

**BASELINE REPORT ON THE STATE OF ACCESS TO INFORMATION  
IN SADC.**

A report prepared by Mzi Memeza for the Access to Information Programme of  
the Freedom of Expression Institute (FXI).

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## ACKNOWLEDGEMENTS

The Freedom of Expression Institute's Access to Information Programme would like to acknowledge and thank the following individuals and organisations for their time co-operation and patience in assisting with the information gathering phase of this research.

Jack J. Jubilee Zambia	JUBILEE Zambia
Richard SEATINI	SEATINI Zimbabwe
Collins MEJN	MALAWI Economic Justice Network
Trevor Ngwane	ANTI- PRIVATISATION FORUM
Twisema Muyoya	MWENGO Zimbabwe
Kandji Kaitira	MISA Namibia
Roshnee Narrandes	OSISA
Titus Moetsabi	Freedom of Expression Institute

**EXECUTIVE SUMMARY FOR THE FXI ATI<sup>1</sup> BASELINE REPORT:  
THE STATE OF ACCESS TO INFORMATION IN SADC, JAN 2005**

- 1.1 The report examines the extent to which SADC countries meet the freedom of information macro indicators developed by the Open Society Justice Initiative (OSJI). The OSJI macro indicators are captured in three areas in the report, namely: an overview of legal framework, the constitution and other legislation; an assessment of public authorities' actual provision of information upon receiving requests and public authorities' internal readiness to provide information to the public with reference to case studies in SADC. Out of the case studies, the access to information needs of civil society organizations is explored.

Most SADC countries are signatories to the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration on Human Rights (UDHR) and the African Charter on Human and People's Rights (ACHPR). Swaziland is not a party to the ICCPR and the ACHPR. It is the only state in SADC that is not party to the ACHPR and is also one of two states in the region that is not a party to the ICCPR. However even those countries who are signatories of the above mentioned international instruments do not recognize the right to freedom to access information as espoused in the instruments but only protect the content of the right to freedom of expression either as a separate right and in most instances include under it the right to access information as an incident of the right to freedom of expression.

In addition to the skewed picture presented by the constitutions of SADC countries, there is also a dearth of legislation facilitating access to information (ATI) in specific instances of public life (such as local government finances). On the contrary, what you find is a proliferation of legislation proscribing access to information on the basis of national security, defence, and the integrity of the head of state. These find resonance in pieces of legislation such as the National Defence Law or State Secrecy Laws that are widely enacted in SADC. South Africa remains exceptional. Contemporaneous with section 32(2) of the Constitution, parliament enacted the Promotion of Access to Information Act 2 of 2000 (PAIA) to give effect to the right of access to information. PAIA is therefore legislation with a particular constitutional status: it is legislation mandated by the Constitution to give effect to a Constitutional right. There can be no doubt that South Africa is enjoying more freedom of expression and access to information than it has done for many decades, even centuries. However, there is still a need for more vigilance. It seems that a lot of public debates must still be encouraged on these issues so that ATI can actually penetrate the "grassroots" level. The other challenge faced by South Africa is to address the censorship effects that flow from huge numbers of people not having adequate access to the means of receiving and producing information. This great need presents possibly the most daunting, yet diffuse, challenge to ensuring that freedom of expression and access to information is a right owned and practiced by all.

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<sup>1</sup> Access to Information (ATI)

Even though South Africa bears the most progressive legislative scheme for access to information in the region, the realization of this right hasn't been without fault.

It is also worth noting that despite the dearth of access to information legislation in the region, some countries such as Mozambique, Malawi, Zambia and Namibia currently have bills on access to information legislation. The precise contours that these legislations will take currently a matter under debate. In consultation processes, MISA has been quite active in ensuring that the key tenets of access to legislation are reflected in the bills.

### 1.2 Needs Assessment of Access to Information Partners (SEATINI, MISA, JUBILEE, OSIS, MEJN and MWENGO).

Access to information needs were explored in the areas of debt and debt related issues; budget monitoring and participatory budget making; transparency in macro-economic decision making; international financial institutions; and trade.

#### In the area of debt and debt related issues/ international financial institutions and trade

- Access to agreements between member states and the creditors is essential (IMF, ADB and the WB). In particular, information on the terms and conditions of loan agreements;
- Finance Ministers in most SADC countries have immense powers that enable them to unilaterally enter into agreements with IFI's. Campaigns should be developed around access to information in the hands of Finance Ministries;
- Basic information on revenue and expenditure as provided for mostly in Medium Term Expenditure Budgets of many SADC countries position organizations involved in debt and debt related issues to examine the extent of the borrowing of their countries; and
- Conduct workshops with government officials on issues and debates around the World Trade organization.

#### Macro- economic policy formulation/ transparency in macro-economic decision making:

- Budget analysis and monitoring requires reliable information;
- The use of other legislation other than national legislation, for instance, at local government level providing for access to information on local government revenue and expenditure has proved useful for organizations looking into budget formulation and analysis. In South Africa the Municipal Finances Management Act is a case in point whilst in Malawi the Public and Management Procurement Act is quite instructive.

### 1.3 To identify freedom of information macro indicators in relation to women and youth

- There is also agreement that in addition to the problems of unemployment and poverty, youth in SADC face the critical problem of HIV/ AIDS.

Access to information around socio- economic rights should have a specific focus on these groups;

- A general measure of the extent of inequality between women and men in areas of socio- economic and political participation and decision making in SADC illustrates that women are still relatively weak and vulnerable compared to men;
- Some SADC countries still have laws that discriminate against women and exclude them from decision making in society. Campaigns should therefore also be directed at repealing laws that discriminate against women whilst advocating for access to information legislation.

#### 1.4 To explore communication strategies being used by partners in Access to Information work.

MISA through its regional focus in 11 SADC countries offers best practice in terms of the co-ordination of activities in each country. MISA has been able to work with the Constitutional Review Commission in Malawi, Zambia and Namibia which has thus far resulted in draft bills on freedom of information legislation. Similarly, OSISA through its new AFRI- MAP programme seeks to develop a peer review framework for SADC region countries and offers interesting insights on how communication around SADC can be achieved effectively.

#### 1.5 How freedom of information indicators influence the programming of the Access to Information Programme and the post implementation evaluation.

It is worth noting that the post evaluation of the programme's activities will also take place against the background of the strategic areas of intervention identified hereunder:

- A need to reach consensus with the partners about the importance of integrating access to information work in their respective areas of work linked to the attainment of socio-economic rights.
- There is need to explore the capacity of the Access to Information Programme's partners to integrate access to information work in their respective campaigns.
- A data base should be established that tracks trends and developments in access to information work in the respective SADC countries.
- There is a need for the development of strong advocacy material particularly around the link between accesses to information the realization of socio- economic rights.
- A model access to information legislative framework should be explored – and must provide basis for engaging in consultative processes where there is move towards the enactment of freedom of information legislation.
- As noted above, most SADC countries still have laws that discriminate against women and exclude them from decision making in society. There is therefore an added impetus to advocate for constitutional reform over and above access to information legislation.

## 1. INTRODUCTION AND METHODOLOGY

This report examines two challenges facing the Southern African Development Community (SADC)<sup>2</sup> countries in the area of Freedom of Information (FOI), namely:

- The extent to which SADC countries meet the Freedom of Information Macro Indicators (FOIMI) developed by the Open Society Justice Initiative (OSJI) and
- The prevalence of FOI indicators in relation to women and youth.

An examination of the state of freedom of information in the respective SADC countries will be undertaken with reference to the freedom of information monitoring indicators identified by the OSJI. The freedom of information monitoring macro indicators are divided into three phases:

- The existence of a legal framework facilitating the exercise of the right of access to information;
- Public authorities' actual provision of information upon receiving requests for information and
- Public authorities' internal readiness to provide information to the public.<sup>3</sup>

For each macro indicator there is an additional subset of indicators accompanying each phase. The subset of indicators comprises of a list of inquiries dealing with issues which would otherwise not be addressed by the macro indicator. For example, one of the macro indicators inquires into the existence of a legal framework facilitating the exercise of the right of access to information in a country, and in the lack of such legislation the indicators will inquire into other measures or avenues for accessing the right of access to information. To this end, civil society organisations – particularly the Access to Information Program partners in the region were approached to provide case studies where access to information in state hands has been sought and concomitant challenges in accessing such information were identified.

With reference to the freedom of information macro indicators, an approach to information gathering utilised a range of sources:

- Literature review
- Publications and websites
- Telephone and face to face interviews
- E- mailed requests for information to respondents

The Access to Information Program partners approached were Southern African Trade Information and Negotiations Initiative (SEATINI), Media Institute of Southern Africa (MISA), JUBILEE Zambia, Malawi Economic Justice Network (MEJN), Open

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<sup>2</sup> The SADC countries under examination are Angola, Botswana, Lesotho, Malawi, Swaziland, Mozambique, Namibia, Zimbabwe and Zambia. The Access to Information Programme decided that the nine countries are a representative sample of the socio- economic and political situations that obtain in the entire SADC region comprising of twelve countries.

<sup>3</sup> See draft proposal at p.20 (5.1 Freedom of Information Monitoring Indicators).

Society Initiative for Southern Africa (OSISA), the Anti Privatisation Forum (APF), MWENGO and Botswana Council of Non Government Organisations (Bocongo). Women for Change (WFC), Southern African Centre for Economic Justice (SACEJ).

Information was less successfully obtained from the Botswana Council Of NGO's and Women For Change Zambia. The organisations were approached during the World Social Forum in Lusaka, Zambia, and most of their members were in attendance at the Forum.

Finally the report makes suggestions on the implications of the above investigation for the Access to Information Programme and its implementation.<sup>4</sup>

## 1. BACKGROUND

The importance of access to information in developing countries such as those falling under the SADC region cannot be over emphasised. Apart from rendering the processes of government more open and making those in power more accountable to their people, access to information can also be a useful tool in improving people's lives. According to the United Nations Development Programme (UNDP): *Human Development Report 1997* at p.110:

“Any strategy for poverty eradication must focus not only on what needs to be done, but also on how to ensure that action is taken. This requires such fundamental reforms as promoting political participation by all, ensuring accountability and transparency in government and ensuring a strong role for community groups and non governmental organisations (NGO's) in policy making and legislative decision making.”

The UNDP report also notes ‘that with access to information poor people can begin to organise themselves for collective action to influence the decisions affecting their lives’.<sup>5</sup> Information about the delivery of basic services by the state, such as water and waste management, electricity, health and transport is increasingly becoming important for the realisation of socio- economic rights.<sup>6</sup> For example, the absence of information on state spending over a certain period seriously impedes civil society efforts to engage with the state's obligation to achieve social and economic rights. As will be apparent later in the report, the dynamic of unaccounted funds in most SADC countries with the attendant problems of mismanagement have had a corrosive effect on social spending. Between 1997- 2002 the total of funds unaccounted for by the Angolan government amounted to 4.22 billion U.S. dollars, a sum that equals that provided for by the United Nations Consolidated Inter- Agency Appeal for Humanitarian Aid (4.47 billion U.S. dollars between 1997- 2002) In effect, the Angolan government, with its continued resistance to enact access to information

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<sup>4</sup> A brief exposition of the Access to Information Programme is provided under Para 1 of the draft proposal at p.2.

