

**Why does the law matter? An exploration of the role of legislation for social  
accountability: a comparison of South Africa and Zambia**

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## **1. Introduction**

It can be argued that the quality of governance in Africa is determined, to a large extent, by the ability of citizens to exact accountability from the state. There are various forms of accountability that citizens can demand from those that govern them. While political accountability, which is determined by a cycle of elections and existence of democratic institutions, is well established in many states in Africa, the question of social accountability is increasingly gaining currency as a vital component to improving overall accountability.

Social accountability can be described as an approach which relies on civic engagement to ensure accountability from duty-bearers. In the public sector, it relies on a range of actions and mechanisms used by citizens, civil society organisations, media and communities to monitor the behaviour and decisions of public officials and agencies. Evidence suggests that the forms and successes of civic engagement largely depend on context. In social accountability work, it is important to take into account the availability of entry points for

civic engagement between the state and citizens as represented by various civil society formations.

This paper discusses the importance of legislation in facilitating civic organisations' ability to demand improved public resource management from state actors.

## **2. Methodology**

The paper draws from the social accountability work of the Public Service Accountability Monitor (PSAM)<sup>1</sup>, a Rhodes University research institute in Grahamstown South Africa. PSAM adopts a systems approach to public resource management monitoring, which appreciates social accountability as a right and understands public resource management as a social accountability system. The information has been derived from ongoing social accountability practical work and research in South Africa and Zambia. Qualitative methods have been used and the information provided is from secondary sources as well as interviews.

The analysis presented reflects a comparison of the legal framework that oversees a rights-based systemic approach to social accountability monitoring in South Africa and Zambia with a view of setting out what is legally possible for civic actors to do in the two contexts.

The next section sets out the rights based approach to social accountability. This is followed by an outline of the systemic approach to social accountability monitoring adopted by PSAM. Finally an analysis of the Zambian and South African legislation overseeing public resource management is presented.

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<sup>1</sup> Having started in 1999, in the Eastern Cape Province of South Africa where it based, PSAM has in the last five years expanded its work to a number of countries in the Southern African SADC region. A central objective of the country work is to test the adaptability and applicability of the PSAM rights based approach to social accountability as well as to document lessons for sharing with the wider social accountability monitoring community of practice.

### **3. A Rights Based Approach to Social Accountability**

The human rights framework identifies individuals as rights-holders and government actors as duty bearers. Governments can therefore be held to account for their policies, programmes and projects. In arguing for a rights based approach, the United Nations asserts, “the *raison d’être* of the rights-based approach is accountability” (Langford, 2008: 15). However, it is not always clear the best strategies of engaging government in the most effective way to guarantee accountability and transparency.

Increasingly many practitioners are viewing social accountability as a means to promote transparency and government responsiveness, thus enhance democracy in societies. It refers to alternative forms of political control that rely on citizens’ actions and media organisations that diminish the gap between representatives and the represented. It rests on the actions of multiple civil actors to monitor the behaviour of public officials and agencies to make sure they abide by the law; to expose cases of governmental wrong-doing; and to motivate the action of horizontal agencies, such as the judiciary or legislative investigative commissions, that otherwise would not have been activated (Peruzzotti and Smulovitz, 2002).

Based on several years of analysis and advocacy on public resource management related matters, PSAM asserts that applying a rights-based approach to social accountability can promote transparency and government responsiveness, thus further democracy. The right to social accountability obligates every state to justify and explain its decisions and actions to its citizens as a matter of course and to take timely corrective action where weaknesses are identified. In addition, all citizens have the right to demand justifications and explanations from duty bearers as regards the decisions made in public resource utilisation when it fails to provide them adequately.

For effective social accountability and to realise the right to social accountability, an enabling environment for civic engagement should exist. While many elements of an enabling environment, such as socio-economic, cultural, financial and political factors, can be identified, the focus of the paper will be on characteristics of legislative frameworks.

