



Commonwealth Human Rights Initiative

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Katiba Institute

WORKSHOP ON IMPLEMENTATION OF ACCESS TO INFORMATION

for stakeholders in Kenya

supported by the Commonwealth Foundation

14 – 15 November, 2018

Royal Orchid Azure Hotel, Nairobi

Workshop Report

Prepared by

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Executive Summary

Objectives of the Workshop

Kenya enacted its Access to Information Act in August 2016 and it took effect in September 2016. The Act also requires enactment of regulations which would clarify aspects such as cost for accessing information where applicable. The development of the said regulations is still in progress.. Meanwhile, several civil society actors are among the bodies testing the efficacy of the law by making requests for information of public interest and a number have reached courts for adjudication. Some key provisions in the ATI Act draw inspiration from India's Right to Information Act (RTI Act).

India enacted its own *RTI Act* in 2005. Hundreds of thousands of citizens and collectives are making use of this law to seek information to make the functioning of public authorities transparent and accountable. According to CHRI's estimate in recent times between 5 - 5.5 million information requests are received in thousands of public authorities spread across various jurisdictions in India every year. Given the similarities of governance structures and legal systems in Commonwealth countries, there is a wealth of experience and best practices that can be shared across borders to assist in the process of planning the implementation of Kenya's ATI Act.

A very important component of this project was to provide technical advice to civil society partners and the implementing authorities on implementation of the ATI Act in Kenya. At the heart of the exercise is to help to put in place a citizen-friendly access to information regime. In this context CHRI had prepared a zero draft and preliminary guide for implementation of the Kenya's Access to Information Act. Many important issues around framing of regulations, issuance of guidance notes, training of information access officers etc. highlighted in this draft were discussed at different sessions during the workshop. Keeping in view the broader goals of the project this workshop was designed to augment the efforts of the in-country civil society groups to advocate effectively for the implementation of the ATI Act through sharing experiences on policies and good practices across jurisdictions. The primary aim was to assist in the in-country advocacy with collaborators and help them establish networks with experienced actors in the field of transparency particularly those based in India. The workshop also was designed to contribute in broadening coalitions and help them work strategically and effectively together to promote access to information. The aim was

also to generate greater media support for the topic so that it furthers the cause of effective implementation of the Act. CHRI with its field partner in Kenya, Katiba Institute, organised this workshop with the following overall objectives:

- to identify key issues involved in using and implementation of the ATI Act in Kenya;
- to reflect on issues and challenges around developing delegated legislation for the ATI Act in Kenya and reflect on a roadmap for implementation;
- to reflect on strategies for effective implementation of the ATI Act in Kenya and the way forward;
- to discuss strategies for capacity building and training of the supply and demand side of access to information;

Profile of the participants

CHRI worked with Katiba Institute to select participants in accordance with the overall objectives of the workshop as laid down in the project plan. Stakeholders from both demand and supply side of access to information were invited. While from the demand side there was representation from other civil society organisations (CSOs) leading the ATI campaign in Kenya like Article 19, Transparency International etc. and also individual activists, from the supply side including representatives from Commission on Administrative Justice (CAJ) which is the key implementation and oversight body for ATI, Council of Governors (CoG) which is an association of the Governors of all Counties in Kenya, National Gender and Equality Commission (NGEC), Kenya National Archives and Documentation Service and the Kenya National Commission on Human Rights (KNCHR).

Key learnings and take away

Participants identified the following learning as being of major relevance:

- *Collaboration between CSOs and CAJ*

Participants discussed scope of collaboration in the areas of capacity building of the demand side and technical support for drafting of regulations for the ATI Act and guidelines on proactive disclosure under the ATI Act. The CAJ felt that there should be technical support and grassroots level support from CSOs which would complement CAJ's work and ensure smoother implementation.

- Some participants were of the opinion that there should be use of the ATI Act despite absence of regulations and it should not be an excuse not to use the law but some others believed that enactment of the regulations will obviously enhance the implementation of the right of access to information since they will provide direction on important aspects of law whose implementation requires regulation.
- Many participants expressed concerns about the large number of exemptions listed in the Act as they felt they would be used for rejecting many ATI requests. Discussions centered on the need for developing guidance notes for public entities to invoke exemptions to deny access to sensitive information legitimately. While it was agreed upon that guidance notes from other jurisdictions can be a source for developing guidance notes Kenyan context and sensibilities would have to be kept in mind while drafting them.
- *Issues of record management within the government*

Participants pointed out that in Kenya record keeping is very weak as there is a strong tradition of oral communication in governmental work. They felt that since ATI Act requires written submissions of ATI requests and receipt of written information under the Act, the record keeping practices in public entities will have to be strengthened before going forward with the implementation of the ATI Act.

- *Issue of reasonable fee.*

After a detailed discussion on what would constitute reasonable fee rates for providing access to information participants felt that it was important to fix a cap on fees and amounts chargeable in order to ensure certainty and reasonableness.

- *Issues of information being available in local language i.e. Kiswahili.*

There were concerns raised by participants regarding the availability of information in Kiswahili. They felt that for the ease of access the implementing authorities should make sure that the information and records are also maintained in the local language apart from English.

- *Digitization of information*

Digitization of information and its importance vis-à-vis proactive disclosure obligations was also discussed. Resource persons present emphasized that good practices from India and other jurisdictions on proactive disclosure through websites could be used as reference points to make their Kenyan systems more effective.

- *Ensuring public participation.*

There were discussions around making the ATI Act a means to increase public participation in governance because that is the ultimate goal of transparency. ATI must foster public participation in decision making processes which is a prerequisite under the Kenyan Constitution. When citizens are empowered with information held by the State, they are able to engage meaningfully in the affairs of society. Such participation would also ensure demand driven compliance of proactive disclosure obligations by public entities. The role of media in raising awareness around the ATI Act and its usage was also stressed upon.

- *Developing county legislations*

The Commissioner at CAJ pointed out that they are looking forward to developing a model county legislation on access to information which will be used by county governments to enact their own county legislation.

- Applicability of the ATI Act to private entities. The ATI rules and regulations should lay down clear guidelines for applicability of the ATI Act to private bodies.
- The participants were also made aware of some of the existing transparency mechanisms under other laws like the information maintained under the National Treasury in Kenya about disbursement of funds to county governments which is publicized through the Kenya Gazette.
- There were discussions on harmonizing ATI and the right to privacy. It was emphasized that there is a need to balance both fundamental rights guaranteed by Kenya's Constitution keeping in mind public interest override. Participants agreed that this balance can only be achieved through interpretation by the Courts on a case to case basis.
- The participants felt that there is a need for harmonizing the implementation of the ATI Act and the Data Protection Bill. It was pointed out during the discussion that the Data Protection Bill under consideration in its current form is inconsistent to the regime of transparency under the ATI Act and advocacy efforts are ongoing for making it consistent with the ATI Act before it is passed.

- The participants felt that the information access officers should be sensitized on how to deal with citizens seeking information under the ATI Act.