<sup>5</sup> UNDP *Human Development Report 1997* at p.116

<sup>6</sup> *The Draft Proposal to the Open Society Justice Initiative for Southern Africa: Access to Information For Economic Justice June 2004* at p.2 notes this imperative at SADC regional level where the attainment of information on state delivery can bolster ‘the work of the region's economic justice networks, NGO's, community based organisations and social movements struggling for the realisation of socio- economic rights’.

legislation has not accounted for an amount roughly equal to that spent on the social, health and education needs of the Angolan population.<sup>7</sup>

The report focuses on the following SADC countries; Botswana, Angola, Zambia, Zimbabwe, South Africa, Malawi, Lesotho, Swaziland, Mozambique and Namibia.

## 2. ANGOLA

### 2.1 Overview of Legal Framework and the Constitution

Angola is party to several international treaties that guarantee the right to freedom to receive and impart information; freedom of expression and freedom of association, including the International Covenant on Civil and Political Rights (ICCPR). The ICCPR does not specifically provide for the right to access information, it deals with access to information within a cluster of rights under the rubric of the right to freedom of expression. It thus treats the right to freedom of information as an incident of the right to freedom of expression.

Although not a treaty obligation immediately binding on states, parts of the Universal Declaration on Human Rights (UDHR) including Article 19 on the right to freedom of expression are widely regarded as having acquired legal force as customary international law.<sup>8</sup> This is critical since the Angolan constitution invokes the rights under the UDHR as well as other international instruments to which Angola is a signatory but is silent on the right to freedom of information. As will be apparent from the discussion on the constitution of Angola, the right to freedom of information despite the protection of other rights enunciated under the UDHR is not enshrined. This exclusion is remarkable considering that the Angolan constitution – underlined by the principles of the UDHR, widely embraces fundamental rights and also provides for a limitations clause comparable to that of some SADC countries. The constitution remains silent on access to information in state hands.

Even more, article 21(2) of the Angolan constitution provides that national legislation must be interpreted in accordance with the international treaties to which Angola is a party and the principles of the UDHR<sup>9</sup>. A clear intention to omit a provision dealing with access to information is evident; it does not seem to be a matter of oversight.

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<sup>7</sup> Discussed in detail under para.2.5, where the relationship between lack of transparency and access to information legislation has impacted negatively on the socio-economic development of Angola.

<sup>8</sup> Dugard J in *International Law and the South African Constitution* defines customary international law as a set of norms and duties that develop 'from the practise of states. It requires countries to ascertain and administer rules of customary international law without proof of law- as occurs in the case of foreign law'. [www.ejil.org/journal/vol8/art4/html](http://www.ejil.org/journal/vol8/art4/html)

<sup>9</sup> A similar provision exists in the South African Constitution and states that:

Section 39 (1) When interpreting the Bill of Rights, a court, a tribunal or a forum:

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) must consider international law and
- c) May consider foreign law.

Angola is also party to the African Charter on Human and People's Rights.<sup>10</sup> The Charter, unlike the ICCPR is binding on members states and requires members to ensure and respect the right to freedom of information.<sup>11</sup> The adoption of the constitutive act of the African Union (AU) in 1998 saw the disbanding of the Organisation of African Unity (OAU). Despite this transition, the rights and duties enshrined in the Charter remain intact. For instance, the AU's Constitutive Act makes it clear that the AU shall strive to "promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments".<sup>12</sup> Kindiki<sup>13</sup> has argued that the interventionist stance that the AU permits should extend beyond instances such as war crimes, genocide and crimes against humanity as is the position currently to circumstances involving the entrenchment of public accountability and multilateral governance through the African Peer Review Mechanism (APRM).

The constitution of Angola provides for the protection of the right to freedom of expression under article 32:

"i. Freedom of expression, assembly, demonstration and all other forms of expression shall be guaranteed."

The content of the right to freedom of expression does not include the right to access information in line with the international guarantees of freedom of expression to which Angola is party to (that is, UDHR and ICCPR).

Although the Angolan constitution does not guarantee the right to freedom of information, the concept of the right to access publicly held information was given recognition by a decree on December 15, 1995.<sup>14</sup> This decree has seen permission being granted to the private press to scrutinize government policies. However, the Human Rights Watch<sup>15</sup> has cautioned that despite the existence of such a decree- it is still dangerous for journalists to investigate certain high ranking government officials. The impact of a decree in the area of freedom of information is very minimal since a decree by its very nature is merely a statement in the form of an order or pronouncement by a court of law and does not have the same status and force as legislation. In other words, a decree unlike legislation is not a law of general application.

The lack of a constitutional provision on access to information and access to information legislation is justified on the basis of national defence,<sup>16</sup> and to this end, several draconian laws have been passed under the pretext of national security.

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<sup>10</sup> Angola ratified the African Charter on Human and People's Rights on March 2, 1990.

<sup>11</sup> Article 9 of the Charter states that: 'Each individual shall have the right to receive information'.

<sup>12</sup> Article 3(h) of the Constitutive Act.

<sup>13</sup> Kindiki K, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal', 3 *African Human Rights Law Journal* 1 (2003) at p.100.

<sup>14</sup> Decree No. 16A/95, December 15, 1995.

<sup>15</sup> Human Rights Watch Report, July 14, 2004. *Unfinished Democracy: Media and Political Freedoms in Angola*. [www.hrw.org/backgrounder/africa/angola/2004](http://www.hrw.org/backgrounder/africa/angola/2004)

<sup>16</sup> Human Rights Watch Interviews, Luanda, April, 2004 in *Unfinished Democracy: Media and Political Freedoms in Angola*. A Human Rights Watch Report, July 14, 2004. [www.hrw.org/backgrounder/africa/angola/2004](http://www.hrw.org/backgrounder/africa/angola/2004)

## 2.2 Other Legislation

In 1993, the government of Angola passed legislation limiting the right of access to information. The National Defence Law<sup>17</sup> provides for the classification of documents as state secrets, a determination made on a case by case basis, meaning that they will not be disclosed to those requesting public information unless they fulfil certain criteria such as containing confidential information.

Recently, the government of Angola has passed three laws – the Access to Administrative Documents Bill, The National Security Bill and the State Secrecy Bill- during 2002- 2003 that severely restrict access to information.

The Administrative Documents Bill proscribes access to documents in state hands, whilst the National Security Bill provides for the classification of documents considered critical for national security.

Of particular concern, is the State Secrets Bill. The State Secrecy Bill (the Bill) was passed on July 19, 2002 and criminalizes possession of documents that the government considers sensitive, even if obtained lawfully by individuals not employed by the government. The Bill defines how state secrets will be determined, who makes such determination, and provides penalties for contravening its terms. There are some extremely troubling provisions of the Bill in the context of transparency and freedom of information. Article 2 of the Bill provides that:

“...financial, monetary, economic and commercial interests of the state can be classified as secret, broad terms that invite application of the law to data on oil revenues, IMF documents, or other documents that should be in the public domain in order to further public oversight.”<sup>18</sup>

For contravention of Article 2; any civil servant or political appointee can be punished with up to two years imprisonment for divulging information classified as a state secret.<sup>19</sup> Individuals who are not government officials can also be penalised for possessing or republishing state secrets regardless of how they received them. Article 26 states that:

“Those who are not civil servants or holders of public office and who have access to classified information and materials, irrespective of the manner and source, and disclose such information publicly without being so authorized to do by the relevant bodies, shall be subject to the penalties set forth in Article 24 and 25 of the present act, according to whether they acted with intent or through negligence.”

The penalties enumerated in Articles 24 and 25 of the Bill are six months to two years imprisonment for an intentional breach of state secrecy, or six months imprisonment for an unintentional but negligent breach of state secrecy. This could have a chilling

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<sup>17</sup> Law No. 2/93, March 26, 1993.

<sup>18</sup> State Secrets Bill, art.2.

<sup>19</sup> Ibid. art. 24 and 25.

effect on the Angolan civil society since they are subject to the same penalties as government officials if they report on government activities.

Furthermore the Bill also provides for extra- territorial prosecution of individuals. Article 3 of the Bill states:

“State secrecy shall cover all persons within or beyond national territory, irrespective of whether they are employed by the public administration and who, for any reason, comes into contact with materials deemed to be state secrets under the terms of the present act.”

According to the Human Rights Watch<sup>20</sup>, Article 3 can be interpreted as an attempt to prevent representatives of multilateral institutions, international NGO’s , international press, or other institutions from publishing materials that may be sensitive or embarrassing for the government.

The over broadness of the law is also obvious. The category of documents it classifies as secret is so wide as to encompass everything in state hands. The risk of arbitrary prosecution in the enforcement of this law is also inescapable. Ruth (2000:11) makes a point about overbroad legislation in the SADC region and states that:

“One of the greatest dangers of secrecy provisions is their extreme over breadth. For example, secrecy laws have the ostensible aim of protecting security but block the flow of a wide range of unrelated information which could not possibly relate to legitimate national security interests. Similar over breadth problems apply in relation to the protection of public order, internal government decision- making and so on.”<sup>21</sup>

### **2.3 The Impact of a Lack of Legal Framework for Access to Information**

The lack of a legal framework for access to information has been a major obstacle to public scrutiny of the government’s use of public funds. Access to information is severely curtailed to such an extent that the Angolan government will not disclose basic information about its revenues and expenditure.<sup>22</sup> The World Bank and IMF have over the years been at the forefront of moves aimed at putting pressure on the government to enact access to information legislation in Angola. Karl<sup>23</sup> observes that the longstanding concern by the World Bank and IMF about the lack of freedom of information legislation is motivated by concerns not shared by other international institutions and NGO’s. According to Karl, of particular concern to the World Bank and IMF has been the government’s position of being a direct beneficiary of most economic activity that centres around oil. To this end, the World Bank has been

<sup>20</sup> *Human Rights Watch* Report, Luanda, December 9, 2002.

<sup>21</sup> *Freedom of Information in Southern Africa*, No. 16 October 2000.  
[www.article19.org/docimages/785.htm](http://www.article19.org/docimages/785.htm).

<sup>22</sup> International Bar Association, *Angola: Promoting Justice Post Conflict* (London: International Bar Association, 2003, p.19) The International Bar Association- amongst other problems it noted with Angola’s judiciary were the under funding of the judiciary and the right of access to justice.

<sup>23</sup> Terry L. Karl, *the Paradox of Plenty: Oil Booms and Petrol States*, (Berkeley: University of California Press, 1997).

insisting upon disclosure and publication of all of the Oil Diagnostic reports, audits of Sonangol and the Banco Nacional de Angola (BNA)<sup>24</sup> prior to holding donor conferences. In the same breath, oil companies operating in Angola have not been visited with the same demands about disclosure.

The U.N. Secretary General's April report to the Security Council<sup>25</sup> on the UN mission in Angola noted:

“Social and economic rights remain a serious problem in Angola. Despite recent initiatives, there is still a gap between Angola's substantial revenues and the funds allocated to improving the living conditions of the population.”

