CHAPTER TWO

THE PROBLEM OF ACCESS TO INFORMATION IN AFRICAN JURISDICTIONS: CONSTITUTIONALISM, CITIZENSHIP AND HUMAN RIGHTS DISCOURSE

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Abstract

This chapter interrogates the idea that African countries are lagging behind the rest of the world in adopting access to information (ATI) practices. The commonly cited indicator for this is the absence of ATI legislation in all but a handful of African countries. But the evidence shows that ATI laws have produced mixed results in other parts of the world, and claims for the benefits have been exaggerated. Three key elements are identified that influence the adoption of ATI behaviours in African countries. These are: commitment to constitutionalism, defined as the acceptance by government that there can be legally defined and freely adopted limits to power; the contestation over citizenship, all too often seen and used as a political weapon to silence or marginalize critics or opponents of government; and the rights-based nature of emerging international jurisprudence, which may make it less likely that ATI will gain a firm foothold in African tribunals. The chapter closes by pointing to the patrimonial nature of many African political systems, with bureaucracies valued for their loyalty more than for their independence or predictability, and concludes that genuine administrative reform may be a more urgent precondition for transparency in governance than the passing of an ATI law.

Introduction: The 'African Failure'

There are various ways of classifying systems of government, but one of the most important and useful is the distinction between *constitutionalist* and *arbitrary* regimes.[1] The most significant change in South African

[1] This chapter is based in part on a paper presented to the First Global Conference on Transparency Research, Rutgers University, New Jersey, 19–20 May 2011. I am grateful to

governance after the collapse of the apartheid system in the early 1990s, to cite a relevant example, was the shift from parliamentary supremacy to constitutionalism, a system (or perhaps more accurately a world view) in which the power of the state is limited by a fundamental law, a rule-set that lays down both citizens' rights and the state's duties and which is enforceable in law. To be a constitutionalist state, however, is not the same as having a constitution, a point to which we shall return below. In a parliamentary system, by contrast, there are effectively no limits on what the state may do: in this sense the power of government may be exercised arbitrarily, and in the case of South Africa in the days of apartheid, clearly was so exercised. Indeed, in an often-quoted passage from a 1934 judgement, the South African Chief Justice James Stratford wrote that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway and … it is the function of courts of law to enforce its will" (quoted by Chaskalson 2009: 26). And so, step by step, the legal framework for apartheid was put into place.

The ATI idea is quintessentially constitutionalist. At its very core is the notion that governments *must* comply with a sub-set of rules that lay down the limited conditions (the exemptions) under which they may legitimately refuse to allow citizens access to state documents and files. These exemptions—to do with privacy, to do with national security, and so on—can themselves ideally be boiled down to one simple rule: if harm will result from the release of the information into the public domain, then it must remain secret. Otherwise, it must be made available. The critical point is that ATI is always and everywhere seen fundamentally as a rule-set, and this is the principal reason why ATI advocacy tends to measure the success or failure of its campaigns by the benchmark of whether a law was passed—in other words, whether the rules were agreed to. This core constitutionality of the ATI concept has not been made much of in the recent literature, with few exceptions. Making a case twenty years ago for a wider and more nuanced African constitutionalism based on the treatment of rights as programmatic *and* normative, and their broadening to include the collective or communal, Shivji argued—almost in passing—for ATI's status as a basic constitutional right:

> [The right to information has] to be constitutionally entrenched … The right to information or the right to know is of very wide purport but includes the

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> right to demand and receive information from state organs … [G]overnment secrecy, the standard ploy of the state to keep the citizenry ignorant of state affairs, has been severely attacked. (Shivji 1991: 43)

He went on to cite Indian jurisprudence from the early 1980s in support of this position and its relevance to the African situation.

The problem with this general legislative approach, however—and here is the rub—is that it focuses on the means and runs the risk of losing sight of the end. If ATI systems and transparent governance systems are fundamentally *instrumental*, then their only goal is government *accountability*, the building of a state that is answerable to civil society, to the citizenry. But the mere existence of a rulebook—in this case ATI legislation—tells us little about how accountable a regime actually is in practice, as the examples of Angola and Zimbabwe clearly show. Both have ATI laws in place, but the effect of the legislation has been negligible.

The problem becomes even more serious when the same simplistic approach is applied uncritically to the African continent as a whole. If success is measured *only* by the yardstick of whether an ATI law is in place, then the inescapable conclusion is that African countries are generally performing poorly (Banisar 2006; Vleugels 2008). This would be true even if some kind of general constitutional promise were to be regarded as an acceptable indication of good intentions. Consequently, commentators—and not only foreigners—have repeatedly taken African governments to task for their supposed failure to join what was once described as a "veritable wave of freedom of information laws sweeping the globe" (Mendel 2003: vi). There is "very little … activity … on the African continent" (Dimba 2008: 1); African countries are "lagging behind" (Baglo 2009: 31–32); "the African region lags far behind the rest of the world" (Carter Center 2010a); and "Africa lags behind other regions around the world in granting citizens the right to information" (Open Society Foundation 2011).

Ironically, it seems that even those African countries with constitutional guarantees and enabling laws in place have not really managed to bridge the legislative gap effectively. In a declaration issued at the end of an ATI summit in Ghana in 2010, for example, the Carter Center held them to an even higher standard:

> Where regional instruments, constitutional provisions and national laws exist often they have inadequately advanced the right of access to information due to factors such as insufficient political will, weak legal and administrative guidelines, and ineffective implementation and enforcement. At their worst, some national legal frameworks have even repressed rather than enabled the right of access to information. (Carter Center 2010b: 2)

But this formulation is more descriptive than analytical. To say that political will is absent does not tell us why politicians do not want ATI. To say that legal and political enforcement is weak does not explain the causalities at work. So, what are the deeper reasons for the reluctance of African governments to pass laws that, if other countries are anything to go by, can be safely left to sink into oblivion on the statute book? There are times, as Karl Marx wrote in 1857, when "the only possible answer [to a question] is a critique of the question and the only solution is to negate the question" (Marx 1973: 127). This chapter suggests that African governments are not 'lagging behind' in some normative sense because they are slow to adopt ATI laws; rather, we may be interrogating the problem in the wrong way. A considerable body of literature exists on the post-colonial state and on contestations of citizenship in various parts of Africa, but ATI activists and scholars have by and large not referred to these lines of analysis in their attempts to understand why transparent and accountable governance has been slow to take root in African jurisdictions.

