

FEATURE

Enforcing the Right of Access to Information as a Tool to Curb Illicit Financial Flows in Africa

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The relevance of enacting access to information (ATI) laws in the light of the problem of illicit financial flows in Africa is that it entails putting the tried and tested principles of transparency and accountability to work.

Through proper application, these democratic principles can serve as effective mechanisms to counteract and expunge the socio-economic and political conditions that enable national and international transactions of financial and economic significance to be shrouded in secrecy and conducted without accountability – conditions that allow illicit financial flows to continue to derail agendas for economic development.

The negative impact of illicit financial flows in Africa

The negative impact of illicit financial flows is a well-researched subject and is generally understood as a reference to money which is illegally earned, illegally transferred or illegally utilised (High Level Panel Report by AU/ECA 2015). Occurring both horizontally across and vertically up and down different levels of social and political structures, these flows inevitably impact on the poor whilst enriching the few. Illicit financial flows are symptomatic of poor models of governing resources and point to the incapacity of African states to stop these flows and track and secure the return of the funds involved.

False invoicing, tax avoidance, tax evasion, money-laundering, and transfer pricing are merely a few examples of how illicit financial flows are channelled. Their negative impact is often

experienced in the form of the loss of investment capital and revenue, loss that severely weakens a country's capacity for national development, in particular its ability to provide public and social services that could benefit the poor and marginalised. It is from this perspective that arguments arise linking illicit financial flows to rising poverty and corruption levels in Africa, as well as to heightened inequalities between developed and developing countries.

In recognition of the dire consequences of illicit financial flows, initiatives have been undertaken by the global community, national governments and regional bodies to address the problem. These initiatives were assessed by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights (United Nations Human Rights Council 2015). The Independent Expert's report incorporated further information from studies

that support the view that illicit financial flows remain one of the underlying causes of poverty and constitute a human rights issue, one which contributes, for example, to inadequate compliance with the Millennium Development Goals.

Addressing illicit financial flows: ATI under international law

ATI laws have long-standing recognition under international law, particularly given that that ATI has been viewed traditionally as an offshoot of freedom of expression; fortunately, it has developed into a stand-alone right, thus placing greater obligations on states to ensure the accessibility of public interest information. One of the earliest instruments according prominence to ATI is the Universal Declaration of Human Rights, which refers to the right to 'seek, receive and impart information and ideas through any media and regardless of frontiers' (article 19).

This right is also echoed by article 19 of the International Covenant on Civil and Political Rights. The United Nations Human Rights Committee has recognised the relevance of article 19 to developmental issues. In its General Comment No. 34, it requested that states proactively disclose government information which is of public interest, emphasising the need for them to remove unnecessary impediments to ATI, such as unreasonably high fees, and to ensure mechanisms are in place to hear appeals against refusals to grant ATI.

The intersection of ATI and development has allowed for the integration of ATI principles in certain regional and international conventions that have a bearing on illicit financial flows and the general anti-corruption agenda. The United Nations in particular has initiated several conventions useful to this cause. These include the United Nations Convention against Corruption, which focuses on the prevention of corruption through international cooperation among member

states and domestic criminalisation and asset recovery procedures, all of which are critical for dealing effectively with illicit financial flows.

Another example is the United Nations Convention against Transnational Organized Crime. Not only does it encourage international cooperation, but most signatories have, as a result of it, enacted domestic legislation and created a number of criminal offences, such as participation in organised criminal groups, money-laundering, corruption and obstruction of justice; in addition, new and sweeping frameworks have been adopted in respect of extradition, mutual legal assistance, and law enforcement cooperation.

Furthermore, ATI laws are found in at least six African Union treaties. The African Charter on Human and Peoples' Rights (African Charter) declares in article 9 that 'each individual shall have the right to receive information', while the African Charter on Democracy, Election and Good Governance (Democracy Charter) stipulates more directly under article 19(2) that 'each State Party shall guarantee [...] free access to information'. Similarly, the African Convention on Preventing and Combating Corruption provides that 'each State Party shall adopt such legislative and other measures to give effect to the right to any information'. It is significant that the right to information is guaranteed under a convention which is solely concerned with detecting, preventing, and prosecuting acts of corruption.

