

Freedom of information in the SADC region: implications for development and human rights

Stephen M. Mutula

— Senior Lecturer, Department of Library and Information Studies,
University of Botswana, Botswana

Abstract

Purpose – To argue that developing countries in the Southern African Development Community (SADC) region should embrace the concept of freedom of information to enable better human rights and economic development.

Design/methodology/approach – The paper reviews the current situation through discussion of current legislation and proposed policies.

Findings – Whereas several theories abound as to why there has been little development in sub-Saharan Africa, this paper discusses the status of freedom of information legislations within the SADC region and the implications for accountability and transparency in the management of public resources.

Research limitations/implications – The paper suggests the importance of further research into the importance of freedom of information legislation for economic and human rights development.

Practical implications – The paper has practical implication for those considering the potential of freedom of information legislation in developing countries.

Originality/value – Freedom of information has largely taken a back seat amidst several social, economic and political reforms that have been instituted collectively or by individual countries. It is the view of this paper that freedom of information provides an important link for the economic, social and political reform initiatives.

Keywords Human rights, Freedom of information, Developing countries

Paper type Conceptual paper

Introduction

Governments, especially in developed countries where freedom of information (FOI) legislation has been enacted, are facing increasing public pressure to demonstrate good governance in the management of public resources. FOI legislation supports accountability, transparency and anticorruption measures, and is an important component of many modern democracies. FOI gives citizens a mechanism for holding their governments accountable by requesting information about official activities and provides assurance that personal information is only used for legitimate purposes (Wamukoya and Mutula, 2005). FOI legislation can help to ensure that information is not manipulated and misused for corrupt purposes by governments or bureaucrats. Moreover, it can empower the public to demand sight of information held by the government in whatever form. This proviso, however, is often abused by governments who outrightly deny or restrict public access to the information. Hamelink (2003) points out that those human rights that relate to communication are often ignored in most parts of the world.

The concept of FOI legislation is not new although it is increasingly gaining currency all over the world, with most attention focused on human rights. FOI laws are thought to have originated in Sweden and Finland in the 18th century. The US on the other hand enacted the FOI law in 1966, followed by Denmark and Norway in 1970. Other countries that pioneered FOI legislations include France, The Netherlands,

Canada, New Zealand and Australia in 1982. The surge in democratization during the 1990s saw more countries coming on board with FOI legislations including the Republic of Ireland in 1997 and the UK in the year 2000 (Sebina, 2005; Kernighan, 1978). FOI legislation presupposes government subservience to the individual, subject to observing sensitivity of government information or private interests. The US government in 1966, for example, enacted a Freedom of Information Act which would effectively deal with requests for government records consistent with the idea that the people have the right to know about themselves. The Department of Justice in the USA is generally required under the Freedom of Information Act to disclose records requested in writing by any person (Federal Communication Commission, 2005).

Similarly, in the UK, the Freedom of Information Act 2000 makes provision for the disclosure of information held by public authorities or by persons providing services for them. The act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and if that is the case, to have that information communicated to the requester. However, there are exceptions when the information may not be released to the party requesting it, such as matters relating to national security (Crown Copyright, 2000). The act came into force in 2005 and is expected to generally promote a culture of openness and accountability across the public sector in the UK. The act is further expected to lead to a better understanding about: how public authorities carry out their duties; why they make the decisions they do; and how they spend public money (International Commissioner's Office, 2005).

Principles of FOI

The basic philosophy that informs FOI is that democratic values dictate government to be an agent of its citizens. Consequently, government gathers and uses information resulting from the agency relationship it has with the public. Moreover, access to information is expected to benefit both government and the public. Government therefore holds public information in custody on behalf of the citizens (Stiglitz, 2002). FOI presupposes that the government is propelled to power by the public and consequently the people are sovereign. Similarly, the government is the agent and the people, the principal and therefore the authority rests with the principal to retain the representation and have the mandate to question its efficiency and efficacy.