In order to carry out social accountability initiatives, the constitutional, legal and regulative framework of the context should be the basis for the questions civic actors can ask about the choices their governments make in the use of public resources. Using, for example, the right to information as a foundational right, civic actors can demand explanations and justifications for the decisions made by state actors when required.

#### **4. A Rights Based Approach to Social Accountability Monitoring**

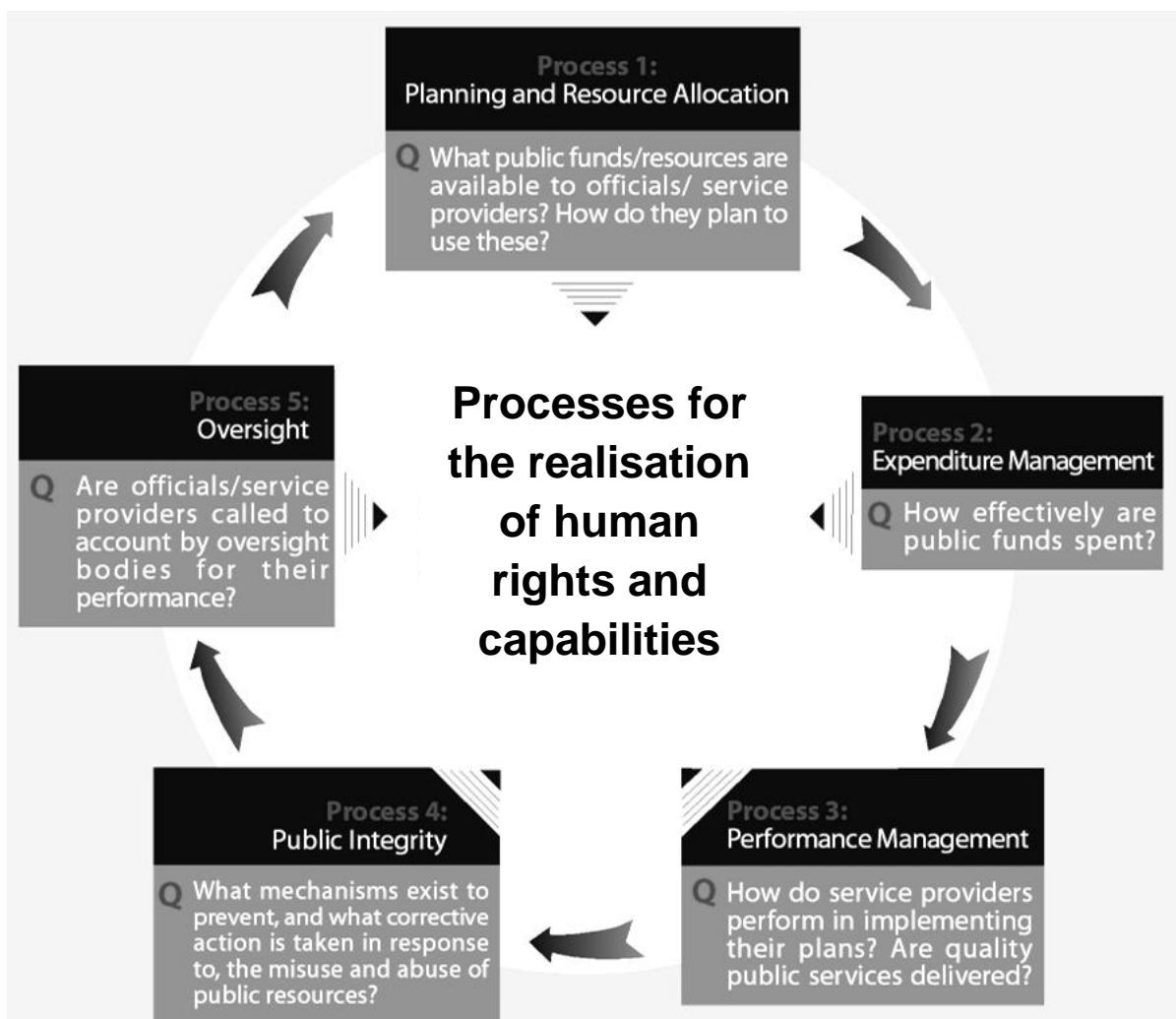
Using the systems approach, public resource management can be broken down into five interrelated processes. The processes are:

- Process 1: Planning and resource allocation – this is an inter-linked process which entails the development of a strategic plan to guide effective service delivery and the allocation of resources according to socio-economic priorities.
- Process 2: Expenditure management – this is the process of executing the budget through the spending of allocated resources.
- Process 3: Performance management – this process entails the implementation of strategic plans.
- Process 4: Public integrity management – this is the process of preventing or correcting the ineffective use or misuse of public resources by private or public officials.

- Process 5: Oversight – in this process, oversight bodies hold the Executive and departments to account for the implementation of the four processes described above (PSAM, 2012)

These processes can be described as social accountability processes and they work together to form a social accountability system. When meaningful civic participation is institutionalised to ensure that civic actors can demand justifications and explanations for state actor decisions and performance and corrective action as required, states can better deliver services to its citizens and meet the development needs of society. Figure 1 is an illustration of the social accountability system.

**Figure 1: Social Accountability System**



(PSAM, 2012)

An effective approach is for civic actors to systematically monitor social accountability, taking into account the interlinked nature of the processes. If any of the processes is ineffectively implemented or weak, this will negatively affect the other processes. When each process has institutionalised provisions to ensure civic groups can demand justifications and explanations for decisions and the performance of public officials and that those responsible for resources management are able to provide such justifications, explanations or take required corrective action, many benefits can be gained from social accountability initiatives.

This institutionalisation can be facilitated through empowering legislation. Enabling legislative frameworks are important for social accountability initiatives to flourish. It is therefore important to, from the onset, consider and understand the legal framework of contexts and the extent to which it facilitates civic actors demanding explanations and justifications for decisions made by state actors, as well as allow for corrective action to be taken in instances where systemic weaknesses in public resource management lead to poor service delivery. Admittedly, laws can exist but knowledge of laws (and therefore action) by civic actors may be limited or governments may overlook these without reprimand. The next section reviews the legal frameworks of South Africa and Zambia and the extent to which they facilitate civic actors accessing the right to social accountability. Attention is given to the constitutional and legal framework overseeing social accountability as it exists.

## **5. A comparison of Zambian and South African legislation facilitating social accountability monitoring**

Zambia has had a constitution since independence in 1964. However, this basic law has long been undergoing demands for review or outright repeal or else in the process of actual

review. As a result, the Republican Constitution has undergone four major review processes since the country attained Independence <sup>[1]</sup>.

The main issues of contestation in the constitution have been largely political. These have ranged from the desire by the liberation United National Independence Party (UNIP) to institute a one party state in the early 1970s to demands by opposition parties and civil society that the powers of the president be reduced. At the time of writing this paper, the Zambian Constitution is reaching the final phases of yet another review which is the culmination of many years of contestation. The new constitution, when passed, is expected to fundamentally review public resource management legislation. This paper will restrict itself to the Zambian constitutional and legislative environment as it currently exists.

The Zambian Constitution's Bill of Rights is entrenched in Part III of the Constitution (1996) and can only be amended via a referendum. The Bill of Rights, addresses political and civil (first generation) rights but has historically not included third generation socio-economic rights. These were however included for the first time in the 1996 constitutional amendment but placed in Article 112 of Part IX of the Constitution termed the "Directive Principles of State Policy", a non-justiciable section of the constitution. The Directive Principles of State Policy therefore serve only as a guide to governments who must endeavour to provide the socio-economic rights therein only in so far as state resources are able to sustain their realisation. In this regard, Article 111 of the constitution explicitly states that

