ARTICLE 19

Kenya: Realising the Right to Information

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Contents

20. The County Governments Act, 2012.
21. Recommendation No. 3 – "Other Recommendations", page 479 of CIPEV.
22. ICJ Kenya – Towards Implementation of Access to Information in Kenya, Page 51.
23. The Access to Information Bill 2013.
24. Clause 10 (1) and 19 (4) of the Access to Information Bill, 2013.
25. ICJ Kenya - Implementation of Access to Information in Kenya, page 45
26. Chapter 187, Laws of Kenya.
27. Chapter 185, Laws of Kenya.
28. Chapter 19 of the Laws of Kenya.
29. Public Participation and Parliamentary Oversight: Legal Reforms and Policy Options – Africorg; Page 10.
30. The County Governments Act, 2012.
31. Article 19: Right to Information and Parliamentary Accessibility, Accountability and Transparency – The Kenya Parliament Case; Page 8.
32. High Court Petition No 549 of 2013
33. High Court Petition No 43 of 2012
34. Petition 403 Of 2006; High Court of Kenya
35. High Court of Kenya Petition No 43 of 2012.
36. The Public's Right to Know: Principles on Freedom of Information Legislation; Article19.
37. High Court Petition No. 155A of 2011.
38. High Court Petition No. 398 of 2012.
39. See: http://www.opendata.go.ke
40. Access to Information: A Key to Democracy, The Carter Centre, November 2002.
41. Article 249 (1); Constitution of Kenya, 2010.
42. UNDPs (1997) Public Information Disclosure Policy, paras 1 and 6.
43. The term 'private sector' is used for the statutory bodies that are not owned by the state, and are operating mainly for profit, including businesses, companies, corporation, firms, banks etc.
44. Article 10, Constitution of Kenya, 2010.
45. Chapter 6, Constitution of Kenya, 2010.
46. Section 29 The Ethics and Anti-Corruption Commission Act.
47. Section 95(1) County Governments Act.
48. Section 95 (1) County Governments Act.
49. Mining Act Cap 306 of 1940, Section 12(4)
50. Survey can be found at: https://opendata.go.ke/Education/Julisha-Survey-on-kenya-ICT-Market-Overview-2011

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"The free flow of information and ideas lies at the very heart of the very notion of democracy and is crucial to the respect for human rights; central to the guarantee in practice of free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public"
Abdul Waheed Khan, Assistant Director General for Communication and Information, UNESCO

"Reaffirming ARTICLE IV(1) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session held in October 2002, which provides that "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"
The African Platform on Access to Information Declaration (Preamble)

"Convinced that it is of critical importance that clear and comprehensive principles are established to guide promotion and protection of the right of access to information in Africa through the adoption and effective implementation of appropriate national laws and regulations"
The African Platform on Access to Information Declaration (Preamble)

Executive Summary

There are several benefits to be gained if information is made available to the public. Primarily, access to the right information has an impact on the enjoyment of other fundamental rights including life, health and education. It has effects on all other spheres of life, be they political, economic, social or cultural. The provision of accurate information gives individuals the data and knowledge they require in order to participate effectively in the democratic process in any politicised society. An informed public is more likely to contribute to the economic development of any society than an ignorant public, and may also act as a guard against corruption within and outside of government.

Over the past three decades, Kenya has struggled with a lack of government transparency. However, all is not lost. Transparency, accountability and participation are now entrenched in Kenya, sitting at the heart of the 2010 Constitution of Kenya.[1] Similarly, a number of international and regional treaties that create clear legal obligations and commit the government to enacting and implementing comprehensive right to information laws, as well as to sharing periodic implementation reports, also now form part of the country's law.

As one of the 16 countries in Africa whose constitutions expressly provide for access to information,[2] Kenya has recently made significant steps to improve access to information despite the lack of right to information (RTI) legislation.[3] With initiatives like the Kenya Open Data Initiative (KODI), the development of a detailed ICT Master Plan, and its subsequent implementation creating the national ICT infrastructure and commitment to the Open Governance Partnership (OGP), Kenya has shown a willingness to establish a culture of openness in governance.

However, there still exist legislative, institutional and political barriers. Beyond the lack of comprehensive legislation, other significant challenges include the lack of any clear implementation and complaints mechanism; citizens' lack of awareness of their right to information; an entrenched culture of secrecy; and public officials' limited understanding of their obligations under the RTI.

Right to Information (RTI) laws offer guidance by proposing minimum standards for mechanisms which the public can use to request information from state and public institutions and relevant private bodies. These laws usually validate the right to information with a presumption in favour of granting access, setting timelines within which requests must be processed and making recommendations regarding associated costs.

Where the presumption in favour of granting access is concerned, laws often spell out provisions for proactive disclosure, clearly establishing a legal obligation on state and public authorities not only to respond to requests but also to "push out" information. Such laws also establish any exemptions from access, such as the protection of privacy, trade secrets, and national security. Thus, even though Kenya has instituted different open data initiatives and launched e-government services, it is critical that a comprehensive right to information law is enacted to clarify how the constitutional provisions are to be implemented and create clear structures for oversight.

This working paper seeks to achieve five main purposes. First, it seeks to underscore the importance of enacting a comprehensive RTI law, both as a legal obligation (internationally and locally) and as a positive practice for a country that is seeking to be inclusive, open and accountable in its management of public affairs. Second, it shows what has already taken place on the road to developing a comprehensive access to information law in Kenya, and comments briefly on the Access to Information Bill, 2013. Third, it makes a brief assessment of the extent to which different public bodies have implemented constitutional guarantees for access to information in the first four years of constitutional implementation. Fourth, it aims to create awareness and clear understanding of the policy issues which different stakeholders and public bodies must consider as they seek to implement the Constitution's provisions on access to information. Lastly, it puts forward recommendations to those bodies and parts of society which are critical to the full realisation of the right to access information in Kenya.

The paper is therefore relevant to both state and non-state actors. For instance, civil society organisations seeking to promote and defend the right to access information, especially those working with minority and marginalised groups like people with disability, will find clear provisions in the paper about how and where they can engage. It may also offer some guidelines to those groups that have previously conducted social accountability programmes.

For public bodies, especially Parliament, the Executive, the Judiciary and Constitution Commissions, the paper reiterates their individual and collective roles in promoting and defending the right to information. It also underlines how enhanced access to information may increase citizens' trust in public bodies and enhance the public bodies' efficiency and effectiveness in public service delivery.

1. Introduction

Democracy depends on knowledgeable citizens whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold public officials accountable.

Access to information allows individuals and groups to understand government policies and the decisions governments make relating to health, education, housing and infrastructure projects, as well as the factual basis for such decisions. This makes it a basis for stakeholder engagement, and a key lever for good governance, transparency, accountability and rule of law.

Making information easily accessible is important for three key reasons:

- It is a platform for innovation that will generate economic and social value: This is achieved through efficiencies within government, service delivery improvements and citizen feedback systems. Ultimately, this should enhance the creation of new job opportunities and create a suitable environment for investments.
- It enables data driven decision making: Parliamentarians, policy makers, civil society organisations and the general public can access and analyse progress on various aspects of society, thereby helping them make accurate decisions on issues that affect people's lives.
- It is the foundation for improving transparency and accountability: Detailed, timely information on the operation of government, the impact of the work it does and the opportunities that exist for improving the country are paramount for holding public figures accountable for how public resources are used.[4]

Before and after the enactment of the Constitution in August 2010, the government of Kenya made some effort to enhance openness within government structures and operations by introducing initiatives aimed at facilitating the availability and accessibility of information to all Kenyans.

In 2004, the National Alliance of Rainbow Coalition (NARC) government established the e-government department under the Office of the President. Its role was to have oversight so that it could galvanise all ICT projects within government aimed at enhancing service delivery. This was followed by the creation of the Ministry of Information, Communication and Technology to handle the wider universal access goals with the aim of enabling citizens to participate actively in a global knowledge-based economy.

The Ministry of Health rolled out a number of interventions in conjunction with select civil society organisations such as *afri afya* to improve access to health management information through the use of ICTs.

In July 2011, the government launched the Kenya Open Data Initiatives (KODI), making more than 390 data sets freely available to the public through a single online portal. The goal of running the open data portal was to make core government information, including development, demographic, statistical and expenditure data, available in a digital format which researchers, policymakers, ICT developers and the general public could use.

A month later, Kenya began the process of joining the Open Government Partnership (OGP) leading to its eventual admission in April 2012. This made Kenya only the third country in Africa to join the OGP, following South Africa and Tanzania. Since then, five other African countries have joined.[5] The OGP is a multinational initiative launched in 2011 that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.[6] At the time of writing this paper, 64 governments have already joined, eight from Africa.

Other initiatives included the development and launch of the national broadband strategy. In 2014, the government launched the National ICT Master Plan,[7] along with public service centres, dubbed 'Huduma centres', and e-procurement. As a result of all these initiatives, Kenya has scored more highly than most other lower middle income countries in the global e-government survey. In the 2012 e-government index, Kenya ranked 119th.[8]

Government efforts to realise access to information in Kenya should be praised, especially when viewed in the context of the country's past when most information was classified and the government operated in secrecy. Despite these encouraging steps, a number of obstacles remain for transparent governance, not only related to legislation.

A culture of secrecy still persists in most public bodies. Poor maintenance of records and information, a lack of adequate funding, and a lack of public awareness of the right of access are all obstacles to openness in Kenya. Translating constitutional and legal rights into practice will therefore require commitment and effort by both public officials and citizens, along with a clear RTI law offering proper guidance on the issues that arise as public bodies release information.

Kenya is not alone in the challenges of realising access to information on the Eastern African region In Tanzania, for example, even with constitutional guarantees in place, efforts to pass an RTI have been going on since 2001.

