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RIGHT TO INFORMATION ADVOCACY

THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

2016

AFIC

Africa Freedom of Information Centre is a pan-African civil society organisation and resource centre that promotes the right of access to information on the continent through comparative research, coordinating regional advocacy, facilitating information-sharing and capacity building. AFIC is a membership organization with 39 civil society organisational members in 23 African countries. It was initially registered and started operations in Nigeria in 2008 until it was moved to Kampala in 2008 in Nigeria and later moved to Kampala in 2010.

AFIC's mission is to advance access to information in Africa by engaging selectively with continental level actors, institutions and processes and sub-regional organizations through monitoring international, continental and regional treaty commitments and compliance related to access to information; coordinating and amplifying the voice of its members at a continental and regional level; aggregating the skills and experiences of its members in support of one another transnationally; and acting in solidarity with the advocacy efforts of its members.

AFIC has Observer Status with the African Commission on Human and People's Rights. It is also a member of the Civil Society Steering Committee of the AU-EU CSO Human Rights Dialogues.

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THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

The African Commission of Human and People's Rights (the African Commission, or the Commission) was established in 1987 for the protection and promotion of human and people's rights and the interpretation of the African Charter on Human and People's Rights (the African Charter). It holds biannual Ordinary Sessions during which States' compliance with the Charter and human rights situations on the continent are reviewed, and reports are provided by the Commission's mechanisms (Special Rapporteurs and working groups). Civil society engagement is critical to the effectiveness of the Commission.

The 56th Ordinary Session of the African Commission, held from 21st April to 7th May 2015 in Banjul, The Gambia, saw some outstanding developments, Representatives of the following twenty (20) State Parties made statements on the human rights situation in their respective countries: Malawi, Burkina Faso, Togo, Rwanda, Egypt, Mauritania, Sahrawi Arab Democratic Republic, Kenya, Algeria, Ethiopia, Namibia, Angola, Nigeria, Democratic Republic of Congo, Niger, Guinea Bissau, South Africa, Chad, Eritrea and Guinea. A total of forty-one (41) NGOs with Observer Status with the Commission made statements on the human rights situation in Africa. The Commission made on statement on the situation of human rights in Burundi in the presidential elections;

In accordance with Article 62 of the African Charter, the Commission considered the periodic reports of the following seven (7) State Parties: The Federal Republic of Nigeria; The Republic of Djibouti; The Republic of Niger; The Federal Democratic Republic of Ethiopia; The Republic of Uganda; The Republic of Malawi; and The Republic of Senegal.

The Commission adopted the following Resolutions: i. Resolution Condemning the Xenophobic Attacks in the Republic of South Africa; ii. Resolution on the Human Rights Situation in the Republic of Kenya; and iii. Resolution on the Right to Rehabilitation for Victims of Torture.

The session was preceded by the NGO Forum held from 17 to 19 April 2015; Meeting of the Working Group on Economic, Social and cultural Rights, held from 19 to 20 April 2015; and the launch of the Report of the state of freedom of expression in Eritrea, held on 21st April 2015.

THE RIGHT TO INFORMATION IN AFRICA

The right of access to information is a fundamental right recognized by the Universal Declaration of Human Rights since 1946. The right to information is a guiding principle for participatory democracies since only an informed population can effectively contribute to the construction of governments and political institutions. People need information to be able to adequately express themselves on matters of governance, holding leaders accountable, influencing service delivery and decision-making and for promoting and protecting their human rights.

Freedom of information is established in international law and human rights standards. Six African Union treaties recognize the right to access to information and oblige state parties to these treaties to observe and promote this right. The treaties are: article 9 of the African Charter on Human and Peoples Rights, article 19 of the African Charter on Democracy, Elections and Governance, article 9 and 12 (4) of the African Union Convention Against Corruption, article 10 and 11 of the African Union Youth Charter, article 6 of the African Charter on Values and Principles of Public Service and Administration and article 3 of the African Statistics Charter.

Over the past five years, Africa has witnessed progress in terms of promotion and protection of the right to information, challenges with adoption and implementation notwithstanding. The Regional Conference on Access to Information held in Accra, Ghana in 2010 under the auspices of the Carter

Centre identified key findings among which were the importance of access to information in advancing human rights, good governance and democracy and the limited legislation and application of regional and international standards that was slowing down development and observation of key civil and political rights in Africa. By 2010, there were only five countries with national access to information laws, these were: South Africa, Zimbabwe, Angola, Uganda and Ethiopia.

Other key milestones for the advancement of transparency in Africa have been the adoption of the African Platform on Access to Information (APAI) Declaration by the Pan African Conference on Access to Information, the subsequent adoption of the African Model on Access to Information by the African Commission on Human and Peoples' Rights and the declaration of September 28th as International Day for Universal Access to Information by UNESCO on November 17, 2015. These new tools provide civil society additional spaces and resources to engage key actors on the advancement of the right to information in Africa.

AFIC working with its membership, partners, national governments and the organs and institutions of the African Union, has successfully advocated for a number of regional treaties with provisions on access to information ratified and progressively implemented. Only 12 countries worldwide had access to information legislation in 1990; this has changed rapidly as more than 100 countries have such laws today. However, African experience has seen only 19 of 54 countries adopting national access to information laws over the same period: South Africa, Angola, Zimbabwe, Uganda, Ethiopia, Liberia, Nigeria, Sierra Leone, Guinea, Niger, Rwanda, Mozambique, South Sudan, Sudan, Burkina, Tunisia, Togo. Even so, this handful of African pioneers is still challenged with implementation due to an absence of political will, human and financial resources and technical expertise.