Action points identified for leveraging implementation:

The RTI-LP identified the following actions points for advocating for the implementation and massifying awareness on the use of the RTI law in Kenya:

- To advocate with CAJ Commissioners and the ICT Ministry for the effective implementation of the ATI Act;
- To assist and advise the CAJ and the Government to draft the ATI regulations.
- To bring together all the groups already working on the ground around implementation of the ATI Act in Kenya on to a common platform. The strategy would require follow up consultations and discussions around implementation issues;
- To involve the relevant committee(s) of Parliament in Kenya in the process of implementation would also be strategically important. To focus energies on building alliances with sympathetic lawmakers and policymakers to ensure effective implementation of the ATI Act.
- To identify RTI ambassadors and champions across sectors – such as the Legislature, the Executive and the Judiciary to plan and promote the implementation process; The action plan may include consultations on a pilot basis with key supply side stakeholders;
- To hold sensitization sessions on the ATI Act at universities and academic institutions with students and training of trainers (ToT) sessions on ATI in local languages would help spread awareness and use of the ATI Act in a big way. Making the media aware about ATI by sensitizing media persons, publicity of ATI through both print and broadcast media, training journalism students and interaction with editors and sensitizing them about ATI would be strategically important for popularizing awareness about the law.
- To collaborate with donors who are showing interest to support implementation efforts. Eg- USAID etc. It is crucial to explore possibilities of partnership and funding for ATI advocates in civil society in this regard to avoid duplication and ensure sustainability of support over the medium term.

Follow-up action

As the ATI promotional project in Kenya is scheduled to continue for this year, CHRI plans for the following as follow up action:

- *Holding a Right to Information Learning Programme (RTI-LP) in India*

CHRI plans to host a learning programme for the chairpersons and commissioners at CAJ and a small group of senior staff members of the CAJ and key government agencies in New Delhi. This RTI-LP is aimed at an in-depth interaction with senior representatives in Government, Information Commissions, civil society and the media about the measures being put in place to engender transparency in government in India. A site-visit for the delegation would also be arranged to give an overview of the practical regime of transparency being rolled out by the administration at the grass roots level. CHRI believes that these interactions will be useful for the CAJ to identify examples of good practice that could be incorporated in the implementation process in Kenya

- *Technical assistance for drafting of regulations*

CHRI is committed to provide technical assistance in the drafting of regulations of the ATI Act to the Commission on Administrative Justice from time to time. It will also help in the advocacy efforts of civil society organizations around the implementation of the regulations based through advise on strategy and approach.

- *Revision of the user guide*

CHRI's partner Katiba Institute has on their own initiative developed a User Guide based, mainly, on the ATI Act. Once the regulations are in place, CHRI would, based on their experience in developing ATI guides in India and other countries, collaborate with Katiba Institute to revise the [ATI User Guide](#) or develop a different user guide in accordance with the regulations.



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Background

This workshop was aimed to augment the efforts of the in-country civil society groups to advocate effectively for the implementation of the ATI Act through sharing experiences on policies and good practices across jurisdictions. The primary aim was to assist in the in-country advocacy with collaborators and help them establish networks with experienced actors in the field of transparency particularly those based in India. The workshop also was designed to contribute in broadening coalitions and help them work strategically and effectively together to promote access to information. The aim was also to generate greater media support for the topic so that it furthers the cause of effective implementation of the Act.

Objectives

The overall objectives of the workshop were:

- to identify key issues involved in using and implementation of the ATI Act in Kenya;
- to reflect on issues and challenges around developing delegated legislation for the ATI Act in Kenya and reflect on a roadmap for implementation;
- to reflect on strategies for effective implementation of the ATI Act in Kenya and the way forward;
- to discuss strategies for capacity building and training of the supply and demand side of access to information;

Workshop Proceedings

DAY 1: 14th November 2018

Session 1 -Introduction

1.1- Opening Remarks

Ms. Christine Nkonge, Executive Director of Katiba Institute opened the event. She welcomed the participants and introduced the guests of honor Hon. Florence Kajuju, Chairperson, Commission on Administrative Justice (CAJ), Lucy Ndung'u, Access to Information (ATI) Commissioner, CAJ; Hon. Priscilla Nyokabi, Commissioner, National Gender and Equality Commission (NGEC) and mover of the Private Members Access to Information Bill, 2016, which became law, Professor Yash Pal Ghai, founder director, Katiba Institute; Mr. Wajahat Habibullah, Chair, Commonwealth Human Rights Initiative (CHRI) and the first Chief Information Commissioner of India's Central Information Commission; Mr. Sanjoy Hazarika, International Director, CHRI and Ms. Jill Cottrell Ghai, Director, Katiba Institute among others. Ms. Nkonge thanked the Commonwealth Human Rights Initiative and the Commonwealth Foundation (CWF) for partnering with Katiba Institute. She then went on to explain the purpose of the workshop which was to discuss and better understand the challenges to the implementation of the Access to Information Act, 2016, as well as identify clear pathways to implementation in the context and spirit of Article 35 of the Kenyan Constitution. She took the participants through the programme agenda explaining the objectives of each session and activity that had been planned out. Participants validated the schedule subsequently without making any changes.

She elaborated on some of the challenges in implementing the Act which all public entities and private entities are trying to overcome including; fully digitizing all records by September 2019, proactively publishing and publicizing information and achieving routine and systematic disclosure of information. She emphasized that if these goals were to be achieved by overcoming the challenges, then it would result in a transparent and open government. Effective implementation of the ATI Act means higher accountability and proper realization of people's individual rights. The government would be more successful in implementing their mandate and more efficient by acting as a cohesive unit, she added. She pointed out that a government that is more open is more likely to prioritize the right developmental projects for its people and conduct sustainable initiatives that would make more people feel that their needs are being taken care of. Ms. Nkonge then listed out the objectives of the workshop for the benefit of the participants. She concluded her speech by calling attention of the participants to the efforts and progress made in India on ATI in terms of usage and implementation of their law. She pointed out that India is ranked sixth in the world for actively disclosing information and is a good case study for Kenya to emulate in order to achieve effective implementation of the new ATI Act.

Next, Mr. Sanjoy Hazarika, International Director, CHRI thanked the CWF for supporting the initiative of implementing ATI in Kenya. He briefly spoke about the history and origin of CHRI and its work in the arenas of access to information and access to justice. He added that CHRI is one of the first UN accredited civil society organizations (CSO) in the global south. Mr. Hazarika also emphasized the role of the media in ensuring the right to information is implemented effectively. He mentioned that a lot of success stories around ATI in India is due to the fact that media has been active in using the right to information and has been vocal around implementation issues. In India, the Right to Information Act (RTI Act) is used widely as a tool of investigative journalism, he added. He pointed out that in Kenya journalists can replicate the Indian experience and use ATI Act as a tool for investigative and data journalism. Mr. Hazarika urged the participants to not just consider the right to information as a way of seeking information but also as a way of knowing what the government is doing, what they do not do, and what they could do in order to promote transparency.

Ms. Sandra Waswa of Article 19 Eastern Africa spoke about some of the strategies and actions points to be adopted by civil society organizations in Kenya in order to better implement the ATI Act. She mentioned that although the law has already been enacted in Kenya there is still a long way to go in terms of implementation. She emphasized that there was need to take time and reflect on how best to implement the law. She suggested that the drafting of the regulations should be prioritised because the legal framework for implementation of ATI Act is incomplete without regulations that provide the detailing of the law. She pointed out that citizens in Kenya are creating a demand for information and the State needs to act upon it with full active disclosure and resolute action. Ms. Waswa also stated that ATI is concerned about the realities of a country and therefore there was need for the citizens to utilize it and actualize their democratic rights. She said that to make the law real and alive it is necessary that it is made enforceable without delay and the duty bearers take up their roles seriously. She felt that all stakeholders could help in strengthening oversight mechanisms as well as the capacity building of people. The media also had a role to play in ensuring the people were sensitized and made aware of the law. This would not only help in creating demand but also expanding the space in which the law is operationalized. By so doing, it will create an impeccable example on how to use low cost inputs and achieve high impact as far as transparency in Government is concerned.