In Uganda, where there has been an access to information law since 2005, implementation of the right stalled until 2011. This was due to the failure to pass regulations to bring into effect a number of provisions relating to making requests, fees, roles and functions of public authorities and information officers.[9]

Rwanda was the latest country in the sub-region to pass an ATI law. The law, passed in 2013, has been praised for meeting international standards of best practice in some aspects, including its scope, limited costs and clear provisions on proactive disclosure. To achieve even better implementation, there is a need for all relevant bodies to understand the ministerial guidelines on cost, time, proactive disclosure, private bodies and national security, and to set aside adequate financial and human resources.[10]

There is no access to information law in Burundi. The country's constitution does not fully guarantee freedom of information.

It is South Africa's access to information law that is regarded as the 'gold standard' in Africa: however, the demand for information by citizens there is apparently low and bureaucratic compliance is weak.

While this report uses the words Right to Information, Freedom of Information and Access to Information interchangeably, we acknowledge that there are normative and conceptual differences. We prefer the concept right to information.

RTI in Law

In 1946, the United Nations General Assembly adopted Resolution 59 (1) on freedom of information stating:

"Freedom of Information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of Information implies the rights to gather transmit and publish news anywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world"

In 1948, the Universal Declaration of Human Rights (UDHR), which is generally agreed to be the foundation of international human rights law, also recognised the right of access to information. Article 19 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". Building on the UDHR, the International

Convention on the Civil and Political Rights (ICCPR) which entered into force in 1976 also recognised the right of access to information in its Article 19.

Other notable international instruments redolent with references to transparency, openness, and access to information in specific areas include, but are not limited to, the United Nation Convention against Corruption (UNCAC);[11] Principle 10 of the 1992 Rio Declaration on Environment and Development; and Article 6 of the 1998 UN Declaration on Human Rights Defenders.

On 9 December 2003, Kenya became the first country in the world to sign and simultaneously ratify the UNCAC, which is the first global legally binding instrument against corruption. UNCAC, which was adopted in October 2003, requires that States Parties take certain measures aimed at preventing corruption by reviewing their laws, institutions and practices.

In its 2008–2012 Implementation Report on UNCAC, Kenya recognised the lack of an RTI law as one of the major gaps in combating corruption in the country.[12]

It is, therefore, widely recognised that the right to information is protected by the main human rights treaties and has developed into a norm of customary international law.

Globally

The last two decades have witnessed an explosion in the number of comprehensive national access to information laws. Before 1990, there were only 13 countries with such laws, most of them Western democracies. It is now estimated that there are about 100 countries with national laws that clearly spell out the right of information and procedures for the public to request and receive government-held information.[13] While most of the countries in Europe (46 out of 50 countries) and the America and the Caribbean (21 out of 41 countries) have such laws. The Middle East has the fewest countries with such laws (only Israel, Yemen and Jordan). Africa, as will be seen below, has not been fast at enacting and implementing comprehensive access to information laws.

The Commonwealth

In 1999, the Commonwealth Secretariat set up an expert group on the Right to Know and the Promotion of Democracy and Development. Based on the experts' final report, the Commonwealth Freedom of Information Principles were adopted. In adopting these principles, Commonwealth law ministers recognised the right to access information as a human right. They highlighted some of the benefits, including "the facilitation of public participation in public affairs, enhancing the accountability of government, providing powerful aid in the fight against corruption as well as being a key livelihood and development issue."[14]

These principles were approved by the Commonwealth Heads of Government in 1999. Following this, the Commonwealth Secretariat designed a Model Law on Freedom of Information, intended to serve as a law-making guide for countries in the Commonwealth.[15] However, there is a dire need for the Commonwealth to advocate on this issue and to support the majority of its member states, especially in Africa,[16] who do not have strong access to information, as they enact or review their laws and also implement them.

Africa

In Africa, policies and practices for implementing the right of access to information have begun to emerge only in recent years; however, the momentum for RTI laws is building after a decade-long civil society campaign and the work led by the African Commission on Human and Peoples Rights (ACHPR) to develop a model for RTI in Africa.

Only 11 countries in Africa (Angola, Cote D'Ivoire, Ethiopia, Guinea–Conakry, Liberia, Nigeria, Rwanda, Sierra Leone, South Africa, Uganda and Zimbabwe) have ATI laws and two have actionable regulations (Niger and Tunisia). In 2000, South Africa became the first country in Africa to pass an RTI law, with Cote D'Ivoire becoming the 13th in 2014.

The African Charter on Human and Peoples Rights (the Charter) provides in Article 9 that "every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law."

The Charter was adopted in June 1981 and entered into force in October 1986. It is the duty of every African Union (AU) member state to ensure compliance and periodically report on the state of the Charter's implementation through the African Commission on Human and Peoples' Rights.

In July 2002, the Durban AU Summit endorsed a Declaration on Democracy, Political, Economic and Corporate Governance which committed participating states to establishing the African Peer Review Mechanism (APRM) to promote adherence to and fulfilment of its commitments nationally. As of August 2014, 35 countries had acceded to APRM, and 18 of them, including Kenya, had completed their first review.

The Africa Union has, in recent years, adopted several regional treaties that require States Parties to prioritise the adoption of access to information legislation in the context of democracy, the fighting of corruption and the ensuring of service delivery.

The African Charter on Democracy, Elections and Governance, which has as one of its objectives the promotion of the necessary conditions 'for citizen participation, transparency, access to information, freedom of expression and accountability in the management of public affairs', obliges States Parties to 'implement programmes and carry out activities to promote good governance by ensuring transparent and accountable administration'.

Similarly, Article 9 of the African Union Convention on Preventing and Combating Corruption obliges States Parties to adopt such 'legislative and other measures to give effect to the right to access to any information that is required to assist in the fight against corruption and related offences'.

More significantly, the African Charter on the Values and Principles of Public Service and Administration devotes an entire section to the right of access to information, albeit in the context of public administration.

Several other continental treaties such as the African Youth Charter, the African Charter on Statistics and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa also recognise the importance of access to information in Africa.

In February 2013, the African Commission on Human and Peoples Rights (ACPHR) formally adopted the African Unions Model Law on Access to Information for Africa, which is intended to guide countries to adopt and implement access to information legislation.[17] The adoption of the model law is a milestone for the continent and it is hoped that more countries on the continent will pass the law as a result.

With continued advocacy, it is hoped that more countries will soon make the commitment to pass access to information laws. However, there is still a considerable amount of work to be done on the continent as 43 countries have not yet passed access to information laws and those that do have laws are not doing much in terms of implementation.

The East African Treaty does not have any clear provisions on access to information but it clearly spells out principles of good governance and transparency as being critical to the community and reiterates provisions on transparency found in the UN and AU treaties. In Article 6 (d) it *inter alia* states:

Good governance including adherence to the principles of democracy, the rule of law, account ability, t transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protect ion of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Kenya

The enactment of a new Constitution of Kenya in 2010 heralded a new chapter in the right to information in Kenya. This right is now recognised and codified under Article 35 which states:

1. 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 and fundamental freedom.

Article 33 of the Constitution makes guarantees for freedom of expression in Kenya and states in Article 33 (1) (a) that "Every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas."[18]

This guarantee of the RTI is also anchored by several other provisions contained in the Constitution which further entrench the application of access to information in Kenya. These include Article 2 (5) and 2 (6) which provide that *"The general rules of international law shall form part of the new law in Kenya" and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution."*[19]

Kenya is signatory to the Universal Declaration of Human Rights (UDHR) , the International Convention on Civil & Political Rights (ICCPR), the African Charter on Human & Peoples Rights (ACHPR) , the United Nations Convention Against Corruption (UNCAC) and the African Union Convention Against Corruption, all of which create obligations for states for the implementation on access to information. As Kenya is a monist state, where international law does not require translation into national law, these international and regional instruments now apply as law and are enforceable in courts of law.

Chapter 13 of the Constitution also makes provisions for the values and principles of public service; and provides in Article 232 (1) (f) that *"Transparency and provision of the public of timely, accurate information shall be one of the principles of public service".*

The implementation of the new constitutional dispensation, with its high demands of integrity, openness, transparency and accountability in public service, calls for the inclusion of access to information in other crucial statutes. The County Government Act 2012 is progressive in its provisions for citizen participation and access to information, as seen in Parts VIII and IX of the Act.

Section 87 recognises that timely access to information, data, documents, and other information either relevant or related to policy formulation and implementation, is one of the main principles influencing citizen participation in the management of a county government. Part IX makes provision for public communication and access to information at county level.

Section 96 (1) provides that "every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other state organ in accordance with Article 35 of the Constitution"; Section 96 (2) makes provision for the county government and its agencies to designate an office to be used to ensure access to information as required by sub-section (1). Section 96 (3) obligates the county government to enact legislation to ensure access to information subject to national legislation. [20]

2. Processes to enact a comprehensive RTI law in Kenya

After over 13 years of debate, review and consultations, a comprehensive RTI law has yet to be passed in Kenya. The process is still uncertain even four years after the enactment of the Constitution of Kenya in 2010.

The first attempt to draft an RTI law in Kenya was undertaken by civil society when the International Commission of Jurists - Kenya undertook research in 2001/2002 and drafted the first RTI Bill. In the same year, there was an attempt to introduce the Bill in Parliament as a private members bill. The Bill was not able to be debated before Parliament was dissolved to prepare for the 2002 general elections.

A second attempt was started in 2005, resulting in a redraft of the earlier Bill which was introduced in Parliament in 2007, again as a private members bill. However, it met the same fate as the 2002 draft as it was not discussed in time. This delay was the result of the government seeking leave to build consensus which it saw to be desirable when introducing such a law.

The quest for comprehensive transparency, including an RTI law, regained momentum in the wake of the post-election violence between December 2007 and February 2008, because of the need for a comprehensive, transparent and unhindered investigation into the injustices that had been witnessed. The Commission of Inquiry into the Post-Election Violence (CIPEV or "the Waki Commission") recommended the immediate enactment of an FOI law thus: "The Freedom of Information be enacted forthwith to enable state and non-state actors to have full access to information which may lead to arrest, detention and prosecution of persons responsible for gross violations."[21]

As a result, the need for an RTI law was specifically spelt out in the National Accord of 2008, which emphasised that an FOI law would accelerate planned institutional reforms calling for transparency and accountability in government and for enhanced information disclosures within the police force.[22] In August 2008, the government published the FOI Bill 2008.The Bill was not significantly different from other drafts but it incorporated aspects of both FOI and Data Protection in the same bill. This bill was never introduced to Parliament.