STATE REPORTING OBLIGATIONS¹

One of the most effective means by which the Commission can ensure the promotion and protection of human and peoples' rights is through the State reporting procedure. Under article 1 of the Charter, State Parties thereto

1 Extract from <http://www.achpr.org/states/reporting-procedure/>

undertake to adopt legislative and other measures to give effect to the rights protected by the Charter. Under article 62, they are required to submit reports to indicate how they have implemented article 1, that is, the legislative and other measures they have adopted to give effect to the Charter.

The African Charter on Human and Peoples' Rights prescribes in Article 62 that: "(...) each State Party shall undertake to submit every two years, from the date the Charter comes into force (for that State), a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter." The Charter does not however indicate the organ to which these reports should be submitted.

The Commission then, in a broad reading of its powers, fully justified under Articles 45 and 46 of the Charter requested to be entrusted with the task. Consequently, in its 3rd Ordinary Session in April 1988, the Commission of the OAU decided to "specifically assign it with the mandate to consider the reports to indicate the general orientation as regards their form and substance". This recommendation was adopted at the 24th Ordinary Session of the OAU Assembly of Heads of State and Government. Since then, therefore, the Commission has been receiving and examining States' reports submitted pursuant to Article 62 of the Charter.

At its Fourth Ordinary Session held in October 1988, the Commission adopted the General Guidelines relating to the form and content of the periodic reports, detailing the type of information required by the Commission.

It should be noted that of the 53 States which have ratified the Charter only 47 have submitted reports to the Commission, and only 8 are up to date with their report obligations.

The Commission has several times mentioned the advantages and benefits of State Reporting:

1. Monitoring implementation of the Charter
2. Identify difficulties
3. Share information among States
4. Provide advices and recommendations to States

PROCEDURES ADOPTED WHEN EXAMINING STATE REPORTS

Upon receipt of a report, the Secretariat studies it and informs all the Commissioners. Copies of the report are sent to all the commissioners. Prominent human rights institutions, local NGOs from the State that has submitted the report, are either informed or sent copies of the report. This distribution of the State report is in conformity with Rule 78 of the Commission's Rules of Procedure which provides that: "Periodical reports (...) submitted by State Parties to the Charter (...) shall be documents for general distribution (...)" These human rights institutions are requested to avail to the Commission, information and/or questions on the human rights institution of the State concerned. The Secretariat, with all the information at its disposal, prepares questions that would be asked to the representative of the State.

The questions are not necessarily limited to information in the report. The questions are transmitted to the State concerned and to all Commissioners at least six weeks before the date of the session at which the report is going to be examined. A letter, together with a list of the questions prepared at the Secretariat, is sent to the State requesting it to send a highly qualified official (s) to the session to present the report. It is very important that States send representatives who will be able to answer questions posed to them on the spot. The Secretariat also specifically contacts the Commissioner responsible for promotional activities in the country concerned, who, under normal circumstances is going to be the rapporteur to lead discussion on the report, and provides him with any further information on the report.

The examination of State periodic reports is done in open sessions of the Commission, that is, before all the participants, including NGOs, National Human Rights Institutions, State representatives and other invitees. However, only the Commissioners can pose questions to the State representatives.

There is no fixed time limit for the state representatives to make the presentation. After the presentation, the Special Rapporteur poses questions to the representatives. These are supplemented by additional questions from other Commissioners. The line of questioning is not limited to the questions prepared by the Secretariat.

In the past, after the question and answer session, the Commission went into a close meeting to discuss possible recommendations. The practice however has changed, and presently, after the question and answer process, the rapporteur sums up and the Chairperson concludes the discussion.

After the examination of a State report, the Commission usually decides that a follow-up letter be sent to the State concerned, summing up the examination and putting in writing the questions that were not given satisfactory answers, if any.

Rule 84 states that “The Secretary shall, at each session, inform the Commission of all cases of non-submission of reports or of additional information --- In such a case, the commission may send through the Secretary, to the State Party (...) a report or reminder relating to the submission of the report or additional information.”

Reminders are sent to State Parties every three months (in the past it was once every six months). The Commission usually attaches a list to the annual activity report which illustrates the status of submission of State periodic reports. This list contains the names of those States that have submitted their reports, the number of reports submitted, the reports due, and the names of those States which have not submitted any report.

The State reporting system of the African Commission is still in its infancy. Unlike the UN Human Rights Committee, the African Commission examines very few reports during each of its sessions. To develop this system further, the Commission would need the cooperation of States, NGOs and civil society.

The final stage of the review involves the Committees drafting and adopting findings and recommendations in the form of Concluding Observations. On concluding the dialogue with the State Party in the Review Session the Committee meets in a closed session to discuss its findings. The country rapporteur then prepares, with OHCHR's assistance, the draft Concluding Observations for consideration by the Committee. The agreed structure of the Concluding Observations is as follows: introduction including whether the report complied with the Committee's reporting guidelines; any reservations to the treaty entered by the State Party; and the level of the delegation and the quality of the dialogue, positive aspects of State's fulfilment of its obligations under the treaty, factors and difficulties impeding the implementation of the treaty principal subjects of concern and suggestions and recommendations – including a recommendation for wide dissemination of the Concluding Observations.²

