

**The torn veil: Access to information as a tool for combating corruption
with reference to Uganda**

**A Dissertation submitted to the University of Pretoria in partial fulfillment
of the requirements of the LLM (Human Rights and Democratisation in
Africa) degree**

By

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October 2004

DECLARATION

I, Folusho De-grata Shado, hereby declare that this dissertation is my own work and has not been submitted to any other university for the award of a degree.

Signed:

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Date: 31 October 2004

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DEDICATION

Dedicated to my parents, Mr. & Mrs Shado , my sisters, Ore and Stella-Rita and my brothers Rex Dasilva and Horatio Dacosta and to the good Lord who placed me in this family.

ACKNOWLEDGEMENTS

I am grateful to Mr. Larry Diamond for his invaluable advice and guidance at the initial stage of producing this paper. I acknowledge the work of Transparency International Article 19, and Anti Corruption Coalition Uganda in the advocacy for access to information and the fight against corruption around the world and in Uganda. They provided useful resources that helped to shape this paper. Thanks are also due to the many people who encouraged and assisted me in one way or the other during the course of my research. Particularly, I wish to thank Dr. Henry Onoria under whose supervision this research was done, Prof. Frederick Juuko who graciously agreed to read through a draft of the paper, the management and staff of Centre for Human Rights, University of Pretoria and the Human Rights and Peace Centre, Faculty of Law, Makerere University, the LLM (Human Rights and Democratisation in Africa) class of 2004, my teachers Mr. Ade Ipaye and Prof. Yemi Osinbajo, my tutor Magnus Killander and my special friend Miss Nyaradzo Chari.

LIST OF ABBREVIATIONS

ACCU	Anti Corruption Coalition Uganda
African Charter	African Charter on Human and Peoples' Rights
ATI	Access to Information
AU	African Union
CBR	Centre for Basic Research
E- government	Electronic government
FOI	Freedom of Information
ICCPR	International Covenant on Civil and Political Rights
IGG	Inspectorate of Government
IGOs	International Governmental Organisations
NGOs	Non-Governmental Organisations
POATIA	Promotion of Access to Information Act
TI	Transparency International
TICPI	Transparency International Corruption Perceptions Index
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDP	United Nations Development Program
UNESCO	United Nations Educational Scientific & Cultural Organisations

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CHAPTER 1 – INTRODUCTION

A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives.

– James Madison, letter to W. T. Barry, 4 August 1822.¹

1.1 Background to the study

The quest for knowledge and the search for truth are matters that are deeply embedded in human nature and are indeed as old as man's existence.² The power that knowledge gives has been the source of motivation for space explorers, scientists, archaeologists and scholars in other fields of learning from the beginning of time through the centuries. Through all of history and the present time, human beings have sought to freely express themselves in different forms and to be allowed unfettered control in the search for what is true.

At the turn of the century, the world witnessed global advancement in information technology like never seen before which has made the quest for knowledge even more appreciable. Internet connections on computers systems that fit in the palm of a hand, high-speed communication literally 'from the ends of the earth' and new advancements in outer space marked the entry of the 21st century. Groundbreaking progress in communication technology has made it possible to access all forms of information from the Internet, satellites or mobile phones from any part of the world.

Thus, the dawn of the information age brought to fore the power of information on almost every aspect of human life – family life, work, security, health, education, public expenditure and the way in which we are governed. However,

¹ Reprinted in K Saul 'The complete Madison: His basic writings' quoted by C Noteboom 'Addressing the external effects of internal environmental decisions: Public access to environmental information in the international law commissioner's draft article on prevention of transboundary harm' (2003) 12 *New York University Environmental Law Journal*, 245 246.

² 'Man' here is used in the wider sense to include women.

the extent of the power of information and freedom of expression also brings with it responsibilities on authorities to control its use and imposes duties on individuals to use it with respect to the rights of others and the protection of the State. Methods of control have sometimes resulted in the building of a culture of secrecy and the erection of barriers to access information even those affecting the basic rights of individuals.

When citizens lack information, they are placed in a situation of obscurity as far as influencing policy priorities or accessing public resources are concerned because without information, they are unable to voice informed opinions or be visible in the process of resource allocation and distribution. As democracy relies on the traditional value of openness and participation in governance, the right to access information lays the foundation for a truly democratic environment and the lack of it aids corruption. A virile and informed civil society is therefore relevant to combating corruption through active participation in governance.

The issue of combating corruption continues to feature prominently in International agendas on economies and good governance as it becomes clearer that corruption with its consequent effects on society is incompatible with the values of democracy. It also features prominently in the human rights discourse because the prevalence of corruption in any society has serious human rights implications. According to a United Nations report,

Corruption is at its core a governance issue—i.e., the failure of institutions. Weak institutions are incapable of supplying society with a framework for competitive processes and obstruct the legitimate procedures that link the political and economic areas. Corruption—both petty and grand—deepens poverty, debases human rights, degrades the environment, derails development, including private sector development; can drive conflict in and between nations, and destroys confidence in democracy and the legitimacy of governments.³

³ See United Nations Development Program: *LDC III session on Governance, peace and social stability* at <<http://www.undp.no/download.asp>. > (accessed 15 September 2004). See also the communiqué of the IXth International Anti-Corruption Conference *Durban commitment to effective action against corruption*, addressing the theme "Global Integrity: 2000 and Beyond", held in Durban, South Africa on 10 - 15 October 1999.

What this means is that the effect of corruption spins a web that covers every aspect of the lives of citizens and touches very much on human rights. For example corruption keeps people in poverty,⁴ and has the effect of aiding unchecked degradation and pollution of the environment.⁵ It also promotes conflicts in and between nations.⁶ These and many more are practical examples of how corruption perpetuates human rights abuse. Also, if people have to pay bribes to access their civil, political social and economic rights such as the right to access to justice, right to food, adequate housing, right to own property or right to education, public services become discriminatory based on those who give the bribes and those who refuse or cannot afford to give a bribe and so there is a violation of their human rights.

Apart from investigating all these incidents of corruption as it indirectly affects human rights, there is a growing development of the right to democratic

⁴ Mary Robinson, former UN Human Rights Commissioner and former President of Ireland believes that 'the most fundamental threat to human rights of our time is poverty, which is an affront to civil and political rights, but also to all socio-economic rights.' See letter from Ms Robinson <http://www.chr.up.ac.za/academic_pro/llm/docs/MaryRobinson/letr.pdf> (accessed 5, September 2004).

⁵ See, generally, R Mwebaza 'Access to information, public participation and justice in environmental decision making in Uganda' (2003) 9, no. 1 *East African Journal of Peace & Human Rights* 37.

⁶ For instance, the lack of transparency in resource extraction industries across Africa sees the corporate sector providing major funds to unacceptable military and political elite who then use conflict to cover up corruption and embezzlement. In a country such as Angola, almost a third of the state's revenue went missing in 2003 and this has to do a lot with the fact that the companies do not release information about payments to the state. See IRIN News <<http://www.irinnews.org/report.asp>> (accessed 23 March 2004). Oil-producing countries such as Angola and Nigeria are more prone to corruption because revenues are being diverted into the hands of western oil executives, middlemen and local officials in the public contracting process of the oil sector. See Transparency International (TI) Corruption Perceptions Index 2004 <http://www.transparency.org/cpi/2004/cpi2004.en.html>> (accessed 24 October 2004).

governance, which presents a platform for citizens to demand freedom from corruption as a right.⁷ A writer describes the experience in Japan thus:

A rights-based approach to achieving freedom from corruption is grounded on the existence of the right to corruption free governance. The consequence of having these particular rights is to ensure that there is a claim on the government representatives, and the institutions that they should help assist or collaborate with, in ensuring access to justice and various resources for the citizenry while ensuring freedom from corruption. The insistence of rights on the part of the Japanese citizenry and the corresponding duties on the part of the government allow for the elevation of the corruption prevention discourse, from a public policy and economic development framework, to the understanding of corruption - free governance as an inalienable part of good governance. This rights-based approach to development identifies duties on the part of the government and its officials to ensure transparency and accountability in governance. The concept of human dignity and non-discrimination is inherent in any understanding of human rights. Any form of corruption violates human rights, particularly when it discriminates against people on the basis of those who give bribes, and those who do not.⁸

In Africa, the overwhelming effect of corruption on development has left many states grappling with what is now accepted to be an international problem. Human rights are affected by corruption because it entrenches poverty and encourages the diversion of public funds that would otherwise have been available for development into private pockets.⁹ This directly affects the enjoyment of human rights. The conclusion is that there is a direct link between corruption and human rights and the question is - How do we fight it?

Several options are being utilized in the anti-corruption drive across the globe, one of which is advocacy for open governments. In Africa, most governments operate in a culture of secrecy, which may be ascribed to a hangover of colonial rule, as the rulers of those periods often operated with secrecy laws. In the

⁷ See, generally J Udombana 'Articulating the right to democratic governance in Africa' (2003) 2 *Michigan Journal of International Law* 1209.

⁸ R Kumar, 'Corruption in Japan – 'Institutionalizing the right to information, transparency and the right to corrupt free governance' (2004) 10 *New England Journal of International & Comparative Law* 1 21.

⁹ \$400 billion (United States Dollars) is lost to bribery in the government procurement worldwide per year. Transparency International Corruption Perceptions Index (TICPI) (2004) <<http://www.transparency.org/cpi/2004/cpi2004.en.html>> (accessed 23 October 2004).

words of Niels Bohr¹⁰, 'the best weapon of a dictatorship is secrecy but the best weapon of a democracy should be the weapon of openness'. Democracies should operate based on the principle of openness because corruption is less likely to thrive in open societies and on the other hand, the lack of public information contributes to corruption.¹¹

The central argument of this paper is that it is imperative for African states to guarantee access to information held by government as well as other public information in private hands by legislating on ATI and by embracing a culture of open governance so that ordinary people can participate in the democratic process.