An earlier separate study also noted:

“Infant mortality in Angola is the second highest in the world. One third of Angolan children die before their fifth birthday. Out of every 10 children, five die of malaria before reaching the age of five. Immunisation rates in Angola are among the lowest in the world, causing death from otherwise preventable diseases such as tetanus, measles, pneumonia and meningitis.”<sup>26</sup>

Sixty percent of hospitals and clinics were destroyed during the war, taking a devastating toll on the health care system.<sup>27</sup> Education spending is similarly low. According to the United Nations Children's Fund (UNICEF) only four percent of Angolan children who attend primary schools reach the fifth grade.<sup>28</sup>

The legacy of war and colonialism loom large in any development effort in Angola. On the other hand the low levels of government funding of the socio and economic needs of its population is a result of unexplained diversion of funds. This as I have shown above is a function of a lack of transparency and access to information legislation.

### 3. ZAMBIA

#### 3.1 Overview of Legal Framework and the Constitution

The constitution of Zambia Act, 1991 does not have a specific provision dealing with the right to access information.<sup>29</sup> Instead, access to information, like Angola and most SADC countries is provided for under the extensive reach of the right to freedom of

<sup>24</sup> Songanol and BNA are state owned Oil Companies.

<sup>25</sup> United Nations: *Report of the Secretary General on the United Nations Office in Angola*, S/2000/351, p. 5.

<sup>26</sup> United Nations Development Programme (UNDP), *Human Development Report 2001* (New York: Oxford University press, 2001) Human Development Indicators.

<sup>27</sup> Ibid.

<sup>28</sup> UNICEF, Angola: Statistics, August 2003.

<sup>29</sup> The constitution of Zambia, like the constitutions of Botswana and Lesotho guarantee what has sometimes been referred to as 'a passive right to information'. See [Fourth Media Lawyers Conference Report](#) at p.23; and Duncan J in [Active or Passive? The Right to Information in Southern African Constitutions](#), The OSISA Journal, 4<sup>th</sup> ed. Issue 3 November 2004 at p.16.

expression in article 20 (1) of Part III of the constitution.<sup>30</sup> Article 20(1) of Part III states:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, **freedom to receive** and impart information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons.” (My emphasis)

Article 20(2) of Part III provides further that:

“Subject to the provisions of this constitution no law shall make any provision that derogates from freedom of the press.”

The wording of article 20 (2) of the Zambian constitution is similar to article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19 states:

“Everyone shall have the right to freedom of expression, this right shall include **the freedom to seek** and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” (My emphasis)

In both instruments, the right to access information is an incident of the right to freedom of expression. In other words, freedom of information is part of a cluster of rights (that is right to artistic creativity, press freedom etc.) that fall under the umbrella of the right to freedom of expression.<sup>31</sup>

Even before one examines the treatment of the right to seek information under the right to freedom of expression, it becomes apparent from recent media reports that whilst the constitution protects the right to freedom of expression, there is none- less a critical disjuncture between this commitment and government’s practises. The

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<sup>30</sup> This is in contrast to the South African Constitution where the right to access information is specifically provided for in section 32 and there is also a requirement that supplementary legislation be enacted to give effect to the expansive right of access to information. Section 32 states:

32 (1) Everyone has the right of access to-

- a) any information held by the state and;
- b) Any information that is held by another person and that is required for the exercise or protection of rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

<sup>31</sup> Maloney M and Mue N also make this point in their report titled: *Media Law and Practise in Southern Africa No.7: Zambia*, ARTICLE 19, and February 1998 at p.3. [www.article19.org/docimages/243.htm](http://www.article19.org/docimages/243.htm). A similar point is made in a report by the *Times of Zambia*, Saturday, March 27, 2004, The Press Association of Zambia (PAZA) and the Zambia Union of Journalists (ZUJ) represented by Benjamin Mwanza, recognising a need for a self standing provision on the right to freedom of information and press freedom made a submission to the newly set up Constitutional review Commission (CRC) that “the current provisions which were an appendix of freedom of expression are vague and inadequate. They emphasised that freedom of the press (and information) should be expressly enshrined in the constitution in the same manner that freedom of expression was provided for.” For a detailed report see: <http://www.times.co.zm/news/viewnews.cgi?category=all&id=1080359834>

*Times of Zambia*<sup>32</sup> recently reported that Lusaka's principal magistrate, Jones Chinyama has censured journalists covering the trial of second Republican president, Frederick Chiluba. Magistrate Chinyama said in future he would not hesitate to cite anyone for contempt of court if an application came his way.<sup>33</sup> In addition to the Zambian government's intolerance of the press, there have similarly been restrictions imposed on radio stations.

Further, despite the protection of the right to freedom of expression under the Zambian Constitution, its scope is limited. Article 20(3) states that:

“Nothing contained in or done under authority of any law shall be held to be inconsistent with or in contravention of Article 20, to the extent that it is shown that the law in question makes provision that is ‘reasonably required in the interest of defence, public safety, public order, public morality, or public health.’”

Article 20(3)(b) permits limitations that are reasonably required for the purpose, among others, of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence. So any law, or act done pursuant to the provisions of any law, can, in principle, be challenged under the constitution on the grounds that it is not reasonably required or even if it is reasonably required that it is not reasonably justifiable in a democratic society.

What is "reasonably required" or "reasonably justifiable in a democratic society" has not been defined by the constitution, and the courts have had the opportunity to do so in passing only recently in relation to the provisions of Section 5(4) and Section 7 of the Public Order Act, 1955 in the case of *Christine Mulundika v. The People*.<sup>34</sup>

In addition to the limitations provided for in Article 20(3), Article 25 of the constitution permits derogation from freedom of expression during time of war or a state of public emergency. One of the consequences of the broad grounds for limiting freedom of expression is that laws which undermine this freedom are presumed to be constitutional unless declared otherwise by the courts. Any person who believes that his fundamental rights have been, are being or are likely to be infringed by any provision of the law or act done under the authority of any law can apply to the High Court under Article 28 of the Constitution. The court can make any order or directive as may be necessary to give effect to the rights in question.

Although Article 27 provides for a mechanism to forestall the enactment of any legislation which is unconstitutional, it is difficult to see how ordinary citizens can use it. These processes are often cumbersome and complex for ordinary citizens.

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<sup>32</sup> Friday, November 26, 2004. [www.times.co.zm/news/viewnews.cgi?category=all&id=1101451216](http://www.times.co.zm/news/viewnews.cgi?category=all&id=1101451216)

<sup>33</sup> Ibid.

<sup>34</sup> In Zimbabwe, however, which has a similar constitutional provision, the Supreme Court observed: "What is reasonably justifiable in a democratic society is an illusive [sic] concept — one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right."

In terms of the Zambian constitution- Article 27 the Chief Justice may, if requested to do so by the National Assembly, set up a tribunal to look at the provisions of a bill which are inconsistent with the constitution. The request must be made to the Speaker, by not less than 30 members of the National Assembly, within three days of the final reading of the bill. In underdeveloped countries like Zambia, the constitution remains a complex document, and it is unthinkable to expect people to discharge these responsibilities under the constitution in the face of dire socio and economic circumstances.

Further, Article 78(8) of the constitution provides that no law shall come into operation until it has been published in the *Government Gazette*. The rationale for this is to make it known to the public and encourage debate. But there is no constitutional obligation to gazette a bill before it becomes law, except where the bill involves the alteration of the constitution. Moreover, the Gazette is often published late, and even when it has been published there are only a few copies for circulation among members of the National Assembly. The same applies to parliamentary debates. The position on law reports is even worse. The latest official report is the Zambian Law Report of 1987. In the absence of up-to-date law reports, access to judicial decisions is difficult, even for legal practitioners.<sup>35</sup>

### 3.2 Other Legislation

Most pieces of legislation which undermine media freedom and the right to access information in state hands are legitimised on the grounds of national security, public order or public peace. In a report prepared by Maloney and Mue (1998:11) on Media Law and Practice in the SADC countries,<sup>36</sup> a point is made that *'the entire government machinery in Zambia is run in secrecy. The public has access to the information which the government wants them to have. Press queries often go unanswered. Public officials are under no obligation to provide the information which is sought. Even official government publications are difficult to obtain.'*

The Zambian penal code<sup>37</sup> has been one of key instruments used by the state to deny access to information in state hands on the grounds of national security.

Under Section 67 of the Penal Code, it is an offence, punishable on conviction by up to three years' imprisonment, for anyone to publish, whether orally or in writing, any statement, rumour or report which is likely to cause fear and alarm to the public or disturb the public peace, knowing or having reason to believe that such statement, report or rumour is false. This provision is especially unfair and unreasonable in a country where those in power have no obligation to answer inquiries from the press or public and where there are no legislation enabling people to have access to government information.

Under Section 69 of the Penal Code, it is an offence for anyone to publish, with the intention of bringing the President into hatred, ridicule or contempt, any defamatory

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<sup>35</sup> Ibid. at p.11.

<sup>36</sup> *Media Law and Practise in Southern Africa No.7: Zambia* (1998) ARTICLE 19 <http://www.article19.org/docimages/243.htmreport>

<sup>37</sup> The Zambian code is the coloraly of the Criminal Procedure Act in South Africa.

or insulting matter, whether in writing, print, word of mouth or in any manner. The penalty for this offence is imprisonment for up to three years.

In addition to the penal code, the State Security Act of 1969 has an all-embracing provision dealing with possession, communication and receipt of information relating to national security Section 4 of the Act states:

“It is an offence for anyone in possession of any matter or information relating to a protected place which has been entrusted to them in confidence by a government official, or which they have obtained as a result of their current or former position as an office-holder or contractor to the government, to use that information in a way which is prejudicial to the safety or interests of the republic or to communicate it to an unauthorized person or to fail to take proper care of it, or to retain any such document or material under their control when they have no right to do so or to fail to comply with directions for its return or disposal.”

Further to section 4, subsection 3 also makes it an offence to receive material believing it to be communicated in contravention of the provisions of the Act, unless the person receiving it can show that it was so communicated against his or her wish.

Section 5 of the State Security Act further provides:

“It is an offence for anyone in the service of the government to communicate any classified matter to a person other than one to whom it is in the interests of the country to communicate it. Anyone convicted of this offence is liable to imprisonment for up to 20 years.”

"Classified matter" is defined in the Act as any information or thing declared to be classified by an authorized officer. The effect of section 5 is to grant absolute discretion to authorized officers to determine what classified matter is. This clearly undermines media freedom by making it difficult to obtain access to information, since the authorized officer may simply declare any information being sought as classified matter.