The consideration of State reports is an important part of the work of the African Commission on Human and Peoples' Rights (ACHPR or the Commission), which falls under Article 62 of the African Charter on Human and People's Rights. The purpose of this process, in the words of the ACHPR, is to "to create a channel for constructive dialogue" on the implementation of the African Charter. It provides an opportunity to evaluate State actions to advance the rights protected in the ACHPR and its protocols, identify obstacles to the realization of these rights, and formulate recommendations for improving State practice. Civil society participation is critical to provide a counterpoint to government reports, ensuring that the Commission has an accurate picture of the situation on the ground. Civil society organisations (CSOs) can work to improve the quality of the recommendations and also work

2 http://docs.escr-net.org/usr_doc/CEDAW_CESCR_reporting_guidelines_FINAL_Oct_6_2010.pdf

to ensure their implementation at the national level. Despite its potential, the State reporting procedure faces a number of serious difficulties. In general, States parties have shown insufficient engagement in the process: the majority of States parties are not up-to-date in their reporting; States fail to engage actively with the ACHPR; and the Commission lacks capacity to ensure appropriate follow up and implementation of its recommendations.³ Despite the potential to address these questions, civil society organisations have not extensively engaged in this process. Relatively few CSOs participate regularly in ACHPR's sessions, and those that do often do not focus on the State reporting procedure. In addition, available advice on CSO engagement with the ACHPR focuses relatively little attention on this procedure.

New calls for the use of African Human Rights mechanisms, as first instance for redress, will potentially boost ACHPR and the African Court on Human and Peoples Rights.

SHADOW REPORTING

As part of the Committees' review processes, in addition to receiving information from States Parties, both Committees also consider information and reports provided by non-governmental organizations (NGOs) that are referred to as Shadow Reports or Alternative Reports.

Through shadow/alternative reports RTI and FOE advocates can critically engage with the reporting and monitoring process by providing data (including statistical data and case-studies) on the achievement of the rights and gaps in implementation of the obligations outlined in the ACHPR and other regional or international mechanisms.

This can include data on:

1. The real situation of the RTI and FOE in the country
2. The impact and progress made by the State in implementing RTI and FOE
3. Violations of the human rights

³ http://www.ishr.ch/sites/default/files/article/files/roadmap_english.pdf

4. Inadequacies and gaps in laws and policies and their implementation

INFORMATION ABOUT OBSTACLES TO THE REALIZATION OF RTI AND FOE

During the 56th Session of the ACHPR, AFIC submitted shadow reports on Uganda, Malawi (in collaboration with CHRR), Nigeria (in collaboration with Media Rights Agenda) and Sierra Leone reflecting on the state of FOE and ATI from a citizens' perspective. During the session, AFIC engaged commissioners and made statements based on the shadow reports. These reports empowered the ACHPR to engage state parties on FOE and ATI issues. The Special Rapporteur was appreciative for AFIC's work as quoted below in a communication dated 30th April 2015:

"...I wish to express my profound gratitude to you personally and to AFIC for the support you gave me during the 56th Session of the African Commission on Human and Peoples' Rights through the provision of shadow reports. The reports enhanced my engagement with State Parties which presented their State Reports..."

AFIC has identified that the main challenges to the respect of the right to information and freedom of expression in Africa as 1) lack of legal frameworks regulating these these rights, 2) poor implementation of the existing frameworks, 3) lack of capacity of the international mechanisms to enforce and monitor state compliance with human rights and 4) lack of capacity of civil servants and civil society to use the available tools.

SHADOW REPORTS SUBMITTED TO THE ACHPR by AFIC

NIGERIA

Ratifications

Ratification of human rights treaties supports the protection and promotion of human rights. In essence, it advances the cause of human rights. Nigeria has been commendable in acceding to human rights treaties and international instruments dealing with access to information. It signed the African Charter on Human and Peoples' Rights on August 31, 1982 and ratified it on July 22, 1983. The Charter has subsequently been domesticated and now forms part of Nigerian Laws. Nigeria is therefore impliedly also a State Party to the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in October 2002 to elaborate on Article 9 of the African Charter on Human and Peoples' Rights.

Nigeria also signed the African Charter on Democracy, Elections and Governance but is yet to ratify the instrument. It similarly signed the African Charter on Values and Principles of Public Service and Administration but is yet to ratify it.

Nigeria signed the African Convention on Preventing and Combating Corruption on December 16, 2003 and subsequently ratified it on September 26, 2006. It signed the African Youth Charter on July 2, 2007 and later ratified it on April 21, 2009.

Nigerian has not formally endorsed the African Platform on Access to Information Declaration, although it participated in the process leading to its adoption in Cape Town, South Africa, in September 2011.

Nigeria ratified the Treaty of the Economic Community of West African States on June 2, 1975. It also signed on December 21, 2001, Protocol A/SP1/12/01 on Democracy and Good Governance, a Supplementary to the Protocol of the ECOWAS Treaty on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. It similarly signed on January 16, 2008, Regulation MSC/REG.1/01/08 on the ECOWAS Conflict Prevention Framework.

The country also recognises the United Nations' Universal Declaration of Human Rights. It ratified the International Covenant on Civil and Political Rights on July 29, 1993 and the United Nations Convention against Corruption on June 9, 2003.

Legislation

On May 28, 2011, Nigeria joined the league of countries with freedom of information laws.⁴ The country was the second nation in West Africa to have a law that gives its citizens the power to access government held information and information held by private bodies carrying out public functions.

The law applies to all arms of government: the Executive, Legislative and Judiciary as well as to all tiers of government: Federal, State, and Local governments. The enforcement of the law will reverse the endemic problem of corruption and Nigeria and open up the government.