Yerevan (2000) outlines what can be considered as the basic assumptions upon which FOI legislations are founded. He points out that:

- democratization of the society is a positive phenomenon in the modern development of mankind;
- positiveness of democracy is almost undoubtedly accepted by majority of the population in developed as well as developing countries;
- in democratic societies, all classes of the population get involved in the social life of the country and engage in the decisions of both local and global character;
- FOI is an important component of democratic structures of any country and it is in the interest of governments and their people that such legislation is implemented.

Status of FOI legislations in the Southern African Development Community (SADC) region

The history and tradition of free access to information in Africa in general has been poor. Before 1990s, many African governments were known for stifling attempts at adopting information technology including the Internet through unfavourable regulatory practices. Despite the increasing liberalization of the telecommunication sectors, this situation is still reported in some countries in Africa. For example, in countries such as Morocco, Algeria and Tunisia, Internet policies exist that affect online freedom of expression. Similarly, in Zimbabwe, the government is reported to have indicated that it will monitor e-mail communications by regulating the operations of Internet service providers (ISPs) (Gajjar, 2002).

As Table I highlights, excepting South Africa and Zimbabwe, in most countries in the SADC, FOI laws are not in place. As a result, governments are not under any obligation to release public information in their custody. In Botswana, for example, a letter to the editor in one of the local daily newspapers clearly expresses the contradictions of democratic institutions in the country and by extension the rest of the SADC region (Kojane, 2005). Although the Botswana Government has on various occasions instituted public commissions to investigate matters of public concern, the outcomes of such commissions are largely not made public. This was the case with the Commission on the establishment of a Second University, Balopi Commission on Chieftaincy and more. Moreover, in 2003, the government of Botswana made attempts to enact a bill that was aimed at regulating the media. For example, programmes that were aired on national TV and radio stations in which the public aired their views on matters pertinent to their lives were discontinued, reportedly at the instigation of a government minister, although the bill was shelved indefinitely following a public outcry. CyberCorp (1999) notes that the lack of FOI legislation in Botswana created an environment that encouraged unnecessary secrecy in government.

In Zimbabwe, cases of government interference with the freedom of the press have widely been documented. Moreover, the government has adulterated the FOI legislation through various amendments. For example, the controversial Access to Information and Protection of Privacy Act has been used by government to often seize the printing machinery of certain newspapers and take journalists to court (Kirby,

Country	Status of FOI enactment 2004
Angola	Pending
Botswana	Pending
Democratic Republic of Congo	Pending
Lesotho	Pending
Malawi	Pending
Mauritius	Pending
Mozambique	Pending
Namibia	Pending
South Africa	Law promulgated
Swaziland	Pending
Tanzania	Pending
Zambia	Pending
Zimbabwe	Law promulgated

Source: Adapted with additions from: Banisar (2004)

Table I.
Status of FOI
legislation in Southern
Africa

2004), while on the other hand, promoting the state owned press that is used largely to propagate the political agenda of the ruling party. Similarly in South Africa, draft legislation was published in 2004 known as the Prohibition of Hate Speech which was widely seen as an attempt by the ruling party to muzzle the independence and freedom of expression that is guaranteed under the constitution. Both South Africa and Zimbabwe would seem lack the political will to implement the FOI to the full.

In Malawi, constitutional guarantees on access to government information are in place where members of the public can gain access to government information. However, the Malawi government regulates access to government information using the same constitutional guarantees. The current status of FOI legislations in the SADC region is summarized in Table I.

Restrictions by governments to publicly held information

The Universal Declaration of Human Rights and other related UN treaties, such as the Convention on the Rights of the Child (Article 13) provide guarantees of the right of access to information. However, censorship remains a great concern with political and commercial pressures on independent news reporting ever-present and freedom of speech on the Internet under serious threat in many parts of the world (Hamelink, 2003). FOI laws recognize that government has the right to retain and keep certain information secret away from public scrutiny. Moreover, the right to freedom of expression is also increasingly under threat from significantly enhanced state powers to monitor and intercept communications around the world. Muragori (2004) citing Transparency International-Kenya Chapter points out that over the years, several instances of abuse of office have been committed in the country owing in many ways to the lack of FOI. The existing media laws exacerbate problems of lack of access to information. For example, the Official Secrets Act Cap 187 denies media practitioners' official information; the act declares all official information a state secret. Similarly, the Criminal Libel and Defamation Laws under Penal Code Cap 63 deals with Defamation, while Contempt of Court Laws make court reporting very difficult. These draconian laws have often been used by the Kenyan government to muzzle the media. This situation also occurs in some SADC member countries such as Zimbabwe, Zambia, Tanzania and Malawi (Githongo, 1998; Kirby, 2004; Sebina, 2005).

