Can the Model Law on Access to Information for Africa Fulfil Expectations?

The African Union and the Model Law for Access to Information – empowering Citizens, not political Leaders

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Abstract

In this paper I critically engage with the Model Law for Access to Information for Africa, adopted by the African Commission on Human and Peoples’ Rights in 2013. This provides a very recent example of the complex and often competitive relations between supra-state, state and non-state actors in Africa.

The Model Law aims at promoting transparency and accountability, as factors contributing to human rights, democracy and development across the continent. As the product of an organ of the African Union, it is intended to represent the views of Member States. Superficially, this appears to be the case. African governments are increasingly adopting domestic laws on access to information and thereby, in theory, catching up with parts of the world where this right is more widespread. African politicians have themselves welcomed and promised to implement the Model Law, winning the approval of civil society and the Commission.

However, political structures in most Member States are not conducive to effective access to information. Authoritarian regimes are closely guarding their powers and reducing civil freedoms. Political and public transparency is thwarted on various grounds, both openly and surreptitiously. Access to information laws have been passed, for example, in Uganda, with the underlying intention of restricting press freedom. In several countries, journalists and activists are being increasingly persecuted, detained and threatened, and press freedoms curtailed.

In the face of governmental resistance, the goal of advancing access to information will depend on pressure from civil society for change. The Model Law reaffirms the efforts of civil society organisations, legitimising their quest for transparency, political participation and civil freedoms. Although the law was intended to directly improve the political rights of Africans, its greatest effect is likely to be indirect: empowering non-state actors and increasing indirect pressure upon governments for democratic transformation.
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Introduction

The first law to guarantee citizens the right to budgetary information was adopted in Sweden in 1766.¹ Many years later, in 1948, access to information (ATI) was acknowledged as a fundamental human right in Article 19 of the Universal Declaration of Human Rights² and is nowadays firmly recognised as an internationally guaranteed human right.³ This political and legal idea has greatly expanded since. In last 40 years, the majority of countries worldwide have passed legislation regarding ATI.⁴ These laws are generally aimed at “giving citizens, other residents, and interested parties the right to access documents held by the government without being obliged to demonstrate any legal interest”.⁵ The spread of laws providing rights to access information reflects the prevailing belief that ATI is one essential pillar in a strategy to improve governance, reduce corruption, strengthen democracy through enhanced participation, increase development,⁶ and reduce human rights violations.⁷

African countries have also acknowledged the importance of ATI, declaring 28 September “Right to Information Day”.⁸ However, Africa is lagging behind other regions regarding the adoption of laws guaranteeing the right.⁹ To date, eleven African countries have adopted such laws, although in most, ATI is not enforced effectively.¹⁰ However, the African Union Commission on Human Rights (“the Commission”) adopted its first ever model law in February 2013: the Model Law on Access to Information for Africa (“the Law”).¹¹

This Law comes with great aspirations:

“By exposing corruption, maladministration and mismanagement of resources, increased transparency and accountability is likely to lead to better management of public resources, improvement in the enjoyment of socio-economic rights and to contribute to the eradication of under-development on the continent.”¹²

The Law was warmly welcomed by African leaders and non-governmental organisations (NGOs), although the former have often been reluctant to adopt and implement such legislation. This raises the question whether the development and publication of this Law will strengthen the provision of ATI in Africa. Due to the very recent release of this law, there is to date¹³ no academic review or analysis by legal NGOs or institutes available. This thesis aims to fill this gap.

¹ Adeleke 2013:86.
³ FOIA Update 2013:76.
⁴ FOIA Update 2013:76.
⁵ Ackerman/Sandoval-Ballesteros 2006:93.
⁹ http://www.achpr.org/sessions/51st/resolutions/222/.
¹¹ FOIA Update 2013:17.
¹⁴ 15.09.2013.
After outlining the potential effects of ATI legislation and the development of this law globally (II.), I will scrutinise the Law’s provisions (III.). I will argue that the Law, whilst overall being “impressive”, contains sections that are vulnerable to abuse when applied in the context of authoritarian African regimes. Comparative legal analysis with other developing countries that have adopted similar laws, especially South Africa and India, allows me to suggest areas for possible improvement.

This thesis will assess the practical value of the Law and the affects it can have across African countries. Already several countries are reviewing the Law and considering its implementation, or are drafting their own ATI laws. Although it is likely that the Law will be adopted in at least some countries, its impact will depend on comprehensive and holistic commitment by political leaders, civil society and international stakeholders. I will scrutinise the relevant political and societal conditions within African Union members (IV.), to suggest that countering ideologies, such as secrecy trends and authoritarian political systems, will hinder effective implementation.

Civil society is currently not strong enough to overcome these barriers. These limitations mean that the immediate effect of the Law will be restricted. However, its long-term effects should not be dismissed – its existence will strengthen African civil society organisations (CSOs) in their efforts to develop an effective approach on ATI, and will shape future ATI legislation. International stakeholders will support these trends to a certain extent.

However, even if the Law is adopted and enforced domestically, systemic problems will limit its effect. These include the difficulties of developing one law for diverse countries, and conditions that impede law-enforcement in developing countries, such as access to justice challenges and traditionally low levels of ATI awareness. These will prevent the Law from attaining the full potential of ATI for the foreseeable future.

**Methodology**

The theoretical framework to evaluate the content of this law will be drawn from principles developed by experts in the field: Article 19, the leading NGO supporting ATI worldwide, which has also developed a Model Law; the African Platform on Access to Information (APAI), an affiliation that supports the Commission, and the Special Rapporteur on Freedom of Expression and Access to Information in Africa, in spreading ATI around the continent; and highly reputed academics and practitioners in the field of ATI, such as Banisar, Calland, Darch and Diallo. Further appraisals are taken from think-tanks that provided input during the drafting process.

I have also analysed developing countries that have previously adopted ATI legislation. I have assessed specific challenges in implementation, and the applicability of these experiences to African countries, as the Law has not yet been adopted in any country yet. My conclusions especially draw on the comprehensive study by PriceWaterhouseCoopers (PWC), which in 2009 comprehensively...

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15 CLD 2011:1.
16 Nsekeng 2013.
18 The APAI was founded in 2009 to lead and promote the ATI movement in Africa. It consists of organisations and institutes with exceptional expertise regarding ATI such as Article 19, one of the most renowned NGOs in the field and leader of the worldwide movement towards more access to information, http://www.africanplatform.org/index.php/about-us.
19 Nsekeng 2013.
examined the effects of the Indian Right to Information (RTI) Act 2005 by interviewing 5000 prior information requestors, public authorities in five states as well as civil society organisations and parts of the media.20

**Background**

In this section I will set the scene for more specific discussions on the Law, by summarising the impact and effect ATI is considered to have according to prominent scholars and practitioners. This will be followed by a sketch of the development of ATI globally, the Law and its foundations in international and African law.

**Effects of Access to Information**

It is widely believed (and considered proven by some authors)21 that effective ATI legislation is one factor promoting greater transparency concerning government activities, which itself encourages improved governance, deters corruption, and supports human rights and participatory democracy.22

As citizens and other interested parties request information regarding public policy, they acquire the ability to hold governments accountable. If the public does not agree with the activities revealed, it has two means of holding the ruling elite accountable: withdrawal of (electoral) support, or pursuing individual legal responsibility for misconduct.23 In order to prevent these outcomes, political leaders will improve policies, reduce human rights abuses,24 and, especially in developing countries, strengthen individual socio-economic rights through a more equitable distribution of resources and sustainable development programmes.25 Consequently, the traditional understanding of ATI as a civil right to control the state has been altered to include the enforcement of socio-economic and other human rights.26 As Amartya Sen declares poignantly, free and informed media in a democracy prevents famines, as the leaders will have to avoid negative press.27 ATI is therefore a precondition for the realisation of all other rights.28

Directly linked to the improvement of governance through guaranteed ATI is the reduction of corruption in the political and commercial spheres.29 The availability of means for the public investigation of corruption reduces corruption itself. In turn, the increased integrity of the government leads to more competition, thereby giving the poor a real chance to lift themselves out of poverty.30 Reduced corruption increases efficiency, output and thus value-increased transactions that promote development and economic growth.31 At the same time the reduction of corruption

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21 PWC 2009:27; Calland/Bently 2013:572 claim there is no conclusive evidence concerning effects of ATI.
26 Article 19 2007:5-6; Calland/Bentley 2013:571; Calland 2010:3.
29 Idemudia 2013:129.
frees resources and opens scope for more effective investments, a necessary condition for sustainable development.\footnote{Soubottina 1992:122.}

The UN has emphasised the importance of ATI in the fight against corruption (2003),\footnote{http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, Art. 10.} and in supporting democracy as it provides “vertical accountability” between the state and its citizens (2004).\footnote{Meyer-Resende 2011:6.} As the public acquires more meaningful information regarding electoral candidates and public policies, it becomes more politically informed and increases its political participation.\footnote{Article 19 2007:9; Darch / Underwood 2010:25-26; Idemudia 2013:128; Meyer-Resende 2011:13, Snell/Sebina 2007:67; Adeleke 2013:86.} This process increases the interaction between civil society, the private sector and government.\footnote{Calland 2010:2-3; Article 19 2007:9; Idemudia 2013:129; Adeleke 2013:86.} Generally, the society feels empowered and mobilised as it partakes more strongly in governance and feeds its own knowledge into policy development.\footnote{Kadiri 2012:6.} ATI is thus a “powerful tool” allowing the most marginalised members of society to influence politics.\footnote{Kadiri 2012:7 concerning the Nigerian Freedom of Information Act 2011.}

Examples from around the world show the positive impact of ATI legislation: in Buenos Aires the cost of medical items was reduced by 50 per cent after critical investigations, while in Mali 1000 “ghost” public servants were taken off the payroll.\footnote{Neuman/Calland 2007:10.} In India, RTI is considered to have improved governance across different areas such as municipalities, elections, trade unions, employment and service delivery.\footnote{Bentley/Calland 2013:576; FOIA Update 2013:76.} Recent studies have assessed that submitting information requests instead of offering bribes was equally effective in acquiring the right ration cards in India.\footnote{Kadiri 2012:7 concerning the Nigerian Freedom of Information Act 2011.}

