

**Freedom of Information as the Oxygen of Democracy: a Case Study
on Nigeria**

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Introduction

In my village, Enugwu-Uku, whenever anything was to be done, the ekwe (a wooden drum) would be beaten by the designated person. When it is beaten, people know that there is something to be done, and that people should come to the village square for information. To the extent that people were to be effected by actions to be taken, they had to be involved in the decision, there was like just ordering.

- Nicholas Peter, describing the situation in pre-colonial Igboland ¹

There is a now rising a consensus that the access to information is an enabler of other human rights and that it contributes significantly to good governance. The UN General Assembly in 1946, in its very first session, adopted the *Resolution 59(1)* that states that “Freedom of information (FOI) is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.” Abdul Waheed Khan of UNESCO has emphasized that the “free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights.”²

The right to know which is derived from the freedom of expression helps the exercise of the right to vote, prevent and expose human rights abuses and corrupt acts of public officials which thrive on secrecy.³ FOI is a multifaceted right that brings many gains like transparency and accountability, integrity in governance, enhances civic participation, prevents and exposes

¹ Florini, Ann, *The Right to Know*, p. 143 (2007).

² Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 1 (2008) - Abdul Waheed Khan is the Assistant Director General for Communication and Information UNESCO.

³ Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 1 (2008) - Abdul Waheed Khan is the Assistant Director General for Communication and Information UNESCO .

corruption and human rights abuses. This work is focused on the modern concept of freedom of information and the role it plays in ensuring a vibrant enduring a vibrant democracy.

Claim and Scope

The premise of this writing is that FOI is a core right that promotes the enjoyment of other rights and this consequently powers the engine that ensures a democracy functions properly in a given society or context. The right component of FOI has been long acknowledged. As a basic start, Article 19 of UDHR provides for the right seek and receive information embodied in freedom of expression. Consequently, public access to information is connected with being able to express one's views in responsible manner without hindrance. It is the other side of freedom of expression, as it aids an individual to exercise this right.

Gradually, national and international Courts are warming up to this idea, evidenced by the growing number of jurisprudence in favor of this claim. The United States Supreme Court as far back as 1965 was very emphatic on the citizen's rights of access to information. In *Lamont v. Post Master General*, the Court held that the *Postal Statute* violated the addressee's right to know. Justice William Brennan in his concurring opinion noted that "the right to receive information is a fundamental right", thereby affirming this right.⁴ He further noted that nothing can be gained with the dissemination of ideas, "if willing addressees were not free to receive and consider them, this will be like a barren marketplace of ideas with no sellers and buyers."⁵ Also

4 *Lamont v. Post Master General*, 381 U.S. 301 at 308 (1965).

5 *Lamont v. Post Master General*, 381 U.S. 301 at 308 (1965).

in *Griswold v. Connecticut* the right to receive information was held by the Court to be part of the freedom of speech and press.⁶

At the national level also, India's Supreme Court has often affirmed this right. In the famous case of *UP v. Raj Narain* it said that the government does not have the luxury of keeping secrets as they must be accountable to the public for their conduct. It further emphasized that the citizens had a right to be informed of all public acts carried out by public officials.⁷ This case is very instrumental as it not only affirmed the right, but it highlighted clearly the import of the right in ensuring good governance. In a more recent case of *Dinesh Trivedi, M.P & ors. V. Union of India & ors* it was again opined that "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare."⁸

Chidi Odinkalu has brought some interesting dimensions in support of the FOI by purporting that it has theological foundations in two major religions – Islam and Christianity. He claims that both religions are in agreement that inequality in access to information creates inequality in human relations.⁹ The Bible promises that: "wisdom and knowledge are granted to you"¹⁰ and that "you shall know the truth and the truth shall set you free."¹¹ Thus, if you seek, you shall find and if you ask, it says, it shall be granted unto you.¹² Also Prophet Isaiah, laments the denial of

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

⁷ *U.P. V. Raj Narain & Ors.* (1975) 4 SCC

⁸ *Dinesh Trivedi, M.P & ors. V. Union of India & ors.* (1997) 4 SCC 306

⁹ Odinkala, Chidi. A. *Freedom of Information in Nigeria, Perspectives, Problems & Prospects*, p.15 -16 (2008) – also presented at *Section on Public Interest and Development Law (SPIDEL)*, Nigerian Bar Association, NBA. Text of Law and Development Lecture, 2008, organised by *Bamidele Aturu & Co, Legal Practitioners*, Agip Hall, Muson Centre, Lagos, 27 October, 2008.

¹⁰ 2 Chronicles 1:12

¹¹ John, 8:32

¹² Matthew, 7:7

this right with these words: “therefore my people go into exile for want of knowledge; their honored men are dying of hunger, and their multitude is parched with thirst.”¹³

In the Holy Qur’an, Allah poses the rhetorical question: “Are those who know and who do not know equal?”¹⁴ According to Khaled Abou El Fadl, “[i]n the symbolic universe of Islam, ignorance is *kufir*, and a dead intellect is equated with the darkness of a dead soul.”¹⁵ The Biblical book of Job complains: “Job speaks without knowledge, his words are without insight”.¹⁶ These may not mention the freedom of information specifically but clearly acknowledge an individual’s wellbeing is based on being able to receive information and issues that affect his existence.

There is clearly a tension between the right to know, privacy and national security. There has been a frequent debate on how far disclosure should go and when privacy should prevail. The jury is also out on what constitutes valid boundaries on secrecy on matters of national security. Ann Florini acknowledges that no reasonable person will insist that citizens give up their rights to privacy; or that corporations in the detriment to their business give out trade secret or that governments to the detriment of their troops give out strategies.¹⁷ These competing rights need to be weighed, with a higher value attached to a citizen’s right to know.¹⁸ It has also been argued that the battle over these rights reflects patterns of existing political and economic privileges and power.¹⁹

¹³ Isaiah 5:3

¹⁴ Ch. 39:9

¹⁵ Khaled Abou El Fadl, *Conference of the Books: The Search for Beauty in Islam*, p.73 (2001). The concept of *Kufir* in Islamic law refers to a notion of shielding the truth after one has recognised it as true. It could also refer to infidelity to, ingratitude or unbelief in *Allah*.

¹⁶ Job 34:35

¹⁷ Florini, Anne, *The Right to Know*, p.3. (2007).

¹⁸ *Ibid*, p.3-4.

¹⁹ *Ibid*,pg. 4.

Advocates of this right argue that it promotes the enjoyment of not only political rights, but also socio-economic rights. Toby Mendel observes that most people ignore the fact that this right serves a number of important goals, aside from political participation.²⁰ It is central to personal decision making as it aids access information that facilitate decision making. For example access to medical records can help individuals make decisions about treatment.²¹

The main concept discussed in this work is how this right enables other rights to ensure that there is a functioning democracy. This focuses on factors that must exist before a society can be seen as a democratic one. Joseph Stiglitz argues that there exists a basic right to know in democratic societies.²² There is a presumption of transparency and accountability in a democratic society, as citizens must be informed of the rationale behind governments' action.²³

This further raises the question of how much information citizens need in order for a democracy to be functioning? By all accounts, information is critical to the expansion of meaningful citizen participation and influence in contemporary democracies.²⁴ Political scientists disagree on how much information citizens require in order for them to be competent voters and civic participants. The extreme position of minimalists theorizes that citizens need "easily digested information cues and short cuts in order to make political decisions without investing enormous time and effort into the tedious task of becoming informed."²⁵ The other end of the spectrum believes that citizens need very detailed information on public policy as they are very deeply

²⁰ Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 13 (2008).

²¹ Ibid, p. 13.

²² Matthew Gibney, *Globalizing Rights*, p. 116 (2003).

²³ Matthew Gibney, *Globalizing Rights*, p. 117 (2003).

²⁴ Cain, Dalton & Scarrow Dalton, *Expanding Political Opportunities in Advanced Industrial Democracies*, P.116,(2003).

²⁵ Ibid, p.116

involved.²⁶ In the final analysis, contemporary position argues that democratic government has an obligation as a general policy to make information available to the public.²⁷ There must be so much information out there that it promotes transparency in the actions of government.

FOI is seen in practice as a negative right, as it mandates the government to refrain from interfering with the free flow of information. This interference can easily be challenged when governments take actions affecting this right.²⁸ In adding to this discourse, I also think that it imposes some positive obligations on government to adopt measures that would ensure transparency in all their dealings. This entails maintaining a system of good record keeping and taking appropriate steps taken to ensure that information is readily accessible to the public. FOI thus puts a double obligation on government in order to come to fruition.

The historical antecedent of this right is important in contextualizing it. The right to information has existed for over 200 years and is gradually gaining momentum as a large number of countries have enacted access to information laws and put measures in place to actualize the right.²⁹ Sweden was the first country to have made such a law in 1766 and Colombia can also claim a pride of place with her *1888 Code of Political and Municipal Organization* which allowed citizens to request and access public information's.³⁰ As of 2006, the Privacy International's

²⁶ Cain, Dalton & Scarrow Dalton, *Expanding Political Opportunities in Advanced Industrial Democracies*, P.116,(2003).

²⁷ Ibid, p.116

²⁸ Roberts, Alasdair. "Structural Pluralism and the Right to Information" in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002, pp. 36-37.

²⁹ Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 1 (2006)

³⁰ Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 30 (2008).

Survey listed 69 countries as having FOI laws, since then China, Nepal and Jordan have joined the league, resulting in every region of the world having FOI legislation.³¹

In Africa, only few countries have access to information laws, but a number of countries are in the preparatory stage of enacting them. Nigeria has for over ten years been involved in what can only be described as the FOI Bill saga, without a freedom of information law to show for it. It should make for an interesting case study as it illustrates the peculiar problems that are faced in trying to ensure the passage of FOI legislations. It highlights the fears and interests that usually come to play in the passage of such legislation. The factors that have come into play include the long history of military rule, colonialism, diverse ethnic and religious background, and poor transparency and accountability practices of the past government amongst others. The official and deeply ingrained culture of secrecy in the public sector has done much harm on the development of the country.

Nigeria's performance in governance and anti-corruption according to the 2007 Global Integrity report has degenerated from the 2006 assessment.³² The accountability of the three branches of government, inclusive of the civil service is still weak and citizens' have little access to official information.³³ The introduction of the FOI bill several years gave so much hope to people that the opaqueness in which government operates will cease and there will be room for scrutiny of their actions. This would enhance public participation in the process and promote accountability in governance. The expectations of the public on the Bill when passed into law is that it will reposition the country socio-economically also.

³¹ Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, p. 30 (2008).

³² Global Integrity, *2007 country Assessments*, available at <http://report.globalintegrity.org/Nigeria/2007>

³³ Ibid

Gaps and Contributions

The question I would emphatically try to answer is whether there can be a democracy without a regime of access to information to public information. So much as been said about the fact that it promotes good governance already, but none as attempted to boldly answer what its absence implies for democracy. The general thrust of the discourse has been focused on freedom of information as component of the freedom of expression and speech. Undoubtedly there are linkages between freedom of expression and press and this right. However, there has not much focus on the right to know as a standalone right. This is more of a citizen's right and tool, which puts dual obligations on government.

Structure and Methodology

The thesis will use relevant literature, case law, index and policy analysis to establish the claim and try to answer the questions the questions highlighted earlier. For purposes of clarity these questions are: What is freedom of information and its elements; are there limits to this right; what is meant by a functioning democracy; what role does it play in ensuring good governance; and can a society be democratic without it?

The specific structure of the work will be as follows:

Chapter One is the introductory and concepts defining part. It begins by exploring FOI and its elements. As of necessity, the reasonable limit on the right in a democratic setting has to be discussed. Another key concept being that of democracy with emphasis on a working one will be defined for purposes of this work. The connection between it and good governance will be made.

For purposes of standard setting the international scene will be looked at. There have been over the years established elements that ensure effective access to information within a FOI regime in any given country. These FOI principles will be explored. It is important for purposes of emphasis to look into the international legal environment of this right and judicial interpretation on its content. The jurisprudence of organizations like the Inter-American Court on Human Rights, African Commission on Human Rights and the European Court on Human Right will be used. A brief look will also be taken of two African countries that have access to information laws to see how they are faring.

Chapter 2 sets the stage for contextualizing Nigeria and highlighting its peculiarities. Its socio-economic context will be delved into. Its challenging political history from pre and post independence will be highlighted. The story of Nigeria can never be complete without highlighting the role oil has played in shaping its history. The colonial legacy of the civil administration is an important feature as it shapes the regime of access to information.

Chapter 3 will then examine the Freedom of Information story in Nigeria with the objective of highlighting how the absence of a FOI law and culture of limited access to information as affected its nascent democracy. I will re-examine the legal framework governing access to public information in Nigeria currently and also assess the attitudes the Government in the last twelve years since the incursion of democracy. This chapter will add to the ongoing conversation on what we stand to gain or lose by embracing a regime of public access to information and focus on how we have been faring as Nation without it. The Nigerian public lead by CSOs have for over ten years been campaigning for a freedom of information law. Despite being arguably the most popular bill before the National Assembly, it still has not been passed. This work will add

to the debate and help solve the impasse that the bill has been facing. The saga for the last ten has built and sustained an incredible momentum for the law, and this can be seen as an opportunity. The non-passage of the bill is however not the only challenge, there are other post bill challenges that include the reorienting the executive as they have been used to operating in the culture of secrecy and instinctively refuse the public access to information..³⁴ This work will also address other challenges like the poor record keeping culture of in the public sector.

