Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information

Towards an Egalitarian Realisation

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Abstract: Part of the popular attraction of transparent governance and freedom of information is that it has the potential to reconfigure venerable information asymmetries between state and citizen. Is this an expression of the liberal genealogy of the idea? Based on four foundational considerations, this article argues that the 'new' practice of the right of access to information (ATI) suggests that the idea can escape its liberal heritage to serve egalitarian socio-economic outcomes. The first explores the genealogy of ATI as a right, examining its 'liberal' roots. The second considers the idea that liberal rights are, per se, non-progressive or anti-egalitarian. Accordingly, the third examines the nature of the right. The fourth considers the praxis and the emerging empirical picture to see if it supports ATI's embryonic 'theory of change', which casts ATI as a 'power right', which in practice, and subject to certain conditions, enables ATI to adopt an egalitarian disposition.

Keywords: democracy, egalitarianism, freedom of information, liberalism, right of access to information, transparency

Introduction: An Under-theorised 'Liberal' Right

The inquiry that this volume prompts, at least in respect of freedom of information, is timely and much needed. In the past two decades, there has been a huge expansion of the legal protection for the right of access to information (ATI) – as freedom of information is more commonly known now. In 1992 there were just fifteen countries with ATI laws, only two of which (Columbia and Philippines) were not mature democracies (Vleugels 2012 cited in Calland 2013: 14). As of September 2012, this had risen to ninety-three national ATI laws (with 180 sub-national laws and three international laws – the Belfast Good Friday Agreement, the European Union and the World Bank).[1] Alongside this significant expansion of legal protection, there has been a concomitant growth in the operation of ATI in different socio-eco-

Theoria, Issue 140, Vol. 61, No. 3 (September 2014): 70-88
doi:10.3167/th.2014.6114005 • ISSN 0040-5817 (Print) • ISSN 1558-5816 (Online)

nomic, political and institutional settings and so a great deal more is now known about how ATI works in practice. However, despite a growth in the academic literature in recent years, the discipline still remains under-theorised (Darch and Underwood 2005).

As more than one scholar has put it, the past twenty years has been – at least in terms of recognition of the legal right and in terms of advances in establishing the legal right – the 'age of transparency' (Birchall 2014: 78; Sifry 2011); while another expert writes of the period 1989–2001 as the 'decade of openness' (Blanton 2002), albeit that it was a decade that ended with the 9/11 attacks on the World Trade Center in New York and which, amongst many other things, contributed to a retreat back to greater secrecy in the name of security and the 'fight against terror'. Part of the popular attraction of transparent governance and freedom of information is that it has the potential, whether through statutory protection or not, to reconfigure venerable information asymmetries between state and citizen. By performing such a reconfiguration, however, any genuinely effective ATI regime would almost inevitably also start to reconstitute fundamental power relations between state and individual, thus opening up the possibility of a democratic practice that does not rely merely on formal institutional arrangements and legal protection. One question, pertinent to this volume, is this: is this 'merely' a liberal idea, bearing in mind the liberal genealogy and original orientation of the right to freedom of information (from which ATI developed) in international human rights law? In this context, it is liberalism's characteristic claims of universality and individualism that are most important. In other words, cloaked in liberalism's particular, historical ideological clothes, is ATI an idea with a core universal character, and one that is preoccupied with the rights of the individual (against the over-weaning state)?

As is often the case with liberal worldviews, the proponents of the principle of transparency and ATI typically present the idea as being 'supra-ideological', with a core 'technical' rather than political character. This article seeks to engage this contrast in worldviews and contribute to the nascent (but growing) body of work on ATI that has a more theoretical disposition. It does so with particular attention to ATI's history in modern South Africa. Drawing on previous work in developing a four-faceted theoretical prism for understanding the complexity of ATI (Blanc-Gonnet Jonason and Calland 2013), the article hones in on one of the four facets: the multi-rationale character of the right of access to information, as freedom of information is increasingly conceptualised and understood now and as it is articulated in section 32 of the South African Constitution.

Different actors perceive ATI to serve different public policy or democratic governance or human rights objectives – to name but three that reflect the ATI discourse's current 'pan-ideological' compass. This suggests that, not only is the theoretical basis for understanding ATI weak, its ideological underpinnings are flabby and the political case for ATI is weakened by too many

facile or shallow presumptions about the relationship between the 'right' of ATI and 'democracy'.

This article proceeds on the basis, and with the rebuttable presumption, that the principle of transparency and often the practice of ATI has successfully disguised itself within a liberal, and hence notionally supra-ideological, conceptual problematic, leaving its egalitarian potential largely unrealised except at a superficial political level. In order to build a sounder philosophical case for ATI as an egalitarian democratic idea, the relationship between ATI as a legal instrument – a justiciable right that imposes duties on information-holders in the public sector (and, in South Africa, the private sector too) – and the political economy of power needs to be defined more clearly. Drawing on new experiences around the world, especially from developing countries and/or newer democracies such as India and South Africa, the article explores the following thesis: if the legal regime for ATI operates on the basis of procedural rights and duties created within a liberal-democratic praxis, then there are likely to be significant limits to the potential of ATI as a subversive force that can advance the interests of communities that are socio-economically marginalised.