Ms. Yvonne Ogwang representing Ms. Jacqueline Mogeni, Chair Council of Governors (CoG) read a speech written by Ms. Mogeni in the workshop. In her speech, Ms. Mogeni highlighted the efforts of the CoG at the level of the Counties in Kenya. She specifically mentioned that Taita Taveta and Makueni are the only two counties that seem to have complied with the ATI Act so far. In the case of Makueni, she mentioned that the county government is proactively encouraging public participation. As a way of promoting the use of law, the CoG had held a sensitization week, where citizens were able to interact with the technical team to come up with the best practices of ensuring that information was widely disseminated. Moreover, the CoG convened public forums on a weekly basis, which included live tweet sessions to engage citizens in the discussions. These forums served to engage and inform the public on the activities of their county governments and to also get feedback on what they thought about their operations. Apart from that, the CoG ensured that information about county administration was updated on their website.

She pointed out that while many entities focused on sharing information through their website, it was critical to keep in mind that many people may not be able to access such platforms easily as they may not be digitally empowered. Therefore, there was need to find more conventional ways to disclose information. It was also important to ensure that disclosure of any information did not threaten security or endanger the lives of people.

1.2- The Constitutional Perspectives on Art. 35 of the Constitution

Professor Yash Pal Ghai. Founder Director, Katiba Institute (KI)

Professor Yash Pal Ghai, began his speech by highlighting the importance of interpreting Article 35 in the context of other Articles in the constitution. According to Professor Ghai, Article 35 goes beyond the right to information it expands upon people's sovereignty. Furthermore, he stated, that Article ensures people can access information from any public entity and some private entities. The second part of Article 35 states that every person has the right to the deletion of incorrect information about them contained in the records of the government or from other organizations. Professor Ghai then dwelt upon Section 3 of the Act which obligates the state to proactively publicize any important information affecting the nation or an individual.

Professor Ghai then provided examples of access to information procedures and regulations from other jurisdictions. He pointed out that in the United Kingdom when there is critical legislation to be enacted, the government conducts public consultation through the mechanism widely known as "green papers". Green papers are consultation documents produced by the government on which they elicit and gather public opinion. Their aim is to allow people to give their feedback on policies or legislative proposals which are considered during the parliamentary discussion on

the bill or legislation. Professor Ghai encouraged the participants to consider advocating something similar to these green papers as it promotes meaningful public participation in law and policy making in Kenya.

He emphasized the use of Article 35 for advocating for proactive information disclosure in government at all levels. It is one of many provisions of the Kenyan Constitution that deals with obligatory disclosure of information, he added. Furthermore, a citizen should not be required to ask or seek the information they should already have access to. Professor Ghai then outlined the responsibilities of the State as listed in the preamble of the Constitution. He said that there are many more provisions in the Constitution that implicitly promote Article 35 including the portion on devolution. He emphasized his point by providing the following inputs:

- The State was created to serve the people and it should be transparent. The people are the owners of the Constitution and the State is there to serve them. This is repeated several times throughout the Constitution.
- The people are the ultimate custodians of the Constitution, not the government.
- The people should uphold the Constitution by assuming responsibility and taking an active role in decision-making processes.
- In order to have Article 35 and the ATI Act fully implemented, we need to look beyond Article 35.

Professor Ghai called attention to several provisions in the constitution including:

- ❖ Article 10 which is concerned with the fundamental principles of governance, state information, and human rights.
- ❖ Chapter 6 in the constitution which is on the governing behavior of politicians and public servants and their obligation to practice basic standards of conduct.
- ❖ Article 73 under Chapter 6. He emphasized that if Article 73 were to be fully implemented there would in fact be no requirement of Article 35. Article 73 mentions about the responsibilities about leadership and lists down the guiding principles of integrity and accountability in public decisions and actions. He felt that if these principles are followed in letter and spirit it would be much easier to realize the goals set out in Article 35 which deals with freedom of information.
- ❖ Article 118 which promotes Parliament's responsibility in promoting engagement.
- ❖ The connection between Article 35 and Article 47 i.e. the right to fair administrative action.

He then urged that action should be taken to revive Chapter 6 of the constitution which deals with leadership and integrity. The Chapter is predicated upon the assumption that State officers¹ are the nerve Centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. He also urged that citizens should actively hold the judiciary accountable for its actions as well as other branches of government including the Parliament. He illustrated his point saying that the Parliament has an obligation to involve people in the process of lawmaking which would, therefore, increase public participation. He added that public participation is only possible when people begin understanding what the government is doing and have the opportunity to comment on government processes and procedures.

Professor Ghai concluded his presentation by calling attention to the Government's obligation to provide good governance, integrity, transparency, and accountability to the people. The State owes people more attention and the tools to practice meaningful participation, he added. He said that there needs to be a revamping of the system and the government and citizens need to actively enforce what is written in the Constitution and begin holding the government accountable. The notion of sharing information is a part of people's sovereignty and should be actively pursued, he concluded.

1.3- Keynote Address from the Guest of Honor, Ms. Florence Kajuju, Chair Commission on Administrative Justice (CAJ):

Hon. Florence Kajuju, the chair of the Commission on Administrative Justice (CAJ), opened her speech by thanking the participants and hosts. There were several things that the Hon. Ms. Kajuju touched upon in her address including what the CAJ has done as a Commission, the challenges in the near future, and the role of government, citizens and civil society. She began by speaking about the CAJ's active role in implementing the ATI Act.

Hon. Ms. Kajuju mentioned that access to information is one of the rights under the Constitution of Kenya. She also added that while the Constitution provides the broad framework for the exercise of this right, whereas the specifics are to be found in the ATI Act The jurisdiction to enforce and oversee the implementation of the Act was conferred on the Commission on Administrative Justice (earlier known as the Office of the Ombudsman). In particular, the Commission is tasked with the responsibility of investigating and determining complaints of violations of the Act; overseeing and promoting the implementation of the Act by public and private bodies; and conducting and facilitating public education of access to information among others. An interesting, but fundamental aspect of the review jurisdiction conferred upon CAJ is the binding nature of its decisions and orders which have the same effect as those of the High Court, she emphasized.

She went on to describe that the implementation of the Act, much as it commenced with earnestness, was affected by situational challenges. Notably, the Commission was not properly constituted for a long period (the last two years) since the time that the Act had just come into effect. This was because of the long drawn electoral process in Kenya which created uncertainty in Government and delayed appointments to key institutions like the CAJ. This delay had an effect on policy formulation and strategic direction on the implementation of the Act. Nonetheless, she emphasized that the Commission made progress in a number of areas such as the review of 81 decisions of public and private bodies (in its capacity as the Ombudsman); facilitating the development of access to information infrastructure in the public sector; training of over 2,800 officers from national and county governments, including the Information Access Officers (IAOs); development of a simplified version of the Act, and handbooks on best practices and proactive disclosure; and mainstreaming of reporting on access to information by public bodies. CAJ is now looking forward to developing a model county legislation on access to information which will be used by county governments to enact their own county legislation, she added.

She said that when CAJ came into office three months ago realizing the challenges, it took a number of immediate steps. First, as required by law, one of the Commissioners was appointed as the Access to Information (ATI) Commissioner. Second, a Task Force was constituted to develop draft regulations to the Act. The task force is composed of all critical stakeholders on ATI, including the Office of the Attorney General and Department of Justice, Ministry of Information, Communication and Technology and the Kenya Law Reform Commission.