Prior to its enactment, Nigeria had many laws which hindered disclosure of information such as the Official Secret Act, the Criminal Code, the Penal Code, etc. Though the FOI Act circumvents these restrictions in Section 1, of the Act where it states:

⁴ Freedom of Information (FOI) Act, 2011

“Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.”

CONCERNS

On Constitutional and Administrative Measures

The right to freedom of expression guaranteed in Section 39 of the 1999 Constitution is a general right and does not guarantee any specific right to the media. Section 39 does not provide any express guarantee of right to press/media freedom, media independence or right of access to information.

Section 22 of the 1999 Constitution places on the media the obligation/duty of holding government accountable to the people. However, a journalist or media house cannot cite this section of the law in its defense for carrying out that duty because it is not justiciable and therefore unenforceable.

The Appeal Court, in a judgment delivered by Justice Philip Nnaemeka-Agu, in the case of Senate of National Assembly v Tony Momoh [1983] 4 NCLR, 269), asserted that: “The right to freedom of expression under Section 36 [of the 1979 Constitution] [now Section 39 of the operating 1999 Constitution] is one which belongs to all who have to hold opinion, receive and impart ideas, or disseminate information and contemplates no separate treatment to the mass media. He also said “Section 21 [Section 22 of the 1999 Constitution] is only one of the fundamental objectives and directive principles of state policy which are not justifiable.” This is a subsisting judgment as the Supreme Court has not overturned it.

Nigerian statutes still contain criminal libel laws which tend to censor the media.

The power to authorize broadcast licenses are vested on the President of the Federal Republic of Nigeria and so make it susceptible to political influence rather than to clearly set out and transparent requirements.

On Legislative Measure

The FOI Act, 2011 is a good piece of legislation meeting most, but not all, international standards and principles on Access to Information laws. However, it is not a perfect law. It has its flaws.

The flaw in the FOI Act falls short of international standards. The oversight responsibility of the FOI Act is the duty of the Federal Attorney-General and not an independent information commissioner. An Attorney-General in Nigeria is a political appointee; he/she combines with the office that of the Minister of Justice and so being saddled with the oversight responsibility for the implementation of the FOI Act adds a third office making his/her work, not only burdensome but susceptible to political interference. In Nigeria, there are calls for the separation of the office of the Minister of Justice from that of the Attorney-General.

Additionally, the Nigerian FOI Act does not provide for administrative redress mechanism for requests that are denied. The law says requesters who are denied access to information may go to court to seek redress.

The FOI Act contains all the highlights listed by the Nigerian State in its report but implementation of the law remains a major challenge.

Among the challenges of implementing the FOI Act, public institutions are really not complying with the seven-day timeframe within which they should respond to requests for records and information. They, very often, ignore requests or “send requesters on endless wild goose chase”. They also subject FOI requests to all the bureaucratic bottlenecks of public institutions thereby making a mockery of the timeframe for response. Additionally, public institutions are neither keeping proper records of their operations nor are they making access to records and information in their custody easily accessible to members of the public.

In fact, public institutions have failed to abide by virtually all the obligations set out in the Act for public institutions including their obligations to designate an officer to be in charge of public requests; provide appropriate training for their officials on the public's right of access to information or records held by government or public institutions; to record and keep every information about all their activities, personnel, operations, and businesses etc.; proactively publish certain types of information, even without anyone requesting them; and properly organize and maintain all information in their custody in a manner that facilitates public access to such information, among others.

Though the Federal Attorney-General has oversight responsibility for the effective implementation of the act and though he has churned out guidelines for the effective implementation of the Act, public institutions are not complying with the guidelines, probably because there are no sanctions for disobeying either the FOI Act or the Attorney-General's guidelines.

Additionally, the Federal Government is not doing enough to ensure the effective implementation of the law.

The Presidency has failed to grant every request made to it under the FOI Act and so also the Minister of Finance.

The 1999 Constitution, as amended, has no clear and specific provision guaranteeing the right of the public to access information held by government bodies. The closest provision to a constitutional right to information is that contained under Code of Conduct Bureau which explains that the Bureau can maintain custody of asset declaration information and will make information available for inspection when any citizen of Nigeria calls for it in line with the provisions set by the National Assembly.

The FOI Act is a legal right and can be easily amended unlike constitutional rights. A legal right cannot reign over a constitutional right. This means that FOI Act therefore has no clear constitutional backing and the right to information remains a legal right rather than a constitutional right.

RECOMMENDATIONS

In order to ensure a conducive access to information and freedom of expression environment in Nigeria, it is recommended that Section 22 of the Constitution should be relocated to Chapter Four of the Constitution and be made justiciable. In addition, the FOI Act should be made a constitutional right and guaranteed under Chapter Four of the Constitutions.

OTHER RECOMMENDATIONS ARE:

- a. Repeal Laws which Hamper Access to Information: Nigeria should amend or repeal laws and policies that continue to hamper the access to information regime particularly the Official Secrets Act which public officials still cite to deny access to information.
- b. Sensitize Public Institutions
- c. Budgetary Provisions
- d. Proactive Disclosure: The proactive disclosure provisions in the FOI Act reduce the burden on public institutions to process numerous individual requests for information from members of the public. Accordingly, public institutions should take advantage of this important mechanism in the law to make information available to the public as this will also enhance citizens' trust in the institution.
- e. Record Keeping
- f. Monitoring Public Institutions
- g. Enforcement of the FOI Act
- h. Strengthening the Oversight Body
- i. Public Awareness
- j. ECOWAS Regional Framework and UNESCO

We acknowledge positive steps taken by the Federal Government of Nigeria on advancing the right to information in Africa such as its active participation in the first Pan-African Conference on Access to Information as well as the implementation of APAI declaration. In this regard we urge the Federal

Republic of Nigeria to take leadership on the issue by sponsoring a resolution at the UNESCO General Assembly for the declaration of September 28 as International Right to Information Day.

