right to information as part of the third-generation human rights? In our opinion, such right could well belong to the second generation. In fact, contrary to such rights as the right to peace, to the environment, and to development, which belong to the category of third-generation human rights, the right to information can be given a specific bearing, as is the case in states that have provided themselves with a specific legislation for that purpose.

<sup>7</sup> This is the date of the adoption of the Constitution by referendum.

<sup>8</sup> The purpose of this article is not to deal with this issue, but I will go so far as to indicate that freedom of the press and freedom of opinion refer generally to the freedom of expression. This freedom is defined both in its content and its nature. It enjoys a wide jurisprudence, which helps in the understanding of the notion. However, this has not been the case for the right to information. See F. Sudre (1989).

The original constituent power in Burkina Faso has provided for a constitutional protection over the right to information despite uncertainties on its true nature. One can even wonder whether in spirit the Constitution did not intend to keep this in the same category as the freedom of the press and opinion and the right to information. That seems to be the case, because Article 1 of the law 56/93/ADP of 30 September 1993 on the Code of Information in Burkina Faso is drafted in the following manner: “The right to information is a part of the fundamental rights for all citizens”. Based on that disposition, it is apparent that for the legislator, the right to information is as fundamental as the freedom of the press and opinion. It is fortunate to have had the right to information included in the Constitution, which is the fundamental reference in the context of the rule of law. Therefore, we can consider that the Constitution in Burkina Faso has been bold enough. In fact, an analysis of the African constitutions which were passed in roughly the same period reveal that only a few provided for the constitutional right to information (de Gaudusson et al. 1997). It is certainly beneficial to have a right included in the Constitution. In fact, “thanks to its fundamental nature, a law enjoys a super-legality that entails the subordination of all other norms and authorities of those dispositions” (Sandwidi 1996: 10). The implementation of the right to information occurs through the adoption of an ordinary law which allows for its effective exercise by its beneficiaries. Nonetheless, the legislator operates under the control of the constitutional judge in order to guarantee the conformity of the passed law with the Constitution. The existence of an effective control over the constitutionality of the laws is what urges the legislator to conform to the constitutional prescription.

Unfortunately, the legislator in Burkina Faso does not have at his disposal a specific law devoted to the right to information. Using the constituent power approach, which has not made a clear distinction between the right to information on the one hand and the freedom of press and opinion on the other, the legislator limits himself to defining just the conditions of the law’s implementation in different legislative texts that deal with other subjects. Those laws which are known as ordinary laws are not subject to constitutionality control.<sup>9</sup>

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<sup>9</sup> Article 155 of the Constitution states that “the organic laws and rules of the National Assembly should be submitted to the Constitutional Court before their promulgation or implementation. In the same way, ordinary laws and treaties submitted to the ratification process can be referred to the Constitutional Court before their ratification”.

*The Legislative Observance*

It is through the legislative branch that the conditions of implementation of a constitutional law or a freedom are considered. In this regard, Article 101 of the Constitution of Burkina Faso stipulates that the fundamental principles of the freedom of the press and the freedom of access to information are set by the law. In his restrictive interpretation of Article 101, the legislator in Burkina Faso determines the legal regime of the press and the right to information in the same law. Law No. 56/93/ADP on the Code of Information was passed on 30 December 1993. We can therefore agree that unlike Liberia, Guinea, South Africa, Niger, etc., this country does not have a true legal regime for the right to information. In those countries, the legislator is able to separate the legal regime of the press from that of the right to access information. In other words, each of these issues is taken care of by a specific law in those countries. This approach of Burkina Faso's legislator creates confusion between the beneficiaries of the freedom of the press on the one hand, and the right to information on the other hand. In fact, the law on the freedom of the press has a personal area of implementation that is limited to the media and its professionals, whereas the right to information is much broader, as it is applied to citizens.

In Burkina Faso, Article 49 of the Code of Information defends the principle of the right for free access to sources of information. However, that right applies only to professional journalists. Journalists can use that right in their profession. The exact meaning of the notion of a professional journalist was debated up until 2009, but the adoption of Law No. 2009-002/CSC/CAB, on the conditions necessary to carry a press card and a press pass, settled this issue in Burkina Faso. According to that law,

The press card is only granted to professional journalists and those whose work is related to the press. A professional journalist is anyone whose main occupation is in one or more press agencies, in one or more dailies or periodicals, or in one or more audiovisual companies from which he or she gets his or her main earnings. The press correspondent from Burkina Faso working in the national territory or abroad on behalf of a press agency based in the country is a professional journalist if he or she fits the conditions expressed in the first paragraph. Photo journalists, image reporters, audiovisual technicians, graphic editors are also journalists according to this law.<sup>10</sup>

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<sup>10</sup> Article 18 of the law.

In other words, a professional journalist who plans to work on a dossier that is related, for instance, to the theme of corruption has free access to sources of information in relation to the subject. Article 50 of the Code lists the sources of information for journalists. These are the central or regional administration, public collectivities, public services, companies with an economic, social, or cultural nature, and national, regional, or local institutions.

All these entities, which mainly depend on the public sector, are under the obligation to provide the necessary information to any professional journalist. Article 50 carries at least two limitations: first, it compels actors of the private sector to provide information to journalists. The fact that it refers to economic, social, or cultural companies should not lead to confusion, as this involves only public-sector companies. For what reasons are large mining companies which exploit gold in Burkina Faso not obliged to supply information to journalists and ordinary citizens? Those companies whose mining activities greatly affect the rural population socially and environmentally should not be excluded from companies that are obliged to provide information. Mining can obviously be very dangerous to the environment because of the use of chemical products. Rivers can be polluted, engendering negative consequences for people's lives. In this event, the population has the right to get complete and exact information on the causes. They should also be able to determine who bears the responsibility. Unfortunately, this has not often been the case. In 2009, in the Sahel region of Burkina Faso, a river was polluted owing to mining activities. This generated large losses for cattle breeders. A government and Parliamentary investigation was undertaken, but the reports and recommendations which were generated were never open to the public. A press agency initiated its own investigation on the pollution of the river. The agency was able to have access to only two reports after many months of investigation.<sup>11</sup>

Article 50 of the Code of Information does not conform to the principles of the regional directives on mining because it limits the obligation to give information to public-sector entities only. In fact, according to the regional directives, "ECOWAS member states which do not have a law on free information sharing are encouraged to have it in order to promote access of the public and the media to information related to mining".<sup>12</sup>

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<sup>11</sup> See *Le Reporter*, No. 61, [www.reporterbf.net](http://www.reporterbf.net).

<sup>12</sup> Article 13 § 2 of the Directive C/DIR 3/05/09 of 23 May 2009 on the harmonization of the fundamental principles and policies in the mining sector.

Moreover, the 1998 reform on public administration, which was implemented through the adoption of Law No. 013/98/AN of 28 April 1998 on the legal regime for the professions and agents of the public service, redefines the relationship between users of the public service and the institution. In fact, Article 21, Paragraph 1 of the law on public service states that “[c]ivil servants are at the service of users. They should treat dossiers with diligence and courtesy in their interactions with users. Therefore, agents are under the obligation to provide information which the users are entitled to”.<sup>13</sup> With the on-going integral decentralization policy,<sup>14</sup> which started with the municipal election of March 2006, constituencies such as the commune and the city play a critical role in the social and economic development at the local level. Many activity sectors which before were the state’s responsibility have been transferred to these constituencies, which have a local administration which deals with people’s fundamental problems and concerns in various activity sectors, especially in the areas of education, health, and the environment. In order to guarantee a responsible participation of the population in the constituencies’ life and to allow for citizens’ control over their local elected leaders, the General Code on Constituencies stipulates as follows:

Those living in constituencies have the right to information on local management. This right is manifested in:

- 1) Public debates held on local development programs and on the use of the local budget;
- 2) The budget and the constituencies’ accounts are made available to people;
- 3) People’s access to the council of the constituencies’ meetings, except when these are closed sessions;
- 4) The publication of the deliberations from the council and the decisions made by local authorities and related to the budget are made available to anyone. These documents held by the president of the council of the constituencies or an entitled public service concern the following: the erection of public buildings, borrowings, decentralized cooperation, agreements with the State or foreign funders, aid and grants, and participation in the society.

People’s right to information on local issues are based on the on-going dispositions on the public nature of local authorities’ decisions and the freedom of access to administrative documents.<sup>15</sup>

<sup>13</sup> Article 21, Paragraph 2 of Law No. 013/98/AN of 28 April 1998 on No. 013/98/AN legal regime on occupations and agents in the public services.

<sup>14</sup> Burkina Faso has 351 communes since that date.

<sup>15</sup> Article 11 of Law No. 055-2004/AN on the General Code on Constituencies in Burkina Faso, Special J.O. No. 02, 20 April 2005.