### **3.3 JUBILEE Zambia**

JUBILEE Zambia has been active primarily in the area of debt and debt related issues. According to JUBILEE Zambia<sup>38</sup>, the amount of debt owed by Zambia to the African Development Bank (ADB), International Monetary Fund (IMF) and the World Bank (WB) totals 7.3 billion US dollars. Zambian income per capita is 300- 330 US dollars and the dollar per capita is 700 US dollars. The dollar per capita is higher than the Zambian income per capita which currently stands at between 300 and 330 US dollars. This, according to Jubilee Zambia illustrates the gravity of the economic situation in Zambia. Thus Zambia is classified as a Highly Indebted Poor Country (HIPC). About 170 million US dollars from the national coffers go towards servicing the debt annually. This amount is higher than what government allocates to education, health and other social services. Jubilee Zambia further notes that ‘despite the annual

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<sup>38</sup> Interview, 21.12.2004.

servicing of the debt with such huge amounts the principal debt remains intact – Zambia is only dealing with the interest on the principal debt’. It is against this background that JUBILEE Zambia’s constant demand has been the immediate cancellation of the debt. The demands imposed by the newly configured African Union (AU) in the form of the New Partnership for Africa’s Development (NEPAD) and the Millennium Development Goals (MDG) have also given impetus to the claim for debt cancellation if Zambia is to realise the imperatives imposed by NEPAD and MDG.

Jubilee Zambia notes the importance of a progressive access to information regime if JUBILEE Zambia is to engage meaningfully in debt and debt related issues:

“It is very important that in order to participate meaningfully in the national development process, we must have correct information at the right time.”<sup>39</sup>

In principle, government is committed to making information available to civil society organisations and persons requesting information for the exercise of rights, but this commitment is not translated into practise.

JUBILEE Zambia’s campaign has been centred around access to agreements between Zambia and the creditors (IMF, ADB and WB). The organisation has required information on the terms and conditions of loan agreements so that they can offer alternatives where necessary. In terms of the Zambian constitution, the Minister of Finance has the sole power to enter into loan agreements with creditors. JUBILEE Zambia has been very critical of these immense powers conferred on the Minister of Finance. A need to have wide ranging debate on state borrowing is reflected on the submissions made by JUBILEE Zambia to the Constitutional Review Commission.<sup>40</sup>

It is in limited instances that government has co-operated and granted requests, otherwise civil society organisations have had to approach the Human Rights Commission. Jubilee Zambia points out that ‘certain practises die hard- the Minister of Information does not entertain requests for information and consequently civil society organisations have developed strategies and opportunities for accessing information.’ The Human Rights Commission is often approached to follow up on the requests made. In certain instances, creditors and donor organisations such as the DFID, EU is approached to provide information. According to Jubilee Zambia, their response has been mixed.

The government has however, in certain instances, been keen to provide information and involve civil society organisations in decision making. For example, the Medium Term Expenditure Financial Budget and the Sector Advisory Group on Macro Economic Framework comprise representatives of civil society organisations.

It would seem that the mixed response by the government in providing information is informed largely by two factors. Firstly, where a request is made and government views the information sought as calculated to embarrass it – the request haven’t been

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<sup>39</sup> Ibid.

<sup>40</sup> The Constitutional Review Commission is a body set up to look into amending the constitution by the year 2008.

successful. However where a collegial and non threatening relationship obtains – there haven't been difficulties with accessing information. Jubilee Zambia makes the point lucidly that:

“We have endeavoured to create a working a relationship with the state where we are seen as partners in development and not critics and this has enabled us to gain access information where it would otherwise have been difficult.”<sup>41</sup>

Jubilee Zambia also notes that ‘the challenges facing organisations requiring information in state hands to advance their work are the identification of common rallying points so that advocacy groups speak consistently and in one voice.’

### 3.4 MISA Zambia

The lack of constitutional and legal protection of the right to access information in state hands has even become more acute particularly amongst media organisations. Media and civil society organisations have demanded that the Zambian government enact legislation that will provide for the right of access to information, set out the scope of information to be made available to the public and promote transparency and accountability by public officers.

Recently (in February of this year), members of the Zambian media marched to Lusaka to demand the enactment of the Freedom of Information Bill. The president of the Zambian chapter of the Media Institute of Southern Africa (MISA) said: ‘the bill was among the three pieces of legislation which were to have been approved by parliament last year. The other two – the now Independent Broadcasting Authority Act, and an amendment to the Zambian National Broadcasting Corporation Act, to transform it into a public service broadcaster went through parliament. But the Freedom of Information Bill was withheld’.<sup>42</sup>

Lobbying still continues and public officials remain sceptical about the merits of the proposed legislation.<sup>43</sup>

According to MISA Zambia, there are a number of practical obstacles facing those who attempt to access information from public authorities. They often receive wrong or inadequate legal guidance, since very few lawyers and judges have an appreciation of media or constitutional issues and so have not developed the necessary expertise for dealing with them.

Even though the requester is able to gain physical access to the relevant building (that is Department of Information), in order to file a request once the relevant official is found. Because of a lack of access to information legislation setting out the procedure for the state to handle requests, the requests end up as mute refusals. In the absence of lack of access to information no administrative capacity exists within government

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<sup>41</sup> Interview, 21.12.2004.

<sup>42</sup> [http://www.irinnews.org/report.asp?ReportID=39443&SelectRegion=Southern\\_Africa](http://www.irinnews.org/report.asp?ReportID=39443&SelectRegion=Southern_Africa)

<sup>43</sup> <http://www.irinnews.org/report.asp?ReportID=44062>

departments to respond to requests for information. Consequently, requesters end up resorting to the Human Rights Commission.

As a result of the intervention of the Human Rights Commission and media organisations, between 1991 and 1992, there were several court decisions upholding the importance of the public's right to information. Legal action has however proved expensive and protracted and most importantly remains inaccessible to the many that require information for the exercise of constitutional rights.

### **3.5 Challenges**

The government of Zambia, from 1999 has acknowledged the need to enact an access to information legislation but has up to now done nothing in that regard. Civil society in general has not been very vocal in lobbying the government for the enactment of an access to information legislation. It seems that people of Zambia do not appreciate the importance of the right to access to information and its value for democracy. Access to information is a requirement for consolidating democracy. There is a need to educate citizens on the importance of the right to freedom of information at the national level while at the same time lobbying the government to enact a law giving effect to the right.<sup>44</sup>

## **4. ZIMBABWE**

### **4.1 Overview of Legal Framework and Constitution**

The constitution of Zimbabwe Act, 1979 protects the right to information under the wide contours of the right to freedom of expression. Article 20(1) of the constitution provides that:

“(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

Article 20(2) further provides for the limitation of the right to freedom of expression in the interest of defence, public safety, and public order, the economic interests of the state and public health and morality. The section reads:

“(2) nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision:

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health.”

What is in the interest of defence, public safety, public order, the economic interests of the state and public health and morality is defined broadly to include the protection

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<sup>44</sup> see: The Fourth Media Lawyers Conference (2001) at p.23.

of the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings; the prevention of the disclosure of information received in confidence and maintenance of the authority and independence of the courts or tribunals or Parliament (Article 2(a)(i) – (iii).

A recent draft constitution has attempted to clearly define the right of access to information in relation to the right to freedom of expression. The draft constitution unveiled in December of 1999 provides the following:

“(1) everyone has the right to freedom of speech and expression, which includes—

- (a) Freedom to hold opinions;
- (b) Freedom to seek, receive and communicate ideas and information regardless of frontiers;
- (c) Freedom of the press and other media of communication;
- (d) Freedom of artistic creativity; and
- (e) Freedom from interference with correspondence or other forms of communication, including electronic and telephonic communication.”

Subsection (1)(b) attempts to provide for an active right to information. Despite this constitutional guarantee, the government of Zimbabwe has nevertheless provided for the establishment of a media commission with powers to take disciplinary action against journalists who violate “any law or code of conduct applicable to them.” Further, the current constitution and other laws contain a long list of restrictions on free expression, including prohibitions on criminal defamation.

## 4.2 Other Legislation

There is no legislation giving effect to the right of access to information. The parliament approved the Access to Information and Privacy Bill in January 2002 and the President signed it into law on February of the same year.<sup>45</sup> A misnomer about this act that bears mention is that whilst its title refers to freedom of information and access to information, its provisions provide for the opposite. The main thrust of the act is to give the government extensive powers to control the media by requiring the registration of journalists and prohibiting the “abuse” of free expression.<sup>46</sup> It has been widely viewed as an instrument designed to give the government more powers for media censorship.<sup>47</sup> The provisions on access to information are limited to citizens or residents to records held by a public body. Unregistered media and foreign agencies are excluded from categories of persons entitled to exercise this right. It has been argued that the Access to Information and Public Privacy Act (AIPPA) comes on top of the already draconian Public Order and Security Act (POSA) which has been

<sup>45</sup> Access to Information and Protection of Privacy Act (AIPPA), 15th March, 2002 (General Notice 116/2002). The act was amended in June 2003 by the Access to Information and Protection of Privacy Amendment Act, 2003, No. 5 of 2003.

[www.kubatana.net/html/archive/legisl/030611aippamd.asp?sector=LEGISL](http://www.kubatana.net/html/archive/legisl/030611aippamd.asp?sector=LEGISL)

<sup>46</sup> ODAC Background Paper: *Public Accountability and Multilateral Governance: The State of the Art Challenges for the Region* at p.9. [www.opendemocracy.org.za/documents/Background\\_Paper.doc](http://www.opendemocracy.org.za/documents/Background_Paper.doc)

<sup>47</sup> Banisar D. *Freedom of Information Around the World Update 2002*, (Harvard University, 2002) [www.privacyinternational.org/issues/foic/](http://www.privacyinternational.org/issues/foic/)

tightened to impose a jail sentence of up to two years for any journalist caught working without accreditation from the government-controlled media commission.<sup>48</sup>

The Access to Information and Public Privacy Act (AIPPA) also provides that the public authority upon whom information is sought must respond to a request in thirty days. There are exemptions for cabinet documents and deliberations of local government bodies, advice given to public bodies are deemed privileged, client and attorney privilege, law- enforcement proceedings, national security, inter-governmental relations, public safety, commercial information and privacy.<sup>49</sup>

There is also a public interest provision that requires the government to release information even if there is no request. Such information would pertain to matters that threaten public order; the prevention, detection or suppression of crime, and national security. The act also includes provisions on access and use of personal information.

There is also a prohibition on reporting the proceedings of a Parliamentary Committee. It is regarded as a serious offence to report parliamentary proceedings and the President may forbid disclosure of even the possibility of future proceedings in a court in relation to any matter as well as all matters connected with any current or future legal proceedings.<sup>50</sup>

A number of legislation in Zimbabwe like the ones discussed above grant virtually unlimited discretionary powers to the executive to restrict the flow of official information. In addition to the above, another such example is section 18 of the Zimbabwean Law and Order (Maintenance) Act. This act allows the President to prohibit certain publications in his absolute discretion with no possibility of judicial review.

### 4.3 SEATINI

Contrary to the experience of most media organisations and civil society organisations, SEATINI contends that ‘we work in partnership with government.’<sup>51</sup> According to SEATINI, their main objective is to improve and assist government in negotiations, conduct workshops with government officials on issues and debates around the World Trade Organisation and Africa’s relationship to it.’ To this end SEATINI hasn’t experienced difficulties in accessing information in state hands to enable it to engage government on regional trade negotiations between government and; COMESA and the SADC region.