In addition, we also call upon the Federal Government of Nigeria to take an interest in leading efforts by ECOWAS to adopt a regional framework treaty on access to information.

UGANDA

The African Commission on Human and Peoples' Rights had in its Concluding Observations and Recommendations expressed concern with the situation of citizens' access to information in the following respects as well as ACHPR reporting in the following respects.

- a. Lack of involvement of civil society organisations and citizens in the preparation of the State Report to the African Commission on Human and Peoples' Rights.
- b. Failure to implement previous recommendations especially with regard to the need to amend the NGO Act to address concerns raised by civil society.
- c. Lack of regulations to implement the Access to Information Act.
- d. Failure to ratify and domesticate key African Union treaties including the African Charter on Democracy, elections and Governance.
- e. Increased threats and harassment of human rights defenders and shrinking civic space in Uganda.
- f. Failure to create, manage and disseminate information on vulnerable groups such as refugees, asylum seekers and internally displaced persons.

We are pleased to report that there has been progress in as far as involvement of civil society organisations preparing the State Report. The Ministry of Foreign Affairs in particular hosted more than three meetings in which civil society and other government agencies made inputs into the draft report. The climate of the meetings was conducive and dialogue was generally constructive.

On April 21, 2011 Government in line with ACHPR recommendation gazetted Access to Information Regulations. The Ministry of information and National Guidance is reported to have carried out some awareness raising meetings with some ministries and departments.

In respect to the amendment of the NGO Act and civic space in general, this remains an area of concern. The operation environment for civil society has increasingly become difficult with new administrative requirements for renewal of NGO certificate which include vetting by internal security organization. In addition, there has been increased break-in and theft of property from NGO offices. Over 15 cases were documented and all cases had been reported to Uganda Police but no report has ever been produced. The Minister of Internal Affairs, General Aronda Nyakirima while meeting with civil society organisations on the matter gave assurances for investigations and increased security and this has helped to improve the situation as there hasn't been reported cases of break-ins and theft over the past year.

Despite a history of contested elections on account of lack of transparency, Uganda has not ratified and domesticated the African Charter on Democracy, Elections and Governance which in Article 9 recognises the right of access to information in electoral processes. Ugandan civil society made consultations across the on electoral and constitutional reforms and the issue of access to information on elections was high among the concerns of citizens. The Governments attitude towards citizen proposals in this regard are cold.

IMPLEMENTATION OF PREVIOUS ACHPR RECOMMENDATIONS

AFIC acknowledges Government's implementation of the ACHPR the recommendation regarding the passage of regulations to operationalise the Access to Information Act⁵. However, we are concerned that the Regulations limit the right to information and in some respects goes against the spirit of Article 41 of the Constitution on citizens' right to information as well as ATIA. For example, the Regulations require requesters to pay access fees for

5 Uganda Access to Information Regulations 2011 No. 17 <http://www.africafoicentre.org/index.php/foi-laws/155-uganda-ati-regulations>

each request yet ATIA dictates that information should be provided freely and only a minimal cost of reproduction e.g. photocopying should be charged. The other areas of concern with the regulations relate to lack of guidance for public agencies⁶.

We also acknowledge the involvement of civil society organizations in the preparation of the 5th country Report in line with ACHPR recommendation.

We confirm and commend Government's efforts including the allocation of funds to sensitize the population on their right to information, training of public information officers. However, the level of funding is far below the required needs. For example, no other ministry or agency other than the Ministry of Information and National Guidance is allocated budget for ATIA implementation. Indeed recent studies by the Carter Centre in the ministries of Finance, Justice, Agriculture, Health, Education as well as Uganda Revenue Authority and Uganda Bureau of Statistics found a very low level of implementation⁷. This has been confirmed by a new study on ATIA implementation by the World Bank⁸.

The Ministry of Information and National Guidance is provided about US\$100,000 annually for ATIA implementation. This is very inadequate to create awareness, coordinate implementation, train officials and provide the necessary equipment for effective implementation.

Government has collaborated with civil society organisations in promoting implementation of ATIA. For example, since 2009 annual right to information day commemoration activities have been jointly organized. Another area of collaboration is training and awareness raising activities for public officials, establishment of an access to information portal among other areas.

6 WRI Analysis of Uganda ATIA Regulations <http://www.africafoicentre.org/index.php/reports-publications/22-analysis-of-uganda-access-to-information-regulations>

7 Carter Centre IAT <http://www.cartercenter.org/peace/ati/IAT/index.html>

8 World Bank ATI Assessment <http://www.freedominfo.org/2014/03/world-bank-creating-tool-gauge-foi-implementation/>

We acknowledge Government's collaboration with the Special Mechanism on Freedom of Expression and Access to Information in Africa on different initiatives highlighted in the State Report is commendable.