This disposition remains useless for the following reasons: except for civil society and non-governmental development organizations, most of rural illiterate people living in these constituencies are not aware of the existence and the importance of this right to information on the management of local issues. It is regrettable that no particular measure has yet been taken to determine the conditions of the freedom of access to administrative documents both at the national and local levels. As is shown by the texts above, journalists in Burkina Faso have at their disposal a relatively important legal basis for their access to information from the state's institutions. They are entitled to this right both as citizens and as journalists. As journalists, they can use the dispositions of the Code on Information. As citizens, they can use their right to information based on the law on public service and on constituencies. However, journalists are still faced with many difficulties in spite of the fact that central and decentralized public administration institutions are subject to the obligation to provide information. Generally, public administration institutions in Burkina Faso are known to disregard the right to free access to information. Journalists are subjected to an uphill battle when trying to get information from the public administration. The President of the Press Editors' Society (SEP) has stated that it is thanks to his personal contacts that he managed to get certain information.<sup>16</sup> In fact, he hardly ever gets anything whenever he sends his journalists to get information. It is only when he himself goes to these institutions that he gets the information, provided that he has a personal friend there.

Faced with the refusal of the administration to satisfy information requests from journalists, Prime Minister Tertius Zongo sent instructions in 2008<sup>17</sup> as a reminder of the obligation of administration services to provide information requested by journalists. By the same token, he set up a Governmental Information Unit.<sup>18</sup> As for the government of Luc Adolphe Tiao,<sup>19</sup> current Prime Minister, a new toll-free line has been established for all citizens. Its aim is to ensure that the flow of information is fluid. The establishment of the toll-free line and the Governmental Information Unit are part and parcel of government's institutional communication to help make visible its policies toward citizens. These mechanisms are still

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<sup>16</sup> Interview on 24 November 2011.

<sup>17</sup> Unfortunately, this instruction, in the eyes of the law, does not create new obligations. This is used only as a reminder of the content of a law.

<sup>18</sup> For more information, see [www.sig.bf](http://www.sig.bf).

<sup>19</sup> Luc Adolphe Tiao replaced former Prime Minister Tertius Zongo.

insufficient. The line might be a good initiative for the government to improve its communication policy toward its citizens, but its efficiency for journalism remains to be seen. In fact, journalists look for information that may disturb. As is said in journalism circles, what is interesting in the media is not those trains which come on time, but those that are late.

The right to information is subject to observance both at the constitutional and legislative levels. Although there is doubt over its actual legal nature, this right in Burkina Faso is regarded as a fundamental right. However, many constraints make this right useless.

#### A RIGHT THAT HAS MANY LIMITATIONS IN ITS IMPLEMENTATION

Despite its existence, the right to information has many limitations in its implementation. Many debilitating factors are noted in its implementation, some of which are related to its normative and institutional framework, while others are related to the socio-cultural context.

##### *Factors Related to the Normative and Institutional Framework*

Two factors linked with the normative and institutional framework will be examined. On the one hand, there is a lack of precision in the normative and institutional framework (a); on the other hand, we note ambiguities in the legal texts (b).

- (a) The lack of precision in the normative and institutional framework.

The existing normative and institutional framework of the right to information in Burkina Faso is not precise. This affects its efficiency. In fact, the Code of Information, which regulates the right to information for journalists vis-à-vis the administration, states that the latter should provide only the “necessary” information.<sup>20</sup> This leads us to ask two questions. The first is on the notion of necessary information. The second question is who determines what is necessary information? Is it the journalist or the informing administrative body? The word “necessary” seems absolutely superfluous. It can also serve as a pretext to prevent the journalists’ access to information. The abusive use of this word is cause for concern. It is

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<sup>20</sup> Article 50 of the Code of Information.

up to the administration to determine which information is qualified as necessary. To write an article, the journalist looks for information related to the article. In the process, it is logical that he determines what information is necessary to the article. But because the administration has to provide only information that is deemed necessary, it can be feared that it will refuse to answer to the journalists' requests which may actually be necessary. The use of the word "necessary" is irrelevant because Article 51 of the Code clearly indicates in which cases the information can be withheld. These are classical limitations: information can be withheld from journalists in the event that it may threaten the state's internal or external security, reveal a strategic military or economic secret, foil, deflect, or compromise an investigation or an on-going legal case, or threaten a citizen's dignity and private life.

These are classical limitations to the right to free access to information, the implementation of which should be under the control of the constitutional judge. There is concern that the rather general nature of these limitations makes them prone to being abused, hence stripping the right to free access to information of its content. Notions such as threatening a citizen's dignity and private life are relatively well-defined in the law. However, the same cannot be said about the notion of threatening the state's internal or external security, for instance. Should we qualify the information according to which deserting Mauritanian soldiers may be in training in Burkina Faso with the purpose of fomenting a coup d'état in their country as of a nature to threaten the state's internal or external security? In a nutshell, it is worth recalling that after a foiled coup attempt, the Mauritanian government alleged, on 26 August 2004 via the foreign press, that those behind the failed coup were trained in Burkina Faso. The latter denied any involvement and invited the African Union to conduct the necessary investigations in order to establish the truth. In an exclusive interview with the state-owned paper *Sidwaya*, the Security Minister, trying to question the patriotism of his opponent Herman Yaméogo,<sup>21</sup> accused him of sending that information to the authorities of Nouakchott.<sup>22</sup>

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<sup>21</sup> Herman Yaméogo is known as the most staunch opponent of the Blaise Compaoré regime. As UNDD President, he is rightly or wrongly accused of having strong relations with some African heads of state who are hostile to Compaoré's regime. Among those were Presidents Laurent Gbagbo (Côte d'Ivoire), General Gnassingbé Eyadéma (Togo), Lansana Conté (Guinea), and Eduardo Dos Santos (Angola).

<sup>22</sup> See *Sidwaya*, No. 5107, 28 September 2004, p. 3.

(b) The existence of some ambiguities in the legal texts

Law No. 013/98/AN (passed on 28 April 1998) on public service occupations and agents has some clauses which considerably limit the right to information. In fact, Article 21 of that law guarantees the right to information, but it says at the same time that some sorts of information are not to be provided and that a list of such information should be established by the managers of the different ministerial departments and institutions. Despite guaranteeing the right to information, Article 21 still bears ambiguities at different levels.

The right to information is guaranteed only to those who ask for information. In other words, the administration does not have to communicate information unless it is requested. The obligation to inform should involve both requested and unrequested information, except for those limitations which are covered by Article 51 of the Code of Information. Nonetheless, the administration in Burkina Faso makes public in a proactive manner some information. This is the case with the institutional practice of publishing laws and rules in the official newspaper before their implementation. The establishment of the Governmental Information Unit serves to partly cater to the concern about information sharing, even when information is not requested. The law does not clearly provide for the list of unclassified information, yet it gives ministers and presidents of institutions the prerogative to determine the list of information that cannot be accessed. Are these people well equipped to determine restrictions to the right to information in the administration? Is such a power not unconstitutional? Limitations to the implementation of a right or a freedom provided by the Constitution can be applied only through the legislative channel.<sup>23</sup>

Since the adoption of Law No. 013/98/AN (on 28 April 1998) on the legal regime applied to civil servants, no administration or institution carries a document that clearly indicates a list of unclassified information. This unfinished regulation of the right to information can also hamper its implementation. This, in fact, can be a pretext for a civil servant to deny the right to information to users when, normally, at this stage of the legislation, nothing should justify refusal to provide information to users, except for unclassified information stipulated in Article 51 of the Code of Information. Article 21 in its present form is an obstacle to the

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<sup>23</sup> Article 4 of the Declaration of Human and Citizen's Rights, adopted in 1789, stipulates that the limits of the law can only be determined by the law.

effectiveness of the administrative action. Guaranteeing the right to administrative information is part and parcel of a policy geared toward the improvement of the relationship between the administration and the administered. This relation of proximity depends on the will to communicate to the public and abandon the practice of secrecy as the basis of administration. It can also be said that the right to information is an effective means to ensure transparency in the functioning of the administration. The right to free ATI ensures to citizens and journalists the means to gauge the breadth and impact of corruption in States where this practice is widespread.<sup>24</sup> The factors at the basis of the legislation's weakness alone do not explain the obstacles to the right to information. The socio-cultural environment should also be factored in.

#### *Factors Related to the Socio-Cultural Environment*

The main socio-cultural factors are the sociological context (a) and the decline of investigative journalism (b).

