The interrelation between human rights norms and the right of access to information

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Over the last twenty years, the rise of constitutional democracy in Africa has raised hopes for socially responsive governments. An emerging trend in the package of constitutional rights now found in new constitutions in Africa is the inclusion of the right of access to information (ATI).

The importance of the right of ATI is well established globally, with clearly articulated principles on the nature of the right in different international agreements. In giving effect to this right in some of the African regional instruments, the African Commission on Human and People’s Rights recently adopted a model law on ATI, the first of its kind in Africa. African states are also beginning to recognise the importance of this right in promoting transparency in government. By 2015, 17 African countries had ATI laws (Angola, Burkina Faso, Côte d’Ivoire, Ethiopia, Guinea, Liberia, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan; Tunisia, Uganda and Zimbabwe), although with varying degrees of success for the domestic advancement of ATI. A further six African nations have drafted ATI Bills that are at various stages of consideration by their Cabinets and Parliaments.

The move in Africa over the past decade to consider and pass domestic ATI laws arguably constitutes some sort of recognition from African leaders of the centrality of this concept to democratic governance. Whether the realisation of the right of ATI by African states is a genuine attempt to be transparent or is rather paying lip service to openness and accountability is beyond the scope of this paper.

In South Africa, the Constitution of 1996 recognises the right of ATI in section 32, which compels both public and private bodies to provide access to information upon request. Section 32 further provides that national legislation should give effect to the right, hence, the passage of the Promotion of Access to Information Act 2 of 2000 (PAIA). One of the most important understandings of the right of ATI, dubbed as the right to know, is that it can make a material, tangible difference to the lives of vulnerable people, and thereby contribute to social and economic justice. The argument follows that ATI creates a mechanism through which individuals and communities can gather information relating to the activities of the government in realising their socio-economic rights, and can therefore use this information to hold government accountable. Indeed, as Mukelani Dimba puts it, “freedom of information creates the conditions in which decisions about the allocation of resources can be challenged” (Dimba 2008).

The understanding of ATI as an enabling condition for other rights, particularly for socio-economic rights and development, has been acknowledged under international law. For instance, the Rio Declaration on Environment and Development notes in Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided (author’s emphasis).

Principle 10 was ground-breaking in many ways. Appearing in 1993, this UN Declaration went far further than many other international human rights instruments in promoting and protecting the right of ATI. Although Principle 10 is concerned with environmental issues and does not couch ATI in the language of a right, it accords the concept a certain and significant value insofar as it provides that ATI is a non-negotiable condition set down for all states parties to make available, and that mechanisms should be established for ‘redress and remedy’ should access not be forthcoming. The latter point in fact affords ATI the status of a right in so far as it is justiciable.

Further, Principle 10 articulates another significant aspect of ATI, namely, that it facilitates meaningful participation between the state and its citizens, or between a powerful private entity and the local community. Indeed, engagement and dialogue with the people affected is one of the most important components of the delivery of socio-economic rights, and one which is only achieved through granting the right of ATI. This was determined by the Constitutional Court of South Africa in the case of the Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others, where the Court stated that meaningful engagement was a two-way process whereby the government and the persons involved consulted with one another in order to achieve a pre-determined objective. And further, in the case of Government of South Africa v Grootboom, the Court, in recognising the inter-connectedness of civil and political rights and socio-economic rights, demonstrated...
ATI can be used to confirm the existence of an established policy and hold a government agency accountable to that policy.

the justiciability of socio-economic rights.

In addition, recent court cases on PAIA are beginning to show the utility of the right of ATI for the enforceability of socio-economic rights in South Africa. In Vaal Environmental Justice Alliance (VEJA) v Company Secretary of Arcelor Mittal, a community in the Vaal wanted Arcelor Mittal to close its disposal site because they alleged that the company was dumping hazardous waste. To achieve this, the community sought access to the company’s environmental impact assessment documents that proved their allegations. The information request was denied and the community appealed to the High Court. The High Court affirmed that community-based civil society organisations are entitled to monitor, protect and exercise the rights of the public by seeking information to assess the impact of various activities on the environment (Paragraph 16). Because the request for ATI had been submitted to Arcelor Mittal, a private company, it was necessary to state what right the community wanted to protect with the information sought, as stipulated by section 32 and the PAIA. The community stated that the information was needed to protect the right to an environment that is not harmful to health or well-being, as guaranteed under section 24 of the Constitution.

