ADILI

Issue 70
September 28, 2005

a news service from transparency international-kenya

DRAFT FREEDOM OF INFORMATION ACT 2005

An exclusive interview with Hon. Raphael Tuju, Minister for Information and Communication.

Hon. Tuju avows that the enactment of this law will be a milestone because it will reduce corruption, which has thrived in the past due to excessive secrecy.

What does the proposed Act aim at?

The principal objective of the proposed Act of Parliament is to enable members of the public obtain access, to the widest extent possible and consistent with the public interest and the right to privacy, to information in the possession of Government and bodies owned and controlled by government and to enable citizens to have personal information relating to them in the possession of such bodies.

Accordingly, the proposed law will provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it. It will also provide for the independent review both of decisions of such bodies relating to that right.

How will proposals in the Act contribute to the fight against corruption in Kenya?

Since the law will make possible for members of the public to obtain access to the widest possible extent, it follows that it will greatly contribute to the fight against corruption. Corruption has thrived in the past due to excessive secrecy.

What are the key challenges with regard to freedom of information that necessitated the proposed Act?

Until the proposed bill becomes law, you as a member of the public cannot obtain access to much of the information in the possession of the government and bodies owned or controlled by the government. It is not even possible at the moment to get much of the personal information relating to you because of the restrictions imposed by some of the outdated pieces of legislation in our statute books. These are some of the key challenges that necessitated the preparation of the proposed law.

☞ *pg 2*

IN THIS ISSUE

This issue focusses on the Draft Freedom of Information Act 2005 highlighting:

☞ *from pg 1*

DRAFT FREEDOM OF INFORMATION ACT 2005

How will proposals in the proposed Act be implemented?

The implementation of the proposed law will take place in accordance with the provisions of Section one which provides that it shall come into operation on such a date as the Minister responsible for information, by notice in the Gazette appoints. In this regard, it is provided that the Minister may appoint different dates for different provisions.

Does the country have adequate human and financial resources to implement the Act?

The implementation of the proposed law will not amount to re-inventing the wheel, so to speak. We have the necessary human resources. The required budgetary provisions can be made to cater for further training to ensure that this important piece of legislation enters our statute books as soon as possible.

Are provisions contained in the Act consistent with freedom of information clauses in the proposed draft constitution?

I have not detected any glaring inconsistency but lawyers may come up with something - they usually do. However, it is a universally accepted principle of law that where an Act of Parliament is inconsistent with a constitutional provision, the provisions of that Act are null and void to the extent of that inconsistency.

What period of time should be given to measure the political will in implementing proposals contained in the proposed Act once enacted into law?

As I have already pointed out, the time when the proposed law comes into operation will be fixed by the Minister responsible for information. The law does not make any provision for what you refer to as political will and it is not correct to say that this should be a condition for its implementation.

What are some of the likely challenges in the implementation of the proposed Act?

Admittedly, the enactment of this law will be a major milestone knowing as we all do how things have been since independence. The National Rainbow Coalition (NARC) government has created considerable democratic space and we are ready for the challenges that may arise in the implementation of this law. We strongly believe it will further increase the democratic space in the country.

What is the way forward in ensuring that provisions contained in the Act effectively fight graft?

Once the proposed piece of legislation enters our statute books, the government will spare no efforts to ensure that it is fully implemented. There may be the initial teething problems when the necessary infrastructure is being put in place but once it goes into effect, this will have to be implemented. Of course, there will be need to read and understand it as it opens a window of opportunity that has always been firmly shut.

"Once the proposed piece of legslation enters our statute books, the government will spare no effects to ensure that it is fully implemented. There may be the initial teething problems when the necessary infrastructure is being put in place but once it goes into effect, this will have to be implemented. Of course, there will be need to read and understand it as it opens a window of opportunity that has always been firmly shut"

FREEDOM OF INFORMATION LEGISLATION IN KENYA WHERE ARE WE NOW?

By Priscilla Nyokabi

Freedom of information refers to the right to know; citizens' right to official information held by the government. It entails an obligation on the part of the public authorities to facilitate public access to information.

Democracy thrives best in an atmosphere of trust, openness and accountability. The right of citizens to access public information makes government more accountable for its decisions and actions. It is worth reiterating the benefits of an effective right to information regime:

- ***It strengthens democracy***

The foundation of democracy is an informed citizenry, able to choose its leaders on the basis of their track record with regard to transparency and accountability in the conduct of national and private affairs. Additionally, an informed citizenry will hold its government accountable for the policies and decisions it promulgates.

- ***It supports participatory development***

Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment without the involvement of people. An effective right to information regime enables people to be aware and participate in prioritizing their development needs and project implementation.

- ***It is a proven anticorruption tool***

In 2003, of the ten countries scoring best in Transparency International's Annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime.

- ***It supports economic development***

By providing crucial support to the market-friendly, good governance principles of transparency and accountability, an effective right to information legislation supports economic development

- ***It helps to reduce conflict***

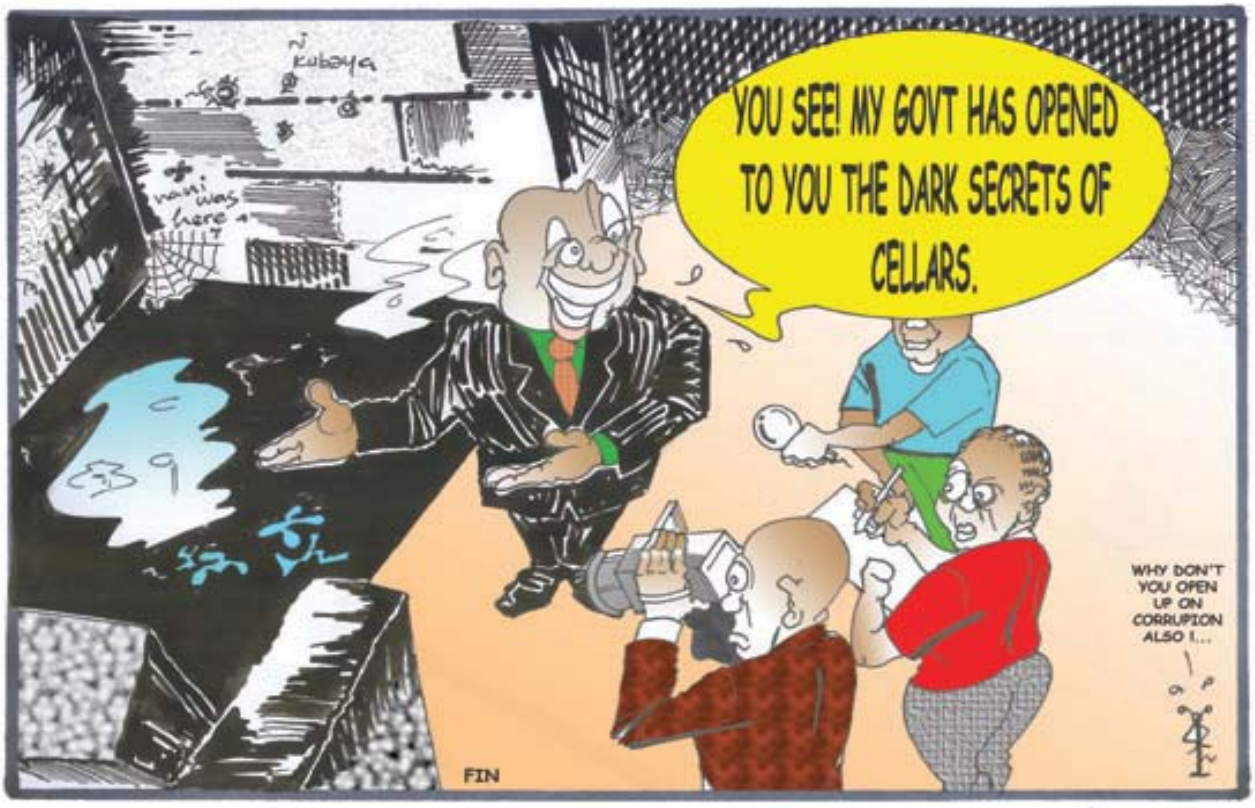
An effective legislation promotes openness and national stability reducing discontentment in the populace.