In August 2010, Kenya enacted a new Constitution which, for the first time, provided a guarantee for freedom of expression and the right to information as contained in Article 35, which guarantees citizens' right of access to information. This gave a new impetus to the campaign for the enactment of specific FOI legislation and led to the drafting of the draft FOI 2011 Bill.

The new approach significantly separated provisions for RTI and data protection noting that, though they were related, they were different issues. This led to the development and tabling before Parliament of a new comprehensive Access to Information Bill in 2011.

In 2012, this bill was recalled by the Commission for the Implementation of the Constitution (CIC) in order for further stakeholder consultation to take place so that it could pass constitutional muster. The review *inter alia* proposed the need for a clear oversight mechanism; a limit to the exemptions; a limit to the timeframe for processing information requests to a maximum of 35 days where appeals are necessary; and provisions for clear proactive disclosure by all public bodies. Despite high hopes that the FOI Bill would be passed before the dissolution of the National Assembly for the March 2013 elections, this did not happen.

The Access to Information Bill, 2013 is currently at the Attorney General's office awaiting formal publication and introduction to parliament for subsequent debate and enactment. Even though the constitutional provisions on transparency in general and on access to information in particular became enforceable nearly four years ago with the enactment of the Constitution, the lack of clear provisions for Parliament to pass a comprehensive RTI law by a specified time continues to be a cause of concern and uncertainty. In the final analysis, the Constitution has provided the country with better provisions on RTI, without a sense of urgency for enabling legislation to be enacted.

3. Highlights of the Access to Information Bill, 2013

The Access to Information Bill, 2013 was proposed in view of Article 35 of the Constitution, aiming to articulate in detail the scope and exercise of this fundamental right.

The Bill is considered a positive step towards ensuring effective protection and establishing a clear framework for the promotion, protection and fulfilment of the right to freedom of information in Kenya. It sets out the principles for access to public information, determines the subjects of the law (both those with the right and those with a duty to uphold the right) and regulates the procedure for seeking public information.

The Bill positively enshrines a number of progressive freedom of information principles including:

- The right to seek information from public and private bodies;
- A clear and simple procedure for assessing information that takes into account language barriers and imposes minimal costs. Clause 14 (2) lays the foundation for charging minimal fees by providing that the fee charged shall not exceed the actual cost of making copies of the information. 14 (3) provides that the Cabinet Secretary shall make regulations prescribing fees payable when providing information to applicants;
- A comprehensive proactive disclosure regime.

Proactive disclosure is one of the most important principles in an ATI regime. Clause 5 of the 2013 ATI Bill provides for disclosure of information by public entities and mandates disclosure on particular information, and includes the functions and duties of the entity; the powers and duties of its officers and employees; the procedures to be followed in the decision-making process; the salary scales of its officers by grade; and the guidelines to which the entity should adhere in its dealings with the public or with corporate bodies.

The proactive disclosure provisions also require publication of all relevant facts and information relating to policies formulated by the public entity and decisions made by the public entity which affect the public.

Considerations when disseminating information are provided for in Clause 5 (2) (a) and include the need to reach people with disabilities; the costs that may be incurred in disseminating information; the local language; and the most effective method of communication. The Bill further provides that information should be easily accessible and available free of charge or at a reasonable cost, taking into account the medium used for making the information available.[23]

Public accountability for information officers

The ATI Bill designates the CEO of the public entity as the information access officer and confers the power of delegation of this duty to any other officer of the entity. It sets a time limit of 21 days for responding to a request for information and creates liability in the shape of either a fine not exceeding fifty thousand shillings, or imprisonment for a term not exceeding three months, or both, for failing to respond within the required time.[24]

Clause 20 (3) of the Bill also states that it is an offence for any officer to prevent disclosure, whether by altering, defacing, blocking, erasing, destroying or concealing any record held by the public entity. A public officer found guilty of this offence is liable on conviction to a fine of a maximum of five hundred thousand shillings, or to imprisonment for a maximum of two years.

Protection of people making disclosures

The Bill seeks to protect people who make disclosures of information which have been obtained in confidence and in the course of their duties, as long as that disclosure is made in the public interest and relates to violations of human rights, mismanagement of funds, conflict of interest, corruption, abuse of public office, or threats to public health, safety and the environment.

The 2013 ATI Bill is described as:

“An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and connected purposes”.

The enforcement of the Act are therefore conferred on the Commission of Administrative Justice which is to act as an oversight mechanism in the implementation of ATI. The 2013 Bill still contains several areas of concern which should be amended before enactment in order to ensure the maximum application of the right of access: for example, the right to information is only guaranteed to Kenya citizens and not foreign citizens; and the right only applies to natural (human) Kenyan citizens and not legal entities such as business entities and public governmental and non-governmental organizations in Kenya. This provision is not in line with international human rights law applicable in Kenya.

In Part VI of the Bill, provision is made for the Cabinet Secretary to make regulations for the better carrying out of the provisions of the Bill including: regulations about the manner in which applications shall be made; measures that must be taken to ensure that adequate records are created and maintained by the entities; procedures for a complainant to make an application for a review by the Commission; the procedure to be followed by a public entity when consulting with a third party before giving access to information; the compensation that can be sought by an individual who has suffered damage as a result of a public entity holding inaccurate information about the individual's personal affairs. The current ATI Bill meets most of the criteria for an effective ATI law according to international standards.

The Bill scored 114 out of a possible 150 using the Right to Information (RTI) Legislation Rating Methodology. If passed in its current form, Kenya will be placed 10th globally in terms of having the most progressive Access to Information law.[25] However, this ranking only refers to the text of the law and does not cover the implementation process.

4. Realising RTI in Kenya: The roles of different actors

Despite the lack of specific legislation on the RTI, implementation of access to information in Kenya has improved with the passage of the Constitution.

Crucial to this is the role support institutions play in ensuring the functioning of the RTI. These include parliamentary oversight, judicial independence and the autonomy of public auditors. The roles of different public institutions in the realisation of the right of access to information are discussed below.

4.1 The role of Parliament

The parliament is the legislative branch of government and is the fundamental element of democracy. It is built on the premise that power flows from the people to their elected representatives who are empowered to make laws that govern the people.

Passing an access to information law

As a primary law-making body, Parliament has a central role in realising the right of access to information. The Kenyan Parliament should pass effective access to information legislation as a priority, giving everyone a right to access information held by public authorities.

Review and repeal of laws that hinder access to information

The Kenyan Constitution 2010 has transformed the role of Parliament and given it more powers than before, especially in the area of oversight. In this area, Parliament has to rely heavily on the cooperation of government agencies if it is to be effective. Therefore, it is necessary to make changes to existing laws such as the Official Secrets Act and the National Assembly (Privileges and Immunities) Act which restrict access to information. Where there is conflict between the access to information law and any other legislation, the Parliament should ensure that the access law should prevail up to the point where the inconsistency is removed.

Oversight of the implementation of access to information by the Executive

Under the new Constitution, the primary place where the Executive is to be scrutinised is the parliamentary committees. Parliamentary committees fall into six broad categories: Standing Legislative Committees, Standing Non-Legislative Committees, Ad Hoc Committees of Inquiry, Special Purposes Committees, Joint Committees and Sub-Committees of Parliamentary Committees. The Constitution envisions that, to the greatest extent possible, functions of the committees should be conducted in the most transparent manner possible and with the involvement of members of the public.

Gaps

1. Parliament has not passed an access to information law

The Kenyan Parliament has shown ambivalence, so far lacking the political will to ensure that there is national legislation on FOI. This is manifest in the failure of the Parliament to initiate discussion on any of the FOI Bills that have been introduced to the Parliament in the past few years. It is also notable that all the bills have been introduced as private members bills.

2. There are still several laws hindering access that have not been repealed

The Kenyan Parliament has not been progressive in repealing laws that restrict access to information; there are still several statutes that prohibit and criminalise access to information. Foremost is the Official Secrets Act (OSA),[26] which formalised and institutionalised the culture of secrecy through an official oath of secrecy which all public servants were obliged to take. Section 3 (7) of the OSA places a complete cloak of secrecy over all official documents and provides for severe punishment for disclosure. The Service Commissions Act,[27] the main statute that governs the Public Service Commission (PSC), also prohibits and criminalises the disclosure of any information without the written consent of the President. Section 5 of the Service Commissions Act (SCA) places an obligation on all members who take office in the PSC and their staff to take a prescribed oath of secrecy. Other statutes that bolster the culture of secrecy by obliging directors and staff to take oaths of secrecy include The Statistics Act (2006) and the Public Archives and Documentation Act.[28]

3. Challenges to the oversight of the Executive

With regard to oversight of the Executive, the most serious legal limitation to access to information is in the National Assembly (Powers and Privileges) Act: under Sections 17 and 18, this allows information to be withheld. Under Section 17, a person called to give evidence before a committee may refuse on the grounds that "it is of private nature". Section 18 gives public officers two types of restrictions on giving evidence to committees. Firstly, they may not produce evidence in Parliament on military matters except with the consent of the President; and secondly, public officers may not reveal any correspondence or other evidence affecting the public service which the President has directed not to be produced. These provisions create major obstacles to effective scrutiny of the government by the Parliament and need to be amended.[29]

Opportunities

Opportunities to implement access to information have been enhanced by devolution. Pursuant to the guarantees contained in Article 35 of the Constitution, Parliament has passed legislation that supports the implementation of the right of access to information. The County Management Act makes provisions for public communication and access to information in the management of county affairs.

