

MEDIA LAW AND PRACTICE IN SOUTHERN AFRICA

**Freedom of Information
in
Southern Africa**

No 16 October 2000

This paper is one of a series dealing with media law and practice in countries belonging to the Southern Africa Development Community (SADC). A conference addressing this theme was held jointly by ARTICLE 19 and the Media Institute of Southern Africa (MISA) in Zanzibar in October 1995.

Each paper in the series will focus on a particular country describing current and recent developments in media law and practice, or a particular theme of wide relevance within the whole SADC region.

It is hoped that the series will contribute to greater awareness of issues affecting media freedom in this fast-changing region and will provide an invaluable resource for individuals and organizations working in this field.

ACKNOWLEDGEMENTS

This report was written by Evan Ruth, former Legal Officer to ARTICLE 19. It was copy-edited and designed by Katherine Huxtable.

ARTICLE 19 gratefully acknowledges the generous support received from the Swedish International Development Agency (SIDA). The views expressed do not necessarily reflect those of SIDA.

ARTICLE 19

The Global Campaign for Free Expression

Lancaster House, 33 Islington High Street

London N1 9LH, United Kingdom

Tel: (+44 (0)20 7 278 9292, Fax: (+44 (0)20 771) 713 1356

E-mail: africa@article19.org

www.article19.org

ARTICLE 19 — East and Southern Africa Office

87 Juta St, Argon House, 5th Floor

PO Box 30942

Braamfontein 2017

South Africa

Tel: (+27 11) 403 1488 Fax: (+27 11) 403 1517

E-mail: info@article19.org.za

www.article19.org

Media Institute of Southern Africa (MISA)

Private Bag 13386, Windhoek, Namibia

Tel: (+264 61) 23-2975, Fax: (+264 61) 24-8016

E-mail: research@misa.org.na

www.misanet.org

© ARTICLE 19

1 902598 29 6

All rights reserved. No part of this publication may be photocopied, recorded or otherwise reproduced, stored in a retrieval system or transmitted in any form by any electronic or technical means without prior permission of the copyright owner and publisher.

CONTENTS

INTRODUCTION	1
Human Rights, Democracy and Access to Information	2
CONSTITUTIONAL PROVISIONS	5
LEGISLATIVE PROVISIONS	9
Official Secrets Act.....	9
Other Legislation.....	11
THE LEGITIMACY OF SUCH PROVISIONS UNDER INTERNATIONAL AND CONSTITUTIONAL LAW	12
The Prescribed by Law Test	13
Proportionality - Overbreadth.....	15
POSITIVE DEVELOPMENTS IN THE SUB-REGION	17
Botswana, Malawi and Zimbabwe.....	17
South Africa	19
CONCLUSION	24

INTRODUCTION

Freedom of information, and specifically access to information held by public authorities,¹ is a fundamental element of the right to freedom of expression and vital to the proper functioning of a democracy. As political and social changes have swept across southern Africa in the last two decades and fledgling democracies have appeared throughout the sub-region, there has been increasing acceptance of the importance of human rights and, in particular, of freedom of expression.

Until recently, however, the right to freedom of information has tended to be overlooked. While many established democracies across the world have enacted freedom of information regimes, the states of southern Africa have regarded freedom of information as a luxury, affordable only to wealthier and well-established democracies.² A "culture of secrecy" has become entrenched in government throughout the sub-region and members of the public, including the media, are routinely denied access to official information which, in a democracy, they should be entitled to receive. This breakdown in the flow of information impairs the democratic process and slows economic and social development as citizens are unable to participate effectively in the processes of government, make informed choices about who should govern them and properly to scrutinise officials to ensure corruption is avoided. Government officials themselves also fail to benefit from public input which could ease their decision making or improve their decisions. Also, without accurate information on matters of public interest, citizens must rely on rumours and unconfirmed reports, with the obvious danger this presents for accurate and reasonable reporting by the media.

Change is coming, however. The importance of freedom of information is now accepted by many in civil society throughout the sub-region and lobbying has begun in earnest to ensure the enactment of effective legislation to overturn the "culture of secrecy" once and for all. In Zimbabwe, Malawi and Botswana concrete proposals for reform have been put forward.

¹ For a detailed discussion of access to privately held information see: Gideon Pimstone, "Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill", *South African Journal on Human Rights*, Volume 15, Part 1, 1999.

² See Richard Carver, *Freedom of Information: Accountability, Equality and "Vulgar Enquiries"*, a paper prepared for the Commonwealth Human Rights Initiative Conference, (Harare: January 1999).

In South Africa itself a liberal freedom of information regime has recently been enacted.³ This should change the landscape for the whole sub-region and spur further progress in countries where it is needed most.