Chapter four will conclude my analysis and unite all my evidence and facts. The faith of my hypothesis, “FOI as human right is a prerequisite for functioning democracy” will be revealed here. This work will offer many insights to that claim.

³⁴ Florini, Anne, *The Right to Know*, p.165 (2007).

Chapter One

1. Exploring Freedom of Information

Introduction

What is Freedom of Information (FOI) in a functioning democracy? This section will analyse what is commonly known as FOI as recognized by scholars, international human rights instruments and practitioners. It will discuss the elements of FOI, how it interacts with other rights, look briefly at the regulatory framework and practice in Uganda and South Africa, two countries in Africa that have access to information laws. The relationship between this concept and democracy would be made.

1.1 Definition of Freedom of Information

Freedom of information otherwise known as the right to access to information has a long history and there is some consensus on what it means. The United Nations considers it firstly a fundamental human right and the enabler of other human.”³⁵ The right of access to information is held by every individual to access information he or she needs to make decisions and live an independent life.³⁶ It is generally accepted this covers only information held by public officials. These public bodies are as a result of this right under an obligation to publish information proactively without access being requested.³⁷

³⁵ UN General Assembly. (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

³⁶ Article 19, *Access to Information: an Instrumental Right for Empowerment*, p.5 (2007).

³⁷ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.14 (2003).

This right puts two kinds of obligations on states in order to come to life. The negative obligation mandates government to refrain from interfering with an individual's access to information. It is easily established that it is a negative right, as governments take actions frequently that affect this right. The regulation of the media by issuing broadcasting policies and licenses is done by them.³⁸ The argument is also that it imposes a positive obligation on states to put measures that facilitates access to information by citizens.³⁹ International human rights NGOs claim that there is a positive obligation on states to ensure that individuals have information on human rights violations.⁴⁰ It is obvious that if there is no positive obligation on states, this right cannot be enjoyed. Public authorities have to develop and maintain a culture of effective record keeping; if this is absent information cannot be retrieved by the public.

There is a strong acknowledged relationship between access to information and freedom of expression and press. Herbert Brucker, one of the earliest scholars who discussed freedom of information ties it closely to the right of the press to disseminate information. He claims that "FOI means nothing more than realizing the practice of the Fourth Estate."⁴¹ This guarantees press objectivity by ensuring that it is truly independent and not susceptible to pressure from government and other actors.⁴² This notion however is changing, as FOI is being seen as a broader individual right than one for the press only.

³⁸ Robert, Alasdair. *Structural Pluralism and the Right to Information* in *The Right to know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, p. 36-37 (200)

³⁹ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.14 (2003).

⁴⁰ Article 19, *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* p.5 (2000). Online at www.article19.org/docimages/869.htm

⁴¹ Brucker, Herbert. *Freedom of Information*, p.276 (1949).

⁴² Ibid, p. 276 – 277.

Many international instruments providing for this right submerge it within freedom of expression. *Article 19(2) of the ICCPR* provides that “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 form of art, or through any other media of his choice”. Again there is the reference to the press here.

Freedom of information is seen as the enabler of other rights. As previously mentioned in this work the U.N had recognized it “as the touchstone of other freedoms.”⁴³ It is not contested that it aids the enjoyment of other political rights. The ICCPR for instance in Article 24 guarantees citizens the right to engage in political processes; to vote or be voted for. For elections to be truly meaningful and fulfill its functions, the citizenry must have access to information.⁴⁴ It also enhances participation at all levels of governance by citizens.⁴⁵

It is now obvious that it aids the enjoyment of other rights, aside from political rights. Ramkumar and Petkova argue that citizens need to be empowered to participate in the political process of projects with immense impact on the environment like mining.⁴⁶ This is especially important for communities whose main source of income comes from natural resources. They argue that armed with information, these citizens can take actions to protect themselves from environmental health risks and hazards.⁴⁷ There is a new movement on environmental governance confirmed by the *1992 World Summit on Environment and Development* which insists that citizens must have access to information in order to participate in decision making on crucial environmental issues.

⁴³ UN General Assembly. (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

⁴⁴ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.13 (2003).

⁴⁵ Ibid, p. 13.

⁴⁶ Vivek Ramkumar and Elena Petkova, *Transparency and Environmental Governance*, in Florini's Anne, *The Right to Know*, p.283.

⁴⁷ Vivek Ramkumar and Elena Petkova, *Transparency and Environmental Governance*, in Florini's Anne, *The Right to Know*, p.284.

1.2 International Principles on Freedom of Information

There are no mandatory international minimum standards governing FOI legislations or policy that exists. The trend has been to codify access to information rules in constitutions, separate laws and regulations. There have also been moves by international organizations to have FOI legislations. *The Council of Europe's Recommendation 2002 on the Right of Access to Official Documents* clearly stands out, as it sets a minimum standard recommended for governments' access to information legislations.⁴⁸

However, there have been some best practices on minimum principles that FOI legislations have to contain in order to attain their intended goals. International NGO's like Article 19 and Open Society Justice Initiative have been very active in compiling this minimum standard. These principles are to be used in measuring national legislations. Basically principles have developed, evolving out of international, regional and national laws and also state practice.⁴⁹ This work will discuss these principles briefly.

The first principle is one of maximum disclosure. This principle is grounded on the premise that FOI is a basic right, consequently there is a presumption that public officials have an obligation to disclose information and there exists a resultant right for members of the public to receive information. Individuals should not be required to show specific interest or give reasons for requesting for this information. For instance *Section 6(2) of India's Right to Information act* provides that an applicant requesting for information held by a public authority "shall not be

⁴⁸ Recommendation Rec. (2002)2 of the Committee of Ministers to members states on access to official documents, adopted by the Committee of Ministers on February 21, 2002 at the 784th meeting of the ministers deputies.

⁴⁹ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.2 (1999).

required to give any reason for requesting the information or any other personal details except those that may be required to contact him”.⁵⁰

Public officials can only on cogent and limited grounds refuse to give out public information.⁵¹

The grounds for non disclosure of information must be very limited and cogent. If an individual is denied access to publicly held information, the burden of proving that refusal falls within the very limited scope of exception should be on the public official.⁵² Ideally, this right should be held be everybody in the society. In many countries with FOI laws it is the citizens who enjoy this right. However, the Japan and South Africa laws are models as also non citizens enjoy this right.⁵³

The information should cover all forms of records held by public bodies, whether it's a document, electronic and so on. It should also include information held by all the branches of and the different levels of government in a particular country.⁵⁴ Personal information held by public bodies is inclusive in the scope of this right. People should know information the public authorities have about them and have the right to correct any omission or mistakes on this data.⁵⁵

The second principle puts an obligation on public bodies to publish key information in their possession proactively. They should without waiting for requests from the public publish information that in their judgment would be of public interest. The categories of information's that they must publish include: operational information; information on requests or complaints;

⁵⁰ Right to Information Act, Section 6(2), (2005).

⁵¹ Ibid, p. 2

⁵² Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.2 (1999).

⁵³ Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 14 (2005).

⁵⁴ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.3 (1999).

⁵⁵ Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 14 (2005).

guidelines on how members of the public may provide input into major policy proposals and decisions; types of information in its custody; and policy document affecting the public and justifications for them.⁵⁶ The information must be relevant and succinct in a manner that captures the essence of the message and does not over burden the public. Too much information may have the same effect as no information.⁵⁷ It must also not also contain a very scanty detail that is of no use to the public.

The third principle is that of promotion of a principle of an open government. There must be a culture of openness in order for the ideals of the FOI legislations to be realized. An unwilling civil service has shown to be one of the major obstacles in realizing the aims of FOI even with the best of laws.⁵⁸ This means that priority must be given to promotional activities after the passage of a legislation to educate public officers and re-orient them. Measures that could be adopted include training for public officers; whistleblower protection mechanism, and procedural mechanism for accessing information.⁵⁹ This includes establishing systems to store records and information in manner that allows for easy access and accountability mechanisms to make clear whose responsibility it is to provide information as well as sanctions.⁶⁰

The fourth principle is one of the most important as many FOI legislations are defeated on this leg. It provides that there must be a limited scope of exceptions. The “exceptions should clearly

⁵⁶ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.3 -4 (1999).

⁵⁷ Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 16 (2005).

⁵⁸ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.4-5 (1999).

⁵⁹ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.4-5 (1999).

⁶⁰ Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 17 (2005).

and narrowly be drawn and subject to strict harm and public interests tests.”⁶¹ For instance, the South African *Promotion of Access to Information Act* in chapter 4 gives very specific grounds that request for access to information may be denied and this can be broadly categorized to include: grounds of national security and defense; international relations; economic interests of the republic; information on an ongoing legal proceedings and privacy and commercial information of 3rd parties.⁶²

There is the popular international law three part test that is used to judge if these exceptions are justified:

- a. If there is a legitimate aim provided for by law;
- b. The requested information if disclosed may cause substantial harm to that aim;
- c. The harm to the aim must be greater than the over whelming public interest to receive this information.⁶³

Aside from proving that an information falls within the legitimate exception category, a balancing act must be done of the other two parts of the test for this information to be legitimately withheld.⁶⁴ No public body should have a blanket exemption from the operation of the law, even if majority of their functions fall within the zone of exception.⁶⁵

⁶¹Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.5 (1999)..

⁶² Promotion of Access to Information Act, Chapter 4, (2000).

⁶³ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.5 (1999).

⁶⁴ Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 17 (2005).

⁶⁵ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.5 (1999).

The fifth principle is that there must be processes to facilitate access and clear provision for decision making. Information requested must be processed as rapidly as the situation allows and there must be an independent review process for refusals.⁶⁶ There must also be effective internal systems that would ensure that information is accessible expeditiously with strict time limits within which to comply with request or give a written notice of refusals including grounds for refusal. Upon refusal, an individual should have a right of appeal to an independent administrative body first before recourse to a court.⁶⁷ This body must have certain powers and meet certain standards. For instance this body must have the power to require the public body to release the information upon investigation.⁶⁸ This is necessary to ensure accountability and that refusals are not arbitrary.

The sixth principle is that the process of accessing this information should not be expensive. In principle, accessing information should be at no cost, any costs charged should relate to cost of making copies of the document. These costs must not be high as this will constitute a bottleneck and the purpose of the law will be defeated as it will deter applicants. Different systems have been developed in different jurisdictions. In some, there is a flat rate for all requests and the fee increases proportionally to the actual cost of retrieving and providing the information.⁶⁹ As accessing this information is a right, any cost involved in public officers fulfilling must be considered as the normal course of their work paid for by citizens through taxes.⁷⁰

⁶⁶ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.7 (1999)..

⁶⁷ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.7 (1999).

⁶⁸ Ibid, p. 9.

⁶⁹ Ibid, p. 8-9.

⁷⁰ Danish Institute of Human Rights, *An Introduction to Openness and Access to Information* p. 18 (2005).

Principle seven mandates that meetings of public bodies should be open to the public in order to increase their participation in decision making.⁷¹ This proviso is targeted at governing bodies which include meetings of elected bodies. Public bodies are under an obligation to ensure public participation in specific task. For instance in Denmark, a certain percentage of parents must be members of all primary school boards.⁷² There can be closed meetings, but there must be established procedures for this type of closure and justifiable reasons for this action. The reasons may include public health and safety, and law enforcement and investigation.⁷³

Principle eight is concerned with the superiority of laws on disclosure in relation to other laws. Previously existing laws that conflict with the principle of maximum disclosure should be corrected or repealed.⁷⁴ This implies a consistent effort and long term commitment on the part of the government to institute a legal regime of access to information without contradictions.

Finally, Principle nine mandates protection for whistleblowers. There must be comprehensive protection for individuals which includes any administrative or employment related sanctions for those who blow the whistle for on corrupt acts.⁷⁵ It must be stressed that this list is not comprehensive, but merely an attempt to establish a much needed minimum standard for access to information legislations. This is an evolving area and there is still room for addition of more principles to ensure maximum disclosure of public information.

⁷¹ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p 8 (1999).

⁷² Danish Institute of Human Right, *An Introduction to Openness and Access to Information* p. 18 (2005).

⁷³ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.9 - 10 (1999).

⁷⁴ Article 19, *The Public's Right to Know: Principles of Freedom of Information*, International Standard Series, p.10 (1999)

⁷⁵ Ibid, p.10.

1.3 International Legal Environment and Jurisprudence on FOI

There is a gradual move at the international level to recognize FOI is a basic right. This is evidenced by the growing number of international human rights instruments that have acknowledged this right. Also there is some positive jurisprudence in international and regional courts in support of this right. This section is aimed at highlighting the international regulatory positions on this right.