Additionally, much writing and research on ATI embeds inbuilt normative assumptions—about the primacy of legislative solutions, about the character of diffusion of innovation, and about the appropriate location of ATI in human rights discourse. The difficulty is that as a basis for advocacy in specific jurisdictions this creates expectations that are rooted in the normative claims made for ATI—that it improves democratic behaviour, or that it helps to eliminate corruption. When observable reality diverges from the expectations implicit in such claims, most ATI writers and commentators, as we have seen, search for pathological conditions within the polity; hence, political will is lacking or administrative systems are weak, and, eventually, African countries are seen as laggard. This is nothing new; it is 25 years since Crowder (1987: 11) first commented that "contemporary judgements about the so-called failure of Africa are really judgements made in terms of a Eurocentric dream … in which liberal democracy would be the norm".

But what does it really mean to say that African countries have not engaged with the issue of ATI, that they lack political will, have weak legal-administrative systems, and are poor at implementing and enforcing the law? Is it true that the most appropriate response is to push for more legislation similar to that adopted elsewhere, despite the fact that many of the claims regarding outcomes seem to have been exaggerated? Is it possible that using the idea of 'Africa as laggard' *as the point of departure for analysis* is another manifestation of what has been called the "long tradition of Western perspectives on Africa as a problem that needs to be fixed"?

In this tradition, which sees African countries as potential objects of developmental intervention "rather than as serious political actor[s]" the assumption that "neo-liberal orthodoxy … and the policies of economic reform [are a] panacea for the problem continent" is all too easily arrived at (Hoehn 2005: 1).[2]

In the following sections, I will argue that there are three key theoretical elements to understanding the present situation of ATI in African countries. These are, first, the question of constitutionalism and the post-colonial state in Africa; second, the highly contested concept of citizenship in African countries; and last, the rights-based nature of emerging international jurisprudence on ATI, coming mainly from a Latin American context, which may make it less likely that ATI will gain a firm foothold in African tribunals.

'Constitutionalism' and the Post-Colonial State

The question of the role of the constitution and its implications for constitutionalism in post-colonial African governance is a key issue in the analysis of ATI in African jurisdictions. The history of constitutions in colonial and post-colonial Africa can be and often is divided into three or four periods—the period immediately following the 'independences' of the 1960s; the period of decline into one-party rule or militarism; and the so-called 'third wave' of democratization from the 1990s onwards. This is a familiar story but is worth rehearsing briefly here because of its importance for the analysis of ATI.

What sort of state possesses the characteristics that make a rule-based, adversarial ATI system workable and ATI practices and behaviours achievable? The short answer is and must be, of course, the liberal state. The key elements of the classical liberal project for an economically developed nation-state are an individual "desire for liberty from the coercive power of others—*an element that may be almost universally shared* … [and] the absence of desire to exert power over others" (Buchanan 2000: 117, emphasis added). The project is globalizing in nature (Young 1995: 527–529), a characteristic derived in large part from its claims to represent universal values and to be ideologically neutral, claims that are reproduced in human rights discourse and hence much of ATI discourse as well.

Consequently and first of all, workable ATI needs a bureaucracy *and institutions* competent enough to manage political information effectively in the form of retrievable records (documents or digital files), and

disinterested or professional enough to concede that ATI practices may have benefits that outweigh its short-term interests as an elite group. Second, fractions of the political class must be genuinely dependent both electorally and in terms of policy-making on the agreement of 'civil society'—in other words, hegemonic in the Gramscian sense of ruling by consent as well as by force or the threat of force. It is clear that many countries of the global North, the so-called 'developed world', are able to meet these pre-conditions only in a partial and incomplete manner, even with strong traditions of bureaucratic independence and stable political institutions.

Many African polities do not command such resources or political traditions at all. African post-colonial states are, by and large, 'weak' states, and hence to some degree unstable. Some countries such as Liberia (1989–2003), Sierra Leone (1991–2000) and most notably Somalia (1991 to the present) have endured conditions of the near-total collapse of central state authority for long periods. Although the state is supposed to possess a monopoly of violence, African armies were and remain poorly organized, trained, led, and equipped. Nevertheless, or perhaps because of this, military intervention has been common. Some 40 of the 53 countries of Africa have been subjected to military rule, in some cases for protracted periods. Ghana had 5 military coups in 50 years of independence; Nigeria suffered 6 military regimes lasting over 28 years in a period of 48 years after independence. In 1992, only 18 countries in sub-Saharan Africa were under civilian rule (Saine 2009: 15). In most African countries, 'society' is completely dominated by the powerful institutions of state power, and indeed is more or less 'obliterated' by them:

> ... the interventionist state of liberal cosmology [presumes] a separation between the state and civil society ... the authoritarian state has spread its tentacles throughout every facet of social relations. The organizing principle of the organs of the state has the concentration of power in the executive, the military or personalized rule, rather than the separation of powers decreed by liberalism. (Adelman 1998: 81)

The paucity and weakness of civil society organizations attempting to influence policy is both a symptom and the consequence of this concentration of power. It is fair to say that "liberalism in Africa is still struggling to create a satisfactorily liberal political space. In Africa, liberalism remains a project to be realized" (Young 1995: 534). The same, of course, applies to the conventional idea of constitutionalism, and by extension to the conventional rights-based concept of ATI.