If ATI is to have any currency as a democratic tool within an alternative ideological paradigm such as that of 'egalitarian liberalism' that this volume is directed towards, it will require a sharper definition of the kind of democracy that we are concerned with, and a parallel re-calibration of the type of human right with which we think we are engaged. This leads the article to conclude that ATI's potential as an egalitarian human right is subject to at least three conditions, namely: it must escape legal formalism; it must be articulated and enforced as a collective, communitarian right, as well as an individual one; and it must encompass privately held information as well as public.

Four Considerations

The argument that this article makes is based upon four main foundational propositions or considerations. The first explores the genealogy of ATI as a right, examining its 'liberal' roots. The second considers the idea that liberal rights are, per se, non-progressive or anti-egalitarian. In the chosen context of this article, this entails a discussion of whether a right – in this case ATI – with a liberal heritage, is automatically and necessarily non-egalitarian, from a theoretical perspective. Since this debate is one that this whole volume is primarily engaged with, a 'minimalist' approach is taken by simply presenting the arguments so that this article can take its place alongside the other contributions to the debate that appear in this volume. Accordingly, little time is devoted to making the case that liberalism is inherently conservative or anti-egalitarian. Instead, for the purposes of the argument, for exploring whether in both theory and practice ATI should be seen as an example of egalitarian liberalism, the argument proceeds on the footing that liberalism is essentially

non-progressive and the basis for this assertion is simply summarised in very simple terms.

The third consideration concerns what kind of right we are dealing with, and asks: is a right such as ATI shackled by its liberal heritage, or can it transmogrify into something with a more progressive and egalitarian character? And fourthly, what does the state of the art – the praxis and the emerging empirical picture – tell us about the effect and impact of ATI on equality? This final consideration is crucial because the case for ATI as a subversive, progressive idea will no doubt be stronger if the usage of ATI by communities to advance their rights and their struggles for social justice, both in South Africa and elsewhere, has been effective in adjusting power relations and achieving egalitarian objectives.

Liberal Origins?

Legally, ATI does have an essentially liberal origin. In international law, the starting point is Article 19 of the Universal Declaration of Human Rights (UDHR), which states: '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'.[2] Drawing inspiration from the UDHR, article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) [1966] states that: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[3]

Hence, the right to seek information is enshrined in international human rights law as a vital component of the right to freedom of expression. This genealogy stems from the premise that the right to freedom of expression is facilitated and enhanced by freedom of information (FoI) and ATI, and would remain unfulfilled or even devoid of meaning without it. Together, FoI and freedom of expression are essential to 'establish a marketplace of ideas, which is fundamental not only for the development of a free personality, but also for a democratic government. Without FoI, freedom of expression is useless' (Wieland 1999: 84).

It is in this sense that ATI is a subset of the broader right of freedom of expression. Since freedom of expression is a liberal right par excellence, ATI has an indisputably liberal lineage. Without probing ATI's liberal origins per se, some scholars had, until recently, questioned the relative importance of ATI to the liberal rights tradition. For example, despite its expression alongside freedom of expression in the UDHR and ICCPR, Darch and Underwood (2005: 85) have argued that ATI is a 'weaker kind of right' than freedom of expression because ATI is 'a specific response to the modern historical phenomenon of the nation state', whereas freedom of expression applies across time and regardless of the nature of social institutions or arrangements.

However, the fundamental status of ATI in international law was put beyond doubt in 2006 by the seminal *Reyes* decision of the Inter-American Court of Human Rights. The court found that ATI is a fundamental and justiciable human right enshrined in international law that imposes duties on the state, including the obligation to respond to any request from a citizen who 'seeks' (the word used in the UDHR, ICCPR and Article 13 of the Inter-American Convention on Human Rights, on which the *Reyes* litigation was based) information from the government or other state agency.[4] *Reyes* notwithstanding, Darch and Underwood's call for greater theoretical development of ATI, particularly in terms of the 'concrete conditions in which it will be used' (2005: 85) remains pertinent, not least as a challenge to the rather indolent theoretical assumptions made by some of the more boisterous advocates for ATI legislation (see below), and is something that this article hopes to begin to respond to (in particular, see *A Liberal Praxis?*).