Legal Environment

United Nations

There are several instruments in which the U.N has recognized the right to receive information. The General Assembly had adopted *Resolution 59(1)* which recognizes FOI.⁷⁶ This provision is clearly aimed at ensuring the free flow of information in the society. The pacesetter international human rights instrument which sets the standard for international human rights, the *Universal Declaration of Human Rights (UDHR)* in article 19 provides for the right to seek and receive information.⁷⁷ This law has influenced the drafting of other international and regional human rights instruments. It is also considered customary international law.

The ICCPR also guarantees this freedom in terms very similar to the UDHR.⁷⁸ The ICCPR is different from the UDHR in the sense that it is binding on states, while the UDHR is not. However, like the UDHR it provides for it within the freedom of expression guarantee. This why the *U.N Commission on Human Rights* in 1993 established the *U.N Special Rapportuer on*

⁷⁶ UN General Assembly. (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

⁷⁷ UDHR, adopted by U.N General Assembly in 1948, article 19.

⁷⁸ UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

Freedom of Opinion and Expression in 1993 to clarify the content of article 19.⁷⁹ The Special Rapporteur clarified that the right to freedom of expression includes the right to access information held by public bodies. He also went further to elucidate that this right correlates into a duty for the state because it imposes a positive obligation on them to ensure this information.⁸⁰

Council of Europe (CoE)

The foremost human rights instrument of the CoE is the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. It guarantees in article 10 freedom of expression and this right includes freedom to “receive and impart information and ideas without interference by public authority and regardless of frontiers”.⁸¹ It should be noted that the component of seeking information is missing from this guarantee. Also, the Council of Ministers in February 2002 adopted a Recommendation which advised that “Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.” This in addition to several other decisions show the importance placed on the right to information.

The CoE also adopted a *Convention on Access to Official Documents* in November 2008.⁸² This is the first binding legal instrument by the CoE to recognize as a right, access to official documents held by public authorities.⁸³ The convention permits limitations to this right to protect certain interests like national security, defense or privacy. It also states minimum standards in

⁷⁹ U.N Resolution 1993/45, 5 March 1994.

⁸⁰ Report of the Special Rapporteur on Freedom of Opinion and Expression, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 Jan. 2000.

⁸¹ ECHR, article 10, (1950).

⁸² Council of Europe Convention on Access to Official Documents, (Adopted by the Committee of Ministers on 27 November 2008 at the 10424 meeting of Ministers Deputies).

⁸³ Synopsis on Council of Europe Convention on Access to Official Documents - Council of Europe Treaty Series No. 205 (2009) - available at http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2437.

the processes for accessing information in forms of charges and review procedures. It is aimed at establishing a common basis of minimum standards for the CoE 47 member states and leaves room for them build on this foundation for greater access.⁸⁴ Importantly, Article 3 provides for a public interest test to be used by state parties before possible limitations to access to official documents can be done. It provides that “limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting” several listed interests.

This Convention has been criticized for being weak by CSOs, parliamentarians, government officials and information commissioners across Europe.⁸⁵ It is said to have fewer openness guarantees than many FOI Legislations in Europe – “narrowly defines the public bodies and documents covered, imposes no time limits for responding to requests, and does not provide a right to appeal the government’s decision to a court or independent body.”⁸⁶

Organization of American States

This organization also guarantees this right in article 13 of the *American Convention on Human Rights (ACHR)*. It also approved the *Inter American Declaration on Principles on Freedom of Expression* in 1997.⁸⁷ This document is very comprehensive and in its preamble recognizes the right to information by asserting that “convinced that guaranteeing the right to access to

⁸⁴ Synopsis on Council of Europe Convention on Access to Official Documents - Council of Europe Treaty Series No. 205 (2009) . http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2437.

⁸⁵ Freedom House Press Release, ***Council of Europe adopts weak access to information convention (2008)*** - available at freedominfo.org/news/20081219.htm.

⁸⁶ Ibid.

⁸⁷ 108th Regular Session, 19 October 2000.

information held by the state will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions.....”⁸⁸

Finally, the Inter-American Commission on Human Rights in 1997 established a Special Rapporteur’s office.⁸⁹ This office is very actively promoting the right to information held by public bodies as a basic right. For instance in its Annual report of 1999 it noted that “the right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted.”⁹⁰

African Union (AU)

The Organization of African Unity (now known as the AU) had in its *African Charter on Human and Peoples Right* provided for the right to access information as Article 9(a) states that every individual shall have the right to receive information. Later, in the 32nd Ordinary Session of the African Commission on Human and Peoples Right 2002, countries adopted the *Declaration of Principles on Freedom of Expression in Africa*⁹¹ that endorses the right to information. The Declaration states that “Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”⁹²

⁸⁸ Preamble, Inter American Declaration on Principles on Freedom of Expression (1997).

⁸⁹ See IACHR Press Release No. 2/98, 6 March 1998, paras.14-15.

⁹⁰ Annual Report of the Inter- American Commission on Human Rights 1998, Volume 111, Report of the Office of the Special Rapporteur for Freedom of Expression, 16 April 1999.

⁹¹ 32nd Ordinary Session of the African Commission on Human and Peoples’ Rights, 17-23 October 2002, Banjul, Gambia.

⁹² African Commission on Human and Peoples Right, Declaration of Principles on Freedom of Expression in Africa, 2002.

The AU's *African Charter on Democracy, Elections and Governance* adopted at the AU Assembly of 30 January 2007 states as one of its objectives "the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs." The Charter has a number of access provisions including Article 19 that mandates member states to "guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission."

International Jurisprudence

The European Courts of Human Rights (ECHR) has made some in support of public access to information. It however has been very cautious, and unwilling to recognize this as a right or to impose positive obligations on member states.⁹³ In *Leander v. Sweden* the Court held that the use of confidential information in government files was not an obstruction of access to information. It went on to say that Article 10 did not confer the government any obligation to provide access to information.⁹⁴

Also, in the cases in *Sirbu and others v. Moldova*⁹⁵ and *Roche v. United Kingdom*⁹⁶ the Court held that the claims presented on the basis of freedom of expression did not include access to the specific information sought. In *Roche* the Court asserted that "the freedom to receive information prohibited a government from restricting a person from receiving information that others wished or might be willing to impart and that freedom could not be construed as imposing on a State, in

⁹³ Mendel Toby, *Information as a Internationally Protected Right* - available at <http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf>.

⁹⁴ *Leander v. Sweden*, (1987), 9 EHRR 433, Para. 74.

⁹⁵ *Sirbu and others v. Moldova* (2004) EHRR, Applications nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01.

⁹⁶ *Roche v. U.K* (2005) EHRR, Applications nos. 32555/96

circumstances such as those of the applicant's case, positive obligations to disseminate information". Thus it is reluctant to impute positive obligation on states.

The trend gradually began to change, as the Court seems to be getting bolder. In the celebrated case of *Társaság a Szabadságjogokért v. Hungary*, the Court for the first time recognized that the freedom of expressing as guaranteed by Article 10 of the ECHR is inclusive of the right to information from public bodies.⁹⁷ The Court noted that the ECHR protects the freedom of expression; hence authorities cannot be allowed indirect censorship by arbitrary restrictions on public gathering of information, especially when the intention is to disseminate such information to the larger public.⁹⁸ In the case of *Kenedi v. Hungary*, it again held that right to access information for research is an integral part of being able to exercise one's freedom of expression.⁹⁹ It is hoped that there will be in the future categorical statements from the Court that will frame this as a standalone right with positive obligation on states.

Inter-American Court of Human Rights

The case of *Claude Reyes and others v. Chile*¹⁰⁰ is a historic one and a positive step for freedom of information promotion in the continent. The Court held that the general guarantee of freedom expression protects the right of information held by public bodies. The decision was emphatic that in order to give effect to these right, states had a positive obligation to adopt legal and other measures to ensure the effective exercise of this right. Also, to define limited exception that will be applied in ways that did not harm this right.

⁹⁷ *Társaság a Szabadságjogokért* (2009), EHRR, *Application no. 37374/05*.

⁹⁸ *Társaság a Szabadságjogokért* (2009), EHRR, *Application no. 37374/05*.

⁹⁹ *Kenedi v. Hungary* (2009) EHRR, *Application no. 31475/05*.

¹⁰⁰ *Claude Reyes and Others v. Chile*, (2006) Series C no. 151 Para. 77 (Inter-American Court of Human Rights).

1.4 FOI in Africa – Uganda and South Africa

The 1995 Constitution of Uganda in Article 41(1) guarantees every citizen the right to access information held by the government. The exception is where such information will be harmful to national security, state sovereignty or interfere with an individual's right to privacy. Section 42(2) goes on to instruct the Parliament to make laws enabling the release of information covered by the law.

However, it was after nearly 10 years of sustained advocacy by CSO advocates before the *Ugandan Access to Information Act* was passed in 2005.¹⁰¹ The law has narrowly drafted exceptions; well developed and progressive procedural guarantees for instance detailed notice is required to be provided in every step and it provides protections for whistleblowers as encouraged by international best practices.¹⁰² On the down side, it does not encourage proactive publication of information; recourse for refusal to provide access is to the courts as no independent oversight mechanism was established; makes very poor provisions for promotional measures that are commonly found in access to information laws like mandating the production of a guide for the public on how to request information and fails to assign responsibility within government for ensuring the proper implementation of the law.¹⁰³

Despite all the paper guarantees, implementation has been challenging. Several years after, implementing regulations are yet to be adopted and this has impeded implementation.¹⁰⁴

¹⁰¹ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.111 (2008).

¹⁰² Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.111 (2008).

¹⁰³ Ibid, p. 111 & 118.

¹⁰⁴ Ibid, p.111.

In the case of South Africa, the 1999 Constitution guarantees both access to information held by the state and those held by private bodies which is necessary for the enjoyment of any right.¹⁰⁵ The Constitution also has a uniquely practical provision as it went on to give the government a three years timeline to pass a law giving effect to this right.¹⁰⁶ The government complied with this, ensuring that there were no delays in passing an access to information legislation.¹⁰⁷ This birthed the *Promotion of Access to Information Law, 2001* in compliance with the Constitution. It has been adjudged one of the most progressive access to information laws in the world, as it has very strong procedural guarantees and a limited set of exceptions.¹⁰⁸ A flaw in the law like its Ugandan counterpart's is that it also does not make provisions for administrative level of appeal and recourse are to the courts. It also does not put an obligation to the government to proactively publish information.¹⁰⁹

Despite the existence of the law, implementation is said to be weak.¹¹⁰ In a 2006 study conducted by the Open Society Justice Initiative (OSJI), it is reported that 62% of requests for information are refused or given no answer at all.¹¹¹ In terms of actual provision of information, the country when compared with seven other countries that have access to information laws had the lowest score.¹¹²

¹⁰⁵ Act No. 108 of 1996, Section 32- Available at: http://www.acts.co.za/constitution_of_the_republic_of_south_africa_1996.htm.

¹⁰⁶ Article 32(2) and Schedule 6, item 23 of the South African 1996 Constitution.

¹⁰⁷ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.94 (2008).

¹⁰⁸ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p.94 (2008).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43 - Available at: http://www.soros.org/resources/articles_publications/publications/transparency_20060928.

¹¹² Ibid. P.69.

Aside from these two mentioned countries in Africa; Zimbabwe also has an access to information law. Several other countries in the continent are also on the verge of enacting an access to information law. For instance, Rwanda has a draft law on Access to information

1. 5 Defining Democracy

The concept of democracy has no universal agreed on definition, so it like many other concepts has been defined in many ways by various persons. Arguably the most popular and memorable definition of this concept is Abraham Lincoln's who saw it as "government of the people, by the people and for the people."¹¹³ In trying to make sense of this concept, Robert Dahl is preoccupied with political equality in a given context. He argues that everyone must be included in the decision making process, armed with adequate information for making competent choices.

¹¹⁴ In contrast, Lord Bryce argues that "democracy is government in which the will of the majority of qualified citizens rule."¹¹⁵ Otiye Igbuzor further argues that "democracy at its core is a state of mind, a set of attitudinal dispositions woven into the fabric of the society, the concrete expressions which are its social institutions."¹¹⁶ Robert Goodin sums it up as "a matter of making social outcomes systematically responsive to the settled preferences of all affected parties."¹¹⁷

Although there is no consensus on a definition, majority of the scholars are in agreement that this concept contains some defining elements which include rule of law; transparency and accountability; free and fair elections; human rights; multi-party system; citizen participation;

¹¹³ Igbuzor Otiye, *Perspectives on Democracy and Development in Nigeria*, p.75 (2005).

¹¹⁴ Dahl Robert, *On Democracy*, p. 62 – 68 (2000).

¹¹⁵ Igbuzor Otiye, *Perspectives on Democracy and Development in Nigeria*, p.75 (2005).

¹¹⁶ Ibid, p.76.