According to SEATINI, despite the lack of a legal framework for the right of access to information and by extension the administrative capacity to handle requests for information, their organisation hasn’t experienced difficulties. Not only are most of their written requests considered by the state officials – even oral requests for information is possible. In the words of SEATINI: ‘we are able to phone the relevant

<sup>48</sup> <http://www.ifex.org/es/content/view/full/62982/>

<sup>49</sup> Banisar D. *The Freedominfo.org Global Survey* (May 2004)

<sup>50</sup> *Freedom of Information in Southern Africa*, No. 16 October 2000.

[www.article19.org/docimages/785.htm](http://www.article19.org/docimages/785.htm)

<sup>51</sup> Interview with Richard SEATINI, Programme Officer. Interview conducted on 03.01.2005.

government office and request information for instance on commodity price agreements between Zimbabwe and other countries and we get the information’.

SEATINI also notes that they have adopted a position that SEATINI will not be involved in national domestic politics, and the problems of Zimbabwe must be sorted out by Zimbabweans. This stance has in many respects made the government to cooperate with SEATINI and not see them as potential critics.

#### **4.4 MWENGO**

Mwengo’s main objective is to strengthen the capacities of NGO’s in Eastern and Southern Africa to articulate and implement a development agenda rooted in African experience and analysis. Contrary to SEATINI’s experience with the Zimbabwean government, MWENGO has had difficulties in accessing information in state hands. MWENGO contends that, in seeking certain information in state hands, a distinction should be made between instances where the information is readily made available; where access is denied and where the government department/ body in question does not have the administrative wherewithal to make available information even if it can. It is the last instance that MWENGO identifies as featuring prominently in attempts to access information. This instance leads to mute refusals. In other words, the information is out there, and the official struggles to get hold of it and in the eyes of the requester this amounts to a refusal to furnish the requested information. MWENGO characterises this as one of the problems that continues to vex even those public authorities who are willing to make available unclassified information.

In addition to mute refusals, there have been instances where there has been outright refusal to grant information. This has been particularly the case in the areas of macro-economic policy formulation.

There is need, according to MWENGO to look critically at the readiness of bureaucracies in some SADC countries to roll out the demands attendant upon the enactment of a freedom of information legislative framework.

#### **4.5 Challenges**

The Supreme Court of Zimbabwe is currently considering a case on the interpretation of the actual ambit of the right to freedom of expression and the right to access information. The Zimbabwe Lawyers for Human Rights and the Legal Resources Centre Foundation are applying for an order against the state President to disclose reports of two commissions of inquiry.

Pending the outcome of the above mentioned case, challenges for access to information remain in Zimbabwe. The restrictive nature and impact of the registration requirements for civil society organisations and media organisations has rendered the political climate quite precarious for the exercise of the right to access information in state hands. To date three (3) newspapers have since been closed for allegedly failing to comply with the registration requirements throwing a large number of journalists

and support staff into the streets. The closures have had a negative impact on freedom of expression and denied the public of an independent and pluralistic media.<sup>52</sup>

The government of Zimbabwe has since 2001 suggested that a bill on access to information is underway. One of the difficulties for civil society organisations operating in Zimbabwe is that the Ministry of Information in Zimbabwe views members of the public who seek information as enemies of the state, and the public's request for information are turned down, and a conference of media lawyers acknowledged that the exercise and enjoyment of the right to information in Zimbabwe is further impeded by a breakdown of law and order.<sup>53</sup>

## 5. NAMIBIA

### 5.1 Overview of Legal Framework and the Constitution

The Namibian constitution, like most constitutions of SADC countries protects the right of access to information under the right to freedom of expression. Article 21(1)(a) of the 1990 constitution of Namibia guarantees freedom of speech and expression, including freedom of the press and other media:

“1. all persons shall have the right to:

Freedom of speech and expression, which shall include freedom of the press and other media;...”

Article 21(2) sets out limits on these freedoms:

“2. The fundamental freedoms referred to in paragraph (1) shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said paragraph., which are necessary in a democratic society and are required in the interest of the sovereignty and integrity of Namibia, national security, public decency or morality...”

According to Article 21(2), legislation providing for national security, public decency etc. would trump the right to access to information protected under the right to freedom of expression. The limitations on the right to freedom of expression are qualified by Article 22 which is titled- “Limitation upon Fundamental Rights and Freedoms” and provides that:

“Whenever or wherever in terms of the constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

Be of general application, shall not negate the essential content, and shall not be aimed at a particular individual;

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<sup>52</sup> <http://www.ifex.org/es/content/view/full/61449/>

<sup>53</sup> The Fourth Media Lawyers Conference (2001) at p. 24.

Specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.

Shortly after independence the government of Namibia adopted an Information Policy which states that the nurturing of democracy requires a constant and free flow of news and information. The main objective of this policy is “to ensure that the country’s media are free and able to fulfil their traditional roles of public engagement, education and entertainment...”<sup>54</sup>

Other than this policy, there is no legislation guaranteeing access to information.

## 5.2 Other Legislation

There is no law providing for access to information.

The Namibian government’s approach to access to information is coloured by its longstanding reluctance to address questions and disclose information related to the struggle for independence. The Namibian government has been criticised for its refusal to undertake transparent investigations and provide documentation of events that occurred during the liberation struggle.<sup>55</sup>

Despite the above and the dearth of legislation providing for access to information, Namibia started a debate on the enactment of access to information legislation. At the 9<sup>th</sup> International Anti Corruption Conference held in Durban, South Africa in 1999, L. H. Du Pissani, the Deputy Prosecutor General outlined a broad “Anti- Corruption and Promotion of Ethics Initiative” that presented recommendations to parliament, including that “an affirmative obligation be placed on government as well as on other public institutions that operate on taxpayers money to disclose maximum information to citizens. Another recommendation that was made to parliament was that a Freedom of Information Act should be passed and constitutionally safeguarded.

These recommendations were carried forward in the form of the National Integrity Promotion Program (NIPP). In Transparency International’s Global Corruption Perceptions Index for 2003, Namibia was listed at 41 well above the majority of other African countries. However, to date, there’s no bill specifically enabling public access to information that has yet been passed.

## 5.3 MISA Namibia

According to MISA, all legislation in Namibia is published but not all ministerial regulations. Ministers publish public information leaflets when the need arises and if the budget allows, examples are leaflets on Namibian national symbols, government posters, code of conduct for labour inspectors, and all policy documents. The Office of the Government Gazette and the Department of Justice publish legislation and regulations. Parliament publishes draft bills and notices pertaining to the work of the

<sup>54</sup> Access to Information in Developing Countries by Robert Martin and Estelle Feldman, April 1998 (Working Paper) at p.3. [www.transparency.org/working\\_papers/martin-feldman/7-legislation.html](http://www.transparency.org/working_papers/martin-feldman/7-legislation.html)

<sup>55</sup> ODAC Background Paper, *Public Accountability and Multilateral Governance: The State of the Art-Challenges for the Region* p.8

National Assembly and the National Council. National statistics are also published. Government publications are available to the general public at the National Library of Namibia, the library of the University of Namibia and at some regional offices of the Ministry Information and Broadcasting. MISA also contends that members of the public easily access information from municipalities and town councils. As noted by Martin and Fieldman (1998), there is generally a willingness to move towards access to information legislation in Namibia.<sup>56</sup>

Kandji Kaitira, a Programme Manager for MISA Namibia further notes that they are facilitating processes geared towards the enactment of access to information legislation in Malawi and other SADC countries. To this end there is an Access to Information Bill in Malawi and plans are also afoot in Namibia.

### **5.4 Challenges**

According to Martin and Feldman (1998), the Namibian government is facing serious budgetary constraints which make it difficult to publish information regularly. In the absence of clear guidelines which an access to information law would provide, it is difficult for the state administration to meet an obligation that is not clearly defined and procedurally set out.

## **6. MOZAMBIQUE**

### **6.1 Overview of Legal Framework and the Constitution**

The constitution of Mozambique, came into force in 1990 and specifically protects the right to information as an aspect of freedom of expression. Article 74 of the constitution states:

“All citizens have the right to freedom of expression and to freedom of the press as well as the right to information; Freedom of expression, which includes the right to disseminate ones own opinion by all legal means, and the right to information shall not be limited by censorship; freedom of the press shall include, in particular, the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications; The exercise of the rights and freedoms referred to in this article shall be regulated by law.”

### **6.2 Other Legislation**

The Press Law of 1991 contains provisions aimed at ensuring that the rights set out in Article 74 of the constitution are realised. Article 3 of the Press Law defines the right to information as "the faculty of each citizen to inform him/herself and be informed about relevant facts and opinions, at the national and international level, as well as the right of every citizen to disseminate information, opinions and ideas through the press".

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<sup>56</sup> Access to Information in Developing Countries by Robert Martin and Estelle Feldman (April 1998), Working Paper at p.4. [www.transparency.org/working\\_papers/martin-feldman/7-legislation.html](http://www.transparency.org/working_papers/martin-feldman/7-legislation.html)

In terms of the Press Law, all legislation should be published and there is a government printing service. National Statistics should also be published. According to Martin and Feldman (1998)<sup>57</sup>, the Mozambique government, despite the absence of access to information legislation is able to provide key information to the public. The government regularly publishes public interest material.

### **6.3 Challenges**

Whilst the Press Law represents an attempt by the Mozambique government to make information available to members of the public it does not go far enough in ensuring that an administrative capacity is created within the state apparatus to make information available. More importantly, the Press Law (Article 3 in particular) does not establish the responsibility of government to provide information freely to its citizens, subject only to the limitation of genuine interests of national security, personal privacy, commercial secrecy and the operation of the judiciary.

There is therefore an urgent need for further legislation establishing the mechanisms whereby citizens can achieve access to information.

In a report prepared by Article 19 on the State of Media Law in Mozambique<sup>58</sup>, a point is made that journalists belonging to the independent media complain about the discrimination they suffer when attempting to gain access to official information by comparison with their colleagues from the public media. The report also notes some of the initiatives by the government aimed at providing information to civil society organisations. However these occasions such as the weekly meeting of the Prime Minister with national and foreign journalists where officials provide information to the media as a whole depend on good will and contacts rather than on clearly established rules.

## **7. SWAZILAND**

### **7.1 Overview of Legal Framework and the Constitution**

There is currently no constitution in Swaziland. The constitution of 6 September 1968 was suspended on 12 April 1973 as a result of a Royal Proclamation by the current King's father (King Sobhuza). The King's Proclamation criticized the constitution for failing "to provide the machinery for good government and for the maintenance of peace and order" and stated that it had "permitted the importation into our country of highly undesirable political practices". It also abolished the whole second chapter, on the protection of fundamental rights and freedoms, including those of freedom of expression and freedom of association and assembly.

A new constitution was promulgated 13 October 1978, but was not formally presented to the people; since then a few more outlines for a constitution have been compiled

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<sup>57</sup> Ibid.

<sup>58</sup> Media Law and Practise in Southern Africa No.11 (July 1999) at p.12.  
<http://www.article19.org/docimages/235.htm#9>

under the Constitutional Review Commission (CRC), but so far none have been accepted.