ARTICLE 19 has been active in lobbying for the enactment of freedom of information legislation both in the southern African sub-region and throughout the world. As part of this process, ARTICLE 19 has produced a set of *Principles on Freedom of Information Legislation*. These set out clearly and precisely the ways in which governments can achieve maximum openness when drafting such legislation. They are based on international and comparative law and standards, evolving State practice and the general principles of law recognised by the community of nations.⁴ This study is intended to examine developments in the sub-region in the light of ARTICLE 19's *Principles on Freedom of Information Legislation* and to contribute to the process of change and reform already underway.

Human Rights, Democracy and Access to Information

The right to freedom of information is an important aspect of the international guarantee of freedom of expression which includes the right to seek and receive as well as to impart information. The right is proclaimed in Article 19 of the Universal Declaration of Human Rights and protected in international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights. Article 19 of the ICCPR is in the following terms:

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

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

³ The Promotion of Access to Information Act, No.2, 2000. This Act embodies large sections of what had been known as the Open Democracy Bill. See below for a full discussion of the Act.

⁴ The *Principles* are available on ARTICLE 19's website at <http://www.article19.org>.

There can be no doubt of the importance of freedom of information as an aspect of the right to freedom of expression. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated:

Freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated.

In recent years, the UN Special Rapporteur on Freedom of Opinion and Expression has regularly stressed the overriding importance of freedom of information. For example, in his 1995 report to the UN Commission on Human Rights he stated:

Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.⁵

Recognising the importance of freedom of information, a large number of states have enacted such legislation, particularly in the last twenty years,⁶ and moves are afoot throughout the world to continue this process.⁷

The widespread acceptance of the need for freedom of information legislation is recognition of the fact that in a democracy, access to official information is vital to ensure that the people retain ultimate control over the functions of government. Freedom of information allows citizens to scrutinise their officials, to participate in decision making and to exercise their rights and responsibilities in an effective and informed manner. Fundamentally, official information belongs to the public. It is a national resource which should be used solely for public purposes.⁸

The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist and who ultimately...fund the institutions of government and the salaries of officials.⁹

⁵ UN Document E/CN.4/1995/32, para. 35. See also the Special Rapporteur's annual reports to the UN Commission on Human Rights each year since 1995.

⁶ Such as, for example, Australia, Austria, Canada, Colombia, Denmark, Finland, France, Greece, Hungary, the Netherlands, New Zealand and the USA.

⁷ The following countries have either recently enacted FOI legislation or are considering drafts: Belgium, Czech Republic, Bulgaria, Lithuania, Moldova, Latvia, India, Ireland, Trinidad, Japan, Thailand and the United Kingdom.

⁸ See Australian Law Reform Commission, Report Number 77, 1995, <http://www.alrc.gov.au>, Chapter 2 paragraph 4.9.

⁹ *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs*, (1993), 1 QAR 60, 73. Quoted in *Ibid.*

Like freedom of expression, however, the right to freedom of information is not absolute. International human rights law recognises the legitimacy of carefully drawn and limited restrictions on freedom of expression and freedom of information to take into account overriding interests such as privacy and national security. Under international human rights law, restrictions on freedom of expression and freedom of information must meet the conditions set out in Article 19(3) of the ICCPR:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions on the free flow of information must meet a strict three-part test.¹⁰ First, they must be provided for by law. The law must be accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹¹ Second, the restriction must pursue one of the legitimate aims listed in Article 19(3); this list is exclusive. Third, the restriction must be necessary to secure that aim, in the sense that it serves a pressing social need, the reasons given to justify it are relevant and sufficient and the interference is proportionate to the legitimate aim pursued.¹² International jurisprudence makes it clear that this is a strict test, presenting a high standard which any interference must overcome. This is apparent from the following quotation, cited repeatedly by the European Court of Human Rights (ECHR):

Freedom of expression, as enshrined in Article 10 [of the ECHR], is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.¹³

¹⁰ This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, No. 458/1991, para. 9.7. The same test is applied by the ECHR. See *The Sunday Times v. United Kingdom*, 26 April 1979, No. 30, 2 EHRR 245, paras. 45.

¹¹ *The Sunday Times*, *op cit.*, para. 49.

¹² See *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40 (ECHR).

¹³ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63 (ECHR).

CONSTITUTIONAL PROVISIONS

All but two States in the sub-region¹⁴ are parties to the International Covenant on Civil and Political Rights and all but Swaziland are parties to the African Charter on Human and Peoples' Rights. In keeping with their obligations under these human rights treaties, most states in the sub-region have constitutions which protect fundamental human rights.

Four states in the southern African sub-region have separate constitutional articles which specifically protect the right to information in some form.¹⁵ In some constitutions freedom of information is not specifically mentioned, while in others the right to seek and/or receive information is spelt out within the general freedom of expression article.