Existing legal position on access to information

The right to access information is not expressly provided for in the constitution. There is no right for the populace to seek information. Section 79 of the current constitution of Kenya guarantees the freedom of expression, which includes: "freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)".

Clear legislation is necessary to enforce the right to access information. This right is not adequately provided for and can only be inferred from a general reading of section 79 which unfortunately has claw back clauses. This is exacerbated by

☞ *pg 4*



FREEDOM OF INFORMATION LEGISLATION IN KENYA

the Official Secrets Act, a colonial relic that criminalizes disclosure of information by public officials. In a study conducted by the Kenyan Chapter of the International Commission of Jurists (ICJ Kenya) in 1999, it was concluded that Kenyan legislation does not secure freedom of information.

International Instruments and the Right to Information

The right to information underpins all other human rights. The United Nations' General Assembly in its inaugural session in 1946 adopted resolution 59(1) which stated that freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.

The right to access information is codified in Article 19 of the Universal Declaration of Human Rights. Similarly, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) to which Kenya is a party, provides as follows:

"Everyone shall have the right to hold opinions without interference. 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".

The African Charter on Human and Peoples' Rights also enshrines the right in Article 9:

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

By acceding to the African Charter, ratifying the ICCPR and including a similar provision in its constitution, Section 79, the Republic of Kenya has agreed to take on the responsibility for the protection and promotion of the right to information. It is required to domesticate the provisions in the International instruments and legislate for the right to information. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform in government and across public bodies. Legislating for Freedom of Information (FOI) will create the balance needed between access to information and national security as it provides for exemptions.

"Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. There should be a strong presumption in favour of access to information. The law should cover all public bodies as well as private bodies that carry out public functions or where their activities affect people's rights"

Draft Freedom of Information Act 2005

This draft was prepared by the Ministry of Information but the same has not been published for the legislative process to begin. It is a good indication that the government does actually have an intention of passing a Freedom of Information legislation.

However it is regrettable that nothing much is known of the fate of the Bill. Should the proposed new constitution not be adopted the country still needs to have a freedom of information legislation.

It is difficult to foretell when the Government will enact this law without the benefit of constitutional provisions outlined above. Even if prioritized, the period between now and when campaigns for the next general elections start, is inadequate. The Government already has many laws lined up for enactment and this one is not even published.

Content of FOI Legislation

There are internationally developed and accepted minimum principles that an access to information legislation should meet, as detailed below.

Maximum disclosure

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. There should be a strong presumption in favour of access to information. The law should cover all public bodies as well as private bodies that carry out public functions or where their activities affect people's rights.

The law should establish minimum standards regarding maintenance and preservation of records by public bodies. It should provide that obstruction of access to, or the willful destruction of records is a criminal offence.

Obligation to publish

Information should be published and disseminated. The law should establish both general obligations to publish and key categories of information that must be published.

Promotion of open government

Informing the public of their rights and promoting a culture of openness within government are essential. Experience in

FREEDOM OF INFORMATION LEGISLATION IN KENYA

various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. The law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information, which is available, and the manner in which such rights may be exercised.

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

Limited scope of exceptions

The law should be clearly and narrowly drawn and subject to strict "harm" and "public interest" test. Exemptions should be based on the content rather than on the type. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

- 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.

The Act should have the right to independent appeal on decisions made to deny information. Strong penalties should be put in place for frustrating the spirit of the Act; for example concealment of records.

Simple, easy and inexpensive access

The law should provide for simple and easy access. A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read and write. The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants.

Disclosure takes precedence

Laws that are inconsistent with the principle of maximum disclosure should be amended or repealed. The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Legislation dealing with publicly held information should be subject to the principles underlying the freedom of information legislation.

Whistleblower protection

The law should provide for the protection of whistleblowers. Whistleblowers perform a function of early warning and complement the work of regulators. Whistleblowers should benefit from protection as long as they acted in good faith and in reasonable belief that the informa-

☞ pg 6

FREEDOM OF INFORMATION LEGISLATION IN KENYA

tion was substantially true and disclosed evidence of wrongdoing. FOI law should be subject to effective monitoring and evaluation.

Critique of the Government Draft Freedom of Information Act 2005 (*some of views expressed here have been borrowed from a critique by Commonwealth Human Rights Institute of the proposed Act***)**

Having outlined above the minimum standards of a good freedom of information legislation, the cardinal rule is that the proposed Act remain faithful to these principles. The current Government Draft Freedom of Information Act 2005 provides a good working draft for the legislation of the right to information but it clearly does not comply with the minimum principles, a lot of input is required before its publishing. ICJ-Kenya and the Freedom of Information Network are in the process of publishing a memorandum of views on this draft geared towards its improvement and alignment to international standards. (*An excerpt of the views are highlighted on page 10*)

Kenya is drafting this freedom of information law after many other countries including those of the commonwealth with whom we share many similar laws, it is important we learn the lessons of other countries and borrow the best provisions. That said, it is disappointing to note that the proposed draft seems to have borrowed heavily the United Kingdom's and Australian Acts. The Government should borrow from more progressive and less restrictive Acts like South Africa's *Access to Information Act 2000,* the Indian *Right to Information Act 2004* or the Mexican *Federal Transparency and Access to Public Government Information Law 2002* which provide better models.

"The best highlight of the draft is article 45 which repeals the Official Secrets Act. A major misgiving is that the Act is seriously weakened by the absence of comprehensive offences and penalties provisions. Sanctions for non-compliance are particularly important incentives for timely disclosure where the bureaucracy is not used to hurrying at the request of public"

It appears that large tracts in the Bill have been modeled on the Australian *Freedom of Information Act 1982* and the UK *Freedom of Information Act 2000*. Both of those Acts are notorious for being very technically drafted. Both Acts also operate in contexts which have highly conservative legal jurisdictions. They do not provide good FOI models for countries which are genuinely committed to enabling the right to information to become more than just an administrative right exercised by opposition members of parliament (MPs) and journalists, and instead to be used by ordinary people to simply and cheaply access valuable information. The supreme value of the right to information is that it can be a tool for the empowerment of the public. However, the more complicated a law is drafted, the harder it becomes for people to use it to easily and effectively engage with the Government.