The weakness of the post-colonial state has many root causes, not least the arbitrary nature of the colonial borders agreed between the European

powers in the late-nineteenth century. Generations later, this process created geographical and demographic problems that are structural in nature. African rulers struggle to "project authority over inhospitable territories that contain relatively low densities of people", hampered by the diversity of populations and by ecological factors, with "coastal, forest, savannah, or near-desert" regions often found in proximity to each other (Herbst 2000: 11–12). Capital cities built in the colonial period were located not at the existing centres of African power but for the convenience of the European rulers, which often meant that they were located on the coast for ease of communication with the metropole (ibid. 16). The relationship between the new centres of power and their rural hinterlands after independence was often weak and distorted. African nationalism in the 1950s and 1960s, except in southern Africa, was primarily urban in character, and after independence "even the most basic agents of the state—agricultural extension workers, tax collectors, census takers—[were] no longer to be found in many rural areas" (ibid. 19).

At independence, complex democratic constitutions were imposed on these structurally challenged polities, along liberal principles largely determined by the departing English and French (the Portuguese left later and in different circumstances). But the new governments had emerged from a context of autocratic and *dirigiste* colonial rule, and their leaders had little experience of pluralism or formal democratic behaviours. They were also highly voluntaristic and triumphalist, promising instant prosperity and well-being to the citizenry (Okoth-Ogendo 1991; Dore 1997; Fombad 2007a). At independence, these elites

> appropriated all the assumptions of Western modernity in both their national and international forms. The newly independent African states were run by people who looked to essentially Western visions of modernity and progress. The need to catch up often legitimated socialist versions of modernization, but everywhere the new state was seen as central to bringing about rapid progress … Economic and political mobilization, *by overtly authoritarian means*, became the order of the day. (Young 1995: 535, emphasis added)

To the "overtly authoritarian" in government, the 'independence constitution' soon came to be seen as a liability, an unwanted constraint on the making of policy in pursuit of development and nation-building, encouraging disunity. As a result, governments began actively to seek ways of subverting the constitution as the basic law; the methods that they found were both the cause and the outcome of the emergence of the 'imperial presidency', the diminution of political space, and the

assertion of discretionary power (Okoth-Ogendo 1991: 13). The process was facilitated by what has been called the "fragility and technical deficiency" of the independence constitutions, which made it all too easy for governments—often untrammelled by opposition—simply to change objectionable provisions at will (Fombad 2007b: 59). This in turn created a climate of insecurity:

> … political and constitutional instability during Africa's first three decades of independence was caused by the ease with which post-independence African leaders subverted constitutionalism by regularly amending their constitutions to suit their selfish political agendas. (ibid. 28)

As "all aspects of public order law" were strengthened ostensibly in pursuit of development agendas, human rights such as the right of assembly and free expression were whittled away, and of course with them any idea of ATI (Okoth-Ogendo 1991: 13).

In the early 1990s, the Soviet Union vanished and the socialist-bloc countries abandoned Marxism, the Cold War came to an end, and a 'third wave' of democratization passed across the African continent; as far as constitutions were concerned, attempts were made to correct some of the earlier errors. The so-called 'Washington Consensus' of the 1990s, although fundamentally interested in neo-liberal economic policy, pushed political concepts such as governance, transparency, and accountability as well (Saine 2009: 18). It may not be necessary to go as far as Canfora (2004), who argues that democracy consists essentially in the exercise of power by those without property and dismisses the identification of democratic practices with mere institutional arrangements, to realize that many of these buzzwords have taken form, but lack content, as Adelman (1998: 74–75) has argued:

> … whatever their apparent diversity, African constitutions are increasingly mere variations on a Western theme and, as such, appear to encourage pluralism while producing its exact opposite … This confusion of form and content diverts attention from enduring and intransigent national, regional and international problems … it also straitjackets constitutional debate by circumscribing the possibility of local, pluralist responses to the crisis.

Progress in what has been termed the 'domestication' of democratic practice has thus been slow and uneven (Owusu 1997: 121). This process ideally involves not the simple transplantation of a Western institutional structure for democratic practice—pluralism, elections, and so forth—but their integration with the core cultural and social systems of particular countries, insofar as these have survived the colonial period unscathed:

> Domesticating democracy in the African context amounts to a dynamic and continuous process of institutionalization in which democratic ideas, beliefs, values, practices, actions and relationships, and new forms of political behaviour gain acceptance and popular support in society and become successfully integrated with other features of the culture and society, endowing them with popular legitimacy. The challenging question is how do these democratic institutions and practices fi t into changing indigenous social and political practices and beliefs, modifying or transforming them, and then how are they in turn modified or changed by pre-existing forms? (ibid. 121)

This is an issue that Fatima Diallo addresses in more detail in her chapter on the social anthropology of ATI in African countries in this volume. Caution is certainly necessary, since much of what passes for 'traditional' leadership is neither traditional nor democratic but a self-serving parody of the constructed mechanisms of colonial indirect rule (see, for example, Ntsebeza 2005).