With some exceptions, such as in South Africa (on which more, below) where the demand for ATI extended beyond state information to privately held information, the mainstream call for ATI has been premised on the notion of a secretive state that needed to be held to account through greater transparency. This is certainly true in the United States, where the Freedom of Information Act of 1966 (FOIA) was developed to give Congress more powers of scrutiny over a secretive executive. Darch and Underwood critique this traditional liberal understanding of ATI as simply about 'citizens ability to gain access to state records (facts, data or documents)' (2005: 79). Such an approach to ATI is unlikely to be transformative in countries with relatively short democratic traditions and politically disempowered citizens because its efficacy as a change process depends entirely on the level of demand for information from the citizenry and state compliance with ATI requests (Darch and Underwood 2005: 79). This liberal approach, though common, is too 'narrow' because it limits ATI issues to 'theoretical and technical questions of how citizens can access state records, without having to overcome such obstacles as demonstrating legitimate interest or paying excessive costs' (Darch and Underwood 2005: 84). In the United States the FOIA was passed in an era of civil rights activism and soon 'redefined itself within a framework of the (individual) citizen's relationship to the state' (Darch and Underwood 2005: 78). However, because the Act's vision was constrained to an ad hoc solution to a particular problem, despite its immense practical significance, it never gained recognition as the expression of a Constitutional principle (Darch and Underwood 2005: 78).

Other common liberal arguments for ATI are that it 'promotes and stimulates popular participation in the political process' and that it can provide an important safeguard function by 'discouraging arbitrary state action and protecting the basic right to due process and equal protection of the law' (Roberts 1999: XX). Moreover, ATI can be used as one weapon in the armoury of civil society in fighting corruption, promoting transparency and resisting the politics of patronage.

The struggle for ATI laws has often occurred in the context of political transition. For instance, Darch and Underwood cite the Philippines, where, after judicial affirmation of the right to access information in the late 1940s (*Alberdo Subido v Roman Ozeta and Mariano Villanueva* GR L1631, 27 February 1948), the next manifestation of a citizen's right to information occurred in the early 1970s at a time when the democratic rights of citizens were being taken away amidst violent protests, civil unrest and martial laws (Darch and Underwood 2010: 166). The constitution that was later adopted protected the right to information. However, with martial law still in place, its realisation was marred by a resistance to any attempt to obtain state-held information: the government continued working under secrecy. A legal challenge against the legality of the president's tendency to rule through secret decrees was brought and in a landmark decision the court held that such decrees had no legal force until they were made public. In a later constitution, the right to information was better protected, providing for enabling legislation that was passed in 1987. Other countries where the freedom laws were developed during transitional periods include Guatemala, Bolivia and Brazil.

Since the ICCPR was developed during a particular 'moment' in history in the aftermath of the Second World War, in which conceptions of the state were still dominated by the idea that citizens needed to be protected from its autocratic and potentially dictatorial tendencies, there can be little surprise that ATI's liberal roots have attracted the attention of Marxist scholars. Birchall (2011b), for example, describes ATI in terms of it being used by conservative forces to embarrass the legitimate endeavours of a democratic state, which, by corollary, she argues, has a right to be secretive in order to protect itself from undue interest and to maintain its progressive programme. This approach deserves to be taken more seriously, because generally both scholars and practitioners have tended to assume that the principle of 'transparency', and therefore ATI, is an inherently, and incontrovertibly, 'good thing', without any critical thinking about the potential democratic downside of increased transparency or greater uptake of the right to ATI.

Rights are, of course, just as (if not more) likely to be used by the powerful to defend their interests as by the disempowered to advance theirs. A telling example of this tendency in terms of ATI is to be found in the U.S.A., where the corporate sector has become by far the biggest user of freedom of information legislation (Radez 2010: 641[5]) – a theme which is engaged with further below (see *A Liberal Praxis?*). Such unintended consequences can have massive implications for states with weak or under-resourced governments but well-resourced and determined private actors, as is the case in many developing countries.

In short, an approach that takes transparency or the passing of ATI legislation as an inevitably positive democratic development runs the risk of succumbing to a theoretically feeble methodology that adopts ATI as a pan-ideological or politically neutered notion, with the result that the political implications of ATI, and its potential for reconfiguring power relations, are ignored.

Liberal Assumptions?

Birchall's critique is relevant here because it provokes an examination of the role of the state and the relationship between ATI and the democratic state. Liberalism presumes the worst of the state; it assumes that over-weaning state power will inevitably lead to the trampling of the rights of the citizen, which, therefore, need legal protection. Putting aside the limitations of this 'vertical' approach to power relations and the extent to which it ignores the rapid structural pluralism of state and society over the past thirty or more years, one of the weaknesses of this approach is that it also presents ATI as a 'pan-ideological' or even 'non-ideological' phenomenon. This approach tends to disregard the intensely political nature of information and the political economy of its control regime – the question of who gets access to what information, when and how. From this progressive perspective, liberalism is an essentially conservative ideology because it seeks to limit the power and capacity of the state to pursue its democratically mandated programmes. This approach to the state's democratic mandate may encompass the notion of social transformation, which is a persistent theme of great if vexing importance in the South African polity. Birchall goes further to suggest while 'elements of globalist Left have also chosen to invest in [transparency] as an anti-capitalist tool' (Birchall 2011b: 62), such investment may be counter-productive in that because of a 'close relationship between transparency and neoliberalism, the Left is at risk of echoing liberal celebratory rhetoric around transparency' (Birchall 2011a). Not only is ATI a liberal idea, therefore, but – 'worse' still, from a progressive perspective – a neoliberal one:

> Transparency is closely linked to a neoliberal ethos of governance that promotes individualism, entrepreneurship, voluntary forms of regulation and formalised types of accountability. It is powerful in that it is inscribed in political, financial and cultural documents, processes and policies that not only suggest, but push for, a certain normative order (Garsten and Lindh de Montoya 2008: 3).

For present purposes, I define the relationship between transparency and 'neoliberalism' in terms of the following two primary features:[6] first, that everything is subject to performance assessments and standards in order to assess its validity in productively contributing to the social system – and that transparency and ATI's role is to provide the material for such performance assessments and standardising. Second, the understanding that everything can be dealt with (and controlled) by the free market – and that because free markets require a degree of at least optimal perfect competition, that access to such markets requires high levels of information to be available to all the main corporate protagonists.

Moreover, runs the Birchall argument, the notion of rights as a defence for the citizen against an interfering, negligent or self-serving state is misplaced, and in practice tends to secure the interests of incumbent interest-holders, such

as property owners. The constraints that liberal rights impose upon the state are thus anti-transformative and therefore conservative. It is important to note, however, that essential to this argument is the inbuilt assumption that the state has an authentically transformative purpose. From this, one can begin to construct the basic tenets of a counter position: whether or not it is the case that the state has an authentically transformative intention or not, liberal rights can support transformation when they are used as a means of holding the state to account at the point at which it ceases to be transformative: to shine a light on the state's failures in order to help get the state back on a 'corrected' track. However, one must at this point then recognise that this takes us back to the original idea of liberal rights as a check on 'big, bad government'.

An alternative way of critiquing ATI as a liberal right is that it serves a conservative purpose by limiting the state's 'freedom' (or duty) to use secretive measures where it deems them necessary in order to pursue its democratically mandated programmes, which is part of Birchall's core argument (Birchall 2011b). But, again, the assumption here is that the state has an authentically transformative purpose. And so, an alternative way of thinking about a liberal right such as ATI is that when it 'engages' or is engaged by progressive activists, it is used not so much as means of limiting state power but as protecting state power from being used other than for the transformative, progressive purpose for which it has been mandated (whether by the constitution, as in South Africa, or by electoral mandate, or by a combination of the two). And, at this point it is worth reminding oneself that while the notion of a 'legitimate secret' may be neither a legally straightforward nor uncontroversial idea, ATI legal practice usually recognises that the state has a duty to withhold information where disclosure would be harmful to a specific public interest (for example, personal privacy in respect of individual health records). The advantage of having a legal basis for the right of ATI is that the information-holder who deems it appropriate and necessary to withhold information on the basis of a potential harm to the public interest that would be caused by disclosure has to do so on the basis of legality – of specific exemptions to disclosure and on the basis that application of such exemptions may be challenged in court and may, therefore, need to be defended and justified by the information holder. This would seem to be the principle of public accountability – what South African jurist Etienne Mureinik named as the 'culture of justification' (Mureinik 1994) – in action. Does a state that is steadfastly pursuing democratically mandated programmes really need to keep information secret (except under certain narrowly defined legal exemptions)? Surely, such a principle of public accountability should be of overriding importance?

But, this discussion also requires a more careful examination of the nature of the right. What sort of right are we dealing with? And, in turn, this requires both a theoretical and an empirical response. First, however, it is worth considering the extent to which a right, such as ATI, can transmogrify over time

(I use the word 'transmogrify' advisedly, to denote the inherently surprising nature of the sort of change in character that I have in mind here). In this respect, Dubow's writing (including his contribution to this volume) encourages the idea that a right can shift in its character through a combination of history, context, usage and litigation. He has noted that the humanitarian impulses of the Cape liberals – a political tradition of the Cape Province of South Africa that ostensibly pursued non-ethnic policies – were motivated more by the desire to expand the scope of citizenship rights for white colonialists than for Africans. For instance, the desire to promote trade and economic development was founded partly on the desire to enhance settlers' as colonial citizens enjoying the rights of free-born Englishmen. Thus, claims to citizenship rights and representative institutions were strongly inflected by local conditions (Dubow 2012: 33). As the terrain of the liberation struggle shifted, so did attitudes to human rights – initially regarded with great suspicion by the African National Congress (ANC) leadership, many of whom spoke of them as 'bourgeois' or as tactically counter-productive (Dubow 2012: 94). Equally, notions of cultural relativism and the strong psychological impact of colonialisation combined to embed a deep suspicion about human rights as being a 'Western' construct, especially in the eyes of those with a revolutionary tradition and worldview. Arguably, shifts in geopolitics and in the balance of forces internationally, as much as strategic considerations, permitted the ANC and other key members of the negotiating elites that comprised the Convention for a Democratic South Africa (CODESA) and other processes of the early 1990s to embrace the idea of liberal constitutionalism and its attendant rights with far greater enthusiasm (Dubow 2012: 117).