Regrettably the draft Bill is overly legalistic, such that it may be very difficult not only for the public to understand the law, but also for public officials to know how to implement it. The right to information is about opening up government to the participation of the common person. As such, it is crucial that right to information laws are drafted in a user-friendly way, the terms of the law need to be clear and precise.

The unnecessary legalism evidenced in the two model Acts has been compounded by the fact that the Acts have not been replicated in their entirety. Most notably, the definition clauses in the Australian and UK Acts have not been replicated, as a result of which the meanings of many clauses are problematically ambiguous. Adoption of random individual clauses has caused certain internal inconsistencies between various provisions in the Bill which need to be sorted out as a priority. Internal consistency should be checked so that all provisions interact appropriately.

All the provisions of the Bill should be simplified to ensure that it is easily understood by the public and public officers alike. If not amended some provisions are likely to create serious obstacles to implementation of the law and to the full enjoyment of the right to information in practice. This is because we lack administrative openness having been under the Official Secrets Act since independence.

The best highlight of the draft is Article 45 which repeals the Official Secrets Act. A major misgiving is that the Act is seriously weakened by the absence of comprehensive offences and penalties provisions. Sanctions for non-compliance are particularly important incentives for timely disclosure where the bureaucracy is not used to hurrying at the request of public.

The most important aspect of this legislation is the preamble as it sets out the tone and mood of the entire legislation in outlining the objective, thus our specific critique of it in this article.

Preamble

The right to access information is only given with regard to information in the possession of the government or public bodies. It is necessary to include a right of access to information held by private bodies undertaking public functions or any information held by another person required for the exercise or protection of any right or freedom as in Article 51 of the proposed draft constitution. The preamble does not cover or provide for the duty of maximum disclosure on the government. It is important that the intent of the Bill establishes clearly the principle of maximum disclosure, transparency and accountability.

The preamble should provide as follows:

☞ *back page*

DRAFT CONSTITUTION ACCESS TO INFORMATION PROVISIONS IMPLICATIONS FOR THE FIGHT AGAINST CORRUPTION

By James Wamugo

The right to information has emerged as a vital component of effective governance. Many countries now recognize flow of information as an integral part of the social contract between the government and the governed- that all official information held by the government is so held on behalf of the citizens and must therefore be accessible by its true owners-the citizens. In principle, official information held by government is created and maintained in the name of the public. It therefore follows that the governed must know that which is done in their governance.

As James Madison rightly observed way back in 1822 which is valid in the Kenyan context today that:

"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".

Ordinary citizens need access to government held information in order to exercise their rights in just about every phase of their lives. Without it they are ready prey to the corrupt and abusive.

Perhaps from the echoes of the above words by Madison, the proposed draft constitution of Kenya published on August 22, 2005, Chapter Six, the Bill of Rights under Article 51 provides that:

"every citizen has the right of access to 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 right or freedom".

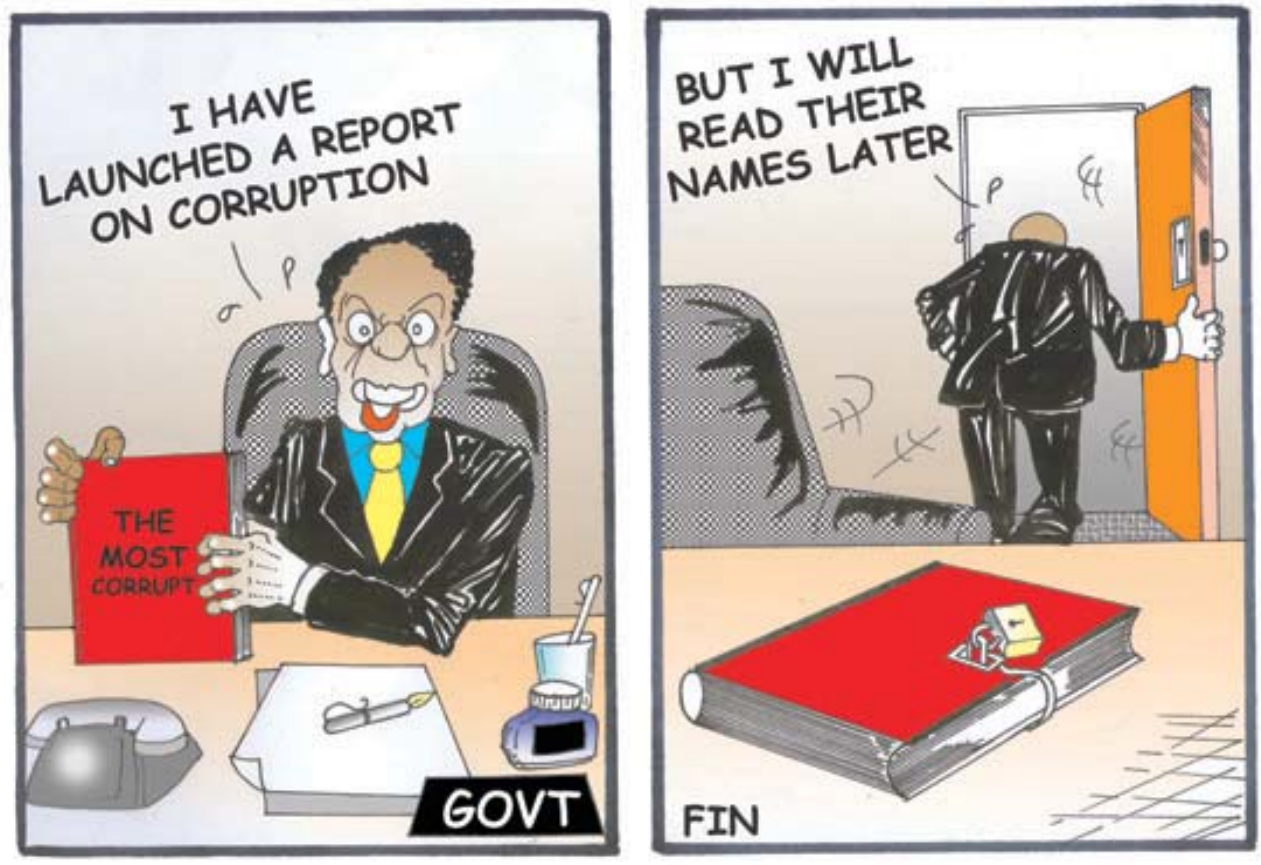
Provisions in the proposed draft constitution provides for mechanisms for the enforcement of this constitutional right of access to information. The South African constitution has similar provisions. Subsequently, its parliament passed an enabling law that provides for public access to information held by the government bodies and makes information on the functions and operations of the government bodies available to the public.