In the 1990s, the nature of the 'power map' that a constitution delineates began to show signs of having changed, with recognition that its authority is not arbitrary but derives from the citizenry. A constitution, in such a framework, "derives its whole authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed" (Fombad 2007a: 6). Nevertheless, in many countries the shift to pluralism has been formal rather than effective. Parties have been formed, and elections have been held and frequently declared free and fair; but even so "the chances of an opposition political party winning election … have progressively diminished" (ibid. 4). That said, it is necessary to recognize that formal democratization is better than most of the alternatives and that in many African states a framework has been established in which struggles over such issues as ATI are both meaningful and important:

> … any movement towards constitutionalism and the rule of law that calls for state structures to be reorganized so as to institutionalize the principles of the division and check of power must be welcomed as a step towards democratization. (Mamdani 1990: 366)

With its overtly constitutionalist dispensation, South Africa is usually considered the continent's most committed country, a commitment manifested most obviously in the proceedings of the Constitutional Court, which has the power to declare legislation null and void if it violates the provisions of the constitution. There is already a body of jurisprudence

from the court, which shows that it is very much a fully functioning institution. This whole situation is sometimes represented as in some sense exceptional:

> the construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. (Makau wa Mutua 1997: 65)

As it turns out, the political commitment of the ruling African National Congress (ANC) to formal constitutionalism may be more fragile than previously believed. The ANC has argued that in a developmental state, constitutional jurisprudence must be aligned with the aspirations of improving the well-being of all citizens, in what might perhaps be seen as a shift in underlying philosophy towards a version of legal realism. In practice, several controversies have illustrated this emerging trend. One of the most important was over the contentious 'secrecy bill' (more formally, the Protection of Information Bill), which was passed by Parliament in late 2011 (South Africa 2011b). This occurred despite a lengthy public campaign of opposition in the media and by a range of civil society organizations, of which the most prominent was the Right to Know Campaign (R2K no date). The absence of a public-interest defence and excessively broad powers for the classification of government information were two of the major issues raised by opponents, who saw (and see) the legislation as representing a fundamental threat to ATI in South Africa.

Second, the South African government has shown signs of an increasing lack of patience with Constitutional Court and other judgements that it sees as limiting its power to make and execute policy. President Jacob Zuma has dropped several hints that he regards the judgements of the court as amounting to unwarranted political interference. In a speech to the third Access to Justice Conference in Pretoria in July 2011, he hinted that some judgements were driven by oppositional political motives:

> … we seek to respect the powers and role conferred by our constitution on the legislature and the judiciary, [and] we expect the same from these very important institutions of our democratic dispensation. *The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can.* … Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, *simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country*. (Zuma 2011, emphasis added)

In February 2012, Zuma created a further stir when he criticized court judgements because they included dissenting opinions. The government intended to review the powers of the Constitutional Court, he said in a newspaper interview, because "some of the decisions are not decisions that every other judge in the Constitutional Court agrees with … there are dissenting judgements … the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case? That's what has made the issue to become the issue of concern" (Monare 2012). At the same time, the Ministry of Justice published the 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state', already cited above (South Africa 2011a). It remains to be seen how deeply entrenched South Africa's constitutional regime actually is. In the meantime, let us turn to an examination of the importance of a broad concept of citizenship to the success of an ATI system

ATI and Contested Citizenship

The state creates, obtains, or holds information in the form of permanent records, and then the citizenry demands or requests access, which is granted or refused, according to the rules or arbitrarily as the case may be. The character of a particular state—patrimonial or legal-rational—and its political class, the competence of its bureaucracy, and the state–civil society relationship: all these factors *partially* determine how such ATI transactions play out. The other determinant aspect in this asymmetrical relationship is the contested concept of what constitutes citizenship and who can legitimately claim it. At one end of the spectrum are generously broad and cosmopolitan interpretations—usually in stable democracies—which take the mere idea of nationality and expand it inclusively. At the other end are legally or politically enforceable definitions—especially in some African polities—that are so narrow that they even exclude people from different localities in the same country, a point to which I shall return.

There are two types of citizenship *theory*, the normative and the empirical (Bellamy 2008: 27). In normative theory the citizen is an almost entirely abstract being, innocent of age (more or less), race, gender, ethnicity, class, and sexual orientation. But of course, if citizenship is contested, these qualities matter—and so empirical theory, by contrast, deals with concrete historical manifestations of citizenship (ibid. 28). The story

of citizenship and human rights in Africa is in many ways the story of these two competing theories.

But broad or narrow definitions of who qualifies for citizenship are not really the heart of the problem. Regardless of definition, citizenship in contemporary African politics is a hotly contested category: citizenship is denied or revoked to silence the opposition, expel troublesome individuals, and persecute and remove specific groups of people. This naturally helps to create instability. When asked for his reason for taking up arms, a fighter in the recent conflict in Côte d'Ivoire responded that he wanted an ID card, without which he could do nothing (Manby 2009: 1). The record shows that even the exercise of the ATI right, in those African countries which have laws in place or under consideration, often depends on the possession of citizenship. In 2003, the former Nigerian President Olusegun Obasanjo famously rejected a draft ATI bill because it would have granted the access right to non-Nigerians (Odemwingie 2003: 17). More recently, a Kenyan court has ruled that the country's recently passed ATI legislation grants access rights only to Kenyan citizens (Ayaya 2012).[2]

Contestation over citizenship and categories of citizenship is to a large extent the toxic legacy of colonial practice. During the colonial period in most parts of Africa, England, France and Portugal deliberately used categories of citizenship and non-citizenship as part of the machinery of oppression and for control of the colonized populations. Race, ethnicity, language, and gender were all used to divide the population into settlers, *assimilados*, 'natives', 'foreign natives', and other classifications (Manby 2009: 4). Vital events' demography—the requirement that births, marriages, and deaths be registered—often did not apply at all to those categorized as mere 'natives', with the result that many middle-aged African citizens alive today have no documentary proof of their parentage or their date and place of birth. The situation is not improving: UNICEF estimates that today over half of African children under five have not been registered, predominantly among rural populations, where the percentage is of course higher (quoted by Manby 2009: 115).