Contrary to common belief that restrictions of access to information are practiced in countries which have not matured in their democratic governance, this is also happening in the very cradle of democracy. For example, although the US has long been perceived as the champion of human rights, there are exemptions to solicitation of information under the Freedom of Information Act that relate to security raise problems (Yerevan, 2000). These exemptions include information related to personal privacy, information on commercial secrets, information that may impact the process of a criminal investigation, information on the dealings of financial institutions and internal rules that govern regulations which concern the employees of a government agency. Many citizens over the years have expressed concern about these exemptions owing to persistent government action on many levels geared towards exploiting these exception-clauses of the acts to withhold information (US Department of Justice, 2005). For example, cases against the government that have often involved defendants such as the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Council not releasing information requested by the public demonstrate that government is under no obligation to release information that it does not wish to come to public knowledge.

Moreover, the Freedom of Information Act applies only to federal agencies and does not include a right of access to records held by Congress, the courts or by state or local government agencies (Federal Communication Commission, 2005). In addition, the technical procedure for requesting information in the custody of agencies with statutory responsibilities for public information is bureaucratic. Issues such as the amount of information that the government should be obligated to reveal and the point at which public availability should not be crossed are not clearly defined. In addition, the issue of who should determine and enforce those boundaries to the benefit or detriment of those seeking and withholding information remains unclear.

Developed countries other than the US such as Norway, Canada, the UK, Sweden, The Netherlands and Germany have made attempts to enforce freedom of access to information to varying degrees of success. Germany, for example, does not have specific FOI legislation in place, although the constitution stipulates the right of access to publicly-held information. However, the request for information can be denied if the volume of the requested information is excessive. Similarly, The Netherlands government protects information jeopardizing the unity of the monarchy. In Canada, laws protect the notion of cabinet secrets and suchlike cabinet documents (Yerevan, 2000).

The Digital Opportunity Task Force (2002) points out that in spite of the fact that international human rights treaties include many provisions designed to guarantee inclusiveness, such as universal access to information and knowledge, large numbers of people around the world are excluded from access to the basic means of communication, such as telephony, broadcasting and the internet. Furthermore, access to information about wider matters of public concern is also unduly limited. Although technology provides great potential in contemporary societies, there are several challenges for its full implementation to enhance human rights, owing in many ways to political control and interference with freedom of expression. Hamelink (2003) notes that strict intellectual property regimes create information enclosures and pose critical obstacles to emerging "knowledge" societies. Moreover, many people are excluded from the democratic political process owing to the lack of effective means of participation which is exacerbated by monitoring and interception of communications in the name of security. The so-called information society is predicated upon access to information, where all persons without distinction are empowered to create, receive, share and utilize information for their economic, social, cultural and political development (Martin, 1995).

Restrictions on publicly-held information are pervasive all over the world, especially in developing countries. In Kenya, for example, Okwach (2005) points out that whereas information should ordinarily be in the public domain, it is zealously guarded and kept out of the reach of its citizens. For example, a report by the Kenya Human Rights Commission points out that getting information from State House is like "squeezing water out of a rock". The report notes that ironically, judicial bodies were among the institutions that were known not to respond to requests for information.