Consequently, Swaziland does not have constitutional protection of the right to information. All that currently remains of the constitution are a few sections including those concerning the exploitation of land and minerals, the succession within the monarchy, financial matters and some aspects of the judiciary.

Swaziland is also not a party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). It is the only state in the SADC region that is not party to the ACHPR and is also one of two states in the region that is not a party to the ICCPR.

## 7.2 Other Legislation

Swaziland has no freedom of information legislation. On 29 July, Swaziland's parliament approved the Secrecy Act, this act restricts the media in their efforts to obtain information and report freely on the activities of government. It also forbids journalists from publishing information the government considers secret. Individuals found guilty of violating the law can be jailed for up to five years or fined up to US\$3,385 -more than double the annual salary of most journalists in Swaziland, says MISA.<sup>59</sup> Under the new law, journalists found in possession of confidential government documents can also be taken to court and forced to reveal their sources.<sup>60</sup>

The Secrecy Act is not only confined to journalists, but also provides that civil servants found guilty of disclosing such information face the same punishment.

In clarifying the ambit of the Act, Ministry of Justice and Constitutional Affairs spokesman David Lukhele said:

"If a journalist is found in possession of confidential government documents, the government will seek a court order forcing that particular journalist or media house to disclose the source of the information."<sup>61</sup>

Another cabinet source said:

"If a journalist is convicted of contravening the Secrecy Act, he or she faces a minimum [fine] of more than US \$3,000 or five years in jail."

He then added,

<sup>59</sup> <http://www.ifex.org/en/content/view/full/34109/>].

<sup>60</sup> MISA says the government's move to enact the Secrecy Act follows a series of incidents in which authorities, including Swaziland's King Mswati III, claimed to have been embarrassed by reports detailing the alleged misuse of public funds. In particular, the country's only major independent media outlet, the "Times of Swaziland," has written several exposés of government corruption, including in 1995 when it published the names of King Mswati III's brothers and other royal officials whose refusal to repay hundreds of millions of dollars in loans helped drive the government bank into bankruptcy, reports the UN Integrated Regional Information Network (IRIN) news service. see IFEX alert: <http://www.ifex.org/en/content/view/full/34109/>

<sup>61</sup> <http://www.ifex.org/en/content/view/full/75/?PHPSESSID=51d81c0b1f4bc2bb96cd3df79326230f>

"However, a judge is still at liberty to exercise his or her discretion when delivering the sentence. This will depend on the extent of the damages caused by [the] publication of the confidential information."<sup>62</sup>

In addition to the Secrecy Act, there's the Official Secrets Act. Enacted in 1968, the act prohibits any person who possesses or has been entrusted, "by any person holding office under the Government", with any code, password, sketch, plan, model, article, note, document or information, from communicating it to any unauthorized person, retaining it, failing to take proper care of it or using it "in any manner or for any purpose prejudicial to the safety or interests of Swaziland". The penalty is a fine or a prison sentence of up to five years, or both. To convict a person under this act, it is not necessary to prove that the accused was guilty of any particular act, but merely that "it appears, from the circumstances of the case or the conduct of the accused, that his purpose was a purpose prejudicial to the safety or interests of Swaziland".

The only exception is the Magistrate's Courts Act, 1939, which guarantees the public's right of access to records, stating that "the records and proceedings of the court shall in all cases be accessible to the public, under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed by the rules." However, access to information under this Act, like most laws providing for access to information in the region (that is Mozambique) 'depends on goodwill and contacts within the state bureaucracy rather than on any clearly established rules.'<sup>63</sup>

### **7.3 Challenges**

A Freedom of Information Act is urgently needed in Swaziland. Concomitant with this challenge is the need for a constitution that provides for a bill of rights.

A Constitutional Review Commission has been set up to draft a constitution. It sets the tone for civil society organisations to lobby for a constitution that respects basic human rights, including freedom of expression and the right of access to information.

## **8. MALAWI**

### **8.1 Overview of Legal Framework and the Constitution**

The constitution of Malawi provides comprehensive protection for the right to access information. In addition to the protection of the right to access information under the rubric of the right to freedom of expression, separate provisions define the specific right to access official information. Article 37 of the Malawian constitution provides that:

"Subject to any act of parliament, every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of his right."

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

Despite the provision's express protection of the right to information, the proviso that this right is subject to an act of parliament limits the efficacy of the provision itself. In other words, the right of access to information must not be in conflict with any act of parliament.

## **8.2 Other Legislation**

There is no law providing for the right of access to information in Malawi. The right of access to information is only provided for under the constitution subject to the limitation that it may not be in conflict with any act of parliament.

## **8.3 MALAWI Economic Justice Network**

The MALAWI Economic Justice Network (MEJN) is a coalition of civil society organisations interested in economic governance in Malawi. MEJN is a product of an organisational transition by JUBILEE 2000 from an organisation advocating for debt cancellation to one that seeks to engage economic policy formulation beyond debt and debt related issues. MEJN has therefore since its inception in 1999 been engaged in economic policy formulation through engaging in budget analysis and monitoring. The organisation has also been involved in the areas of trade and trade negotiation.

Despite the absence of legislation providing for the right of access to information, MEJN requested information from the Ministry of Finance on budget formulation. MEJN's request was not considered. MEJN has had to approach the IMF and the World Bank for such information and according to MEJN, the response has been mixed.

After intensive campaigning, the government finally entered into a memorandum of agreement with MEJN to access information in state hands. As a result of the agreement concluded in 2002, MEJN is now able to access information from the various parliamentary committees and in particular the Budget and Finance Committee.

According to MEJN, even though the constitution of Malawi provides for the right to access information and ends there. In other words, there is no concomitant provision providing for the enactment of legislation to realise this constitutional imperative, civil society organisations should none the less creatively look at other pieces of legislation which provide for opportunities for accessing information in a particular context. For the MEJN, the Public Finances and Management Procurement Act provide such opportunities. Despite its efficacy, the Act does not provide for mechanisms for compelling disclosure where there is refusal. It is against this background that access to information legislation remains crucial.

Following the conclusion of the memorandum of agreement in 2002, MEJN notes that they have since become partners with government. MEJN is involved in discussions with government in the formulation and implementation of its Poverty Reduction Strategy. MEJN is also a permanent member of the National Committee on Monitoring and Evaluation of Government Programmes. Donors also sit as observers in the Committee. MEJN also sits in a committee under the Ministry of Trade and

Industry where two seats are provided for civil society organisations and MEJN is one of the committee members. Another critical department in the area of social and economic justice – the Ministry of Economic Affairs is pro- active in providing information to the public thereby obviating the need for requests in the areas of policy and the budget.

These developments, according to MEJN, which are fairly new (2002) have seen the state taking a pro- active stance in the provision of information to the public and civil society organisations. Even more, the involvement of civil society organisations in deliberations around policy formulation has obviated the need to request information as the availability of information becomes a prerequisite for participation in the committees.

### **8.4 Challenges**

The Malawian government has been considering the enactment of access to information legislation. Civil society organisations have taken a leading role in raising public consciousness and campaigning for freedom of information legislation.<sup>64</sup> Submissions have been made to the Malawi Law Commission on implementing the right to freedom of information in the Malawi Constitution. The Commission decided, as a preliminary matter, to recommend an amendment of Section 37 of the Malawi Constitution to remove the words "subject to any act of parliament" and thus strengthen the content of the constitutional right. While the Law Commissioner has expressed the hope that Malawi will move towards the South African trend in this regard, there has been no movement at the official level and freedom of information no longer appears to be on the government's agenda.

## **9. LESOTHO**

### **9.1 Overview of Legal Framework and the Constitution**

Section 14 of the 1993 Constitution of Lesotho provides that:

“(1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.”

However, this right is subject to a number of restrictions, which are listed in paragraphs 2, 3 & 4 of Section 14 which provide that:

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – in the interests of defence, public safety, public order, public morality or public health; or for the purpose of protecting the reputations, rights and freedoms of other persons or the

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<sup>64</sup> Interview with Collins Maglasi, Director of the MALAWI Economic Justice Network, 04.01.2005.

privacy of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation or telephony, telegraphy, posts, wireless broadcasting or television; or for the purpose of imposing restrictions upon public officers.

(3) A person shall not be permitted to rely in any judicial proceedings upon such provision of the law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the freedom guaranteed by subsection (1) to a greater extent than it is necessary in a practical sense in a democratic society in the interests of the matters specified in subsection (2) (a) or for any of the purposes specified in subsection (2) (b) or (c).

(4) Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish.”

The overall wording of Section 14 is reasonably close to that of Article 19 of the ICCPR. It also differs in some important respects. It is noteworthy that it does not explicitly state, as does Article 19 of the ICCPR, that people should have the right to freedom of expression and information "regardless of frontiers".

In addition, while Section 14 guarantees freedom to hold opinions and to receive ideas and information, it is not explicitly stated that there is a constitutional right to actively seek information. This might potentially be interpreted to mean that Lesotho's citizens, including media workers, should wait to receive such information as the government deems fit to release.

There are no provisions in the constitution of Lesotho for any direct derogation from the right to freedom of expression in times of war or under a state of emergency. However, under Section 21, other rights may be derogated from which could lead to *de facto* restrictions upon the right to freedom of expression in such circumstances. The rights which may be derogated from are the right to personal liberty, the right to freedom from discrimination and the right to equality before the law.<sup>65</sup>

## 9.2 Other Legislation

Lesotho has no freedom of information legislation. The Official Secrets Act (No. 36 of 1967) gives the government absolute discretion to decide what information should be released into the public domain. Every document is "classified" until the authorities deem otherwise. Section 3 of the act prohibits the unauthorised obtaining, retention, disclosure or publication of official information which may prejudicially affect the interest of Lesotho. Any body found guilty under Section 3 may be imprisoned for up to fourteen years. To convict a person under Section 3, it is not

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<sup>65</sup> see: <http://www.article19.org/docimages/519.htm#2>

necessary to prove that the accused was guilty of any particular act, but merely that it appears that his or her purpose was prejudicial to the interest of Lesotho.

Sections 12, 13 and 14 of the act also grant the Director of Public Prosecutions, or his representative, the right by warrant to require telegrams to be produced to him, to arrange for interception of communications over telegraph or telephone lines, and to require any person suspected of being able to furnish information on spying offences to disclose it.

In addition to the Official Secrets Act (No. 36 of 1967), the Internal Security (General) Act (No. 24 of 1984) makes it an offence for any person to utter or write any words with subversive intention, whether inside or outside Lesotho. (19) Under Section 9 of the Act, it is unlawful for a person not to disclose information which he or she has and knows or believes to be of material assistance in preventing any subversive activity or for securing the apprehension, prosecution or conviction of a person for an offence involving the commission, preparation or instigation of such subversive activity. A person found guilty of these offences may be fined or imprisoned for up to twenty years.

Another piece of legislation which has the effect of proscribing access to information indirectly is the Sedition Proclamation (No. 44 of 1938). It creates the offence of sedition. According to the act, an act, speech or publication is seditious if it is intended to bring the King, his heirs, successors or government into hatred or contempt. Section 2 provides that:

"...publication includes all written or printed matter and everything, whether of a nature similar to written or printed matter or not, containing any visible representation or by its form, shape, or in any manner capable of suggesting words or ideas".