She apprised the participants in the workshop about the progress made by the Task Force. She mentioned that there has been considerable progress in framing of the regulations to the ATI Act and are expected to be in place early 2019. She said that all other stakeholders would be invited for their inputs on the draft regulations as the access to information law affects all constituents of society. She felt that the enactment of the regulations will obviously provide the necessary impetus to the implementation of the right of access to information since they will provide direction on important aspects of law such as fee rates, pro forma for use etc.

She also dwelt upon on why ATI is considered as an ‘empowerment’ right. She said this is so due to its facilitative nature vis-à-vis other rights. She emphasized that it enables citizens to demand their rights from an informed position thereby making representative democracy meaningful. The implementation of the right of access to information bridges the gap between policy and implementation, and building trust in government by curbing corruption and maladministration that thrive in secrecy. Further, access to information plays a pertinent role in conflict prevention as it is concerned with ensuring an inclusive and participatory approach to governance and service delivery. It thus engenders public participation which is a prerequisite under the Constitution. When citizens are empowered with information held by the State, they are able to engage meaningfully in its affairs.

She added that as the courts have consistently held, public participation must be real, not illusory. This is only possible by providing effective access to information to citizens. Ultimately, this leads to good governance and sustainable development. It is worthy to note that while it is important to have sound legal and regulatory frameworks, the success of implementation of the right of access to information is also dependent on the efforts of every stakeholder. Public bodies, the private sector, and more importantly the citizens must play their respective roles. We should, for instance, sensitize and encourage citizens to seek information from relevant bodies, she said. For example, people need information on health, education, farming, weather, national and county budgets, government projects and all other subjects that impact on their socio-economic development. The other stakeholders also need to play their role in enhancing this right through availing information, including by way of proactive disclosure.

She welcomed partnerships with CAJ from civil society in the implementation process and also acknowledged the role that Commonwealth Human Rights Initiative (CHRI), have played in enhancing the right to information across the Commonwealth. She said that as a Commission, they look forward to engaging with CHRI so that they can harness from CHRIs experience. Learning from other jurisdictions that have trodden the right to information path is important for any country such as Kenya that is in its infant years of implementing the law.

In conclusion, she encouraged every participant to become an access to information champion. She urged the participants to share the information in their respective communities. As a nation, she said that Kenya stands at a very crucial stage of development, and the aspirations and goals of its people can and will be met if there is sharing of knowledge on critical subjects. The right to information can be a tool for making this happen. She urged that the participants be the ambassadors in this cause, knowing fully well that the law caters for both citizens and government interests which converge in creating a better society for the greater good.

She reiterated that the CAJ is ready to engage with any partner who is willing to walk with them in the journey of implementing the right to information law. She concluded her speech saying that that CAJ invites any ideas, comments, suggestions or any manner of intended engagement for as long as it is for the enhancement of the right for the citizen to know.

Session 2: A highlight of ATI issues in Kenya

2.1 Implementation of the Kenyan ATI Act: Status Report

Hon. Priscilla Nyobabi, Commissioner, National Gender and Equality Commission (NGEC):

Hon. Priscilla Nyobabi, Commissioner, National Gender and Equality Commission (NGEC) who piloted the RTI Bill as a private Member’s Bill in Parliament, eventually enacted as the ATI Act, shared the story of her association with access to information - since she was a student. She told the participants about how she learnt about higher education loan boards and solar energy and how that information really helped her through life. She emphasized that the road was not easy because at that time such information was not readily available. She realized how fortunate she was for learning about this information because had it not been available to her she would not have had the same opportunities for shaping her career. Giving examples of her own life experiences, she showed how access to

information is important in many regards. She emphasized that many people lacked the knowledge of government services that were available to them. Information was capable of helping people get to self-fulfillment.

Hon. Nyobabi then explained her role in moving the Access to Information bill as a private member in Parliament. She felt impassioned to do this because she believed everyone in the country could benefit from the access to information like she had when she was younger. Access to information provided a realistic approach to citizen and civil society tracking of budgets and public spending. If the costs of projects could be clear this would mean, there would be an effective use of funds and beneficial development. Access to information can also be used as a tool of development in order to solve problems in real time and be applied to practical realities. For instance, South African citizens are known to use ATI to get their entitlements under development in rural areas. Information also plays a role in helping to protect the lives of the people. She felt that while the law had some gains since its enactment, there were still issues that needed to be addressed in terms of implementation. She suggested that publicity of the law as well as drafting of the ATI regulations need to be done. This would help in connecting people more with the meaning of ATI and widespread promote use of the law.

Ms. Lucy Ndungu, Access to Information Commissioner, Commission on Administrative Justice (CAJ):

Ms. Lucy Ndungu, Access to Information Commissioner, CAJ, opened her remarks by emphasizing on the importance of public participation and exercising a high degree of control over public bodies. She said that increased people's participation would help in the effective implementation of the Act. She added that the strength of ATI lies in the fact that it encouraged transparency in and accountability for the affairs of the State.

She then dwelt on the mandate of CAJ with regards to implementation to the ATI Act. She said that CAJ has to oversee the implementation and also enforce the Act, additionally it has to investigate complaints made by requesters/applicants, receive and review reports from public entities, facilitate public education and awareness, monitor state compliance with international obligations and review decisions arising from alleged breach of the Act. This she said was a tall order. Additionally, CAJ also has the power to issue summons and orders requiring persons to appear before it in any review proceeding. CAJ has the power to require government officers, to disclose information about the affairs of the State that is within their knowledge.

Since the appointment of the new commissioners earlier in the year, the CAJ has taken steps towards ensuring efficient implementation of the Act. Commissioner Ms. Ndungu highlighted the following:

- CAJ has so far received 71 cases for review filed by citizens who were not satisfied with the responses of the public institutions when they invoked the ATI Act to seek information. Of these review requests 55 cases have been resolved.
- CAJ developed three publications that seek to inform all stakeholders about the ATI Act and its implementation. Publications include best practices on implementation of the ATI Act, a simplified version of the Act and a guide about information that is required to be proactively disclosed under the ATI Act.
- CAJ has conducted training sessions on ATI at the county level where officials from both public and private entities took part.
- CAJ has developed a curriculum on ATI to train officers at the county level.
- CAJ has developed partnerships and linkages with other organizations
- CAJ has formed a task force to work towards drafting of regulations, the aim is to have them in place latest by April, 2019.

The Commissioner went on to explain the challenges experienced by the CAJ in its work. These include lack of adequate finances, the culture of secrecy in both private and public institutions, lack of ATI regulations, inadequate infrastructure and lack of awareness of the Act. On behalf of CAJ, Commissioner Ms. Ndungu sought support from

participants in the drafting of regulations, advocacy for their adoption, sensitization of stakeholders about the law and dissemination of the ATI material they have prepared.

Key issues emerging out of the discussions:

One of the participants commented that CAJ could do more in taking the lead for advocating for proactive disclosure in public and private institutions by itself responding to requests for information received from the citizenry. Another participant felt that Kenya has experienced a major challenge as far as official documentation of the track record of its leaders are concerned. This made it difficult for voters to know about their past performance before elections. Consequently, the absence of adequate knowledge about the performance of political leaders sometimes resulted in the selection of political candidates who were not fit for office. The participants unanimously agreed that there was need to fast-track the process of drafting the regulations for better implementation of the ATI Act.