ATI laws are also perceived to have additional indirect positive effects. Improved archival and record-keeping practices create institutional memory, which future policy-makers draw upon.\footnote{AFIC 2012:2.} ATI laws are also considered to encourage increased foreign investment and aid.\footnote{Escaleras et Al 2010:437.}

However, this chain can only unfold its full potential in an environment where essential conditions are met: in a democracy, where the government effectively implements and the public uses the law, the media publishes critical information, and the government, fearing political consequences, alters its policies in the public interest.\footnote{Darch/Underwood 2010:14; Meyer-Resende 2011:14.} Therefore the potential of ATI legislation depends greatly on the surrounding political, legal and social structures.\footnote{Escaleras et Al. 2010:439.} As will be discussed in more detail in part IV., many of these preconditions are not sufficiently fulfilled in Africa; on the contrary, authoritarian regimes are reducing civil freedoms.\footnote{Escaleras et Al. 2010:437.} In the worst cases, ATI may harm governance outcomes by enabling potential bribers to find out whom to bribe.\footnote{Escaleras et Al. 2010:437.}
ATI is by itself insufficient to ensure increased development, strengthened human rights and reduced corruption. However, while it “is not a silver bullet”, it is a powerful driver for change, if accompanied by structural reforms strengthening democratic political institutions and civil society groups influencing and monitoring the processes. If these conditions are met, ATI can “bring in a socio-economic revolution”.

**Development and Spread of Access to Information Legislation**

In 1990, only 16, mostly Western developed countries, had adopted ATI legislation, but by 2010 this had increased to more than 70 countries, including in Eastern Europe, South America, and China, supported by campaigns by the World Bank and Transparency International and other international stakeholders. Despite this broad uptake, the adoption of the Indian RTI Act in 2005 remains exceptional. India suffers from pronounced economic, political violence and societal difficulties. High levels of corruption and public mismanagement undermine the socio-economic rights of many destitute, rural and illiterate citizens. As these challenges are found in many African countries too, often in more extreme forms, the Indian experience can indicate which practical challenges the Law will face.

The RTI Act came about in a very different fashion to the Model Law. The campaign for ATI began in the 1990s when the Mazdoor Kisan Shakti Sangathan organisation (MKSS) in Rajasthan was investigating the local government’s practice of not paying daily workers the minimum wage while charging the national government fully. The activists realised they would only be able to investigate effectively if they accessed official documents. Other activists investigated the lack of sufficient food rations and sought access to documents detailing food entitlements. These campaigns grew into a civil movement demanding ATI as “a weapon in the battle for government accountability”. Attempts in 1999 to pass such legislation were unsuccessful, but in 2001 the Supreme Court ordered the government to publish lists of those families allegedly living below the poverty line and entitled to grain. Ninety per cent of those had no right to grain, and accordingly never got it, but the distributors siphoned it off in their name.

In 2005 the RTI Act was finally passed and strongly endorsed; more than 2 million requests were filed in the first two and a half years. However, while some successes have been accounted for, the overall impact of the Act has been considered “disappointing”, as legal and practical obstacles
hinder its implementation. These obstacles will be considered below, to assist my analysis of the African Law.

ATI is well recognised at a regional level in Africa, and found in six African Union treaties. The African Charter on Human and Peoples’ Rights declares (Article 9) that “each individual shall have the right to receive information”. The African Charter on Democracy, Election and Good Governance of 2007 (Democracy Charter) stipulates more directly in Article 19(2) that “[e]ach State Party shall guarantee […] free access to information”. Similarly the African Convention on Preventing and Combating Corruption provides that “[e]ach State Party shall adopt such legislative and other measures to give effect to the right to any information”.

However, the reality on the ground does not reflect these regional commitments. Compared to the spread of ATI globally and in African Union treaties, domestic implementation in Africa is lagging. Seventeen countries guarantee ATI constitutionally, but in legally non-actionable form, while 13 countries have adopted ATI laws, the first being South Africa in 2000 and the most recent being Cote d’Ivoire and Sierra Leone. Other countries with ATI legislation include Ethiopia, where the public will not discuss politics openly for fear of denunciation and repercussions, and Zimbabwe where the law oppresses journalistic investigations. However, ATI in Africa is gradually increasing, as seen in laws in Uganda, Kenya and Mozambique, and in progressive orders by the Commission ordering the Nigerian government to release environmental information even in the absence of ATI legislation.

The Commission has endeavoured to encourage and lead this growth. In 2002 it released a broad Declaration on Access to Information, stating that:

“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.”

The Declaration also includes principles protecting whistleblowers, prioritising ATI over secrecy laws and supporting press freedom. However, the Declaration is non-binding and its principles are not delivered in many African countries.

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69 FOIA Update 2013:17.
70 http://www.freedominfo.org/2014/01/access-law-approved-cote-d-ivoire-98th-world/
72 Conversation with staff of NGO, The Hunger Project Ethiopia, in July 2010; the ATI-law also criminalises “committing an offence through mass media”, Salisbury 2011.
73 Dimba 2008.
74 Biraahwa 2012:5.
75 FOIA Update 2013:13; Darch/Underwood 2010:220.
76 APAI 2011:2; FOIA Update 2013:17.
77 http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html.
In a new attempt to strengthen ATI, the Commission passed a resolution in 2010 intended to “secure the effective realisation of ATI in Africa”. In 2012 the Commission adopted the African Platform on Access to Information (APAI) Declaration that affirms ATI and its importance for development.

The Law itself was developed in collaboration with the University of Pretoria, political and civil society leaders from numerous African countries. During the drafting process observer status was granted to the 24 NGO members of the Africa Freedom of Information Centre (AFIC) to the African Union, tasked with monitoring the progress of national ATI laws. In 2013 the Law was adopted by the Commission with the aim that Members would replicate it domestically. While Western NGOs and stakeholders have been surprisingly silent at these events, the Law was warmly greeted by African NGOs and political leaders from Ethiopia and other countries stating this was the support needed to implement their commitment to ATI.

Assessing the Law against Key Principles of ATI

In this section I will critically engage with the essential elements of the Law, showing that while it is satisfying overall, it has weaknesses allowing abuse by domestic governments. Comparing the Law to the key principles of ATI, its key strength is its coverage of private bodies, while its main weakness is a lack of definitions, leaving loopholes for abuse.

Overall Objectives and Relationship to Other Laws

The law is clearly structured and shows commitment to key principles concerning ATI. In its impressive Preamble, it acknowledges ATI as a human right and references the African Charters that have previously recognised the significance of this right. The Preamble underlines its commitment to:

“assisting African states in formulating, adopting or reviewing access to information legislation which meets a minimum threshold of good practice and providing uniform benchmarks for effective implementation of such legislation”.

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78 More details in IV.2.
80 Biraahwa 2013:5.
81 Biraahwa 2013:4; FOIA Update 2013:17.
82 APAI 2011:1.
83 Sendugwa 2013.
84 AFIC 2012:1.
87 Sendugwa 2013.
88 Preamble, Model Law 2013:13.
89 Preamble, Model Law 2013:14.
Simultaneously it expresses concern that “there is a dearth of access to information legislation in Africa” despite the potential it has to enable good governance through “enhancing transparency, accountability and the participation of persons in public affairs, including exposing corruption and issues associated with underdevelopment”. The Commission thereby indicates that it follows the prevailing view on the value of ATI legislation, despite evidence showing its limitation in states lacking liberal freedoms.

The Law demands that “save for the Constitution” the Act shall be supreme to any other legislation or provision that restricts the disclosure of information by any information holder (s 4). This section reflects Principle 3 of the APAI Declaration, which states that ATI should be established by law, be binding, enforceable and take precedence over other laws. This provision is of great practical and theoretical importance. In practice it would spare civil servants the lengthy process of checking conflicting laws before disclosing information. Such requirements are known to induce request denial. In theory this section also prevents adopting secrecy laws to deny access to information that would – according to principles of concurring laws – be understood to correct “mischief and anomalies of the earlier law”. Experience with previous ATI legislation across Africa has shown that, where constitutional supremacy clauses are lacking, later secrecy laws are frequently used to narrow the scope of the rights provided. Considering the strong pressures contradicting ATI laws in Africa, it cannot be assumed that countries will adopt the Law’s supremacy clause.

**Scope of Rights and Obligations**
The starting point of any law is its scope. In the next part the beneficiaries of the Law’s rights and subjects of its obligations will be described.

**Fundamental Right Accessible to Everyone**
APAI demands that the law must apply to anyone, regardless of social status and without need to give reason for a request for information from a public body. The Law complies with these requirements. Section 2(a) gives “every person” the right to request information. Information is defined broadly in s 1 as “any documentary material irrespective of its physical appearance”.

However, experience suggests that African governments may be reluctant to extend the right to “every person”. Previously, African governments have refused to adopt laws giving rights to non-citizens, and this limitation can present a major impediment; in Tanzania citizenship has frequently been revoked for critical and investigative journalists, while other countries make it very difficult to acquire citizenship. Additionally, UNICEF estimates that almost two-thirds of Sub-Saharan African children are not registered and therefore cannot prove citizenship. These factors highlight the need for non-citizen ATI, but indicate difficulties in implementation.