¹¹⁷ Goodin Robert, *Reflective Democracy*, p.1 (2003).

equality; political tolerance; economic freedom, multi-party system and control of the abuse of power.¹¹⁸ The classic mechanism of institutionalizing this concept and making sure it is responsive is voting. Electoral check ensures that the democratic credentials of any system are credible.¹¹⁹ Fayemi however argues that democracy goes beyond mere holding of elections. It is more of social institutions as undemocratic ones cannot foster and sustain democracy, no matter how regularly elections are held.¹²⁰ Goodin backs him up by acknowledging that while election is a necessary condition of democratic rule, it is not the most important factor in ensuring that a polity is genuinely democratic with social responsiveness.¹²¹ Further deepening the discourse, he holds that it's the internal acts that precede voting that are more important. Peoples votes should be a reflective well thought out process and not spontaneous. They should vote responsibly, guided by information.¹²²

The fundamentally liberal democratic model is that of reflective democracy.¹²³ This assumes that the process of decision making is a collective process of autonomous people coming together to make joint decisions and all their independent perspectives must be respected.¹²⁴ The democratic elitism is the first wave of democracy, which held that populist theories were impractical because it was too time and attention consuming to be doable. Democracy for them involved the competition of elections and further competition by interest groups to push their agenda to elected officials.¹²⁵ The second wave of democracy was participatory democracy. This was aimed at increasing the number of citizen's participation in formal political processes and

¹¹⁸ Igbuzor Otive, *Perspectives on Democracy and Development in Nigeria*, p.76 (2005).

¹¹⁹ Goodin Robert, *Reflective Democracy*, p.1 (2003).

¹²⁰ Igbuzor Otive, *Perspectives on Democracy and Development in Nigeria*, p.76 (2005).

¹²¹ Goodin Robert, *Reflective Democracy*, p.1 (2003).

¹²² Ibid, p.1

¹²³ Ibid, p.23.

¹²⁴ Ibid, p.1.

¹²⁵ Ibid p. 3.

other social processes. It advocated for raising the level and nature of peoples involvement, by empowering them to engage meaningfully in the processes.¹²⁶ The third and most recent wave being the deliberative democracy is about giving people the ability or opportunity to participate in effective deliberation. The challenge of the last two waves has been on how to effectively involve a large number of persons meaningfully.¹²⁷

An analysis of these definitions, explanations and trends of democracy show that they are all concerned about people's participation in the process of governance in one form or the other. They are biased about people owning the process and having a say in it. Effective participation of people in the process cannot happen without them having adequate information to aid their decision making.

Conclusion

FOI is clearly an internationally recognised right entrenched in several international and national instruments. Although being cautious national courts are also now iding to ensure that this right is not merely persuasive, but also obligatory. It is a right that supports the enjoyment of all the three generations of human rights. In order for this right to be enjoyed, governments have to take certain practical steps to birth it, unless it will be mere rhetoric. It is clear that this right has a close relationship with democracy.

¹²⁶ Goodin Robert, *Reflective Democracy*, p.1 (2003).

¹²⁷ Goodin Robert, *Reflective Democracy*, 3-4 (2003).

Chapter Two

The Nigerian Context

This chapter provides background information on Nigeria, giving a brief overview of its topology; land mass; population and system of government and politics. The country's civil service administration is also briefly looked at with its British colonial legacy that has defined it till this day. The impact of oil in Nigeria's polity and the consequences is also discussed here.

2.1 Background

Nigeria is situated in West Africa, officially called the "Federal Republic of Nigeria" with "356,667 sq mi (923,768 sq km) and borders the Gulf of Guinea in the south, Benin in the west, Niger in the northwest, Chad in the northeast, and Cameroon in the east."¹²⁸ The capital of the country is Abuja and Lagos state has the largest city in terms of population.¹²⁹ It has a combination of fauna, ecology and vegetation that can be found all over Africa. The coastal regions have mangrove swamps, the land mass stretching through the rain forest in the south, the Sahel of the north and Savannah of the middle belt.¹³⁰ It has a tropical humid climate, with rainfall decreasing in amount and frequency from the south to the north, varying from 2,000 mm per year in Lagos to 1,200mm per year located in the north, with an average temperature of 29 C in Lagos and 26 C in Kaduna.¹³¹

¹²⁸ Encyclopedia - <http://www.encyclopedia.com/topic/Nigeria.aspx#1E1-Nigeria>.

¹²⁹ Ibid

¹³⁰ Nigeria's National Planning Commission's 1998/1999 Report.

¹³¹ Nigeria's National Planning Commission's 1998/1999 Report.

The last census conducted in the country estimated a population of 140,003,542 people, 71,709,859 being males and 68,293,683 females.¹³² Nigeria is said to be the most populous nation in Africa, with over 250 ethnic nationalities residing in it and speaking different languages.¹³³ The existence of so many nationalities has been described by a leading Nigerian politician, Chief Obafemi Awolowo as a “mere geographical expression and not a nation.”¹³⁴ There is no commitment to the Nation, but to the various ethnic nationalities creating a mad scramble for its resources and conflict amongst the various groups. Consequently, issues of corruption are viewed through ethnic lenses, as any attempt on ensuring accountability is seen as witch-hunting a particular tribe.¹³⁵

The country operates a federal system of government, with three-tiers of federal, state and local governments. There are 774 local government areas, 36 states and a Federal Capital Territory.¹³⁶ The other tiers of government are dependent on the federation account. The country’s experiment with the federal system has also contributed to a rise in violence, as it encourages rivalry between the states and the centre over resources. This problem is naturally more exacerbated in the Niger Delta Region part of the country which produces the oil, but is desperately poor. In addition to operating a federal system, the Constitution mandates a “federal character” which requires that quotas in political positions, jobs and other benefits from government be practiced. ¹³⁷ This balancing principle is being distorted by a principle of

¹³² Nigerian Newsday, Nassarawa State Weekly Newspaper, “*Editorial: Results of the 2006 Census*” (2007) - available on <http://www.nasarawastate.org/newsday/news/hausa07/NewArticle32.html>.

¹³³ Nigeria’s National Planning Commission’s 1998/1999 Report.

¹³⁴ Florini, Anne, *The Right to Know*, p.147 (2007).

¹³⁵ Ibid.

¹³⁶ Nigeria’s National Planning Commission’s 1998/1999 Report.

¹³⁷ International Crisis Group, *Nigeria’s Faltering Federal Experiment*, Africa Report No. 119 (2006) -available at <http://www.crisisgroup.org/home/index.cfm?id=4464>.

indignity which makes the right to such dependent upon where a person's parents and grandparents are from, resulting in massive discriminations against "non-indigenes."¹³⁸

2.2 Colonial Heritage and Civil Service Administration

The civil service administration in Nigeria is part of its colonial heritage that has affected access to information in the country till date. It consists of the federal civil service and state autonomous civil services, each organized around departments or ministries. The civil service was organized strictly according to the British "colonial masters' traditions until the 1988 reforms.¹³⁹ These reforms however did not abolish its colonial inheritance of a "culture of blanket official secrecy encapsulated in a series of Official Secret Act, which was enthusiastically embraced by the post independence rulers and their civil servants." ¹⁴⁰ Nigeria in all its post independence constitutions has struggled to maintain an appearance of providing individuals access to public information. For instance, section 39 of the 1999 Constitution gives the right "to receive and impart ideas and information without interference." This right is however limited in subsection 3 that provides:

"Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society- (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other government security agencies established by law."

This attitude on access to information was inherited from Britain who under their colonial government did not feel obliged to give information to the colonized people and also had their

¹³⁸ International Crisis Group, *Nigeria's Faltering Federal Experiment*, Africa Report No. 119 (2006) -available at <http://www.crisisgroup.org/home/index.cfm?id=4464>.

¹³⁹ Helen Chapin Metz, ed. *Nigeria: A Country Study*. Washington: GPO for the Library of Congress (1991)- available at <http://countrystudies.us/nigeria/78.htm>.

¹⁴⁰ Florini, Anne, *The Right to Know*, p.147 (2007).

own tradition of secrecy with their Official Secrets Act in 1962.¹⁴¹ Nigeria after independence in turn passed its own Official Secrets Act in 1962,¹⁴² emulating the British example. This law prohibits the transmission of information termed “any classified matter” which is defined in a very ambiguous way.¹⁴³ This law and successive governments attitude of secrecy and opaqueness in government affairs has been in operation till date, granting public access to government information only on the basis of tokenism and not as a right.

2.3 Political History – From Military to Civilian

The country’s history can be traced to pre-colonial times when there existed various systems like the Yoruba and Benin Kingdoms. The status quo changed with the conquest of Lagos by the British in 1861 and the joining of Southern and Northern components in 1914 into what is now known as Nigeria. ¹⁴⁴ Earlier, in the 1885 Berlin Conference where areas of exploitation were allotted to European powers to resolve their conflict of interest, Nigeria was ceded to Britain. After the Conference, Britain formed the Oil Rivers Protectorate which included the Niger Delta and extended eastward to Calabar with the purpose of controlling trading coming down the Niger. ¹⁴⁵ The territory was in 1894 renamed the Niger Coast Protectorate and expanded to include Calabar and Lagos Colony and Protectorate. The protectorate was expanded largely by diplomatic means, although Ijebu, Oyo and Benin had military force employed against them.

¹⁴¹ Florini, Anne, *The Right to Know*, p.148 (2007).

¹⁴² Official Secrets Act, Chapter 335, Laws of the Federation of Nigeria, 1990.

¹⁴³ Florini, Anne, *The Right to Know*, p.148 (2007).

¹⁴⁴ Igbuzor Otive, *Perspectives on Democracy and Development in Nigeria*, p.77 (2005).

¹⁴⁵ U.S Library of Congress, Nigeria’s Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

Treaties were also signed by 1885 with rulers of the far North as Sokoto, and British control of the region was confined to the coastal area until 1900.¹⁴⁶

In 1900, Frederick Lugard assumed the position of High Commissioner of Northern Nigeria and used his six year tenure to transform the commercial sphere of influence into a viable territorial unit under effective political control.¹⁴⁷ With a combination of diplomacy and military force, he subdued local resistance. His success in Northern Nigeria has been attributed to operating the policy of indirect rule, which governed the protectorate through the mechanism of defeated rulers. If the defeated rulers accepted British authority and cooperated with them, they could retain their titles but were responsible to the British officials who had the final say.¹⁴⁸

The south became formally a protectorate from 1906 and there was an attempt to apply the indirect rule which proved relatively easy in the Yorubaland, where the still existed boundaries of traditional kingdom and governments and this were retained or revived in some cases.¹⁴⁹ It was more difficult in the South East as the Aro hegemony had been crushed and finding acceptable local administrators was frustrating. The task of administration was then left in the hands of colonial official and this caused ill feelings with the locals.¹⁵⁰

Hugh Clifford (1919-25) was Lugard's successor and he opposed the indirect rule based on his conviction that the primary goal of the colonial government is the introduction of western

¹⁴⁶ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

experience.¹⁵¹ He was uncomfortable with the latitude allowed local leaders under the indirect rule. He stopped further extension of judicial authority held by the northern emirs as he felt there was no reasonable chance of success on the experiment because of their traditions and culture. In the south however, where he saw the opportunity of building schools modeled after the European model the rationale was not applied. His reforms were strongly resented by the north.¹⁵²

The British colonialist artificially created a political entity that brought diverse peoples together in one country with very little sense of a common nationality.¹⁵³ Inconsistencies in policies of Britain reinforced differences and created animosity with a desperate attempt by each region to preserve their indigenous cultures. Nationalism which became a political factor in Nigeria was derived from broad pan Africanism and not from a sense of a common national identity.¹⁵⁴ Modern Nationalists with ideas influenced by Western education in the south opposed indirect rule as it had entrenched an old fashioned ruling class who had no room for new ideas. Those in the North were anti-Western and appeals to Islamic legitimacy upheld by the rule of the Emirs.¹⁵⁵ By 1938, agitation for dominion status within the British Commonwealth had begun. The then began an agitation for self government under the Commonwealth.¹⁵⁶

After several years of agitation, the country gained independence from British rule in 1960.¹⁵⁷

The First civilian Republic lasted six years with Nnamdi Azikwe as the First President, after

¹⁵¹ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

which the military forcefully took over power in 1966.¹⁵⁸ A 1966 Coup brought Yakubu Gowon to power, who announced his intention to return power to civilian rule in 1976 after his military's political program had been completed.¹⁵⁹ His regime was heavily criticized for being very inefficient and corrupt. This was coupled with the fact that there were restrictions on political activity. He was deposed in a bloodless coup in July 1975 and replaced by Brigadier Murtala Muhammed. Murtala was seen as a national hero because of his pro- people policies. Despite the broad popular support he enjoyed, he was assassinated during an unsuccessful coup in February 1976.¹⁶⁰

Lieutenant General Olusegun Obasanjo succeeded Brigadier Murtala and pledged to continue his predecessor's reform programs.¹⁶¹ After thirteen years of military rule, power was handed over by Lieutenant General Olusegun Obasanjo to President Alhaji Shehu Shagari in 1979 after elections.¹⁶² This marked the beginning of a Second Republic in Nigeria.

The Second Republic was terminated in 1983, lasting only four years after which the military took over power again.¹⁶³ The power was seized again on the pretext that there was low confidence in the civilian regime with allegations of electoral fraud in the ousted president's re-election.¹⁶⁴ Major General Buhari who was the leader of the coup d'état took over. His agenda again like his predecessor's was to reduce corruption and federal spending. In August 1985, a group of officers headed by Major General Ibrahim Babangida removed him from power after

¹⁵⁸ Igbuzor Otiye, *Perspectives on Democracy and Development in Nigeria*, p.77 (2005).