##### (a) The sociological context

The value of laws and institutions is determined by the societies in which these are implemented. Information had a sacred value in traditional African societies. Some kinds of information were only accessed by initiated people. These were made public only through specific modalities. In many societies in Africa, only griots were entitled to spread the information within the community, depending on the will of the king or chief. Drummers played this role in other societies. Information played a special social function of harmony and cohesion in these societies. Is it, therefore, right to think that the culture of secrecy, which is observed in today's administration in Burkina Faso, is a cultural heritage from the past? As in many domains, the transition to a modern state did not always bring along new habits to suit the new situation. The civil servant's refusal to relinquish information without the go-ahead of his or her hierarchical superior, even when it is not necessary, is by no means different from the behaviour of the traditional griot. This explains why even the simplest information of no apparent importance may be withheld from the user as long as it deals with the functioning of the administration. Just to avoid being the one who provided the information, an agent will keep sending

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<sup>24</sup> In the 2011 Transparency International Report on the indicators of corruption, Burkina Faso was graded 3.0 and ranked 100th out of 182 States. See [www.transparency.org](http://www.transparency.org).

the information seeker to the next agent pretending that the information is not yet available. They often say: "Go and come back next week. Maybe we will be able to do something then!" Tired of going back and forth between his home and administrative services, the information seeker will give up. Such dysfunctions within the administration can at times be unbearable, especially when the information seeker has to cover hundreds of kilometres between his or her workplace and the capital city, as it is in most cases. Numerous cases like this entail the neglect of work, for information-seeking takes time.

Outside the cultural aspect, information retention in the administration in Burkina Faso is practised purposefully. It is clear that information is power. Consequently, public servants demand money before providing information that should normally be freely given. This is how corruption comes into play.

(b) The decline of investigative journalism

The strength of the right to information can also be limited by the actions of the media and journalists themselves. Seeking information is even more important in the practice of investigative journalism,<sup>25</sup> which has been in decline since the murder of journalist Norbert Zongo.<sup>26</sup> In fact, this journalist built the fame of his newspaper *L'Indépendant* on the quality of its articles, which were the product of long investigative work which only he mastered so well. Of course, investigative journalism has not totally disappeared from the media in Burkina Faso.<sup>27</sup> However, only a few are professionally interested in it. Instead, some journalists would rather fabricate rumours when manipulated by politicians or other members of society—hence the inaccurate, incomplete, and unverified information often published in periodicals. This is a serious deontological and ethical problem, while a small effort in information research and some rigour in dealing with the information would allow for a good article with true and

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<sup>25</sup> For the year 2010, no journalist received the Norbert Zongo Prize for the best investigative journalist. Launched every year by the Norbert Zongo National Press Centre, the aim of this prize is to encourage investigative journalism. See [www.cnpress-zongo.org](http://www.cnpress-zongo.org) for more information.

<sup>26</sup> Norbert Zongo was publishing director at *L'Indépendant* newspaper, which he founded. He and three other people were assassinated on 13 December 1998 while travelling together. An independent investigative commission sponsored by the state concluded that the journalist was murdered because he was investigating the death of David Ouedraogo, the driver of President Blaise Compaoré's brother, François Compaoré. The latter had ordered that Ouedraogo be tortured by members of the President's security unit and murdered.

<sup>27</sup> Some newspapers such as *Le Reporter* and *L'Évènement* are trying.

exact information. An endowment fund was put in place to contribute to the development of investigative journalism in Burkina Faso.<sup>28</sup> It provides funds to journalists who submit projects of investigative articles. According to Newton Ahmed Barry,<sup>29</sup> the project's coordinator, the number of financed projects is well below the available funds because of the low quality of submitted projects.

#### CONCLUSION

Decision-makers and civil-society members in Burkina Faso have realized that the right to information has now become an exigency for democracy and good governance. Despite the weakness of the legislative apparatus, many initiatives from civil society are being taken for its amelioration. Such is the case for the Norbert Zongo National Press Centre, which five years ago took on the advocacy for the adoption of a specific law on access to information. Public authorities themselves do not remain completely indifferent to this dynamic. But, decision-makers still resist, pretending that they still do not understand its relevance. The reality is that the adoption of such a law would compel them to practise good political and administrative governance.<sup>30</sup> A much stronger involvement of citizens and various civil-society stakeholders around the issue is needed in order to win the fight for the right to information.

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<sup>28</sup> These funds were established by the Programme for African Investigative Reporting (PAIR). See [www.pair-africa.org](http://www.pair-africa.org).

<sup>29</sup> Newton Hamed Barry is a journalist and editor-in-chief of the newspaper *L'Évènement*. He is known as one of the best investigative journalists in Burkina Faso. This is a product of informal conversations which we have often held on the subject.

<sup>30</sup> I have held conversations with Dr Cyriaque Paré (former Communications Director at the Office of the Prime Minister) about the Norbert Zongo National Press Center's advocacy for the adoption of a specific law on the right to information. He informed me that the Prime Minister Tertius Zongo told him that the majority of his government members are against the adoption of this law for fear that journalists will abuse the law against them.

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## CHAPTER TWELVE

### ACCESS TO INFORMATION AND TRANSPARENCY: OPPORTUNITIES AND CHALLENGES FOR NIGERIA'S FOI ACT 2011

Morayo Adebayo and Akinyinka Akinyoade

#### ABSTRACT

*This chapter assesses the characteristics of Nigeria's Freedom of Information Act, 2011 (FOIA), first in relation to previous Acts in Nigeria which partly regulated access to information, and second, in relation to emerging challenges. Content review and assessment of public perception of the FOIA (passed on 28 May 2011) shows that the Act is intended to make public records and information more freely available and accessible to members of the public and also allow them to have recourse to the courts in the event that their request for information is denied. The law purposefully deals with the shortcomings of pre-existing Acts by introducing statutory provisions aimed at recognizing, ensuring, protecting, and encouraging the exercise of the public's right to information. Information 'sacredness' still persists in public agencies, and the FOIA cannot achieve its purpose without the general public accepting the collective responsibility of demanding and ensuring a transparent government. Consequently, awareness and enlightenment programs should be frequently organized so as to create a participatory platform for members of the public; the judiciary should also actively play its watch-dog role; and the legislature should exercise its mandate to monitor the implementation of the Act and to ensure that it is kept up to date by regular reviews.*

#### INTRODUCTION<sup>1</sup>

In this chapter, we assess the characteristics of Nigeria's Freedom of Information Act (FOIA), first in relation to previous Acts in Nigeria which partly regulated access to information, and secondly in relation to emerging challenges. This assessment is conducted bearing in mind the six

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<sup>1</sup> The authors hereby acknowledge comments from Fola Adekele (Supreme Court of South Africa) and Maxwell Kadiri (Open Justice Society Initiative).

principles set out in Paragraph 2 of Part 4 of the Declaration of Principles on Freedom of Expression, issued by the African Commission on Human and Peoples' Rights in 2002, which elaborates on Article 9 of the African Charter on Human and Peoples' Rights as follows: everyone has the right to access information held by public bodies; everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right; any refusal to disclose information shall be subject to appeal to an independent body and/or the courts; public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest; no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles. Mendel (2008) also sets out the principle of clear exceptions that are limited in scope and subject to strict 'harm' and 'public interest' tests.

On 28 May 2011, Nigeria enacted the Freedom of Information Act, 2011, which is aimed at making public records and information more freely available and accessible to members of the public and also allows them to have recourse to the courts in the event that their request for information is denied. The importance of guaranteeing and protecting the right of ATI<sup>2</sup> lies in the fact that the government may never be truly transparent and accountable without being actively held to account by the electorate.

On the one hand, enacting laws such as the FOIA also necessarily facilitates the prospects of ensuring public participation in governance, in keeping with the provisions of Section 14(2)(c) of the 1999 Nigerian Constitution, which provides that "the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution".<sup>3</sup> Section 39 further guarantees the right of every person to freedom of expression, including the freedom to hold opinion and to receive and impart ideas and information without interference. On the other hand, this provision of Section 39, like the provision of Article 9 of the African Charter on Human and People's Right (Ratification and

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<sup>2</sup> This right is guaranteed by Article 19 of the Universal Declaration of Human Rights and also by Section 39 of the 1999 Constitution of the Federal Republic of Nigeria, Cap. C23, Laws of the Federation of Nigeria.

<sup>3</sup> Cap. C23, Laws of the Federation of Nigeria, 2004.

Enforcement) Act, 1983,<sup>4</sup> is quite weak in terms of the protection it affords to the right to FOI. The weakness stems from the failure to expressly protect the right 'to seek' information, which is the expression used in the relevant portions of Article 19 of both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), respectively.

Using archival records, secondary data, and substantive interviews of officials of some government agencies, this chapter discusses the pre-FOIA legal regime, the FOIA, and post-enactment activities, with a view to assessing the level of transparency in practice and ascertaining the actual and possible impacts of the FOIA against the backdrop of the transparency agenda of the current Nigerian government. In this chapter, all the above-mentioned principles are assessed, with extra attention given to two principles: clear exceptions as they relate to matters of Nigeria's national security, and the principle of actively promoting open government. Bearing in mind the more-than-a-century-old principle of secrecy that permeated Nigeria's public service architecture before the advent of the FOIA, it is pertinent to commence with a history of the right of ATI in Nigeria.