Enshrining a right of ATI in the new constitution (both interim and final) was a product of this shift. In South Africa, ATI was enacted 'as part of a rapid *negotiated political transition*, and as part of a self-conscious attempt to begin building a national human rights culture' (Darch and Underwood 2005: 78, emphasis in original) and as a reaction to secretive authoritarian state culture: record keeping, censorship and disinformation linked to abuse of power and human rights violations. Section 32 of the final constitution states that 'Everyone has the right of access to (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise or protection of any rights. In turn, and in accordance with section 32(2) of the constitution, the Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted to give effect to section 32. According to Darch and Underwood, the ATI legislation derives more, therefore, from a 'constitutional imperative than from popular pressure', although this analysis fails to take into account the not insubstantial 'Open Democracy Campaign' that was mustered by a group of around ten major NGOs, church organisations and trade unions during the period between the passage of section 32 in 1996 and the passing of PAIA in early 2000.[7]

A Liberal Right?

This brief account of the history of ATI in modern, democratic South Africa, leaves the question of whether the right has a liberal or, on the other hand, a more progressive or even subversive derivation in South Africa. ATI may have found its place in the final constitution of South Africa merely because of what has been referred to as the 'inevitable globalisation of constitutional law' (Tushnet 2009). If so, then it suggests a more traditional, liberal derivation, because the global constitutionalism that was prevalent in the 1990s was closely associated to the 'Washington consensus', which had at its heart a profound suspicion of state power and a design to limit and control state power.[8] If the fathers and the mothers of the South African constitution were eager, as they no doubt were, to prevent a repeat of the egregious oppression of apartheid government, then requiring the state to operate in an open and transparent, as well as accountable, fashion was also an essential element in the motivation for including a right of access to information in the constitution.

However, even if this is so, two contrary pieces of evidence can be adduced to support the idea that the motive for section 32 and, certainly, for its enabling legislation – the Promotion of Access to Information Act, 2000 (PAIA) – was a deliberately progressive one. First, the extension of the right of ATI to privately held information was a groundbreaking and arguably radical broadening of the scope of the right – a crossing, so to speak, of a legal and political rubicon (Calland 2007). In an era of 'structural pluralism' (Roberts 2001), where many functions and services previously reserved for the state have been taken over by private actors, access to private information is essential if the subversive potential of ATI is to be articulated. Indeed, this approach gives added succour to the argument against ATI as a purely liberal right and certainly one that is such a potentially significant accomplice to neoliberalism (see above). If ATI's scope can be brought to bear on corporate power, then does this not take much of the wind out of the sails of those who take the line that it serves only or mainly to undermine the mandate of a democratically elected state? However, more research is needed on the extent or otherwise to which PAIA's 'horizontal' application to privately held information has delivered real accountability in corporate power, as well as in respect to other corporate transparency measures, such as the Extractive Industries Transparency Initiative or the Construction Sector Transparency Initiative.

Second, the composition and intent of the Open Democracy Campaign Group was inherently progressive, influenced as it was by the emerging idea of ATI as a 'leverage right' (Jagwanth 2002) and by the approach taken by the Mazdoor Kisan Shakti Sangathan (MKSS) in India, whose modus operandi, now well documented, is to use information acquired via the (Rajasthani) state ATI law to underpin campaigns for social justice relating to development aid and infrastructure, workers' wages, and rations programmes for the poor, to name but three[9] (Jenkins and Goetz 1999).

Darch and Underwood's account of the derivation of ATI in South Africa (2005) points towards a liberal reading of the right. However, it also acknowledges that any consideration of ATI 'is fundamentally a change process that needs to be managed in its social circumstances, rather than a simple constitutional or legislative act' and that ATI 'aims in a deeply subversive way to reconfigure the relationship between state and citizen by specifying how and under what terms politicized knowledge is shared – in other words, by reconfiguring at least partially the nexus of knowledge and power' (Darch and Underwood 2005: 78). Moreover: 'informed populations are better able to protect their interests, to hold the political class accountable, and to achieve social and economic development' (Darch and Underwood 2005: 85). This accords with the emerging 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, whether in the state or the private sector' (Calland 2013: 16). In practical terms, only collectives are likely to persist when met with a denial of the request for information (or a so-called 'deemed refusal', when the request is met with silence[10]).