From the factors that analysts point out as the causes of corruption, three main ones recur - greed, ethical depravity and opportunity.¹² The issue of promoting access to information as a tool for fighting corruption is in response to the issue of reducing the opportunities that officials in government, non governmental organizations (NGOs), international financial institutions or private business bodies and those who engage in transactions with them have to engage in corrupt practices. When these transactions are open to public scrutiny, it increases the chances of detection and raises the risk of engaging in corruption.

Many Constitutions include specific guarantees of ATI, reflecting a growing acceptance of this fundamental human right. Examples include the 1995 Ugandan and 1996 South African Constitutions.

Though the constitutions of some countries contain provisions guaranteeing the right of citizens to information, the usual perception is that this right merely

¹⁰ A Danish Physicist

¹¹ See, generally P. Lee 'Bureaucratic corruption in Asia: The problem of incongruence between legal norms and folk norms' in L Carino (ed) *Bureaucratic corruption in Asia: Causes, consequences and control* (1986) 69 101-103.

¹² W H Heath 'Investigating and prosecuting corruption in government departments', Paper presented at the Institute for Human Rights & Criminal Justice Studies 2nd World Conference, Durban, 3 December, 2001.

places an obligation on government not to interfere with the free flow of information or that it merely governs the regulation or non-regulation of the media and laws relating to telecommunication and not the specific legal right of individuals to access government-held information or public information in the hands of private bodies.

Thus, governments around the world and in several African countries are being urged to give effect to this constitutional right through legislation on access to such records and information. ATI legislation include provisions on the public's right to access information held by public authorities and imposes an obligation on public authorities to publish key categories of information to give effect to the constitutional right of access where it is included in the Bill of Rights.

1.2 Statement of research problem

Although most African States seek to tackle the problem of corruption through institutional responses such as anti-corruption commissions, offices of ombudspersons and anti corruption laws, it is important that citizens have a legally enforceable right of access to information through ATI legislation. The constitutional guarantee of access to information in Constitutions of African States cannot effectively be realized without ATI Legislations. However, as the existence of these laws in itself will not bring about the desired changes, there is a need to agree and design minimum international standards and guiding principles that will influence the content and operations of the laws.

1.3 Scope and objectives of the study

The scope of this study is the Access to Information Law in Uganda and the potential it has for effectively reducing corruption in the governance of that country. Uganda is seen as a country that is largely corrupt.¹³ It has proposed an Access to Information Law, 2004 to its Parliament. This research will therefore appraise the constitutional and legal framework for access to information in Uganda and attempt to establish the nexus between enacting

¹³ See TCPI 2001, 2002 and 2003.

appropriate legislation enlarging access to information and combating corruption.

The research further appraises the proposed Access to Information Law of Uganda with reference to standards and models that have been developed by international non-governmental organizations and also analyses the aspects of ATI that create a culture of anti-corruption.

1.4 Significance of the study

More and more countries are enacting ATI. This study is therefore an evaluation of one of these laws in an African state with the aim of highlighting specific aspects that directly relate to corruption, outlining the issues and questions concerning concepts such as whistle blowing and protection of national security. It is believed that the study might present a guide that may be used by the people and Government of Uganda in assessing the impact of the Uganda Access to information law through a comparative study of the international and national frameworks in other jurisdiction.

What is lost to corruption goes beyond economic losses and touches on human rights. It is hoped that this study establishes the relevance of ATI laws in combating corruption in Uganda.

1.5 Hypotheses/Research questions

The main thesis of the study is that the effective enjoyment of the right to access to information must extend beyond the constitutional guarantee; there must be a legally enforceable right to access government records backed up by law. Secondly, it is not enough to enact ATI law, a culture of openness must be in place and there must be value in the kind of information that is released. The central question of this thesis is thus this: *Can specific access to information legislation affect the level of corruption in Africa with reference to Uganda?*

1.6 Literature review

A lot has been written on access to information as a right but it is often discussed as a part of the right to freedom of expression and not as conceptualised in this paper.

However, as more countries enact ATI laws, more literature is developed by commentaries and memoranda on those laws and the interpretation of the provisions contained in them.

Transparency International (TI), a non-governmental organization based in Berlin is concerned with the issue of corruption. It conducts surveys of the perceptions of international business people and organizations regarding corruption in the countries where they have contacts and the results are published in an annual Corruption Perceptions Index (CPI). The CPI grades countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. In 2003, it ranked Uganda as the 17th most corrupt country in the world.¹⁴ The CPI focuses on corruption in the public sector and defines corruption as the abuse of public office for private gain.¹⁵

In 2003, TI focused on the role of access to information in combating corruption. Larry Diamond discusses the importance of access to information thus:

One type of law that is particularly important regards Access of information. Malfeasance thrives in secrecy and obscurity. The more that government transactions and operations are transparent, visible and open to scrutiny, the more feasible it is to expose, deter, and contain corruption. For this reason, citizens must have the legal right

¹⁴ See Transparency International Corruption Perception Index 2003 at <http://www.transparency.de/fileadmin/pdfs/CPI_2003_release_eng300903D.pdf> (accessed September 22 2004).

¹⁵ Ibid.

to request and receive information on all functions and decisions of government that do not undermine National security or that do not infringe the individual right to privacy.¹⁶

According to him, it is important to have an open flow of information so that civil society can monitor government armed with facts and from an informed point of view. Realising the right to information is much more than allowing the free flow of information from the government to the public. It is also about people exercising their right to seek and receive necessary information from government.

On a warning note however, Robert Martin and Estelle Feldman in “Access to Information in Developing Countries” caution against reliance of access to information as the ‘magical cure’ that will bring about radical transformation.¹⁷

1.7 Methodology

The method of research has been desk based. The study seeks to vet the Ugandan Bill on access to information and the guiding principles developed to make it effective.

The research examines the Constitutions of Uganda and South Africa, some laws on access to information, international law treaties and resolutions and draft models of access to information legislations.

Also published works relevant to the discussion such as textbooks and journals were consulted and cited. However, the research relies considerably on the Internet as a research tool because a large volume of resources is available on the Internet.

¹⁶ L Diamond ‘Building a system of comprehensive accountability to control corruption’ Paper presented to the seminar on Democratic consolidation: the international context and the Mexican experience, Mexico City, 18-20 February 18-20 2003.

¹⁷ Working Paper ‘Access to Information, Why?’ (1998)
<<http://www.transparency.org/working-apers/martin-feldman/why.htm>>(accessed February 25 2004).

The choice of methodology is based on the nature of the research topic. It basically is an evaluation of written text and legislations on the subject matter of the paper.

1.8 Limitations of the study:

The research is limited to Uganda only so as to focus on one African country and compare it to international models. Perhaps the greatest limitation to this study is the factor that this research is directly related to which are the difficulties encountered in accessing relevant and accurate information. Government records, statistics and official documents that could have been examined and relevant to show the impact of corrupt practices in Uganda and to validate the hypothesis of this research are presently inaccessible due to the culture of secrecy that still prevails in the country. As a result, the research has to rely on secondary sources such as reports of NGOs, credible newspaper reports and some other writings.

The study does not undertake a comparative study of other African countries such as Nigeria and South Africa, which should have been appropriate given the fact that Nigeria is perceived as the most corrupt African Country¹⁸ and that South Africa is the only African country whose legislation on ATI is already in use.¹⁹ This is because the location of the researcher during the period the topic has been actively researched did not allow access to all relevant information from these countries. Also narrowing down to Uganda gives this research more space to deal with most of the relevant issues within the prescribed length of the paper.

1.9 Synopsis of the study

The study is divided into five chapters. Chapter One is an introduction, which sets out the background of the study, the focus and objectives of the study, the

¹⁸ TCPI 2003 and 2004.

¹⁹ South Africa's Promotion of Access to Information Act 2 of 2002 came into effect on 9 March 2004.

significance of the study especially to Uganda, the hypothesis, the methodology of the research and the literature review.

Chapter Two deals with the conceptualisation of ATI at the international, regional and national levels. It should be noted that this paper conceptualises ATI only in relation to corruption so as to limit the discussion to the subject matter of the research. It also examines the UN, AU, and Commonwealth responses to ATI as tool for openness in government, transparency and accountability and how ATI helps in developing a culture of anti-corruption.

Chapter Three examines the nature, causes and level of corruption in Uganda and the aspects of ATI that creates a culture of anti-corruption such as open Government. Key concepts such as whistle blowing, open governance and the use of technology in information disclosure are discussed.

Chapter Four is an overview and an evaluation of the contents of ATI Bill in Uganda and a critique of the bill in relation to the basic principles developed under international law.

Chapter Five summarizes the study and makes some recommendations that may enhance the value of the proposed ATI in Uganda.

CHAPTER 2 - CONCEPTUALISATION OF THE RIGHT OF ACCESS TO INFORMATION (ATI)

2.1 Introduction

Freedom of information is usually regarded as an integral component of the right to freedom of expression and opinion. Though it is difficult to give a precise definition to this right, it generally connotes the right to seek, receive and impart information and ideas without interference or unreasonable restrictions. The broad principles underlying the right to freedom of expression and opinion are often expressed in international human rights instruments, national constitutions and other national laws globally, an indication that it encompasses rights that are universally accepted as fundamental to human existence.²⁰

In some writings, the concepts of 'Freedom of Information' and 'Access to Information' are sometimes used interchangeably but in the context of this paper, they are treated as related but different ideas. Freedom of information is a larger concept of which access to information is a subset.

²⁰ Article 19 of the ICCPR provides that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Cf Article 9 of the African Charter on Human and Peoples' Rights. See also article 29 of the Constitution of the Republic of Uganda 1995 (hereinafter Uganda Constitution).