The tenor of legislation limiting access to information has been such that it is either vague (such as the Sedition Proclamation Act) or is justified on the grounds on national security.<sup>66</sup> According to ARTICLE 19, any restriction on expression or access to information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. It is not justifiable to base such restrictions on vague and subjective phrases such as "the interest of Lesotho."<sup>67</sup>

Finally, section 22 of the Parliamentary Powers and Privileges Act of 1994 prohibits anyone from printing or causing to be printed proceedings of the Senate, the Assembly or a committee without the authority of the Speaker or the President. The penalty for doing so is a fine or imprisonment for up to one year, or both.

### 9.3 Challenges

Since 2000, civil society organisations have been calling for the enactment of legislation dealing with access to information. Although the Lesotho Law Reform

<sup>66</sup> Similar legislation found in Angola, Zimbabwe, Zambia, Angola, Botswana.

<sup>67</sup> <http://www.article19.org/docimages/519.htm#2>

Commission drafted the Access and Receipt of Information Bill in 2000, journalists are still barred from receiving information from the authorities. The aim of the Bill is to give effect to the constitutional right of freedom of expression by ensuring access to information and by enabling people to use such information for the exercise or protection of their rights, but this has not been forthcoming.

MISA Lesotho (MILES), requested the government to "table the Access and Receipt of Information Bill in Parliament," adding that "the work of media practitioners, as an integral part of our society, would be made easier and more effective, more importantly the peoples' constitutional right to freedom of expression through access to information would be put into effect." The Media Institute of Southern Africa (MISA), and MILES (an affiliate) introduced the "ASK and Speak Out" campaigns as an "acknowledgement of the need for access to information legislation" in SADC. <sup>68</sup>

## 10. BOTSWANA

### 10.1 Overview of Legal Framework and the Constitution

Article 12 of the constitution of Botswana includes the right to receive and communicate ideas and information without interference as part of right to freedom of expression.

### 10.2 Other Legislation

The Botswana National Security Act of 1986 follows the wording of many of the Secrecy Acts found in the sub region (that is Angola, Zimbabwe, Zambia, Angola, and Lesotho). It forbids the unauthorised disclosure of a wide range of official information. The penalty for publishing or even obtaining such information is a prison term of up to 30 years. The following are some key provisions of the Act:

“3. Any person who, for any purpose prejudicial to the safety or interests of Botswana

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b. obtains, collects, records, publishes or communicates in whatever manner to any other person any secret official codes, password, sketch, plan, model, note, document, article or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person;

c. ...shall be guilty of an offence and liable on conviction to a term of imprisonment not exceeding 30 years.

4. (1) Any person who, having in his possession or control any secret official codes, password, sketch, plan, model, note, document, article or information that relates to or is used in a prohibited place or anything in

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<sup>68</sup> 2003 World Press Freedom Review: <http://www.freemedia.at/wpfr/Africa/lesotho.htm>

such a place, or that has been made or obtained in contravention of this act, or that has been entrusted in confidence to him by any person holding office under the government, or owing to his position as a person who holds or has held office under the government, or as a person who is or was a party to a contract with the government or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed by or under a person who holds or has held such an office or is or was a party to such a contract –

A. uses the information in his possession for the benefit of any foreign power or in any other manner or for any purpose prejudicial to the safety or interests of Botswana; or

b. ...shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 30 years.

5. (1) Any person who communicates any classified matter to any person other than a person to whom he is authorised to communicate it or to whom it is in the interests of Botswana or is his duty to communicate it, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 25 years.

(2) In a prosecution for contravention of subsection (1) it shall be no defence for the accused person to prove that when he communicated the matter he did not know and could not reasonably have known that it was a classified matter.”

The negative effect of these vague and general provisions on the flow of even the most basic information cannot be over emphasised. Civil servants are required to take oaths of secrecy under this Act and will not release any information without specific authorisation for fear of falling foul of the provisions.

Another effect of these provisions is that members of the public and journalists are directly refused access to information, referred to other officials or simply ignored.

Article 5 deserves special mention in that it makes it quite impossible for a person to know when they might be releasing classified information. It further provides for a penalty of 25 years for the communication of classified information even where the person accused of releasing the information did not know and could not reasonably have known that it was classified. Article 4 of the same Act forbids the use of information "for any purpose prejudicial to the safety or interests of Botswana".

### **10.3 Challenges**

The Freedom of Information bill is not a priority for the government of Botswana. Government officials point out that ‘the passing of a Freedom of Information Bill is a big exercise and must be followed by the setting up of an agency to implement it. This

will require substantial resources - buildings, people, vehicles, office equipment and many others - and thus substantial planning'.<sup>69</sup>

Botswana currently has no policy on the release of information to the public. The main sources of the information on government are speeches made by ministers at official functions, in the National Assembly or on tours of their constituencies. IRIN also notes that telephonic enquiries directed to government officials rarely elicit any meaningful responses to requests for further information.<sup>70</sup> Transparency International<sup>71</sup> also tells the story of a researcher who wanted to write a guide to libraries in Botswana. The researcher approached the headquarters of the National Library Service (BNLS), for a list of addresses of their libraries. Instead, the researcher was told to "obtain the express support of the Office of the President, as is required by the anthropological Act, or forget it!"

MISA Information Officer Caroline Lubikwe told IRIN: "People put in power are accountable for what they do and the decisions they take. Freedom of Information legislation will broaden the information base, making the work of media practitioners much easier."<sup>72</sup>

## 11. SOUTH AFRICA

### 11.1 Overview of Legal Framework and the Constitution

The new Constitution of the Republic of South Africa (Act 108 of 1996) guarantees the right of access to information. Section 16(1) states:

“Everyone has the right to freedom of expression, which includes:

- a. freedom of the press and other media
- b. freedom to receive or impart information or ideas.
- c. freedom of artistic creativity; and
- d. academic freedom and freedom of scientific research.

The right in subsection (1) does not extend to:

propaganda for war; incitement of imminent violence; or advocacy or hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

The general right in section 16(1)(b) is augmented by an explicit right of access to information in section 32 of the Constitution. There is a further Constitutional obligation that the state enacts enabling legislation to fully realize this right.

Section 32 states:

“1. Everyone has the right of access to:

<sup>69</sup> <http://www.irinnews.org/advsearch.asp>

<sup>70</sup> Ibid.

<sup>71</sup> [http://www.transparency.org/working\\_papers/martin-feldman/index.html](http://www.transparency.org/working_papers/martin-feldman/index.html)

<sup>72</sup> <http://www.irinnews.org/advsearch.asp>

any information held by the state; and information that is held by another person and that is required for the exercise or protection of any rights.

The section goes on to state that - national legislation must be enacted to give effect, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

Thus, the right of access to information is not only a constitutional guarantee, but an obligation on the state to give practical assistance to persons seeking access to information in state hands.

### **11.2 Other Legislation**

Contemporaneous with section 32(2) of the Constitution, parliament enacted the Promotion of Access to Information Act<sup>73</sup> (PAIA) to give effect to the right of access to information. PAIA is therefore legislation with a particular constitutional status: it is legislation mandated by the Constitution to give effect to a Constitutional right.<sup>74</sup>

PAIA provides a legislative framework for citizen’s right of access to government information. It marks a significant break with the past. The overall objective of the Act is to establish good governance that is free of corruption and accountable to the public. Part of achieving this is to empower the public effectively to scrutinize governmental decision making processes that affect them, hence the access to information and open meeting sections of the Act. These two sections are subject to certain limitations but generally citizens have the right to access information held by a government body, in so far as this can be done without jeopardizing good governance, personal privacy, commercial confidentiality, law enforcement, legal proceedings, international relations and defence and security.

The next crucial aspect about the Act is the protection it affords the citizen against a private body abusing information held on her/him. The citizen is able to demand that government or the private body alter any personal information held on the citizen and which the citizen deems to be incorrect, while the citizen also has the right to know what the information is being used for or to whom the information will be furnished.

In addition to PAIA, the approach of government to the issue of freedom of expression is underpinned by various other pieces of legislation and practices of state and governmental institutions such as the Judicial Services Commission, the Independent Broadcasting Authority, the Public Protector, the Auditor-General and many others.

### **11.3 Ibrahim Harvey case study**

The Freedom of Expression Institute (FXI) and Mr Ibrahim Harvey, a Masters student at the University of the Witwatersrand brought legal action against a state institution,

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<sup>73</sup> 2 of 2000.

<sup>74</sup> Currie I and Klaaren J, The Promotion of Access to Information Commentary, Siber Ink Publishers 2002 at p.12.

Johannesburg Water in a bid to obtain certain information. Mr Harvey' Masters Degree focuses on the corporatisation of water and sanitation services in the Johannesburg area, and to this end information was sought from Johannesburg Water- a service utility overseeing the provision of water and sanitation in the Johannesburg area.

Mr Harvey has attempted to obtain certain information from Johannesburg Water since 2002. His attempts have been unsuccessful. In 2003, Mr Harvey approached the FXI which then submitted a formal request in terms of section 18 of the Promotion of Access to Information Act, 2000 (AIA) to Johannesburg Water for the disclosure of a range of documents. The documents ranged from minutes of Board Meetings to contracts between Johannesburg Water and its service providers. Some information was provided by Johannesburg Water whilst some was not provided on a number of grounds for refusal listed under the Act that is disclosure of personal third party information, trade and commercial secrets and confidential information that requires protection. The matter awaits adjudication in the near future but a critical lesson to be drawn from the Ibrahim Harvey case study is the paradox of struggling to access information in a country hailed for a progressive freedom of information legislative framework.

#### **11.4 The Open Society Initiative of Southern Africa (OSISA)**

OSISA is involved in Constitutional Review processes in Swaziland , Malawi , Zimbabwe and Zambia.

The Human Rights and Democracy Building Programme of OSISA is involved with the National Constitutional Assembly (NCA) of Zimbabwe and Swaziland. The NCA is a conglomerate of human rights organisations, churches, trade unions, women groups, professionals and interested individuals. Through the NAC, representatives of civic society have come together to initiate a process aimed at entrenching democratic participation by ordinary Zimbabweans and Swazis in the making of a new constitution and in the governance of their country. NCA provides opportunities for OSISA to lobby for the enactment of an access to information legislation in these countries.

OSISA is also involved in the AFRI- MAP component that deals with access to information and interfaces with the three themes identified in the project. that is The Justice Sector; Political Representation and Public Service and Anti - Corruption.

#### **11.5 Challenges**

There can be no doubt that South Africa is enjoying more freedom of expression and access to information than it has done for many decades, even centuries. However, there is still a need for more vigilance. It seems that a lot of public debates must still be encouraged on these issues so that they can actually penetrate the "grassroots" level. The other challenge we are facing is to address the censorship effects that flow from huge numbers of people not having adequate access to the means of receiving and producing information. This great need presents possibly the most daunting, yet diffuse, challenge to ensuring that freedom of expression and access to information is rights owned and practices by all. Even though South Africa bears the most

progressive legislative scheme for access to information in the region, the realisation of this right hasn't been without fault.

