



ACCESS TO INFORMATION AS A TOOL FOR SOCIO-ECONOMIC JUSTICE

By

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Introduction

It has been asserted that the 21st century will be, or is, the African century. This assertion is supported to some extent by economic growth figures that show Africa is enjoying some of the highest levels of economic growth in the world. A number of countries have achieved double-digit levels of GDP growth – for example Ghana’s economy grew by 14 percent in the last year. It has also been reported that overall Africa is experiencing about 7 percent economic growth per annum. These are impressive figures considering the negative growth in some European countries and the financial crisis that recently battered the United State of America.

All the above does not mean that Africa has resolved some of its key defining challenges such as poverty, lack of development and economic inequality among its peoples. These will continue to be with us for a little while longer still. While strong and impressive gains have been made in ensuring political stability, the issue of unequal development will remain a major risk to any economic success that the continent might enjoy.

While strong and impressive gains have been made in ensuring political stability (in Africa), the issue of unequal development will remain a major risk to any economic success that the continent might enjoy,

Freedom of Information as a tool for development

Many of the democratic transitions that have occurred in Africa fall under what is regarded as “the third wave of democratization”¹. The third wave of democratization has created opportunities for development and reconstruction of many nations that had been brought to their knees by oppressive, secretive and undemocratic regimes of the past. This development and reconstruction has not focused only on infrastructure and the economy but the democratic imperatives have also demanded a rethink of the relationship between those in power and those who voted them into power. In this reconfiguration we should recall the words of the American constitutionalist, Alexander Hamilton, who once said:

*“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary... A dependence on the people is no doubt the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.”*²

If men and women were angels, indeed we would not require basic human freedoms such as the right to vote and freedom of expression (which includes the right to seek, receive and impart information) to be protected in national constitutions nor would there have been any need to make special constitutional provisions obliging governments to share the spoils of economic growth fairly among citizens through ensuring that even the most impoverished of society have access to services needed to sustain life, protect dignity and enhance the prospects of future generations. Alas, men and women are not angels and we therefore need these “auxiliary precautions” to protect the democratic order for the material benefit of the poor. It is vital that national constitutions protect not only civil and political rights but also promote realization of social and economic rights.



MANY NAMIBIANS LIVE IN MIDDLE TO UPPER CLASS HOMES, WHILE THE MAJORITY OF NAMIBIANS LIVE IN POVERTY.

¹ According to Jones and Stokke (2005) the “third wave refers to a series of democratic transitions in Southern Europe in the 1970s, in Latin America in the 1980s, in Easter and Central Europe and former Soviet Union from the late 1980s, and in parts of Africa in the 1990s”

² Hamilton, A. quoted in President Thabo Mbeki’s Address to a Judicial Symposium held in Johannesburg, South Africa, 2003

“... democracy is not necessarily a sufficient condition for development or social and economic equality, and many scholars have argued that democracy will remain a formality unless it also includes substantive social and economic equality”

By social and economic rights, I refer to what the late Professor Kader Asmal – the South African Human Rights scholar, activist and former government minister – once called “the red and green rights”, namely, the rights to housing, health care, food, social security, social services, education, human dignity in conditions of detention, healthy environment, land and security of tenure.

The third wave of democracy has not, in most cases, necessarily translated into social and economic development of communities that had previously been materially disadvantaged by discriminatory and undemocratic systems of government. I believe this is largely because focus has tended to be largely on full constitutional protection of civil and political rights as the cornerstone of the democratic order while neglecting or partially entrenching social and economic rights within the constitutional framework.

Some correctly argue that democracy is not necessarily a sufficient condition for development or social and economic equality, and many scholars have argued “that democracy will remain a formality unless it also includes substantive social and economic equality” (Jones and Stokke, 2005). Amartya Sen’s argument is that “democratic institutions are guarantors for public deliberation and effective responses to poverty and deprivation” (Jones and Stoke, 2005). Sen (2000) goes on to argue that:

“Freedoms are not only the primary ends of development, they are also among its primary means. Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form opportunities for participation in trade and production) can help generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.”

Mumtaz Soysal, in his 1977 Nobel Lecture, argued that:

“When those deprived of their socio-economic rights cannot make their voices heard, they are even less likely to have their needs met. If a person is deprived of one right, his chance of securing the other rights is usually endangered. The right to education and the right to freedom of information and open debate on official policies are necessary to secure full public participation in the process of social and economic development. The freedom of the human mind and welfare of the human being are inextricably linked.”



THE RED AND GREEN RIGHTS: THE RIGHTS TO HOUSING, HEALTH CARE, FOOD, SOCIAL SECURITY, SOCIAL SERVICES, EDUCATION, HUMAN DIGNITY IN CONDITIONS OF DETENTION, HEALTHY ENVIRONMENT, LAND AND SECURITY OF TENURE.

In countries where citizens were unjustly denied access to certain services and resources because of their race or other societal background, a constitution – as an “auxiliary precaution” – that protects of socio-economic rights is most vital to the process of redress, reconstruction and redistribution.