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90 Preamble, Model Law 2013:14.
91 Preamble, Model Law 2013:14.
92 APAI 2011, Principle 3.
94 Adebayo/Akinzoade 2013:274.
95 See IV.1.b.
96 See IV.1.b.
97 APAI 2011, Principle 1.
99 [http://www.unicef.org/media/media_45451.html](http://www.unicef.org/media/media_45451.html).
Obligations Apply to Public Bodies and Private Bodies

The Principles by Article 19 and APAI demand that ATI obligations should apply to “public bodies”, including all governmental or quasi-governmental organisations, defined de facto by the scope of work. The obligations should also apply to private bodies that provide functions and services on behalf of the government or are financed publicly. APAI has further expanded the requirements to include private bodies if they either “have exclusive contracts to exploit natural resources”, or have information related to “the protection of human rights, the environment or public health and safety, or to the exposure of corruption of illegal actions” or which may aid the pursuit of rights.

While the notion of including private bodies in such laws is not new, it is rarely adopted. However, drawing on the South African law, the Law does cover private corporate bodies. In addition to public bodies established by law and the so-called relevant private bodies that are “totally or partially controlled or financed [...] by private funds [...] or carrying out statutory or public functions or [...] service”, the Law includes private bodies such as partnerships in their trade capacity, or former juristic persons that are not elsewhere covered (s 1).

Unlike requests to public bodies, requests to private bodies are only enforceable “where the information may assist in the exercise or protection of any right”. This section responds to the harm which may be done if corporations are not required to disclose information regarding the health and environmental risks of their activities. Concerning oil extraction by Shell in Nigeria, which resulted in terrible environmental pollution and health problems for the residents of Ogoniland, the Commission ruled that the government should have provided prior information on the health dangers involved, arguing that the lack of information negated constitutional guarantees to life and health.

However, the term “right” is very broad and not defined. In the current version of the Law it could be understood to refer to any right acknowledged by domestic law. Thus, breadth of private body information covered would depend on national law, which could greatly restrict the Law’s scope. For example, the lack of legalised indigenous rights to land in the context of “land grabbing” has demonstrated that having ancestral occupation does not necessarily provide any entitlements regarding the land, and might not generate a “right” under ATI law either. It is also unclear whether environmental standards constitute an individual and enforceable “right” or instead a societal and governmental aspiration.

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103 Banisar 2011:11.
105 S 12.
107 Cotula 2011.
108 Francioni 2010:43.
These ambiguities leave the scope of the Law susceptible to abuse by authoritarian governments. It would be preferable if oversight bodies and the judiciary clarified the scope by defining the concept of “right” to include “any right under the African Charter for Human and Peoples’ Rights”.

Obligations
In the next part I will discuss the obligations prescribed in ATI principles and successfully translated into the Law.

Maximum Disclosure with Limited Exemptions
The key to any ATI legislation is the principle of maximum disclosure of information held by public bodies, with only limited exemptions. Expert reports generally demand that exemptions be strictly limited, and relate to a legitimate aim listed in the law, such as national security, privacy, public and individual security and the effectiveness and integrity of policy developing processes. Even in these circumstances, information may only be withheld if it can be demonstrated, on a case-by-case basis, that its release would cause harm, and thus the public interest of withholding outweighs the interest in disclosure. Any information withheld must be disclosed soon as the risk of harm passes. However, information regarding human rights abuses, dangers to public health, safety or the environment may never be withheld.

Part III of the Law has applied these principles. Information requests may only be refused if two conditions are met: firstly, for a reason stated in the Law, and secondly, applying a balancing test, if the harm to those protected “demonstrably outweighs the public interest of release”. The information officer carries the burden of proving that these conditions are met (s 38). Such balancing tests allow independent arbiters to determine in each individual case whether the public or other interests prevail.

A standard suite of legitimate aims may be invoked to prevent disclosure. These include the personal rights of others who have refused consent (s 27); confidential commercial interests, but not if the disclosure would facilitate the accountability and transparency of prior decisions, concerns public funds, would reveal misconduct or deception, or concerns information from the public domain (s 28); and national security, international relations and the economic interests of the state (s 30-32). If the disclosure “would cause prejudice” to preventing and detecting a crime, apprehending or prosecuting offenders, administering justice or assessing or collecting tax, a request may be denied (s 33). Communications between medical practitioners and patients, lawyers and clients, journalists and their sources, or documents otherwise privileged in legal proceedings, remain confidential unless the protected person consents to their release (s 35). Section 36 stipulates the confidentiality of information relating to the examinations and recruitment processes of academic professionals. All of

111 Article 19 2007, Principle 1; APAI 2011, Principle 2, 8;
113 APAI 2011, Principle 8; OSJI 2006:5-6.
114 S 25.
these exceptions are accepted widely as respecting the necessary balance between the principle of maximum disclosure and other interests, if applied appropriately.\textsuperscript{116}

However, easily prone to abuse and not common in ATI laws is s 37, which allows the information officer to refuse a request if it is “manifestly vexatious”. CHRI concluded that while it is necessary to be able to refuse harassing requests, this exception to disclosure is prone to abuse, as an “information officer may feel vexed” at the possible exposure of corrupt actions.\textsuperscript{117} Alternatively, requests may be refused due to a broad understanding of “vexatious” as an example from Nigeria illustrates:

“A requester hand delivered a request to the Ministry of Transport for the minutes of the meeting where the decision was taken to use London taxis for public transport in the Federal Capital Territory. He was told by an officer that he was looking for \textit{wahala} [trouble] by asking for minutes of a meeting held by government officials. The official even suggested that the requester might be insane and refused the request for being vexatious.”\textsuperscript{118}

It would therefore be preferable to follow foreign best practice examples from Canada or the UK and include criteria to assess the abusive intent by the requester, for example if this intent is positively known\textsuperscript{119} or a request is repeated obsessively.\textsuperscript{120} Due to the lack of clarification or examples of requests that may rightly be considered vexatious, this provision is likely to be used as an excuse for not providing information, and may discourage genuine requests and reduce trust in the law.\textsuperscript{121}

\textbf{Disclosure Processes}

APAl and Article 19 stipulate that “the process to obtain information should be simple and fast and take advantage of new information community technologies”,\textsuperscript{122} while providing the information at low or no cost.\textsuperscript{123}

\textbf{Process}

The request process is laid out clearly in s 13-23 of the Law. These stipulate that the requestor need not provide an explanation for requesting information from a public body in the normal time frame. Considering the special needs of potential requestors on a continent where many people are illiterate, s 14 demands that the “information officer must take all necessary steps to assist the person, free of charge”. However, the Indian experience has shown that information officers often do not comply with such obligations, and therefore effectively prevent requests by the illiterate.\textsuperscript{124}

\begin{flushright}
\textsuperscript{116} Article 19 2007:10; Banisar 2011:6.
\textsuperscript{117} CHRI 2011:22.
\textsuperscript{118} OSJI 2011:3.
\textsuperscript{119} CHRI 2011:22.
\textsuperscript{120} CHRI 2011:23; Article 19, Model Law, chapter 14.
\textsuperscript{121} CHRI 2011:23
\textsuperscript{122} APAI 2011, Principle 5.
\textsuperscript{123} APAI 2011 Principle 5; Article 19 2007, Principle 5, 6.
\textsuperscript{124} PWC 2009:43.
\end{flushright}
**Speed**

The time frame for responses to requests is stipulated in s 15 as 21 days or 48 hours in emergency cases. This complies with the guidelines for speedy processing, although a 48 hour time frame might be unrealistic, especially if a request was issued on a Friday evening.\(^{125}\)

If a third party’s rights are involved and they object to the disclosure, no information may be released until any possible appeal process has been determined or the right to appeal has expired (ss 15(7) and 81). The CLD considers this to undermine the principle of releasing information quickly.\(^{126}\) It recommends disclosing information at the end of the appeals process and compensating the third party if the disclosure was unjust. However, the unlawful disclosure of personal information will often be beyond repair, nor can damages be adequately accounted, arguing against this recommendation. Acknowledging the fact that judicial backlogs in Africa and India often amount to several years and can thus undermine speedy ATI,\(^{127}\) the most adequate balance appears to be as stipulated, so long as information officers are adequately trained to filter out objections lacking sufficient grounding.

**Fees**

While it is acknowledged that fees should not deter applicants from requesting information, the implementation of ATI legislation is very costly.\(^{128}\) The Law has balanced these competing interests in s 23, by providing that lodging requests is free of charge, and fees may not be required in relation to time the information officer spends searching for or examining information. However, costs may be incurred for the reproduction, translation and transcription of documents. As the languages spoken by bureaucrats are often not those of requestors,\(^{129}\) translation costs will regularly be incurred and could especially deter poor and rural applicants, who are affected most by language barriers and the lack of funds.\(^{130}\)

The Law has responded to these difficulties by barring fees for “(a) personal information regarding the requester, (b) for reproduction of information which is in the public interest”, (c) when the information holder has not complied to disclose the requested information in the legal time frame” or (d) where the requester is indigent.” While these exceptions are to be welcomed, the term “public interest” and “indigent” are very broad terms. CLD suggests that in order to provide officers and oversight bodies with clearer guidance, indicative examples of “public interest” should be given,\(^{131}\) as the term is likely to be understood very differently by different people.\(^{132}\)

Similarly the term “indigent” may easily be abused.\(^{133}\) The specific definition of the term “indigent”, as well as the appropriate fee within each country, must be developed domestically. It would be
advisable if the Law provided guidelines to help define these issues, as, for example, the Ugandan fees deter potential applicants from requesting information.

However, PWC discovered that in India the submission fees are only the smallest part of the costs incurred by requesters. While the application fee was 10 rupees, rural citizens had to expend an average of 250 rupees for each request, a prohibitive sum. This included travel costs and loss of income while travelling, as up to five visits were necessary before requests were answered. Although requestors are legally entitled to compensation for expenses, if the second appeal is not answered within the specified time frame, this right is rarely enforced. The cost of requests therefore depends strongly on civil servant compliance, and the accessibility of places to lodge requests; for this reasons, 65 per cent of Indian survey participants favoured call centres, online submissions and facilitations – recommendations that are equally appropriate for Africa.