As is with the South African experience, if the vote goes "yes" in the referendum, in a word, access to information will form a legal presumption of openness and accountability, thereby entrenching the integrity of democratic governance and more importantly in the fight against corruption. As what is envisaged is a culture which requires people to participate in their governance and the government to account to them for its decision.

The dark past

The practice today is an obsession with secrecy, which persists in all spheres of daily lives, which has its roots from our colonial heritage. We inherited a culture of suspicion, characterized by the denial of factual and recorded

☞ *pg 8*



DRAFT CONSTITUTION ACCESS TO INFORMATION PROVISIONS IMPLICATIONS FOR THE FIGHT AGAINST CORRUPTION

matters courtesy of various legislations such as the Official Secrets Act, the Preservation of Public Security Act, the Penal Code etc. These laws administer a vow of silence to all civil servants and public officials, not to disclose any government held information, which a politician classifies at his\her discretion as an official secret.

But the most notorious of these laws is the Official Secrets Act. It establishes a general presumption that any official information is secret unless its release has been specifically authorized and provides for severe criminal penalties in cases of unauthorized disclosure. The best illustration is the Mbai murder trial, where some journalists from the Standard Group of newspapers and a Police Officer (who was alleged that he secretly gave the information to the journalists), were arrested and charged for being in possession of information considered secret by the State.

The dilemma with Kenyan citizens as was with the journalists and the police officer is that the Act does not clearly define the parameters of state security, public interest and public safety, which are its main objectives. Instead it places a blanket duty of secrecy on government officials and anyone who may advertently or inadvertently come across official information.

Since there is no other legislation regulating the access to information from the government, the Official Secrets Act has the final word in the management and dissemination of public information. Consequently, the emphasis is on government interests as opposed to the public interest. Secrecy is regarded as paramount and taken for granted as the overriding consideration in handling official information.

The Act unmistakably places the burden on those seeking access to information, not those claiming the right to non-disclosure. In large part, the law has served as a basis of amorphous threats by government officials who frequently warn of dire consequences for those responsible for leaks. Consequently, as many commentators have rightly observed, the Act does not serve its stated purposes but acts to create a 'chilling effect' upon public servants that needlessly interfere with the free flow of information.

Official information is a national resource, a currency for every citizen to use in order to understand policy decisions and their implementations, including administrative procedures and practices. When citizens access official information in government ministries for example, they are able to understand the rationale for policy and regulations, scrutinize implementation and check malpractice before it is too late. For instance, if you go by the latest media reports on government procurement, the media has been able to highlight malpractices in the tendering processes before the government losses money through corrupt deals. Yet this has happened with limited access to official information pertaining to government procurement processes.

"There must be political will to confront a culture that scorns whistleblowers; civil servants must be trained to implement a viable whistle blowing policy that allows them to raise concerns without fear of reprisal; civil servants themselves, must know and understand their rights under the law in order to be able to report misconduct in a proper manner"

Generally, the limitations on access to information placed by these legislations, for instance, when one looks at government tendering, makes it possible for a few individuals to conspire and defraud the state for fear of exposure as no one can dare expose the mal practice. Yet we know that its civil servants who can act as whistle blowers on such scams due to their interaction with "information' pertaining to such processes. A case in hand is the "infamous" Goldenberg scandal which due to the secrecy tag it was kept out of the public scrutiny for far too.

A new era

Given the escalating corruption levels promoted and protected by official secrecy, it will become a thing of the past as the anchoring of the right of access to information in the proposed draft constitution will guarantee the necessary protection for any public officer who discloses information on malpractice/administration, law breaking, and corruption which they encounter in the course of their duty and are compelled by their conscience to disclose it in the public interest. But as the South African experience has shown for the benefits to be accrued in the fight against corruption three things must happen. There must be political will to confront a culture that scorns whistleblowers; civil servants must be trained to implement a viable whistleblowing policy that allows them to raise concerns

☞ pg 9

DRAFT CONSTITUTION ACCESS TO INFORMATION PROVISIONS IMPLICATIONS FOR THE FIGHT AGAINST CORRUPTION

without fear of reprisal; civil servants themselves, must know and understand their rights under the law in order to be able to report misconduct in a proper manner.

Challenges

As is with the United States (whose landmark freedom of information legislation has long been a world leader) for example, there is plethora of data on who makes contributions to election campaigns, yet critical information that provides insights into the political influence gained by major contributors is largely absent. Consequently you might suffer from information overload, if the information you receive is not informative.

Any subsequent legislation that follows prescribing the limits as provided under Article 34 of the proposed draft constitution on limitations of rights, if not well thought could be an easy catch for the state security card to be overplayed. The limitation article pertaining to access to information could effectively reclaim most, or perhaps all, of the ground previously conceded.

Once we have legal right to information with an appropriate breadth and scope, how then should competing interests be resolved in any particular case of dispute? Public as opposed to political interests should always be the criterion. Hence civil servants should not enjoy discretionary powers in terms of deciding what information to release or not to. There should be an independent information commission or an appeals body.

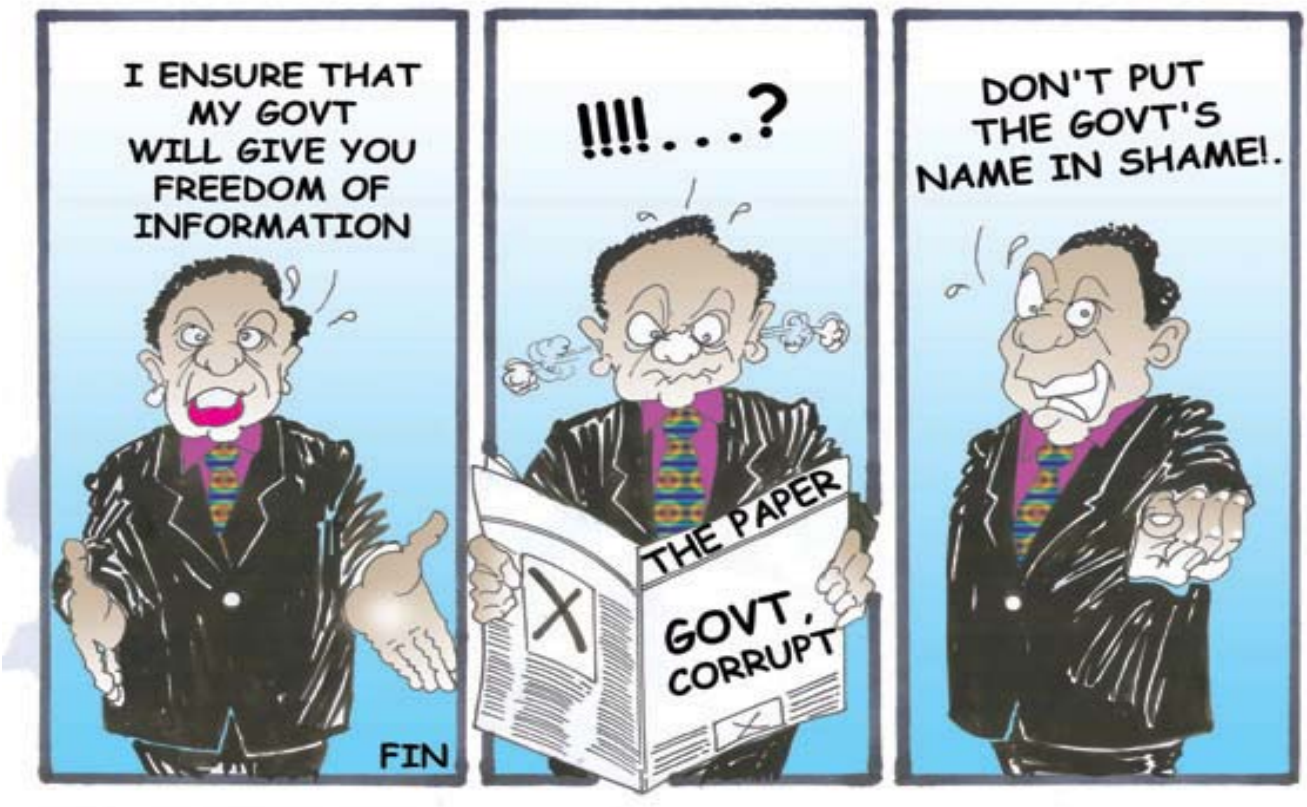
Access to information goes hand in hand with improved record management. There seems little point in having access to information that is chaotic and unreliable. Clearly there needs to be systematic, complete and dependable record keeping. If provisions in the proposed draft constitution were to become law, we must be prepared to take the world, as it is not as it ought to be. Old records may be so chaotic as to render rights of access highly time consuming, if not wholly fruitless.