This 'theory of change' is consistent with the proposition that Darch and Underwood have advanced, namely that when applying Hohfeld's (1919) class typology – rights as claims, liberty/privileges, immunities and power rights – ATI is a 'power right'. If one accepts this proposition, that ATI is about giving less powerful actors the opportunity to have a more meaningful engagement with more powerful actors, does that still succumb to the anti-liberal critique, because it assumes 'big, bad state; poor, victimised citizen'? Maybe. But what if the right is being exercised – and here we turn to the empirical record – by communities and by civil society organisations representing the interests of those communities, to ensure that there is both more meaningful participation and the means to hold government to account? And what if, moreover, in doing so there is a far more politically attuned and incisive assault upon the prevailing socio-economic order? In other words, it may be justifiable to entertain the idea that ATI can genuinely confront the structural relations and barriers to substantive equality.

A Liberal Praxis?

Answering these questions requires an examination of the praxis. A more empirical approach may even be necessary to address this consideration. There has been a 'paradigm shift' in the understanding of ATI that has emerged from observations of its usage, especially in the newer democracies and particularly in the developing country context – in terms of who is using new ATI laws and for what purpose (Calland 2013: 17). Bentley and Calland illustrate how civil society groups have used ATI as a leverage right to shift the balance of power between marginalised communities and unresponsive government representatives (Bentley and Calland 2014). This paradigmatic perspective speaks of ATI as a claiming of the right for essentially egalitarian purpose. India has proved

to be the pivotal and most influential case study in this regard. India's Right to Information (RTI) Act has had a range of impacts across a variety of socio-economic and civil and political rights across the country since it was enacted in June 2005. According to a 2008 evaluation by the Central Information Commission, which is responsible for implementing, monitoring and evaluating usage of the Act, RTI has been widely used 'as a tool for facilitating effective delivery of socio-economic services … [empowering] people to seek details about their entitlements and, accordingly, to take informed decisions in all matters affecting them so as to secure equity and justice' (Ansari 2008: 12). The Act has been effective primarily at addressing gaps in service delivery and in holding government to account for corruption and mismanagement, particularly in the area of social services.

Although individual citizens have themselves been directly involved in RTI requests, much of the usage of the Act has been driven by NGOs, in support of either communities with collective agendas or of individuals whose individual right of access to information will leverage a community benefit. The collective and community nature of this practice is arguably in and of itself non-liberal, if not anti-liberal. NGOs have played a key role in operationalising the Act and transferring its power to the people who stand to benefit from it most, but who otherwise may not have been able to gain access.[11] The MKSS movement was the first to come to prominence. Its campaign, 'The Right to Know Is the Right to Live', has made significant use RTI as a collective, 'leverage right' (Jagwanth 2002) to claim socio-economic rights for poor communities or to expose the denial thereof.

In neighbouring Bangladesh, which passed its Right to Information (RTI) Act in 2009, ATI law has been widely used, as in India, for the purposes of holding government bodies accountable for service delivery, with some positive impacts on living conditions. The Act has empowered activists and non-active citizens alike. For instance, a 36-year-old widow who had taken to begging after her husband's death in order to provide for her two children used the Act to probe suspected corruption in the allocation of Vulnerable Group Development (VGD) cards, which provide access to targeted government services and benefits. As well as uncovering gross corruption by the government body responsible for issuing VGD cards, the information she received revealed that the denial of her request for a VGD card was arbitrary, and she was able to force the local government to overturn the decision and issue her a card as a result (Commonwealth Human Rights Initiative et al. 2012: 5).

In 2011, with NGO support a single mother used the RTI Act in Bangladesh to advocate for an increase in the number of beneficiaries on a government social programme. She requested information on the social programmes available in the region, details of who was eligible to benefit from these programmes, and what the procedure was for ensuring that these people were on the list for the 2010–2011 financial year. Her local community used the information to set up a committee to monitor the implementation of these pro-

grammes and to ensure that everyone who was eligible was served by them (Commonwealth Human Rights Initiative et al. 2012: 7).

ATI legislation has also been successfully used in Jamaica to improve the quality of a local water source relied upon by thousands of villagers for drinking, bathing and fishing. In Thailand, with the assistance of a public interest lawyer another single mother was able to use her right to information to uncover corruption in the allocation of places at the country's top schools, thereby broadening access to previously excluded groups (MST News 2013).

In South Africa, the ATI law (PAIA), passed in 2000, has also been used by a variety of socio-economic rights advocacy groups. The passing of PAIA also inspired the Right to Know campaign, which can be described as 'multi-class and cross-sectoral in nature'.[12] As Langford et al. conclude in their volume on socio-economic rights in South Africa, PAIA 'has been used by social movements as part of building a case to go to court' (2014: 427). Significant progressive activist organisations such as the Treatment Action Campaign (TAC) and the Anti-Privatisation Forum (APF) have used PAIA and the pursuit of access to information as part of their socio-economic rights litigation strategy (Langford et al. 2014: 427).