FOI and human rights

On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights (United Nations, 1998). The key components of the declaration are the recognition of the inherent dignity and of

ranked fifth from the bottom in a survey of countries where corruption was perceived by visitors and businessmen to be a serious problem. The country took position 81 among 85 nations – sharing a spot with Nigeria (Centre for Public Integrity, 2005). Njagih (2005) points out that FOI enhances the responsibility of the media to inform by providing guarantees for “whistle blowers” and people who may disclose official information of public interest without threats of liabilities. Similarly, a liberal FOI legislation should protect persons who disclose information that would otherwise be restricted from civil, criminal and administrative liabilities, especially if the information can further public interest. In all cases, however, considerations need to be given if the public interest outweighs the benefits of keeping the information protected. Moreover, the ability of the public sector to be made accountable and transparent is to ensure that citizens have access to information held in the custody of government. A properly implemented FOI law should provide a strong foundation for accountability, transparency, democratic governance, poverty eradication, elimination of corruption and efficient use of public resources.

Access to information by the populace can help people to become well informed and to contribute positively to governance through democratic participation. Similarly, access to information can enable people to make realistic demands on government and assist in creating jobs and understanding their rights, obligations and responsibilities. By harnessing the power of information, the public can bring force to bear on authorities to provide new and better responses to vital long-standing issues which Consulting and Audit Canada (2004) identify as poverty reduction, wealth creation education, equity and social justice. Similarly, the SADC E-readiness Task Force (2002) points out that in societies where access to information by the public is easily facilitated, there are advantages for sustained economic growth and social development.

Facilitating access to information held by government is critical to development. Chronic weaknesses in government information management can adversely affect private sector investment. For example, overseas firms may hesitate to invest in a country if they do not have adequate information systems that can be interrogated to reveal how courts handle commercial cases. Likewise, large-scale infrastructure investments may be delayed or incur significant additional costs if government information management systems such as registries cannot provide complete and definitive information. Moreover, poor means of access to government held information can contribute to the lowering of the general standard of services offered to businesses. For example, there may be delays in replies to written inquiries about the registration of businesses and the issuance of licenses. On the other hand, the role and participation of the private sector in an increasingly electronic environment are critical especially with regard to e-commerce and e-business transactions. Governments are required to provide a conducive environment through enabling legislation such as FOI and regulatory frameworks to ensure the availability of reliable evidence of activities transacted to protect the rights, obligations and entitlements of all parties involved. The International Records Management Trust (IRMT) (2004) points out that in order to enhance accountability and transparency in the management of public resources, governments need to modernize their laws to include among other things FOI so that public and private sectors alike can make the best possible technical decisions about how to operate with a minimum of uncertainty about how their legal rights will be affected.

The right to access publicly-held information is expected to enable citizens to understand public policy and become more informed (Maryland, 1992). FOI

entitles any member of the public without necessarily relying on the intervention of a third party or institutions to request information in government hands using well-defined procedures in order to individually or collectively hold their government accountable.

The way forward

Free flow of information and ideas inform public discourse and public policy formulation. FOI is needed to enhance access to publicly-held information in government. Governments must be constantly reminded that they are required under the human rights treaties which largely they have ratified, to implement, promote and protect human rights including the right of access to information held by public agencies. Enacting FOI is one thing but a strong political will and the allocation of substantial resources to ensure its effective implementation is another. Lack of commitment to enact and effectively enforce FOI deepens citizens' distrust of political institutions. Civil society must play a key role in terms of advocacy for rights under FOI. Encouraging people to assert these rights through different types of social action are vital tasks to exert pressure on their governments to demonstrate transparency and accountability in the management of public resources and enhancement of democratic governance.

The prevention of access to public information creates a smoke screen for government, making it difficult for the citizens to engage with government effectively. Furthermore, in the absence of free flow of information, there could be a tendency for some government officials to simply lie or be selective about the truth when caught in a situation in which they are expected to be accountable. The secrecy by which many governments operate can breed official corruption while stifling scrutiny of the conduct of public affairs. With FOI, any ordinary citizen should be able to walk into a government office and access official records and information, upon submitting a written request. With increasing democratization across the world, FOI is a must and not an option.

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Corresponding author

Stephen M. Mutula can be contacted at: mutulasm@mopipi.ub.bw

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