On another practical level, the Law can learn from Indian experience regarding methods of fee payment: while many rural citizens would prefer to lodge requests by mail or email to save travel costs and time, fees could not be paid at the post office, but had to be paid to the information officer. Considering the similarities between rural citizens in Africa and India, this issue is likely to arise in Africa too. Thus, the much-needed guideline to the Law should suggest practical methods for paying fees.

Overall, the process of lodging requests complies with the theoretical demands of such legislation; however, guidelines to limit the opportunity for abuse and suggest more practical means of submission and payment would strengthen the Law.

**Obligation to Publish Information**

All guidelines to ATI legislation include a duty to publish information publicly and regularly without prior request. This includes information regarding political and departmental powers, structures, budgetary expenditures and policy activities.

An effectively implemented duty to publish has all the positive effects of individual ATI without the effort and cost of individual processes. The need for proactive publication is particularly important in countries where the citizenry is often unaware of its rights, a frequent scenario in developing countries. Legal requirements must strike a balance between ATI and onerous, unachievable or overly time-consuming tasks for government and other bodies.

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134 CHRI 2011:16.
135 Ngabirano 2013:211.
136 PWC 2009:134.
138 PWC 2009:86.
139 PWC 29009:74.
143 Neuman/Calland 2007:17-18 with examples of successful duty to publish in Peru using modern technologies.
144 Jagwanth 2002:7; see also IV.2.d.
“to all communities and sectors of society”, APAI recommends the use of all “reasonable” means of communication including information technology.\textsuperscript{146}

Under the Law, disclosure requirements are regulated by s 7, which demands the prompt publication of many documents produced internally. However, it does not stipulate the means of publication and distribution. Experience from India, which would apply in this respect to Africa, shows that it is preferable and in many cases more cost-efficiently accessible for information to be provided online.\textsuperscript{147} Online publication avoids complications that otherwise can easily prevent the effective implementation of access to information: many people in Africa do not have regular postal addresses\textsuperscript{148} to which such information brochures could be sent if requested and internet access is increasing fast.\textsuperscript{149} In accordance with other commentators, I therefore recommend that publications be published primarily online,\textsuperscript{150} and that the Law be adapted accordingly. Where online publication would be ineffective at reaching the interested audience, for example due to the lack of widespread internet access, other publication means should be adopted, such as newspaper gazetted and radio broadcasting.

Although the principle of proactive publication has been adequately included in the Law, expectations in this area must be limited: in many countries public bodies do not abide by these obligations effectively.\textsuperscript{151}

\textbf{Duty to Collect and Manage Information and Right to Personal Data}

APAI’s and Article 19’s Principle 13 demands the organised management of information produced and collected by governmental and private bodies as a precondition to effectively answering information submissions.\textsuperscript{152} The Law has complied with these suggestions and obliges each information holder to create, keep and maintain information (s 6).

In India, 38 per cent of information officers consider that the lack of a coherent, organised and electronic document management system poses the biggest obstacle to providing information in due time.\textsuperscript{153} This figure highlights the importance of developing and adequately funding record-keeping infrastructure.\textsuperscript{154} Considering the lack of archival and record-keeping practice in Africa, CLD expects this issue to impede effective compliance with the Law.\textsuperscript{155} It would be advisable to develop recommendations regarding record-keeping and data management from best practice examples of developing countries that have already acquired experience and distribute them with the Law.

Additionally, two other record-related issues are known to threaten ATI. Authoritarian regimes are known to destroy records, either in the break-down of their regimes or when ATI requests are

\textsuperscript{146} APAI 2011, Principle 6.
\textsuperscript{147} PWC 2009:65.
\textsuperscript{148} Mbuvi 2012.
\textsuperscript{149} Ancha 2013.
\textsuperscript{150} CLD 2011:13; Banisar 2011:6.
\textsuperscript{151} FOIA Update 2013:76.
\textsuperscript{152} APAI 2011, Principle 13.
\textsuperscript{153} PWC 2009:8, 47.
\textsuperscript{154} PWC 2009:49.
\textsuperscript{155} CLD 2011:9.
lodged. The Law addresses this problem by criminally sanctioning the alteration, destruction and concealment of information (s 88).

More recently, the practice of informal lunches and phone calls instead of formal meetings with minutes, or of simply not recording important policy decisions to avoid disclosure, has emerged as a threat to ATI, attracting courts’ attention around the world. ATI legislation thus needs to include more detailed provisions on record-making. While the Law includes in its definition of information “fact, opinion, advice, memorandum” (s 1), it does not stipulate when and why these records must be created, or which details must be included. The Law should therefore be amended to mandate the creation of memoranda of any discussion producing significant policy decisions, including the participants, time and deliberations, similar to US rule-making procedure.

**Oversight Bodies and Right of Appeal**

The strong disclosure principles and carefully limited exemptions contained in the Law will only be effectively implemented if accompanied by an independent oversight body that has strong powers in an easily accessible appeals process – as Neuman and Calland succinctly conclude: if a state wants to withhold information, it will do so regardless of regulated exceptions. Any kind of exception in the Law will be used to shield information; the effectiveness of the oversight mechanism and appeals process thus “determines the value and usability of the law for ordinary citizens”. According to best practice recommendations, oversight bodies generally consist of independent institutions, such as external bodies, ombudsmen or the existing court system. The Model provides for the internal review (ss 40-44) of any refusal of disclosure; any decision or lack of decision may be appealed to the oversight body (ss 71-74), the decisions of which can be challenged through judicial review (s 83). This appeals process is open to everyone, again in accordance with requirements for a strong and effective ATI law.

This appeals procedure is in compliance with general recommendations. However, minor issues weaken the Law’s oversight provisions. While APAI demands “adequate” funding, the Law lacks guidelines how to assess the funds needed. Furthermore, members of the oversight body, the “information commissioners”, are to be selected and appointed by an undefined “appropriate authority”.

The model law developed by Article 19 suggests that commissioners be appointed by the head of state after an affirming two-thirds majority by the legislative body. The recommendation acknowledges that the legislative body, directly elected by the citizens, is the “key to democratic governance” and has three tasks: passing laws, deliberating on citizens’ interests and overseeing

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161 Kadiri 2012:2.
163 APAI 2011, Principle 12.
165 Article 19, Model Law, chapter 34.
the executive.\textsuperscript{167} The Commission abided by these recommendations, and thus the domestic legislative body oversees the members of the oversight mechanism, terminates their office if necessary (s 49(2)(c)), and appropriates their budgets; the oversight body is thus accountable to the parliament (s 53(6)).

These provisions, however, reveal a certain politicisation of all ATI matters. In countries with less separation of powers and weak institutions, or a lack of strong oppositional parties – deficiencies various African countries show – the oversight body will not be as independent as declared (s 53) but dependent on the parliament, whose activities it is supposed to reveal.

However, this political conflict cannot be resolved: the oversight body has to be appointed by some institution and the legislative is usually the most legitimate, as well as used to overseeing other bodies and commissions.\textsuperscript{168} In order to reduce the politicisation the Law demands that commissioners may not hold a political position during the commission term and (going beyond the standard recommendations)\textsuperscript{169} may not have held a political role for five years prior (s 53 (2)(c)).

Overall the Law has developed strong and independent oversight mechanisms, which would support transparency and accountability, if implemented accordingly and embedded in functioning political institutions.

\textbf{Whistleblower Protection}

The Law combats human rights abuses, corruption and other misconduct by enabling their uncovering.\textsuperscript{170} Ideally, it would be the first step to altering the secretive bureaucratic culture amongst civil servants towards disclosing such misconduct, in answer to requests or even without specific requests. In order to facilitate the proactive release of information of vital public importance, Article 19, APAI and other experts consider that legal protection for “whistleblowers” is essential to the effective implementation and functioning of ATI legislation.\textsuperscript{171} Legal provisions should protect whistleblowers against any kind of liability or sanction if revealing “wrongdoing”, which in this context should include:

“the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment.”\textsuperscript{172}

The whistleblower must believe the information is true, even if the disclosure breaches his or her legal or employment obligations.\textsuperscript{173}

The Law does not fulfil this requirement but only protects those acting in “good faith” against civil, criminal and employment-related sanctions and liability, s 87. This appears to include only disclosure

\textsuperscript{167} Meyer-Resende 2011:9.
\textsuperscript{168} Meyer-Resende 2011:9.
\textsuperscript{169} Model Law Article 19, Chapter 34(2).
\textsuperscript{170} Preamble, Model Law 2013:13-14.
\textsuperscript{172} Article 19 1999, Principle 9.
\textsuperscript{173} Article 19 1999, Principle 9.
given despite the existence of an “exemption” demanding the withholding of information (“no person is [...] liable for the disclosure or authorisation for the disclosure in good faith”).

The currently most famous whistleblower, Edward Snowdon, who released information concerning the systematic breach of privacy rights worldwide, shows that even in a “developed” and “democratic” country some human rights abuses will only become public through disclosure by individuals. In developing countries, where democracy and human rights traditions are less established, the legal protection of a whistleblower could be one further control mechanism to strengthen and increase good governance. The whistleblower protection clause need not necessarily be within the ATI Law, but most African countries currently lack clauses protecting whistleblowers, although the African Union Convention on Preventing and Combating Corruption demands passing such laws (Article 5).

The Nigerian Freedom of Information Act is considered to have ended silence in the public sector, by implementing an effective protection for whistleblowers. In s 27 it stipulates that:

“(2) nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization by any person, [reveals] any information which he reasonably believes to show a) a violation of any rule or regulation b) mismanagement, gross waste of funds, fraud, and abuse of authority; or c) a substantial and specific danger to public health or safety notwithstanding that such information was not displaced pursuant to the provision of this act.

(3) no civil or criminal proceeding shall lie against any person receiving the information or further disclosing it.”

The Law would be greatly strengthened if it was amended to include a similar protective clause.

Duty to Fully Implement and Openness of Government

In Principle 14 APAI posits that “[p]ublic and relevant private bodies have an obligation to ensure the law is fully implemented. This includes internal procedures and processes and the designation of responsible officials.” However, experience from a number of countries has proven that in developing countries, more than half of requests remain unanswered.