This view was expressed in a UNDP practice note thus:

Freedom of expression and the right to information held by public authorities are related but different concepts. Freedom of expression and the free flow of information and ideas include the right to information, but the right to official information is a more narrowly defined concept, which requires specific legislation'.²¹

This chapter discusses how ATI is conceptualised in international human rights instruments, in the Commonwealth, at the African Regional level and at the national level.

2.2 Conceptual framework on Access to Information

The context in which this paper discusses ATI adopts Rose Mwebaza's conceptualisation of the right as it works in two directions. According to her, what ATI guarantees in the first place, is the right of persons to seek information from public authorities and the corresponding obligation on the public authorities to provide that information. Secondly, it guarantees the right of the public to receive information and the corresponding duty on the public authorities to collect and allow that information to be disseminated without the need for specific requests.²²

Thus, ATI envisions not merely the freedom of the press and the free dissemination of information but also covers the rights of people to seek information and the duty on public authorities to provide that information. The duty involves proper storage, organisation, and accessibility of the information so that it has value and the duty to withhold it only when it is proven that this is in the best public interest.

Two aspects are attached to the duty of the state to enable access to information. Firstly, it is under an obligation to enable citizens to access information when they so request and secondly, it has a duty to proactively cause the dissemination of information to the public even before requests for

²¹ See practice note on Access to Information
<http://www.undp.org/oslocentre/access_prac.htm> (accessed 22 September 2004).

²² R Mwebaza (n 5 above) 42.

such information are made.²³ It is essential that ordinary persons are able to peruse official information because the only way they can contribute meaningfully to good governance is by making informed decisions on matters that affect them as individuals and collectively as a group. The full enjoyment of civil and political rights, socioeconomic rights or group rights can only be attained when people are kept informed and can debate issues from that informed perspective.

The nature of Government information for which access is important includes:

International accords; negotiating briefs; policy statements; minutes of discussions with investors, donors and debtors; cabinet deliberations and decisions; parliamentary papers; judicial proceedings; details of government functioning and structure; intergovernmental memos; executive orders; budget estimates and accounts; evaluations of public expenditure; expert advice; commendations and guidelines; transcripts of departmental meetings; statistical data; reports of task forces, commissions and working groups; social surveys and analyses of health, education and food availability; assessments of demographic and employment trends; analysis of defense preparedness and purchases; maps; studies on natural resource locations and availability; proof of the quality of the environment, water and air pollution; detailed personal records.²⁴

2.2.1 International normative framework

ATI's importance in combating corruption and for other objectives has become prominent in recent times with the right being given recognition in varying degrees in several international and regional instruments and now by specific legislations in more than 50 countries around the world while at least 30 other countries are in the process of doing so.²⁵ Sweden was the first country to

²³ This option is the most cost effective option. When there is a culture of keeping proper records and constant dissemination of information, it saves the cost of producing such information on the basis of individual request.

²⁴ See *Open Sesame: The right to information in the Commonwealth* Report of the Commonwealth Human Rights Initiative (CHRI) (2003) <http://www.humanrightsinitiative.org/chogm/chogm_2003/chapter%20Broadly-wordedofficialsecret> (accessed 4 April 2004).
See D Banisar 'Freedom of information and access to government records around the world' <http://www.freedominfo.org/survey/global_survey2004.pdf> for a survey of

legislate on access to information in as early as 1776. The International framework includes the UN and the Commonwealth.

(a) The United Nations (UN)

In 1946, the UN declared that freedom of information 'is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated'.²⁶ The Universal Declaration of Human Rights (UDHR), though not a binding international document, provided the foundation for the protection of the right to 'seek, receive and impart information'.²⁷

The right was crystallised in a legally binding international human rights instrument by the provisions of Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR), which places an obligation on State parties to ensure that every person within their jurisdictions has the right to freedom of expression. The ICCPR prescribes that the right include 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' This has been the basis for the struggle for the freedom of the press and the ideology that the persons involved in the business of gathering and dissemination of news and opinion belong to a special category and ought to be granted special privileges and be protected against governmental interference.²⁸

Inherent in this right, is a right to have access on request to official documents and records that are in the hands of public authorities and also public records in private hands. The guarantee of a legal right to access information that is being held by government as an integral component of the broader right of freedom of information was explained by the UN Special Rapporteur on Freedom of Opinion and Expression who in his Annual Report to the UN Commission on

the state of freedom of information in countries which have adopted comprehensive national laws on access to information.

²⁶ United Nations General Assembly Resolution 59 (1), February 1946.

²⁷ Article 19.

²⁸ See UN Document E/3443 'Report on developments in the field of information since 1954'.

Human Rights in 1997 stated that the 'tendency of many governments to withhold information from the people at large ... is to be strongly checked.'²⁹ In the 1998 Annual Report of the Special Rapporteur, he affirmed that freedom of information includes the right to access information held by the State. He stated that:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....³⁰

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the

²⁹ UN Document E/CN.4/1997/31 'Promotion and protection of the right to freedom of opinion and expression' *Report of the Special Rapporteur*, 4 February 1997.

³⁰ UN Document E/CN.4/1998/40 'Promotion and protection of the right to freedom of opinion and expression' *Report of the Special Rapporteur*, 28 January 1998 para 14.

exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.³¹

In October 2003, the UN General Assembly adopted the first international treaty against corruption.³² It recognised the necessity for citizens' participation in

³¹ UN Document E/CN.4/2000/63, 'Promotion and Protection of the right to freedom of opinion and expression' Report of the Special Rapporteur.

³² UN Convention Against Corruption
http://www.unodc.org/pdf/crime/convention_corruption/signing/convention_e.pdf
(accessed 20 October 2004).

governance and linked access to information to the fight against corrupt practices. In that document, the obligations on each State party are that it takes appropriate measures, *within its means*³³ and in accordance with domestic law to promote individuals and civil society groups' participation in the fight against corruption. It encourages that this should be strengthened by policies aimed at enhancing transparency, ensuring public access to information, undertaking public information activities, respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information subject only to certain restrictions which must be provided by law and are necessary for respect of the rights of others, national security, public order, or of public health or morals.³⁴

(b) The Commonwealth

The Commonwealth of which Uganda is a member has also stepped up its campaign against corruption through ATI visions. In 1980, the Commonwealth Law Ministers' meeting was concerned with issues of good governance and recognized the need for official information to be made accessible to the public to enable them participate in governance.³⁵

The Commonwealth Heads of Government also met in 1999 (in Durban from 12 to 15 November 1999) on the issues of good governance and the elimination of corruption and there emphasised that corruption has become a global epidemic, which ought to be addressed comprehensively through action at both national and international levels. They welcomed the report of the Commonwealth Expert Group on Good Governance, and endorsed the framework for principles for promoting good governance and combating corruption, proposed by the group, as the basis for pursuing concerted strategies based on zero tolerance for all types of corruption at national and global levels.

³³ Emphasis mine. This phrase seems to denote that a progressive realisation of this right is anticipated in recognition of the differences in the capacities of states to fulfil such obligations, which depend on the level of technological advancement of each state.

³⁴ Article 13 UN Convention on Corruption (n 31 above).

³⁵ Meeting of Commonwealth Law Ministers, Port of Spain, Trinidad and Tobago, 3-7 May 1999.

In 2004, Commonwealth Parliamentarians met in Accra, Ghana and called for greater access to information. It was agreed that free access to government information is vital for the development of an informed and functional democratic society.³⁶

In their recommendations, the delegates recognised that freedom of information is a fundamental human right, and a cornerstone of democracy and good governance and that the recognition of this key right is essential to empowering all members of society, including Parliamentarians, to strengthen Parliamentary democracy and to reversing practices of government by the few.³⁷

In their opinion, such measures would promote transparency in governance.

2.2.2 African Regional Instruments and Action Plans on ATI

ATI has been conceptualised in the African Regional system for the protection of human rights. The first point of contact is the African Charter on Human and Peoples' Rights (African Charter)³⁸ which provides that '[e]very individual shall have the right to receive information'. The provision is direct and has been declared as reflecting that the right is vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his her country.³⁹

The Study Group on Access to Information, which met from 5 to 9 July 2004, comprised some 20 members from the parliaments and legislatures of Fiji Islands, India, Nigeria, South Africa, and Trinidad and Tobago, British Columbia and Scotland who participated in the event hosted by the Parliament of Ghana. The Study Group was jointly organised by the Commonwealth Parliamentary Association (CPA) and the World Bank Institute.

³⁷ Parliamentarians Call for Greater Access to Information at <http://www.thecommonwealth.org/Templates/System/LatestNews.asp?NodeID=38537>

³⁸ Article 9 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3, rev 5, 27 June 1981.

³⁹ See Communication 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Twelfth 12th Annual Activity Report , para 53.

The African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa⁴⁰. Principle IV of the declaration states, in part:

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

40 Adopted at the 32nd Session, 17-23 October 2002.

- secrecy laws shall be amended as necessary to comply with freedom of information principles.

The African Convention on Corruption was adopted to provide a legal basis for the region to tackle the problem of corruption.⁴¹ According to its preamble, the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples necessitated the convention. It contains provisions that guarantee access to information and the participation of civil society and the media in the monitoring process.⁴²

2.2.3 Conceptualisation of ATI in National Legislation – case of South Africa and Uganda

Since Uganda's adoption of a new Constitution in 1995, Uganda courts have had cause in several cases to make pronouncements on ATI.⁴³ Article 41 of the Constitution of Uganda provides as follows:

(1) Every Citizen Shall has a right of access to information in the possession of the state or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right of the privacy of any other person.

(2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

South Africa is the first African country to enact ATI legislation. The objectives of the Promotion of Access to Information Act (POATIA) of 2000 is to give effect

⁴¹ Uganda adopted the Convention in July 2003 .

⁴² African Union Convention on preventing and Combating Corruption, July, 11, 2003 available<http://www.Africaunion/Official_documents/Treaties_Conventions_Protocols.htm (accessed 29 April 2004) .