1. The Government of Uganda should implement previous recommendations of the African Commission on Human and Peoples' Rights regarding expanding and protecting civic space, ratification and effective implementation of the African Charter on Democracy, Elections and Governance.
2. The Government of Uganda should fully implement the Access to Information Act, 2005 by pro-actively disclosing information, developing and issuing manuals of functions and index of records, institute measures to respond to all information requests to respective public bodies and reporting to Parliament under Section 43 should be respected.
3. The Access to Information Act (2005) should be amended to align it with the Model Law on Access to Information for African Union, Principles of Freedom of Expression in Africa as well as other regional standards and international best practice. Among others, the right should be extended to everyone, creation of an Independent Information Commissioner, define and limit scope of exemptions, scope to include appropriate private bodies, sanctions for non-disclosure, promotional measures as well as strengthening provisions on reporting and mandatory disclosure.
4. The training of all appointed Information Officers in ministries, departments and agencies on establishing and running and effective access to information regime should be urgently considered by the Government of Uganda.
5. Funding for the Ministry of Information and National Guidance to effectively support ministries, departments and agencies to meet obligation under ATIA and the Constitution regarding the right of access to information should be boosted. In addition, all ministries, departments and agencies should allocated budget for the implementation of the Access to Information Act.

6. We call upon the Government of Uganda to join the Open Government Partnership (<http://www.opengovpartnership.org/>). This multilateral voluntary initiative seeks to promote transparency and accountability through a partnership of citizens with their Government through constructive engagement. It involves the identification by Government and civil society of grand challenges to transparency and accountability and agreeing commitments through which to overcome them. Uganda meets eligibility since the launch of OGP in 2011 but has not expressed interest to join the partnership despite enormous benefits for both government and civil society.
7. The Rt. Hon. Prime Minister should issue practice directives to all ministries, departments and agencies covered by the Access to Information Act with regard to its implementation in General and annual reporting to Parliament in line Section 43 of the Act.
8. The newly appointed Minister of Information and National Guidance, General Jim Muhwezi should put in place a mechanism for meeting with civil society organisations on a quarterly basis to discuss the advancement of citizens right of access to information. He should also operationalize the ATIA focal point office to ensure effective coordination and support for ministries, departments and agencies.

MALAWI

Ratifications

Naturally, ratification of human rights treaties supports the protection and promotion of human rights. In essence, it advances the cause of human rights. Malawi has exemplarily ratified the core treaties that recognise the right to information including the African Charter on Human and Peoples Rights, African Charter on Democracy Elections, Governance; African Union Convention on Prevention and Combating Corruption; African Charter on Values and Principles of Public Service; African Union Youth Charter and African Statistics Charter.

Legislation

Malawi has strong constitutional guarantees for access to information. The 1994 Constitution of Malawi guarantees the right of access to information in Article 34, providing that,

“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.”

Activists have been advocating for Access to Information legislation. They were given confidence in February 2014 when the Malawian Cabinet finally adopted an Access to Information Policy. Malawi has never had a policy on the right to information. Further, its policies and laws emphasized on official secrecy and confidentiality as evident in the Police Act of 1968, Malawi Army Act of 1965 and the Official Secrets Act of 1913. This removed the last major hurdle to the enactment of an ATI law.

Further, as already noted, the 1994 Constitution of Malawi includes separate guarantees for freedom of opinion, freedom of expression, freedom of the press and the right of access to information in Articles 34 to 37. Additionally, section 44 on the constitution prohibits a limitation on rights including the right to information especially the content of these rights.

However, Malawi is yet to pass its Access to Information Bill. At the time of writing this report, Malawi has a draft Bill that illustrates advances in access to information in Malawi. The Bill is progressive in nature and it addresses most of the key issues and elements of the right to information and access to information. However, the bill has some flaws, for instance, it fails to appreciate the protection of good faith disclosures pursuant to the law itself

Malawi has also developed citizen engagement through membership to key platforms like the Open Government Partnership , Extractives Industry Transparency Initiative , and Construction Sector Transparency Initiative.

CONCERNS

In respect of freedom of information

The African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa which states that "The right to information shall be guaranteed by law (...)"

Further, the Model Law requires that "save for the Constitution", the Access to Information Act shall be above any other legislation that restricts the disclosure of information. This echoes Principle 3 of the APAI Declaration, which states that ATI should be established by law, be binding, enforceable and take precedence over other laws.

However, Malawi has been reluctant to adopt and implement such legislation. The Malawian parliament still needs to pass an access to information bill. The delay in enacting the bill has been due to a number of factors, mostly political in nature. Political will has been uncertain or ambiguous. Information is power and there is always a fear that once the media has full access to public information, the government may lose its clout and political muscle.

Encouragingly, Malawi's Access to Information Bill is complete and significantly conforms with good practice in the area of access to information legislation. However serious concerns exist around the distinctions that the Bill makes between the categories of information it may consider. Section 7 of the Bill provides for exemptions on information that is private and confidential and information that involves the private interests of a third party.

Problematically across Africa, individuals make requests for information on the details of multilateral agreements and what is owed to the government by foreign countries and multinational institutions. They are often told that such information cannot be disclosed because of the confidentiality agreements entered into between the state and the third party concerned.

The common thread that seems to be cutting across most pieces of legislation and bills is that they have exemptions on the basis of information that is of interest to private third parties. These exclusions to the right to information are so inequitable because they effectively negate the right to access information.

Furthermore, Malawi still struggles with the principle of maximum disclosure taking precedence over secrecy. Malawi has a wide range of statutory provisions that prohibit disclosure of some types of public information to members of the public. The uncertainty created by the continued existence of restrictive legislation makes it hard for public officials to know exactly how much to disclose. If one law tells them to release information but another tells them they will be prosecuted for any unauthorized disclosures, officials will most likely err on the side of caution and continue to withhold information.