Studies in different countries have demonstrated that information officers refuse to disclose information as revealing personal, departmental or governmental misconduct and incompetence, as it might harm their careers. In an attempt to overcome the lack of compliance by civil servants, the Indian RTI Act and the Law (s 88(2)) both provide that individual information officers may be fined for withholding information wrongfully, although such roles are not financially rewarded better

174 Nsenkeng 2013.
176 Adebayo/Akinzoade 2013:274.
178 Escaleras et Al. 2010:438.
than other civil servant positions.\textsuperscript{182} In India this financial risk has lowered willingness amongst civil servants to become an information officer and hence has resulted in many junior bureaucrats being information officers, who lack the authority to request information from senior staff,\textsuperscript{183} which again reduces the law’s implementation. Similar outcomes can be expected in Africa from the current version of the Law. CHRI thus suggests that fines for misconduct should lay against institutions, rather than individual officers.\textsuperscript{184} Additionally, providing the oversight body the power to order enforceable compensation to requestors who suffered losses due to the unlawful denial of their information requests would create a monetary incentive to comply with the law.\textsuperscript{185}

An alternative model was developed by PWC who suggest filling these positions with more senior officials who are provided monetary incentives to take the job and comply with the RTI Act, as they alone are capable of implementing these laws successfully.\textsuperscript{186} Either of these models would be likely to increase compliance with the Law, and to encourage improved training for information officers also, as departments would want to avoid financial losses. Simultaneously, such training would address another issue that impedes compliance. Evaluation studies in South Africa and India have shown that many requests are refused and provisions on proactive disclosure ignored, as staff are unaware of their obligations and incapable of answering requests due to their lack of training.\textsuperscript{187}

Additionally, Article 19 requests regular staff trainings to challenge the existing secrecy culture among public bodies and “actively promote open government”.\textsuperscript{188} These recommendations have been adopted in s 62 of the Law, which demands that the oversight mechanism must promote awareness of ATI through a variety of measures.

The Law responds to international experience of civil services undermining the most progressive legislation, through a lack of compliance.\textsuperscript{189} However, currently the Law is not creating sufficient incentives for senior staff to become information officers, although effective ATI law implementation depends on senior staff being responsible.\textsuperscript{190}

**Conclusion**

The Law complies with “all the major principles that ought to inform a progressive information access law”.\textsuperscript{191} The provision obliging corporations to disclose certain information is the most exceptional, yet absolutely necessary considering the great disparity in power between African citizens and multinational corporations. Most other principles have been adopted to form a strong and progressive ATI Law for Africa. But the “devil is in the details”,\textsuperscript{192} and the lack of definitions or guidelines on how to define or interpret certain clauses and terms such as “vexatious” and “public interest”, or how to assess adequate fees and funding domestically, provides an entry door for

\textsuperscript{182} PWC 2009:9, 49.
\textsuperscript{183} PWC 2009:45, 49, 84.
\textsuperscript{184} CHRI 2011:27.
\textsuperscript{185} CHRI 2011:32
\textsuperscript{186} PWC 2009:9.
\textsuperscript{188} Article 19 2007, Principle 3.
\textsuperscript{189} Article 19 1999, Principle 3.
\textsuperscript{190} Neuman/Calland 2007:13.
\textsuperscript{191} CHRI 2011:34.
\textsuperscript{192} CHRI 2011:34.
inefficiency, ineffectiveness and abuse. The Law would thus have been strengthened if explanatory
notes had been incorporated, providing guidance to lawmakers in drafting, civil servants in applying
and the judiciary in controlling applications of the Law, which in most countries explores a
completely new field of rights. Furthermore, the Law lacks essential whistleblower protection and
thereby reduces the willingness by civil servants to reveal corruption and other misconduct amongst
the government.

Implementation of the Model Law
Despite the vast amount of effort, time, resources and commitment invested in the development
of the Law, its impact will depend on a variety of factors, including the surrounding legal and political
environments, administrative infrastructure and political will. ATI laws rely even more on political
participation and will to enforce than do most laws, as all governmental bodies and institutions are
required to comply and reveal information concerning their activities, incurring administrative and
potentially reputational costs in the process.

In this chapter I will therefore discuss those practical, political and societal issues that will determine
the Law’s fate at the domestic level, whether it will be passed and enforced, and achieve increased
accountability and improved governance. Impediments may occur on two levels.

In the first part I will discuss those political and societal elements that facilitate the effective
adoption and gradual implementation of the Law in the Member States of the African Union. I will
demonstrate that while the Law will not be able to overcome strong counter-pressures that will
undermine its effective enforcement in many African countries, such as secrecy traditions and strong
authoritarian regimes, it will nonetheless strengthen civil society’s long-term quest for information.

In the second part I will illustrate systemic challenges that will continue to impede the Law even if
enforced. These include the generic problem of any law created not specifically for the respective
country, the need for complementary laws, lack of awareness and general access to justice issues.

Factors Influencing Adoption and Implementation
As discussed above, in most respects the Law developed by the Commission is strong and
comprehensive. But ATI laws do not operate in a vacuum, and the Law will depend for its passage,
enforcement and effect on an “enabling [political] environment”. As Calland/Bentley emphasise, ATI
concerns political power and thus requires political will to adopt and implement effectively.

In the following part I will assess the strength of factors that influence whether the Law will be
passed in Member States, and whether, if passed, it would be followed up by sufficient enforcement.

ATI experts have assessed that in conformity with prevailing political theories, the political will to
adopt and implement and ATI laws is usually formed if certain considerations outweigh political
reasons to oppose such reform projects. Three interrelated motives for forming the political will to

193 CHRI 2011:34.
194 Neuman/Calland 2007:3.
195 APAI 2011, Application of Principles 1, 2.
196 Calland/Bentley 2013:582.
introduce ATI laws can be distinguished. Firstly, reform projects may be delivered in return for material advantage within the international system.\textsuperscript{198} These may be direct, such as grants by international development agencies or membership of the WTO, or indirect, as when reform strengthens international perceptions of the “modernity” or “civility” of the state and leads to more opportunities for advantageous cooperation.\textsuperscript{199}

Secondly, governments may have an endogenous commitment to the reform policy (such as economic, tax or education reforms) or to state identities (such as democratic, liberal or progressive) with which the reform is considered to accord.\textsuperscript{200} If this is the case, governments may introduce the reform out of principle and to maintain consistency with these identities.\textsuperscript{201}

Thirdly, and closely related to this, domestic pressure may generate the political will to adopt policy reforms, as the political elite’s power relies on public support.\textsuperscript{202} This pressure commonly arises from broad sections of the public demanding policy reform, often catalysed by NGO campaigns. How much domestic pressure is needed to induce reform and implement a policy depends on the political system. In pluralistic democracies, leaders need greater electoral support than in authoritarian states, and so will be more influenced by public demands.\textsuperscript{203} Nevertheless, even authoritarian regimes rely upon some measure of consent to maintain their rule.\textsuperscript{204}

Once any new policy or law is passed, political will is required to sustain implementation efforts.\textsuperscript{205} In the following part I will assess the strength of elements contributing to or opposing political will to adopt and effectively implement the Law, within the three motives of material advantage, principled commitment or domestic pressure. It should be noted that the spread and effective implementation of ATI does not appear to be dependent on economic success or development, as other developing countries in Latin America have demonstrated.\textsuperscript{206} Therefore, the lack of economic development in Africa, per se, need not be a conclusive barrier to the effective realisation of ATI.

My analysis of the current situation will demonstrate that while it is likely that the Law will be passed in several African countries soon, actual enforcement is a more remote possibility. Personal interests in non-transparency and strong traditions of governmental secrecy, currently fuelled by the global fear of terrorism, are preventing the enforcement of the Law over the short term. Civil society is not sufficiently strong or organised to apply the necessary pressure on governments to alter this reasoning. However, the Commission’s advocacy of ATI and dissemination of the Law will strengthen NGOs and CSOs in their quest for ATI, opening space for public arguments on ATI which will gradually increase the pressure for effective implementation of the Law. This endeavour will be also supported, at least indirectly, by World Bank and UN support for such values and the Law.

\textsuperscript{198} Risse/Ropp 1999:252.
\textsuperscript{199} Risse/Ropp 1999:252.
\textsuperscript{200} Risse/Sikkink 1999:14.
\textsuperscript{201} Simmons 2009:13.
\textsuperscript{202} Simmons 2009:15.
\textsuperscript{204} Risse and Sikkink 1999:38; Keck and Sikkink 1998:206.
\textsuperscript{205} Ackerman/Sandovall-Ballesteros 2006:115
\textsuperscript{206} Ackerman/Sandovall-Ballesteros 2006:116.
Material Advantage

One reason to form the political will to adopt and implement a law is to obtain an arranged or expected material advantage in the international system. However, the World Bank and IMF have so far neither directly commented on, nor promoted the Law, nor is it likely that they will demand the implementation of the Law as a precondition to a loan or grant. The practice of imposing such preconditions has been frowned upon and officially discarded, not least because many developmental examples prove that adopting laws only to obtain a World Bank or IMF grant has often resulted in ineffective laws. With respect to ATI laws, experiences in Nicaragua and Honduras have shown the ineffectiveness of loan preconditions: their ATI programmes were severely underfunded and not used by the public, as neither government nor society was committed to them.

More indirect incentives to guarantee ATI have proven more successful, if backed up by sufficient civil society engagement. In various Eastern and Central European states, ATI laws were enforced as governments knew this would increase their chances of obtaining EU membership. Similarly, Mexico has adopted ATI knowing this would enhance its relations with the US.

Such effects enhance the likelihood of the adoption and implementation of the Law domestically. While not demanding the implementation of ATI directly as a condition for a grant or loan, international stakeholders are known to promote transparency, good governance and accountability. The World Bank, for example, is working with governments and civil society in Africa to promote ATI. In these efforts, it is addressing multiple levels of political will-formation: directly persuading leaders of the value of ATI, strengthening civil society pressures in support, and emphasising its commitment to this value.