2.2: A presentation on the salient features of the Kenyan ATI Act:

Ms. Jill Cottrell Ghai, Katiba Institute:

Ms. Jill Cottrell Ghai from Katiba Institute began by reminding all participants of the milestones that have been reached before the transition of the government from one that was full of secrets (the era of “Sirikali”) to an open one where information is required to be shared with all its citizens by law. Based on the Act, every citizen has the right to access information either from any public or private entity as long as it does not contravene any other person’s rights.

She said that the word “information” in the ATI Act refers to records. She pointed out that there is a concern that ATI requests may be rejected simply by citing that the record is not being maintained. She felt public entities are likely to misuse this gap as such precedents have been experienced in the United Kingdom too where information is defined as record. Private bodies which receive contracts from the government to execute any of its affairs should also be required to disclose information under the ATI Act in order to foster their accountability. As specified in the Act clearly, a citizen does not have to give a reason as to why they need information, especially when it comes to public entities. However, refusal to disclose information could be tied to matters of national security. Conversely, this makes it challenging as ‘national security’ lacks a clear definition in the law.

Ms. Jill Cottrell Ghai also noted there were vague features that made bits of the Act elusive. For instance:

- There is no prescribed format for requesting information.
- The term ‘national interest’ is also not well defined in the law.
- While no fee is to be charged to the requester, the Act allows for a reasonable fee in the case where records being asked for required printing or copying. The use of the word ‘reasonable’ could easily give room for misuse by officials, either as a way to discourage requesters or take undue financial advantage of them.
- The timelines in which information officers should respond to requests is not quite clear, Section 10 provides the time limit as 21 days while Section 11 of the Act mentions that it should be within 15 days.

Ms. Jill Cottrell Ghai also called attention to the need to have information in various forms such as texts, data, video, audio and paper. She felt that having information in diversified forms will definitely increase people’s access to information.

Ms. Sandra Waswa, Article 19:

Ms. Sandra Waswa spoke about some of the strategies and actions civil society organizations in Kenya can take in order to better implement the ATI act of 2016. Although the law has already been enacted in Kenya there is still some

way to go in terms of implementation. She emphasized that there was need to take time and reflect on how best to implement the law, keeping in mind that legal frameworks without regulations were not enough and thus called for the need to refocus.

Citizens are creating a demand for information and the state needs to act upon it with full and active disclosure of the decisions and actions. Ms. Waswa also stated that ATI was about the realities of a country and there was need for the citizens to utilize it and actualize their democratic rights. Furthermore, making the law real and alive would require to first have it enforceable and therefore that meant that duty bearers had to take up their role. Additionally, all other stakeholders could also help in strengthening oversight as well as achieving the capacity building of all people. The media also had a role to play in ensuring the masses were sensitized and made aware of the law. This would not only help in creating demand but also expanding the space in which the law could be exercised. By so doing, it was an impeccable example on how to use low cost and achieve high impact.

Having dealt with the subject of ATI for quite a while as an advocate for the adoption of the ATI Act, Ms. Sandra Waswa urged the participants to celebrate the passing of such a progressive law. She said, at the same time the participants should try to build on the usage and advocacy around the implementation of the law. She listed the following points to explain:

- While the Act stipulated proactive information disclosure, there was also a need for developing a clear strategy to make this happen. She advised the participants to strengthen the advocacy around proactive disclosure and to constantly ask the public entities to fulfill their proactive disclosure obligations.
- While the Act had taken into consideration the inclusion of people with special needs such as persons living with disabilities, the same should be kept in mind while drafting the regulations. She pointed out that the advocacy should be for the regulations to have specific provisions for the differently abled.
- The Act contains provisions on the whistle blower protection which should be considered as an important fact while drafting regulations. She pointed out that for the ATI Act to be used frequently and help in making public entities accountable the requirement for a strong safeguard mechanism for the ATI user is important. The regulations therefore should expand.

Key issues emerging out of the discussions:

One of the participants pointed out that according to Part 2, Section 4 of the ATI Act, all public bodies were required to disclose information in a reasonable manner. The use of the word 'reasonable' needs to be explained. Ms. Waswa explained that such gaps can only be addressed when the regulations are detailed and elaborate.

Another participant had concerns on how to address right to privacy and the right to access information was still not clear. There seemed to be a conflict between the two issues and a clear line needed to be drawn considering all were rights. Ms. Waswa pointed out that one right certainly does curtail the other right, it is just a matter of harmonious construction when the rights come into conflict with each other.

Session 3 -ATI and Existing Systems and Practices in the Administration: A Review

Mr. Wajahat Habibullah, Ex- Chief Information Commissioner, Central Information Commission, India

Mr. Wajahat Habibullah who was appointed the first Chief Information Commissioner at India's Central Information Commission, shared the audience the Indian experience of implementing the Right to Information Act since 2005. He hoped that Kenya could pick up some good practices from the Indian implementation experience to make their ATI rolling out process more effective and efficient. He said that promotion of proactive disclosure is key to ensure successful implementation of the Act as this makes it mandatory for all public entities to maintain records and to keep them updated. He pointed out that while proactive disclosure is very elaborately included in access to information laws across jurisdictions, its implementation poses a major challenge. It requires regular updating of the information.

He said, when proactive information disclosure requirements are fulfilled other aspects of the law eventually fall into place. He pointed out that digitization of data has also helped expand people's right to information in a big way across many jurisdictions. He also emphasized that while applying the law, the interpretation should be done in a systematic manner.

He added that the use of RTI in India has played a big role in people accessing and realizing their democratic rights. This is mainly because public bodies and leaders elected have to be accountable by disclosing information on their activities. Failure to do so will lead to a faulty democracy. Public participation has played a big role in the implementation of the law in India and other jurisdictions on the globe. Kenya could also consider investing in resources and energies in participatory processes for ensuring better implementation of the ATI Act.

Henry Nyabuto, Kenya National Archives

Speaking on behalf of the Kenya National Archives, Mr. Nyabuto explained the role of the Kenya National Archives and Documentation Service (KNADS), in disclosing information to citizens as well as keeping and managing records and publications obtained from government offices. However, he mentioned that in executing their duties, they faced various challenges. He listed some of the following challenges:

- Archives is not situated in a favorable location that supports storage of records. Records are exposed to dust and air pollution.
- Record keeping within the government departments is not up to the mark. Often records are poorly managed by government agencies.
- Although KNADS in the process of digitizing all records they are holding, it is proving to be a slow process as some of the records date back to 30 years. Given their brittle nature, digitization poses a major challenge.
- Lack of adequate staff is another challenge. When employees retire or move to new jobs, replacements hardly come or when they do they do not happen in a timely manner.. As a result, skill transfer does not take place and there is considerable loss of institutional memory. Inadequate human resources are a major hindrance for the Archives to do its job effectively.
- KNADS does not receive sufficient funding from the government which creates hurdles in carrying out the functions efficiently.

Despite the challenges, Mr. Nyabuto still hoped that with the effective implementation of the AIT Act, KNADS would be able to perform its functions entrusted under the law better. This will require adequate levels of training of public officials regarding their duties and responsibilities under the ATI Act. He suggested that such training would help public entities in maintaining their records and documents in a more efficient manner. He also pointed out that involving information technology experts and gathering inputs from them in planning could help in smoothening the process of digitization of data. Using the example of the Open Government Partnership (OGP), he apprised the participants that the government was already working on a plan that would promote the keeping of records and consequently dissemination of information.

Key issues emerging out of the discussions:

One of the participants felt encouraged that more requests for information from the citizenry and civil society could help in making public entities proactively disclose information and at the same time help the government in identifying

better what its citizens might want based on the type of information requests it receives. ATI would therefore act as a mechanism of feedback for better governance.