This Act, which provides powers, functions and responsibilities for county governments recognises in Section 87 that timely access to information, data, documents and other information relevant or related to policy formulation and implementation is one of the main principles influencing citizen participation in the management of the county government.

Part IX makes provision for public communication and access to information at the county level. Section 96 (1) provides that "every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other state organ in accordance with Article 35 of the Constitution". Section 96 (2) goes even further and makes provision for the county government and its agencies to designate an office to ensure access to information as required by sub-section (1). Section 96 (3) obligates the county government to enact legislation to ensure access to information subject to national legislation.[30]

Recommendations

1. Ensure the transparency of Parliament as a key institution

Parliament should play a leadership role in promoting open government by ensuring its own practices and procedures are open to the widest possible extent. Over the past decade, the Kenyan

Parliament has implemented measures to improve openness, participation and public scrutiny of parliamentary business. Critical milestones include:

- The introduction of live coverage of parliamentary proceedings by the media;
- The 2008 amendments to open up the proceedings of the committees of the House to public attendance and to introduce a simplified procedure for public petitions; and
- The increased use of technology in the conduct of parliamentary business which has resulted in a website onto which important basic information has been uploaded, allowing members of the public easier access to parliamentary business.

Under Article 118 of the Constitution, Parliament is required to conduct its business in an open manner, and its sittings and those of its committees must be open to the public. Parliament is further mandated to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Article 119 obliges Parliament to facilitate public participation and involvement in the legislative and other processes of Parliament, including petitions.

A study undertaken by Article 19 in 2012 on Parliamentary Accessibility, Accountability and Transparency, however, revealed that the Parliament in Kenya remains largely inaccessible to most citizens, making it one of the least understood and hardest to engage with of Kenya's governance institutions.[31] Very few Kenyans are therefore able to participate in the affairs of Parliament either as individuals or collectively.

2. Pass a law on access to information

Even with constitutional guarantees, an access to information law is necessary in order to establish an institutional and implementation framework for this right. Having a law will ensure a functional complaints mechanism to address violations of the right to access information. The application of an access to information law will enhance effective oversight of government actions as there will be clarity about when exceptions when asking for government accountability within parliamentary committees.

4.2 The role of the Judiciary

The administration of justice is the primary function of the Judiciary. Other roles of the Judiciary include dispute resolutions and law-making functions. This implies that the Judiciary, while interpreting existing laws, also performs the role of law maker.

The meaning and interpretation that courts give to the text of law is indeed the true determinant of the scope of rights to be enjoyed by the intended beneficiaries of the law. The Judiciary in Kenya therefore plays a crucial role both in law-making and in the interpretation of the Constitution in cases relating to access to information.

Positive aspects

The Judiciary in Kenya has made positive steps towards recognising and trying to articulate the right of access to information as contained in the Constitution. However, the full extent of the right is yet to be tested both before the courts and administratively for its full meaning.

Article 20 (4) of the Constitution of Kenya, 2010, provides that courts and other adjustment authorities shall, in interpreting the provisions of the bill of rights, 'promote the spirit and objects of the bill of rights and promote the values that underlie an open and democratic society, humanity, equality, equity and freedom'.

In various decisions, the courts have recognised the centrality of the right of access to information in the exercise of other rights. In the case of *Nelson O. Kadison Vs Advocates Complaints Commission & AG,*[32] *the court emphasised the importance of the right of access to information as stated in the case of Famy Care Limited vs. Public Procurement Administrative Review Board & Another,*[33] by noting "the right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and other values as set out in the Constitution. It is based on the understanding that without access to information the achievement of higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

The court further noted in its decision that "Public bodies exist to protect members of the public and are intended to enhance good governance. It is in the public interest that complaint procedures and processes remain open and transparent in so far as possible consistent with the national values and principles enshrined in Article 10 of the Constitution. Access to information relating to public complaints against people seeking state of public office is especially significant because Chapter 6 of the Constitution, which deals with leadership and integrity, is one of the pillars of the Constitution and the right of access to information is pivotal to its effectiveness."

The case of *Peter Kariuki Vs. AG*,[34] illustrates the Judiciary's willingness to challenge traditional reasons given for restricting information. The ruling had the effect of challenging the wide scope of exemptions often relied on by states when refusing to give information. In its judgment, the court ruled that Article 35 of the Constitution grants the petitioner the right to access information held by the Department of Defence in order to enable them to pursue their claim. The ruling read in part, *"the Department of Defence is under an obligation to avail the desired information to the petitioner and this court makes specific orders to that effect. It is completely unacceptable for the Attorney General to insinuate that that the record regarding salaries and allowances of the petitioner and the Major Generals is confidential information that cannot be disclosed to the petitioner or the courts."*

Challenges

While it is positive that the Judiciary recognises the right of access to information as articulated in the Constitution, to a large extent court rulings and interpretation delivered so far have not been progressive in stretching the application and enforcement of ATI in Kenya. Some of the challenges are:

1. Narrow interpretations of the law

One of the criticisms of the constitutional guarantee of the right to information has been that the right only applies to Kenyan citizens. Recent court rulings have enhanced this limitation by offering a narrow definition of the concept of a "citizen". In the case of *Famy Care Limited vs. Public Procurement Administrative Review Board & Another*,[35] the court ruled that Article 35 applies only to Kenyan citizens and not to foreigners and, furthermore, that the right of access to information can only be enforced by Kenyan natural citizens and not Kenyan juridical people (thus exempting legal and other entities such as private companies from having a right of access to information). This is contrary to the internationally established principle of maximum disclosure which establishes the obligation for public bodies to disclose information and the corresponding right of every member of the public to receive this information. The principle further stipulates that everyone present in the territory of a country should benefit from this right.[36]

The ruling in the above case was the first decision by a court that defined the people entitled to assert the right of access to information under Article 35. As such, the doctrine of precedent would bind other subordinate courts and tribunals, obliging them to use this limited interpretation.

2. Limited application of the law

One of the key principles of freedom of information legislation is that of proactive disclosure. This principle dictates that public bodies provide information to the public without waiting for formal information requests from the general public.

Recent rulings by the courts in Kenya have had the effect of limiting the application of the proactive disclosure obligation of the government and public bodies. In *Kenya Society for the Mentally Handicapped (KSMH) Vs. the AG*[37] the court held that *"Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied".*

This goes against the internationally established principle of proactive disclosure. This ruling was upheld in the case of *International Centre for Policy and Conflict vs Attorney General and IEBC*[38] where the court ruled that "in interpreting whether or not the state should collect and provide information to the citizen, there can be no violation if no request for information was made". The ruling further stated that there was a need to demonstrate that any information disseminated is inadequate in terms of the extent to which it falls below the standard prescribed by Article 35.

It should be appreciated that it will take some time before sound, coherent and consistent jurisprudence settles on the subject of access to information. This is especially true because all decisions so far have emanated from the High Court and Magistrates' Courts. The Court of Appeal and the Supreme Court, which have more authoritative power in the interpretation of the Constitution, are yet to make decisions on access to information.

4.3 The role of the Executive/public bodies

In the recent past, there has been some effort by the state to actualise access to information in governance. Pursuant to the provisions of the Constitution and out of the realisation that the clamour for change is unstoppable, the government, in collaboration with various stakeholders, has embarked on a number of initiatives aimed at ensuring the availability and accessibility of information by all Kenyans.

There is therefore an acknowledgement by government that the information it holds is a national asset which must be shared in order to improve transparency, promote social and economic values and boost the development of the country.[39]

With the current advent of ICTs and e-government, there has been some attempt to use ICTs to facilitate the public's access to information and participation. On 8 July 2011, the President of Kenya launched the Kenya Open Data Initiative, a web portal that made key government data freely available to the public through a single online portal. Information uploaded onto the portal included census results, national and regional expenditure reports and information on key public services.

In doing so, Kenya became the first developing country in Sub-Saharan Africa to develop an open government portal and the second in Africa after Morocco. The initiative has been one of the most significant steps Kenya has made to improve governance and implement the new Constitution's provisions on access to information.

Other reform strategies have been introduced within government ostensibly to improve service delivery and performance by facilitating access to information and citizens' participation as part of the public sector reforms. Under these reforms Citizen's Service Delivery Charters were instituted with the aim of providing certain information to the public including: mandates of each public institution; services to be provided; and standards of services to be provided. Under these Charters, citizens are mandated to fully participate and to demand information and accountability from all public officials.

In introducing these measures, the Kenyan government has demonstrated a willingness to transform the relationship between government providers and citizens. However, there are numerous obstacles that work against the achievement of true openness in Kenya.

Passing an access to information law is only one small step in promoting governance. For Kenya, as in many African countries, the question of addressing the culture of secrecy that exists in most government and public bodies is important. While a good ATI law will "force" openness, truly open governance is possible only where officials have some commitment to openness. Addressing the culture of secrecy is therefore fundamental to proper implementation of an access to information law.

The challenge is that all these changes should be anchored in legislation and, therefore, the government must see the passage, implementation and enforcement of a vigorous access to information law as a priority.

It is important to note that the passing of an FOI law may be the easiest piece of the puzzle. It must be accompanied by a commitment to implement it effectively.

On its own, an access to information law is no panacea. But with political will, it can lay the foundation stone upon which a fairer, modern and more successful society can be built.[40]

4.4 The role of constitutional commissions & independent offices

One of the clear intentions of an FOI law is to ensure that there is not only a clear administrative process for realising the right, but also a clear complaints mechanism through which citizens can access redress for breach of this right.

Most FOI legislation establishes information commissioners or sets up an ombudsman's office, which is used to address complaints and appeals in the event of a request for information being turned down by a state agency. As is the international practice, it is essential that the implementation and realisation of the right to access information be monitored by an oversight body. Countries that have long-established regimes of access to information such as Sweden, New Zealand, and Norway have established an ombudsman's office as an oversight body for the implementation of the right of access to information.