More directly, the United Nations Democracy Fund and the Open Society Initiative for Southern Africa began funding a programme in March 2013 for two years aimed at “Strengthening Legal Frameworks on Access to Information in Africa”. This programme targets regional and sub-regional institutions and their commitment to the Law’s enforcement. Additionally, this programme will train CSOs and civil servants in monitoring previously adopted ATI laws. It thus addresses all stakeholders that are necessary to implement ATI effectively. While such projects are not directly linked to material international advantages, it cannot be overlooked that considering the high dependence of many African countries on financial support from the World Bank, UN and other stakeholders, the opportunities of enhancing relationships through desired legal changes will at least be considered. This suggests that the need for financial support from the international community will indirectly support the adoption and implementation of the Law. I will now consider whether this influence is likely to be matched in the political commitment of African leaders to adopt ATI.

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207 Simmons 2009:18.
210 Ackerman/Sandovall-Ballesteros 2006:122.
211 Ackerman/Sandovall-Ballesteros 2006:122.
212 Ackerman/Sandovall-Ballesteros 2006:122.
Political Commitment
In the next part I will demonstrate that African governments’ commitment towards the values and goals of ATI, such as democracy and accountability, is currently outweighed by personal and customary interests in maintaining secrecy. Thus, they currently lack endogenous will to implement the Law.

Assessing Leaders’ Commitment to ATI
The Law was only published six months ago and has not yet been adopted as domestic legislation in any country, therefore the commitment by African leaders to the values enshrined in the Law can only be assessed by analogy from their behaviour regarding treaties with comparable values and principles, and from regional ATI experience.

The Law encourages governmental accountability and transparency “as an indispensable component of democracy”\(^{215}\) in which the public gains greater control over the government. In this respect the intention and effect of the Law can be compared to the Democracy Charter which equally promotes democracy and pluralistic and fair elections.\(^{216}\)

The Democracy Charter was adopted in 2007, with votes from leaders who had come into power by undemocratic means and have since avoided holding fair elections. It came into force in 2012 as a “miracle” after having been ratified by the fifteenth African state and now binds its parties.\(^{217}\)

However, the Democracy Charter has not increased democracy across the continent.\(^{218}\) On the contrary, many elections are systematically rigged. Ethiopia signed the Charter in 2007 and ratified it the next year\(^{219}\) while the country was considered “partly free”\(^{220}\) by Freedom House. It has since restricted levels of civil and political freedom, and is now considered “not free”.\(^{221}\) While this may be a simple example, it is not an exception, as the previously slow trend towards democratisation and civil freedom is currently stagnating.\(^{222}\) As Mangu posits succinctly, “constitutional manipulation, corruption and bad governance [...] are still common practice across the continent”.\(^{223}\)

These observations support the common theory that while African leaders are willing to acknowledge and sign up to treaties strengthening democracy and human rights, practice will not necessarily follow suit.\(^{224}\) Leaders sign such treaties in order to appear credible, modern and supportive of these values demanded by civil society and the international community and especially the Commission, but these pressures are not yet strong enough to also induce effective enforcement to the detriment of leaders’ real power.

\(^{215}\) Preamble Model Law 2013:13.
\(^{216}\) Kane 2008:47; Mangu 2012:351.
\(^{217}\) Mangu 2012:348-349.
\(^{218}\) The Economist 2013:23.
\(^{223}\) Mangu 2012:363.
\(^{224}\) Mangu 2012:371; Maluwa 2012:659.
Accordingly, the warm welcome and commitment towards the Law is not to be taken at face value, as the leaders are not yet committed to the underlying values, and the effective implementation of this Law is the real challenge. This perception is further affirmed by experiences with African countries that have adopted ATI laws. FOIA considers them not sufficiently effective. This observation can be illustrated with different examples: Uganda’s law does not institute an independent oversight body, in Angola whistleblowers are not protected and in Guinea the public interest in disclosure cannot be cited to override the government’s interest in withholding information.

Most alarmingly, the Zimbabwean “Access to Information and Privacy Protection Act” appears to support ATI; in reality, however, it provides legal grounds to withhold all cabinet documents, draft legislation and documents that might affect relations between different levels of government. The law was in fact passed to suppress free speech and media that had begun to expose scandals involving the authoritarian ZANU-PF party. The law also required the registration of journalists, and prohibited the abuse of free speech, a provision widely used to silence journalists.

Furthermore, international and regional political pressure to adopt ATI has in some respects reduced. South African’s previous commitment to ATI had increased the willingness of other countries to adopt some kind of ATI legislation. However, the South African parliament subsequently passed the Protection of Information Bill, which, if enacted, would greatly reduce the scope of the ATI law in several ways, for example through criminalising journalistic investigations into corruption. It has not yet been enacted, as President Zuma surprisingly refused to sign it, proving how contested these issues are. In the meanwhile it has had the effect that other African countries postponed and stopped the passage of ATI legislation – the little political will faded further. The publication of the Law 16 months ago has not succeeded in countering this notion; only 2 countries (Sierra Leone, Cote d’Ivoire) have passed ATI legislation of varying quality since its adoption.

Additionally, an increasing trend by African leaders to distance themselves from “Western principles” can be perceived, which reduces the influence Western stakeholders have on reforms. Specifically concerning ATI, scholars argue that the Commission’s view of ATI as a fundamental right is not shared by African politicians. Darch argues that the idea of sharing information on government procedures has not really been acknowledged and accepted by African governments, and that external pressure will not change, but in fact reinforce, this narrative. He suggests that declaring access to information a human right is actually harming the spread of this idea on the African continent, as sentiments against neo-colonialism are increasing, and ATI contradicts African

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225 FOIA Update 2013:15.
226 Ibe 2013.
227 FOIA Update 2013:13.
228 Nsenkeng 2013.
229 Dimba 2008.
231 FOIA Update 2013:16.
232 FOIA-Update 2013:18.
233 Smith 2013.
234 FOIA-Update 2013:18.
236 Mutua 2001; Ochieng 2012; Kariuki 2013.
237 Darch 2013:43.
bureaucracies’ traditions of secrecy. Two Zambian scholars even argue that censorship is not only traditionally common but also necessary to avoid instability in Africa.\(^{238}\)

Summing up, political commitment to the value of ATI is currently low, and even if adopted, without further motives, effective implementation of the Law is not probable soon. Additionally, neither inter-African nor international peer pressures are sufficiently strong to alter this reticence amongst the political elite.

**Counter-Pressures**

Two other countering pressures reduce the willingness of African governments to introduce and implement ATI: the personal interests of the ruling elite, and secrecy traditions and concerns.

The Law creates transparency and induces change in the political system towards less corrupt and authoritarian regimes, which thus become more vulnerable to critique and challenge.\(^{239}\) These reforms contradict the personal interests of those who would have to enforce them: political and bureaucratic elites, which profit personally and financially through their hold on power.\(^{240}\) Thus, political leaders have personal motives to oppose the effective implementation of the Law domestically.

Additionally, traditional values contradict ATI. “Information has a secret value in traditional African societies”,\(^{241}\) Sango emphasises, in common with other scholars and practitioners.\(^{242}\) This attitude developed over time and is now deeply entrenched in the bureaucracy.\(^{243}\) Former colonial regimes embedded secrecy strongly in legal and administrative systems, and these were maintained in the postcolonial period.\(^{244}\) This governmental secrecy culture was reinforced by the relatively recent liberation movement, that also developed secretly, making secrecy their “way of life”.\(^{245}\) The liberators upheld this culture when they took government.

This secrecy culture discourages ATI.\(^{246}\) Governments and bureaucrats perceive non-transparency as a measure of power and freedom, and fear to lose this impunity if the veil were lifted.\(^{247}\)

These notions and traditions amongst the civil service and political elite push against ATI reforms,\(^{248}\) further decreasing the political will to implement the Law. As Neuman, Calland and Abuya argue, these entrenched beliefs and habits can only be overcome by a new culture of openness that is promoted over a long term by a committed government.\(^{249}\)

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\(^{238}\) Chiumbo E MM/Kakana, F “Promoting good governance through freedom of access to information and censorship to information”, quoted in Darch 2013:49.

\(^{239}\) Ackerman/Sandoval-Ballesteros 2006:121.

\(^{240}\) Idemudia 2013:140; Darch/Underwood 2010:160.

\(^{241}\) Sango 2013:356


\(^{243}\) FOIA Update 2013:13.

\(^{244}\) Darch/Underwood 2010:219; similar behaviours can be observed in Senegal Diallo 2013:60.

\(^{245}\) FOIA Update 2013:13.


\(^{247}\) Diallo 2013:75, 78.

\(^{248}\) Adebayo/Akinzoade 2013:271.

\(^{249}\) Neuman/Calland 2007:10-11; Abuya 2013:240.
There is little to suggest that such a new culture is developing. On the contrary, terrorism and insurgencies in many parts of Africa have provided an “easy excuse” to pass measures that negatively impact ATI.\textsuperscript{250} The legislative majority for the South African Secrecy Bill illustrates this notion.\textsuperscript{251} Some commentators believe it was facilitated to stop publications concerning corruption scandals involving senior members of the ANC,\textsuperscript{252} and it is considered an unexceptional example of how ATI restrictions are justified by citing and national security concerns.\textsuperscript{253} Zambia shed ATI from its Constitution;\textsuperscript{254} and the efforts by civil society and some parliamentarians to pass an ATI law have been rebuffed for many years on the pretext of countervailing security interests.\textsuperscript{255} This has further strengthened the Secrecy Bill from 1923, which criminalises the release of public information within at least 25 years. Overall, national security concerns are cited to justify the most common and broad exceptions to the principle of disclosure in current African ATI laws.\textsuperscript{256}

These examples are part of global efforts by governments to protect secrecy, justified by external and internal threats of terrorism. Most prominently, US President Obama passed Executive Order 12526 that allows reclassifying and withholding information involving national security concerns, after a request has been submitted.\textsuperscript{257} This order reduced the US’ previous credibility as a proponent of ATI.\textsuperscript{258}

Overall, the secrecy culture in the African bureaucracy, strengthened by current and international trends, bolsters political opposition to the effective implementation of the Law.