Mr. Vincent Chahale, Director Legal and Advisory Services, CAJ, Kenya added that proactive disclosure should be interpreted liberally unless the courts decide otherwise. He pointed out that CAJ will try to develop guidelines to be followed in this regard.

Shailesh Gandhi, Ex-Information Commissioner, Central Information Commission, India

Mr. Shailesh Gandhi joined the workshop via Skype. He presented on records classification review in the light of exemptions, public interest override and data protection provisions in the ATI Act. He emphasized that the purpose of keeping records in an institution is to enable access to them for officers at a later date. By extension of that logic such records in public institutions should be made accessible to the general public as well. He pointed out that Kenyan ATI Act has outstanding provisions especially in Section 5 of the Act which citizens could take advantage of demand for proactive disclosure by the government.

Giving an example from the Municipal Corporation of the city of Mumbai India, he said that all contracts signed and awarded to different parties by that institution have to be posted on the website for public access. This minimizes the chances of misusing public resources and keeps government officials accountable. Nonetheless, he pointed out that for a democratic country to achieve full disclosure of public information, each individual citizen should take responsibility for pushing for disclosure by usage of the ATI Act as well as advocating for suo-moto disclosure.

He also pointed out that often RTI users are accused of misusing information. If information is readily made available on official websites chances of such misgivings can be reduced considerably. If information is already available on website nobody will question the intentions of RTI users.

He however pointed out that suo-moto or proactive disclosure practices are not the ultimate benchmark, there is still a lot to be achieved. Such guarantees often remain on paper and there is tremendous resistance from government institutions towards private citizens accessing public information. He lamented that large sections of the bureaucracy, and the judiciary occasionally appear to be resistant to the free flow of information in India.

Key issues emerging out of the discussions:

One of the participants pointed out sometimes an individual may not want some of his/her private information to be made public, how would that be dealt in a suo-moto disclosure regime. Mr. Gandhi pointed out that what can be given to one citizen and is disclosable information should mean disclosable information to all. Further, there should not be any problem in balancing privacy and suo-moto disclosure as long as the piece of information is not considered to be exempt under any of the exemptions listed in the Act.

Another participant enquired whether it is the individual officers or offices which should be made accountable as far implementation of proactive disclosure is concerned. Mr. Gandhi responded to this query saying that ideally institutional accountability is desirable but when it comes to implementing proactive disclosure provisions of an ATI law advocacy should also be aimed at making officers within the public entities responsible for this specific role.

Day 2: 15 November, 2018

Session 4- Proactive Information Disclosure and Adjudicatory Processes under the ATI Act

Anne Marie, Kenya National Commission on Human Rights

Representing Kenya National Commission on Human Rights (KNHCR), Ms. Anne Marie began by emphasizing that the Access to Information (ATI) Act recognizes and imbues in itself the Universal Declaration of Human Rights which is the touchstone of all rights. She added that there are other domestic legislations as well that accord the Act prominence in the constitution such as the Public Finance Management Act which lays down that the parliamentary budget should be published within 14 days of its passage. Under the Public Finance Act, there is devolution of information at the county government level too which enables timely access to information and data which in turn helps in policy formulation and influencing citizen participation. She felt that the ATI Act having interdependence with other rights like freedom of association, freedom of expression which are corollaries to freedom of information will help the law in achieving transparency and accountability.

Ms. Marie pointed out that the ATI law has many aspects within it which made it stronger but the strength will not be fully attained until the gaps in the implementation are filled. She lamented that acts like that of the Official Secrets Act contravening Article 35 of the Kenyan Constitution and the ATI Act have still not been repealed. She suggested harmonization of such contradicting laws. She felt that it is important that duty bearers are sensitized through training about the needs of recipients of information. There are persons with special needs who require tools and mechanism enabling their access to information. This seemed like a fact that had been forgotten by most public entities. On this note, she insisted that information ought to be provided in a manner that is palatable to the recipient. She pointed out that since the recognition to the LGBT community is still new to the country, it is important to ensure that their gender related information is safeguarded to avoid stigmatization and prejudice and the information on them collected during the 2019 census should be deemed private. She concluded by reminding the participants that information and knowledge are the drivers of the Sustainable Development Goals (SDGs) numbers 9 and 16 in developing accountable and transparent institutions. She hoped for faster implementation and wider usage of the law in Kenya.

Ben Nyabira, Katiba Institute, Kenya

Mr. Ben Nyabira from the Katiba Institute spoke on the obligation of proactive disclosure and responsibility of the government. Mr. Nyabira quoted a famous adage which says "he who has the most information is successful in life." He called upon the participants to take initiative in seeking information in order to grow individually and develop as a country. He urged that before filing an ATI request applicant should do adequate background research to have access to accurate information. Consequently, he hoped that the workshop would trigger people in thinking in terms of achieving some objectives such as creating a legal framework for the Act as well as promoting routine and systematic disclosure of information. To support the obligation for proactively disclosing information, Mr. Nyabira used examples of sections in the Act that advocated for this. For instance:

- Section 4 provides that information should be disclosed expeditiously by default.
- Section 5 provides that public entities ought to continuously update information disclosed providing all relevant facts regarding policies and decisions made.

Shailesh Gandhi, Ex-Information Commissioner, Central Information Commission, India

Mr. Shailesh Gandhi joined the workshop via Skype on the second day also. Mr. Gandhi pointed out that non-compliance with the statutory obligation of proactive information disclosure is a road block that implementation of the ATI Act is likely to face in Kenya. He said, this is often the experience with ATI implementation in other jurisdictions. He, therefore, suggested that the CAJ could consider issuing binding orders and taking action against those who do not comply with proactive disclosure requirements. Mr. Gandhi advised that it would be wise to have a penalty provision for such non-compliance. He also pointed out that there should also be a time frame within which commissioners should respond to such complaints of non-compliance.

He advised the participants that they should try not to depend heavily on the court for deciding ATI issues if they want transparency and accountability to grow. Mr. Gandhi advised that the CAJ should ensure that backlogs should be avoided in disposing of appeals and complaints. He also suggested that only pro-transparency people should be appointed to the CAJ for better implementation of the law. He added that unnecessary delays in deciding on an issue increases pendency which finally becomes unmanageable. In India most people have stopped appealing due to this reason. He said that with too much pendency ensuring compliance will also get difficult and to not let load pile up the approach is to figure out what are the issues in the decision and 85% of the times there is likelihood that it is a contestation on the law and not a legal issue arising out of it.

Venkatesh Nayak, Coordinator, Access to Information Programme, CHRI

Mr. Venkatesh Nayak from CHRI shared experiences of proactive disclosure in India with the participants. He emphasized that proactive disclosure is not a new phenomenon and it is only the forms of disclosure that has changed, the movement towards technology and digitization of records. He cited a few examples of transparency through digital medias in India. He described the central government's fiscal transparency through the [State Loan Data Release Initiative](#) of the Ministry of Finance. He explained that the distribution of finances from the centre to the States is disclosed proactively under this online initiative.. On the main website, it posts the amount and purpose of funds going to every state including the dates of disbursement. The use of visualization software has also made it possible for the automatic generation of graphs which can be used in analyzing the performance and efficiency of these entities in spending public finance. On the downside, however, there is not enough capacity within civil society to digest and analyze so much data yet.