In Kenya, the ATI Bill confers oversight along with enforcement functions and powers on the Commission on Administrative Justice (CAJ). In Section 22(1) of the Bill, it states that "The Commission shall oversee and be responsible for the enforcement of this Act". The Bill further stipulates the functions of the Commission to be: investigation of complaints; the request and receipt of reports from public entities; facilitating public education and awareness and developing a program about the right of access to information; and monitoring compliance by the state with its international treaty obligations.

The CAJ's functions can be used as a platform for the implementation and enforcement of the right where access has been denied without proper justification. It can also be used when legislation, processes and procedures are working against the realisation of the right to access information that is held by public bodies.

Specifically, the CAJ can facilitate the realisation of the right of access to information by:

- Advising various public institutions on how to review their codes of conduct and guidelines in line with the constitutional principle of fundamental freedoms;
- Setting up a complaints mechanism process by formulating standards which the various public institutions must adhere to and monitoring compliance;
- Recommending compensation or other relief where public institutions have acted in a manner that has denied the realisation of the right of access to information as provided in the Constitution.

Such proactive implementation offices (Information Commission/Ombudsman) which approach courts to assist in the interpretation of sectoral laws that may restrict the interpretation of Article 35 of the Constitution go a long way towards developing the substantive component of Kenya's right to access information in the absence of legislation or regulations that give effect to the right.

Chapter 15 of the Constitution creates constitutional commissions and independent offices, whose aims are to protect the sovereignty of the people, secure the observance of democratic values and principles by all State organs, and promote constitutionalism.[41] Article 254(1) provides that each commission, and each holder of an independent office, is required to submit a report to the President and to Parliament. The Article further stipulates that every report from a commission or holder of an independent office should be published and publicised.

Article 228 and 229 of the Constitution establishes the Office of the Controller of Budget and the Office of the Auditor General as independent offices. These offices have the core mandate of overseeing the budgets of the national and county governments by authorising withdrawals from public funds.

Their stipulated roles include oversight of the implementation of both national and county government; preparation of quarterly, annual and special reports to the legislature and executive on budget implementation; investigations into budget implementation matters; and the mediation of conflicts between national and county governments with regard to budget implementation. One of their key roles as stipulated by Section 39 (8) of the Public Finance Management Act, 2012 involves the dissemination of information to the public about budget implementation at both national and county levels. These roles are further anchored in Article 35 and Article 201 (a) which provide for public participation as one of the principles that guide financial management.

4.5 The role of citizens and civil society organisations (CSOs)

Legislation is only the first step towards the realisation of RTI. By itself, it does not guarantee access to public information in practice. Different people, those with rights and those with a duty towards them, must therefore understand and play their role in ensuring the effective implementation of access to information.

Making access to information work in practice is a two-way responsibility: government must deploy resources to respond proficiently to information requests; and citizens and civil society organisations must generate requests and actually use the law.

Access to information laws will be ineffective if citizens and non-governmental organisations lack the capacity to exercise their rights to information. Access provisions and laws will not be used if CSOs are incapable of acting on the information obtained through requests. The public also has a duty to use litigation to push its frontiers in order to secure a wide jurisprudence from courts in interpreting access to information.

Civil society has been at the forefront of entrenching a culture of constitutionalism in Kenya both before and since the enactment of the 2010 Constitution. CSOs have been involved in the push to legislate for ATI by providing critiques to bills, engaging implementation institutions like the Commission for the Implementation of the Constitution (CIC), and lobbying Parliamentarians about access to information issues. They have also organised training sessions to increase knowledge of access to information, and researched and published books and materials on access to information. Such organisations continue to undertake these activities in order to facilitate awareness and support policy makers regarding their mandate. It is imperative for organisations and networks focused on RTI to think beyond the enactment of FOI legislation to the further steps of making access to information a practical reality. It is envisaged that the role of CSOs beyond legislating for legal reform should be:

- Advocating for ATI legal reform in other existing statutes – amending statutes such as the Official Secrets Act, Service Commissions Act, Preservation of Public Security Acts and the National Assembly (Powers & Privileges) Act;
- Building popular support for ATI among citizens;
- Training public officials in the handling of requests;
- Monitoring implementation of ATI laws;
- Helping citizens use ATI rights to achieve wider social goals.

Demonstrating the practical value of ATI may be the most important function that civil society could play. To give meaning to the right of ATI, it must be enforceable and enforced. Beyond ensuring that the proper legislation is in place, governments and civil society organisations should focus on the best means to ensure well-constructed and functioning enforcement systems to achieve the right to information.

4.6 The role of the UN and other international bodies (World Bank)

While regional and national legislation on ATI is important, it is equally necessary for complementary policies to be developed in the international arena.

1. The Commonwealth

It is notable that, despite the Commonwealth's commitments to openness and transparency, the Commonwealth itself has a poor record in terms of information sharing.

The Commonwealth Secretariat does not have a comprehensive disclosure policy in place, and continues to hesitate to engage civil society in its working or functions. Information such as communiqués of meetings are often released, but records of policy formation and decision making (and even the internal administration of the Secretariat) are automatically deemed confidential and remain secret for thirty years; even after that time access can be difficult.

2. The United Nations

Within the UN itself, the practice/policies of access to information show great variation depending on the agencies that has developed them. The United Nations Development Program (UNDP) Public Information Disclosure Policy is extremely wide and inclusive. The policy's objective is stated clearly to be to ensure that information concerning UNDP operational activities will be made available to the public in the absence of a compelling reason for confidentiality.[42]

There is a presumption in favour of the public disclosure of information and documentation generated or held by UNDP. Anyone can ask for copies of any document in the UNDP's possession, except those expressly exempted on such grounds as commercial confidentiality, confidentiality of internal deliberative processes, legal privilege and privacy of employees. Where a request is refused, an appeal can be made to an Oversight Panel consisting of three UNDP professional staff members and two people from outside the UNDP.

Such policies are an important step forward, facilitating citizens' participation in projects that affect them and working to ensure that economic development reaches its target.

By contrast, a review of the provisions of the new Access to Information Policy developed by the United Nations Environment Program (UNEP) shows that it falls short of true transparency. The pilot policy needs to be strengthened in order to meet its aim to "enhance transparency and openness". The areas that require strengthening in the policy include:

Grounds for refusal — While all access to information legislation and policy includes exemptions that should be narrowly defined, the UN policy makes reference to "grounds for refusal" that have very broad provisions allowing it to deny information requests, essentially defeating the purpose of the policy. For example, Clause 15 of the policy states "UNEP does not provide access to any documents, memoranda, or any other communications which are exchanged with member states, with other organisations or agencies, where these relate to the exchange of ideas between these groups, or to deliberative or decision making process of UNEP, its member states, or other organisations, agencies or entities".

This means that the most basic information — even regarding planning details of meetings — could be exempt.

No reason for refusal to give information — The policy states that the organisation does not need to provide a reason for denying someone's information request. This is also true of appeal decisions. The policy states that *"The outcome of the review will be communicated to the requester, but there will be no requirement for providing a detailed explanation of the outcome of the review."*

The appeals mechanism established in the policy also requires review. The policy sets up a UNEP Access to Information panel that consists of 7 UNEP staff appointed by the Executive Director. There are no non-UNEP members on the panel to ensure independence and the impartial application of the policy.

In contrast, the World Bank Access to Information Panel includes independent appeal mechanisms and makes its review decisions public on its websites, as well as providing reasons for the refusal of information.

In terms of capacitating/empowering entities and states with regard to access to information, the UN has been supporting them through various entities and projects including UNDP, UNESCO, and UNFPA in their priority program areas such as HIV/AIDS, the environment, gender, crisis prevention and ICT for development.

3. The World Bank

According to the World Bank, its Access to Information Policy makes a ground-breaking change in the way the World Bank makes information available to the public. This makes it possible for the public to get more information about projects under preparation and about implementation, analytic and advisory activities and board proceedings.

Underlying this Access to Information Policy is the principle that the World Bank will disclose any information in its possession that is not on a list of exemptions. This makes the World Bank one of the most progressive institutions, setting the standard for enhancing transparency within international bodies and embracing five key principles: those of maximum access to information; setting out a clear list of exceptions; safeguarding the deliberative access; providing clear procedures for making information available; and recognising requesters' right to an appeals process.

4. UNESCO's Media and Information Literacy campaign

As development partners for both government and civil society organizations, UNESCO has been a major advocate for media education and information literacy and has supported various initiatives to promote media literacy as an integral part of the development process.

UNESCO is implementing a Media and Information Literacy campaign whose strategy is to bring together two fields of information — literacy and media literacy — in terms of the knowledge, skills and attitude necessary for life and for the work of citizens globally.

UNSECO views the Media and Information Literacy campaign as a basis for enhancing access to information and knowledge, freedom of expression and quality education. It covers the competencies that are vital for people to be effectively engaged in all aspects of development.

A particular focus of the campaign is training teachers to sensitise them to the importance of media and information literacy in the education process, enabling them to integrate it into their teaching and providing them with appropriate pedagogical methods, curricular and resources. This is regarded as one of the critical ways in which the capacity of citizens can be enhanced to evaluate content critically and make informed decisions as users and producers of information and media content.

4.7 The role of the media

The media is assigned a special watchdog role in a democracy. This means that the independence of the media, freedom of speech and freedom of information is sacrosanct. Access to information and journalism interact, relate and feed off one another.

In conceptual terms, freedom of expression and right to information are two sides of the same coin. In Kenya, the rights of the freedom of media are recognised in Article 34 of the Constitution which provides that the freedom and independence of electronic, print and all other types of media is guaranteed.

The media in Kenya is largely regarded as a diverse and vibrant growing industry. It includes four major daily newspapers, more than 20 FM radio stations and the Kenya Broadcasting Corporation (KBC) – the only nationwide broadcaster. Since the advent of multi-party politics in 1992, the Kenyan media has continued to live up to its long-standing reputation for vibrant and critical reporting, despite some cases of threats and intimidation.