#### PRE-FOIA LEGAL FRAMEWORK ON ATI IN NIGERIA

Before 28 May 2011, there were several laws in force which had provisions regulating the public's right to access information held by public institutions. Such laws include the Evidence Act of 1945,<sup>5</sup> the Statistics Act of 1957,<sup>6</sup> the Official Secrets Act of 1962,<sup>7</sup> the Public Complaints Commission Act of 1975,<sup>8</sup> the Criminal Code 1990,<sup>9</sup> and many other laws which either remotely or directly provided for the right of members of the public to access specific information held by public bodies. As it will be shown in

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<sup>4</sup> The African Charter on Human and People's Rights provides for the right of every individual to receive information and to express and disseminate opinion within the law. In the case of *Abacha v Fawehinmi* (2006) 6 Nigerian Weekly Law Reports, [part 660] at p. 228, the Supreme Court held that by virtue of the African Charter on Human and People's Right (Ratification and Enforcement) Act, which domesticates the Charter, the latter had the same authority as any other Act of the Nigerian National Assembly.

<sup>5</sup> Cap. E14, Laws of the Federation of Nigeria, 2004.

<sup>6</sup> Cap. S10, Laws of the Federation of Nigeria, 2004.

<sup>7</sup> Cap. O3, Laws of the Federation of Nigeria, 2004.

<sup>8</sup> Cap. P37, Laws of the Federation of Nigeria, 2004.

<sup>9</sup> Cap. C38, Laws of the Federation of Nigeria, 2004.

due course, these were laws that also more or less constrained or circumscribed the existence and application of this right rather than strongly providing for it. Laws that provide for it positively, without circumscribing it in any way, include the Environmental Impact Assessment Act, 1992; the Nigerian Extractive Industries Transparency Initiative (NEITI) Act, 2004 (except for its construal confidentiality provision that has not been applied hitherto and is up for legislative review); the Fiscal Responsibility Act 2007; and the Public Procurement Act, 2007. The subsequent paragraphs will expand on how specific legislation impacted on ATI.

The Evidence Act of 1945 is a law that regulates matters relating to the obtainment and admissibility of evidence in both criminal and civil court cases, amongst other things. The Evidence Act also regulates ATI by members of the public; for instance, Section 111 provides that every public officer who has in his custody a public document which any person has a right to inspect, shall upon demand and payment of legal fees give such a person a certified true copy of the document. However, some provisions of the Evidence Act also limit ATI. Sections 165 to 176 in particular deal with information referred to as official and privileged communication. Specifically, judges, magistrates, jurors, legal practitioners, court clerks, and interpreters cannot be compelled to disclose information which came to their knowledge while acting in their official capacities, though they may be examined as to other matters which occurred in their presence while so acting. Also, police officers and magistrates cannot be compelled to disclose their sources of information as to the commission of a crime; subject to the directions of the President or a governor, unpublished official records relating to the affairs of the state cannot be produced or given in evidence; and lawyer–client information is protected as privileged communication. These restrictions are necessary to ensure that the judiciary is able to impartially perform its duties while at the same time protecting people’s right to privacy, ensuring national security, and fostering confidence in the judiciary. However, the disclosure of some of the information under this category can in some instances be compelled by a special order of court.<sup>10</sup>

The 1957 Statistics Act authorized the Federal Statistician to take statistics from time to time and to provide for the collection, compilation, analysis, and publication of statistical information and to provide for

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<sup>10</sup> No organ of government is exempted under the FOI law; the judiciary is also subject to the FOIA.

connected matters. The Federal Statistician is further empowered to obtain information from any person for reasons incidental to the execution of this duty, and failure to furnish the required information is an offence punishable by three months' imprisonment.<sup>11</sup> In Section 12, persons employed in the execution of any power or duty under the Act are bound to subscribe to an Oath of Secrecy before assumption of such duty; a violation of this oath attracts a punishment of one year imprisonment with an option of fine or both. Unlawful disclosure of information is punishable by a term of one year imprisonment; this offence extends to the person who publishes or communicates information which he knows to have been disclosed in contravention of the Act.<sup>12</sup> The practical effect, therefore, is that a journalist who publishes information of this kind is guilty of an offence alongside the public official who makes the disclosure. This provision effectively discourages whistle-blowing activities and thus reduces the possible sources of credible information, as it would be difficult to verify information received from the few informants who provide any information relating to government activities. Inasmuch as the Statistics Act seemed to be aimed at upholding the right of the citizenry to information, it is more of a privilege than a right. The Act did not provide for the right of the populace to make a demand for information; and the right to query the published information is not provided for under the Act.

Another Act that was to follow was the Official Secrets Act of 1962, which made further provisions for securing public safety and connected purposes. Section 1 of this Act makes it a punishable offence to transmit, obtain, retain, or reproduce classified information without due authorization, and such an offence is punishable with a maximum sentence of 14 years imprisonment.<sup>13</sup> However, concerning ATI, the Act provides for restrictions in certain circumstances, such as information for purposes which may be prejudicial to national security<sup>14</sup> and information about things designed or adapted for use for defence purposes during periods of emergency.<sup>15</sup> The Official Secrets Act, being security-centred, was not designed to guarantee or protect the right to information but to curtail it.

Three decades later, the 1990 Criminal Code Act was enacted to also regulate the circulation of information to members of the public through

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<sup>11</sup> Section 14 of 1957 Statistics Act.

<sup>12</sup> See Statistics Act, Section 13, for penalties.

<sup>13</sup> Official Secrets Act, Section 7.

<sup>14</sup> *Ibid.* Section 2.

<sup>15</sup> *Ibid.* Section 3.

some of its provisions. For instance, Section 97 makes it a misdemeanour punishable by two years' imprisonment for a public servant to publish or communicate facts which he obtained by virtue of his office and is duty-bound to keep secret. This section therefore discourages whistle-blowing activities by public officers.

Having considered the provisions of some of the numerous laws which existed to regulate ATI before the advent of the FOIA, it is apparent that before the adoption of this law, there was no all-embracing piece of legislation in place which aimed at ensuring the protection of the citizen's right to know. Rather, there were several laws which either constrained or promoted ATI in varying degrees. This legislative constraint of the right of ATI was attributed by Ajulo (2011) to Nigeria's colonial heritage and long period of military rule, which entrenched in the conduct of government business a culture of secrecy, thus shielding the governments and their actions from public scrutiny.

For the aforementioned reasons, especially in a democratic dispensation, the FOIA became a 'must have' for Nigeria; without it, a transparent and accountable government would have remained nothing but a lofty ideal. The Act once in place declared itself as

an Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.<sup>16</sup>

The Act thus attempts to put an end to the era of a government shrouded in secrecy. In the following section, we examine the FOIA in greater detail.

#### EXAMINING THE FOIA, 2011

The journey from FOI Bill to Act spanned a period of 18 years, during which the proponents of the Bill and other stakeholder groups fought to have the Bill passed into law. The Media Right Agenda (MRA), Civil Liberties Organization (CLO), and the Nigerian Union of Journalists (NUJ) conceived the idea of a Freedom of Information Law for Nigeria.<sup>17</sup>

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<sup>16</sup> The preamble, FOIA.

<sup>17</sup> See Origins of the Freedom of Information Campaign, Freedom of Information Coalition website:

Despite several setbacks and major opposition, the Bill was assented to by Nigeria's President Jonathan on 28 May 2011. The law before its enactment was the topic of many debates,<sup>18</sup> which have continued even after its passage.

Section 1 of the Act boldly declares it to be superior to its predecessors as far as the right to access information is concerned. It reads thus:

Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

### *Relevant Provisions of the FOIA*

This section will expatiate on and critically analyse some core provisions of the FOIA in order to aid in the understanding of the Act.

#### *Record-Keeping and Proactive Disclosure*

The Act proceeds to impose an obligation of proper record-keeping on public institutions.<sup>19</sup> Public institutions are defined as legislative, executive, judicial, administrative bodies, and private bodies which expend public funds or carry out public duties.<sup>20</sup>

Public institutions are required to create records of all their activities, transactions, and operations, and keep, organize, and maintain such information in a way and manner that facilitates public access to the record or information so created.<sup>21</sup> These records existed prior to this enactment, at least for audit purposes; however, the novelty of this section

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[http://www.foicoalition.org/publications/foi\\_advocacy/background.htm](http://www.foicoalition.org/publications/foi_advocacy/background.htm) (accessed on 1 August 2011). Other organizations like the R2K and Open Justice Society Initiative joined the campaign along the line and contributed to the advocacy campaign for the enactment of the Bill into law.