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<sup>[1]</sup> Chona Constitutional Review Commission 1972 which brought about the one party state, the Mvunga Constitutional Review commission of 1991 which reintroduced multi-party politics, the Mwanakatwe Constitutional Review Commission of 1996 and the Mung'omba Review Commission Of 2004 whose final output is yet to be enacted

“the Directive Principles of State Policy ... shall not be justiciable and shall not thereby, by themselves, despite being referred to as right in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity”

In terms of social accountability monitoring, the Zambian citizens and civic actors cannot then demand by right that a minimum level of services be delivered by the government. Instead, it is left to them to leverage the Directive Principle of State Policy to encourage the state to utilise resources available for the provision of socio-economic rights to citizens.

In comparison, socio-economic rights are provided for by a very strong legal framework in South Africa, with the South African Constitution being internationally considered to be one of the most progressive in as far as legislating for justiciable second generation rights. It is one of the few in the world that does not make a hierarchical differentiation between civil and political (first generation) rights and socio-economic and cultural (second generation) rights (Mubangizi, 2006). Rather, the South African constitution provides in the Bill of Rights (Chapter 2 of the Constitution of South Africa) for the progressive realisation within the available resources of the state of, among others, the rights to housing, health care, food, water, education and social security.

The fact that socio-economic rights are constitutionally guaranteed to citizens translates into a very strong platform from which civic actors and citizens can demand for accountability in the way government plans for, allocates and spends public resources. South African civic actors are able to engage with these rights from the perspective of accountability, demanding that the socio-economic rights are made accessible to citizens. Organisations and media practitioners engaged in public resource management monitoring can insist that government show that in its public resource management, it is progressively advancing citizens' access to a range of rights. In instances where civic actors are of the view that a particular community



is not accessing service delivery, they can demand that government show that it is allocating resources in the spirit of the constitution.

The Zambian legal framework underpinning the public resource management framework has, what can be argued to be, fundamental weaknesses as regards accountability. This is primarily because, in all the processes that make up the social accountability system, as set out above, an inordinate level of discretion and latitude is vested in the Executive wing of government. Until 2009, the budgetary process in Zambia was overseen by Article 117 (1) of the Constitution of Zambia, (Act No. 18 of 1996) which mandated the Minister responsible for finance to present the budget for the approval of the National Assembly within three months [ninety (90) days] from the beginning of the financial year that it related to. To this effect, the budget was presented in January and approved by the end of March. Because the budget was tabled after the financial year had begun, a number of issues arose that compromised both the prudent execution and accountability of the budget process. The Parliamentary Estimates Committee Report of 2000 particularly identified these. Primary among the problems was that, with the budget being approved only in March, three months after the financial year had started, a quarter of the years expenditure was carried out before the budget was passed. This expenditure was carried out under a Presidential Warrant as provided for in Article 115 (1) of the Constitution. With the budget being approved well into the financial year, disbursement occurred after planned for activities were due to start leading to fiscal dumping at the end of each year (Interview: Hon. Hachipuka).

In order to remedy this situation, Parliament made an amendment to the current Constitution in 2009 (Amendment Act No. 20) so that the budget would be tabled to Parliament not later than October of the preceding financial year and passed not later than 31<sup>st</sup> December. The 2010 budget was the first presented under this amendment making 2011 the first year in

which the financial year begun with an approved budget thereby allowing for budget implementation to be executed over the full twelve months of the financial year.