Mamdani's work (1996) on the division of African populations by late colonialism into citizens (mainly white settlers) and subjects (members of local 'tribal' communities administered through indirect rule) has illustrated how local discriminations have led to the denial of full citizenship. In many African countries citizenship really is a means of accessing rights

[2] This is not a uniquely African problem; the issue has also played out in the United States between state jurisdictions (Desai 2006).

and hence such resources as equal educational opportunity, employment, and basic social services. Membership, belonging, rootedness have to be competed for over and over again, often violently. These contestations take many forms, but the common theme is always some variant of *autochthonie*, or rootedness in the land. The processes of democratization, in the absence of a strong sense of state and nation, and of 'imagined community' have strengthened the sense of *local* rather than national identity and fuelled emotional rhetoric around 'us', the ones who belong here, the *autochthones*, and 'them', the foreigners, the strangers, the ones with no rights, the *allogènes*.

In theory, international law should make the revocation of citizenship very difficult, strictly limiting the circumstances in which it can happen and requiring a proper court hearing in which an individual can challenge the state's decision. But there are plentiful examples to show that African practice differs sharply from legal theory. In Tanzania, the outspoken publisher and journalist Jenerali Ulimwengu had his citizenship revoked despite having been born in the country; other Tanzanian journalists have been stripped of citizenship as well (Manby 2009: 137–138). In the 1990s, to cite another instance, the then Zambian president, Frederick Chiluba (1943–2011, in power 1991–2002), barred people with foreign parents from candidacy for the presidency; he then attempted to deport his predecessor, Kenneth Kaunda (b.1924, in power 1964–1991), on the grounds that he was Malawian (Kaunda's father was born in Malawi). Chiluba later faced accusations from opponents that he also was not Zambian, but Congolese. In some cases, a formal offer of naturalization has been made, but this is a lengthy and complex process with an uncertain outcome. In Senegal, only 12,000 successful applications have been made in the half-century since independence in 1960. Under a 2004 law, the DRC requires a presidential decree to finalize a naturalization process; Sierra Leone requires 15 years of permanent residence; Ethiopia until recently demanded proof of 'perfect' mastery of Amharic, the national language. South Africa, by contrast, granted 25,000 certificates in 2006–2007 alone (ibid. 141–142).

But the rights of difficult individuals are not the only focus of contestation. Côte d'Ivoire is home to large populations of immigrants from neighbouring countries in the Muslim north, who share ethnic ties with local northerners. Southerners, on the other hand, are mainly Christians. Under President Felix Houphouët-Boigny, northerners participated in political life without too much concern about their origins. After Houphouët-Boigny died in 1993, however, the question of citizenship became a political issue in the struggle to succeed him but was inadequately addressed in

a succession of negotiated peace agreements (Bah 2010: 599). By 2010 the rhetoric of *autochthonie* had become frighteningly bloodthirsty:

> Daughters and sons of the Greater West, link hands together, the hour has come for us to be heard. The hour has come to kill the Akans and chase them from our lands. The hour has come to recuperate our land. The hour has come to clean our villages and towns of the Dioulas (Mossi) and the Akans.... (Marshall-Fratani 2006: 10)

To make matters worse, the father of Alassane Ouattara (b. 1942), the presidential candidate of the main opposition party, was born in what is now Burkina Faso, and the son was thus disqualified by the electoral code from running on several occasions. The outcome was eventually the violent overthrow of President Laurent Gbagbo in April 2011. These problems, or variants, are to be found not only in Côte d'Ivoire but also in Cameroon, the DRC and elsewhere (Cutolo 2010; Page et al. 2010).

A few African jurisdictions have formalized the idea of 'internal citizenship', which has caused considerable distress and instability. Ethiopia has implemented the concept of a federation of ethnically or linguistically determined territorial units, with significant population displacement as a consequence (Manby 2009: 112–114). The secession of Eritrea in 1993 also resulted in considerable dislocation of populations and disputes over who was or was not Ethiopian or Eritrean. In Nigeria, the existence of subcategories of citizenship limits access to rights and resources in a formalized way that appears to contravene the country's constitution (ibid. 110–112). All Nigerians are required to acquire a 'certificate of indigenity' to show that their ethnic and family origins are rooted in the original community of their place of origin. If they are living in that community, they are 'indigenes'; if they are resident somewhere else, they are 'non-indigenes' and may be refused employment in the public service of the state where they are living; their children may not have access to scholarships for higher education and may in fact be charged higher tuition fees (Human Rights Watch 2006: 1–2). Non-indigenes may even lose the right of some kinds of political participation, an absolutely fundamental component of modern democratic citizenship (Bellamy 2008: 4). The end result is that

> these discriminatory policies and practices effectively relegate many non-indigenes to the status of second-class citizens, a disadvantage they can only escape by moving to whatever part of Nigeria they supposedly belong in ... A Nigerian who cannot prove that he is an indigene of somewhere ... is discriminated against in every state of the federation and is barred from many opportunities at the federal level as well. (Human Rights Watch 2006: 1–2)

What is almost completely absent from these narratives is any manifestation of the idea of 'cosmopolitan citizenship'—an idea that would take into account the rights of the refugee, the migrant worker, or the urbanized and detribalized proletarian, and on which a meaningful human rights and hence ATI practice might most securely rest. A working definition of what such a modern and inclusive citizenship might consist of is that it is mainly the right to have and claim rights, although citizens as social actors clearly also have duties both in relation to the state and in relation to each other. The difficulty that arises is that of defining what rights belong to the citizen as citizen, and can therefore be denied to, say, visitors, refugees, or illegal immigrants. The South African solution has been to limit only four rights to citizens of the republic—namely, citizenship itself, the right to vote and be a candidate for office, the right of free residence, and free employment rights. All other rights by implication belong to everybody, including refugees and even illegal immigrants (Manby 2009: 149). This constitutes recognition that, at a normative level, human rights are rooted in the dignity of the human person and therefore adhere to all humans regardless of their membership of a particular national or political community.