He emphasized that the central idea of proactive disclosure is to make data available and accessible to people through various means- both offline and online. He then demonstrated proactive information disclosure practiced in relation to systems of financial receipts and expenditure in the northern Indian State of Uttar Pradesh through [KoshVani](#). Kosh Vani is, a portal access information about the transactions conducted by the State Government's treasuries up to the sub-district level. He showed how information is updated on a real time basis making it possible for people to examine how much money was spent as of the previous day and correlate it with the budgetary allocations made during the financial year. With every update, the backend of the website automatically calculated the proportion of sanctioned funds spent, in real time. .

He also provided an example of the [Kerala State Police](#) which makes data about individuals arrested by the Police public as a part of the fulfillment of the transparency mandate laid down in Section 41C of the Indian Criminal Procedure Code, 1973. Kerala Police makes arrestee data publicly accessible through its website for every police station under its jurisdiction on a weekly basis. This information includes, the name, gender, age and address of the arrestee, the place of arrest, the date and time of the arrest, the offences that the arrestee is suspected to have committed, the name and rank of the arresting police officer and the location of the Magistrate' court where the arrestee was produced s per law. Additionally, information about individuals arrested is made public on a daily basis on the notice boards of police control rooms in every district for the public to view. He pointed that these statutory

mechanisms of transparency have been brought in to curb the rampant abuse of police powers to take away the civil liberties of an individual howsoever temporarily.

He also provided an example of good practice of proactive disclosure of information about government records in Norway. He said that the Norwegian government has set up a dedicated website- [E-Innsyn](#) to disclose meta-data about files and records generated or received by every participating ministry. This website is a searchable database of all records held by government specifying the custodian of the record, the subject matter and title of the record, the date on which the record was created or received and whether the information contained in it is covered by any of the exemptions listed in Norway's ATI law. He said that any person could access this website and place a request for an electronic copy of any of the records whose meta-data is displayed there. If the document is not covered by any exemption under Norway's ATI Act, the concerned agency which holds the information transmits a copy of the same by email with a few days. He shared his own experience of procuring information on request via e-mail through this facility to show that it works for any person sitting in any corner of the world. This, he said is also testimony to the amazing progress that Norway has made towards digitization of records, facilitation of access to people through online methods, free of charge and in an expeditious manner. This is a sterling example of transparency in Government, he said.

Key issues emerging out of the discussions:

After the presentations, the session was opened for discussion. One of the participants suggested that there was a need to come up with standard rates of fee to be used by entities covered by the ATI Act in Kenya for providing copies of information to requesters so that the possibility of officers demanding exorbitant fees for furnishing information may be prevented.

Another participant pointed out that some information was already available through the e-citizen portal and the charges for accessing such information were different compared to what was provided in the Act. He said, such facilities limited access to users who were tech-savvy which is contrary to the offline methods through which information could be accessed under the ATI Act.

Another participant enquired whether human power employed or furnishing information will also be factored in while calculating the costs of reproduction of the requested information by a public entity in order to charge a fee on the requestor. Mr. Wajahat Habibullah responded by saying that since wages are already paid to a government employee such cost should not be included while calculating fees payable under the ATI Act. The salary is paid from funds that citizens contribute as taxes. So there is no logic in playing a double burden on a citizen who seeks information. He suggested that the regulations to the ATI Act may clarify these matters in order to avoid confusion and misuse of the fee related provisions in the ATI Act.

Adding to Mr. Habibullah's response, Mr. Venkatesh Nayak from CHRI said that in the north eastern state of Arunachal Pradesh in India Community Service Centres with internet access were used by farmers to gather information about the market price of agricultural commodities prevalent in faraway markets without having to physically visit those places for finding out such information. He made a suggestion that [Huduma Centers](#) in Kenya which are citizen service centres that provide National Government Services through a single window in a transparent, efficient and easily accessible manner for all persons could be used as community service centers for giving people access to information from public and private entities free of charge. He also emphasized that transparency cannot be brought about by only one legislation. Many countries like the USA have tried a sectoral approach to transparency whereby laws and regulations relating to environment, water, sanitation, health, education, corporations etc. require disclosure of various categories of information. Similarly, in countries like Kenya and India several laws other than ATI place a duty of information disclosure either proactively or on demand. Further any one

body cannot be made solely responsible for implementing a regime of transparency across the entire governmental apparatus. All the stakeholders must work collectively to implement ATI laws and provide for demand-drive suo-moto disclosure of information through both online and offline methods. This would require a regular review of the ATI requests received by public entities, identification of the categories or types of information frequently of repeatedly sought by people and making necessary efforts to disclose such information proactively so as to obviate people's need for making formal requests for such information in the future.

Another participant pointed out that since most records of companies and corporations in Kenya were digitized, they were not forthcoming on transparency. It was a matter of encouraging them vigorously to comply with disclosing information. Some participants took a different view and said that it was not fair to make a generalization that all public entities were non-compliant with the requirements of transparent government because, some of them were readily providing information to the people including the media. The Independent Electoral Boundaries Commission (IEBC) was cited as one such example. IEBC was ranked No. 2 in overall disclosure when measured against the eight principles of Open Data Index. However the judiciary and parliament were placed at the bottom of the list when measured against the same criteria.

Session 5- Developing Capacity Building and Training Programmes for Stakeholders

Ms. Jill Cottrell Ghai, Director, Katiba Institute

Given the previous day's discussion on striving for a balance between ATI and the right to privacy both of which are guaranteed fundamental rights under the Constitution of Kenya, it was agreed by the organizers that a short presentation be made about the challenges that the interaction between the two seemingly conflicting rights posed to the ATI implementing agencies.

Ms. Jill Cottrell Ghai spoke about the challenges involved in harmonizing the interests of personal privacy and the public's access to information. She said that the right to privacy and the right to information could be differentiated and balanced so that none trumped the other. This indeed is the manner in which seemingly conflicting fundamental rights must be complied with without letting the enjoyment of one diminish the other. She urged the participants that instead of looking at the challenges that the two rights posed to each other, they could make use of the Act as it existed and push for implementation. The ATI Act was a good example of how personal privacy was ordinarily protected but ATI would prevail over it if the larger public interest was served better by transparency. She said, a, the focus should be on getting a subtler way of interpreting the Constitution. It was also important to note that public officials are not subject to the same amount of privacy as other people. Private citizens are always afforded a higher degree of protection to privacy than public officials, especially regarding their public actions and assets and liabilities declarations.

Once this session was concluded the house was open for the inputs from participants. One of the participants posed a question as to which private entities were bound to provide information under the ATI Act. Mr. Venkatesh Nayak responded to the query saying that The ATI Act is very progressive in so far as it covers all "private bodies" that are registered under any law and which 'utilize public funds', 'engages in public functions', 'provides public services', 'have exclusive contracts to exploit natural resources' or are in 'possession of information which is of significant public interest' in relation to issues of human rights, public health and environment etc. Experience from South Asia and other parts of the globe shows that unless such bodies are clearly identified by the Government, they will resist transparency. He suggested that the implementation authorities should clearly set out the list of private entities covered under the Act.