A number of African countries have guaranteed socio-economic rights in their national constitutions, such as is the case in Eritrea, Madagascar, Mozambique, Somaliland, Ethiopia, Malawi³ and South Africa, while others guarantee these rights through state policy, such as the case in Lesotho, Uganda⁴ and Namibia. The protection of socio-economic rights by any country’s constitution or state policy and making their progressive realization partially justiciable by the courts is quite a

³ Accessed from <http://www.chr.up.ac.za/undp/domestic/constitutional.html> on 09 August 2012.

⁴ *Ibid*

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departure from the norm where the focus has tended to be on judicial protection of political and civil rights. Traditionally Freedom of Information has found its place among the body of these political and civil rights.

During the era when only a few Scandinavian countries and the USA had Freedom of Information (FOI) legislation, these laws created an understanding of FOI as merely a part of the right of freedom of expression which in and of itself had come to be perceived as a right that only affects journalists and political activists. Even the earlier international legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights enveloped FOI within the broader right to Freedom of Expression.

I firmly believe that it is when FOI is used as a leverage right for the protection or promotion of other socio-economic rights that it finds its real meaning in the context of a developing country. The well-known and remarkable work of the MKSS in Rajasthan in India, emulated by other organizations in South Africa and elsewhere, shows how FOI can be used to the benefit of local communities and governments by helping social organizations expose corruption that has compromised the proper implementation of development projects and social security schemes. This work supports the idea that one of the purposes of the tools of democracy - such as FOI - is “to advance poor people’s access to socio-economic resources and services” (Barbeton, Davis and Sarkin, 2000). This is consistent with the United Nations Development Programme in their assertion that

“Effective anti-poverty programmes require accurate information on problems hindering development to be in the public domain. Meaningful debates also need to take place on the policies designed to tackle the problems of poverty. Information can empower poor communities to battle the circumstances in which they find themselves and help balance the unequal power dynamic that exists between people marginalised through poverty and their governments.”

For example in India the government runs a massive food subsidy scheme as a social security measure aimed at promoting the people’s right to food. However, such food rations are in most instances distributed through shopkeepers in the private sector, called ration-dealers. Ordinarily a member of the public would take his/her ration card and go to the local ration-dealer to collect some food parcels. The dealer would then claim payment from the government for the food he has distributed to the local community in terms of the food subsidy scheme. However some ration dealers have been reported to be manipulating the process for their own ends by telling the members of the public that they’ve run out of food subsidy stock and offering to sell to the person food from the ration-dealer’s “ordinary trading stock”. In the records of the ration-dealer such a transaction is recorded as a distribution in terms of the food subsidy scheme and money is claimed from government as well. Therefore the ration-dealers get paid twice, both by the customer and by the government.



FREEDOM OF INFORMATION CAN BE USED TO THE BENEFIT OF LOCAL COMMUNITIES AND GOVERNMENTS BY HELPING SOCIAL ORGANIZATIONS EXPOSE CORRUPTION THAT HAS COMPROMISED THE PROPER IMPLEMENTATION OF DEVELOPMENT PROJECTS AND SOCIAL SECURITY SCHEMES.

This practice was exposed in a number of villages in the state of Rajasthan when the communities assisted by the MKSS used the state’s FOI law to access the ration-dealers’ claim documents sent to the government. Massive discrepancies were discovered between what the ration-dealer’s were claiming from government and what they actually distributed by the communities as captured in individual ration cards that each member of the community kept as a record of the rations they’ve received. For example a claim document would detail all the food items given to person X on a specified date but person X’s own ration-card wouldn’t show any entry for that date.

By accessing government documents the citizens in villages scattered across the state of Rajasthan were able, again, to reconcile what is claimed on paper with the reality on the ground. The cases described above illustrates vividly the multi-dimensionality of FOI in the developing world where it can be used as tool for accountability, for protection of socio-economic rights, a tool for fighting corruption and a tool for improving government efficiency.

In Thailand the children's right to education and fair and equal treatment was protected when a parent used the country's FOI law to challenge a public school's decision to deny her child enrolment in one of the country's best public schools. In seeking access to results of enrollment tests for children who had applied for enrolment, the parent of the child exposed the discrimination that had hitherto been part of the selection process which favoured children from rich and prominent families. That action prompted a countrywide overhaul of the system of selection and enrolments in public schools.

However, in countries where FOI legislation has not been passed, the citizens cannot yet claim the protection provided by FOI. For example in a village near the Tanzanian capital city of Dodoma, the women are the bedrock of their community as they are the main breadwinners in a community sustained by their subsistence agricultural activities. Local schools had been built with donor support under the condition that the donor agency and government would put in some funding for every Tanzanian shilling paid towards the running of the schools by local parents who sent their children to these schools. These funds would then be controlled by local authorities and the school principals. Inefficiency and some reported cases of corruption left some of these schools in a state of disrepair and there is simply no accountability on how these funds were spent. The women don't have any recourse available to them, short of social mobilisation, which in itself require access to information, and yet Tanzania does not yet have an FOI law.