Articles 33 and 34 of the 2010 Constitution have been widely praised for expanding freedom of expression and of the press, especially as they seek to prohibit the state from interfering with the editorial independence of individual journalists, as well as state-owned and private media outlets.

Recent developments have, however, reversed these gains with the recent passing of retrogressive and punitive legislation that limits the free operation of journalists in Kenya. In 2014, the media landscape in Kenya changed as a result of two new laws — the Kenya Information Communications Act and the Media Council Act — passed by the National Assembly on 5 December 2013. These laws are having a limiting effect on the media and the right to freedom of expression as the changes have introduced undue state interference to media regulation.

Among some of the concerns over the provisions in the legislation are the creation of punitive penalties for media outlets and journalists contrary to recognised regional and international standards; the undermining of the Media Council of Kenya's independence by giving the right to hear appeals to another body; and the creation of unjustifiable restrictions by prescribing minimal educational standards for anyone wishing to qualify as a journalist.

The concentration of media ownership in a small number of hands often with strong political connections raises concerns regarding the motives of media owners with political and business interests and is a threat to the objectivity of the press. The question of the control of these outlets has resulted in tense relations between the mass media and the Kenyan government and has undermined freedom of expression in Kenya.

Media as an agenda setter

In its role as an agenda setter, the press has the ability to communicate to citizens en masse the importance of access to public information and the ways in which it can be practised.

It is certain that the journalistic use of the right to access information can alter relations between the government and the press, and this in turn can affect how the recognition of the right of access to information progresses. The implementation of access to information laws, when this fulfils the promise of providing greater transparency and openness from public institutions, inevitably generates tension and resistance between the media and government officials and politicians.

Challenges

Although the media is important and powerful, unless it can empower the individual locally, then we can question the very notion of why it exists. Despite the proliferation of Access to Information laws globally, journalists' use of the law has not been effective for the following reasons:

- Obstacles disincentivise the use of ATI by journalists, including: delays in responding to requests; the lack of specific legislation on ATI; repeated use of the same reasons for denying access to information.
- Journalists use access to information laws/rights less than expected. A study conducted in Mexico showed that requests submitted by journalists represent between 5% and 16% of the total requests made to public institutions.
- While journalists have a responsibility to get information themselves, most newsrooms are under-resourced, data is unreliable, and there are poor newsroom management skills, as well as weak economies and weak regulatory institutions which do not adhere to the code of conduct and ethics. There is less investment in worthy but unprofitable tasks like investigative journalism and media content is neglected.
- Lack of support from editors and the inability to access information by other means can act as strong incentives for the use of the legislation.

The effective exercise of the right to access information by journalists facilitates progress in terms of the opening of institutions through public debates about what should be considered public information. Although it is believed that the link between the press and access to information is strong and almost inherent, this relationship is not always present, nor does it always generate the expected benefits.

Lack of media and information literacy in Kenya

Media and information literacy lies at the core of freedom of expression and information since it empowers citizens to understand the functions of media and other information providers, to critically evaluate their content and to make informed decisions as users and producers of information and media content.

In Kenya, there is still a lot to be done regarding media literacy, as with other attempts to scrutinise media behaviour. There is a need for media to promote media literacy among their audiences. Working directly with citizens to engage them in the media, helping them to understand the role of the media in democratic processes, and empowering them to become critical consumers of news media is essential if the media is to fulfil its potential in improving democratic governance.

Research on media literacy in Western societies suggests that "an individual who has knowledge of the media will more easily acquire a well-founded opinion on societal issues/ events and, thereby, will be better equipped to express his/her opinion, individually as well as collectively, in public and other social contexts."

4.8 The role of the private sector

Until the recent past, freedom of information laws have excluded the private sector from their jurisdictional influence, and have applied only to information and records held by the state, subject to exemptions.

However, it is now recognised that the private sector is performing many public functions that were traditionally performed by the state, and substantial amounts of information held by the private sector should now be brought under the legal regime for access to information. The exclusion of the private sector from these laws has adverse effects on transparency and integrity in public policy, as well as on the capability of citizens to exercise their human rights. Therefore, the extension of the regime to the private sector has become vital for the advancement of the human rights agenda.

According to a global survey of the 70 countries that had adopted comprehensive FOI laws before June 2006, only 19 had laws that applied to information held by both government and private bodies.[43] In Africa only Angola and South Africa were amongst the 19 countries.

It is one of the strengths of the Access to Information Bill, 2013 that it extends beyond disclosures by public entities to private bodies. The Bill gives citizens the right to access information from any private entity or non-state actor that receives public resources and benefits; utilises public funds; engages in public functions; provides public services; has an exclusive contract to exploit natural resources with regard to said funds, functions, services or resources; or is in possession of information which is of significant public interest.

The Bill makes provision for the routine and systematic disclosure of information by private bodies based on the constitutional principles relating to accountability, transparency, public participation and access to information. It states that one of its objectives is to provide for a framework in which both public and private entities proactively disclose the information that they hold.

Considerations

To enhance the debate about business transparency, it is important to recognise the legitimate concerns of the business community and the origins of its traditional preference for secrecy over openness. Corporations are bureaucracies, and as such are prone to adopt a culture of secrecy, as often the result of a subconscious impulse as a deliberate strategy or policy. As noted by Max Weber, secrecy has tended to be regarded by managers and directors as a major power resource in maintaining a competitive advantage over rival organisations.

The following considerations should be made:

- Balancing the right to know with commercial confidentiality is more important for private sector information than government information. Most countries do not have data protection laws. Kenya has a Data Protection Bill that was drafted by government and meant to be passed, but it has not yet been presented to Parliament for debate. When this is passed, it will balance these two interests.
- Private entities should be made aware that the trade secrets of companies or personal information of employees are not expected to be disclosed because these categories of information should be exempted by FOI legislation. However, it is envisaged that basic financial, safety, environmental and other information that affects the realisation of people's human rights should be accessible by the public.
- Globally, there is no consensus about what disclosure standards should apply to the private sector. New insights are needed into how and which forms of openness in the private sector can serve the public interest and how to bring about beneficial forms of greater disclosure.

Kenya's private sector is still operating under the radar of secrecy, maintaining the potential to facilitate corruption and undermine good public policymaking. To enlist private sector support in the push for transparency, private bodies should be made aware of the advantages that FOI legislation can bring them. Used properly, FOI legislation can yield a wealth of information that is useful for business. This includes information on contracts; details of previous bids, such as pricing, personnel levels and competency; evaluation criteria, which show how previous bids have been evaluated and contract decisions reached; compliance and performance data; background information used to shape procurement decisions and influence the regulatory climate - for example, minutes of meetings and internal discussion documents.

Private bodies should join multi stakeholder initiatives in promoting transparency. This should include adopting corporate and social responsibility (CSR) policies that promote transparency and accountability, including access to information and the protection of whistle-blowers.

Realising access to information: The application of APAI principles

5.1. RTI and health

The enjoyment of the highest attainable standards of health is inherently linked to the availability, accessibility, accuracy and acceptability of health information.

The United Nations recognises the right to the highest attainable standards of physical and mental health. It summarises the importance of access to information and transparency as essential features of an effective health system thus:

"Access to health information is an essential feature of an effective health system, as well as the right to the highest attainable standard of health. Health information enables individuals and communities to promote their own health, participate effectively, claim quality services, monitor progressive realization, expose corruption, and hold those responsible to account.

In Kenya the right to health is enshrined in Article 43 (1) (a) of the Constitution which states "every person has the right – To the highest attainable standard, which includes the right to health care services, including reproductive health care'.

In practice, however, accountability and transparency in health is still far from acceptable. There has been much progress in Kenya with regard to publicly-held, health-related information and the engagement of civil society organisations in the sector, but full and effective access to quality health information remains elusive. Accessing information from doctors, health care workers or health administrators is usually difficult and, where access is possible, the information provided may be incomplete or unverifiable. In most cases, both private and public healthcare facilities are not willing to disclose the majority of information, particularly information touching on budgets, plans or commodities (e.g. drugs).

The capacity of citizens to demand and use health information is still low. Citizens remain largely unaware of their legal right to health information. In some cases, citizens are reluctant to assert their right either because of a sense of secrecy or a prevailing culture of not questioning authority. Such information is sought mostly by analysts who wish to understand the health system and how the services are provided, planned for, financed and progress reported. Most patients rarely ask for such information.

There is however, an increasing appreciation of the right of access to information as a key driver in the realisation of the right to health.

The Kenya National Patients Right Charter, developed in 2013, reaffirms the right of every person, patient or client to access full and accurate information about their health and health care. In addition, it provides for the right of patients to be informed about all provisions in their medical scheme/health insurance policy and the right to informed consent for treatment.

The Kenya Health Policy (2012- 2030) also makes provision for adequate health information to guide the decision-making processes by all actors in the health sector, including health managers and policy makers. It further articulates the strategies to attain this, including the harmonisation of data collection, analysis, and dissemination mechanisms of state and non-state actors through a legal framework; the comprehensive analysis of health information to inform decision making; and strengthening mechanisms for health information dissemination to ensure information is available where and when it is needed.

There is also an array of bills under development that, if passed, would do much to enhance access to health information. These include the Health Bill, which takes into account the devolution of the health system and mandates the national government, county government and every other organ that has a role or responsibility within the National Health System to ensure that appropriate, adequate and comprehensive information is disseminated about the health functions for which they are responsible, in recognition of the provisions of Article 35 (1) (b) of the Constitution.

The Health Bill also highlights the responsibilities of public health officers with regard to provision of information to citizens and takes into account the responsibilities of patients by stating that a user of the health system has a duty to supply the health care provider with accurate information pertaining to his or her health status.

Other legislation and bills that have access to information provisions include the HIV and AIDS Prevention and Control Act, the Mental Health Care Bill and the Reproductive Health Bill; the latter mandates national and county governments to provide information and education on available contraception options and family planning services.