It is precisely at the interface between the broadly-defined citizen (a member of the political community but not necessarily the national one) and the state (the political community in the exercise of its power) that rights are claimed and the duties to respect, protect, and fulfil must and do operate. It is the state that must not interfere with the exercise of rights; it is the state that must prevent third parties from interfering; and it is the state that must create the conditions (such as providing information) that will facilitate the exercise of rights even in the absence of any active interference. Built implicitly but unavoidably into this human rights paradigm, and hence into the existing model of ATI systems, is an inclusive and cosmopolitan concept of citizenship. The handful of examples of international jurisprudence concerning ATI, which are examined in the following section, demonstrates exactly these characteristics as both strength and weakness, as we shall see.

International ATI Jurisprudence

Activists have long asserted that ATI is a 'fundamental human right', and a significant proportion of the literature arguing for the necessity of ATI relies on what might be termed the 'rights argument', often to the virtual exclusion of any other justificatory rationales (e.g. Mendel 2003: iii; Article

19 2000: 4). This creates a difficulty that is usually ignored. Human rights discourse has been subjected for some time to a range of critiques, not so much for its actual content as for its claim of universality, its emphatic individualism, and its Eurocentrism—the "damning metaphor … that depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other" (Makau wa Mutua 2001: 201).

The rights argument as set out has rested largely on a specific reading of Article 19 of the venerable Universal Declaration of Human Rights (UDHR 1948) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR 1966), as well as on other, subsequent international and regional instruments. The original UDHR Article 19 reads as follows, and most of its derivatives use very similar language:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In the early years of the ATI movement, little effort was made to examine the theoretical foundations of the rights claim, other than reference to the texts of the international instruments, and there was no jurisprudence either. This situation is now changing, with some involvement of African interests, as we shall see. We are fortunate to have both the beginnings of an international jurisprudence on this question, as well as a more sophisticated theoretical understanding of the relationship between the right and the duty of states to 'fulfil' it, derived from the application of Hohfeldian analysis to ATI, first put forward by Darch & Underwood (2010; Hohfeld 1919).

First of all, a brief summary of the theoretical argument: early in the twentieth century the North American legal scholar Wesley Hohfeld (1879–1918) developed a typology in which all rights (held by citizens) have correlative duties (usually but not always held by the state). The right-duty axis was seen essentially as a relationship between two actors, to be constituted in four ways, of which the most important for our purposes are the claim-right with a justiciable remedy, and the privilege-right or freedom with a null correlative (ibid.). The holder of a claim-right could demand that the state act to respect, protect, and fulfil his or her rights; the holder of a privilege-right could only demand that neither private nor state power be used to limit his or her liberty. Hohfeld's essentially conservative theory remains influential, especially with regard to the duty end of the equation, which has been further elaborated by other scholars (for

example, Shue 1979). The state's duty towards the citizen—an individual who has the right to have rights—can be divided into the duty to respect, or not to interfere with people's rights; the duty to protect, or to prevent interference by other individuals or entities; and the duty to fulfil, or to create the necessary conditions for rights to be enjoyed. Without an ATI right, it is hard to see how this last requirement for the necessary conditions to be created for the enjoyment of other rights can be said to have been satisfied. When the state makes available information about shelter, housing, education, elections or how to pursue a court case or obtain legal advice, it is in fact keeping its end of an Hohfeldian bargain by making it possible for rights connected with these things to become genuinely justiciable, even if ATI mechanisms are not involved, but most especially when they are.

The beginnings of an international jurisprudence of ATI can be traced to the 2006 judgement by the Inter-American Court of Human Rights in the case of Claude Reyes and Others v. Chile. This was the first case to derive an absolute right of access to information from the 'seek' language of Article 19 as reproduced in Article 13 of the regional American[3] Convention on Human Rights (OAS 1969; IACHR 2006: 41, paragraph 76). The judgement was described at the time as ground-breaking, pioneering, and historic. For the first time in international jurisprudence, a duty of the state to provide information even in the absence of specific ATI legislation was established and, by extension, a citizens' right to seek and receive information. The court based its judgement on the language of Article 13 of the American Convention on Human Rights, which is closely modelled on Article 19 of the Universal Declaration of Human Rights, already cited above. Article 13 of the American convention states that

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (OAS 1969)

The court argued that the words "seek and receive information" must be read as meaning that the state has a "positive obligation" to provide it, that there is no requirement that an individual prove "direct interest or personal involvement" in order to legitimize a claim, and that once received,

[3] Note that the word 'American' is used here in a pan- or inter-American sense, not in reference to the United States, which is not in fact a signatory.

information enters the public domain and may "circulate in society" (IACHR 2006: 41, paragraph 77).

Several years passed before another case advanced the cause of ATI further. In 2010, the same Inter-American court decided in Gomes Lund and Others v. Brazil that an amnesty law designed to protect the perpetrators of gross human rights violations during a period of military dictatorship had no force, because it contravened the public right to know about the conditions that permitted such abuses. There was significant South African involvement in this case; the Open Society Justice Initiative filed an *amicus curiae* brief together with the Commonwealth Human Rights Initiative of India and two South African activist organizations, the Open Democracy Advice Centre and the South African History Archive. South African interest derived from the national preoccupation with "non-judicial truth processes in countries emerging from decades of state repression", with obvious parallels in several South American historical experiences, including Brazil's (Open Justice Initiative and others 2010: 9). The brief was effective:

> The court relied in part on arguments contained in [the] brief … The brief argued that the right to the truth—for the victims or their family members as well as the general public—is now well established in international law and state practice. It is a broad right that guarantees the public's right to know about the underlying conditions that led to past abuses … In its ruling, the court, echoing arguments made by the Justice Initiative and its partners, recognized for the first time that the right to information contained in Article 13 of the American Convention undergirds a legally enforceable right to the truth for victims and for society as a whole. (Open Society Foundations 2011)