In the TAC's case this was to claim a right to healthcare and, specifically, access to affordable anti-retroviral drugs to treat HIV/AIDS, while in APF's case it was to scrutinise the impacts of the privatisation of public services such as water. TAC used PAIA to secure records concerning government plans for the roll-out of new medicines that had been proven to prevent mother-to-child transmission (MTCT) of HIV/AIDS. HIV-positive women were not being given access to these medicines at antenatal clinics, which was resulting in unnecessary deaths and transmission of HIV. ATI was a key part of TAC's wider social mobilisation strategy, which culminated in the Constitutional Court (*Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC)) ordering the government to revise its policy to ensure universal access to ARVs for HIV-positive mothers.

Another socio-economic rights NGO, Freshwater Action Network, has experienced success using ATI to claim rights to water and a healthy environment in India. They have partnered with rural communities to use ATI to request information about local government plans and budgets related to water and sanitation services. The acquired information has been used to conduct social audits into what should have been spent versus what was spent on these services, and what was supposed to be delivered against what was actually delivered to communities. They combined the information they received from the state with their own field research to identify irregularities between what the official records say and what is happening on the ground. The results of these audits are then presented to local government officials and politicians as evidence of the need to improve water and sanitation services. The pressure exerted by these marginalised and excluded communities through this process has led to improvements being made to existing services as well as the con-

struction of new water and sanitation facilities by the state (Freshwater Action Network 2008).

The ATI Act has also been successfully employed in broadening enjoyment of a number of other socio-economic rights in India (Ansari 2008: 14–16). For example, it has been used to help advance food security, by improving the implementation of nutritional support schemes for school children from poor families, and as part of a campaign to secure the establishment of supplementary nutrition centres in the urban slums of Bangalore. It has also been used to promote social security, by helping to secure hitherto unpaid pensions for poor senior citizens. Access to education has also be advanced by use of ATI, by uncovering mismanagement of minimum school infrastructure schemes, which has led to greater utilisation of funds for infrastructure development. And healthcare rights have been protected through ATI requests directed towards information about the procurement process for medicines at primary health centres, which has resulted in a more efficient stock management and greater availability of medicine at these centres.

A major South African environmental rights case (*Biowatch*, which concerned Monsanto and genetic crop trials) emerged also from a PAIA application (Langford et al. 2014: 427). The Open Democracy Advice Centre in South Africa has used ATI to help communities claim rights to healthcare, housing and clean water. There is also evidence of ATI being used in India and Bangladesh to help secure workers' rights. In India, a social grassroots activist group used the RTI Act to access local public works records detailing the nature of an infrastructure project, including the money allocated to it by central government for workers' wages and benefits. The group read the results out loud to community members at a public hearing, which led to workers revealing that they had not been paid the amount allocated to them in the project budget. Other discrepancies were also revealed between what the official documents said and what was actually being delivered to the workers, resulting in improvements to wages and working conditions (Banisar 2006: 73).

In Bangladesh, an NGO used the RTI Act to access information on the government's implementation of minimum wage regulations in the shrimp industry. After a long process involving several mute refusals and appeals, information was finally provided that showed that the number of workers receiving the minimum wage fell far short of the government's official estimation. The government subsequently took measures to ensure that the minimum wage regulation was being fully implemented at all levels across the shrimp industry (Commonwealth Human Rights Initiative et al. 2012: 9).

The use of ATI legislation in India and elsewhere to claim a wide range of socio-economic rights by empowering poor communities with the information necessary for a more meaningful engagement with government chimes well with the thesis that ATI can be decisive in creating the conditions for a more politically attuned and incisive assault upon the prevailing socio-economic order. And while this modest sample of cases and references barely indicates

the dense empirical picture that is now emerging from the experience of using relatively recently passed ATI laws in developing country settings, one can still ask: are these not egalitarian, progressive, transformative demonstrations of the right of ATI demonstrating how ATI can serve egalitarian objectives? Despite its liberal past, does ATI not have a progressive, transformative and therefore egalitarian present and future, albeit that its more progressive character may be dependent on a number of matters pertaining to legal construct, instrumental usage and context?

Synthesis: A Liberal Right with Egalitarian Potential?

Although ATI retains its liberal functions, the examples above suggest that when ATI is engaged by progressive forces, it is used not so much as a means of *limiting* state power, but to *prevent* state power from being used other than for transformative purposes and to help steer the state in the direction of its progressive mandate. These examples also show that ATI is capable of improving living conditions for vulnerable or disempowered groups, and is as likely to be deployed in service collective goals as much as individual ones. Buttressed by a nascent, though still inadequate, theory of change for ATI that is now emerging to 'catch up' with the enormous increase in knowledge about the operation and praxis of ATI following an explosion of ATI legislation around the world, the emergent empirical picture suggests that there is a reasonable basis for asserting that ATI is a progressive, and even subversive, right that has outreached its liberal origins.