The Bill provides for confidentiality and makes it an offence for a person to divulge reproductive health care information in their possession; it also provides for adolescent-friendly reproductive health and sexual health information and education by the Reproductive and Health Care Board.

5.2. RTI and children/youth

In most countries, even where an adult's right to access information is well–established, young people's access is subject to disproportionate restrictions because of their young age, relative lack of experience and the range of situations – for example, school and home – in which they are dependent on adults for information. Children's right to information is therefore often violated in ways in which adults' is not.

The United Nations Convention on the Rights of the Child (UNCRC), the foremost international convention for children, makes provision for freedom of expression, access to information and mass media, and children's right to privacy. Article 13, which makes provision for children's right of freedom of expression, states that children have the right to get and share information, as long as the information is not damaging to themselves or others. The Convention further states that freedom of expression includes the right to share information in any way they choose, including by talking, drawing or writing.

Article 17 of the UNCRC specifically addresses access to information and mass media and requires states to "recognise the important function performed by the mass media and to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral wellbeing and physical and mental health".

The Convention recognises the vulnerability of children and places some limitations on children's rights to receive information by encouraging states to ensure the development of guidelines to protect children from information and material injurious to their wellbeing.

Kenya ratified the UNCRC on 30 July 1990, and subsequently enacted the Children's Act 2010 in order to domesticate the provisions of the Charter. Neither the Constitution nor the Children's Act provides for the right of children to access information. However, the Children's Act provides for their right to privacy in Section 19 which states, "Every child shall have the right to privacy subject to parental guidance".

In Kenya, the question of children's right to access information has become pertinent when dealing with issues like reproductive health and HIV/AIDS, drug use, and the growing use of the internet and social media by children. Children are often denied honest information about drugs and excluded from designing policies and awareness campaigns. The UN Committee on the Rights of the Child has often emphasised to individual countries their obligation to provide children and their parents with accurate and objective information about issues such as drug use.

The right of adolescents to access appropriate information regarding reproductive health and HIV/AIDs has also been overlooked in laws and policies that have been developed.

5.3. RTI and women

In Kenya, women's access to information is disadvantaged by factors such as geographical location, education and literacy, levels of economic empowerment, access to various media, and other societal barriers that limit women's access to knowledge. In order to ensure women's effective access to information, ATI and other laws will need to make a deliberate attempt to enhance women's access to information, acknowledging them as a disadvantaged group

These factors have meant that women remain trapped in a cycle of lack of knowledge which can only be mitigated by a conscious effort to ensure that women access information that can assist them to make informed choices.

For instance, majority of women in Kenya live in rural areas where there are fewer public services and institutions for people to access information, as these areas are poorly served by the media. Access to information and media laws should therefore stipulate proactive measures to ensure that women with limited access to the media can access the information they need. Language barriers also contribute to women's lack of access to information. In Kenya, public information held by public institutions within different sectors is in the English language and, while this is the official language, it is not that main language that most citizens speak, particularly women.

Despite the increase in the availability and use of mobile telephony and internet access in the country, the access and use of ICTs remain a challenge for many women and girls. This is primarily because women are poorly placed to benefit from the knowledge economy because they have less access to scientific and technical education, and less access to skills training and development.

Although a number of CSOs have played a part in initiatives to improve African women's access to and use of the internet, as well as influencing policy makers in order to ensure the inclusion of gender perspectives in ICT policy-making processes, the impact of this has been difficult to gauge.

The Convention on Elimination of all forms of Discrimination against Women (CEDAW), which is often referred to as the international bill of rights for women, does not explicitly provide for the right of access to information for women. It only does so in the context of health information that relates to family planning. Kenya ratified the CEDAW in 1984.

5.4 RTI and people with disabilities

The Constitution of Kenya, 2010, guarantees people with disabilities the right of access to information. Article 54 states that a person with any disability is entitled to reasonable access to information, and to use sign language, braille or any other appropriate means of communication. The Constitution mandates the government to promote the development and use of sign language, braille and other communication formats and technologies accessible to people with disabilities. The use of sign language is recognised further in Article 120 (1), which states that the official languages of Parliament are Kiswahili, English and Kenyan sign language, and that the business of Parliament may be conducted in English, Kiswahili and Kenyan sign language.

Article 21 of the Convention on the Rights of Persons with Disabilities states that state parties shall take all appropriate measures to ensure that people with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others using all forms of communication of their choice. Kenya ratified the Convention on the Rights of Persons with Disabilities and, as a result, the Convention forms part of the laws of Kenya and therefore Kenya is obligated to realise the rights it guarantees.

Other legislation that contains provisions guaranteeing the right to information includes The Persons with Disabilities Act that was enacted in 2003. This marks an important milestone in realising the right to information for people with disabilities. The Act establishes the National Council for Persons with Disabilities and one of its functions is providing access to available information.

The Employment Act also takes into consideration the needs of people with disabilities in seeking and receiving information. An employer is required to ensure that the terms of a contract are explained to an employee, with its provisions being communicated in a language that the employee understands. In terms of a policy framework, The Kenya National Commission on Human Rights (KNCHR) strategic plan of 2013-2018 intends to advance the rights of people with disabilities.

The obligation to ensure access to information by people with disabilities applies to both public and private bodies. Article 27 (4) provides that no person shall discriminate against another on the grounds of disability or language. The Persons with Disabilities Act Section 39 mandates all television stations to provide a sign language inset or subtitles in all newscasts, educational programmes and programmes covering events of national significance.

Despite the fact that the Constitution and other laws have guaranteed the right of access to information by people with disabilities, it is a fact that people with disabilities still face barriers in accessing information during official and other interactions. Most television stations do not have a sign language inset during newscasts, general programming and national events. Parliament, however, has put in place sign language interpreters during parliamentary proceedings. Kenya does not have a newspaper in braille. Public institutions such as hospitals, courts, police stations and schools do not have sign language interpreters nor do they provide other formats of communication. As a result, disabled people are generally prevented from enjoying their rights to access education and justice and other political rights.

5.5. RTI and corruption

Corruption thrives in environments where people cannot access information. When a government's actions are covered by a veil of secrecy, there is room for corruption. Information access is therefore a way to combat corruption: this can be done by the government releasing information to the public, and by the public having the right to access information and therefore being able to monitor the actions of government.

Under the Constitution, national values and principles of governance include good governance, transparency, integrity and accountability.[44] The Constitution also contains a chapter on leadership and integrity that establishes the threshold for leadership. One of the guiding principles on leadership and integrity is making decisions that are not influenced by corruption.[45]

One of the important measures that the Constitution has undertaken in the fight against corruption is the requirement for public participation in the affairs of the national and country governments. This ensures that the public can ask for information from public bodies, and can therefore participate in decision making about the use of resources and keep their leaders to account.

Public participation is listed as a national value and principle of governance under Article 10. Parliament and county assemblies are also required to facilitate public participation in their affairs. The Constitution also provides that its principles guiding public finance include openness, accountability and public participation in financial matters.

Article 13 of The United Nations Convention Against Corruption, which Kenya has ratified and which therefore forms part of the laws of Kenya, mandates States Parties to take appropriate measures to ensure that the public participate in the prevention of and fight against corruption. It notes that such participation should be strengthened by ensuring that the public has effective access to information and that the state respects, promotes and protects the freedom to seek, receive, publish and disseminate information concerning corruption.

The Ethics and Anti -Corruption Commission was established in line with Article 79 of the Constitution which ensures compliance with the provisions of the chapter on leadership and integrity. The Commission is required to publish and publicise important information affecting the nation and to make provision for information requests by citizens in line with Article 35 of the Constitution. These information requests are subject to the payment of a reasonable fee and may be subject to confidentiality requirements.[46]

The County Governments Act also recognises the importance of access to information as a mechanism to fight corruption in devolved governments and provides for avenues which the public can use to access information and participate in the affairs of governance and decision making. It provides that every citizen shall, on request, have access to information held by any county government, unit or department thereof or any state organ in accordance with Article 35.[47] It also provides that a county government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county which may include: television stations, ICT centres, websites, community radio stations, public meetings and traditional media.[48] It also states that county governments shall encourage and facilitate other means of mass communication, including traditional media.

5.6 RTI and the environment

Democratisation and public participation in environmental governance are desirable elements that would enhance chances of realising the Kenyan dream of achieving a clean and healthy environment and realising meaningful sustainable development. Access to information and justice and participation in decision making is integral to the concept of environmental democracy.

The generally recognised minimum requirements as being necessary for the existence of environmental democracy is the tripartite so-called "access right" in environmental matters: namely access to information, participation in decision making, and access to justice.

International instruments

The Rio Declaration (1992) provides for environmental democracy, as it crystallises the emergent norms of public involvement in environmental issues.
Principle 10 of the Declaration emphasises the need for citizens' participation in environmental issues and access to information about the environment held by public authorities. Under Principle 10, member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. In particular, the individual's right to access information held by public authorities concerning the environment is guaranteed. This includes entitlement to information on hazardous materials and activities by people likely to be affected by them.

Constitutional provisions

Environmental provisions are included in Chapter Four of the Kenyan Constitution under 'Rights and Fundamental Freedoms', Chapter Five under 'Environment and Natural Resources', and Chapter Ten under 'Judicial Authority and Legal System'.

Environmental rights and freedoms are presented in Article 42 of the new Constitution, which states:

"Every person has the right to a clean and healthy environment, which includes the right —

a. To have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
b. To have obligations relating to the environment fulfilled under Article 70 (which relate to enforcement of environmental rights).

National legal framework: The Environmental Management and Coordination Act of 1999 (EMCA)

The Environmental Management and Coordination Act represents a bold attempt to provide an appropriate legal and institutional framework for environmental democracy. It recognises the role of public participation and the publication of Environmental Impact assessments, and tries to incorporate principles of international environmental law. However, in reality, access to environmental information and meaningful public participation is still minimal.