⁴³ See the cases of *Attorney-General v Major-General Tinyefuza* Constitutional Appeal 1/1997 (unreported); *Zachary Olum v Attorney General* Constitutional Case 6/1997 (Unreported); and *Green Watch (U) Ltd. V Attorney-General* HCCS 139/2001 (Unreported).

to the Constitutional Right of Access to information and to open up government and the South African private sector.⁴⁴

Section 32 (1) of the Constitution of South Africa specifically guarantees the right to information as it provides that 'everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.'⁴⁵

The POATIA provides for a right of access to any record of both private and public bodies which is necessary for the protection or exercise of any right, exemptions to the right to access information relating privacy, commercial confidentiality, defence and national security, and provisions for the protection of whistleblowers.

It sets out the procedure for access to these records and the obligations of private bodies and government to respond to requests for records. The Promotion of Access to Information Act 2000 came into force on March 9, 2002.⁴⁶

2.3 Conclusion

In summary, this chapter distinguishes the narrower concept of access to information from the broader concept of freedom to information. When conceptualising ATI within the framework discussed above, the emphasis is on access to government-held records as opposed to freedom to express ideas and opinions held by individuals or groups and the right to disseminate those ideas and opinions through the news media or other popular forms of expression without interference. The objective of conceptualising ATI in this form is aimed at removing secrecy within the decision-making process and also

⁴⁴ Section 9 POATI.

⁴⁵ The Constitution of the Republic of South Africa 1996 (South Africa Constitution).

⁴⁶ For a detailed commentary of the Act, see I Currie & J Klaaren *The Promotion of Access to Information Act commentary* (2002).

to keep citizens and other interested groups informed about the way the political process functions.

Access to these records and information is not merely to satisfy curiosity but to reveal documentation on matters such as the criteria that is applied by government agencies in making its decisions as well as information about citizens that are in the possession of the state. When these are easily available for scrutiny, people are empowered to discover the basis on which decisions that fundamentally affect their lives and basic rights are made and may have the opportunity of exposing corruption.

The next chapter of this study will therefore examine some of the aspects of ATI that will aid the creation of an anti-corruption culture.

CHAPTER 3 - ASPECTS OF ACCESS TO INFORMATION (ATI) AND THE CREATION OF AN ANTI-CORRUPTION CULTURE

3.1 Introduction

This study does not examine ATI legislations in isolation but sets out to establish whether it has the potential to effectively reduce the level of corruption in Africa with particular focus on Uganda.

The issue of corruption has become a major point of political discourse for African leaders as the effects of corruption and the need for information become more and more real and from all indications, it seems that African states are moving towards reaching a normative consensus against corruption.⁴⁷

Advocating for specific ATI legislation aims at urging African states such as Uganda to use ATI to guarantee a legal right to request and receive information that will increase the likelihood of detecting corruption. This chapter discusses the nature, level and causes of corruption in Uganda and the existing framework for combating it. It further examines those aspects of ATI that relate to the control of corruption.

3.2 Overview of political and bureaucratic corruption in Uganda

Uganda was ranked in Transparency International's Corruption Perceptions index (TICPI) as the 3rd most corrupt country in 2001, as the 9th most corrupt country in 2002 and the 17th most corrupt country among the 133 countries that were surveyed in 2003.⁴⁸ Though the effect on the economy and growth rate is a cause for concern, its effect on human rights and democracy is just as grave.

⁴⁷ See B Marong 'Toward a normative consensus against corruption: Legal effects of the principles to combat corruption in Africa' (2002) *Denver Journal of International Law and Policy* 99.

⁴⁸ Fortunately, the country's corruption ranking was better in the CPI 2004 which was released just before the end of this research. It was ranked as one of the 43rd most corrupt countries out of the 145 countries that were surveyed.

Broadly defined, corruption refers to the abuse of public office for private gain. Nye posits that a political act is corrupt:

When it deviates from the duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains: or violate the rules against the exercise of certain types of private-regarding influence'.⁴⁹

The acts and practices so described have been defined under the various international and regional human rights instruments that deal with corruption.⁵⁰

⁴⁹ G. Nye, 'Corruption and Political Development: a cost benefit analysis', (1967) *American Political Science Review*, 61 416.

⁵⁰ See for example, article 4 of the AU Convention on Corruption which defines corruption as :

- (a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person, or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- (b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- (c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- (d) the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
- (e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
- (f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing

In Uganda, the most common acts of corruption are exchange of bribes, nepotism, influence peddling, diversion of public funds into private hands. Newspapers daily report on allegations of corrupt practices especially by top officials of Government.⁵¹

The political environment in which the Government operates does in part influence the prevalence of corruption in these forms. Uganda's president, Yoweri Museveni and his National Movement government created a unique political system when it took power in 1986 called the "movement" or "no-party" political system, which is based on democratically elected local councils from the village level to the National Resistance Council (Parliament). During local elections, people vote for candidates based on individual merit and not on the basis of their party affiliation.⁵² Though this system is proclaimed by its initiators to be participatory, what exists on the ground is an autocratic

functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for

anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

(g) illicit enrichment;

(h) the use or concealment of proceeds derived from any of the acts referred to in this Article; and

(i) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or on any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

51 For example, a report on corruption in the Immigration Department revealed that the equivalent of \$2.5m (US Dollars) had gone missing in the visa sections at Uganda's three major entry points during the past 12 months. See A Ndawula 'Visa money gone' *Sunday Vision Newspaper* October 3, 2004. Another reports that the head of the National security Fund (NSSF) had private dealings with the proprietor of a private construction company that had sold land to the NSSF at an inflated price. See G Matsiko 'NSSF boss, Mugoya, had fat private deals' *The Monitor* Tuesday October 12 2004 page 1.

52 Report of the Uganda Constitutional Commission (1993), 197.

patronage system that makes it easier for legislative procedures and Government policies to be affected by special or private interests.⁵³

In Oloka-Onyango's view:

the movement system has failed to institutionalise mechanisms of governance distinct from the personality of Museveni... despite a belief that Museveni himself is largely free of blemish, members of the cabinet and Museveni's family have been implicated in dubious deals and questionable associations. A principal target of such machinations has been the privatisation exercise, which has seen well-placed politicians and close Museveni associates figure prominently in the successful bidding for the property.⁵⁴

Many such scandals have faced the Ugandan political system and politicians. In 2001, the Ugandan Government had to set up a commission of inquiry to investigate one of such scandals involving its Revenue Authority, which was alleged to have purchased junk helicopters for the Military forces in which the Ugandan government lost billions of Ugandan Shillings.

Research carried out by for instance the Center for Basic Research (CBR) in Uganda revealed a high occurrence of corruption in the tendering process. Tender boards award contracts on political basis while it is not uncommon to discover that the politicians themselves own the companies bidding for the tenders. In some of the cases, councilors (they are members of the District Council, the top body in the District) front and lobby for certain companies to win tenders in return for a commission while some district tender board members receive bribes in order to favor certain companies to award the tenders.⁵⁵ Also nepotism and allocation of public resources based personal

⁵³ In Africa, corruption by Government officials is aided in no small measure by patronage systems that are deeply entrenched in those societies. It has been said that 'Patronage blends with exclusive personal networks and clan or ethnic allegiances, which proliferate within power broking institutions in many, if not most societies, to the exclusion and detriment of those without access to them. Favours, protections and services which should be available to all as of right are instead subject to preference based on kinship, 'old boy networks', personal indebtedness, common ethnic or political allegiance, whether freely entered into or imposed by force or threat'. See *'Enhancing Access to Human Rights'* (2004) 39.

⁵⁴ See J Oloka Onyango, 'Uganda's "Benevolent" dictatorship'
<http://www.udayton.edu/~rwanda/articles/uganda.html> (accessed 9 October 2004).

⁵⁵ CBR 'Nature, impact and extent of corruption at National and Local Government level'

interests features prominently at the national and district levels.⁵⁶ Government officials use their offices to access state resources for themselves and their cronies through non-transparent allocation of government contracts or jobs. In other instances, head teachers are pressurized to give places to children of government officials.

In the report, the electoral process was also judged to be largely plagued by corruption. Returning officers during elections confessed that they were often inundated by phone calls from high-ranking officials to influence the outcome of the votes. Voters bribing is rampant at election times. The report concluded that abuse of power at all the levels was motivated by financial gain.

According to an IGG survey, the Police and the Uganda Revenue Authority (URA) are the most corrupt institutions in the country.⁵⁷

3.3 Impact of corruption on human rights

Corruption in government has led to the diversion of funds from developmental activities into the hands of a few. In Uganda, most of the money lost in corruption is money borrowed for development projects intended to improve the life of the poor people.⁵⁸

The situation in Uganda validates the comments of Kofi Annan who said corruption hurts the poor disproportionately by 'diverting funds intended for

(2004), Report on research on behalf of Anti Corruption Coalition Uganda (ACCU).

⁵⁶ Uganda has 56 Districts

⁵⁷ IGG second national survey final report to parliament at <<http://www.igg.go.ug>> (accessed 30 September 2004).

⁵⁸ Uganda loses the equivalent of USD100 million (United States Dollars) to graft annually. In 1996, USD 12.5 million was lost in the corrupt purchase of defective military helicopters by the Uganda Ministry of Defence and USD 100 million is lost annually through fraudulent local government tendering. See 'A call for a comprehensive strategy to combat corruption in Uganda : Statement of members of civil society attending a workshop on Transparency and Accountability, Kampala, 13th-14th September 2004.

development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign investment and aid'.⁵⁹

It also deprives the state of revenue that should have been utilised for protecting, promoting and fulfilling its human rights obligations as prescribed by international human rights instruments and national bills of rights.⁶⁰ The right to health for instance is being threatened by the fact that safe drinking water is still a luxury for the majority of the Uganda population. This is only one of the many problems that could be alleviated if funds are utilised properly for the fulfilment of this and other rights.