**Domestic Pressure**

A third factor which may influence the adoption of the Law is broad public pressure for legal or policy reform, to which governments must respond in order to maintain political power.\textsuperscript{259} Many countries that have adopted ATI laws did so in reaction to protests, demonstrations and civil movements.\textsuperscript{260} Domestic civil society does not only play an “indispensable”\textsuperscript{261} role in the genesis of ATI legislation,\textsuperscript{262} but is also essential in the development, implementation, usage, promotion and safeguarding of such legislation.\textsuperscript{263}

If the public is not part of the process, such laws will not be used sufficiently and thus not increase accountability, as Belize demonstrates.\textsuperscript{264} The passage of a law without CSO input can produce a rights-restricting, instead of rights-giving law, such as in Zimbabwe.\textsuperscript{265} Conversely, the positive

\textsuperscript{250} Roberts/Roberts 2010:931; FOIA Update 2013:83.
\textsuperscript{251} FOIA Update 2013:18.
\textsuperscript{252} FOIA Update 2013:18.
\textsuperscript{253} Calland/Diallo 2013:3.
\textsuperscript{254} AFCIC/MISA 2012.
\textsuperscript{255} Adamu 2013.
\textsuperscript{256} Nsenkeng 2013.
\textsuperscript{258} Darch/Underwood 2010:100.
\textsuperscript{259} Simmons 2009:13.
\textsuperscript{260} Ackerman/Sandoval-Ballesteros 2006:121; Neuman/Calland 2007:2, 5-6; Bentley/Calland 2013:577.
\textsuperscript{261} Calland 2010:19.
\textsuperscript{262} Ackerman/Sandoval-Ballesteros 2006:121; Neuman/Calland 2007:2.
\textsuperscript{264} Neuman/Calland 2007:6.
\textsuperscript{265} Neuman/Calland 2007:6.
examples of India and South Africa prove that the involvement of civil society in legislative processes generates more effective and progressive laws.\textsuperscript{266}

The public’s role remains important even after a progressive law is passed. Without continuous information requests, pressure for compliance and the monitoring of implementation, governments are tempted not to provide the vast financial and human resources needed, especially in the first implementation period.\textsuperscript{267} Public pressure will also drive reforms in complementary areas of law and practice, such as freedom of expression and the media.\textsuperscript{268}

Furthermore, as Article 19 posits, civil society is able to challenge and thereby broaden the scope of ATI laws by appealing to oversight bodies and courts.\textsuperscript{269} Litigation and judicial decisions may be especially effective in raising awareness of ATI, increasing political pressure and influencing policies.\textsuperscript{270} Judicial decisions are also known to strengthen social movements and win over opponents, thereby reinforcing rights\textsuperscript{271} such as ATI.

Additionally, the recent trend of restricting ATI as part of counter-terrorism highlights the importance of the public in safeguarding rights.\textsuperscript{272} The numerous tasks for civil society in achieving ATI demonstrate the importance of energetic commitment to ATI over a long period of time.\textsuperscript{273} Neuman and Calland therefore argue that the success of ATI legislation depends on it being demanded, and its progress monitored by a civil society claiming ownership of the law.

The present Law, however, was developed more under the auspices of the Commission with specific CSO input than by broad and public movements. This raises concerns on whether it will attract sufficient civil society ownership and commitment. If not anchored in a “bottom-up” campaign, the Law may fail to generate sufficient societal awareness, usage, promotion and safeguarding.\textsuperscript{274} For example, ATI laws passed in Belize, Honduras and other Latin American countries as conditions for participation in World Bank debt reduction programmes were not endorsed by those societies, resulting in the laws being underfunded and ineffective.\textsuperscript{275} A similar pattern is probable in Africa, especially in countries that deny civil society space and have fragmented CSOs.\textsuperscript{276}

Nevertheless, the medium and long term effects of the Law will be positive for various reasons. Although the Law was not developed domestically, it did involve different African NGOs, academics from a South African university and political leaders in its drafting process. Furthermore, the Commission has trusted APAI members with particular ownership over the progress of ATI in Africa, ensuring that it will not be remote from civil society but carried by NGOs that are close to the

\textsuperscript{266} Neuman/Calland 2007:5-6.
\textsuperscript{267} Neuman/Calland 2007:6, 23.
\textsuperscript{268} An Overview: Transparency and Silence 2006:5-6.
\textsuperscript{269} Article 19, 2007:25; although prefers non-litigious action Calland 2010:19 as courts often do not support the marginalised.
\textsuperscript{271} Scheingold 2011:136-138.
\textsuperscript{272} Dimba/Calland 2002:39.
\textsuperscript{273} Neuman/Calland 2007:23.
\textsuperscript{274} With more examples Dror 1958-1959.
\textsuperscript{275} Neuman/Calland 2007:181
\textsuperscript{276} FOIA Update 2013:15.
Ibe concludes that “[t]he model law was a product of robust collaboration between civil society and the commission”, a civil society that was already campaigning for ATI as a human right and precondition for development.

ATI is increasingly becoming the focal point of CSOs and NGOs across many parts of Africa. AFIC is a large and influential society in the sector comprising 29 CSOs from 16 countries. Increasingly, political leaders are emphasising their commitment to ATI; in Uganda the government joined CSOs in celebrating “Right to Information Day” in 2012. The Law is therefore propagated on fertile grounds, and is already being championed by some domestic CSOs. Additionally, this movement itself is being strengthened by the Law and the Commission’s commitment to ATI, as the demand for ATI becomes a call for a fundamental human right.

At the same time, it must be acknowledged that several governments are restricting media freedoms and the scope for political activism, thereby weakening the pressure civil societies are able to generate. For example, Ethiopia has considerably restricted the scope of legal NGO activities, banning the provision of any kind of information or training on rights. More recently, an NGO law was passed that limits foreign funding, which the government is using, along with other provisions such as those concerning “illegal religious practices”, to silence and close NGOs.

Furthermore, NGOs have been perceived as limiting their effectiveness by failing to unite, reducing their appeal to Western donors. Some previous civil movements have lost momentum and fragmented after having campaigned successfully for legal implementation, not realising that ATI needs ongoing commitment. Finally, Darch and Underwood suggest that the citizenry in some countries feels too indebted to former liberators to question their regimes and demand ATI.

Summing up, the effective implementation of the Law depends on the extent to which it will be claimed and endorsed by the public and civil societies. Where civil society is already engaged in ATI mobilisation it will be strengthened by the Law and the Commission’s commitment, and can now focus its efforts on realising the domestic passage and implementation of the Law. For this to succeed, continuous commitment will be required.

In other countries, civil society is, for a number of reasons, including political practices and fragmentation, not sufficiently equipped to claim ownership of the Law. In these countries, depending on other political factors, the Law might be adopted but ineffective, or not adopted at all. This leads to the conclusion that progress towards effective ATI in Africa will be generally slow, but at

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277 Ibe 2013.
278 Ibe 2013.
280 FOIA Update 2013:13.
282 Nsenkeng 2013.
283 Ravelo 2013.
286 Mangu 2012:368.
287 Ngabirano 2013:211.
least, in parts, faster than it would have been without the Commission’s commitment and the Law itself.  

**Conclusion**

South Africa’s experience in abortively passing its Protection of Information Bill illustrates how contested political processes surrounding the adoption and implementation of ATI laws may be. Overall, however, considering the lack of recent democratic advancement on the continent, the Law will not change Africa’s transparency environment soon. In the longer term, however, CSO engagement regarding ATI will spread, empowered by the Law and supported by the World Bank and UN, thereby gradually allowing more scope for the effective enforcement of the Law.

**Systemic Challenges Impeding the Law**

In addition to the challenges the Law will face in its adoption and enforcement, its effective operation may be undermined by several further impediments. These include other laws and governmental practices. The challenges discussed in this part can be categorised as problems arising from a Model Law applied in diverse countries (a), and law enforcement difficulties in developing countries (b-c).

**One Law for All**

The Senegalese scholar Diallo predicts practical problems in applying this Law in the diverse African countries with vastly differing administrative, legal and informal traditions. The countries took over the legal systems of the colonial rulers, but these were mixed with informal and customary laws, producing very different hybrids across the continent.

The practice of creating one Model Law to fit many different countries has similar effects to legal transplants or harmonising efforts; comparative law scholars agree that such laws will never have the same legal and social affects in another country. As well as intersecting with existing laws, laws will be understood and interpreted according to surrounding cultures, desires, beliefs and traditions. The more the new law interacts with society, the more it will be adapted, whether intended or not. This Law aims at changing traditional interactions between the ruling elite and the citizenry and will thus be strongly affected by existing domestic laws.

Tlakula noted in the Law’s Preamble that, despite the wish to “to reinforce a commonality of approach” concerning ATI, countries are free to adapt it. As Diallo emphasises, there will be particular difficulties in implementing the Law in Francophone parts of Africa. French administrative traditions and cultural understandings of civil service, transmitted to former French colonies, contradict ATI. In the traditional French understanding, the civil service rules and dominates the subordinate citizens, and the civil servants do not consider themselves to be serving

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292 Dagnino 2011:421.  
295 Introduction, Model Law 2013:12.  
296 Diallo 2013:63.  
297 Diallo 2013:69.
the citizens.\textsuperscript{298} Merely adopting the Law will not change these deeply entrenched attitudes, nor will the Law be complied with effectively.\textsuperscript{299} It will be met with strong resistance if governments do not develop methods to improve relations between civil servants and the public. The domestic Francophone discourse on ATI frequently addresses a change of culture,\textsuperscript{300} whereas the Law only generically trusts the oversight body to promote the Law (s 62).