In addition and most recently, in no. 34 of its series of thematic 'General Comments', the United Nations Human Rights Committee unambiguously stated in 2011 that Article 19 of the UDHR refers to and embraces

> a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. (UNHRC 2011: xx)

Unfortunately, the utility of both the Hohfeldian theory and the case law developed in the Americas remains ambiguous in an African context. It is unclear whether African administrations would regard arguments from a rights perspective as especially compelling, and outside South Africa local jurisprudence requiring recognition of such a right, whether internationally mandated or locally legislated, is emerging only slowly. At the

continental level, the African convention equivalent to the American one, the so-called Banjul Charter (the African Charter on Human and People's Rights), adopted by the Organization of African Unity in 1981, uses comparatively cautious language when describing information rights:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

This language differs significantly from that of other international and regional instruments in its omission of any mention of 'seeking', an important word in the reasoning of the Reyes decision. Additionally, even if an unambiguous right-duty pairing could be derived from the language, it seems unlikely that any African counterpart to the Reyes decision will be handed down anytime soon.

This may not be an insuperable problem since, happily, later African regional instruments use much clearer language. The African Union Convention on Preventing and Combating Corruption, which was adopted in Maputo in July 2003 and entered into force in August 2006, includes an Article 9 on 'Access to Information', which states that "each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences"—a broad mandate in several respects (African Union 2003: 12). The African Charter on Democracy, Elections and Governance was adopted in Addis Ababa in January 2007 but has not entered into force, as it awaits ratification by the required minimum of 15 states. It mentions access to information twice. Article 2(10) requires states to "promote the establishment of the necessary conditions to foster … access to information", among other things; Article 19(2) obliges states to allow electoral observer missions "free access to information" (African Union 2007: 3, 8).

The arena in which this issue might play out is the African Court on Human and People's Rights. This tribunal was legislated by the Organization of African Unity in 1998, and it was first established it in 2004, but it remained inactive for several years while it merged with the African Court of Justice. This prompted some criticism, and a report published in 2008 complained bitterly that

> States are obliged to live up to the promise that they made to their people a decade ago … it is in their interest to do so: an effective Court will help to anchor democracy on the continent, ultimately creating stronger and more prosperous nations. The old legal adage is 'justice delayed is justice denied'.

> Ten years is long enough. The African Court on Human and Peoples' Rights must start its work. (Wachira 2008: 2)

The court has, however, finally taken up its cudgels, and delivered its first judgment on 15 December 2009, turning down an attempt to bring former Chadian president Hissein Habré to trial (African Union 2009). It remains unclear whether there is currently any pressure from civil society organizations for the court to take cases in such specialized areas as ATI rights. In the meantime, local case law continues to develop within African jurisdictions, from the bottom up as it were. Examples include the Zambian case of Mulundika and Others v. the People (1996), in which the Supreme Court held that right to participate in public gatherings was inherent in the right to freedom of expression and to receive information without interference; and the more recent Kenyan case of Kariuki v. Attorney General (2011), in which it was decided that army salaries were not secret. Neither case relied explicitly on ATI legislation.

The question remains whether an exclusive reliance on the rights-based character of ATI is the most effective strategy in what might be described as 'hostile environments'—where political systems are largely patrimonial, bureaucracies have low capacity, and politicians are largely not accountable to the citizenry. Tactically, an unwavering emphasis on the rights' character of ATI does not necessarily advance the cause in all and every circumstance, and there are signs that some organizations in African countries are aware of this. In the late 1990s, for instance, Nigerian activists apparently made a conscious decision, in a changing political climate, to shift the campaign focus away from human rights issues:

> ... the revelation of the staggering amounts allegedly stolen by the Abacha family meant that transparency concerns *shifted from human rights to corruption and lack of accountability.* (Obe 2007: 154, emphasis added)

The Nigerian groups saw issues of corruption as easier to mobilize around. Analogously, in post-conflict Sri Lanka ATI activists currently choose to emphasize the administrative efficiencies achieved by accountable and transparent government at all levels, rather than pushing ATI as a 'human right' in a context where officials may equate rights-talk with the risk of being accused of wartime violations (Private communication, 2010). The successful MKSS (Mazdoor Kisan Shakti Sangathan or Organization for the Empowerment of Workers and Peasants) campaigns in Rajasthan in the 1980s and 1990s arose from what were formulated as concrete livelihood issues rather than specific human rights problems (Jenkins and Goetz 1999); and in South Africa the Open Democracy Advice Centre has

had some ATI successes around issues of service delivery such as potable water.

At the strategic level, the familiar critique of the universality-claims and the individualism of human rights discourse must also be taken into account:

> … human rights and Western liberal democracy are virtually tautological. Although the two concepts seem different from a distance, one is in fact the universalized version of the other; human rights represent the attempted diffusion and further development at the international level of the liberal political tradition … the human rights corpus [is] the moralized expression of a political ideology … the specific philosophy on which the current 'universal' and 'official' human rights corpus is based is essentially European. This exclusivity and cultural specificity necessarily deny the concept universality. (Makau wa Mutua 1996: 592–593)

If this critique has any force, then logically it is also a critique of the largely implicit normative claims of ATI activism within human rights discourse. In other words, the idea that there is or might be a single 'best-practice' model that can be reproduced around the world with only minor adjustments is probably mistaken, with serious implications for ATI campaigns in Africa.

An alternative approach that is beginning to be explored theoretically by some scholars relies on the use of administrative or civil service reform as the conceptual framework for building ATI practices. Such reform programmes were heavily backed by the World Bank in the 1990s, with a strong emphasis on reducing wage bills, rationalizing promotion policies, and increasing efficiency, but achieved mixed results (Lienert 1999). Nevertheless, in countries with administrative systems tending towards the patrimonial, such reform is seen by international multilateral institutions as a fundamentally necessary component of the future success of their development programmes; certainly, it is hard to see ATI practice becoming securely rooted without it. But there are significant obstacles. Reforms frequently fail because they are "blocked outright or put into effect only in tokenistic, half-hearted fashion" (Polidano 2001: 346). They can also fail because they are wanted by donors but not necessarily by government officials themselves (ibid. 350).