The Constitution of Angola provides an example of the most succinct type of protection for the right to freedom of expression.¹⁶ Article 32 provides:

- (i) Freedom of expression, assembly, demonstration and all other forms of expression shall be guaranteed.

While the content of the right to freedom of expression within the Angolan Constitution is not specifically defined, it should include the right to access information in line with the international guarantee of freedom of expression.¹⁷

A more detailed form of constitutional protection for the right to access information in the sub-region draws on the wording of Article 19 of the Universal Declaration of Human Rights. Several constitutions contain variations on this theme while, of these, all but the Tanzanian Constitution omit the words "to seek" information. The Zambian Constitution is typical.¹⁸

¹⁴ Botswana and Swaziland.

¹⁵ Malawi, South Africa, Mozambique and Tanzania.

¹⁶ See also article 21(1) of the Constitution of Namibia.

¹⁷ See ARTICLE 19, *The Article 19 Freedom of Expression Manual. International and Comparative Law, Standards and Procedures*, (London: August 1993, 89-96).

¹⁸ See also Article 12(1) of the Botswanan Constitution, Article 14 of the Constitution of Lesotho, Article 18(1) of the Tanzanian Constitution and Article 20(1) of the Constitution of Zimbabwe.

Article 20 states:

- (1) 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 ideas and 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, and freedom of interference with his correspondence.
- (2) Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.

The Constitution of Mozambique specifically includes the right to information as an aspect of freedom of expression.¹⁹

All of these constitutional articles recognise and protect the right to freedom of expression, which includes the right to information. None of them, however, specifically defines the means by which the right is to be respected in practice.²⁰

The constitutions of Malawi and South Africa provide the most comprehensive protection for the right to access information. In addition to general protection as an aspect of freedom of expression, separate articles define the specific right to access official information and, in the case of South Africa, to access any information, whether official or otherwise, necessary for the exercise of other rights.

Article 37 of the Constitution of Malawi states:

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 rights.

¹⁹ Article 74 of the Constitution of Mozambique.

²⁰ The Constitution of Tanzania does contain the following unusual clause (article 18(2)):

Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

While this article is a step forward for the protection of the right to information, its efficacy is limited by the fact that it is subject to a threshold test and to any Act of Parliament. The Malawi Law Commissioner has recognised these weaknesses and recommended changes to strengthen the right.²¹

The initial post-apartheid constitution of South Africa contained a clause protecting the right to information in almost identical terms.²² Following broad consultation and much criticism, however, the 1996 Constitution included a broader right to access information, not subject to a threshold interest test. Article 32(1) of the 1996 Constitution of the Republic of South Africa states:

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 any rights.

An additional safeguard within the South African Constitution is the requirement that legislation be enacted to give effect to the right within three years of the coming into force of the 1996 Constitution.²³

Consistent with international law, all of the constitutions mentioned above contain limitation clauses which subject the rights to freedom of expression and information to certain restrictions. The list of legitimate restrictions in some of these constitutions is broader than under international law, and the onus on the state to demonstrate the constitutionality of its laws is stronger in some constitutions than others. In general, however, they permit restrictions on freedom of expression or access to information which are established by law, necessary or reasonable in a democratic society and which pursue one of the aims listed in the constitutional provision.

²¹ See below.

²² See Article 23 of the 1993 Constitution of the Republic of South Africa.

²³ Article 32(2) and Schedule 6, item 23 of the 1996 South African Constitution. The necessary legislation had to be enacted by early February 2000 and now takes the form of the Promotion of Access to Information Act, No.2, 2000.

The Namibian Constitution provides an example of a provision closely modelled upon the requirements of international law. It states:

21(2) The fundamental freedom referred to in sub-article (1) hereof 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 sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In Zambia and a number of other countries in the sub-region, restrictions on fundamental rights are set out in broader terms. Article 20(3) of the Zambian Constitution states:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose 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, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of newspapers and other publications, telephony, telegraphy, posts wireless broadcasting or television; or
- (c) that imposes restrictions on public officers;

and except so far as that provision or the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

LEGISLATIVE PROVISIONS

Practical realisation of the right to freedom of information requires that constitutional guarantees are implemented through detailed legislative regimes. This crucial threshold was crossed for the first time in Southern Africa in February 2000, with the passage of the South African Promotion of Access to Information Act.²⁴

However, in the rest of the sub-region, legislation in force contributes to an overwhelming culture of secrecy throughout all levels of government. Most governments appear to regard official information as their private property and are extremely reluctant to share it, even where it is uncontroversial. In many countries the relics of colonial Official Secrets Acts create a presumption of secrecy which civil servants must uphold and which the public must be prevented from puncturing. A wide range of other laws restrict the flow of government information either directly or indirectly and punish those who reveal official information, no matter how innocuous.