¹⁵⁹ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

¹⁶³ Igbuzor Otiye, *Perspectives on Democracy and Development in Nigeria*, p.77 (2005).

¹⁶⁴ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

there was civilian criticism of his economic policies and campaign against corruption. There was a failed counter coup in December 1985 against the Babangida government, by a group of senior military officers . Major General Babangida's regime tried to address the worsening recession with programs that led to a series of currency devaluations.¹⁶⁵ He was also accused of clamping down on political rights. He left power in 1993 to an Interim National Government (ING) under Chief Ernest Shonekan.¹⁶⁶

General Sani Abacha in November 1993, seized power from the ING and until his death in 1998 served as a military dictator, suppressing dissent and failing to hand over power to a civilian government as promised.¹⁶⁷ The human rights violations during the Abacha era were so serious that Nigeria was suspended from the Commonwealth and the European Union imposed sanctions and suspended development aid to the country. Corruption was also on an all time high. Abacha was later found to have siphoned millions of dollars of oil revenue to a personal account in Switzerland.¹⁶⁸

After Abacha died in June 1998 of a suspected heart attack, Major General Abdulsalami the highest ranking military officer at the time, took control of the country immediately and conducted elections.¹⁶⁹ After sixteen years of military rule, power was handed over to civilians on May 29th 1999, marking the beginning of the Third Republic.¹⁷⁰

¹⁶⁵ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

¹⁶⁶ Ibid.

¹⁶⁷ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf> .

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Igbuzor Otive, *Perspectives on Democracy and Development in Nigeria*, p.77 (2005).

Former military leader, Olusegun Obasanjo, who had been incarcerated by Abacha was one of the political prisoners released by Abdulsalami. Obasanjo was then elected President amidst the ever present allegations of elections malpractice by his party, the People's Democratic Party (PDP).¹⁷¹ Obasanjo launched a campaign against corruption and introduced several good governance initiatives like the Nigerian Extractive Industry Transparency Initiative (NEITI). His administration faced many challenges like the insurgency in the oil rich Niger Delta region of the country and religious strife in the Northern part of the country.¹⁷²

Obasanjo was re-elected in 2003 amidst speculation that he might try to change the constitution and run for a third term in 2007. However this bid was rejected by the Senate. In April 2007, Umaru Musa Yar'Adua also of the PDP succeeded Obasanjo as the President.¹⁷³

2.4 Resource Course

The story of governance in Nigeria cannot be complete without the story of its oil which has shaped the politics and destiny of the country because the country is a natural resource based economy. "Petroleum has become the main generator of GDP in Nigeria since the British discovered oil in the Niger Delta in late 1950."¹⁷⁴ Oil remains the reason for political and economic conflict and corruption in Nigeria.¹⁷⁵ The country's underdevelopment can largely be

¹⁷¹ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

¹⁷² Ibid.

¹⁷³ U.S Library of Congress, Nigeria's Country Profile (2008) – available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf>.

¹⁷⁴ Civil Society Legislative Advocacy Centre (CISLAC), *Enhancing CSO Participation in the NEITI Audit Process in Nigeria*, p.43 (2007).

¹⁷⁵ Ibid, p.43.

linked to poor management of oil revenue, fostered by the lack of transparency and accountability by the key players.¹⁷⁶

In world production of crude petroleum, Nigeria is ranked eleventh, accounting for 3 % of the world's production and 7% of the total production of the Organization of Petroleum Exporting Countries (OPEC).¹⁷⁷ Nigeria's oil reserves are between 16 and 22 billion barrels according to the United States Information Administration.¹⁷⁸ Although, it is claimed that this reserve is closer 35.3 billion barrels by other sources.¹⁷⁹ Petroleum is responsible for over 70% of the country's revenue at all level of governments, more than 85 % of foreign exchange earnings and 40% of its Gross Domestic Product (GDP).¹⁸⁰ Nigeria is the 2nd largest oil and gas producer in Africa, Angola is now the largest. It was formerly the largest but the unrest in the Niger Delta region of the country over resource equity has slowed down production of oil in the country.

Nigeria with this abundance of natural resources has not escaped the "resource curse." This refers to the "paradox: many countries with an abundance of natural resources (like oil, diamonds, gold other minerals) having less economic growth than countries that do not possess these natural resources."¹⁸¹ This can be attributed to a mismanagement of revenues gained from the natural resources sector. Richard Auty coined this term in 1993, trying to describe how rich countries in natural resources could not effectively manage these resources to improve their

¹⁷⁶ Civil Society Legislative Advocacy Centre (CISLAC), *Enhancing CSO Participation in the NEITI Audit Process in Nigeria*, p.43 (2007).

¹⁷⁷ West Africa Resource Watch, *Natural Resource Management Capacity in West Africa* p.44 (2008).

¹⁷⁸ Civil Society Legislative Advocacy Centre (CISLAC), *Enhancing CSO Participation in the NEITI Audit Process in Nigeria*, p.43 (2007).

¹⁷⁹ Ibid, p.43.

¹⁸⁰ Ikubaje John, *Corruption and Anti-Corruption: Revenue Transparency in Nigeria's Oil Sector* p. 20 (2006).

¹⁸¹ Agwara John Onyeukwu, *Resource Curse in Nigeria: Perception and Challenges* (2007)- available on www.policy.hu/document/200808/john.onyeukwu.pdf&letoltes=1.

economies and how it seems they had lower economic growth than other countries that did not have such resources.¹⁸²

Nigeria typifies this syndrome, being one of the richest countries as early as 1970 is now one of the 25 poorest countries. It is touted as being the 6th largest exporter of oil in the world, but hosts after India and China the 3rd largest number of poor persons.¹⁸³ In the United Nations Development Program (UNDP) 2007/2008 Human Development Report, Nigeria ranked 158th out of 177 countries.¹⁸⁴

Poor management of petroleum by successive governments since it was discovered in the Niger Delta in 1959 has also caused an agitation for resource control by the people of that region who feel betrayed by the manner in which their land has been plundered for oil to serve the nation with no corresponding development to show for it. In a recent report by the Commission of Noble Laureates on Peace, and Peace Equity and Development it noted that the “Niger Delta produces majority of Nigeria’s wealth but only enjoys a small portion of its returns, the rise of militia is a consequence of massive unemployment and lack of socio-economic development and that wealth earmarked for the region is substantial, but is largely stolen from politicians and their supporters who benefit from the continued crisis.”¹⁸⁵

Conclusion

Nigeria is a country that typifies the word diversity. It is collection of diverse peoples who were forcefully put together into a nation and who are yet to attain a real sense of togetherness. It has a long history of British colonial rule which has bequeathed to the country a philosophy and

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ This report is available on- http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_NGA.html#.

¹⁸⁵ Action Aid Nigeria, *Ablaze for Oil*, p.73 (2008).

system of secrecy in governance, with a sense of zero accountability to the citizenry on issues of governance. This was worsened by long years of military rule that true to its nature operated an even closer system of government. Twenty nine out of the country's forty nine years of post independence has been that of military rule. Civic participation was not encouraged by the past rulers and the citizens themselves have been conditioned not to ask questions. The civilian administrations did not fare better; few attempts are now been made to redress this. This lack of transparency and accountability has contributed to poor management of the country's oil and aided massive corruption there. This has had the resultant effect of civil strife and underdevelopment for the country.

Chapter Three

The FOI Story in Nigeria

This section will review some existing laws in Nigeria to point out clauses that promote public access to information and also those laws which prohibit or burden access to information. It will look at the attitudes and practice of civilian governments from 1999-2009 in trying to assess how transparent and accountable they have been. A quick snapshot will be done on some external assessments of Nigeria's governance abilities which have been done over the past few years. It will then look at the FOI advocacy journey in Nigeria.

3 Legal Regime of FOI

3.1 Access Laws

There are numerous laws that seem to provide access to public information but when critically analyzed, it became obvious that they contain few provisions that hinder access to information with grave implications. Thus a central law that would guarantee this right to information is still welcomed.

3.1.1 *The Nigerian 1999 Constitution*

This ground norm does not contain a standalone right to information, but is embedded within the context of freedom of expression which provides:

Section 39 (1) - Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

This provision omits the right to seek information which weakens it and further limits the guarantee by warning that:

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) For the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

(b) Imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

3.1.2 The Public Procurement Act, 2007

Transparency is an important element of a public procurement system as it safe guards against corruption and ensures that there is public confidence in any procurement system.¹⁸⁶ This Act is very pro public accessing information as its stated objectives includes ensuring probity and accountability in the public procurement process at the federal level.¹⁸⁷ To achieve these objectives there are a number of provisions that are provided for in the law that try to ensure this. The Act mandates the Bureau of Public Procurement (BPP) to maintain a number of databases and these include:

¹⁸⁶ Chibuzo C. Ekwewuo, *Non State Actors and Procurement Watch in Nigeria*, p.19 (2008).

¹⁸⁷ Chibuzo C. Ekwewuo, *Non State Actors and Procurement Watch in Nigeria*, p.20 (2008).

- Section 5(h) – Maintaining a national database of the particulars and classification and categorisation of federal contractors and service providers.
- Section 5(i) – To collate and maintain in an archival system all federal procurement plans and information.
- Section 6(i) & (g) – To maintain and publish in the public procurement journal a list of persons that have been prohibited from any public procurement activity.

The Act also includes several proactive disclosure provisions for BPP:

- Section 5(b) – To publish in the procurement manual details of major contracts and also publish said manual in electronic and paper copy.
- Publish paper and electronic editions of the procurement journal.

Other major access provisions include:

- 24(1) – Procurement entities must ensure “an open competitive bidding”, which means “offering every interested bidder, equal simultaneous information and opportunity to offer goods and works needed.”

The act has many other provisions which mandate that information must not only proactively be provided, but can be accessed on request. However there are some worrisome provisions which negate this principle. For instance section 15(2) exempts from the Act provisions of goods and services that may be classified, but does not specify the circumstances of classifying such. This gives too much discretion to the procurement entities and can be easily abused.

3.1.3 *Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007*

This is a revolutionary law that was enacted with a bid “ensure due process and bring transparency in the payments made by all extractive industry to the Federal government and statutory recipients.”¹⁸⁸ It has a major access provisions which is:

- Section 14(1) – The NEITI shall appoint an independent auditor to audit the Federal government’s total revenue accruing from the extractive industry companies and the same shall be published for public information.

This section provides a caveat weakening it that “the content of such report shall not be published in a manner prejudicial to the contractual obligations or proprietary interests of the audited entity.”¹⁸⁹

3.1.4 *Electoral Act 2006*

This law that regulates elections in the country has made some provisions that the national electoral body must proactively provide certain information. It however does not make any provisions for people to be access information directly by their own free will. The access provisions are:

- Section 20(1) – The electoral Commission shall display for public scrutiny the voters register for each local government area council or ward for a stated period during which period any person with complaints can raise it.

¹⁸⁸ NEITI Act 2007, section 2(a).

¹⁸⁹ Ibid, Section 14(1).

- Section 21(1) – The electoral Commission must also publish the supplementary voters list some days after the general elections.
- 35(1) – The same Commission shall within a stated time period publish the statement and full names of candidates nominated.
- 75 (2) – The Commission shall post on its websites and notice board results of the elections.

3.2 Laws that Restrict Access to Public Information

This section looks in details at a few of the many laws which inhibit access to information. Most of these laws compel public servants in a blanket way not to release information except under certain conditions. The rationale for this is protection of state security and private business interest most times. The disclosure of some public information here is criminalized with a penalty of conviction and/or fines in some cases. Many of the laws highlighted in this section are very old laws, some predating Nigeria's independence and many of them influenced by British laws as they then existed.

3.2.1 *Border Communities Development Agency (Establishment, etc) Act of 2003*

Purpose:

An Act to establish the Border Communities Development Agency and for related matters.

Relevant Provision:

Section 22- Secrecy:

(1) A member of the Board of the executive secretary or any other officer or employee of the agency shall-

(a) Not for his personal gain, make use of any information which has come to his knowledge in exercise of his powers or as obtained by him in the ordinary course of his duty as a member of the Board or as the Executive Secretary, officer or employee of the Agency;

(b) Treat as confidential, any information which has come to his knowledge in the exercise of his duties under this Act.

3.2.2 Borstal Institution and Remand Centres Regulation (made under section 48 of Borstal Institution and Remand Centres)- Rule 93.

Purpose:

An act to provide for the establishment of Borstal Institutions and Remand Centres and for regulating the government thereof”

Relevant Provision:

Rule 93- Communications to Press etc.

(1) No public Officer shall directly or indirectly make any unauthorized communication to representatives of press or other persons in reference to matters which have become to him in the course of his duty.

(2) No public officer shall without authority publish any matter or make any public pronouncement relating to the administration of the inmates of a prison or borstal.

3.2.3 *Civil Aviation Act 1990*

Purpose:

An Act to repeal the Civil Aviation Act, Cap 51, Laws of the Federation of Nigeria, 1990 as amended and to re-enact the Civil Aviation Act to provide for the regulation of Civil Aviation, and for related Matters.”