<sup>18</sup> See for instance the submission of the Nigeria Labour Congress (NLC) to the public hearing on the freedom of information bill organized by the Senate committee on information and media on Monday 2 June 2008 at the National Assembly. Available at: <http://www.foicoalition.org/news/2008/submissions.htm> (accessed 30 May 2012); the Lagos Chamber of Commerce & Industry, Observations, comments and corrections on the Freedom of Information Act 2004. Available at:

<http://www.foicoalition.org/news/2008/submissions.htm> (accessed 30 May 2012). Also, AELEX, a firm of legal practitioners and arbitrators, held a lecture on the theme: 'Freedom of Information: Balancing the Public's Right to Know Against the Individual's Right to Privacy', on 24 July 2008.

<sup>19</sup> FOIA, Section 2.

<sup>20</sup> FOIA, Section 31.

<sup>21</sup> FOIA, Sections 2(1), 2(2), 9(1) & 9(2).

is the requirement to create or dedicate specialized units in public offices where records can be easily accessible on demand. For example, the Minister of Finance Mrs Okonjo-Iweala makes public quarterly intergovernmental transfers. This particular practice the minister undertakes pre-dates the enactment of the FOIA, particularly during her first stint in office from 2003 to 2006. Furthermore, under Section 2 Subsection 3, public institutions should ensure the publication of information such as a list of all classes of records under the control of the institution; manuals used by employees; names, salaries, titles, and dates of employment of all employees and officers; names of every official and final records of voting in all proceedings, etc.<sup>22</sup> Subsection 4 of the same section requires that such records and information are widely disseminated and made readily available to members of the public through various means; and such information should be reviewed and updated regularly.<sup>23</sup> Prior to this enactment, proactive disclosure was not generally practised by public bodies (with the exception of a few<sup>24</sup>); thus, the inclusion of this section in the FOIA imposes a new obligatory practice, which if observed will allow members of the public to be more informed about the activities of public bodies and thereby generate more public interest in governance and thus encourage public participation in government. The alteration, falsification, or destruction of public records by a public officer is a criminal offence punishable on conviction by at least one year's imprisonment.<sup>25</sup>

#### *Making Application for Information*

Members of the public are entitled to make an application for the desired information without having to demonstrate any specific interest in the information applied for.<sup>26</sup> Section 8 of the Act stipulates that the fees payable for such applications are limited to standard charges for document duplication and transcription where necessary. In terms of financial costs, this appears to be in favour of those who demand few pages of documents.

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<sup>22</sup> See *supra* Note 20 for a comprehensive list of all information which public bodies are expected to proactively disclose to members of the public.

<sup>23</sup> FOIA, Section 9.

<sup>24</sup> For instance, the Lagos State government, via its official website (<http://www.lagosstate.gov.ng/>) proactively discloses information related to the awards of contracts, the progress made on government projects, proposed projects, achievements, etc.

<sup>25</sup> FOIA, Section 10.

<sup>26</sup> FOIA, Section 1.

For instance, the cost of photocopying one page of a document varies from 3 to 10 Naira.<sup>27</sup> Section 3(3) of the FOIA provides for the right of illiterates and disabled persons, who by reason of such illiteracy or disability are unable to personally make an application for information, to make such applications through a third party. It is further provided for that in the case of an oral application for information being made to an authorized public official, the official shall reduce such application into writing and provide a copy of same to the applicant.<sup>28</sup>

*Time within which to Respond to Requests for Information*

In order to ensure expedient responses to applications for information by entitled persons, the law requires that all such requested information, subject to certain exceptions, shall within seven days be made available to the applicant, and in the case of a refusal, it shall be made in writing to the applicant, with the reasons stated therein.<sup>29</sup> However, where a public institution receives a request for information which in its opinion is of greater interest to another public institution, the recipient institution may within three days, but not later than seven days, transfer the request to the other institution. In this case the application is deemed to have been made on the date in which it was received by the transferee. The applicant shall be notified of the transfer of his or her request.<sup>30</sup> However, Section 6 permits the public institution to extend the seven days' time limit by a time not exceeding an additional seven days if the application received is for a large number of records or if consultations must be made in order to comply with the application and this cannot reasonably be completed within the original seven days' timeframe. Notice of the extension must be given to the applicant, and it must state the reason for extension and that the applicant has a right to have the extension of time reviewed by the court.<sup>31</sup> Failure to comply with the timeframe as specified in the Act is deemed and treated as a refusal of application.<sup>32</sup>

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<sup>27</sup> Street value as at October 2011; approximately 0.06 US Dollar cents (Naira–Dollar conversion rate as at October 2011).

<sup>28</sup> FOIA, Section 3(4).

<sup>29</sup> FOIA, Section 4.

<sup>30</sup> FOIA, Section 5.

<sup>31</sup> The Attorney General of The Federation, through his senior special assistant, reportedly said: "The challenges are that some of the information required may not be readily available within seven days". See "How to make FOIA work, by Soyinka, govts, others", *The Guardian*, Friday, 22 July, 2011, pp. 1 & 4.

<sup>32</sup> FOIA, Section 7(4).

*Refusal of Application and Reviews*

The right to access information is justiciable in terms of Section 1(3), through any State High Court or Federal High Court as the case may be.<sup>33</sup> In the event of a refusal of an application for access to records or information applied for or any part thereof, the public institution must, by a notice given to the applicant, state the grounds for refusal and that the applicant has a right to challenge the refusal and have it reviewed by the court. The notification must also include the name, designation, and signature of each person responsible for the refusal and shall also state whether the requested information or record exists. Wrongful denial of an application is an offence, and the defaulting officer or institution is liable on conviction to a fine of N500,000.<sup>34</sup> An applicant whose request has been totally or partially refused is encouraged by Section 20 to make an application to the court for a review of the refusal. The application must be made within 30 days after the refusal of request by the public institution, or within such further time as the court may, either before or after the expiration of the 30 days, fix or allow. Courts may actually grant a late applicant an extension of time within which to tender an application for review.

The intended effects of these provisions are therefore to ensure that in the event of a wrongful refusal, the responsible officers will be held liable and this will in turn deter indiscriminate refusal of applications. The question arises whether the courts should be the only port of review of these refusals. Of course it might be argued that the judiciary, being the custodian of justice, should be the arbiter of such issues; however, it must be noted that litigants may encounter problems such as delays in court proceedings and the cost of litigation. Nigeria's judicial system is well known for adjournments that stretch cases for long periods.<sup>35</sup> These problems are likely to discourage users of the law from enforcing their rights. In view of the fact that some information requests will be time-sensitive, a more effective option would be the establishment of an independent information commission which is charged with the responsibility of ensuring the promotion and protection of the right of ATI, as is the case in

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<sup>33</sup> *Supra* Note 21.

<sup>34</sup> FOIA Section 7(5); also equivalent to €2175 based on August 2011 Naira-Euro exchange rate.

<sup>35</sup> For further reading on long delays of case disposal in Nigerian courts, see J.G. Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey on Legal Practitioners' (2001) 10 *Social & Legal Studies* 397, 410.

countries like Canada<sup>36</sup> and Belgium.<sup>37</sup> This is a less costly option for the applicant (financially and time-wise)—in comparison with filing a lawsuit at the High Court. The information commissioner would be empowered to make decisions in respect of information requests, which in limited cases may then be the subject of appeals in a law court. This would ensure the quick processing of such reviews and thus reduce the possibility of frustrating information requests. This option was considered during the advocacy for the enactment of this law but was dropped because Parliament stressed the need to reduce the cost of governance in Nigeria. Moreover, bearing in mind the vast geographical spread of Nigeria and the constraints of public funding, its effectiveness in the short-to-medium term would have been limited. But this issue of effectiveness can be resolved by setting up offices in each state, for quick resolution of disputes.

What Nigeria has in addition to the courts' powers of dispute resolution is a combination of the following institutions: firstly, there is the National Human Rights Commission in position to resolve FOI-related disputes, in keeping with its expanded powers under its 2011 amended legislation, which also vests it with the power to make binding orders that are enforceable by the High Court;<sup>38</sup> secondly, there is also the Public Complaints Commission, an ombudsman committed to dealing with FOI-related disputes; and thirdly, there is the oversight responsibility of the relevant committees of Parliament that are created under Section 29(4) of the FOIA. All these institutions essentially serve to complement the judiciary's dispute-resolution role under the Act.

Considering the fact that many public officers traditionally come from a background of secrecy, imposed by the pre-existing laws and the various oaths of offices, the new responsibility of implementing the FOIA may seem daunting. The underlying principles of the FOIA appear contrary to the existing tenets of public service, where civil servants are automatically roped into the rule of secrecy regarding disclosure of information. While it is necessary to ensure the proper training of public officers in line with the provisions of the Act so as to foster compliance, it is also expedient that

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<sup>36</sup> Office of the Information Commissioner of Canada plays this role.

<sup>37</sup> This role is performed by the Commission on Access to Administrative Documents.

<sup>38</sup> See generally, the provisions of the National Human Rights Commission Act 1995 and the National Human Rights Commission Amendment Act, 2010. See also, The Daily Trust, 'Complaint Commission Set to Prosecute Defaulters of FOI Act, says Scribe' (27 March 2012) at

the administrative rule of secrecy be expunged or brought in line with the provisions of the FOIA.