Official Secrets Acts

The most direct and significant restriction on access to official information in the sub-region is the continued existence, either inherited directly from colonial times or in “revitalised” post-colonial versions, of Official Secrets Acts. These Acts establish a general presumption that official information is secret unless its release has been specifically authorised and provide for severe criminal penalties in cases of unauthorised disclosure. The Botswana National Security Act 1986 follows the wording of many of the colonial Official Secrets Acts found throughout the sub-region.²⁵ 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.

²⁴ Act number 2, 2000. See below.

²⁵ See, for example, the Zimbabwe Official Secrets Act 1970, the Tanzanian National Security Act 1970, the Lesotho Official Secrets Act 1967 and the Swaziland Official Secrets Act 1968.

The following are some key provisions of the Act:

3. Any person who, for any purpose prejudicial to the safety or interests of Botswana
 - (a)...
 - (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 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

...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 chilling effect of these vague and general provisions on the flow of even the most basic information cannot be underestimated. Civil servants are generally required to take oaths of secrecy under such Acts and will not release any information without specific authorisation for fear of falling foul of the provisions. This creates a culture of secrecy and paranoia which feeds upon itself and which it is extremely difficult to combat. Members of the public and journalists are either directly refused access to information, referred to other officials or simply ignored.²⁶ The public's right to information is frustrated as rumours and unconfirmed sources become the order of the day.

Other Legislation

A range of other legislative provisions throughout the sub-region are used by governments, either directly or indirectly, to restrict the flow of official or undesirable information.

In South Africa a vast array of legislation controlled the flow of specific types of official information before the end of apartheid. Most of these provisions remain in force pending the application of the new Promotion of Access to Information Act.²⁷ The Defence Act 1957 restricts the disclosure of information related to defence and the armed forces. The National Key Points Act 1980 forbids dissemination of information about security measures in any place declared a key point. The Petroleum Products Act 1977 allows a minister to prohibit the release of information about petroleum products and the Armaments Development and Production Act 1968 forbids disclosure of information relating to armaments. In Zimbabwe, reporting the proceedings of a Parliamentary Committee remains a serious offence²⁸ 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.²⁹ There are a range of other similar laws throughout the sub-region, all of which directly restrict the public's right to access specific types of information.

²⁶ See International Federation of Journalists, *Freedom of Information in Africa*, (Brussels: November 1998).

²⁷ For a discussion of the effects of this Act on inconsistent legislation, see below.

²⁸ Privileges, Immunities and Powers of Parliament Act.

²⁹ See, for example, Section 4 of the Zimbabwe Courts and Adjudicating Authorities (Publicity Restriction) Act.

Laws of general application are also used to punish those who publicise official information without government approval, even where such information is clearly in the public interest. In many countries, for example, the President may prohibit a wide range of publications in his discretion³⁰ and general laws criminalising seditious and false publications can also be used to punish journalists and others who publish unauthorised official information.³¹

THE LEGITIMACY OF SUCH PROVISIONS UNDER INTERNATIONAL AND CONSTITUTIONAL LAW

Given that only one state in Southern Africa has enacted legislation to give effect to the right to freedom of information, and that the laws described above are routinely used to restrict and frustrate the public's right to access information, the question of the legitimacy of such provisions under international and constitutional law is an important one.

As discussed above, international and comparative guarantees of freedom of expression and access to information establish a strict three-part test for the legitimacy of any restrictions on these fundamental rights. In order to be legitimate a restriction must:

- 1) be prescribed by law;
- 2) serve a legitimate purpose; and
- 3) be necessary (or reasonable or justifiable) in a democratic society.

While the range of laws described above is wide and their use and effect differs from State to State, they all share two fundamental flaws. They are vague and overbroad. Because of this they generally fail to satisfy the first and third limbs of the test for legitimate restrictions.

³⁰ See, for example, Section 18 of the Zimbabwe Law and Order (Maintenance) Act.

³¹ See, for example, Sections 45, 46 and 50 of the Zimbabwe Law and Order (Maintenance) Act. In a landmark judgment by the Supreme Court of Zimbabwe in May 2000, Section 50(2)(a) of the Law and Order (Maintenance) Act, under which two journalists had been charged by the authorities, was declared contrary to the constitutional guarantee of freedom of expression. See ARTICLE 19's submission to the Supreme Court of Zimbabwe, *Mark Chavunduka and Ray Choto v. Republic of Zimbabwe*, of July 1999 and the October 2000 report in the Media Law and Practice in Southern Africa Series (No. 15), *False News Provisions: the Mark Chavunduka and Ray Choto in Zimbabwe*. Both are available on our website (<http://www.article19.org>).