Relevant Provisions

Section 20- Restriction on Disclosure of Information.

(1) No estimates, return or information relating to an air transport undertaking obtained under the foregoing provisions of this Act shall without the prior consent of the person carrying on the undertaking which is the subject of the estimates, returns or information, be disclosed except-

- (a) In accordance with directions given by the authority for the purpose of the exercise of any of its functions under this Act; or
- (b) For the purposes of any proceedings under this Act.

(2) Any person who discloses any estimates, returns or any information in contravention of subsection (1) of this section commits an offence and is liable on conviction to imprisonment to term not less than 1 month or a fine not less than N25,000.00 or both.

3.2.4 *Criminal Code Act*

Purpose:

An Act to establish a code of criminal law.

Relevant Provisions:

Chapter 7 of the Act- Sedition and the Importation of Seditious or Undesirable Publications

51 (1) Any person who-

- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
- (d) imports any seditious publication, unless he has no reason to believe that it is seditious;

shall be guilty of an offence and liable on conviction for a first offence to imprisonment for two years or to a fine of two hundred naira or to both such imprisonment and fine and for a subsequent offence to imprisonment for three years and any seditious publication shall be forfeited to the State.

(3) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for one year or to a fine of one hundred naira or to both such imprisonment and fine, and for a subsequent offence to imprisonment for two years; and such publication shall be forfeited to the State.

58. (1) If the appropriate Minister is of opinion that the importation of any publication or series of publications would be contrary to the public interest he may by order prohibit the importation of such publication or series of publications.

Chapter 11- Disclosure of Official Secrets and Abstracting Document

97(1) Any person who, being employed in the public service, publishes or communicates any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanor, and is liable to imprisonment for two years. (2) Any person who, being employed in the public service, without, proper authority abstracts, or makes a copy of, any document the property of his employer is guilty of a misdemeanor and is liable to imprisonment for one year.

3.2.5 *Customs and Excise Management Act of 2003.*

Purpose:

“An Act to regulate the management and collection of duties of customs and excise, and for purposes ancillary thereto.”

Relevant Provision:

Section 7-Information and documents to be confidential:

(1) Without prejudice to the provisions of any other Act concerning official secrets, all information and documents supplied or produced in pursuance of any requirement of the customs and excise laws shall be treated as confidential, and if any person who is or has been a member of the Board or who is or has been employed in the Ministry, communicates or attempts to communicate any such information or the contents of any such document to any person except-

- (a) For the purpose of the custom and excise laws; or
- (b) As required by any other enactment; or
- (c) As otherwise authorised by the Minister,

He shall be liable to a fine of two hundred naira or to imprisonment for six months or to both.

(3). A person who is or has been a member of the Board or who is or has been employed by the Ministry may, except with the consent of the Minister be required to divulge to any court any such information or to produce in any court any such document as is referred to in subsection (1) of this section, except as may be necessary for the purpose of carrying into effect any provision of the custom and excise laws or in order to institute a prosecution or other legal proceedings, or in the course of a prosecution or other legal proceedings under the customs and excise laws.”

3.2.6 *Evidence Act. Of 1945*

Purpose:

This is an Act to provide for the rules of evidence in both civil and criminal procedures.

Relevant Provision:

Official and Privileged Communications

166. No magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no officer employed in or about the business of any branch of the public revenue shall be compelled to say whence they got any information as to the commission of any offence against the public revenue.

167. Subject to any directions of the President in any particular case, or of the Governor where the records are in the custody of a state, no one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

168. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

175. No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

3.2.7 *Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995*

Purpose:

An Act to establish an autonomous foreign exchange market and to provide for the monitoring and supervision of the transactions conducted in the market and for matters connected therewith.

Relevant Provision:

Section 2- Non –Disclosure of source of imported foreign currency

1. Except as required under any enactment or law, a person executing a transaction in the market shall not be required and if required shall not be obliged to disclose the source of any foreign currency to be sold in the market.

3.2.8 *Federal Inland Revenue Services (Establishment) Act of 2007*

Purpose:

An Act to provide for the establishment of the Federal Inland Revenue Service charged with the powers assessment, collection of and accounting for revenues accruable to the Government of the Federation and for related matters.

Relevant Provision:

Section 39- Information and Documents to be Confidential

(1) Without prejudice to the provisions of any other Act concerning official secrets, all information and documents supplied or produced in pursuance of any requirement of the Act or the laws listed in the first schedule to this Act shall be treated as confidential.

(2) Except as otherwise provided under this Act or as otherwise authorised by the minister, any member or former member of the Board or employee or former employee of the service or ministry who communicates or attempts to communicate any confidential information or the content of any such document to any person, commits an offence and shall be liable on conviction to a fine not exceeding N200, 000.00 or to imprisonment for a term not exceeding 3years or to both such fine and imprisonment.

Section 50- Official Secrecy and Confidentiality

(1) Every person in an official duty or being employed in the administration of this Act shall regard and deal with all documents, information, returns, assessment list and copies of such list relating to the profits or items of profits of any company, as secret and confidential.

(2) A person in possession of or control of any document, information, return or assessment list or copy of such list relating to the income or profits or losses of any person, who at any time communicates or attempts to communicate such information or anything contained in such document, return, list or copy to any person

(a) to any person other than a person to whom is authorised by the service to communicate it;

(b) Otherwise than for the purpose of this Act or of any enactment in Nigeria imposing tax on the income of persons;

Commits an offence under this Act.

(3) A person appointed or employed under this Act shall not be required to produce any return, document or assessment, or to divulge or communicate any information that comes into his possession in the performance of his duties except as may be necessary In order to institute a prosecution, or in the course of a prosecution for any offence committed in relation to any tax in Nigeria, not less than N20,000 or imprisonment for a term not exceeding two years or to both such fine and imprisonment.

3.2.9 *Official Secrets Act, 1990*

Purpose:

An Act to make further provision for securing public safety, and for purposes connected therewith.

Relevant Provision

Sec-1- Protection of Official Information.

(1) Subject to (3) of this section, a person who

(a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or

(b) obtains, reproduces or retains any classified matter which he is not authorised on behalf of the government to obtain, reproduce or retain, as the case may be, is guilty of an offence.

(a) A public officer who fails to comply with any instructions given to him on behalf of the government to the safeguarding of any classified matter which by virtue of his office is obtained by him under his control is guilty of an offence.

2. Protection of Defence Establishments, etc

(1) A person who, for any purpose prejudicial to the security of Nigeria-

(a) Enters or is in the vicinity of or inspects a protected place; or

(b) Photographs, sketches or in any other manner whatsoever makes a record of the description of, or of anything situated in, a protected place; or

(c) Obstructs, misleads or otherwise interferes with a person engaged in guarding a protected place; or

(d) Obtains, reproduces or retains any photograph, sketch, plan, model or document relating to, or to anything situated in a protected place,

(e) Is guilty of an offence.

3. Restrictions on photography etc, during periods of emergency

(1) The president may during any period of emergency within the meaning of section 305 of the constitution of Federal Republic of Nigeria, by order provide that during the continuance of that period no person shall, without the permission in writing given by the president, photograph, sketch, or in any other manner whatsoever make a record of the description of, such things designed or adapted for use for defence purposes as may be specified by order.

(2) A person who contravenes the provision of this section is guilty of an offence.

3.2.10 Wireless Telegraphy Regulations (made pursuant to section 28 of the Wireless Telegraphy Act, 1966)

Purpose:

This Regulation is merely making provisions for the guideline and procedures to be followed by the Commission established under the above mentioned Act, in exercise of its duties under the Act.

Relevant Provision:

Regulation 5- Declaration of Secrecy

All persons having access to wireless communications or actually operating licensed installations (other than broadcast receiving installations) shall make a declaration of secrecy as in the third schedule to these regulations in respect of commercial, naval, military or airforce wireless communications.

Regulation 18- No licensee to divulge message received by him as licensee; secrecy of Communication:

No person other than the holder of a broadcast receiving license, nor any person acting on his behalf or by his permission shall divulge to any person other than an authorised officer of the Government or a legal tribunal or make any use whatsoever of any message coming to the knowledge of such licensee or any person by virtue of the license.

Regulation 42- Censor of Messages:

The master of a ship registered in Nigeria may censor all message addressed to or transmitted by a station on Board the vessel under his control, but he shall not divulge to any person (other than the properly authorised officers of the Government or a competent legal tribunal) coming to his knowledge and not intended for the said station.

3.3 Attitude and Practice

After many years of military rule, the return to civilian rule under President Olusegun Obasanjo, who previously had as a military leader voluntarily relinquished power to a civilian government and was also on the board of Transparency International¹⁹⁰ had given much hope that transparency and accountability in government business will improve from the dark days of the military. The President made the battle against corruption one of his major policies thrust. He promised “corruption, the greatest single bane of our society today, will be tackled head-on at all levels” and that “under this administration, therefore, all the rules and regulations designed to help honesty and transparency in dealing with government will be restored and enforced.

¹⁹⁰ Florini, Anne, *The Right to Know*, p.147 (2007).

Specifically, I shall immediately reintroduce Civil Service Rules and Financial Instructions and enforce compliance. Other regulations will be introduced to ensure transparency.¹⁹¹

The Federal Government subsequently adopted laws such as the Independent Corrupt Practice and Other Related Offences Commission Act and the Economic and Financial Crimes Commission Act. No instruments were made to specifically secure citizen's access to public information. This is despite the fact that the Government hinged its economic and social reform strategy on the National Economic Empowerment Development Strategy (NEEDS), a document which prioritizes public access to information. It recommends a Right to Information Law as one of the major laws required to promote Nigeria's economic transformation. It says that a right to information Act that should be enacted the first half of 2004 "will engender openness and feedback through a process of streamlining and rationalizing the system for information collection, collation, storage and dissemination on a timely basis."¹⁹²

There were now attempts by the Federal government to proactively provide public access to government information that did not exist before. The Federal Capital Territory (FCT) for instance started publishing information about sale of government property and allocation.¹⁹³ The Federal Ministry of Information also started advertising information about its procurement tenders.¹⁹⁴ This is before the passage into law of the Public Procurement Act, 2007 which now requires government agencies to advertise information about tenders of a certain category. Revolutionarily, the Ministry of Finance also introduced the practice of publishing in national

¹⁹¹ President Olusegun's Obasanjo's Inaugural Speech at Eagles Square Abuja on May 29th 1994.

¹⁹² NEEDS Document, Chapter 6 (2004).

¹⁹³ Daily Champion, *Opinion*, 2006.

¹⁹⁴ Ibid.

newspapers monthly financial allocation the states receive from the federal government.¹⁹⁵

These mentioned incidences and a few others however did not mean that the public could access information at will. It is mostly the information which different government agencies felt benevolent to provide.

Aside from the legal restrictions which prohibit public access to information, certain categories of government officials are upon employment obliged to take an oath of secrecy not to disclose information unless there is express instructions to do so.¹⁹⁶

On being employed, the new staff is required to subscribe the following oath:

“I....., do solemnly and sincerely promise that I will not directly or indirectly reveal except to a person to whom it is in the interest of the government to communicate any article, nor document or information which has been or shall be entrusted to me in confidence by any person holden officer under the Majesty’s government or the Nigerian Government of which I may obtain in the course of the work which I perform and I will, further, during the continuance of this work exercise due care and diligence to prevent the knowledge of any such article, note, or information being communicated by any person against the interest of the government. I realize that failure on my part to keep these promises renders me liable to imprisonment under the official secret ordinance, 1942 and that the

¹⁹⁵ Thisday, Ngozi Okonjo-Iweala, *Nigeria’s Iron Lady of Finance* (2009) available at - <http://allafrica.com/stories/200907060396.html>.

¹⁹⁶ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria*(2000).

obligation of secrecy imposed upon me by that ordinance will continue after I have left the Government service.”¹⁹⁷

This kind oath taking naturally creates a culture of secrecy within government bodies and has resulted in a situation where public offices are unwillingly to grant press interviews or disclose information no matter how innocuous it is.¹⁹⁸ Constantly in the civil service, information is marked “classified”, “top secret” or “confidential” and there is no public access to such documents except those voluntarily released by government.¹⁹⁹

The government of President Musa Yara’dua that succeeded President Obasanjo also promised at his inauguration to fight corruption and promote transparency and accountability. He started on the right foot by making history as being the first sitting Nigerian President to make his asset declaration public.²⁰⁰ He released for public knowledge details of assets his declaration from the form he submitted to the Code of Conduct Bureau in compliance with the fifth schedule of the 1999 Nigerian Constitution.²⁰¹ This is a tradition he continued from 1999 when he first assumed office as the Governor of Katsina State.²⁰²

However, the unhealthy practice of secrecy oath taking still continued, the scope even widening. The President determined to stop the leakage of confidential information to the public ordered a secrecy oath to be administered to all political appointees in the Presidency by a High Court

¹⁹⁷ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria*(2000).

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Obi-Akper, *Yara’dua’s Assets*, NOW Public (2007) – available at http://www.nowpublic.com/nigerias_new_president_worth_5m.

²⁰¹ Obi-Akper, *Yara’dua’s Assets*, NOW Public (2007) – available at http://www.nowpublic.com/nigerias_new_president_worth_5m.