In addition, there is the Model Law on Access to Information for Africa (Model Law 2013). Adopted by the African Commission, it is controversial inasmuch as it provides a model for guaranteeing that 'every person' in member states – as opposed to 'every citizen' – has access to information held by both public and private bodies. It attempts in several ways to give information rights much broader scope than usual, and regards them as necessary for the successful application of good-governance principles.

However, the Model Law provides for certain exceptions that limit the right to information, limitations which could put efforts to curb illicit financial flows at risk. For example, commercial

and confidential information may be withheld from a requester (section 28), and can also be withheld on the basis of the economic interests of the state (section 32). Commercial information, as well as information pertaining to economic interests, is directly relevant to illicit financial flows, given that these flows derive from commercial activities and from national development opportunities that serve national economic interests.

Emerging norms in international law pertaining to ATI recognise the role of the internet in facilitating the free flow of information. This led to a resolution adopted by the African Commission on the Right to Freedom of Information and Expression on the Internet in Africa, which reaffirms prior declarations and resolutions promoting and protecting access to information both off- and online. Similarly, the African Declaration on Internet Rights and Freedoms describes the internet as a 'vital tool for the realisation of the right of all people to participate freely in the governance of their country and to enjoy equal access to public service'.

The essence of the Declaration is that online injustices, inequalities and marginalisation are reflective of the offline injustices, inequalities and marginalisation that ultimately deny people their fundamental human rights. Not only does the Declaration specifically recognise the right to development, which is relevant to the discourse on illicit financial flows, but its provisions place obligations on governments to ensure the proactive release of data and information, which may be restricted only on legitimate grounds.

Several initiatives in this vein have been developed by the international community, among them the Stolen Asset Recovery Initiative (StAR) which supports international efforts to end safe havens for corrupt funds. One of the challenges noted by StAR concerns the lack of cooperation from those developed countries which are tax havens for illicit financial flows. Such lack of cooperation was intended to be resolved through the advent of the automatic exchange of information initiative (Financial Transparency Coalition 2013), a response by G8 countries to growing demand for disclosure and exposure of tax evasion and corporate tax

avoidance. The automatic exchange of information by tax authorities thus encourages the sharing of tax information between the countries in which individuals and corporations hold accounts. This exchange of information should be automatic and not require that tax or law enforcement officials in one jurisdiction request it from those in the jurisdiction where the account is held.

Other notable initiatives that have successfully integrated developmental goals with concerns relating to illicit financial flows and ATI include the Sustainable Development Goals (SDGs), which aim to significantly reduce illicit financial flows by 2030 (Target 4) and to enable public ATI (Target 10), and the Extractives Industry Transparency Initiative (EITI), which consists of 12 core principles all of which are relevant to ATI principles. Similarly, the Open Government Partnership (OGP) promotes open, responsive, and accountable governance in which governments are empowered to enhance domestic accountability processes and strengthen relations with civil society in common agendas such as advancing anti-corruption reforms. Potential country candidates must meet the eligibility criteria of fiscal transparency, adoption of ATI laws, asset disclosure by public officials, and citizen engagement in policy-making and governance.

Domestic enactment and enforcement of ATI laws

Illicit financial flows are a global problem requiring global solutions; at the same time, illicit financial flows impede national development, increase inequalities between citizens, and cause injustice, making these flows a national problem as well, one hence requiring national solutions.

Enactment and implementation of ATI laws serve to strengthen transparency and accountability, especially in respect of commercial activities that provide the opportunity for unlawful acts involving illicit financial flows. ATI laws provide a means by which citizens and interested parties can hold governments to account on matters of public interest such as these. To date, however,



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less than 20 African countries have enacted ATI laws, specifically the Model Law, at the domestic level. Even though exercising the right to ATI enhances ‘transparency, accountability and the participation of persons in public affairs, including exposing corruption and issues associated with underdevelopment’, there is, according to the Law’s preamble, still a ‘dearth of access to information legislation in Africa’ (Model Law 2013).