Corruption threatens the rule of law as it perpetuates discrimination.⁶¹ It also weakens the judicial system and other institutions responsible for the preservation of democracy. Access to justice is hampered by corrupt practices in law enforcement process.⁶²

Although it may be difficult to calculate and present in this paper the exact impact of corruption on the availability and enjoyment of social and economic rights, research carried out in places such as Uganda confirms that corruption retards both social and economic development.⁶³

⁵⁹ Kofi Annan UN Secretary General in his statement on the adoption by the General Assembly of the UN Convention Against Corruption 2003.

For an economic analysis of the effects corruption S Ackerman, 'The economics of corruption' *Journal of Public Economics*, (1975) 187-203.

⁶¹ Poor people are disproportionately affected by corruption since they cannot afford to pay bribes.

⁶² See W Musene 'Corruption in the Uganda Judiciary: Myth or reality?' (2003) 1 *Uganda Living Law Journal* 248, for an overview of corruption in the Uganda judiciary.

⁶³ By using a data set containing information about the estimated bribe payments of Ugandan firms, Fisman and Svensson study the relationship between bribe payments, taxes, and firm growth in Uganda for the period 1995–97. The authors find that the level of bribery in Uganda has a much greater negative impact on growth, and taxation a considerably smaller one. The paper was part an effort to study the causes and consequences of corruption. According to P Allum, IMF resident representative in Uganda the growth rate in Uganda is in the 6% range as at the time of this research, but that if corruption was significantly reduced, it could be much higher. See K Kiyingi 'Graft hampers growth: As poverty, inequality rise' *The Monitor* Tuesday September 14, 2004.

3.4 Uganda's legal and institutional framework for combating corruption

Uganda has developed several measures over the years in response to the problem of corruption in the country.

3.4.1 Legislative framework

(a) The Constitution

The 1995 Ugandan Constitution contains provisions on concepts, measures and bodies for the prevention and monitoring of corruption.

Under the National Objectives and Directive Principles of State Policy, the State and citizens of Uganda are to “preserve and protect and promote a culture of preserving public property”⁶⁴ and it prescribes that measures should be undertaken to eradicate corruption and abuse of office or misuse of power by those in public office.⁶⁵

The Constitution also makes all public offices and those in positions of authority accountable to citizens.⁶⁶ Article 17 imposes a duty on citizens to ‘protect and preserve public property and also to combat corruption and misuse or wastage of public property’.

The Ugandan Constitution further provides for the establishment of institutions that are to fight corruption such as the offices of the Auditor-General⁶⁷ and an Inspectorate of Government⁶⁸ and adherence to a Leadership Code.⁶⁹

Apart from the Constitution, other national legislations that contain provisions for corruption prevention include the Penal Code Act, Prevention of Corruption

⁶⁴ Objective XXV

⁶⁵ Objective XXVI

⁶⁶ Objective XXVI.

⁶⁷ Article 163.

⁶⁸ Articles 223-232.

Act, Leadership Code Act, Inspectorate of Government Act, Public Procurement and Disposal Assets of Authority Act, Local Government Act.

The Leadership Code Act of 2002 was enacted to prescribe the minimum standard of conduct for senior political officers. Under the law, they are required to render a declaration of assets and income.

Also, in an effort to restructure Government procurement, which is a major source of graft, The Public Procurement and Disposal of Public assets Act of 2003 was enacted under which procurement became decentralised.

(a) Penal Laws

Corruption is criminalized under the Penal Code Act and the Prevention of Corruption Act.

(i) The Prevention of Corruption Act of 1970 conceptualises corruption as a “criminal offence” as follows:

“1. Any person who shall, by himself or by or in conjunction with any other person,

(a) corruptly solicit or receive, or agree to receive for himself, or for any other person; or

(b) corruptly give, promise or offer to any person whether for the benefit of that person or of another person,

any gratification as an inducement to, or reward for, or otherwise on account of any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of an offence”.

However, it should be noted that the Act places corruption only in the context of bribery and applies only to members, officers or servants of a “public body”. It does not cover the activities of private bodies.

⁶⁹ Article 233 (1).

Under Section 29 of the Act “gratification” is defined to include—

- (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- (b) any office, employment or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, in whole or in part;
- (d) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal measure, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- (e) any offer, undertaking or promise of any gratification within the meaning of the preceding paragraphs (a), (b), (c) and (d).

The Act prohibits corrupt acts that may arise—

- (i) with *agents* of a principal, where gratification is secured in respect of acts in relation to the principal’s business affairs (section 2)
- (ii) in respect of corrupt procurement or withdrawal of *tenders* (section 3)
- (iii) bribery of a *member of a public body* in respect of voting at meeting of public body or delay in performance of an official act (section 4)

(ii) Penal Code Act does not define corruption but it contains offences that are penalised that have the objectives of combating corruption such as:

- embezzlement;
- causing financial loss;
- false accounting by public officers;
- fraudulent false accounting;
- conspiracy to defraud;
- uttering false documents and statements by directors and officers of companies, corporations.

The Act unlike the Prevention of Corruption Act applies to private bodies as well as to public bodies.

3.4.2 Institutional and policy framework

The Inspectorate of Government is an independent institution established to work towards the elimination of corruption, mismanagement and abuse of office in Uganda and also functions as the national Ombudsman of Uganda.⁷⁰ It was created in 1986 by the National Resistance movement when it came into power in 1986 and later established as a constitutional office according to the provisions of the 1995 Constitution of the Republic of Uganda.⁷¹ It has powers to investigate, arrest or cause the arrest and prosecution of individuals found to be involved in corrupt practices.

A Directorate for Ethics and Integrity in the office of the president was also established in 1998 with a mandate to co-ordinate anti-corruption programmes and agencies in the country, establishing ethical standards to govern public officials and professionals and formulating policies and strategies for fighting corruption.

In 2001, a decentralisation policy and program was developed to shift power, functions and services to the people to ensure good governance and accountability. However, the prevailing view is that the decentralisation process has merely been a form of decentralising corruption and not eliminating it.

3.5 The Power of Information

It is a cause of concern to note that despite the existence of these legislative provisions, the creation of mechanisms and institutions for controlling corruption and abuse of power in Uganda, corruption remains prevalent in the country.

⁷⁰ Inspectorate of Government Act of 2002.

⁷¹ Article 13.

Cases of corruption especially those involving high profile individuals are not often prosecuted or even investigated. The result is impunity and lack of prosecution. In the junk helicopter purchase scandal, those who were indicted by the report were reappointed as ministers in the subsequent cabinet. The difficulty of institutional or independent investigations is evidently the lack of access to information and the level of secrecy employed in such matters. Thus, there is a need for promoting transparency in governance both within the political structure and bureaucratic apparatus, as this is necessary for the accountability of the people who exercise power.

It becomes necessary to build a support system such as an informed society that may check the effectiveness of these structures. It is submitted that an Access to Information laws will contribute in no small measure to building such a system.

This view is supported by Larry Diamond who states that the control of corruption requires a system of justice and of accountability which may be of three kinds namely, horizontal accountability (agencies of government are responsible for scrutinizing and checking the other parts of the government), vertical accountability (empowering civil society to review and evaluate official conduct), and external accountability (which refers to intervention by international action).⁷²

ATI is a tool for empowering citizens from below to demand accountability from government. This he terms as 'vertical accountability'. In his view, the right to know is linked inextricably to accountability, which should be the central goal of any democratic system of government. Where there is secrecy in the decision making process of a State, the community remains uninformed and uneducated and cannot participate in the political process responsibly. Their alienation often results in a political environment in which the citizens distrust the government, which in turn affects its legitimacy and may finally lead to a breakdown of law and order.

⁷² L Diamond (n above) 'Building a System of Comprehensive Accountability to Control Corruption' Paper Presented to the seminar on Democratic Consolidation: the International Context and the Mexican Experience , Mexico February 18-20, 2003

Accountability can be promoted through exposure and prosecution of those who are found to have engaged in corrupt practices and deter others.

3.6 Revealing corruption through information disclosure

Citizens have a central role to play in the success of anti-corruption plans through the exposure of corrupt practices and the monitoring of government activities. To play this role efficiently, they ought to be well informed. According to Jimmy Carter,

In our experience there are two policy reforms that hold the most promise for reducing corruption and promoting citizen confidence in government: development of an access to information regime and reform of political party and campaign finance systems. Access to government-held information allows citizens to hold their government accountable for policy decisions and public expenditures. Informed citizens can more fully participate in their democracy and more effectively choose their representatives. Importantly, access to information laws can be used to ensure that basic human rights are upheld and fundamental needs met, as individuals may request information related to housing, education and public benefits. Such laws also help government, as they increase the efficiency and organisation of critical records. Governance is improved, and the private sector is assured of more transparent investment conditions. Access to information bridges the gap between state and society as a partnership for transparency unfolds.⁷³

A practical example that supports this view was demonstrated in the findings of a public expenditure tracking survey that was carried out on Uganda by two researchers of the World Bank. Their survey concludes that improved access to public information by publishing information is an effective tool to combat corruption.⁷⁴

⁷³ J Carter 'Access to Information and political finance reform: Promising policy areas for building transparency' *Transparency International Global Report* (2004) 6 also available at
<http://www.globalcorruptionreport.org/download/gcr2004/02_executive_summary.pdf> (accessed 1 October 2004).

⁷⁴ R Reinikka and J Svensson, 'The Power of Information: evidence from a newspaper campaign to reduce capture of public funds' *World Bank Working Paper* 3239

It was discovered that after the Ugandan government decided to make public the amount of grants awarded to school districts in the country by publishing it in newspapers and therefore exposing the leakage that had been occurring in educational funding, the level of leakage fell from 80% in 1995 to 20% in 2001.