In the neighbouring East African country of Kenya the citizens have complained about the mismanagement of constituency development funds (CDF) which are funds controlled by members of parliament aimed at fighting poverty at regional levels. CDFs are also used to run educational and bursary schemes and they constitute about 7.5 percent of the government's revenue. However, in Kenya the CDFs have come to be popularly called "corruption devolvement funds". Kenyans have very little recourse to ensure that they receive the services to which they are entitled because Kenya does not yet have an FOI law.

Some of these cases demonstrate a realization of a socio-economic right through usage of FOI and public pressure and not through litigation, which in any case is beyond the reach of most Africans. Public pressure to influence resource allocation can only be effectively applied if there is sufficient transparency on the process of resource allocation. FOI creates these conditions for effective challenge of resource allocation decisions and also allows people to challenge available resources on "the quantity of the resources that are made available, and on how effectively these resources are used by various spheres of government to ensure that socio-economic rights are progressively realized" (Barborton *et al*, 2000)

Conclusion

In countries plagued by socio-economic imbalances that were inherited from the undemocratic systems of government it is crucial that the products of democratic transition such as FOI legislation must be used to address these imbalances. In the

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field of socio-economic rights, as the cases I've mentioned above show, FOI creates a basis for contestation and justification of governments' decisions on resource allocation. It creates a basis for a fair and reasonable manner of decision making.

BIBLIOGRAPHY

1. A Guide to Measuring the Impact of Right to Information Programmes: Practical Guidance Note (2006). Accessed from <http://www.undp.org/oslocentre/docso6/A%20Guide%20to%20Measuring%20the%20Impact%20of%20Right%20to%20Information%20Programmes%20-%20final%2003.08.2006.pdf> United Nations Development Programme, Bureau for Development Policy, Democratic Governance Group
2. Barbeton, C. Davis, and D. Sarkin, J. (2000) "Claiming resources of socio-economic rights" in Liebenberg, S. and Pillay, K. (eds) (2000) "Socio-Economic Rights in South Africa". The Socio-Economic Rights Project, Community Law Centre. University of the Western Cape. South Africa.
3. Calland, R. Dimba, M. and Naburi, D. Research on Citizen's Access to Information and its use for Greater Government Accountability and Responsiveness (in Tanzania). pg11. 2004. Unpublished report commissioned by the Department for International Development (UK)
4. Calland, R. & Tilley, A. (Eds). The Right to Know, the Right to Live: Access to Information & Socio-economic Justice. Open Democracy Advice Centre (ODAC), Cape Town, South Africa. 2002.
5. Coronel, S. (ed) (2004) The Right to Know: Access to Information in Southeast Asia. Phillipine Centre for Invesitgative Journalism
6. Currie, I. and De Waal, J. (eds) (2001) The New Constitutional and Administrative Law (Volume One: Constitutional Law). Page 398. Juta, Lansdowne.
7. Gloopen, S. (2005) "Social Rights Litigation as Transformation: South African Perspectives" in Jones, P. and Stoke, K. (eds.) (2005) Democratising Development: The Politics of Socio-Economic Rights in South Africa. Nijhoff Law Specials (Volume 64). Martinus Nijhoff Publishers, Natherlands
8. Graham, P.M., (2005) "Socio-Economic Rights: Cornerstone or Capstone of Democracy?" in Jones, P. and Stoke, K. (eds.) (2005) Democratising Development: The Politics of Socio-Economic Rights in South Africa. Nijhoff Law Specials (Volume 64). Martinus Nijhoff Publishers, Natherlands
9. Jagwanth, S. "The Right to Information as a Leverage Right" in Calland, R. & Tilley, A. (Eds). The Right to Know, the Right to Live: Access to Information & Socio-economic Justice. Open Democracy Advice Centre (ODAC), Cape Town, South Africa. 2002.
10. Jones, P. and Stoke, K. (eds.) (2005) Democratising Development: The Politics of Socio-Economic Rights in South Africa. Nijhoff Law Specials (Volume 64). Martinus Nijhoff Publishers, Natherlands
11. Mbeki, T. Address of the President of South Africa, Thabo Mbeki, at the Judicial Symposium, Birchwood Hotel, Benoni, Johannesburg, South Africa, 16 July 2003
12. Mureinik, E. (1994) "A Bridge to Where?: Introducing the Interim Bill of Rights". South African Journal of Human Rights.
13. Sen, A, quoted by Paul Graham in "Socio-Economic Rights: Cornerstone or Capstone to Democracy" (2005)
14. Soysal, M. (1977). Nobel Lecture. Accessed from http://nobelprize.org/nobel_prizes/peace/laureates/1977/amnesty-lecture.html on 15 February 2008. Sourced from "Nobel Lectures", Peace 1971-1980, Editor-in-Charge Tore Frängsmyr, Editor Irwin Abrams, World Scientific Publishing Co., Singapore, 1997



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