²⁰² Ibid.

Judge.²⁰³ This is the first time political appointees in the Presidency were compelled to swear secrecy oaths. In the past they only took Oaths of Office and Allegiance. This has been criticized by a wide array of the public as not only been anti-democracy, but perpetuating the culture of closed government.²⁰⁴

President Yaradua from the beginning of his tenure has been reputed to be sick, but there has been little information about the state of his health. The nation as watched anxiously, with rumors flying around about the specific nature of his sickness.²⁰⁵ There has however been no satisfactory official statement as to the state of his health, but constant cover ups. For instance, in 2008 the President immediately after the budget signing ceremony travelled to Germany. The official story was that he was suffering from allergic reactions and would be back in a few days. A few days passed and another date was announced.²⁰⁶ The polity was agog with speculations as to the nature of the President's illness, due to the secrecy in the Presidency. His frail health has been a major issue even in the period before his election. He took ill immediately after a campaign rally and also had to be evacuated to Germany.²⁰⁷ There was still then no good explanation as to his illness.

Though there have been some pockets of hope, the general practice and attitude of successive Nigerian administrations has been that of secrecy rather than openness since the advent of civilian rule. Government information is regularly hoarded, with public servants scared to release

²⁰³ The News, *Controversial Secrecy Oath (2008)*- available at <http://thenewsng.com/nation/controversial-secrecy-oath/2008/09>.

²⁰⁴ Ibid.

²⁰⁵ Francis Ottah Agbo, *What Afflicts Mr. President*, The News(2008) – available at <http://thenewsng.com/cover-story/what-afflicts-mr-president/2008/04>.

²⁰⁶ Francis Ottah Agbo, *What Afflicts Mr. President*, The News(2008) – available at <http://thenewsng.com/cover-story/what-afflicts-mr-president/2008/04>.

²⁰⁷ Ibid.

even the most harmless of information. This has aided corruption which thrives in an atmosphere of lack of transparency.

3.4 Good Governance and Corruption Profile

Nigeria's bane has been corruption and poor governance over the years. This has cost the country a loss of over \$300 billion in last four decades.²⁰⁸ Many assessments on corruption or good governance have been done and the country ratings have generally been weak, making little progress in some areas.

The continent good governance self monitoring mechanism, the *African Peer Review Mechanism* (APRM) after its 2009 month long assessment visit of Nigeria issued a damning 380-page report. It noted that political and economic corruption has derailed Nigeria's development and growth.²⁰⁹ There was a consensus amongst the observers that corruption is mainly responsible for poverty in Nigeria and "that the menace has held back economic growth and development and frustrated incentives to align budgetary allocations with development priorities."²¹⁰ The report touches on issues of democracy and governance.

The *2009 Mo Ibrahim Index of African Governance* released in October ranked Nigeria 35 out of 53 African Countries assessed. In the West African region, the country was ranked 11 out of 16 countries. There has been little improvement from the previous year's index, where the country ranked 39 out of 48 African countries. This document is published by the MO Ibrahim

²⁰⁸ Afro News, *Corruption Derails Nigeria's Growth*, June 05 2009 available at - <http://www.afrol.com/articles/29233>.

²⁰⁹ Afro News, *Corruption Derails Nigeria's Growth*, June 05 2009 available at - <http://www.afrol.com/articles/29233>.

²¹⁰ Afro News, *Corruption Derails Nigeria's Growth*, June 05 2009 available at - <http://www.afrol.com/articles/29233>.

Foundation as a solely African initiative that aims to improve the quality of governance in the continent. This index was released to coincide with the country's 49th birthday. The index is an assessment of good governance in the areas of participation and human rights; safety and rule of law; human development and sustainable economic opportunity. Nigeria scored lesser than what small countries like Sao Tome, Ghana and Cape Verde did, revealing how weak its governance competence is.

The *Transparency International Corruption Perception Index* (CPI) is a popular assessment to measure a country's progress in its integrity systems. The table below highlights Nigeria's corruption profile according to the TI's Corruption Perception Index from 2000 – 2006 culled from the TI websites of their various years reports.

S/N	Year	Country Rank	CPI Score
1	2000	90/90	1.2
2	2001	90/91	1.0
3	2002	101/102	1.6
4	2003	132/133	1.4
5	2004	144/146	1.6
6	2005	152/158	1.9
7	2006	143/163	2.0
8	2007	147/179	2.2
9	2008	180/121	2.7

CPI Score relates to “perceptions of the degree of corruption as seen by business people and country analysts, and ranges between 10 (highly clean) and 0 (highly corrupt).”²¹¹ This snapshot reveals that the Nigerian public perceives that there is no significant progress in the fight against corruption in Nigeria.

In the *Global Integrity 2008 Corruption Report*, Nigeria’s overall rating of 60 over 100 was described as weak.²¹² The highlights of the report indicate poor accountability across all branches of government and civil service. It notes that although there are some provisions in some policies encouraging public access to information but the general access to information Bill has been roasting in the Nigerian legislature since 1999. However, it also acknowledges that the Public Procurement Act of 2007 as already yielded positive results in Nigeria’s procurement system, despite not being fully implemented. This year, Nigeria has gained a plus 10 marks from the 2007 rating. The Global Integrity Report assesses the strength and weakness of national anti-corruption mechanisms.

3.5 The Struggle for a FOI Law in Nigeria

The country’s political history is besieged with stories of fraud and other kinds of corrupt practices by leaders.²¹³ Nigeria has been ruled for 29 years by military regimes that seized powers by force. Despite their seemingly nationalist flavor they disregarded openness as a necessary ingredient for good governance and government affairs where conducted under the cloak of secrecy.²¹⁴ The first call for a freedom of information policy in Nigeria was necessitated

²¹¹ TI Corruption Perception Index Explanatory Note available at - http://www.transparency.org/policy_research/surveys_indices/cpi.

²¹² Global Integrity Nigerian 2008 Country Report -available at <http://report.globalintegrity.org/Nigeria/2008>.

²¹³ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* (2000).

²¹⁴ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* (2000).

by the revelation that human rights activists could not do their work properly without accessing government information.²¹⁵ NGOs like the Media Rights Agenda (MRA), Nigerian Union of Journalists (NUJ) and the Civil Liberties Organization (CLO) prepared a consultation paper on access to publicly held information.²¹⁶

Advocacy for a FOI legislation was birthed out of the need to make government more honest and accountable.²¹⁷ Despite the less than favorable conditions under the military government, a campaign was birthed with the hope that the military government will keep to its words and hand over power to a civilian government.²¹⁸ “The objective of the campaign was to lay down as a legal principle the right to be informed about administrative documents as a necessary corollary to the guarantee of freedom of expression and to prescribe rules for the exercise of this right.”²¹⁹

After the death of Nigeria’s military Dictator Sani Abacha his successor, Abdulsalami Abubakar relaxed restrictions on civil and political freedoms including freedom of expression.²²⁰ There were now revelations of the staggering amounts allegedly stolen by the Abacha regime and the focus of the FOI campaign shifted from that of mainly human rights to corruption and lack of accountability.²²¹

With the assumption of President Obasanjo as a civilian president in 1994 there was much hope that the status quo will change. This is especially as he promised upon resumption of office that the fight against corruption was his top priority in government and previously was very vocal in

²¹⁵ Florini, Anne, *The Right to Know*, p.152 (2007).

²¹⁶ Ibid.

²¹⁷ Ibid p 153.

²¹⁸ Ibid.

²¹⁹ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* p. 5 (2000).

²²⁰ Florini, Anne, *The Right to Know*, p.154 (2007).

²²¹ Ibid

speaking against governance abuses in the era of military dictatorships.²²² The MRA in consultation with other CSOs produced a draft Access to Official information Act, drawing on the experiences of countries operating FOI laws.²²³ This draft Bill was sent to the President some days after his inauguration asking him to present it to the National Assembly as a sign of commitment to his pledge to fight corruption.²²⁴ This was a show of support to his declared campaign against corruption and to fast track the Bill, because executive Bills are treated favorably by the National Assembly. He declined to do this, offering no explanation for his refusal and asked that the Bill be sent to National Assembly directly by CSOs.²²⁵

After being rejected by the President, the Bill was sent to legislators and one of them sponsored the Bill as required by law.²²⁶ A group of progressive National Assembly members gave their support to it. It got up to the stage of 3rd Reading in House of Representatives, but did not pass this stage in the life of that Assembly despite spirited efforts from legislative allies and CSOs groups.²²⁷ It did not progress at all in the Senate. At that point, legislators who were championing the Bill became disinterested and some even started opposing it after being convinced that it was a “dangerous” Bill by their colleagues.²²⁸

The Bill was again presented with the advent of a new legislative calendar in 2004. The Bill was passed by the House of Representatives on August 25, 2004 and by the Senate on November 15, 2006.²²⁹ The separate versions of the Bill passed by the two chambers were harmonized into a

²²² Florini, Anne, *The Right to Know*, p.154 (2007).

²²³ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* p. 5 (2000).

²²⁴ Florini, Anne, *The Right to Know*, p.155 (2007).

²²⁵ Ibid.

²²⁶ Ibid p.158.

²²⁷ Florini, Anne, *The Right to Know*, p.155 (2007).

²²⁸ Ibid, p. 159.

²²⁹ Media Rights Agenda, *A Report on the The FOI Story* (2009).

single Bill by the Conference Committee of both chambers on February 14, 2007. The harmonized version of the Bill was subsequently adopted by both Houses in February 2007.²³⁰ The Bill by this time had garnered much support by legislators of the both Chambers of the National Assembly who put much effort to ensure its passage by the legislature. The passage was also facilitated by the fact that the Bill had key allies in the executive, like the Minister of Information who spoke in support of the Bill at various public forums. Anti-graft agencies like the Economic and Financial Crimes Commission (EFCC) also went very public in encouraging its passage into law.

In accordance with the provisions of the Nigerian Constitution, the Bill was sent to President Obasanjo for assent in March 16, 2007.²³¹ He refused assent to the Bill on the eve to his departure and did even not return it to the National Assembly making it impossible for a legislative veto to take place. He even feigned ignorance about the existence of the Bill when confronted by CSOs and then hinged his refusal to assent on it being a threat to “national security”.²³² The meeting between CSOs and the President was facilitated by one of his Special Adviser who was a supporter of the Bill. President Obasanjo’s claim of never seeing a copy of the Bill was proven false when the incoming President returned a copy to the National Assembly along with other Bills of which assent were refused by the outgoing President.²³³

Following the refusal by the President Obasanjo to assent to the Bill, it had to start afresh in the new National Assembly which started in June 2007.²³⁴ The Bill has been faster this time than the last time as it is being dealt simultaneously by the Both Chambers of the National Assembly.

²³⁰ Media Rights Agenda, A Report on the *The FOI Story* (2009).

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

Until a few months ago, the process had been relatively quick in both chambers and the Bill had reached advanced stages in each of the chambers.²³⁵ New allies had to be gotten for the Bill, as most of the previous ones did not return to the National Assembly.

The popularity the Bill enjoyed was dampened when the Senate Information Committee introduced many obnoxious provisions into the Bill which CSOs have rejected.²³⁶ One of the most worrisome recommendations is the deletion of the requirement that does not require an applicant for information to give any reasons for his request which is tandem with international standards.²³⁷ The Senate President who postures to be a supporter of this Bill now canvasses that libel which is covered by civil law in Nigeria should be criminalized so the law does not get abused.²³⁸ This new additions is seen as his response to the fears amongst many Senators that they Bill will be used to witch hunt them.

In the House of Representatives, the Bill appeared to have enjoyed popular support at the onset and quickly sailed through the first and second readings.²³⁹ The House had also voted to adopt a procedure that would considerably speed up passage of the Bill. However, over the last year, the Bill has now met considerable resistance from a significant number of Members stalling it progress.²⁴⁰ They are tagging it media Bill that will be abused by the media when passed into law. The President however has given positive indications that he intends to sign the Bill into law once it gets to him.²⁴¹

²³⁵ Media Rights Agenda, A Report on the *The FOI Story* (2009).

²³⁶ Eze Anaba "Senate Waters Down FOI Bill" *Vanguard* newspaper, Thursday, 25 September (2008).

²³⁷ Eze Anaba "Senate Waters Down FOI Bill" *Vanguard* newspaper, 25 September (2008).

²³⁸ Next Newspaper, *Cynicisms, hope trail non passage of FOI Bill*, June 29 (2009).

²³⁹ Media Rights Agenda, A Report on the *The FOI Story* (2009).

²⁴⁰ Ibid.

²⁴¹ Ibid.

The delay in the passage of this very important Bill that has witnessed over twelve years consistent advocacy by CSOs, media, government allies and buy in of the public highlights the mindsets of many Nigerian Leaders when it comes to issues of transparency and accountability. If they were sincere about the gospel they have been preaching, this Bill being the most popular citizen's Bill and a strategic tool to achieve purported goals would have been passed into law. There is however hope that the FOI law will be enacted and not in a watered down form that will be counterproductive to its purpose.