What was concluded from the research was stated thus:

The extent of corruption and leakage seems to have less to do with conventional audit and supervision mechanisms, and more with the opportunity that schools – or clinics in the health sector – have to voice their claims for funds. Traditionally, it is left to government and a country's legal institutions to devise and enforce public accountability. The Uganda experience questions this one-sided approach. With an inexpensive policy action – the provision of mass information – Uganda dramatically reduced the capture of public funds. Because poor people were less able than others to claim their entitlement from district officials before the campaign, they benefited the most from it.

Collusion, inefficiencies, abuse and lack of responsiveness to citizens' needs cannot easily be detected and rectified even with the best of supervision. When institutions are weak, the government's potential role as auditor and supervisor is even more constrained. Measures to empower beneficiaries by increasing information are an important complement.⁷⁵

It is submitted that information in the hands of potential or actual victims of corruption will effectively decrease the opportunity available for those who might otherwise engage in corrupt transactions.

3.7 Aspects of ATI that create a culture of anti-corruption

ATI in the context of this research is not for the sake of satisfying curiosity or an end in itself, but is being canvassed as a way to create the culture of resistance

<http://www.econ.worldbank.org/files/34028_wps3239.pdf> (accessed 1 October 2004).

⁷⁵ Transparency International Global corruption Report (2004) 238 also accessible at <<http://www.globalcorruptionreport.org>> (accessed 1 October 2004).

to corruption through the development of some of its aspects such as open government, the protection of whistle blowers and e-government.

(a) Open Government

Uganda like most Commonwealth countries inherited a culture of secrecy and bureaucratic governance from the period of colonisation. It retained most of the secrecy laws, requirements for swearing oaths of silence by public officials and the culture of generally keeping documents and records of government away from public scrutiny.⁷⁶ Also, where public documents are nominally accessible such as in Registries, what usually happens at present is that vital files concerning transactions of public figures ‘disappear’ when they are called for. An ATI law will create a legal regime that ensures a legal right to access information and opens up government processes to public monitoring. Such cases of disappearances could be easily tracked and someone held responsible for producing it. In effect, citizens are aware of the kinds of criteria that are applied when Government makes decisions or appointments to stop nepotism, favouritism, influence peddling and the like.

Under the Swedish ATI law for instance, the right of access is linked to a system of detailed registers of official documents, which are made available to the public

(b) Protection of Whistleblowers

Whistleblowers are employees who reveal wrongdoing within their organizations or within the Government to the public.⁷⁷ Obviously, people who

⁷⁶ Eg The Officials Secrets Act Cap 302 and The Oaths Act Cap 19, Public Service Standing Orders. In the private sector, the principle developed in the case of *Tournier v National Provincial Union Bank of England (1924) 1 K B 461* is relied upon in Uganda. In that case, the House of Lords held that Banks owe a duty of confidentiality to its customers and may not disclose information concerning transactions.

⁷⁷ Time Magazine’s Persons of the Year 2002 were three women who had taken risks to blow the whistle on three major organizations in the United States. Cynthia Cooper of WorldCom, Colleen Rowley of the Federal Bureau of Investigation (FBI) and Sherron Watkins of Enron helped reveal massive fraudulent practices that led to revelations of

take such steps to expose corrupt or fraudulent practices are at risk of retaliation or isolation by those in authority who may fire them or sanction them in some other way. If there is no framework in place to guarantee protection for such people who reveal corrupt practices, no real advancement can be made in the fight against corruption. It is therefore important that there is a law in place to protect whistleblowers.

ATI laws must contain provisions that protect them from witchhunting and promotes a culture of openness so they can feel secure about reporting incidents of corruption. It may also be difficult to gather evidence to prove cases of corruption if whistle blowing is not encouraged and protected under the law especially in cases where bribery is involved.⁷⁸

One of the instances of corruption in Uganda concerned the mismanagement of its National Drug Authority and its involvement in the purchase and importation of substandard pharmaceutical drugs into Uganda and also the flouting of procurement regulations. One of the employees of the National Drug Authority was the whistleblower on the activities of his superior officers after he had refused to be coerced into issuing an analytical report to endorse imported counterfeit drugs as safe for human consumption. He became a principal witness in a criminal case that was brought by the state against the corrupt officials. During the course of investigations and trial of his bosses, he became the target of the officials who were allowed to resume their positions while on bail. The whistleblower had his contract terminated and his job was advertised with specifications for qualifications lower than his. According to him, he believes that 'information is important to combat corruption but there is a mafia in Uganda that suffocates information'.⁷⁹

widespread corrupt practices within the top echelon of those organisations they worked for. See 'Persons of the Year' *Time Magazine* December 22, 2002.

⁷⁸ See, generally G Dehn 'Whistleblowing & integrity: a new perspective' at <<http://www.cfoi.org.uk/pdf/corruption.pdf> >

⁷⁹ A Kakwemeire, formerly head of the quality drug control laboratory of the Uganda NDA, Interview on 19 October 2004.

3.8 Electronic government (E-government) - Making use of the Internet for information disclosure

These days, the level of technological advancement in such areas as networking, video imaging, and graphics makes it so easy and inexpensive to post government documents and information on the Internet or store it in other easily accessible modes and to develop websites from where people can access important information. Uganda may take advantage of this development by using Electronic government as an alternative to the traditional means of access based on personal contact, phone calls, and mail delivery. For instance, disclosure of information relating to the award of contracts by public authorities has an important role to play in the public procurement process.⁸⁰ ATI laws where in force may require that a wider range of public procurement information is made available online. The practical effects of this is that the public are in a position to constantly monitor the procedure for awarding contracts as often as they wish online at less costs in terms of money and time thereby encouraging accountability and reducing the opportunities for corruption.

Any person who is interested in ensuring accountability may request for information such as the names of tenderers and candidates applying for selection, the tender documents (including prices), the criteria used in the selection process, the records of the evaluation process including rankings of tenderers and candidates for selection, the reasons for selection/rejection of candidates and tenderers and justification for use of negotiated procedures. Where all these information are available for the public, there is greater opportunity to independently scrutinise the recipients of the contracts, thereby minimising the likelihood of discrimination in the awards.⁸¹

Subhas Bhatnagar discusses how corruption may be reduced through the development of the concept of E-Government which refers to the use of

⁸⁰ M Maeve 'Disclosure of information relating to public procurement: The role of freedom of information law' (2002) 3 Procurement Law Review 172-185.

⁸¹ Ibid.

communications technology such as the internet and the mobile phones to open up Government processes and enlarge access to information.⁸²

According to the writer, e-government is an effective way to reduce corruption because firstly, its automated nature requires that rules and procedure be standardized, which would limit the extent of discretion available to civil servants and reduce opportunities for them to take arbitrary actions. Secondly, there is a higher possibility of exposure of wrong doing since the processes allow the action or corrupt practice in question to be tracked to a specific individual.

E-government as an aspect of ATI anticipates that records are computerised for easy and quick access. It also anticipates electronic procurement, situations where one can trace government transactions online. It has three main components – information and registration, e-purchasing and e-tendering provides all information regarding the procurement. In e-procurement, companies doing business with the public sector are all required to register and emails sent to all at once where there is any bidding opportunity for award of contracts

3.9 Conclusion

This chapter gives an overview of the level of corruption in Uganda and some of the effects on human rights and the democracy in the country. As political corruption is the most dominant form of corruption in Uganda, the discussion was limited to the incidences of political corruption and scandals connected to it and not to corruption in other sectors. While institutional responses are important in fighting corruption, civil society participation is vital as well. Citizens deserve to be given a chance to play a part in the fight to reduce and in effect eliminate corruption from the fabric of our societies through information disclosure guaranteed by an ATI law. However, the details of such a law and

⁸² S Bhatnagar 'E-Government and Access to Information TI Global corruption Report 2003 24.

its proper use will determine if it can effectively reduce corruption in Uganda. The next Chapter therefore examines the proposed Uganda ATI law.

Chapter 4 - Overview of the Access to Information Bill, 2004⁸³

4.1 Introduction

This chapter is an analysis of the proposed Uganda ATI Law and a comparative analysis of its provisions with international standards and principles present in similar laws of other jurisdictions and model FOI/ATI law that has been drafted based on best international practice and with number of freedom of information laws from around the world.

Uganda definitely has its own unique political structure and particular demands that makes it necessary for it to develop its own laws in a way suitable to meet the special needs of members of its community. However, these international principles and standards are useful in assessing the capacity of the law to effectively guarantee access.

4.2 Guiding principles underlying ATI Legislations

Article 19, an NGO based in London and concerned with campaigning for the protection and promotion of the right to freedom of expression has developed certain principles on which ATI legislations should be based.⁸⁴ This model which is endorsed by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) prescribes that legislation ensuring right of access to information held by public bodies should uphold the following guiding principles:

1. The principle of Maximum disclosure requires ATI laws to be broad in scope, operation and applicability. In other words, the obligation to disclose information under the laws should extend to public bodies but also to private institutions holding public records, as is the case in South Africa. It ought to have relaxed rules regarding the capacity or *locus standi* to request for information. The Ugandan Constitution for instance,

⁸³ Bills Supplement to the Uganda Gazette No. 15 Volume XCVII dated 2 April, 2004.3

⁸⁴ The Public's Right to Know: Principles on Freedom of Information Legislation (the ARTICLE 19 Principles) <<http://www.article19.org/docimages/512.htm>> (accessed 9 September 2004).

limits the right to citizens of Uganda.⁸⁵ The principle of maximum disclosure requires that ATI be available to all persons and it should not be limited to citizens only. Furthermore, the request need not come from someone who has an interest in the subject matter of the request. What is important is that an individual has made a demand for particular information and has the right to get it. Another important feature of the principle is the presumption of openness which should oblige a body seeking to deny access to requested information to prove that it may legitimately be withheld. The burden of showing legitimacy is on the information officer or person responsible for making the information available.