*Exemption of Certain Categories of Information from Disclosure*

Despite the need to have a transparent government, it is also clearly necessary that some categories of information be kept out of the public domain, in order to ensure national security and protect certain individual rights. Thus, public institutions may deny applications for certain kinds of information.<sup>39</sup> Such information include information which, when disclosed, may be prejudicial to national security; information which may constitute a breach of a person's right to privacy; privileged information; proprietary information; and trade secrets. However, these exemptions are subject to overriding public interest. The individual to whom the information relates may also consent to the disclosure of his/her personal information.<sup>40</sup>

Possibilities exist for the indiscriminate refusal of applications on grounds of the above-mentioned exemptions, particularly the exemption of information which may be prejudicial to national security. At present, the definition of exemptions appears to be left to the discretion of public officers, who are required to refuse disclosure if in their opinion public interest will be prejudiced thereby. However, the test of harm to public interest will be of no effect if not defined, as it may then be applied in a blanket manner, which will in turn whittle down the potency of the FOIA. It is important to note that this exemption, like other exemptions, is subjected to the public interest over-ride test, which should be applied by the relevant public official whenever he or she is faced with decision-making in this regard. The approach taken by Bosnia as regards information that relates to national security is worth considering. Article 6 of the Freedom of Access to Information Act for the Federation of Bosnia and Herzegovina, 2001 allows a competent authority to claim an exemption where disclosure would reasonably be expected to cause substantial harm to defence and security interests and to the protection of public safety. Similarly, the United Kingdom Information Commissioner's Office, in its guidance notes, recognizes that "[t]he exemption should not be

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<http://www.dailytrust.com.ng/index.php?option=comcontent&view=article&id=158064:complaint-commission-set-to-prosecute-defaulters-of-foi-act-says-scribe&catid=1:news&Itemid=2> (accessed 30 May 2012).

<sup>39</sup> See FOIA, Sections 11, 12, 14–19 for the comprehensive details of available exemptions.

<sup>40</sup> FOIA, Section 14(2).

applied in a blanket fashion. There must be evidence that disclosure of the information in question would pose a real and specific threat to national security".<sup>41</sup> Also, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (adopted by a group of experts in international law, national security, and human rights on 1 October 1995)<sup>42</sup> provide guiding principles on invoking the exemption from disclosure on the grounds of national security. The following are some of such principles:

Principle 12 (Narrow Designation of Security Exemption):  
that a State may not categorically deny access to all information related to national security, but must designate in law those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13 (Public Interest in Disclosure):  
In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

The test for exemption therefore goes beyond whether the information requested relates to national security; rather, the question to be asked is whether the disclosure of such information is likely to cause specific and substantial harm. The implications of this will be discussed in a later section, where Nigeria's FOIA is weighed with regards to the pre-existing legal framework.

#### *Protection of Whistle-Blowers*

As an improvement on previously discussed Acts, another important section of the FOIA is Section 28. The provisions of this section counter Section 1 of the Official Secrets Act and Section 97 of the Criminal Code Act by providing for the protection of public officers who disclose information without due authorization. The articles 2 and 3 of the section provides as follows:

- (2) nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an[y] information which he reasonably believes to show

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<sup>41</sup> United Kingdom Freedom of Information Act—Section 24: The national security exemption.

<sup>42</sup> Available at: <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> (accessed 30 May 2012).

- a) a violation of any rule or regulation
  - b) mismanagement, gross waste of funds, fraud, and abuse of authority;  
or
  - c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provisions of this act.
- (3) no civil or criminal proceeding shall lie against any person receiving the information or further disclosing it.

These provisions have officially put an end to the forced conspiracy of silence which hitherto was the norm in public service; a whistle-blower is thereby legally protected, in theory, from any form of reprisal which might deter him from making the relevant disclosure. Three years before the FOIA became law, specifically in June 2008, the Nigerian Pension Commission (PENCOM) developed and adopted its Whistle Blowing Guidelines for Pensions. Similarly, the Securities and Exchange Commission, Nigeria (SEC) adopted a Code of Corporate Governance for Public Companies in April 2011. cursory assessment indicates that the SEC's code is relatively weaker than the PENCOM guidelines in terms of whistle-blower protection, but both show a need for streamlining with the new FOIA.

Vis-à-vis the pre-existing legal framework, it is apparent that the FOIA is designed to do away with the era of secrecy while enshrining the public's right to information, so as to encourage public participation in government. The law represents a good starting point in this endeavour, as it purposefully deals with the shortcomings of the pre-existing legal framework by the introduction of statutory provisions which aim at recognizing, ensuring, protecting, and encouraging the exercise of the public's right to information.

#### *Effect of the FOIA on Pre-Existing Legislation*

The technical effect of the FOIA on pre-existing laws has been the subject of some speculation, pointing in one direction. Firstly, the FOIA has in effect technically repealed the Official Secrets Act, and according to Ajulo (2011) both Acts are in conflict with each other. This argument is based on a cardinal principle of interpretation, which is to the effect that where two statutes or laws made by the same legislature are in conflict with each other, the later law prevails as it is deemed to have come into existence to correct the mischief and anomalies of the earlier law. Also, Enonche<sup>43</sup>

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<sup>43</sup> Ene Enonche co-ordinates the Right to Know (R2K) initiative (see [www.r2knigeria.org](http://www.r2knigeria.org)); communication in Lagos, August 2011.

expressed the view that the FOIA is, by reason of its Section 1, superior to and supersedes the Official Secrets Act. The wordings of Sections 1 and 27 of the FOIA affirm that the legislature intended that the FOIA should prevail over all other Acts previously in place which curtailed the right of ATI.

The National Security Agencies Act of 1986 (NSA Act)<sup>44</sup> might, however, not be so easily dismissed. This Act establishes three security agencies: namely, the Defence Intelligence Agency, the National Intelligence Agency, and the State Security Service.<sup>45</sup> The NSA Act provides that the State Security Service is responsible for the protection and preservation of all non-military classified matters concerning the internal security of Nigeria,<sup>46</sup> while the Defence Intelligence Agency is responsible for the protection and preservation of all military classified matters concerning the security of Nigeria, both within and outside the country.<sup>47</sup> According to Enonche, the NSA Act, which is entrenched in Section 315(5) (c) of the 1999 Constitution, continues to exist and function side by side with the FOIA. This is due to the fact that the procedure for its repeal, as contained in Section 9(2) of the Constitution, is yet to be complied with. The concern raised by the continued potency of this Act lies in the criteria for categorizing matters as 'classified'. The question that readily comes to mind is this: what is the yard-stick for determining whether a matter is classified? Section 2(5)<sup>48</sup> of the NSA Act relies on the definition of 'classified matter' given in Section 9 of the Official Secrets Act:

Any information or thing which, under any system of security classification, from time to time, in use by [the government] or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria.

This broad definition fails to provide the criteria for ascertaining that the disclosure of a matter would be prejudicial to national security. Whatever be the criteria for this categorization, it is hoped that with the advent of the FOIA, care will be taken to ensure that such categorizations are narrowly defined and are compatible with democratic principles.<sup>49</sup>

<sup>44</sup> Cap. N74, Laws of the Federation of Nigeria, 2004.

<sup>45</sup> Section 1, NSA Act.

<sup>46</sup> *Ibid.* Section 2(3)(b).

<sup>47</sup> *Ibid.* Section 2(3)(b).

<sup>48</sup> This sub-section states as follows: "in this section 'classified matter' has the same meaning assigned thereto in Section 9 of the Official Secrets Act".

<sup>49</sup> As previously explained above (see the sub-paragraph on exemptions from disclosure).

### *Opportunities Created by the FOIA*

According to Roberts (2002),

FOI laws influence the balance of power within political systems. Opposition politicians, journalists or advocacy groups are better able to hold governments to account, and more successful in exerting influence within the policy process, if they can obtain documentary evidence that reveals the structure of internal debates over policy.

Examples of opportunities that the FOIA will create as checks and balances to government activities, obtained from 23 Reasons for the FOIA by the Right To Know (R2k, 2011), include:

- The general public can now learn how budgetary allocations to repair, provide for, or fund public utilities such as hospitals, roads, power, potable water in the community are utilized and ensure that the right persons are held accountable for none or inadequate performance;
- Budget administrators can more efficiently track where funds in the budget have been allocated and how much has actually been spent;
- Grants administrators will have access to how research grant allocations to academic and other research institutions are made and disbursed.
- Contractors bidding for contracts can determine whether the award of such contracts followed due process stipulated in existing public procurement processes, regulations and legislations;
- The general public can monitor the level of service delivery from government and their effectiveness in all areas including social policies, basic education, poverty eradication programmes and policies; and among others,
- Journalists and the Press can ensure that they do factual reporting, eliminating a culture of rumour and conspiracy; and encouraging informed and healthy public debate.