The Prescribed by Law Test

International law and all of the constitutions discussed require that any restriction on freedom of expression, including the right to information, be “prescribed by law”.³² This requires not only that a restriction be directly established by a legal provision but also that it is sufficiently clear that citizens know what they may or may not do. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the European Convention on Human Rights:

[A] norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: He must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³³

Vague provisions may be subject to widely different interpretations, both by governments and those seeking to abide by the law. They are, therefore, inevitably open to abuse by governments who may seek to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved.

Many of the legislative secrecy provisions discussed above are so vague that it would be quite impossible for a person to know when they might be releasing classified information. A common example throughout the sub-region is found in article 5 of Botswana’s National Security Act.³⁴ This 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”.

³² This wording is taken from Article 19 of the ICCPR. The Constitutions of the sub-region use a variety of terms such as “under the authority of any law” and “subject to the law”.

³³ *The Sunday Times*, *op.cit.*, para.49.

³⁴ See above.

An additional problem stemming from vagueness is the absence of independent mechanisms to review discretionary decisions by government officials. A number of the secrecy provisions discussed above grant virtually unlimited discretionary powers to the executive to restrict the flow of official information. For example, Section 18 of the Zimbabwean Law and Order (Maintenance) Act allows the President to prohibit certain publications in his absolute discretion with no possibility of judicial review.³⁵ It is a well established principle that where the executive exercises discretion which may interfere with the enjoyment of a constitutional right, that discretion must be subject to adequate guidelines and effective control. The effect of provisions granting broad discretionary powers is unforeseeable and they are a temptation to abuse. They cannot, therefore, be regarded as being “prescribed by law”. Courts in a number of jurisdictions have dealt with this principle. According to the Court of Appeal of Tanzania:

[A] law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by Article 30(2) of the Constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is not arbitrary. It should provide adequate safeguards against arbitrary decisions and provide effective control against abuse by those in authority when using the law.³⁶

The South African Constitutional Court has clearly pointed out the dangers to freedom of expression of granting excessive discretion to executive authorities in the context of the regulation of obscenity:

It is incumbent on the legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in the light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.³⁷

Throughout the sub-region the flow of official information is severely restricted by the vagueness of secrecy laws. Civil servants and members of the general public inevitably err on the side of caution when dealing with official information, preferring not to release anything lest they fall foul of one of these unpredictable and severe legal restrictions.

³⁵ The Zimbabwean Government has been reviewing the Law and Order (Maintenance) Act, which is a relic of the pre-independence period, for several years now. However, the authorities have yet to show that they are ready to scrap those provisions which are out of step with its international human rights obligations.

³⁶ *Pumbun v. Attorney General* [1993] 2 LRC 317, 323.

Proportionality – Overbreadth

Both international and constitutional protections for freedom of expression and access to information require that any limitations on these rights be “necessary” in the sense that they represent a proportionate response to the pursuit of a legitimate aim and that they interfere with the right in question as little as possible.³⁸ Even where a restriction is clear and pursues a legitimate aim, it may still be illegitimate if it interferes with the right more than is necessary to satisfy the aim.

One of the greatest dangers of the secrecy provisions discussed above is their extreme overbreadth. 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 overbreadth problems apply in relation to the protection of public order, internal government decision-making and so on.

While international law does permit limited restrictions on the free flow of information to protect key public interests, including national security, such restrictions must be narrowly drawn and specific to ensure that they apply only to the legitimate interests sought to be protected. In October 1995, ARTICLE 19 convened a group of experts in international law, national security and human rights who drafted what has become known as the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.³⁹ These are now regarded throughout the world as the pre-eminent statement on the definition of legitimate national security interests. They have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression⁴⁰ and noted with approval by the UN Commission on Human Rights.⁴¹

³⁷ *Case & Anor v. Minister of Safety and Security & Ors*, 1996 (5) BCLR 609, para.63.

³⁸ See, for example, *Sunday Times, op.cit.*, in the European Court of Human Rights and the “Oakes Test” elaborated by the Supreme Court of Canada in *R v. Oakes* [1986] 1 SCR 103, 138-9, and adopted by the Supreme Court of Zimbabwe in *Nyambirai v. National Social Security Authority and Anor.*, 1995 (9) BCLR 1221 (SC), 1231.

³⁹ Available in full at <http://www.article19.org>.

⁴⁰ See Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, 29 January 1999, UN Doc.E/CN.4/1999/64, para.23.

⁴¹ See Resolution 1998/42, preamble.

Principle 2 defines a legitimate national security interest as follows:

- (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
- (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest

Principle 15 states:

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Similar principles apply to other types of information.