2. The second principle is the obligation to publish, which places a positive obligation on public bodies to publish and cause the dissemination of key categories of information in anticipation of its use by the public. The positive nature of this obligation makes it unnecessary for specific request to be made beforehand. In these days of advanced technology and information recording, it has become quite inexpensive to distribute and publish information in modes such as making it available on CD ROMs.
3. The third principle is the promotion of open government. The ATI law should prescribe measures that aim at changing bureaucratic attitudes and the culture of secrecy which has been long ingrained in the psyche and workings of most governments around the world, usually inherited from the days of colonialism in countries that were colonised by countries in the West. The inclusion of provisions on training and publicity are some of the ways in which an ATI law may provide for the promotion of an open government because in situations where there is no provision for training and publicity to create awareness of the right to know, the law will merely exist in a vacuum without practical significance or impact on governance. Apart from training and publicity, other methods of promoting an open government is by stipulating penalties and prescribing prosecution of individuals or bodies who are found to have acted or omitted to act in a manner which results in the wilful obstruction

⁸⁵ Article 41

of ATI.⁸⁶ Other aspects of this principle are the requirement for a better record management system to ensure that all the records are stored in such a way as to make it not only easily accessible but also valuable.⁸⁷

4. The fourth principle is that there should be a limited scope of exceptions contained in the ATI legislation. As important as it is to allow access to information, it is agreed that certain classes of information may not be made available for public consumption for the purpose of national security or confidentiality. Legitimate exemptions must therefore be provided for but in order to ensure that these do not go overboard and create an avenue for public or private bodies to invent obstacles for requestors of information, these sort of exceptions should be clearly and narrowly drawn and subject to what has been described as strict "harm" and "public interest" tests. The ARTICLE 19 Principles has designed a three-part test for exceptions as follows:

- The information must relate to a legitimate aim listed in the law;
- Disclosure must threaten to cause substantial harm to that aim; and
- The harm to the aim must be greater than the public interest in having the information.⁸⁸

Limitations should be set down precisely in law, and should be as such as are necessary in a democratic society by being proportionate to the aim of protecting, among other things, national security, public safety and privacy from real threat.

5. The fifth principle relates to the processes that will facilitate access to information and anticipates the building of an environment whereby requests for information are processed without undue delay and fairly and a procedure, which allows for an independent review of refusals.

⁸⁶ T Mendel *Freedom of Information: A comparative legal survey* <<http://portal.unesco.org>> 27(accessed 15 September 2004).

⁸⁷ *ibid* 28.

⁸⁸ *ibid* 29.

Public bodies should be required to appoint an individual as Information Officer to ensure compliance with freedom of information legislation.

6. The sixth principle is in respect of the monetary cost of access. One question that is usually asked is should fees be paid for requests for access? If yes, what kind of costs would be regarded as reasonable? It is important for ATI legislations to address the issue of costs otherwise public bodies and others who are in possession of relevant information may impose excessive cost of access, which will ultimately prevent requests for information and cut back on the effectiveness of such legislations. Fees must not be punitive and should be for the purposes of recovering amounts spent on reproducing copies or to cover the cost of search, preparation and review time.
7. The seventh principle requires that the meetings of public bodies should be open to the public.
8. The eighth principle is that disclosure takes precedence. Many countries still retain repressive secret acts or civil service prohibitions. Those laws that are inconsistent with the principle of maximum disclosure should be amended or repealed. The way the courts choose to interpret provisions on disclosure in cases of conflicts will play a prominent role in determining how far access will go. It is submitted that the provisions of the freedom of information law should overrule those of conflicting secrecy laws.
9. Protection for whistleblowers: An ATI law should protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing. Such protection should apply even where disclosure would otherwise have amounted to defamation.

4.3 Analysis of the Bill

4.3.1 Objectives

The Bill seeks:

- (a) to promote an efficient, effective transparent and accountable Government;
- (b) to give effect to the article 41 of the Constitution by providing the right of access to information held by organs of the State, other than exempt records and information;
- (c) to protect persons disclosing evidence (whistle blowers) of contravention of the law, maladministration [sic] or corruption in Government bodies;
- (d) to promote transparency and accountability in all organs of the State by providing the public with timely, accessible and accurate information; and
- (e) to empower the public to effectively scrutinize and fully participate in Government decisions that affect them.⁸⁹

The practical effect of objectives in paragraphs (b) and (d) is that the Ugandan community is able to access contemporary government information and not just those documents or records that are archived as is the current trend.

Whistleblowers are protected under section 46 of the Bill, which provides that:

No person shall be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment, as long as that person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious health, safety or the environment.

⁸⁹ Section 3

The clause 'as long as that person acted in good faith' seems to be unnecessary. The idea of protecting whistle blowers rests on the fact that a wrongdoing has occurred and someone or some people choose to disclose it to the public or to higher authority and they ought to be protected by law for doing so. That the whistleblower(s) acted in good faith or otherwise acted with ulterior motives for revealing the wrongdoing is another issue entirely. It is submitted that the clause be expunged from the provision as it may be used as a tool for alleged culprits to accuse their accuser (s).

4.3.2 Definitions

Information is defined by the Bill to include written, visual, aural and electronic information while record means 'any recorded information in any format including an electronic format in the possession or control of a public body whether or not that body created it.' The definition is broad enough to capture the key forms of storage. The use of the word 'information' as well as 'record' in the definition ensures that it is broad enough to cover the major forms in which records are created and managed.

4.3.3 Application

The Bill applies to all information and records of Government ministries, departments, statutory corporations and bodies, commissions and other Government organs and agencies, unless specifically exempted by this Act.⁹⁰ The classes of information so exempted are :

- (a) Cabinet records and those of its committees;
 - (b) Records of court proceedings before the conclusion of the case; or
 - (c) Personal information relating to a judicial officer hearing a particular case or involved in a special tribunal or commission of inquiry.
- (3) Nothing in this Act detracts from the provisions of any other written law giving a right of access to the record of the public body.⁹¹

⁹⁰ Section 2 (1).

⁹¹ Section 2 (2).

The Bill clearly targets government-held information only as it makes no reference to public records and information that may be in the possession of private bodies.

The kind of information contemplated include files, reports, agendas, studies, acts, rulings, official letters, budget estimates and accounts, evaluation of public expenditure, international accords, correspondence, e-mail, CDs, requisition forms, decisions, directives, circulars, contracts, agreements, minutes, policy statements, instructions, notes, memoranda, statistics, audio and video tapes, photographs and any other form of record that documents or explains government activities and those of its organs and their agents without regard to their source or date of manufacture.

With expanded technology, such documents may now be easily made available in many forms apart from the traditional written or printed form. It may also be visual, electronic, computer data or holographic.

The exclusion of cabinet records and records of its committees diminishes the extent of disclosure that the law allows. The principle of maximum disclosure anticipates that such blanket exclusions be done without. There is no reason to exclude all cabinet records from public scrutiny as other methods can be employed to ensure that sensitive documents or information are not publicised indiscriminately. For instance, when requests are made for cabinet records measures such as partial disclosure, severability or prescribing the dates after which such information may be published are some of the strategies that may be applied instead of closing all information in its entirety.

Sometimes documents contain some information that falls within an exempt category, but the remainder of the document is not exempt. Article 19 of the Uganda Bill recognizes the use of the tool of severability. So, in situations where requested information is in a document which falls under those exempted from disclosure, it may still be provided after being severed from the rest of the document.⁹²

⁹² It provides that: 'Where a request for access is made for a record containing information which may or must be refused under Part III, every part of the record

It may also be suggested that in situations or circumstances which demand it, disclosure be made available only to a limited number of people or released in parts over a period of time by which it may have reduced in sensitivity.

While some may argue that members of Cabinet may be inhibited from fully expressing themselves at cabinet meetings if they have at the back of the minds the knowledge that such records may be disseminated to the public at any time, it is important to note that democracies are based on the principle of representation. Government is a representation of the people and whatever is being done on their behalf should be available for them to scrutinize. Questions about the relationship between executive actions and effective accountability rely on informed public opinion. There is a responsibility on government to be open to those it purports to represent which demands a balancing of the public's right to know and executive privileges.

4.3.4 Right of Access

Section 5 of the Ugandan ATI Bill grants the right of access to information and records in the possession of a state or public body to every citizen. A person is entitled to access information or a record of public body as long as he or she complies with the requirements under the Act.⁹³

Though the Ugandan Constitution limits the right of access to information to citizens, the ATI law ought to extend the right to all persons to fit within the principle of maximum disclosure. The good thing however is that under the Bill, the person requesting does not need to have a personal interest nor is he or she required to have a reason for requesting the information.⁹⁴ This provision is important because it removes the need to justify requests but rather places the burden of refusing the request on the public authority.

which –does not contain; and can reasonably be severed from any part that contains any such information shall notwithstanding any other provision of this Act , be disclosed.'

⁹³ Section 6.

⁹⁴ Article 6(3).

4.3.5 Exemptions and exclusions

Some key issues to look out for in assessing ATI laws include its provisions on exceptions and exclusions, secrecy laws and the right of appeal.⁹⁵

Exemptions in the context of this paper refer to the categories of information that the law does not apply to while exclusions refer to the entities that are outside the domain of the law. In the case of Uganda, the cabinet, private bodies and non-governmental organizations are excluded and so are not under an obligation to disclose information.

One thorny issue in the drafting of ATI legislations is its provisions on exemptions. It is usually controversial because broadly worded exemptions may be used to hamper and restrict access to information unnecessarily. Exemptions in themselves are not bad as it is necessary to have some classes of information protected so as to guarantee national security and respect of the privacy of individuals and the rights of others. It becomes problematic where exemptions are not subject to any test of legitimacy or are so widely drawn that anything could fall within its ambit. The limits on disclosure through exclusions and exemptions should be tightly and narrowly defined. Any denial of information must be based on proving that disclosure would cause serious harm and that denial is in the overall public interest. Section 2 of the Ugandan Law applies to all information and record except those which are specifically exempted under the law. Information that is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of persons is exempted.⁹⁶ The events on September 11 in the United States of America, where terrorists were able to infiltrate and kill thousands of innocent people shook the world and has set more nations on the edge of tightening laws that may have an effect on the protection of National security.