In spite of this change, other accountability related weaknesses remain in Zambian budget law. Primary among these is that the Zambian constitution allows for a situation in which, in most fiscal years, there is little relation between the amounts appropriated by Parliament and those subsequently expended by government. This is the result of a supplementary budget being an established feature of each financial cycle, making the monitoring of the budget very difficult. The major problem around the supplementary allocations that are expended by Ministries Provinces and Spending Agencies (MPSAs) is that the Zambian Republican Constitution allows for supplementary budgets to be passed retrospectively covering amounts already spent by Ministries and Departments. In Article 117 (4) b and 5 the Constitution provides that a Ministry can spend moneys above those appropriated by Parliament as long as a retrospective Excess Expenditure Bill is introduced into Parliament not later than 30 months after the end of the financial year in which the excess expenditure occurred. The Ministry of Finance is also allowed to introduce Supplementary Expenditure Bills not later than 15 months after the end of the financial year in which the expenditure occurred. The Constitution does not place a limit on this excess expenditure which means the Executive wing of government can seek and receive parliamentary approval for amounts expended more than two years before.

Neither the Constitution nor subsidiary legislation places any requirements to be met before the expenditure takes place. The result of this constitutional provision is that Members of Parliament, civic actors and journalists trying to track expenditure against appropriated funds are usually dealing with figures that have no relation to reality. The result is that quite often questions of misappropriation of funds are discussed in the Zambian media long after the fact (Interview: Public Accounts Committee representatives).

In a situation in which the government is not tied down to service delivery by a constitution that provides for justiciable socio-economic rights as discussed above, the veritable expenditure carte blanche given to government means that large sums of money can be spent on matters that do not in any way advance the good of the governed. The governed for their part cannot ask that government to explain and justify its choices. This is because what might be seen as unplanned for or wasteful expenditure by monitors of public resource management, is expenditure well provided for and protected by the Supreme law of the land.

In Zambia, the absence of access to information legislation further makes seeking accountability from a rights based perspective extremely difficult. This is because the current legislative environment allows for government to classify any information it decides to. The secrecy around government expenditure is legislatively compounded by the fact that the armed forces and intelligence budget is not debated in Parliament neither is it subject to consideration by the Public Accounts Committee. An example of the abuse this can occasion can be seen in the 2007 case in which former President Fredrick Chiluba was found guilty of abusing his office and an intelligence account to satisfy what the presiding judge in the case said was his love for fancy clothes.

The South African constitution, unlike the Zambian one, sets out more rigid standards for accountability. Chapter 13 Article 215 (1) of the Constitution states that national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. In providing for incidents in which expenditure has to occur before the annual budget is passed, the Public Finance Management Act of 1999 sets clear and strict parameters in which such expenditure should occur providing that funds may be drawn from a relevant fund and only utilised for services that were appropriated for in the previous annual or adjustments budget. A limit on the amount that can be so drawn is also set not to exceed 45 percent of the total

amount in the previous budget in the first 4 months. In the subsequent months, the limit that can be drawn is set at 10 percent and finally in aggregate the total amount drawn is not to exceed the total amount appropriated in the previous annual budget. An important provision in the South African public finance legislation that prevents the spend thrift mindset possible under Zambian legislation is that the funds drawn in the event of a delay in national or provincial budgets are not additional to the funds appropriated for the relevant year. Rather they must be regarded as forming part of the funds appropriated for the relevant year.

Unlike the Zambian situation in which supplementary budgets can be brought to Parliament at the sole discretion of the Minister of Finance, the South African Finance Act determines that any adjustment budget should only be tabled in the National Assembly if there are significant and unforeseeable economic and financial events affecting the fiscal targets set by the annual budget or unforeseeable and unavoidable expenditure recommended by the National Executive or Cabinet Committee. The South African Public Finance Act further provides in Section 34 (2) that any incident of overspending not approved by Parliament becomes a charge against funds to be allocated to the spending agency in the next or future financial years.

In comparing Zambian and South African legislation providing for a similar situation in which expenditure has to be carried out before appropriation; and viewing them from the perspective of citizens ability to demand justifications and explanations for the way public resources are used, it can be seen that a South African citizen, organisation or media practitioner is well advantaged over the Zambian in their ability to hold government to account. With the South African finance minister being required to prove that supplementary amounts being tabled in Parliament were unforeseen at the time of the annual budget, the supplementary budget has to include clear justification and connections to national plans for service delivery (National Treasury, 2010). These justifications that legislation requires of the

Minister of Finance are available to accountability bodies, organisations and citizens. In the  
Zambian case on the other hand, accountability and prudent use of resources as regards  
supplementary budgets is dependent on the good will of the executive arm of government.