The secrecy provisions in place in southern Africa fail to differentiate between legitimate and illegitimate national security interests. In practice, they prohibit communication of virtually all official information, even tangentially connected to security issues, even where release of the information concerned could not possibly harm a legitimate national security interest. Section 3(b) of the Botswana National Security Act, for example, forbids the dissemination of any information whatsoever which might possibly be useful to a disaffected person either directly or indirectly.⁴² This would cover, for example, information relating to corruption or mismanagement within the armed forces. The disclosure of such information would not harm national security; indeed in many cases such disclosure would promote it by helping to root out the corrupt and enhancing the efficiency of the armed forces. The range of innocuous information which might be covered by such a provision is almost infinite and its suppression cannot be regarded as a necessary and proportionate response to the need to protect national security.

⁴² See above.

POSITIVE DEVELOPMENTS IN THE SUB-REGION

While only South Africa has enacted a legislative regime to give effect to the right to freedom of information, the winds of change are blowing across the sub-region. In Malawi and Zimbabwe, government bodies have been considering the issue and have made concrete suggestions for change, while in Botswana the momentum established by a grass-roots campaign has resulted in a detailed position paper which seeks to prompt the government to introduce legislation. In South Africa itself, the situation is startling and revolutionary. The Promotion of Access to Information Act 2000, has the potential to transform South African governance, creating, at least at the formal level of the law, one of the most open, transparent and accountable governments in the world.

Botswana, Malawi and Zimbabwe

In Botswana and Malawi, human rights NGOs have taken a leading role in raising public consciousness and campaigning for freedom of information legislation.

In early 1999, ARTICLE 19 submitted proposals to the Malawi Law Commission on implementing the right to freedom of information in the Malawi Constitution.⁴³ The Commission decided, as a preliminary matter, to recommend 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.⁴⁴ While the Law Commissioner has expressed the hope that Malawi will move towards the South African trend in this regard,⁴⁵ there has been no movement at the official level and freedom of information no longer appears to be on the government’s agenda.

The Media Institute of Southern Africa, which has been instrumental in raising awareness of this issue throughout the sub-region, has been particularly active in Botswana where campaigning and public awareness efforts have produced some willingness on the part of the government of Botswana to consider enacting freedom of information legislation.

⁴³ See number 10 in this series, *Malawi. Submission to the Law Commissioner on Implementing the Constitutional Guarantee of Freedom of Information*, (ARTICLE 19 and The Media Institute of Southern Africa. London, January 1999).

⁴⁴ Letter to ARTICLE 19 from the Malawi Law Commissioner, 12 January 1999.

⁴⁵ *Ibid.*

In mid-1999 MISA's efforts culminated in a seminar on the right to freedom of information in Botswana, attended by NGOs, journalists, lawyers and a broad cross-section of members of the public. A detailed position paper was produced covering not only the rationale and objectives of freedom of information legislation but also the details of how an implementing regime should be structured and applied in practice. It is to be hoped that the position paper will spur the government into action.⁴⁶

In Zimbabwe, as a result of pressure and campaigning from across the spectrum of civil society, the government appeared to be moving towards reform in the area of freedom of expression. In September 1996 the Ministry of Justice produced a position paper on the reform of media regulation, defamation and access to official information. Amongst other things, it contained a draft bill on access to information which surprised many by its relatively progressive approach.

The Bill allowed for written applications to government Ministries to access official documents. Applications were to be decided within seven days unless the Ministry required more time, in which case the time limit was thirty days. Reasons for any refusal would have to be given and these would have to relate to one of the exemptions set out in the draft Bill. Any refusal to release documents was to be subject to review by an administrative tribunal headed by a High Court or Supreme Court Judge. Many of the exemptions were reasonable and in line with international practice, but criticism of the draft Bill centred around the broad nature of some exemptions and the lack of a threshold harm test before exemptions would come into play. Two categories of exemption were regarded as particularly problematic. The first would exempt all documents from five sensitive government departments: The Reserve Bank, the Auditor-General, the Scientific and Research Council, the Defence Procurement Agency and the Central Intelligence Agency. The second category would exempt the internal working documents of government departments which would reveal decisions or policies it would not be in the public interest to reveal.⁴⁷

⁴⁶ MISA - Botswana, *Position Paper on a Freedom of Information Act*, (Gaborone, 1999).

⁴⁷ This information is taken from Geoff Feltoe, *Theoretical Perspectives on the Right to Access Information. Expanding the Democratic Space*, (Working Paper 1998:5, Norwegian Institute of Human Rights, University of Oslo).

Even given the overbroad nature of some of the exemption provisions,⁴⁸ these proposals were positive and potentially far-reaching. Unfortunately, internal political developments in Zimbabwe have meant that they now seem to have fallen by the wayside for the foreseeable future.