However, for this to hold true may require a number of necessary though not sufficient conditions to prevail. First, there needs to be a recognition of ATI as 'fundamentally a matter of politics and political economy rather than law and bureaucratic, administrative practice', primarily because it concerns power relations between different social actors (Calland 2013: 15). Relatedly, second, there is a need to avoid legal formalism – which impacts on usage as well as who can claim, and may preclude or limit the transformative potential of the right. As the literature suggests, if the legal right to ATI is obscure, or administratively unwieldy, or beyond the reach of the sorts of communities who have used ATI successfully to secure socio-economic rights in the ways described above, then it is unlikely to realise its egalitarian potential. As an example of this kind of 'chilling' legal formalism one needs to look no further than the Supreme Court of Appeal decision in the case of *Unitas Hospital* in South Africa, where the court held that in effect long-developed common rules on civil procedure and discovery in particular were of greater importance than the constitutional right of ATI.[13] In that case the applicant, a widow whose spouse had died in a privately owned hospital, sought access to a report on standards of nursing in the hospital. The court held that this constituted a fishing expedition and that she should rather litigate and seek access through discovery mechanisms. The court

compounded its formalistic approach by developing a very burdensome test that applicants would have to satisfy when seeking to show that they 'require' access to 'exercise or protect any right' (as set out in section 32(1)(b) and in PAIA), namely that they would accrue a 'substantial advantage' from such access. By definition, applicants for access to information make their requests without sight of the record, and so proving 'substantial advantage' would, at best, involve speculation. As Cameron J. argued in his dissent in *Unitas Hospital*, such legal formalism would defeat the emancipatory, socially transformative and egalitarian purposes of the right.[14]

Third, as in South Africa, the scope of any legal protection of the right of ATI must extend to private as well as publicly held information, recognising both the structural pluralism of the modern state and the power that private actors hold. To limit ATI rights to purely state-held information would be archaic in its understanding of the modern state and society, as well as of modern human rights discourse, and would therefore be more indicative of a traditional, liberal expression of the right. Fourth, rather than as a right claimed by individuals to protect them against state power, for ATI to realise its egalitarian potential may require that ATI is used by and for otherwise marginalised communities as a 'power right'. In this vein, ATI is used as a 'leverage right' in the pursuit of socio-economic rights. This has been the unifying feature of many of the most compelling case studies that have been drawn from the global praxis. ATI deployment has thus served to advance substantive equality, supporting the conclusion that ATI can escape its purely liberal genealogy and should be regarded as a progressive principle and an egalitarian praxis.

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Acknowledgements

The preparation of the draft of this article benefited greatly from the assiduous work of my then research assistant, Daniel Mclaren. My thanks to Patricia Jonason, Assistant Professor in Public Law at Södertörns Hogskola, Stockholm, for sharing her ideas on my early thinking about this article. And also to Colin Darch for reading and commenting on a draft, and for his persistent words of encouragement and critical thinking on the subject of the right of access to information generally.

Notes

1. www.right2info.org/resources/publications/laws-1/ati-laws_fringe-special_roger-vleugels_2011-oct (accessed 6 April 2014).
2. UNGA Res 217 A(III), adopted 10 Dec 1948, UN Doc A/810.
3. UNGA Res 2200 A(XXI), adopted 16 Dec 1966, entered into force 23 March 1976, UN Doc A/6316.
4. *Clause Reyes y otros v Chile*, Order of the Inter-American Court of Human Rights, Case of Claude Reyes et al. v Chile, Judgment of 19 September 2006, para 77.
5. In 2006, commercial interests made up over 60 per cent of all FOIA requests. By comparison, the media accounted for only 6 per cent of total requests.
6. In this, I draw on Martin Eve's work. See: http://blogs.lse.ac.uk/impactofsocialsciences/2013/03/19/open-access-neoliberalism-impact/ (accessed 10 August 2014).
7. See www.opendemocracy.org.za/index.php/who-we-are/our-history.
8. See Das (2001) for an example of how the prescriptions of the 'Washington consensus' were applied to limit the power of the Indian state in the 1990s.
9. For more information on MKSS see www.mkssindia.org/.
10. See, for example: Transparency & Silence: a survey of access to information laws and practices in fourteen countries: http://www.opensocietyfoundations.org/publications/transparency-and-silence-survey-access-information-laws-and-practices-14-countries (accessed 10 August 2014).
11. NGOs commonly act as facilitators and partners in using ATI laws in developing countries where individuals and communities often lack both legal knowledge and the means to utilise the legal tools available to them. However, whether through NGOs or otherwise, in 2008, 20 per cent of information requests in India came from people who live below the governments poverty line, with this figure reaching 37 per cent in rural areas (Ansari 2008: 12).
12. See www.r2k.org.za.
13. *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).
14. Ibid., at paras 28–49 (minority).

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