Transitional arrangements should be provided if citizens' faith in their newly won rights is not to be lost as soon as they try to exercise them. Rather than allowing existing poor records management systems to be used as a reason to block reform completely, it may be better to draw a line and start afresh, with rights of access not being retroactive in areas where the existing systems simply cannot deliver with reliability.

Should those asking for information be required to meet the costs of preparing the replies? If so, should there be limits? Obviously, high fees deter requests and so undermine the whole purpose of the exercise. Fortunately, governments are learning that the benefits of openness can outweigh any related costs. Furthermore, whatever legislation has been passed, only nominal processing fees tend to be required.

The enactment of the proposed law must contemplate how it balances the openness required by it, with the legitimate need for government confidentiality. Honest journalism must be able to report professionally and be unaffected by sponsorship and self-interest. The media should filter through by sifting and sorting out the information into manageable levels. All said and done, we trust that our judiciary eventually will uphold and be the custodian of the constitution.

James Wamugo is a lawyer



MEMORANDUM OF VIEWS ON THE DRAFT FREEDOM OF INFORMATION ACT 2005

By the Freedom of Information Network

Below is an extract of article by article critique of the draft bill

Part I – Preliminary

Short Title and Commencement

This Act may be cited as the "Freedom of Information Act, 2005" [replace with the Right to Information Act 2005. This is because when you term it as a right the Government is obliged to take positive measures to fulfil it. A right is an entitlement for all citizens placing duty on the state to take measures to respect, protect, promote and fulfil] and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint and in this regard the Minister may appoint different dates for different provisions.

(A specific date from the date of passage should be given, up to a maximum of one year, on which the Act will come into operation. This will check against the possibility of the law once passed just sitting on the shelf indefinitely. Experiences in other countries, such as India and the United Kingdom, have shown that such a vague formulation can allow a law to sit on the shelves for years without ever coming into force. Further different timeliness and commencement dates may be set for different categories of documents if necessary especially where administrative measures to organize and collate records are required. The point is that all dates must be set from the outset.)

"A specific date from the date of passage should be given, up to a maximum of one year, on which the Act will come into operation. This will check against the possibility of the law once passed just sitting on the shelf indefinitely. Experiences in other countries, such as India and the United Kingdom, have shown that such a vague formulation can allow a law to sit on the books for years without ever coming into force"

Definitions ***[This should come after the short title and commencement for consistency with common practise in legislative drafting]***

The definition of the word agency should be replaced with the word "public authority". The definition in the Indian Freedom of Information Act would be a suitable definition. *"Public authority means any authority or body established or constituted; by or under the constitution and by any law made by the appropriate Government and includes any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate government."*

Similarly the words "Government", "government departments, agencies and local authorities" should be replaced with the word "public authority". The word "Minister" should only be used where it is referring to the Minister of Information and Technology.

The word 'information' should be broadly defined to include *"any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, works, models, data, material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force."*

The terms 'access to information', 'access to documentary information', and 'access to official information' have been used interchangeably. This can be confusing and potentially limits the scope of information that may be sought. A single standard of 'access to information' should be used to replace the various terms used interchangeably throughout the bill.

Objects

The Bill provides that its object is to extend as far as possible the right of the Kenyan citizens to access information in the possession of the Government. The right to information should not be restricted to citizens only. In a country like Kenya where many people are poor and disadvantaged they may not have the necessary documents to prove their citizenship. The Section should be reworked to provide that the object of the Bill is to extend as far as possible the right of *"all persons"* to access information.

Paragraph (b) of the Act provides that the Bill will create a general right of access to information in documentary form. This should be deleted as it restricts access to information that is not documented.

Paragraph (a) and (c) should be deleted. Paragraph (c) gives room for amendment of records. Records should never be amended for historical purposes].

Part II: Publication of documents and information

[It is important to establish the basis of the right to information. This should stem from the heading of the Part, we suggest that it should read; RIGHT TO INFORMATION AND OBLIGATIONS OF PUBLIC AUTHORITIES.

Publication of information maintained by the government

(1) The responsible minister of a government agency shall: This should be replaced with, "Every public authority shall".

The Bill proposes that the Minister should cause to be published in the Kenya Gazette 'information'. Experience has shown that the Kenya Gazette is not a suitable medium of

MEMORANDUM OF VIEWS ON THE DRAFT FREEDOM OF INFORMATION ACT 2005

dissemination of information. Information should be available in the offices of the public authority where it can be easily inspected. The Bill should provide for an obligation for proper records management. Alternatively if it is found necessary that information should be published the obligation should be tasked to a public official such as the Commissioner of Information. It is highly unlikely that a Minister will approve a publication scheme that will facilitate maximum disclosure.

Section 7(b) of the ICJ Freedom of Information Draft of 2000 provides an obligation on a public authority to ensure that records in its custody are maintained in good order and condition. A similar requirement should be included in the Bill providing that *" Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act."*

Additionally the Bill should broaden the scope of proactive disclosure. The list of topics which public bodies are required to proactively publish is extremely limited. The Bill currently focuses only on providing very basic information about public authorities. The Bill has not exploited the opportunity to use proactive disclosure as a means of increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials.

Documents to be available for inspection and purchase

Section 1(a) to (d) should be moved to Section 4 on Publications. Under paragraph (c) the words 'other business' should be include after the words "enforcement of such enactment or scheme" to widen the scope.