South Africa

In line with other changes in South Africa since the end of apartheid, there have been important developments in the area of freedom of information. In order to implement the constitutional right of freedom of information, then Deputy President Thabo Mbeki appointed a task group to draft a Freedom of Information Bill in October 1994. After very extensive public consultation, including workshops, public discussions forums, lively media debates and the receipt of written and oral submissions from human rights NGOs and a broad cross-section of South African civil society, the Open Democracy Bill was laid before the National Assembly towards the end of 1998. Consultation and debate continued and the Bill went before a Parliamentary Committee which eventually produced the Promotion of Access to Information Bill. This became the Promotion of Access to Information Act in February 2000.

The Act not only provides for the wholesale opening up of South African governance, but also establishes a detailed regime for accessing information in the hands of certain private bodies and individuals, where such information is necessary for the exercise or protection of any rights. It represents a very significant step forward for freedom of information in South Africa.

The Act contains a detailed preamble which sets out the context in which it has been developed, while its specific aims are spelt out in the Act itself as including:

- To promote transparency, accountability and effective governance of all public and private bodies by...empowering and educating everyone-
- (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;
 - (ii) to understand the functions and operation of public bodies; and
 - (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.⁴⁹

⁴⁸ A common problem with draft FOI Bills. See ARTICLE 19's *Submission to the UK Government on the Freedom of Information Bill*, (Censorship News, Issue 53. London, July 1999).

⁴⁹ Section 9(e).

Part one of the Bill contains the interpretation and objectives sections and courts are obliged to prefer an interpretation of the Act which is consistent with its stated objectives.⁵⁰ Government bodies subject to the Act are very widely defined although the Cabinet, courts, judicial officers and members of parliament are excluded.⁵¹ Private bodies are defined to include juristic persons and natural persons or partnerships which carry on any trade, business or profession.⁵² Records for which access requests can be made are also widely defined to include all conceivable types of recorded information.⁵³ Section 5 establishes the supremacy of the Act in case of conflict with other laws, stating that it is to apply to the exclusion of any other inconsistent legislation.⁵⁴

Part two of the Act deals with information held by public bodies and requires the publication and dissemination of information about such bodies, their structure and functions, an index of records they hold and how and to whom requests for information are to be made.⁵⁵ Public bodies must also regularly submit lists of categories of records routinely available to the relevant Minister who must then publish them.⁵⁶

The Act establishes the right of any person to access records held by public bodies,⁵⁷ subject to the specific exemptions. The possible forms of access are set out and provision is made for those who cannot read or who are disabled.⁵⁸ Government information officers have a duty to assist those making requests,⁵⁹ while initial time limits for dealing with requests are set at thirty days, although this may be extended by a further thirty days or deferred.⁶⁰ Fees may be charged for access, although the appropriate Minister may, by notice, exempt any person or category of persons from fees or may set maximum levels of fees.⁶¹ Those seeking personal information about themselves are not required to pay fees.

⁵⁰ Section 2.

⁵¹ Section 1 and Section 12.

⁵² Section 1.

⁵³ Section 1.

⁵⁴ See also section 6 which ensures that the Act will not close down avenues for access already available in other legislation.

⁵⁵ Section 14.

⁵⁶ Section 15.

⁵⁷ Section 11.

⁵⁸ Sections 18(3)(a) and 29(5).

⁵⁹ Section 19.

⁶⁰ Sections 25 and 26 and 24.

⁶¹ Section 22.

Twelve categories of exemption are set out in detail in the Act.⁶² These relate to: third party privacy; records of the Revenue Service; third party commercial information; information supplied in confidence; individual safety and the protection of property; law enforcement and legal proceedings; legal privilege; defence, security and international relations; the economic interests and commercial activities of the State; third party research information; the effective functioning of public bodies; and frivolous or vexatious requests or those which unreasonably divert resources.

The exemptions are within the acceptable range suggested by international and comparative law and practice. While eight exemptions are subject to mandatory refusal,⁶³ all but one of these⁶⁴ is also subject to a limited public interest override test in the following terms:

Despite any other provision of this chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45 if-

- (a) the disclosure of the record would reveal evidence of-
 - (i) a substantial contravention of, or failure to comply with, the law; or
 - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.⁶⁵

Part two of the Act also provides detailed procedures allowing third parties to whom information may relate to make representations as to why the information should not be released.⁶⁶

⁶² Sections 33-46. Section 30 also allows refusal of access to health records where the information might cause serious physical or mental harm to the requester.

⁶³ Sections 34 (third party privacy), 35 (Revenue Service records), 36 (third party commercial information), 37 (third party confidential information), 38 (individual safety), 39 (law enforcement and legal proceedings), 40 (legal privilege) and 43 (third party research information). The remaining exemptions are subject to discretionary refusal.

⁶⁴ Section 35 (relating to records held by the Revenue Service).

⁶⁵ Section 46.

⁶⁶ Sections 47-49.