Conclusion: ATI and Social Change

What, then, are the prospects of embedding ATI behaviours—one way or another—in African states? Formally at least, politics in the developed

world is about processes of developing policy, and the fundamental role of bureaucracy is to implement these policies. All this is achieved through identifiable public institutions—political parties, election commissions, parliaments, ministries, and government departments. ATI is conceived in such circumstances as a formal response to the dangers of bureaucratic and political secrecy and relies *inter alia* on the existence of an approximately Weberian legal-formal bureaucracy that is predictable and efficient in its behaviour, relies on precedent, keeps records efficiently, and is politically independent. It is not surprising that African bureaucracies have not followed the same historical trajectory as those of Europe and North America. This was true in colonial times and remains true today. Significant parts of the colonial archive were created by foreigners "as the working memory of a process of domination" (Hanretta 2009: 121) and thus do not even approximate an accurate or 'truthful' record; rather, they are full of 'gaps and silences'. Hanretta's study of the Sufi community of Yacouba Sylla in French West Africa in the 1940s shows how actively misleading such documentation can often be: "official prejudices and assumptions were heterogeneous and contradictory, often sending officials in opposite directions as they sought to interpret events and gather more information about them" (ibid. 123). This is a powerful heritage that has not yet been entirely shaken off.

It is generally accepted that from the 1970s onwards the bureaucracies—and hence the archives—of many post-colonial African states began to lose such capacity and autonomy as they possessed:

> Bureaucracy at independence was vulnerable to office-holders who had not yet imbibed a distinctive esprit de corps. The bureaucracy degenerated into patrimonial administration unless the political leadership shielded it from patron-client politics … presidents treated the public administration as their personal property. They and their lieutenants arbitrarily filled the expanding ranks of the state apparatus with political appointees [and] selected the top administrators on the basis of personal loyalties … the bureaucratic virtues of *hierarchical authority, expertise, neutrality, predictability, and efficiency* eroded. (Sandbrook 2000: 91, emphasis added)

Even in South Africa, quite possibly the African country whose public service most closely approximates a Weberian ideal, there is a lack of "administrative and management capacity … and, in many cases, adequate, ingrained processes and systems"—processes and systems which are both the creators and the creatures of methodical record-keeping (Calland 2006: 67).

However, the formal state structures and their inefficiencies are not the whole of the problem, because political activity in many post-colonial states is primarily about patronage (access to resources: clientelism and neo-patrimonialism) and in such circumstances

> the institutions that count are largely *informal* rather than *formal*. Formal institutions … are publicly honoured, and often privately circumvented. The informal institutions structure political behaviour and expectations, even though they are publicly unacknowledged or even condemned. (Sandbrook 2000: 59, emphasis in original)

In such systems, an ATI regime that is focused on accessing the documented record of formal civil service activity is probably missing the point on several levels. The formal institutions will likely have poor record-keeping practices because the effort involved would be pointless—decisions are not guided by precedent, and many key decisions are taken in other ways. The records would be empty of meaning, of semantic content. It is also improbable that public servants would be consistently held accountable for their actions. As for the informal institutions, they will likely have no record-keeping practices at all, but for different reasons. They may be covering their tracks, but since they have no legal status as far as ATI legislation is concerned, they have no compelling reason other than immediate need for creating or keeping documents.

It is clear that the problem of what happens after a discovery law has been adopted—the questions of managing demand, of implementation, and so on—is being treated seriously by activists and academics alike in the African ATI community. Nevertheless, we fall all too easily back into modes of thought about ATI that do not necessarily help us understand the concrete reality of the circumstance in which we work. 'Governance' and 'access to information' rights are not necessarily seen by the political class, the public service, or even all African analysts through the prism of Western liberal values. Two Zambian academics, to take a recent extreme example, concede that, yes, the "free flow of information is an essential right of every citizen of any country" (Chitumbo & Kakana 2010: 185). Nevertheless, they also believe that censorship (and hence, presumably, secrecy) "based on the public interest, public morality, public order, public security and national harmony" is necessary to avoid instability, and it is "justifiable to censor speeches, words or art of an author that are likely to cause harm" (ibid. 190).

The most obvious flaw in measuring commitment to ATI values and behaviours by looking for a law is that it tells us almost nothing about

context, nothing about levels of use of the right, and nothing about levels of satisfaction with outcomes. Correlation—to cite the statisticians' cliché—is not causality. If the core purpose of ATI is to help to enforce accountable governance, then legislation must be accompanied by genuine administrative and bureaucratic reform. If the core purpose of ATI is to act as a leverage right for the claiming of other rights—to access social services, for example, or to implement development projects—then we may be moving into the sphere of a new kind of interactive participatory governance, which may require us to develop a new kind of praxis. Favareto et al. (2010: 243) have argued that "social movements can develop different styles of activism, even when functioning in the same sorts of institutional frameworks". It does seem likely that a nomothetic approach to ATI issues based on the experience of either developed countries or other parts of the global South is unlikely to yield satisfactory results in African contexts. Indeed, the fact that the African campaigns for legislation *per se* have either lasted for decades or failed to get off the ground at all may be evidence that the wrong tree is being barked up. Local circumstances may need to be taken into account more seriously and new strategies and models developed. More work, both theoretical and practical, needs to be done if the activist and academic ATI community in Africa is to identify and implement appropriate strategies that are not merely attempts to implement a model that has had, at best, mixed success in other parts of the world.

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