With the Zambian Constitution under review, and a proposed Planning and Budget Act well  
underway to being tabled in Parliament, it is expected that legislative framework in Zambia  
will improve considerably to include provisions that ensure a more rigorous level of  
accountability in the use of public resources. It is unclear whether this Act will adequately  
incorporate public participation in planning and budgetary processes. Nevertheless, it will  
formalise a public resource management framework that is currently overseen by practice. In  
that way Zambian public resource management monitors will be able to systematically  
demand more accountability from duty-bearers using the law as the basis for questions asked.

Zambian civic actors have also been advocating for access to information legislation for  
decades. In the absence of access to information law, much in government departments that  
relates to public resource management is classified as secret or confidential. Only Ministers  
and Permanent secretaries are allowed to release information at their discretion. The  
experience of PSAM researchers is that routine documentation on the PRM cycle expenditure  
or strategic planning is not released and is blanketly classified as sensitive. This has resulted  
in a situation in which journalists and civic actors rely on “friends within government” to  
provide them with restricted information, which information becomes difficult to use as it has  
not been legally obtained (Mwansa, 2011).

In 2012, the government finally announced it was ready to publish an Access to Information  
bill to be tabled in Parliament. However, this was delayed. It is expected that the information  
law, when it is finally passed, will allow for civic actors to access information required in  
public resource management monitoring and its relationship to service delivery.

In South Africa, Chapter Two of the Constitution, section 16 (1) provides for

Everyone has the right to freedom of expression, which includes

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

The Promotion of Access to Information Act 2000 is the main subsidiary legislation which enables organisations and individuals in South Africa to legitimately access any information held by the state, or another person, that is needed for the exercise or protection of any right. In practice, the Act has allowed for South African civic actors to get necessary information from government and even make use of the courts when this information has been refused or delayed (for example, PSAM travel gate case)<sup>2</sup>. Organisations such as the Freedom of Expression Institute (FXI), for example, have even been formed to defend the right to access to information and oppose censorship. South African civic actors can access information from multiple sources to enable the formulation and voicing of their opinions, monitoring of government service delivery performance and for effective engagement with public officials.

While the current Promotion of Access to Information Act of 2000 (PAIA) provides for ready access to information there is great concern with the proposed Protection of Information Bill, commonly referred to as the Secrecy Bill, that was tabled in Parliament in 2010. This Bill, which seeks to repeal apartheid protection of information legislation, aims to regulate the classification, protection and dissemination of state information. Civic actors have expressed concern that, while there is consensus that pre-democracy legislation is in need of change, the

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<sup>2</sup> In 2011, PSAM won an application to the High Court to gain access to information relating to a 2004 travelgate scandal in which members of Parliament were accused of abusing travel funds.

new law seems to set out to allow the state to classify information that has priorly been used to bring cases of corruption and public office abuse. Civic actors are particularly concerned with provisions in the Bill that propose stiff penalties of up to 15 years in jail for anyone leaking or found in possession of classified information. It has been argued that the absence of a “public interest clause” in the protection of Information Bill puts whistle blowers and journalists at risk of jail sentences for publishing information that the public have a right to know. It is also feared that the law, in its current form, would reverse the gains made in South Africa under the Promotion of Access to Information legislation which has allowed journalists, especially, to access information that has blown the lid on a number of abuse of office cases involving high profile individuals leading to successful disciplinary action and court convictions<sup>3</sup>

As regards the critical oversight function vital to public resource management monitoring, PSAM, in its work, engages largely with the Legislature and Supreme Audit Institution. The Zambian Constitution provides for the operation of these bodies. Viewed from an accountability lens, this legislation like others discussed above needs further strengthening to strengthen the oversight function. The Zambian Constitution, for example, while providing for a largely independent Auditor General’s office in Article 121 then hamstrings its ultimate