Subsection 2(a) Cause copies of all documents… made available for inspection and for purchase by members of the public; the words 'for purchase' should be replaced with the word 'access'. This should also be reflected in Subsection 2(c).

Part III Access to documents

Right of access

This section is unduly restrictive as it provides for access to "an official document of a government department," or "a document of an agency." A government department might refuse access on the grounds that a document is not an "official document". This section should be deleted as it is covered in other provisions.

Subsection (2)

Limits the scope of the Act to documents that became documents only after the Act comes into force. This will operate to keep away a large amount of information in government hands which is of interest to the public. The same should be deleted.

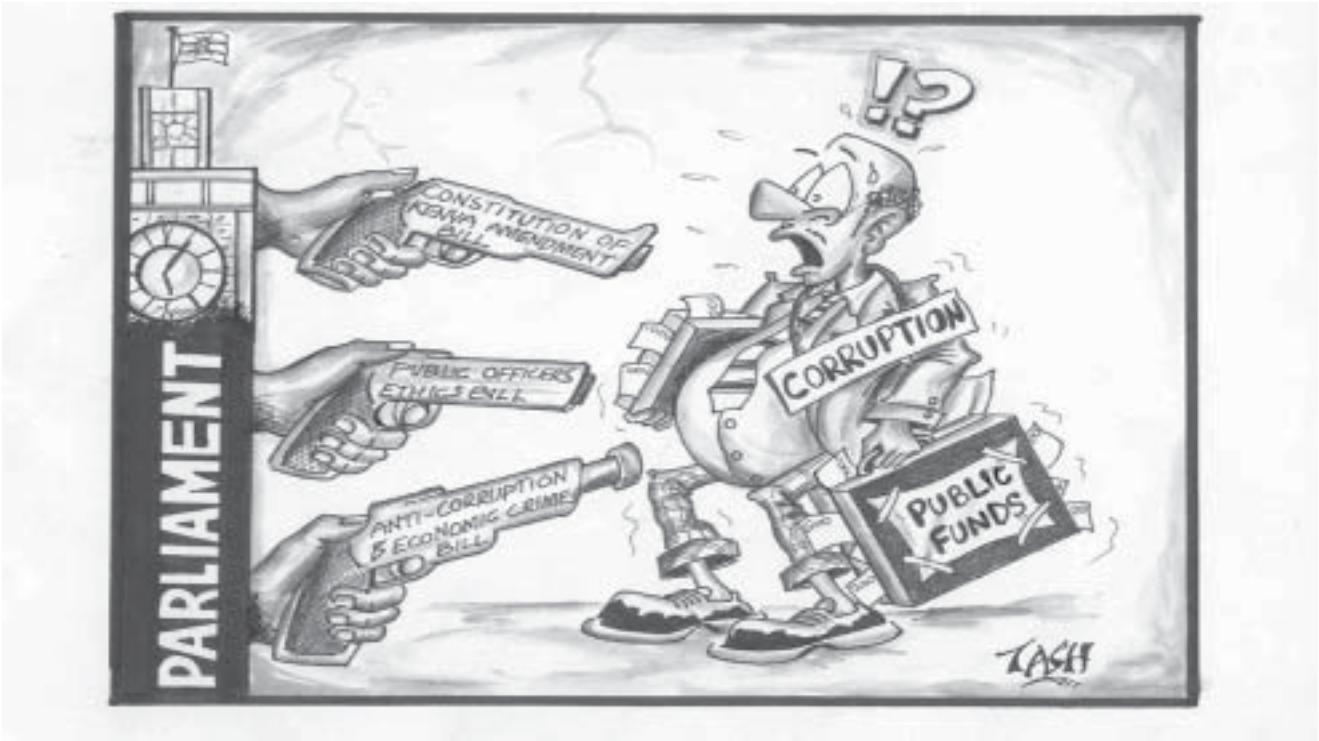
Access to documents apart from Act

The drafter of the Bill should weigh the possibility of moving this section to Section 4 on obligations of public authorities and reword it to read like Section 4(2) to 4(4) of the Indian Freedom of Information Bill.

The section should also be improved by including the words (limit or otherwise restrict). " Nothing in this Act is intended to prevent or discourage, limit or otherwise restrict *ministers and agencies from publishing…"*

Request for access [reword it as Request for obtaining information]

10(2)(a) the word send should be deleted the paragraph



MEMORANDUM OF VIEWS ON THE DRAFT FREEDOM OF INFORMATION ACT 2005

should; "be in writing or in electronic form; and [add that the request can either be in English or Kiswahili]. The Act should also accommodate the diverse capacities of information seekers. Most of the information seekers are illiterate or otherwise disabled. The Act should provide for access to information orally.

10(2)(d) the request must be sent by post or email to the agency's public information officer as designated under this Act.

10(2)(e) provides that a fee shall accompany the request. Under any FOI Act, fees are paid after confirmation of availability of information. Such fees should not be so excessive as to deter potential applicants. A waiver of fees should be granted where the request is of public interest. The ICJ-Kenya draft Freedom of Information bill provides for a waiver of fees if the information sought is of public interest.

10(4) the provision places a burden of making a request to the right agency on requester. Public authorities should be under a duty to forward requests that they know can be dealt with by other agencies, to those other agencies within a set time; and the time taken to forward the request to the other agency will not count when computing the time a request was responded to.

Section 6(3) of the Indian Act provides a good example of how the provision should be reworked. It provides that;

When a request is made to a public authority:

(a) which is held by another public authority; or

(b) the subject of the document is more closely connected with the functions of another public authority than with those of the agency to which the request is made; the public authority to which the request is made shall transfer the application or such part of it as may be appropriate to the other public authority within… days and inform the applicant within ….days about such transfer. (See Section 6(3) of the Indian Bill and the proviso thereto). ALTERNATIVE WORDING: the public authority to which the request is made shall transfer the application or such part of it as may be appropriate

The rationale for the amendment is that if a public authority MAY transfer a request, it will most likely exercise this discretion not to transfer the request. The provision also entrenches the principle of originator control which is always inimical to access to information.

10(5) an additional provision is necessary that information must be provided within 48 hours where it relates to the life or liberty of a person. The provision should also provide that the public information officer who grants or refuses to grant a request should give his or her reasons in writing.

11. Request for access to personnel records.

11(2)(b)(ii) has not been notified of the outcome [change to read: has not been provided with the records] within 30 days after the request was made.

15. E-mail and other computer-based requests

15(1)(a) should be reworked to read inspection of documents, records, work, taking notes, extracts or certified copies of documents or records.

15(3) allows the minister to withhold information where providing it would interfere unreasonably with the operations of his or her functions. This is a carte blanche that could allow the minister to withhold any and every kind of information, considering that ministers are very busy people. It should be reworded to remove reference to the Minister and to read: "would interfere substantially and unreasonably with the operations of the public authority." Add 3(d) The applicant should be informed of his or her right with respect to review the decision as to the form of access including particulars of the appellate authority, time limit, process and any other forms.