⁹⁵ Toby Mendel Freedom of Information legislation: Progress, concerns and standards 57.

⁹⁶ Article 5.

While it is accepted that measures must be taken to protect a nation's security, there is a need to balance this within the human rights of its citizens. Before such classifications are made as to issues of national security, there ought to be an objective assessment of the intention for classifying it as such and the existence of safeguards to prevent abuse.⁹⁷ Toby Mendel suggests two safeguards that may be employed to counter the possibility of abuse. First, exceptions should include a 'harm test' that is only such information that would actually harm national security should be covered and secondly,

South African Promotion of Access to Information Act is liberal in its use of public interest overrides as it adopts an open-ended approach, allowing the interest in release to be balanced against non-disclosure.⁹⁸

Section 21 of the Ugandan ATI Bill provides that an information officer shall refuse access to personnel [sic], physical or mental health medical files, the disclosure of which would constitute an invasion of privacy.

When discretionary powers are granted to officials without being subject to any supervision or scrutiny, it allows for arbitrariness and abuse which is contrary to the fundamental purpose of access legislation as experience shows that such discretionary powers are not always used sensibly.

Part III of the Bill further elaborates on exemptions from disclosure such as unreasonable disclosure of personal information about a person including deceased individuals, commercial information of a third party, certain confidential information, for the protection of safety of persons and property, protection of law enforcement and legal proceedings, protection of records from production in legal proceedings, records that may prejudice the defence, security or sovereignty of Uganda, operations of public bodies.

It has been suggested that there may be separate tests for information provided to the government in confidence and information whose disclosure would cause commercial harm because the former could be open to abuse

⁹⁷ P Birkinshaw *Freedom of Information – The Law, the Practice and the ideal* (1990) 31.

⁹⁸ CHRI Report 2003 (n above) 39.

where the executive and the company in question collude to ensure that the transaction falls within the exemption.⁹⁹ Also where the exemption of information relating to personal privacy is too widely drawn, it would have the effect of undermining the use of ATI to expose corrupt practices in cases where public officials claim improper use of public funds as private matters.¹⁰⁰

It is submitted that all refusals of disclosure should meet the three-part test suggested by ARTICLE 19 outlined above.¹⁰¹

The provisions in Part IV cover appeals. An aggrieved person may lodge a complaint with the IGG against the decision of an Information Officer and if still dissatisfied with the ruling of the IGG, he or she may appeal to the High Court within thirty days after the decision of the IGG is communicated him or her.¹⁰²

Since the IGG functions independently of the state and there is recourse to the courts, this is a good feature of the Bill.

4.4 Conclusion

The chapter discusses the international standards and principles that have been developed to guide drafters of ATI laws on the key issues that the laws should address such as exemptions and appeals. The details of an ATI law are important so that the law does not merely exist as another paper approach to fight corruption without meaningful procedures that would guarantee that people are able to access information promptly and with ease.

The proposed Uganda law seems to have generally incorporated these principles except in some cases such as the right of access. Under the Bill,

⁹⁹ M Frankel 'Freedom of information and corruption'
<<http://www.cfoi.org.uk/pdf/corruptmf.pdf> (accessed 19 October 2004).

¹⁰⁰ In Uganda there was a newspaper report of money that was diverted from teachers pay account to finance the purchase of the district Chairman's private residence. C Musoke 'Ugandan Shillings 129 million teachers pay used to build house for Kabale LC 5 boss residence' *New Vision Newspaper*.

¹⁰¹ n 86 above.

¹⁰² Section 40

only citizens, not everyone, enjoy the right of access, and the exceptions regime remains unsatisfactory in its vague definitions and lack of a proper harm test.

Also the issue of the amounts that should be paid for access is not adequately regulated.

CHAPTER 5 - CONCLUSION

5.1 Conclusion

While this paper argues that legislating on ATI is a tool that African states should strongly consider using if they are seriously committed to exposing and in essence, combating corruption, it is submitted that having a law on access to information is not enough. The lessons that the experiences of citizens in such countries as Zimbabwe teach is that laws on freedom of information without having other strong democratic institutions in place may rather serve as a tool of oppression, intimidation or repression of civil society participation in governance by the government rather than to enlarge access to information.

Therefore, before ATI can be properly placed as an anti-corruption measure in Africa, States must move away from the authoritarian tendencies of operating governments to the exclusion of people and must govern according to democratic principles. The law cannot be effective without the political will to encourage transparency and public participation in governance especially at the senior levels

5.2 Recommendations

While Uganda has taken a giant step by its move towards enacting ATI law, a variety of other factors will affect the effectiveness of the ATI law. Some of those factors that need to be considered are the content of the Law and its level of compliance with international standards and the guiding principles that have been developed according to best practice around the globe. The following are recommendations for the success of the law:

The government needs effects reforms in the public administration system of Uganda and overhaul the process of decision making in Uganda and allow administrative procedures that encourage openness, transparency and accountability. Personal networks within the civil service and bureaucratic resistance must be broken down. This is important because where the administrative systems remain as they are at present, an ATI law may be

frustrated by unnecessary delays or unreasonableness on the part of information officers which would pose a serious obstacle to access.

Uganda ought to remove restrictive laws that are still in effect. An example of a law that needs to be reviewed or repealed is the Official Secrets Act which contains provisions that have the effect of creating restrictions on access to information such as making it an offence to obtain, collect, record, publish or communicate information in whatever manner to any person for use by a foreign power. Another restrictive law is the Government Public Service Standing Orders Regulation 2 which provides that officers should not spread information that comes into their official use otherwise than to an authorized person.

It is suggested that the Government begin to take concrete steps towards changing attitudes of Ugandans both in the public and private sector from a culture secrecy to openness especially among those in the public service. This can be done through education and training workshops and publicity on ATI. The Uganda government has a duty to build the confidence of its citizens and others interested that it is committed to fight corruption.

Corruption is a transnational problem. It is therefore submitted that there is an urgent need to set international standards on ATI. The UN should take steps towards adopting a declaration to set ATI standards. In the local arena, it is recommended that Ugandan government should publicize standard procedures and establish information cells in each public institution where the public may request information. Private bodies such as NGOs, IGOs and financial institutions must also build normative and institutional frameworks on ATI within their administrative systems and also set standards on openness and transparency to govern their transactions, activities and the conduct of their employees. Aspects of ATI such as the protection of whistleblowers and the principle of maximum disclosure must be built within the functioning of these organisations.

A support system ought to be in place to act as checks and balances so that anti-corruption efforts are not left to Government and its agencies alone. Such

support systems may be in the form of supporting legislation, openness in the Courts, the strengthening other institutions for combating corruption and an active civil society.

The courts have a vital role to play in ATI. It lies on the judiciary to take a progressive stance when it is called upon to review refusals of ATI and in interpretations especially as relates to the issue of exemptions under the law. Another aspect of the role of the judiciary is that it should also work with a culture of openness and anti corruption within its own system. Public interest litigation in this area would be useful.

It is further recommended that civil society through free and investigative press should effectively use information to hold governments accountable. Uganda relies heavily on donor funding for its development programmes. These donor agencies are in a place to use compliance with ATI principles as one of their criteria for providing such funding.

Uganda must go beyond rhetoric and cosmetic anti-corruption measures and show a serious commitment to fighting corruption by diligently prosecuting cases of corruption and bringing perpetrators to book to restore confidence in public probity. The present scenario where recommendations of the IGG are ignored and reports of commissions of inquiry are shunned, will have the effect of encouraging impunity and will discourage whistleblowers.

It is further recommended that the government take good advantage of technology and the Internet by making publications available online. However, it should be noted that having a legally enforceable rights of access to information would hold no meaning were the information or records to be accessed are kept in a chaotic manner. Effective records management and proper information delivery systems are important factors to consider in ATI because although information may be available in principle, if it cannot be found or is compiled incoherently, it simply means it is irrelevant and inaccessible.

Public institutions are required under the proposed Uganda law to publish the lists of the records in their possession. It is important that this organised and is

updated regularly. It has been suggested that a central agency be vested with this responsibility, which may take the form of a national archive. The agency will then 'provide guidance to departments on the creation, maintenance and disposal of files, and will itself serve as the ultimate custodian of documentation once it has ceased to be of use to a department. The national archive should conduct periodic records management audits of departments to ensure that the records management policy is being faithfully carried out'.¹⁰³ A lot of training will be required for the officers that would be responsible for these areas.

All information should be professionally collected and processed with user friendly filing systems and categorisation procedures or else what the agency will have at the end of the day will be a flood of useless and unverifiable information, devoid of any critical information that is capable of giving an insight to the decision making process. The responsible authority must constantly keep it the objective of ATI in mind. It is not merely for documentation, it is to allow people participate effectively in governance. Information must take into consideration the needs of the users and the context in which they seek to use the information.¹⁰⁴ Also, the needs of special or vulnerable groups such as physically challenged individuals must be taken into consideration

No doubt, Uganda will face many practical challenges as it goes ahead to combat corruption through ATI. It is submitted that such challenges be met with a strong commitment to conquering the disease of corruption. Once there is this political will, it will be easy to create an enabling anti-corruption environment.

WORD COUNT: 17,291 (including footnotes).

¹⁰³ J Pope 'Confronting corruption: The elements of a National Integrity system' in Transparency *International source book* (2000) (3rd ed) Chapter 24: The Right to Information--Information, Public Awareness and Public Records page 97- 99 at 98

¹⁰⁴ UNDP practice note (n above) 7. It should be noted that there are still a lot of illiterate persons who should not be shut out as a result of their inability to understand complex recording information or may encounter difficulty in understanding the language in which the information is stored.

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