Another participant pointed out that if any other law prescribes a different fee structure for securing information which is much higher than that prescribed in the ATI Act should not the ATI Act apply. Mr. Nayak pointed out that in such cases the law which has the overriding effect generally applies. However this also points out to the need that the transition from secrecy to an ATI regime requires policy guidance. All such guidance cannot be included in the regulations. Instead, guidance notes may be issued on all areas requiring guidance in the implementation of the law

Tahmina Laskar, Senior Programme Officer, Access to Information Programme, CHRI

Ms. Tahmina Laskar from CHRI apprised the participants about the programmes that CHRI designed and execute to train both the demand side and the supply side of access to information in India as well as in other countries in South Asia. She said that as part of the advocacy on the right to information, CHRI conducts workshops, consultations and seminars across India. CHRI's workshops have served to raise awareness about the importance of the right as well as providing expertise and lessons learned to civil society groups lobbying for the right to information at state level. Through our workshops in the various states of India we have developed a good network of NGOs throughout the country, committed to advocating for effective laws on the right to information. CHRI's training Strategy focuses primarily on training of trainers, to maximize the reach of our workshops and ensure that RTI work is locally owned and sustainable. She pointed out that CHRI provides inputs on the developing jurisprudence around RTI laws in India in the training programmes. The design of these training programmes has evolved over time, she said.

She also shared with the participants CHRI's experience of training and enabling the supply side. Since the inception of the Right to Information Act in India in 2005, CHRI has been training information officers at both national and state levels. She hoped that stakeholders in Kenya would take a leaf out of the Indian and South Asian experience in their own context to design their training programmes.

Conclusion:

In the concluding section the floor was opened for comments and suggestions from the participants. Some members of the audience suggested the exploration of the use of private prosecution in Kenya to prompt bodies to disclose information as this was an avenue that had not been used before. Some of the participants were of the opinion that this penal measure would ensure better compliance of proactive disclosure requirements as compared to administrative approaches.

Although they were tasked with different roles and responsibilities under the ATI Act, members of CAJ and CSOs agreed to work together, but independently by marrying their work to make the implementation process efficient.

Participants said they felt encouraged to file ATI requests as they thought, by having one person do it, he/she represented the public interest of a larger group and thus making requests had a huge impact on the decision making processes in government.

The participants also agreed that filing ATI requests are in a way an opportunity to interact with the government. They understood that the interactions between the government and citizens are the biggest achievements of a democracy. Since every person may not be making an ATI request but by if one person does it, he/she represents the public interest of a larger group and it will certainly have an impact on important public policy decisions made by the government.

Regarding training of citizens on the usage of ATI Act one of the participant felt that it would be very patronizing if the trainees are trained through a singular approach. The resource persons responded to the concern mentioning that after the training the trainees are asked to try out the methods and in case of any difficulty there are mechanisms to follow up by the trainers with their concerns too. These training workshops are not designed to put a formulaic usage of the ATI Act, rather are very participative in nature.

Members of CAJ committed to carrying out other tasks regarding the implementation of the Act, without waiting for regulations. They also promised to have the draft regulations ready by the beginning of the year.

As a way forward, members of the audience were asked to use the existing avenues to forge partnerships that would lead to the efficient implementation of the Act.

ANNEXURE -1



Workshop on Implementation of Access to Information Act 2016

November 14-15

Venue: Royal Orchid Hotel, Nairobi

with support from

Commonwealth Foundation

Agenda

Objectives:

- to identify key issues involved in using and implementation of the ATI Act in Kenya;
- to reflect on issues and challenges around developing delegated legislation for the ATI Act in Kenya and reflect on a roadmap for implementation;
- to reflect on strategies for effective implementation of the ATI Act in Kenya and the way forward;

- to discuss strategies for capacity building and training of the supply and demand side of access to information;

Day 1: 14th November, 2018		
Time	Topic	Resource person/ Moderator
8:00-8:30am	Arrival and registration	
Session 1: Introduction		
8:30-9:30am	Introduction – Katiba Institute <u>Remarks from:</u> Christine Nkonge, Ag. Executive Director, Katiba Institute (KI) Sanjoy Hazarika, Executive Director Commonwealth Human Rights Initiative (CHRI) Ms. Sandra Waswa (Article 19 Eastern Africa) Yvonne Ogwang (represented the Chair, Council of Governors)	KI CHRI Article 19 EA CAJ ICT Ministry CoGs
9:30-9:45am	The Constitutional Perspectives on Art. 35 of the Constitution	Prof. Yash Pal Ghai
9:45-10:05am	Keynote address from the Guest of Honour: Chair of Commission on Administrative Justice (CAJ)	CAJ
10:05-10:30am	Coffee/Tea Break	
Session 2: A highlight of ATI issues in Kenya		
10.30 – 11.00 a.m.	Implementation of the Kenyan ATI Act: Status Report: Hon. Priscilla Nyokabi, Commissioner, National Gender and Equality Commission (NGEC) and mover of the ATI Private members Bill that became law Lucy Ndung’u (Access to Information Commissioner, Commission on Administrative Justice)	NGEC CAJ
10:30-11:30am	A presentation on the salient features of the Kenyan ATI Act:	KI,

	Perspectives by Jill Cottrell Ghai Perspectives by Sandra Waswa	Article 19
Session 3: Bedding down the law: key issues of implementation		
11:30-12noon	A presentation on the duties and responsibilities of public entities with respect to implementation of the Act: public, private, citizens and entities owned by citizens, ICT ministry, CAJ, Parliament, Judiciary: <ul style="list-style-type: none"> • Wajahat Habibullah, Chair, CHRI (Ex- Chief Information Commissioner, Central Information Commission, India) • Henry Nyabuto, Kenya National Archives and Documentation Service • Shailesh Gandhi, RTI activist (Ex-Information Commissioner, Central Information Commission, India) (via Skype) 	KI & CHRI
12:00 – 1:00pm	Developing Regulations and proformas for detailing the procedures under the ATI Act: key issues	Open discussion
1:00-2:00pm	Lunch	
Session 4: ATI and existing systems and practices in the administration: a review		
2:00-3:15pm	<ul style="list-style-type: none"> • Understanding and preparing to discharge the obligations of: <ol style="list-style-type: none"> 1) Records management overhaul for implementing of the ATI Act 2) appointment of information officers in public and private bodies • Open discussion with perspectives from India and other jurisdictions 	CHRI, CAJ
3:15-3:30pm	Tea Break	
3:30-4:45pm	<ul style="list-style-type: none"> • Presentation on records classification review in the light of exemptions, public interest override and data protection provisions in the ATI Act • Open discussion with examples from India and other jurisdictions 	CHRI

Day 2: 15th November, 2018		
Session 5: Proactive information disclosure and adjudicatory processes under the ATI Act		
8:30-8:45am	Registration and recap of the 1 st day deliberations	KI
8:45-9:45am	<ul style="list-style-type: none"> • A presentation on the obligation of proactive information disclosure under the ATI Act <ul style="list-style-type: none"> • Anne Marie (Kenya National Commission on Human Rights) • Ben Nyabira (Katiba Institute) • Shailesh Gandhi, RTI activist (Ex-Information Commissioner, Central Information Commission, India) (via Skype) • Open discussion with examples from India and other jurisdictions 	KI CHRI
9:45-10:45am	<ul style="list-style-type: none"> • A presentation on the role of the CAJ as an adjudicatory and oversight body under the ATI Act • Open discussion with examples from India and other jurisdictions 	KI,CHRI
10:45-11:10am	Tea break	
Session 6: Developing capacity building and training programmes for stakeholders		
11:10-11:50am	<p>Open discussion on:</p> <ul style="list-style-type: none"> • Identifying training requirements for the supply side of access to information • Identifying training requirements for the demand side of access to information <p>Speakers:</p> <ul style="list-style-type: none"> • Venkatesh Nayak (Commonwealth Human Rights Initiative) • Jill Cottrell Ghai (Katiba Institute) • Tahmina Laskar (CHRI) 	CAJ, ICT and CHRI

11:50-1:00pm	Any further questions; discussion on the Way forward and reflection on implementation plan	KI and CAJ
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