3.6 FOI Challenges and Prospects

The journey for FOI in Nigeria is been a tough and eventful one. One of its greatest hurdles is the hostility of some National legislators to the FOI Bill that would ensure that the country has a comprehensive FOI Law and the previous obnoxious policies are abolished. They seemed scared that this will be used to witch hunt them, not realizing that the law will aid their oversight functions. This fear of being held accountable is why the Bill has spent over ten years in the National Assembly, been through three parliamentary sessions and five Public Hearings and a presidential veto.

Another key challenge also would be reorienting civil servants from the culture of secrecy which they have been operating within. They are used to not giving out even the most innocuous information, so even with the passage of a FOI Law, changing their attitudes will take a concerted effort. For instance the Code of Conduct Bureau refuses to grant the public access to the Assets Declaration Forms of Public Officer, even with no law prohibiting them from doing so.²⁴² They rather insist that the National Assembly has to pass a law enabling them to do so.²⁴³

²⁴² Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* p. 165 (2000).

This is also directly linked to the culture of the Nigerian people not to request for government information that is derived from the long year's military rule and colonialism. The people have conditioned themselves not to expect accountability from leaders, so they do not even demand for it.

Even if the public employees were willingly to make available information, the poor record system would be an impediment to accessing information. The country has no systematic approach to "keeping records and statistic."²⁴⁴ This poor system of record keeping is in all sectors. A newspaper report complained about the appalling record keeping of the universities that sometimes results in students repeating courses they had previously passed.²⁴⁵ This is even more appalling that with the advent of computers, most of the government ministries are not computerized or storing information electronically. They also rarely maintain functioning websites that could provide information to the public.

There are several prospects to ensuring that the public is able to access to public information. The first step in the process is to educate the citizenry on what the right to know means and how an access to information legislation can aid the realization of this right. The advocates for this Bill in my opinion have done a good job in raising public awareness on the need for the passage of the Bill into law and the public momentum on the Bill is quite high now. They have been able to expand the constituency of people demanding for the passage of the law to include government actors and non-traditional CSO actors. The Actors Guild of Nigeria (AGN) has

²⁴³ Media Rights Agenda, *A Report on the Campaign for Freedom of Information In Nigeria* p. 165 (2000).

²⁴⁴ Ibid, p. 5.

²⁴⁵ Steve Okecha, *How to Fix Nigeria: Education*, Newswatch Magazine, 04 October (2009).

recently joined the advocacy for the passage of the Bill into law, making linkages on how the law will aid their work.²⁴⁶

Despite the challenges, there is hope that the Bill when passed by the National Assembly would be assented to by the President. The President has said in several forums that He would quickly assent to the Bill once it gets to him.²⁴⁷ The key anti-graft agency, the Economic and Financial Crimes Commission (EFCC) has also been an outspoken supporter of this Bill. It again has said it that it will help it in its work in fighting corruption and all other forms of economic crimes.²⁴⁸

Another alternative that FOI advocates are looking at is accessing information through the existing legislations that already give limited public access to certain kinds of information like the NEITI and Public Procurement Laws. Although most of these law mostly mandate the concerned agencies to proactively provide certain kinds of information, but this is progressive in comparison to what was exiting before the enactment of these laws.

Finally, as Nigeria is a federal country the states will still have to enact their own FOI laws for the public to be able to access to information kept by them. Some states like Lagos state have already started working on an FOI Bill.²⁴⁹ The state legislators have even castigated their colleagues at the National Assembly for refusing to set a good example for them.²⁵⁰

²⁴⁶ Lugard Onoyemu, *Nigerian Movies, the Public and FOi Bill*- available at <http://www.nollywood.net/vbee/archive/index>.

²⁴⁷ David Iriekpen, *Nigeria: As Yar'adua Backs FOI Bill*, Thisday Newspaper, 04 Nov (2008).

²⁴⁸ Nigerian News Service , *FOI Bill Will Boost Fight Against Corruption – Waziri*, 03 Aug (2009)- available at <http://www.nigerianewsservice.com/index.php/EFCC-Watch/FOI-bill>.

²⁴⁹ Next Newspaper, *Lagos House Working on Information Bill- Speaker*, 21 May (2009).

²⁵⁰ Ibid.

Conclusion

This chapter highlights Nigeria as a country on the both sides of the divide- one that has majorly a legal regime of secrecy and some access policies. It also has highlighted the slow progress the country has made after its recent transition to democracy on achieving good governance. The attitude of successive civilian governments since 1999 return to power has been one of contradictions: some practices encourage access, but overly more practices encourage secrecy. The legal battle of ensuring an all encompassing FOI law and the resistance by the politicians has shown the complexities of getting an access to information law in a context like Nigeria. The role of stakeholders like CSOs in a process like this cannot be overemphasized, as it unrealistic to expect corrupt public officers to willingly put in place a tool that would be used to hold them accountable. It also reveals that it takes more than legislation to ensure the public can access information, there logistical bumps that must be anticipated and planned for. The section has highlighted that all hope is not lost yet for the battle, but the road will be rough and bumpy

Chapter Four

Is FOI the Oxygen of Democracy? The Case of Nigeria as an Example

This work began with establishing right to access to information as a human rights that is entrenched in several international human rights instruments like the UDHR and ICCPR. It highlighted that several regional human rights instruments and national legislations also consider this right as a human right and provide for it. Most importantly, many national and international courts are now ensuring that this right is justiciable and there is now ample jurisprudence to support this. The judgment of India's Supreme Court in *UP v. Raj Narain* is instructive here.

My work recognized that standard setting was important, so it looked at international principles on right to know. Basic principles on the right to know that evolved from international and state practices were highlighted. These principles evolved from the philosophy of FOI as a right with a corresponding obligation on states to ensure that citizens can access information. This right is off course not absolute, but information must be made available to people unless there is a good case for secrecy in view of overriding public interest.²⁵¹

I agree with the school of thought that argues that this right places several kinds of obligations on government. This right compels government to ensure that there is access to information held by them upon requests by citizens. There is the equally important obligation to proactively make available certain kinds of information even in the absence of request to the public. A third obligation that I am bringing to the discourse is that governments are under an obligation to keep records and provide citizens access to certain kinds of information. For instance, states are not in

²⁵¹ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, Introductory page (2008).

the habit of keeping records of human rights violations for obvious reasons. This mostly in the ambit of non-state actors, but I argue that they must keep data of these kinds of incidences and make it publicly available. All the obligations must be carried out concurrently; a state cannot choose one over the other as they all equally important.

To fulfill these obligations certain practical measures must be taken and they include:

- Enacting an FOI law to ensure that citizens can access information upon request.
- Maintaining a system of good record keeping that will enable information to be quickly accessible and in the proper format when required.
- Training of public officers in order for them to have the right attitude of transparency in the conduct of government business.
- Instituting promotional measures like practical guides to the public on how to access information.
- Maintaining websites and other means of regularly publishing information on their policies and how the public can participate in their activities.
- Publishing a description of every government agency's responsibilities and the documents under their control so members of the public can know where to go for particular information.
- Ensuring institutional measures are in place for the protection of whistleblowers.
- Ensuring that there is an administrative body carrying out oversight functions on how requests are being handled and that they also are the first point of appeal before recourse to the courts.

The uses of this right cannot be overemphasized in this work. It ensures effective business environment by facilitating synergies between the business sector and government.²⁵² National governments hold useful economic information that can be useful for the commercial sector. It is also helpful in personal decision making because if individuals are armed with accurate and sufficient information it will help them in making key decision with affect their lives.²⁵³

However, my work was focused on exploring if democracy can flourish without people being able enjoy and exercise their right to accessing information. The case of information being the oxygen of democracy has been presented by international NGO Article 19 in its Global Campaign for Free Expression.²⁵⁴ This work was conclusively using the Nigerian case to either validate or debunk this claim. My hypothesis at the start of the work was that there cannot be a functioning democracy without right to access information being enjoyed by individuals.

The democracy in my opinion should be synonymous with good governance, standing on the pillars of transparency and accountability. This means that the public must as of right scrutinize the actions of the people leading them and be able to debate about these actions. In order to do this they must be able to access all the relevant information about the government activities. This access is also an effective tool to combating ensuring that government is on the right track by combating corruption. It ensures that any misnomer is exposed and therefore acts like deterrence.

In Nigeria, citizen's have very little access to publicly held information as there is an official policy of secrecy backed up by law. It is a former colony of Britain and has a diverse background

²⁵² Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, Introductory page (2008).

²⁵³ Ibid.

²⁵⁴ Mendel, Toby, *Freedom of Information: a Comparative Legal Study*, p. 4 (2008).

of multi-ethnic, multi-religious and a huge population of peoples. It has been blessed with a rich topology and a wide array of natural resources. The country has been for many decades now extracting oil, but has little in way of development to show for the billions of dollars it has gotten from this resource.

After forty nine years of self rule and twelve years of recent democratic rule, there is a raging debate with no consensus if Nigeria is a failed state, or failing one. The Chairman of the U.S Senate Sub Committee on Africa, Senator Russ Feingold recently classified the country as a failed state.²⁵⁵ In the Brookings Institute Failed States Index the country fared slightly better as it was termed “critically weak”, lagging behind Sierra Leone and Liberia two West African countries that it helped restore democracy.²⁵⁶ The jury is still out if it is a failed state or not, but what is clear is the devastating state of underdevelopment caused by corruption. The state has been unable to guarantee security of life and property, and to provide basic infrastructure and maintain economic and social service adequately.

The question is what does the free flow of information have to do with the bad state of governance and development in Nigeria? The country has for over forty nine years been run by closed governments with trickles of information been given to citizens about the affairs of government. As a result there has been no check and balances by citizens over the affairs of government. Citizens have not been able scrutinize the actions of their leaders effectively and expose wrongdoers. Corruption flourishes in the dark as the case of Nigeria as proven. There has been very minimal citizen participation in public affairs and this has allowed public officers to

²⁵⁵ Sahara Reporters – Available on http://www.saharareporters.com/index.php?option=com_content&view=article&id=672:nigeria-a-failed-state-says-utomi-fayemi-jimi-agbaje-and-others&catid=114:press-releases&Itemid=362.

²⁵⁶ BBC News – available on <http://news.bbc.co.uk/2/hi/africa/8112800.stm>.

implement policies that are more in their interest than that of the nation. Public institutions with the willingness to do perform their roles have found it very challenging to do so. Courts and the law enforcement agencies have experienced countless frustration and are unable to effectively do their work.

The relationship between the leaders and the people has changed to that of master and servant. Public officers do not feel the need to be accountable to the people and the people have been oriented not scrutinize and debate their actions. This is worsened by the fact that the machinery which citizens use to hold elected representatives accountable being elections is flawed in the country. For Nigeria's 2007 general elections, an international NGO, International Republican Institute's (IRI) 59-member international election observation delegation determined that elections process was below acceptable standards.²⁵⁷ Part of the problem noticed was that some ballot boxes did not have serial numbers and candidates names and "Nigerians were encouraged to vote, but again, were inadequately informed about where and how to vote."²⁵⁸ It is clear that it is impossible to exercise the right to vote in such circumstances.

Nigerians have not only been unable to expose corrupt and inefficient governments, but also human rights abuses. At the commencement of a civilian government in 1999 after several years of military rule characterized by gross human rights abuses and repression of political dissent, the Oputa Investigative Panel was set up to reveal the truth about these alleged human rights abuses.²⁵⁹ The Panel concluded their work on May 28, 2002 and handed over a report to the

²⁵⁷ IRI's Preliminary Press Release on Nigeria's 2007 General Elections – available on <http://www.iri.org/africa/nigeria/2007-04-22-nigeria.asp>.

²⁵⁸ Ibid.

²⁵⁹ *Nigeria: Where is the Oputa commission's report?* Africa News Update, Feb 2004 - available on <http://www.afrika.no/Detailed/4852.html>.

President which has still not been officially released to the public.²⁶⁰ A key finding of the report is the culpability of three former military rulers for extra judicial killings.²⁶¹ The information contained in the report that can help hold people accountable and ensure that history does not repeat its self is still not released to the public domain.

The way forward for Nigeria is for the legislators to enact in good faith the FOI Law that will grants citizens access to information held by public administrative levels. This will ensure that there is transparency and accountability and civic participation in governance that would aid development. If enacted, the FOI Law eradicates legal impediments standing in the way of the full enjoyment of this right. The Nigeria case also buttresses the facts that mere laws are insufficient to ensure that this right is enjoyed, but other practical steps must be taken to ensure the realization of this right.

The Nigeria case validates my claim that the right to access to information ensures that a democracy flourishes as it will bring the much needed transparency and accountability in governance and reduce corruption. If any country is practicing a democracy, and the government is running a closed system, the democracy cannot survive. Democracy strives on civic participation which is activated by information. Public access to official information brings the full scrutiny needed for democratic development. There cannot be a sustainable democracy without this right being promoted and enjoyed by citizens.

²⁶⁰ *Nigeria: Where is the Oputa commission's report?* Africa News Update, Feb 2004 - available on <http://www.afrika.no/Detailed/4852.html>.

²⁶¹ Transitional Justice News, Jan 12 2005 – available on <http://www.ictj.org/en/news/newsletter/492.html>.

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