But also in other countries, the effect and strength of the Law will depend on adaptation to the countries’ legal and social particularities, and whether it may successfully be enforced despite countervailing local legal and cultural influences.\textsuperscript{301}

**Need for Complementary Laws**

ATI interacts strongly with several other legal interests. Deficiency in these areas would undermine the Law.\textsuperscript{302} First, as discussed above, public interest disclosures, especially related to corruption, are impeded by the lack of whistleblower protection in most African countries. Kenya, which guarantees ATI constitutionally, has no immediate plans to pass complementary laws to protect journalists revealing official secrets.\textsuperscript{303} South Africa’s parliament, contrary to its own ATI legislation, passed a Protection of Information Bill in April 2013 criminalising whistleblowers and journalistic investigations concerning corruption. These examples illustrate that governments retain a strong interest in preventing certain public interest disclosures, despite a notional commitment to ATI.

Second, the media is intrinsically connected to the freedom of expression.\textsuperscript{304} Only if information can be published and openly shared, can it provoke accountability. Furthermore, it is essential to raise awareness concerning ATI and how to apply the Law,\textsuperscript{305} as levels of ATI awareness are generally low.\textsuperscript{306} In order to raise awareness, the Commission has mandated the oversight body in s 62 with the task to “promote awareness, educate and popularise the right of access to information”. The specific means used to promote awareness must be tailored to the country specifics, but in most cases media broadcasting and grass roots organisations will be the best means due to their accessibility to many parts of the population, including likely information requestors.\textsuperscript{307}

This mandate, however, contrasts with political reality in many African countries. African governments have adopted numerous mechanisms to restrict free expression, beginning with the public concentration of media ownership.\textsuperscript{308} Investigative critical journalism and its publication is reduced through measures such as costly licensing fees for journalistic publications or journalists themselves. More direct measures are also common: for example, the Ugandan leader Musevani

\textsuperscript{298} Diallo 2013:69.
\textsuperscript{299} Diallo 2013:68.
\textsuperscript{300} Diallo 2013:63.
\textsuperscript{301} http://misaswaziland.com/draft-law-on-access-to-information-in-africa/.
\textsuperscript{302} Neuman/Calland 2007:5.
\textsuperscript{303} Abuya 2013:238.
\textsuperscript{304} Escaleras et. Al. 2010:437.
\textsuperscript{305} Darch/Underwood 2010:110-111.
\textsuperscript{306} Darch/Underwood 2010:93; FOIA Update 2013:80. In India, despite the mass campaigning that brought in the RTI Act, only 33% of the urban population, 13% of the rural population, 26% of all men and only 12% of all women were aware of the legislation in 2008; PWC 2009:4. Levels of awareness are similarly low in South Africa, preventing the majority of citizens from using the law, Darch/Underwood 2010:237.
\textsuperscript{307} Article 19 1999, Principle 3.
\textsuperscript{308} Escaleras et. Al. 2010:437.
“shut[s] down radio stations and newspapers that irritate him”, although Uganda’s parliament has passed an ATI law. Arbitrary arrest and the forced exile of journalists, justified under “obnoxious legislation”, is frequent across the continent, and critical journalists have been killed in Rwanda, Ethiopia and other countries.

Reaffirming this notion, the seemingly democratic Malawian president Banda refused to sign the Declaration of the Table Mountain, committed to media freedom and abolishing criminal defamation laws prosecuting journalists. The journalist Makori considers this event an affirmation that African leaders are not committed to independent and strong media, as it might threaten their careers. This view is shared by other journalists; Thomasi concludes, concerning media and press freedoms, “[t]oday, [...] Africa is experiencing its darkest hours.” International treaties, the Commission’s Declaration of Principles on Freedom of Expression in Africa, and domestic constitutions guaranteeing free and pluralistic media, do not of themselves indicate that African leaders as a whole are committed to increasing media freedom.

This lack of complementary laws and freedoms constitutes a great impediment to the application and effectiveness of the law. Without sufficient channels to inform the public of ATI, and mobilise civil society to pressure the government for improved policies, ATI cannot induce broad socio-economic development. However, even an individual’s ATI can enable him or her to enforce personal rights that have been wrongly denied, as the Indian example of food ration cards demonstrates.

Access to Justice
Another significant hurdle that reduces the ability of the poor and other marginalised parts of society in developing countries to obtain their rights is well known and researched under the heading “access to justice”. The systemic obstacles that bar the poor from obtaining judicial support for their socio-economic and other rights in Africa include the cost and time of travelling to court (which affects rural people in particular), unaffordable court fees to which bribes must frequently be added, lack of legal support and illiteracy that prevent the preparation and filing of court orders, court delays of many years in some countries, as well as biases by some judges against the destitute. Dagnino succinctly concludes “formal justice systems are often remote, unaffordable, or incomprehensible to ordinary people and therefore inaccessible.” These barriers are not only greater for poor people, but affect them disproportionately, as the poor are also affected the most by inept and corrupt government and often lack any means to change their living conditions by insisting on their “right”.

309 Makori 2013.
310 Thomasi 2013.
311 Makori 2013.
312 Makori 2013.
313 Makori 2013.
314 Thomasi 2013.
316 Senegal and others are highly respected examples of media freedom in Africa, Thomasi 2013.
317 Thomasi 2013.
318 Dagnino 2011:422.
320 Dagnino 2011:423.
Many of these structural problems to accessing courts, grouped under the concept of access to justice, are also found when approaching governmental bodies or institutions, for example when requesting information. Rural and poor citizens often have to drive furthest and incur high travel fees and time costs, as well as copying and translation fees. Additionally, many illiterate people also feel too intimidated to submit requests. As different studies of ATI laws have illustrated, civil servants are less likely to approve submissions if the requestor is considered a marginalised or powerless person, compared to media or NGO requests. In India, destitute requestors have to visit the information office up to five times before their request is answered. Backlogs in appeals processes further compound the problems faced. After only two and a half years under the Indian RTI Act, the appeals process took between three and 12 months, a time frame which deters and discourages potential applicants.

Such problems are likely to face the Law, which, similar to the Indian RTI Act, has installed the courts as a last instance to challenge unsatisfying responses from the oversight body or to enforce requests (s 83). In India, judicial decision times amount to more than 12 months and an increasing backlog is expected. This problem is not confined to India, but common in African countries too. The judicial backlog in Nigeria dealing with appeals against the ATI law that was passed in 2011 already amounts to several years, in accordance with other experience concerning African courts.

These accumulated problems create barriers for the rural poor to use ATI laws, and will decrease the Law’s impact. This problem can only be resolved by increasing budgets and staff to deal with ATI requests on all levels, which is not likely considering the lack of political support for ATI.

In conclusion, merely adapting and enforcing the Law as adopted by the Commission will not be sufficient to create transparency and accountability to induce better governance across Africa. The Law needs to be complemented by provisions that address local impediments, such as dysfunctional administrative cultures, laws and practices that oppress media freedoms, and barriers to poor and rural populations. It will also be necessary to promote, or at least allow, greater public awareness of the Law.

Conclusion

The story of the Law contains many chapters familiar to those who work on African law reform issues. ATI is a worthy goal, supporting increased human rights, participatory democracy and reduced corruption, although not absolutely guaranteed to deliver these in non-liberal environments. The Commission has worked hard to develop a strong legal framework reflecting most, if not all, of the

323 Diallo 2013:62.
326 PWC 2009:86.
327 PWC 2009:53.
328 Adebayo/Akinzoade 2013:270.
330 Roberts/Roberts 2010:931.
331 See IV.1.
best practice principles suggested by experts. Its weaknesses, particularly the loopholes that provide entry points to abuse, would be remediable through the provision of stronger guidance and definitions.

Far bigger challenges and obstacles are found in the contexts of “corruption, maladministration and mismanagement” present in many African countries. These contexts, which the Law seeks to remedy, also make it less likely that the Law would be honoured. Common ATI issues such as access to justice, infrastructural problems of record management, and traditions of unaccountability by the bureaucracy towards citizens, are heightened in Africa, further limiting the Law’s potential. To overcome such barriers would require a comprehensive commitment by political leaders, not only to allow ATI, but also to fund it sufficiently. Profound changes would also be required in the enabling conditions: independent judiciaries, pluralistic elections and freedoms of expression and media.

At the moment, however, the political will to make such changes and implement the Law effectively is largely lacking. Many rulers are holding strongly on to their authoritarian power, supported in this notion by traditional and modern secrecy trends. International and domestic pressures, although present, are not sufficiently strong to change the calculation by which African leaders opt for greater power over greater accountability.

Overall, therefore, the process of implementing the Law will be long and slow – most likely the longest such process regarding ATI laws so far. However, despite the long period of time it will take, even compared to developing countries that adopted such laws earlier, there is no real alternative. Non-legislative approaches to voluntary openness, often suggested for the private sector, were attempted for the public sector in Peru and Argentina, but faltered due to a lack of budgetary funds and firm obligations.

This does not mean, however, that the public and civil society must simply wait for the legislative to pass these laws and the government to enforce them. Engaged civil society is growing, following examples from South Africa and India, and in concordance with views held by international stakeholders, is increasingly pressuring governments to make formal commitments towards ATI. The Law, and the Commission’s acknowledgement of ATI as a fundamental human right, is fuelling this movement. Even the ineffective promulgation of model ATI legislation strengthens CSOs and creates greater space for activism. The Law may be utilised as a lever for advocating change, an aspect to be integrated into new African state identities, and a trap to catch governments within their own rhetoric. Hence, the Law should not be seen a means in itself, but as part of an ongoing interaction between society and government over the appropriate accountability settings reforming the African landscape of individual and governmental accountability for the public good.

332 Introduction, Model Law 2013:12.
335 Roberts/Roberts 2010:931.
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