The provisions in the EMCA have made important strides in the area of public participation. The Act's provision for environmental information is, however, passive and non-committal. Section 123 of the EMCA provides that any person may have access to any record transmitted to the National Environment Management Authority (NEMA). However, such access is at the discretion of the Authority and is only available upon application. The NEMA can also charge a fee for granting access. According to Section 122, it is within the rights of the authority to maintain confidentiality and therefore restrict access to any document.

The EMCA does not provide a framework for proactive disclosure, and there are no requirements for the mandatory publication and dissemination of the annual environmental report. There is, however, provision for the publication of environmental information contained in Environmental Impact Assessment (EIA) reports. Section 59 (1) requires that the EIA reports are published in the Kenya Gazette and a newspaper that is circulated in the area concerned for two successive weeks following publication of the EIA report. However, there are no similar publication requirements for other important documents like environmental policies, rules, regulations and standards, for which publication is the only requirement.

The rights of access to environmental information and public participation in environmental decision making and access to justice are now guaranteed, at least to a minimal extent.

In order for environmental democracy to become a reality in Kenya, reviews of some of the provisions within the EMCA are necessary. The reporting requirements of public authorities about environmental matters need to be expanded so as to enhance the scope of access to environmental information. This will enhance transparency and accountability on environmental issues.

The public needs to be engaged in formulating rules, regulation, standards and guidelines on environmental matters as these influence environmental decision making. The scope of Environmental Impact Assessments must be enhanced to cover policy formulations.

5.7. RTI and natural resource transparency

Recent discoveries of natural resource wealth and the resultant expectations of economic growth necessitate a strong framework for natural resource management that will ensure that the revenues accruing from these natural resources benefit the citizens. One of the ways to achieve this is to ensure transparency by ensuring that the public has access to information.

Article 10 of the Constitution provides for the national values and principles of governance, and include transparency, accountability and public participation. These principles and values bind all state organs, state officers, public officers and all people who interpret or apply the Constitution, enact, apply or implement any law, or make or implement public policy decisions. In addition, access to information is a right guaranteed in the Bill of Rights of the Constitution and this right includes the government's obligation to publish and publicise all information relating to the state.

Part 2 of Chapter 6 of the Constitution provides for natural resource management, and Article 69 states that the state shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits. It also states that the state should encourage public participation in the management of the environment.

The principal legislation governing natural resource management in Kenya is the Mining Act and the Petroleum (exploration and production) Act. Both of these Acts were enacted before the Constitution of Kenya, 2010, and do not incorporate principles and values such as transparency and the public's right to access information.

The Mining Act does not have robust provisions regarding access to information. It provides that holders of a mineral dealer's licence should maintain registers of the type, quality and quantities of the minerals sold and exported and give these registers to the commissioner or a person authorised by him for inspection. This section does not require the holder of a mineral dealer's licence to provide information relating to money earned from such sales.[49] The Act does not provide for making information available to the public or specify where the public can obtain information such as the revenues paid to the government. Generally, the public is excluded from most of the information relating to mining in Kenya and only the commissioner can access such information.

Both Acts do not make transparency mandatory and therefore any awarding of contracts and licences under this regime is done in secrecy. This also applies to collecting taxes, to royalties and to the allocation of revenues. The Acts do not provide for platforms where the public can access information concerning natural resources.

Two Bills have been developed to govern the mining, oil and gas sectors but these bills still contain loopholes regarding transparency and public access to information. The Bills must be strengthened to ensure that the public can access information and hold government accountable, thus avoiding the resource curse that has plagued many resource-rich countries.

6. Challenges and recommendations

Access to information does not automatically lead to greater citizen participation, state accountability and state responsiveness. Often, there are real structural and political barriers which hinder both the capacity of and incentives for governments to produce information, and the ability of citizens to claim their right to information and use it to demand better governance and public services.

The conditions that make information access rights both important and hard to implement are seen in their most extreme forms in African countries, where challenges in implementing access to information can be related to three key issues, namely: lack of leadership; inadequate support for those implementing requests; and failure to realise that implementation is a process requiring long-term commitment.

In Kenya, although the government has shown willingness to entrench transparency and openness within government, obstacles to achieving open governance still exist. These include:

1. Citizenry that is unaware of their rights to information

The Kenyan public is largely unaware of its right to access information and of the guarantee of this right within the Constitution. Even when aware, a long culture of secrecy and authoritarianism has made citizens reluctant to assert this right, and where requests for information are not granted, citizens choose not to act.

2. Weak implementation capacity for public officials /bodies.

Public officials are unaware of their obligations to provide information as stipulated in the Constitution. Retrogressive provisions barring release of government information, as contained in the Official Secrets Act, The National Assembly (Powers and Privileges) Act, the Preservation of Public Security Act and others, has resulted officials still being reluctant to release information. A piece of research conducted by the African Network of Constitutional Lawyers undertaken in 2011 also cited lack of criteria or guidelines to help guide the operations of officials as one of the deficiencies regarding access to information, as some officers decide to err on the side of caution and not release information.

3. Poor information management

Record management and statistics generation is insufficient to support access to information. In order to respond to requests, an adequate information management system must be designed and established.

4. Insufficient infrastructure

The Kenyan government has made commendable efforts to actualise access to information through online platforms through the establishment of an open data portal, through its commitment to OGP, and through the establishment of digital villages (Pasha centres) which are set up to bring connectivity to the rural areas. However, there are limitations to the effectiveness of these initiatives. The majority of the Kenyan population lives in rural areas and is not able to access online platforms. According to a survey undertaken by the Kenya ICT board, only 6.5 per cent of Kenyan households have access to personal computers with the total number of internet subscribers at 11.5 per cent of the population.

Further findings reveal that the number of mobile phone subscribers is at 24, 968, 891, which is more than half of the Kenyan population, but most of these are in the urban population.[50] This means that poor and marginalised communities are not able to access information through online platforms.

The quality of information provided online is also in question. Many users of Open Data often complain that the biggest issue with the data currently available is the fact that most of it is outdated. It has not been possible to obtain updated data in good time, due to the lack of a legislative framework to push for release of information by the government.

Though the barriers to RTI in Kenya are beyond the remit of legislation, the absence of an RTI law presents unique challenges that can only be solved with the passage of such a law. The following challenges are experienced:

a. Lack of an implementation framework

In order for the constitutional promise about access to information to be fulfilled, there is a need for a domestic law, which would spell out the application process and the conditions under which information would be released or denied, as well as the appeal process to be followed by any person who is unhappy with a decision.

b. Absence of a complaints mechanism

One of the clear intentions of an RTI law is to ensure that there is not only a clear administrative process for realising the right, but that there is also a clear complaints mechanism by which citizens can access redress for breaches of the right of access. The Access to Information Bill confers oversight and enforcement powers on the Commission of Administrative Justice (CAJ). The Bill confers on the CAJ the power to facilitate a complaints mechanism process by setting up standards to which the various public institutions must adhere, and to monitor compliance; and further to recommend compensation or other relief where a public institution restricts the right of access to information.

Recommendations

The benefits of allowing public access to information held by the state are well known. Openness and the sharing of critical information allows citizens to participate in matters affecting their lives and enhances better governance and transparency. For access to information to be a reality and have an impact on governance, the conditions for implementation have to be present. These include an adequate registry, a widely shared administrative language, and a citizenry with the self-awareness, skills and resources to challenge the state.

1. Passing an RTI law

By establishing the right to information in domestic law and setting up public information systems, governments can enhance citizens' participation in governance, advance equitable economic development, reduce poverty and fight corruption.

2. Record Management

Effective management of information is at the heart of good governance and the ability of the government to conduct its business efficiently. Many countries include record management as part of their access to information laws as it is clear that an effective access to information system depends on good record management. In order to respond to requests, an adequate information management system must be designed and established. Record-keeping standards must also be improved.

3. Establish effective promotional measures

An access to information law does not implement itself. It is imperative that a wide range of promotional measures are established to ensure that the public are aware of their rights, that systems are being used and implemented properly, and that standards are being applied to promote the goal of maximum disclosure.

Efforts should be made to ensure that activities to promote awareness are not restricted to the cities and urban areas but reach rural populations. These efforts should also target different groups in society, ensuring traditionally marginalised groups are not excluded.

4. Enhance role of media

The media is in a key position to publicise this right, and also to monitor and report on implementation. As a significant user group of access to information in many countries, the media can play a role in targeting requests to promote progressive interpretation of the law.

Simple access procedures are needed: information access should be quick, easy and affordable. Governments must adhere to strict, enforced time limits in providing requested information, and must charge only the cost of reproducing the information. They must ensure that application procedures are simple and that illiterate, disabled or poor people can easily use them.

5. Support media and information literacy

While the Kenyan government has taken the first step towards developing information literacy, much more work needs to be done to achieve media and information literacy as a whole. There is a need to examine the education system critically so as to equip individuals with the necessary information literacy competencies, thereby improving social lifestyles and political participation.

A variety of other activities can also be undertaken to support media literacy, including; publishing and promoting media monitoring results to heighten citizens' awareness of media practices and processes; civic education; and the introduction of media literacy education in schools.

References

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2. Other African countries with constitutional provisions that guarantee the right to information are Burkina Faso, Cameroon, DRC, Egypt, Ghana, Guinea Bissau, Madagascar, Malawi, Morocco, Mozambique, Senegal, Seychelles, South Africa, Tanzania, and Uganda.
3. This paper will use the terms Right to Information (RTI), Freedom of Information (FOI) and Access to Information (ATI) interchangeably even though there may be some conceptual differences between them.
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10. See: http://www.article19.org/resources.php/resource/3673/en/rwanda:-access-to-information-law-passed
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16. There are 53 member states of the Commonwealth, 18 of them in Africa. Only five African commonwealth member states have comprehensive RTI laws (Nigeria, Rwanda, Sierra Leone, South Africa and Uganda).
17. Model Law on Access to Information for Africa, available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf
18. This may be an even stronger guarantee as it refers to "every person" and not "every citizen" as in Art. 35.
19. Constitution of Kenya, 2010.

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