## **12. THE FREEDOM OF INFORMATION INDICATORS IN RELATION TO WOMEN AND YOUTH**

According to research recently undertaken by the Community Agency for Social Enquiry (CASE), the difficulty in determining problems experienced by the youth is that there are different definitions of youth in SADC and the definitions espoused by international agencies do not correspond.<sup>75</sup> For present purposes the classification of youth as falling between the ages 18 - 35 will be utilised. Despite the disagreements by several organisations about the exact classification of youth, there is however unequivocal agreement about the place and importance of youth in any country's development. There is also agreement that in addition to the problems of unemployment and poverty, youth in SADC face the critical problem of HIV/ AIDS. Women and youth are the most affected by this scourge.

The importance of access to information was illustrated in a recent case where a South African non governmental organisation, The Treatment Action Campaign (TAC), applied to the High Court to compel the Minister of Health to release the implementation plan for the anti- retroviral rollout, including sites, dates and targets. The court ordered in favour of TAC.

The importance of access to information in developing countries such as those falling under SADC has been well stated in this report.<sup>76</sup> The relationship between the realisation of socio- economic rights and the right of access to information in state hands remains critical. A general measure of the extent of inequality between women and men in areas of socio- economic and political participation and decision making in SADC illustrates that women are still relatively weak and vulnerable compared to men. According to a report prepared by the Development Policy Unit Research of the University of Cape Town titled: Human Development Indicators in the SADC Region<sup>77</sup>, gender imbalances in SADC exists in terms of access to productive resources, educational enrolment and adult literacy rates and most importantly in terms of existing laws that deny women certain rights. The report goes further to note that the average distribution of communication and information technology among people in SADC is extremely low, with women being the hardest hit. For instance, in 1998 there were approximately 15 computers, 28 telephones mainlines for every 1000 people in SADC. South Africa has been exceptional, with 47 computers per 1000 persons and Angola the lowest at 0,8 persons per computers. There were approximately 8,22 internet hosts per 1000 people in SADC in January 2000.<sup>78</sup> The picture presented by these findings, most importantly as it pertains to women is that of huge numbers of people not having adequate access to the means of receiving and producing information. It is these structural conditions and difficulties experienced by women that challenge all those involved in access to information work to ensure that special interventions are designed to ensure that freedom of expression and access to information are rights that should be enjoyed by all.

<sup>75</sup> Youth and Employment- An overview of SADC countries. <http://www.case.org.za/youth.htm#3>

<sup>76</sup> See p. 2, para 1 above.

<sup>77</sup> [www.commerce.uct.ac.za/DPRU/p13.pdf](http://www.commerce.uct.ac.za/DPRU/p13.pdf)

<sup>78</sup> Ibid at p. 6.

Apart from the fact that women experience the highest levels of poverty, a gender analysis of access to information is also necessary in exposing the fallacy in countries that are said to be enjoying human rights, that, in reality many women do not know their rights. If they do, in most cases they do not have access to the means of enforcing those rights. Even more, men that invariably advocate gender neutral policies that impact negatively on women dominate social institutions where gender neutral policies are advocated.

### 13. CONCLUSIONS

The right of access to information whether as a self standing right or an incident of the right of freedom of expression straddles numerous aspects of democratic society in a manner quite unlike other fundamental rights we enjoy. It extends to and can conceivably be regarded as essential to the fulfilment of other rights – notably socio-economic rights and other political freedoms. Both the right of access to information and freedom of expression form the backbone of many vital institutions and activities of civil society.

In undertaking an assessment of the right to access to information in the SADC region, one is mindful of the different political systems within which the right obtains. In countries typified or emerging from a dictatorship, the right hasn't been well received as compared to where societies have been open and a constitution with a bill of rights exists. Interestingly in the SADC countries under investigation, all have a constitution with a bill of rights with the exception of Swaziland. In all the countries except Swaziland, the right of access to information is guaranteed under the broad contours of the right to freedom of expression and in certain instances the limitations on the right render it meaningless. Even more, many SADC countries do not recognise the right of access to information, in spite of the fact that – through the *SADC Protocol on Culture, Information and Sport* countries are expected to promote freedom of information.<sup>79</sup>

Duncan also makes the point that the access to information picture in the region is skewed. Some countries recognise the right to access to information passively whilst other recognises it actively.<sup>80</sup> This picture emerged strongly in the interactions with civil society organisations in the region. So that the need for lobbying for an access to information legislation was widely regarded as pressing.

In relation to the OSJI Freedom of Information Macro Indicators, it seemed apparent that the first macro indicator was met by many countries; namely: whether there exist a legal framework for exercising the right of access to information. As pointed out above, all but one has a constitution that recognises the right to freedom of information passively or actively. Other freedom of information laws such as the Municipal Financial Management and Accounting Act in Malawi do not compel the state to disclose where there is unwillingness to disclose. This seems to be the trend in most countries that information is accessed on the basis of good will and the relationship that the government has with the organisation concerned.

<sup>79</sup> Duncan J in Active or Passive? The Right to Information in Southern African Constitutions, The OSISA Journal, 4<sup>th</sup> ed. Issue 3 November 2004 at p.16.

<sup>80</sup> Ibid.

State secret laws, data protection, have the effect of limiting the right to access information as enshrined in the constitution. It is worth- noting that these laws trump access to information provisions in the constitution because there are built-in limitations within the access to information provision in the Constitution. Virtually all the countries with the exception of South Africa limit the right of access to information in the interest of national security and the honour and integrity of the head of state.

In the absence of a legislative framework giving effect to the Constitutional right to access information most SADC countries do not have specific measures for responding to access to information requests. The handling of requests has in many instances been irregular and as pointed out above dependant upon goodwill and connections within the state apparatus.

With the FXI and Ibrahim Harvey case before the courts, the extent to which the courts will uphold the refusal to provide information on the basis of the grounds for refusal provided for in the Act remains to be seen. At- least what we can be sure of is that litigation around this area will continue despite the existence of an enabling legislative framework in any given situation.

The implications of this examination for the Access to Information Programme are varied. In the first instance, it becomes clear that the current legislative framework does not provide a conducive environment for organisations seeking information to advance socio- economic rights. Secondly, and in the absence of legislation compelling disclosure of information, several principles and guidelines can be developed to access information in the region bearing the following in mind.

In the area of debt and debt related issues:

- Access to agreements between member states and the creditors is essential (IMF, ADB and the WB). In particular, information on the terms and conditions of loan agreements;
- Finance Ministers in most SADC countries have immense powers that enable them to unilaterally enter into agreements with IFI's. Campaigns should be developed around access to information in the hands of Finance Ministries;
- Basic information on revenue and expenditure as provided for mostly in Medium Term Expenditure Budgets of many SADC countries position organisations involved in debt and debt related issues to examine the extent of the borrowing of their countries; and
- Conduct workshops with government officials on issues and debates around the World Trade organisation.

Macro- economic policy formulation:

- Budget analysis and monitoring requires reliable information;
- The use of other legislation other than national legislation, for instance, at local government level providing for access to information on local government revenue and expenditure has proved useful for organisations

looking into budget formulation and analysis. In South Africa the Municipal Finances Management Act is a case in point whilst in Malawi the Public and Management Procurement Act is quite instructive.

#### Macro Indicators in relation to Women and Youth:

- There is also agreement that in addition to the problems of unemployment and poverty, youth in SADC face the critical problem of HIV/ AIDS. Access to information around socio- economic rights should have a specific focus on these groups;
- A general measure of the extent of inequality between women and men in areas of socio- economic and political participation and decision making in SADC illustrates that women are still relatively weak and vulnerable compared to men;
- Some SADC countries still have laws that discriminate against women and exclude them from decision making in society. Campaigns should therefore also be directed at repealing laws that discriminate against women whilst advocating for access to information legislation.

In the absence of legislation as is the case with most SADC countries an obligation should be placed on public authorities to facilitate access to information already in the public domain, for example by ensuring that it is available in published form, or through the Internet or some other easily accessible medium. Similarly, public authorities should establish a cheap, efficient mechanism for ensuring that disclosure actually takes place. Thus a public authority may set up an administrative apparatus to entertain complaints from individuals who have been refused access to information and follow up with public authorities to disclose information where appropriate.

Toby Mendel<sup>81</sup> provides a useful picture of access to information principles that have to be borne in mind when proposing access to information legislation where there is none. In the same breath, the Johannesburg principles<sup>82</sup> also provide useful principles which, taken together, with the ones discussed by Mendel amount to the following:

- No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government;
- Everyone has the right to hold opinions without interference;
- Public authority should be broadly defined to include all levels of government including local government, nationalized industries and public corporations, non-departmental bodies, judicial bodies and even private bodies which carry out statutory functions;
- No public authorities should be completely excluded from the ambit of the law; exceptions relating to sensitive information the disclosure of which would harm certain public interests, such as national security or the prevention of crime, are sufficient to protect those interests;

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<sup>81</sup> <http://fxi.org.za/archives/Medialaw/freedom.htm>

<sup>82</sup> <http://wwwserver.law.wits.ac.za/humanrts/instree/johannesburg.html#1>.

- Public authorities should be under an obligation to disclose, upon request, all information they hold, regardless of the form in which they hold it and the source of the information, subject only to exceptions to protect specific interests;

To this end the Access to Information Program partners approached acknowledged the urgency of access to information legislation and suggested the following interventions:

- Consensus on the need for access to information amongst the partners in SADC must first be achieved;
- The need for information sharing amongst civil society organisations in the region on creative and alternative ways of accessing information whilst advocacy work on the enactment of legislation continues;
- The World Bank, IMF, the African Development Bank and other creditors have been forthcoming more than the state in providing access to information pertaining to bilateral agreements;
- Human Rights Commissions in the respective countries have been instrumental in generating case law enabling access to information where no legislation exists;
- The conclusion of memorandums of agreement have enabled civil society organisations to access information where no legislation exists;
- Identify common energy points for effective advocacy work aimed at the enactment of access to information legislation.
- In South Africa, where such legislation exists, its implementation remains controversial. The controversy includes the issue of abuse and a complete refusal at times to furnish information that might potentially embarrass the government. What lessons are to be learnt from South Africa?;
- The resource implications of insisting on access to information;
- Develop best practise model for accessing information in SADC;
- Advocacy material around accessing to information in SADC must be developed;
- Animate at regional level access to information strategies and successes in each and every country.

There was also consensus that the right as contended for requires certain fundamentals to be in place to function properly. So that campaigns for the enactment of freedom of information legislation should also be informed by struggles to make societies more open, respectful of the judiciary and the rule of law. Martin and Feldman<sup>83</sup> identify these preconditions for the realisation of the right of access to information as relating to political stability, autonomy of the legal system, and the presence or absence of an adequate infrastructure for communications.

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<sup>83</sup> Access to Information in Developing Countries by Robert Martin and Estelle Feldman, April 1998 (Working Paper) at p.1. [www.transparency.org/working\\_papers/martin-feldman/7-legislation.html](http://www.transparency.org/working_papers/martin-feldman/7-legislation.html)

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