> ***"Deferrals should be made subject to a maximum time limit after which the information will be considered for release otherwise it could be deferred indefinitely to the detriment of the requester"***

16. Deferment of access

Deferrals should be made subject to a maximum time limit after which the information will be considered for release otherwise it could be deferred indefinitely to the detriment of the requester.

17. Deletion of exempt matter or irrelevant material

Officials who may arbitrarily decide that information requested is irrelevant could easily abuse this provision. The Section could be reworked to provide that; "*where a request for access to information is rejected on the ground that it contains information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information"* Add new subsection providing for the applicant to be informed of his or her right to appeal decisions made pursuant to this section with full particulars of the authority to whom the appeal can be made and the timeliness for the review of the decision.

18. Decisions to be made by authorized persons

There should be a clear chain of command or clarity on which officer within each public authority is ultimately responsible for implementation of the Act.

19. Requests may be refused in certain cases

Subsection (1) of this section is absurd:

- ·Is against the principle of maximum disclosure
- There should be a positive duty on public authorities to maintain documents in line with access to information principles and their envisaged obligations

MEMORANDUM OF VIEWS ON THE DRAFT FREEDOM OF INFORMATION ACT 2005

under the Part of the Bill addressing Public authorities' obligations.

- All public authorities should have an obligation to process requests

As already noted, ministers are very busy people and almost any request is likely to interfere with their functions. Therefore, reference to the minister should be excluded and replaced with reference to a public authority.

19(2)(a) appears to victimize the requester for the inefficiencies of the record-keeping system of the public body and it is unacceptable.

19(5) allows the agency or minister to refuse to grant access to the documents requested without having identified any or all of the documents to which the request relates and without giving reasons. According to the Principles on Freedom of Information Legislation drafted by ARTICLE 19, no public bodies should be completely excluded from the ambit of an FOI law, even if the majority of their functions fall within the zone of exceptions.

20. Information Access Offices. [Add appointment of Information Officers]

The provision provides for the setting up of information access offices. Such offices should be spread out through out the republic. Information officers should also be appointed to man these offices.

20(1) The minister administering this Act [change to: the Minister responsible for implementation, by public authorities, of this Act] shall cause to be published, as soon as practicable after the date of commencement of this Part, but not later than 12 months [change to 3 months] after that date, a statement setting out the addresses of such [add: Information Access Offices [add: and Public Information officers] of the Government, throughout Kenya, as are to be Information Access Offices [add: and Public Information Officers] for the purposes of this section.

Part IV Exempt Documents

21. Documents affecting national security, defence or international relations

Section 21 of the Bill provides that any document that may constitute damage to security, defence or international relations of the republic in the opinion of the minister, and in consultation with no one, may be deemed to be an exempt document. This section vests wide discretionary powers upon the minister. The exemptions are not strictly defined. All exemptions should be subject to the public interest override.

22. Documents affecting relations with other Governments

Sections 22 and 24 similarly allow a minister to issue certificates establishing conclusively that a particular document is an exempt document empower the minister to be judge and jury in his own cause and are likely to be abused.

23. Cabinet documents

Sections 23 and 24 deal with cabinet papers and internal working documents. These should not be exempt documents because of their type, but should be evaluated for their content on a case-by-case basis to ascertain whether they are exempt documents.

"The level of the harm required to justify non-disclosure should be sufficiently high to warrant protection, taking note of the need to promote greater accountability in revealing evidence of a substantial contravention of, or failure to comply with the law; or an imminent or serious public safety, public health or environmental risk"

25. Periods for which certain certificates remain in force

Section 25 provides for periods for which certain ministerial certificates remain in force. In addition to this, there should be a maximum period similar to the 30-year rule in the UK, after which all material should be declassified.

28. Documents concerning certain operations of agencies

Section 28 should be deleted, as it is too wide and could cover virtually anything and does not adhere to the strict definition of exemptions.

31. Documents relating to business affairs etc

Section 31 the private sector. Information would be disclosed where the disclosure of the record provides on overly broad protection of business affairs. As stated earlier, many private bodies carry out public functions and should not be placed beyond public scrutiny. While it is legitimate to protect business interests, this provision should be made subject to a public interest override. The level of the harm required to justify non-disclosure should be sufficiently high to warrant protection, taking note of the need to promote greater accountability in revealing evidence of a substantial contravention of, or failure to comply with the law; or an imminent or serious public safety, public health or environmental risk.

32. Documents relating to research

Section 32 purports to protect documents relating to research. But it is too broad and open to abuse as the harm test is too low. It should be reworded to include "substantial damage" to ongoing research.

34. Electoral rolls and related documents

Section 34 there is no justification to exempt electoral rolls. In a democracy, there is no reason to keep electoral rolls beyond public scrutiny.

REGIONAL NEWS

First global convention against corruption to enter into force
Seven of G-8 have yet to ratify the first truly global anti-corruption convention

Berlin, September 16, 2005

With ratification on September 15, 2005 by Ecuador of the United Nations Convention against Corruption (UNCAC), the first truly global tool in the fight against corruption will enter into force on 14 December 2005. This milestone has been reached despite the fact that, of the Group of Eight industrialized nations (G-8), only France has ratified this essential agreement.

"The G-8 needs to show that they are in this fight to win. Wealthier countries can hardly call on their poorer neighbours to take the fight against corruption seriously when they themselves are unwilling to act," stated Transparency International chief executive, David Nussbaum. "The next ratifications must include all the major industrialized countries, or the G-8's pledges will be worth no more than the paper they're printed on."

Bribe payments, the laundering of corrupt income and the flight of corrupt officials are cross-border phenomena and demand an international solution. The UN Convention against Corruption addresses this. It is a powerful legal instrument that will:

- Accelerate the retrieval of funds stolen by dictators and other public officials, such as under Nigeria's Abacha regime, via faster and better cooperation between gov ernments.
- Push banking centres like Switzerland and the UK to become more responsive to such investigations and take action to prevent money laundering.
- Enable global judicial action against the corrupt, no matter where they are hiding. Even without great resources, nations will be able to pursue foreign companies and individuals that have committed corrupt acts on their soil.
- Activate, for all parties, including major non-OECD trading powers such as China, Russia and Saudi Arabia, a prohibition on the bribery of foreign public officials, drying out a major channel for dirty money.
- Provide a framework for domestic anti-corruption legislation, introducing, in particular, whistle-blower protection, freedom of information and accountability systems for the public sector.
- Require measures to enhance accounting and auditing standards in the private sector and punish non-compliance.

"Countries must do more than sign the right documents; they must translate the UN Convention's provisions into action. The follow-up conference in late 2006 for signatory states must generate an explicit and effective system for reviewing each country's implementation of the convention"

Thus far, 129 countries, including the G-8, have signed, giving it an unprecedented geographical reach. Yet only a quarter of them have ratified, meaning that widespread adoption into national law is still a long way off.

Countries must do more than sign the right documents; they must translate the UN Convention's provisions into action. The follow-up conference in late 2006 for signatory states must generate an explicit and effective system for reviewing each country's implementation of the convention.