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<sup>3</sup> In March 2011 the Sunday Times newspaper used internal Department of Cooperative Governance Documents to allege that the then Minister of Cooperative Governance, Sicelo Shiceka, had abused upwards of 1 Million Rand to pay for luxury stays in hotels and travel that included a visit to a girlfriend jailed in Switzerland on drug charges. He was also accused of throwing a lavish party for his mother at taxpayers money. Shiceka was subsequently fired from Cabinet after the Public Protector carried out an investigation ordered by the Parliamentary Ethics Committee after the newspaper report found him guilty abuse of office

On August 1 2010 the Sunday Times utilised leaked documents (*How we Nailed Cele Times Live May 27 2012*) to publish a story revealing that the then Commissioner of Police, Bheki Cele had signed off a lease deal to rent office space for the police service worth more than a billion Rand against tender procedures. After protracted demands by opposition parties and the general public a commission of inquiry was set up which found Cele guilty of abuse of office and flouting tender proceedings leading to his dismissal by President Zuma in June 2012.

effectiveness by legislatively subjecting it to the President's office. The constitution provides that the Parliamentary Public Accounts Committee that engages with the findings of the Auditor General can only recommend action to the Executive which it may or may not institute. Parliament has no authority to ensure that any adverse findings are put through a disciplinary process or followed. Neither can law enforcement institute criminal charges on the basis of what has been published in the Auditor General's report. This function falls to the Executive that should submit an Action Taken Report to the National Assembly 6 months after the Public Accounts Committee has dealt with it. This generally does not happen and the Public Accounts committee and Parliament in general do not have the power to force the Executive to act on the Auditor General's report (Transparency International of Zambia, 2007). The result of this is that cases of corruption and abuse of resources brought out in the Auditor General's office are rarely taken further than the report itself. This is another matter that has been raised in the constitution review process and the new Constitution is expected to strengthen the powers of the PAC to action matters raised by the Auditor General's report.

## **6. Concluding remarks**

This paper tries to set out the importance of legislation in the pursuit of accountable utilisation of public resources by governments. It compares the legislative environment of two Southern African countries South Africa and Zambia in which the Public Service Accountability Monitor (PSAM) a Rhodes University Research unit works. The paper shows that in a PRM context such as Zambia's in which the Republican Constitution and subsidiary legislation do not provide for rigorous accountability standards, civic actors journalists and even legislators cannot effectively hold government to account in the way it uses public money. South Africa on the other hand has a more stringent standard for accountability written into its law providing organisations that may seek to demand justification and



explanations on the manner in which public resources are utilised a strong base from which to demand accountability. This paper suggests in the final analysis that accountability is not a question that should be left to the good will of duty bearers and governing parties. Rather strong legislation that seeks to prevent abuse of resources but also facilitate systematic questioning of those that preside over the public purse is of critical importance in all contexts. Of critical importance too is right to information legislation and the inclusion of justiciable socio-economic rights in Constitutions. Put together justiciable socio economic rights that tie governments down to the delivery of a minimum standard of services, legislation that envisages a strict standard of accountability throughout the social accountability processes and strong access to information by citizens translate into a citizenry able to hold governments to account and prevent runaway abuse of resources and corruption.

This legislation can then be leveraged in a systematic approach to social accountability monitoring of public resource management that ensures that civic actors approach public resource management as consisting of interlinked processes. Entry points of civic actors should have the backing of legislation that allows access to information so they can, at any point of the system, ask questions that strengthen accountability and ultimately lead to improved service delivery within the resources available to a particular state.

Finally, it can be stated that many times the beginning point for civic actors seeking to strengthen social accountability in their contexts should be advocacy for strengthening legislation that binds the state to providing justifications and explanations for the decisions it makes and for advancing the standards of living of citizens.

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