Part three contains one of the most controversial sections of the Act and one which, in terms of other freedom of information legislation around the world, is revolutionary. It provides a right of access to records held by private bodies where the record is required for the exercise or protection of any right.⁶⁷ Public bodies are specifically permitted to make private access requests, subject to the requirement that, unless protecting their own interests, they must be acting in the public interest when doing so.⁶⁸

The remaining provisions relating to private access requests are very similar to those dealing with access to public information. Private bodies must make certain information routinely available⁶⁹ and may charge fees for access to other information.⁷⁰ Initial time limits for requests are set at thirty days and may be extended⁷¹ and the seven exemption provisions are almost identical to those relating to public bodies.⁷² They relate to third party privacy, various types of commercial information, confidential information, the safety of individuals and the protection of property, legal privilege, and research information. Refusal of access is mandatory in relation to all but one of these provisions⁷³, although they are all subject to a public interest test in identical terms to the test applicable to public information.⁷⁴ Third parties may make representations to private bodies that information which directly concerns them should not be released.⁷⁵

Part four of the Act establishes appeal procedures from decisions of both public and private bodies. Public bodies must provide for an initial internal appeal which may include representations from other interested parties.⁷⁶ From the public body, and directly from the initial decision of a private body, a full appeal lies to the courts.⁷⁷

⁶⁷ Section 50.

⁶⁸ Section 50(2).

⁶⁹ Sections 51 and 52.

⁷⁰ Section 54.

⁷¹ Sections 56 and 57.

⁷² Sections 62 – 70.

⁷³ Section 68 (commercial information of a private body). The other exemptions provisions provide for discretionary refusal of access

⁷⁴ Section 70.

⁷⁵ Sections 71 – 73.

⁷⁶ Sections 74-77.

⁷⁷ Sections 78-82. Initially appeals will lie to the High Court. Section 79 contemplates the establishment of special procedures to hear these appeals in separate courts.

The Court has full powers to make any decision it regards as just in the circumstances⁷⁸ and may examine any record to which the Act applies in order to determine whether or not it should be released.⁷⁹ The public or private body bears the burden of demonstrating that its refusal of access is justified⁸⁰ and the court may order compensation or allocate costs.⁸¹

The final part of the Bill contains miscellaneous provisions including the Human Rights Commission's duties to oversee and monitor the workings of the Act and to report annually to the National Assembly⁸² and the establishment of transitional provisions and offences for those who destroy, conceal or falsify a record with intent to deny access.⁸³

Although a significant and welcome step forward, the Promotion of Access to Information Act is not without its flaws. Earlier drafts, known as the Open Democracy Bill, contained provisions protecting “whistleblowers” who disclose information about wrongdoing and provided for open meetings of decision-making bodies. There were also detailed provisions relating to access to and correction of personal information and the public interest override in the exemption sections was stronger. Many have also suggested that the mandatory publication requirements for government departments should be strengthened so that more information becomes available without the need for an application request.⁸⁴ Although some of these matters are being dealt with in separate legislation,⁸⁵ it is undeniable that the Act has been watered down during its passage through parliament.

Despite these and many other more minor criticisms by both South African and international organisations, the Act provides clear and detailed procedures for accessing a very broad range of both public and private information, the exemption provisions are reasonable and subject to a public interest test and it provides a mechanism for oversight and monitoring which should ensure continued improvements and refinements as the Act begins to have an impact in South Africa. It is to be warmly welcomed, particularly given the poor record of States in the sub-region in this regard.

⁷⁸ Section 82.

⁷⁹ Section 80.

⁸⁰ Section 81.

⁸¹ Section 82.

⁸² Sections 83-85.

⁸³ Section 90.

⁸⁴ See South African Human Rights Commission, *Workshop on Open and Accountable Democracy. Selection: Submissions on the Open Democracy Bill*, (Cape Town, July 1999).

⁸⁵ Notably the provisions relating to whistleblowers and personal information. With regard to whistleblowing, the South African Parliament passed the Protected Disclosure Act 26 in August 2000.

CONCLUSION

Notwithstanding the recent developments in South Africa, it is unfortunately still true to say that the right to freedom of information remains more honoured in the breach than the observance in the sub-region. Despite constitutional protections which guarantee the rights to freedom of expression and information, outdated, vague and overly broad secrecy and general laws unduly restrict the flow of information to citizens and impede the proper functioning of democracy throughout the sub-region.

However, the recent introduction of progressive legislation in South Africa is set to change the freedom of information landscape throughout the sub-region. In addition to these developments, all but one of the countries in the sub-region⁸⁶ are members of the Commonwealth. At the recent Commonwealth Head of Government meeting in Durban in November 1999, Commonwealth Principles on Freedom of Information were formally endorsed. Governments can be sure that sub-regional human rights and civil society groups will be intensifying their campaign to place freedom of information at the top of the agenda as the push for good governance and respect for human rights intensifies throughout the sub-region.

⁸⁶ Angola.