In respect of freedom of expression

Article 9 of the African Charter on Human and Peoples' Rights categorically requires states to guarantee freedom of expression. However, in 2012, a Worldwide Press Freedom ranking listed Malawi as one of the worst countries in the world in promoting press freedom. The report concluded that Malawi had dropped drastically in the press rankings. Though recently Malawi's ranking has improved, the 2012 fall has been described as the worst for any country. It was attributed to rampant threats against, and arrests of, journalists.

The Government, through the Malawi Communications Regulatory Authority (MACRA), interferes in particular in the operations of the privately owned electronic media, whilst, on the other hand, the administration abused and monopolized access to the State-owned Malawi Broadcasting Corporations & Television.

Criminal defamation laws are especially problematic hampering free expression in Malawi. They can lead to the imposition of harsh sanctions. If prosecuted as a criminal violation, it is punishable with up to two years' imprisonment.

RECOMMENDATIONS

AFIC addressed the following recommendations:

- a. Adopt Access to Information Act
- b. Implement African Charter on the Values and Principles of Public Service Administration
- c. Improve Parliamentary Committee Systems to strengthen the level of influence of the two parliamentary committees crucial for ATI legislation, the Legal Affairs and the Media and Communications committees, to exert pressure on the executive to bring the ATI draft bill before parliament
- d. Sustained CSO's pressure on the government, politicians, and decision-makers in order to promote access to information. The media outlets must be utilized in delivering the campaign materials to the public. A media strategy could be the best methodology if well designed in order to maintain the pressure.
- e. Improve Private Sector Awareness on Access to Information
- f. Improve public awareness on the right to information
- g. Awareness raising efforts can be strengthened through the means of creative partnerships with public bodies or civil society, depending on the purpose of the activity and the group of people targeted. Upon request, the Malawian Ombudsman conducts training courses on good openness and administrative practices for public officials.
- h. Harmonizing Laws, as difficulties in harmonizing data protection, privacy, and access regimes can also create an opportunity for resistance and reluctance in passing and implementing the ATI legislation.
- i. Address the weaknesses in Malawi's Access to Information Bill
- j. Align the Malawian law with the recently developed Access to Information Model Law of the African Union.

QUESTIONS FROM THE COMMISSION TO THE STATE PARTIES

NIGERIA

1. Does Nigeria still have laws that contain criminal libel?
2. What is Nigeria doing to strengthen FOIA oversight?
3. What is the state doing to ensure that all information request filed to agencies are answered?
4. What measures has the state taken to strengthen records management to strengthen FOIA implementation?
5. When will FOIA information officers be designated?
6. Have officials been trained in FOIA in terms of the Act?
7. What steps is the Federal Government taking to ensure that agencies comply with FOIA or Attorney General Guidelines?
8. What measures are being taken to ensure that all agencies including the presidency and ministry of finance grant information requests?
9. Ratification on the values and principles of public service and administration

UGANDA

PRELIMINARY QUESTIONS BEFORE THE SESSION

1. Can the government kindly provide information regarding the number and what ministries that have produced manuals in line with Section 7 of the Act?
2. Can the Government kindly provide information regarding the number of ministries that have complied with the Access to Information Act in respect of filing annual reports to Parliament?

3. What steps have been taken to review wide exemptions under the Act e.g. Sections 27, 29, 30, 32, 33 which have potential to defeat objectives of the law?
4. What measures have been put in place, in practice, to facilitate the existence of an accessible, simple and transparent complaints and appeals mechanisms under the Act
5. What measures have been taken to repeal archaic laws that inhibit access to information?
6. Can the State provide statistics regarding requests granted vis-a-vis refusals?
7. What measures has Government undertaken to repeal criminal defamation provisions in the Penal Code of Uganda?
8. When is Uganda going to ratify the African Charter on Democracy, Elections and Governance as well as the African Charter on the values and Principles of Public Service and Administration both of which have important provisions on the right of access to information?
9. What steps is Uganda taking to amend Access to information fees in Access to Information Regulations to bring them in compliance with the Access to Information Act in respect of access fees?

CONCLUDING OBSERVATIONS

Concluding Observations and Recommendations of the African Commission on Human and Peoples' Rights constitute an important feedback to State Parties. It is based on the Commission's consideration of State reports, shadow reports, interventions during the Session as well as the Commission's own research and understanding of the situation in respective countries.

In filing a subsequent report, a State Party is asked to provide specific information on how previous observations and recommendations have been dealt with. This is done to ensure that there is accountability on actions taken.

At the time of producing this publication the African Commission's Concluding Observations and Recommendations in respect of Uganda and Nigeria were yet to be finalised by the African Commission.

NIGERIA

POSITIVES

The African Commission commends Nigeria for adopting the Freedom of Information Act (2011). Moreover, it appreciates the campaign to progressively address knowledge gaps in the understanding of the provisions and implication of the Freedom of Information Act by Government and private sector actors, through the Freedom of Information Unit in the office of the Attorney-General of the Federation.

CONCERNS

The Commission is however concerned about different matters, including:

- a. The continued existence of laws limiting freedom of expression such as criminal defamation;
- b. The slow pace of the implementation of the Freedom of Information Act due to inadequate knowledge of its provisions and implication by a number of Government and private-sector actors, which restricts the citizens from getting vital information from public institutions;
- c. Reported cases of restrictions on freedom of expression, in particular regarding the private media, and the harassment of journalists as well as human rights defenders;
- d. Allegations of lack of an acceptable level of transparency in the exploitation of natural resources such as oil, and lack of respect for environmental standards.