The above demonstrates that a proper implementation and usage of the FOIA will empower members of the public to check government activities and to ensure that due process is followed in the act of governance. The FOIA will also empower individuals to demand the fulfilment of their human rights and keep government under pressure to perform optimally and in accordance with its mandate.

#### PUBLIC RESPONSE TO AND IMPLEMENTATION OF THE FOIA SO FAR

##### *Usage and Implementation*

Within two months of its enactment, the FOIA was put to the test in a suit initiated by the Executive Director of the Committee for the Defence of

Human Rights (CDHR) Olasupo Ojo, suing for himself and on behalf of the CDHR against the Economic and Financial Crimes Commission (EFCC). In this case, the former applied for the leave of court to apply for a judicial review of the refusal of an application for information by the EFCC (Ketefe 2011). The Court in its ruling, dated 18 July 2011, granted the leave to apply for a judicial review and on 1 March 2012 granted an order of mandamus against the EFCC, requiring it to give CDHR the requested information.<sup>50</sup> It therefore took nine months from the beginning of the case to get this order, which underlines the point raised about delays in the Nigerian judiciary. But bearing in mind the history of adjudication in Nigeria, getting this order in nine months seems to suggest that the courts are sensitive to the provision of Section 21 of the FOIA, which urges it to summarily consider FOI cases.<sup>51</sup>

Some governmental agencies<sup>52</sup> were assessed as to level of implementation of the FOIA. At the time of the survey in July 2011, it was discovered that there had been no intentional steps taken yet in line with the implementation of the FOIA—publishing minutes of meetings, dedicating special units to ease access to information—and the rule of sacredness of official information was still binding and entrenching a culture of secrecy.<sup>53</sup> In addition, programs for the training of public officers as demanded by Section 13 of the FOIA have yet to commence. However, this is changing with the public circular issued by the Attorney General of the Federation (AGF) to all ministries, departments, and agencies of government (MDAs) on 29 January 2012 (published in the *Daily Trust* newspaper on 9 February 2012) and two follow-up circulars issued by the Head of the Civil Service (HoS) of the Federation on 31 January and 1 March 2012 respectively, also urging compliance with the FOI law, including directing MDAs to establish FOI compliance units in their respective institutions and to establish intra-ministerial FOI implementation committees. The HoS also has a road map for FOI implementation and an accompanying work-plan.

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<sup>50</sup> First-hand information received from the law firm of Bamidele Aturu & Co, counsel to the claimants, on the 31 August 2011.

<sup>51</sup> For details of the allegation, see EFCC media and publicity unit, 'Anti-Graft War: EFCC Accuses CDHR of Compromise', June 2011.

<sup>52</sup> Public bodies contacted are Lagos State Ministry of Water Front, Federal Ministry of Finance, and Ekiti State Ministry of Finance.

<sup>53</sup> A discussion with several journalists also indicated that it was too early to conduct a survey on the workings of the FOIA.

*Awareness Creation and Public Enlightenment*

On 21 July 2011, a town-hall meeting was organized by the Newspaper Proprietors' Association of Nigeria (NPAN), tagged 'For the Public Purpose: Deepening the FOIA'.<sup>54</sup> The agenda of the meeting was to critically analyse the FOIA, create enlightenment as regards its purpose, and discuss possible ways of deepening it in order to make the best use of it, and at the same time to encourage the public to exercise its right to information as guaranteed by the Constitution and protected by the FOIA. It is only through the exercise of this right by members of the public that the level of transparency necessary for open and accountable governance can be achieved.

During this meeting, one participant, Professor Wole Soyinka (Nobel laureate), made a call to President Jonathan to take advantage of the provisions of the FOIA by initiating an enquiry into the health status, hospitalization, and death of the late President Yar'Adua.<sup>55</sup> Despite widespread societal interest, this request for information is yet to be considered. We concede that such requests should not be made in a forum that gives the impression of playing to a public gallery; written requests need to be made.

These developments represent a step in the right direction as they demonstrate the readiness of some members of the public to make use of the law. However, the awareness campaigns need to be intensified for maximum impact.

*Enactment of State FOI Laws*

Another question which affects the implementation of the FOIA at the level of state governments is whether the law is applicable to states within the federation or whether its scope is restricted to federal government and federal institutions. Nigeria comprises 36 states and a Federal Capital Territory (FCT, Abuja). A popular opinion is that the states are entitled to enact their own state laws because part of the scope of the FOIA falls within the concurrent legislative list. This view is further strengthened, for example, by the recent enactment of the Ekiti State Freedom of Information Law.<sup>56</sup>

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<sup>54</sup> See Public invitation: *The Guardian*, 15 July 2011, 18.

<sup>55</sup> 'Test FOI with probe of Yar'Adua's illness', *The Punch*, Friday, 22 July 2011, 6. See also *The Guardian*, *supra* Note 32.

<sup>56</sup> 'Ekiti domesticates FOI as Fayemi signs 8 bills into law', *Business Day*, 4 July 2011. Available at:

However, the FOIA implements two distinct and exclusive constitutional mandates of the National Assembly. First, Item 60(a) of the 2nd Schedule, containing the exclusive legislative list, empowers the National Assembly exclusively to make laws for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution. Section 14(2)(a), Chapter II of the Constitution provides that “[s]overeignty belongs to the people of Nigeria from whom government derives its power and authority”. Section 14(2)(c) also requires that “the participation by the people in their government shall be ensured”. The FOIA implements these constitutional responsibilities of the National Assembly (Right to Know, 2011).

In addition, Item 4 of the Concurrent Legislative List, contained in Part II of the 2nd Schedule to the Constitution, provides that the National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation. However, Item 5 provides that a House of Assembly may, subject to Item 4, make laws for that state or any part thereof with respect to archives and public records of the government of the state.

There have been several instances<sup>57</sup> where the courts have been called upon to intervene in situations where both the state legislators and the federal legislators have enacted laws which exist side by side on concurrent matters such as this. And in instances where the state and federal laws do not contradict each other,<sup>58</sup> the courts have been quick to apply the doctrine of covering the field. For instance, in the landmark case of *Attorney General (Ogun State) v Attorney General (Federation)*,<sup>59</sup> Fatayi Williams (Justice of the Supreme Court) stated as follows:

It is, of course, settled law, based on the doctrine of covering the field ... that if Parliament enacts a law in respect of any matter in which both Parliament and a Regional Legislature are empowered to make laws, and a Regional Legislature enacts an identical law on the same subject matter, the law made by Parliament shall prevail. That made by the Regional Legislature shall become irrelevant and therefore, impliedly repealed.

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<http://www.businessdayonline.com/NG/index.php/news/latest/24053-ekiti-domesticates-foi-as-fayemi-signs-8-bills-into-law> (accessed 11 June 2012).

<sup>57</sup> See the following cases: *Attorney General of Abia State v Attorney General of the Federation* (2002) 17 Weekly Reports of Nigeria, p. 1; *Rector Kwara Poly v Adefila* (2007) 15 Nigerian Weekly Law Report, [part 1056], p. 42.

<sup>58</sup> In the event of any contradictions between a federal and a state law in respect of a concurrent matter, Section 4(5) of the 1999 Constitution, which provides that the law made by the national assembly shall prevail, becomes applicable.

<sup>59</sup> [1982] 1–2 Supreme Court Cases, p. 13.

The Court of Appeal reiterated this position in the case of *Rector, Kwara Poly v Adefila*.<sup>60</sup> Thus, the States need not invest additional legislative resources in the enactment of state FOI laws. The federal legislation has sufficiently covered the field (Mowoe 2003), and each state government should implement the FOIA.

#### CHALLENGES FOR THE IMPLEMENTATION OF THE FOIA

The FOIA, like almost all enactments, is subject to certain challenges which, if not adequately and promptly tackled, may impede the implementation of the law. Some of these challenges include:

##### *Misconception of the FOIA as Press Law*

The law is widely viewed and even sometimes referred to as a press law, and more so in light of the fact that during the campaign for its enactment, journalists were seen to be at the forefront of the campaign.<sup>61</sup> Public appreciation of the purpose of the FOIA is somewhat limited by a skewed perception that the press/media should spearhead the exercise of the right to information.

##### *Attitude of Courts*

Bearing in mind that the Act defines 'public institutions' to include legislative, executive, judicial and administrative bodies, and that the Nigerian Judiciary is not totally independent of the legislative and executive arms of government, there are potential tests for the judiciary:

- How can judges, who are appointed by the legislative and executive arms of government,<sup>62</sup> be truly independent of these to the extent that they will boldly order such bodies to release public documents in the event of an unlawful refusal of an application for access to information?
- How will the judiciary treat applications for information that might expose corrupt practices in the judicial system? The PCC is relevant in this case, since under its enabling legislation it is specifically empowered to investigate administrative infractions in the judiciary. Administrative

<sup>60</sup> (2007) Nigerian Weekly Law Report, [part 1056], p. 42.