The question of whether information is required for the exercise and protection of a right has been the subject of litigation in South Africa. According to the court in My Vote Counts v Parliament of South Africa:

“required” in the context of section 32(1)(b) does not denote absolute necessity. It means “reasonably required”. The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact-bound. (Paragraph 62)

In the VEJA case, the High Court granted the appeal and directed the company to release the documents. This decision was upheld by the Supreme Court of Appeal when Arcelor Mittal appealed. The VEJA case demonstrates the value of ATI in exercising and protecting other constitutional rights. It also demonstrates the significance of community action in the fight for socio-economic rights, and the value ATI can bring to bear.

Indeed, for Colin Darch, ‘the emerging practice and theory of change in the developing world, which sees ATI as less an individual right and more a collective right to be used to advance community interests against more powerful actors’ (Darch 2013). Further, through developing ATI mechanisms, not just in terms of legislative reform but other policy initiatives based on promoting the availability of state information into the public domain, the state can begin the process of meaningful engagement with citizens and communities. This constitutes an accepted prerequisite for the delivery of socio-economic right services.

The significance of meaningful engagement to the realisation of socio-economic rights has been recognised in international law. Although speaking specifically to the right to work, the General Comment 18 from the Committee on Social Economic and Cultural rights asserts that:

the formulation and implementation of a national employment strategy should involve full respect for the principles of accountability, transparency, and participation by interested groups. The right of individuals and groups to participate in decisionmaking should be an integral part of all policies, programmes and strategies intended to implement the obligations of States parties under article 6.

In promoting the involvement of individuals and communities in decision-making some degree of open access to government spending and planning is necessary, which can be fulfilled through the exercise of the right of ATI. There are also other ways through which this right can be used to enforce socio-economic rights. One is to use ATI to challenge public officials about policy choices, confirm the existence of an established policy, and to hold a government agency accountable to that policy. Developing open budgeting practices accessible to communities to understand the role of budgets in socio-economic delivery is a practical way of achieving this.

Another way of ensuring socio-economic rights enforcement is through the collection of evidence to establish a pattern or practice in government, in order to challenge or justify the practice. For the realisation of the effectiveness of PAIA in aiding the realisation of other human rights, civic education is required. This highlights the important role that civil society organisations can play in helping the public to make these linkages and use the law efficiently. In addition, civil society organisations can show how ATI can serve as a platform to occupy political spaces through engaged public participation. These are crucial roles that must be played by interested stakeholders to achieve the objective of using access to information to enforce socio-economic rights.

At an international level, reporting on state duties to comply with the International Covenant on Economic, Social and Cultural Rights (ICESCR) is about the provision of information that can enable various stakeholders to measure compliance by states with their commitments and analyse the extent to which states are fulfilling their obligations under the ICESCR. States have the obligation to submit reports on measures that they have adopted and the progress made in achieving obligations assumed in the ICESCR. The failure to provide information or to provide access to certain information constitutes a violation...
of obligations that the State agreed to fulfil. The reporting requirement under the ICESCR and the obligations to respect, protect and fulfil are important requirements, and it is recommended that there should be an integration of the right of ATI in treaty-monitoring processes dealing with the realisation of socio-economic rights.

ATI, as an enabling right for the realisation of other rights and specifically socio-economic rights, is perhaps one of the most powerful ways the concept has been imagined. It is also an important prerequisite for community engagement and public participation, both of which requires an active citizenry. As demonstrated in this article there exists, therefore, a relatively robust framework in Africa under which to promote the realisation of socio-economic rights and, implicitly, the right of ATI as an enabling right. Indeed, this understanding of ATI, as an enabler for the fulfilment of socio-economic rights, in fact incorporates within it both the broader understanding of ATI as a human right, as well as ATI as a function of participatory democracy insofar as it enables individuals and communities to engage with states to ensure better access to socio-economic services.

The spread of constitutionalism in African states is occurring at a time when there is an increasing demand for open democracy. The spread of new constitutional ideas given effect to these concepts has no doubt been facilitated by these developments. To sustain this momentum, civil society organisations play an important role in holding African governments accountable to constitutional obligations in order to keep the political will of the government strong in promoting open government.

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