For further details visit http://www.transparency.org/pressreleases_archive/2005/2005.09.15.30th_ratification.html

REGIONAL NEWS

Millennium Development Goals are unreachable without commitment to fighting corruption

Corruption a key obstacle to development, undermining material well-being and social justice; General Assembly must act now

Berlin, September 14, 2005

There will be no fair world, no abolition of extreme poverty, as long as the calculus of corruption undermines education, health, trade and the environment. Dramatic reduction of corruption levels is the responsibility of poor and wealthy nations alike.

"Corruption is a massive drag on efforts to reach the Millennium Development Goals. It means wasted money, time and, ultimately, lives," said Transparency International Chief Executive David Nussbaum. "Governments, especially those of the G-8, need to move beyond paying lip service to the principles of accountability and transparency if they are determined to improve the lives of millions who live in poverty and instability."

Research has demonstrated unquestionably that corruption exacerbates and promotes a raft of development problems. Among them:

Entrenched poverty and hunger (MDG 1)

Corruption hampers economic growth, keeps countries from capitalising on internal resources and reduces aid effectiveness, contributing significantly to hunger and malnutrition. Petty bribery hits the poor hardest, ensuring that they stay poor.

Example: The total volume of bribes paid annually has been estimated by the World Bank Institute at US$ 1 trillion, nearly twice the gross domestic product for Africa, put at less than US$ 600 billion for 1999 by the African Development Bank.

Children deprived of primary education (MDG 2 & 3)

Misallocation of resources due to corruption means schools are never built, or that education systems remain drastically under capacity. Further, corrupt education officials at all levels have often been found to abuse their position as gate-keepers, making good education dependent on capacity to pay bribes.

Example: According to CIET International, 86% of parents polled in Nicaragua reported paying mandatory "contributions" to teachers. Of the mere 47% of girls who managed to get into primary school in a Pakistani province, nearly all reported unofficial demands for money.

Fatalities from treatable illness, child mortality, death in childbirth (MDG 4, 5 & 6)

Misallocation means hospitals are poorly staffed and resourced. Corruption facilitates circulation of fake – potentially lethal – drugs. Bribes are often a prerequisite for access to health care, including maternal health.

Example: In Bangalore the average patient in a maternity ward pays approximately US $22 in bribes to receive adequate medical care. In Nigeria there have been countless cases of deaths due to counterfeit medications that moved unhindered from production plants, across national borders and into unsuspecting markets.

"Misallocation of resources due to corruption means schools are never built, or that education systems remain drastically under capacity. Further, corrupt education officials at all levels have often been found to abuse their position as gate-keepers, making good education dependent on capacity to pay bribes"

Unsustainable development (MDG 7)

Corrupt public officials mean that environmental regulations remain unenforceable, resulting in lost livelihood, illness and social displacement for millions.

Example: Illegal logging facilitated by bribery is deforesting Asia's Pacific Rim. With all its attendant environmental, social and health-related consequences this is a serious threat to local populations.

Impeded economic growth (MDG 1 & 8)

Corruption means greater business risks. It distorts markets and discourages foreign direct investment. It stifles cross-border trade.

Example: In Africa, rampant border and duty corruption deprives countries of the benefits of regional trade as a launch pad to the global market.

For further details, visit http://www.transparency.org/pressreleases_archive/2005/2005.09.14.mdg.html

TRANSPARENCY INTERNATIONAL - KENYA UPDATE

Transparency International Kenya Wins highwayAFRICA Award on Innovative Use of New Media

Transparency International Kenya (TI-Kenya) won the 2005 highwayAFRICA Award for Innovative use of New Media in Africa, under the non-profit category. Now in its sixth year, the awards are given annually at the Highway Africa conference to recognize and promote the creative, innovative and appropriate use of new media technology in Africa. The emphasis of the award is on how the new media benefits press freedom in Africa and encourage social empowerment in African communities. Ultimately the award aims to highlight innovations that result in African media benefiting from new ideas and developments in communications technology. Transparency International Kenya, the runner-up in the non-profit category won the award because, inter alia, TI-Kenya's website demonstrates the importance of Information and Communication Technology (ICT) in promoting good governance.

The hour-long ceremony was broadcast live on the South Africa Broadcasting Corporation (SABC) on Tuesday night, September 13, 2005 in Grahamstown, South Africa. The judges comprised professor, Tawana Kupe, the convener of the awards and associate professor and head of the school of Languages and Humanities, University of Witwatersrand, Dinesh Balliah, a lecturer at the University of Witwatersrand, Roland Stanbridge, director of a Master's in Global Journalism degree at Orebro University and teacher of journalism at Stockholm University and Mathew Buckland, editor of the Mail & Guardian Online.

International Conference and Annual Membership Meeting of Transparency International

Transparency International will host an International Conference and its Annual Membership Meeting on November 12 - 13, 2005 in Berlin, Germany.

For further details, contact Stan Cutzach, Governance Officer, Email: scutzach@transparency.org

Redesigning the state? Political corruption in development policy and practice

The Institute for Development Policy and Management / Learning Initiative on Citizen Participation and Local will will host a conferenceon November 25, 2005 a conference will interrogate why corruption is central to good governance agendas since 1990s, how it works and why poverty is a result. Although the conference seeks primarily to analyze corruption in newer nation states, which are predominantly in Africa, it will also consider papers concerned with corruption in other areas.

For** further information:**http://www.sed.manchester.ac.uk/idpm/research/events/PoliticalCorruption

☞ *cont'd from pg 6*

Freedom of Information Legislation in Kenya

"an Act of Parliament to promote the constitutional right to information by entrenching the principle in law of maximum disclosure of information in the public interest. The Act will, guarantee the right of everyone to access information, and provide for effective mechanisms to secure that right".

This should be an enabling legislation for exercise of the right to access information; it should thus not be restrictive in language and objective.

ICJ-Kenya's Draft Freedom of Information Bill

Another strategy of having a Freedom of Information Legislation in Kenya sooner, in 2006 will be to have a private members Bills. A number of MPs can take the Bill to parliament and have committed to do so. ICJ-Kenya had attempted to do this previously via a motion successfully introduced to parliament by Mukhisa Kituyi, an MP. Towards this end, ICJ-Kenya leading the FOI Network will revise and prepare its draft FOI Bill.

We hope that by the next general election in 2007, a Freedom of Information Legislation in Kenya will have been promulgated and operative.

Ms Nyokabi is the Program Officer of ICJ-Kenya

Want to share your views towards creating a corruption-free society? Be our guest every Saturday at 10.00 am - 11 am on 92.9 FM, KBC Swahili Service.

Adili is a fortnightly news service produced by TI-Kenya's Communications Programme. The views and opinions expressed in this issue are not necessarily those of TI-Kenya. The editor welcomes contributions, suggestions and feedback from readers.

Transparency International, 3rd Floor, Wing D, ACK Garden House, 1st Ngong Avenue. PO Box 198-00200, City Square, Nairobi, Kenya. Tel.: 254-020-2727763/5, 0733-834659, 0722-296589; Fax: 254-020-2729530.