RECOMMENDATIONS

The African Commission recommends that Government of Nigeria should:

- a. Take the necessary measures to ensure the right to freedom of expression, in particular for the private media and human rights defenders;
- b. Decriminalize defamation and amend other existing laws in the statute books of Nigeria that restrict access to information, to bring them into conformity with the Freedom of information Act;
- c. Intensify the training of staff of all appointed information offices in all its ministries, departments and agencies, on the establishment and running of effective access to information regimes.

UGANDA

POSITIVES

The Commission noted the following progresses regarding FOE and FOI:

- a. The adoption of the Access to Information Regulations (2011);
- b. The introduction and operationalization of barazas at grass roots, which are community meetings that facilitate pro-active disclosure of Government budget information and accountability, for development programmes and resources;
- c. The amendment of the rules of procedure of Parliament, in order to allow live televised coverage of parliamentary sessions;
- d. The allocation of funds towards the sensitization of the Ugandan population on their right to information as guaranteed under the Access to Information Act (2006), and also for developing in collaboration with CSOs the online platform “Ask Your Government“, to facilitate access to information by the citizenry;

- e. The proposal by the Uganda Law Reform Commission to repeal the provisions on criminal defamation contained in the Uganda Penal Code Act Cap 120;
- f. The continuous engagement by the Government with CSOs, towards amending the Access to Information Act, so as to align it with regional and international standards, and to strengthen the implementation of the Act and the oversight framework;
- g. The cooperation by the Government of Uganda with the Commission through its Special Mechanism on Freedom of Expression and Access to Information, including its contributions to: the development of a model law on Access to Information for the African Union member States, the African Platform on Access to Information Declaration as well as the Global Principles on National Security and Access to Information.

CONCERNS

The Commission notes that Uganda has not yet ratified the African Charter on Democracy, Elections and Governance.

It records failure of the State to fully implement the Access to Information Act (2006) by not proactively disclosing information, and instituting measures for responding to all information requests to public bodies.

Additionally, it remarks the wide scope of exemptions under the Access to Information Act (2006), and the absence in practice, of an accessible, simple and transparent complaints and appeals mechanism under the Act.

RECOMMENDATIONS

The African Commission recommends that Government of Uganda should expedite:

- a. The processes for the ratification of the African Charter on Democracy, Elections and Governance;

- b. The processes of amending the Access to information Act (2006) (ATI Act). It should as well include reviewing the wide scope of exemptions thereunder, and for putting in place in practice, an accessible, simple and transparent complaints and appeals mechanism under the Act.
- c. The process of effective implementation of the ATI Act, including by developing a standard uniform reporting format and ensuring that all Government ministries and agencies produce manuals of functions and index of records.

Finally, it encourages training staff of all appointed information offices in all its ministries, departments and agencies, on the establishment and running of effective access to information regimes.

MALAWI

POSITIVES

The commission welcomes the initiation of the draft of the Access to Information Bill and the establishment of institutions for the promotion of human rights, such as the Human Rights Commission, and the Human Rights Unit of the Ministry of Justice and Constitutional Affairs.

It commends the steps taken so far to strengthen the enforcement of the decisions of the Ombudsman, in particular, the proposed review of the Ombudsman Act.

It lauds the support provided to CSOs through programmes such as Democracy Consolidation Programme, the Democratic Governance Programme, and Gender Equality and Women Empowerment Programme, whilst guaranteeing the financial independence of CSOs.

CONCERNS

While recognising the significant efforts made by the Government of Malawi to promote and protect human rights in accordance with the provisions of the African Charter, the Commission is however concerned about the

inordinate delay in the enactment of the access to information law in Malawi and the continued existence of laws limiting freedom of expression such as criminal defamation.

RECOMMENDATIONS

The African Commission recommends that the Government of the Republic of Malawi should:

- a. Speed up the processes for the full domestication of the African Charter and all other regional and international human rights instruments that it has ratified, in line with its international obligations;
- b. Expedite the conclusion of the process of passing the Access to Information Bill into law which has been pending for 8 years, whilst ensuring that the law mirrors the international standards and best practices set out in the Model Law on Access to Information for Africa developed by the Commission;
- c. Ensure that the review of the Communications Act incorporate the regional and international standards on freedom of expression and access to information, to which Malawi has subscribed, and further, adopt legislative, policy and institutional frameworks to strengthen freedom of speech and access to information in Malawi;
- d. Decriminalize defamation and other laws limiting the right to freedom of expression, by reviewing relevant statute books.

ACTIONS and AFIC's RECOMMENDATIONS

Upon issuance of Concluding Observations and Recommendations by the African Commission on Human and Peoples' Rights, AFIC will work with respective members in each country to:

1. Develop an action plan for the popularisation and promotion of implementation of recommendations

2. Conduct dissemination activities of ACHPR Concluding Observations and recommendations among public agencies and civil society organisations
3. Monitor implementation of recommendations by respective agencies
4. Draw lessons and experiences from the process.

CHALLENGES

The main challenge remains lack of awareness of how the mechanism works in many countries as well as funds to support the necessary research, consultations and production of shadow reports. In addition, civil society organisations face challenge with funds to cover missions to attend ACHPR Sessions as well as post Session advocacy and engagements. Nonetheless ACHPR is a very important mechanism for civil society to promote freedom of expression and access to information.

AFRICA FREEDOM OF INFORMATION CENTRE (AFIC)

Plot 436/437 Mawanda Road.
Suite A4, Corner House.

P. O. Box 35643, Kampala

Tel: +256 414 533554

Web: www.africafoicenter.org