<sup>61</sup> Personal communication with Bola Agunbiade, Senior Special Assistant to the Governor of Lagos state on Public law and Constitutional Matters, 1 August 2011.

<sup>62</sup> See Sections 231, 238, 250, 256 and 271 of the 1999 Constitution, for provision relating to the appointment of Judges.

decision-making on FOI requests made for information held by the judiciary itself on its administrative and financial practices would also fall under the PCC's investigative role.

- Will they be willing to impose the maximum penalties for the offences created under the Act?

### *Inadequate Awareness and Understanding*

Without public participation, Nigeria cannot honestly lay claim to an effective ATI law. Not many members of the general public are interested in picking up a statute with the intention of reading and understanding its contents: the general perception is that the understanding of such documents is beyond the reach of the average non-legal mind. This therefore constitutes a hindrance to the effective implementation of the FOIA. Many may have heard of the Act, but very few understand the positive impacts likely to ensue from its full implementation. Thus, there is a need for the following: creation of more awareness through the production and wide dissemination of easy-to-read versions of the Act, perhaps in local languages; production and wide dissemination of materials which explain the advantages of the FOIA; and organization of educative and informative fora on the FOIA. Until this is done, public understanding will remain low, and there will be little or no participation from the members of the general public. The efforts of R2K and the Open Society Justice Initiative to address this issue are noteworthy. They have enabled the publication of a version of the FOIA in Hausa, Yoruba, and Igbo, while a translation into pidgin English is on-going.<sup>63</sup>

In South Africa, for instance, Section 10 of the South African Promotion of Access to Information Act, 2000 (PAIA) mandates the South African Human Rights Commission (SAHRC) to compile a guide in each official language on how to use the PAIA. The SAHRC is also charged with the responsibility of enlightening members of the public on ATI, how to make requests, where to go for what information, what to do if the request is denied, etc.<sup>64</sup> Such enlightenment helps to foster participation from

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<sup>63</sup> R2K Blog, Right To Know (R2K) Translates The Freedom Of Information Act (FOIA) 2011 And Other Educational Publications Into Hausa Language; Other Translations To Follow Shortly, 15 March 2012. Available at: [http://www.r2knigeria.org/index.php?option=com\\_content&view=article&id=245:right-to-know-r2k-translates-the-freedom-of-information-act-foia-2011-and-other-educational-publications-into-hausa-language-other-translations-to-follow-shortly&catid=72:release&Itemid=319](http://www.r2knigeria.org/index.php?option=com_content&view=article&id=245:right-to-know-r2k-translates-the-freedom-of-information-act-foia-2011-and-other-educational-publications-into-hausa-language-other-translations-to-follow-shortly&catid=72:release&Itemid=319) (accessed 30 May 2012).

<sup>64</sup> Personal communication of Maxwell Kadiri with his colleagues at SAHRC indicates that there is a challenge to meeting this obligation due to poor funding. Moreover, with the

the general public. Similarly in India the Parivartan organization, founded by Arvind Kejriwal, seeks to promote transparency and accountability in every sphere of governance, educating people about the Right to Information Act, 2005 and how to use it, with a simple message: "From birth to death you pay taxes to the government. It's your money. So why don't you ask the government how your money is being spent?" (Sen 2006).

### *The Rule and Culture of Secrecy in Public Service*

As explained above, there is an ingrained culture of secrecy in the public service in Nigeria, which appears to have been derived from the automatic rule of sacredness of official information bestowed on civil servants on assumption of office. Thus, the average public servant cringes at a request for information from members of the public; yielding to such a request might under the previous legal regime cost him his job, or at least result in a reprimand, or even result in his being imprisoned based on the provisions of the Official Secrets Act, the Criminal Code, the Statistics Act, and similar provisions in other laws that were applicable hitherto. It is therefore quite unrealistic to expect the same public servant to automatically switch over to being a person who is open to the release of information which he/she was hitherto oath-bound to keep hidden from public scrutiny. In order to achieve a transition from the era of information sacredness and oaths of secrecy, there is an apparent need for a reorientation of public officers. In the absence of this, public officers will remain suspicious of demands for information and will impulsively decline such requests or attempt to pass on the burden of responding to the request to a superior officer. This will in turn engender delays in response to requests and thus impede successful implementation of the Act. This is also the reason why Section 13 of the FOIA, which provides for the training of public officials in the public's right to access information, was specifically included in the law. The idea is to use it to gradually wean public officials away from a default position of secrecy to one that embraces and encourages openness.

### *State of Record-Keeping*

Most governmental agencies lack modern systems of record-keeping: records are still mainly paper-based and highly disorganized in terms of location and storage, even where there is willingness to release information. For instance, information retrieval at the Lagos State Probate Registry is a difficult undertaking which cannot be completed within

the seven-day time-frame stipulated in the Act. Thus, to achieve compliance with the provisions of the Act, an overhaul of record management processes is inevitable and urgently required. The impetus for this is further strengthened by the very clear wording of the provisions of Section 2(1), 2(2), 9(1) and 9(2)—which, by the way, remains the only provision of the FOIA that was restated twice, for purposes of emphasis and in recognition of the deep-seated challenge of record creation, record-keeping, record organization, and maintenance of same in the public service generally. However it is encouraging to note that in March 2012, the Head of the Civil Service of the Federation organized a week-long training for record management officers in the federal civil service from salary grade level 04 to 14 on new record management practices in the light of the enactment of the FOIA.<sup>65</sup>

#### CONCLUSION

On the FOIA to date, some issues stand out. Firstly, the law purposefully deals with the shortcomings of pre-existing Acts, with the introduction of statutory provisions aimed at recognizing, ensuring, protecting, and encouraging the exercise of the public's right to information. For example, by reason of its Section 1, it supersedes the Official Secrets Act and other related laws that hitherto created a culture of secrecy in the public service. But secondly, the status quo of information sacredness which existed in public agencies prior to FOIA still persists in some form, even though necessary steps are being taken towards ensuring that this secrecy culture is curtailed. In addition, the definition of exemptions may be abused. Moreover, there exists a wrong public attitude, born out of ignorance that legislation like the FOIA is suitable for understanding by legal minds only, and the media is expected to be at the forefront of testing its application.

The FOIA represents a legal framework within which the right to access information could thrive. It allows ATI as a right and attempts to end the era of government secrecy, but it is only the beginning of a long and

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amended NHRC legislation which also grants it direct funding from the consolidated revenue funds account of Nigeria, the NHRC would also be able to take on this role as part of its expanded Human Rights public enlightenment campaign in the country.

<sup>65</sup> AllAfrica, 'Nigeria: Federal Civil Servants Undergo Training in Proper Record Keeping' (14 March 2012). Available at <http://allafrica.com/stories/201203140952.html> (accessed 30 September 2012).

tedious journey. However, the failure to extend the scope of the Act to include information held by purely private bodies<sup>66</sup> cannot be over-emphasized. This has implications for private-sector employees, labour union agitation for rights, and accountability of management of companies. At this early stage of Nigeria's FOIA, pitfalls identified with regard to exemptions and secrecy to which civil servants are bound pose risks to the successful implementation of the FOIA. This is not to say that FOI implementation in other countries has been smooth; but problems are peculiar to national contexts.<sup>67</sup>

The FOIA cannot achieve its purpose without the general public accepting the collective responsibility of demanding and ensuring a transparent government. Consequently, awareness and enlightenment programs should be organized frequently so as to create a participatory platform for members of the public. The judiciary must step up to its responsibility as the watch-dog, judicial reviews should not drag on longer than necessary. For instance, in the case between CDHR and EFCC, the judicial review of the refusal of application for information lasted approximately nine months.<sup>68</sup> The speedy resolution of such cases is critical to the relevance of the requested information; thus, unnecessary judicial delays must be avoided in order to give credence to the FOIA. The legislators must also ensure continuous review of the Act, as usage will continue to expose loopholes, which must be filled in order to ensure optimum impact.

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<sup>66</sup> By this we mean private bodies which do not utilize public funds and neither perform public functions nor provide public services—i.e. they are purely private. (This category has yet to be covered by the FOIA).

<sup>67</sup> For instance, the Canadian Access to Information Act of 1982 is, according to David Bansir, *Freedom of Information Around the World 2006*, in need of updating: "There is wide recognition that the [Canadian ATI] Act, which is largely unchanged since its adoption, is in drastic need of updating".

[http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf). See also Stanley L. Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, 2008. A recent study has ranked Canada's Access to Information Act last amongst five countries surveyed. See "Canada ranked last on freedom of information", *Fort Frances Times Online*, Monday, 10 January 2011. Also, see Bookman & Amparan's (2009) study of Mexico; Prat 2005; Jenkins & Goetz, 1999.

<sup>68</sup> *Supra* Note 54.

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