As noted in the Model Law, only a handful of African countries have a genuine interest in defending and availing the right to information to their people or citizens. Most constitutions on the continent provide for a general right to seek, receive, and impart information; some include a more specific right to information held by the state on certain matters, for example, the right to access personal information or environmental information; other countries yet provide for the right to information as a component of the right to freedom of expression – unsurprisingly so, given that the right to information has its origins in the right to freedom of expression. For example, article 29 of the Constitution of Ethiopia (1994) provides that

[e]veryone has the right to freedom of expression without any interference. 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 media of his choice.

In contrast to a general provision of this kind which does not create any positive obligation on a government to disclose information, a few countries have adopted specific constitutional provisions on ATI. For example article 62(2) of the 2013 Constitution of Zimbabwe explicitly provides for this right by declaring: ‘Every person including the Zimbabwean media has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise of the protection of a right.’ The Constitution goes further by calling, in article 62(4), for the enactment of legislation to guarantee a statutory right of access to information.

However, there are various challenges in respect of enacting and enforcing ATI legislation. With regard to enactment, the reasons for not having such legislation usually centre around the political stability of the state. For example, it could be argued that an ATI law would hardly be a priority in a country undergoing civil unrest, armed conflict or post-conflict recovery. Other reasons may be that politically repressive and despotic regimes would be averse to democratic influences and freedoms, which would result in greater scrutiny of financial flows, governance practices and corruption allegations. Then, among countries which have indeed taken measures to adopt ATI laws, a challenge is that a common approach is to include ‘claw-back’ clauses that in essence create justifications for limited access to, or narrow application, of a right.

A case in point is a matter brought before the Magistrates’ Court of Uganda (*Charles Mwanguhya and Angelo Izama v Attorney General Uganda*) by two journalists to whom the government denied access to information concerning an oil exploration agreement. The Constitution of Uganda provides in article 41 that

[e]very citizen has a right of access to information in the possession of the state or any other organ of the state except where the release of the information is likely to interfere with the security of the state or the right to the privacy of any other person.

Relying too on Uganda's Access to Information Act (No. 6 of 2005), the applicants contended that because the subject matter of the agreement, namely oil, belonged to the people of Uganda, the state was under an obligation to comply with the request, which was made in the public interest. The Court, however, found that the applicants had not sufficiently proven public interest or demonstrated clearly how this information would be used 'to make government more transparent, accountable and efficient in the management of the oil resources'.

This case illustrates a number of recurring problems relating to the status of ATI in Africa and the factors that facilitate illicit financial flows. Lack of transparency is a key factor. The oil prospecting and exploitation agreement regarding which the applicants sought disclosure raises concerns that unequal contracts negotiated between multinational corporations and governments in the secret corridors of political power and fuelled by bribery serve to enable illicit financial flows, for example by allowing parties to avoid payment of royalties and taxes.

The Constitution of Uganda, together with Uganda's ATI legislation, contains provisions which limit – or, rather, undermine – the right to ATI. According to the Constitution, state security and privacy are legitimate reasons for the denial of ATI (article 41). Indeed, the question of privacy as a reason for non-disclosure was defended by the Court as valid in view of the confidentiality clause in the oil agreement; privacy was therefore a more compelling argument than public interest. However, even if it were true that the applicants had not sufficiently proven public interest, the Court's decision reinforces public wariness that such agreements enjoy a privileged status and protect elite interests far removed from the lives of ordinary people.

Uganda's Access to Information Act provides further exemptions that curtail access (articles 23-34). These include the protection of certain confidential information from third parties, the implication being that parties in the position of, for example, multinational corporations

would enjoy complete protection from disclosure regarding the agreements they conclude with their government partners. Such an approach is in conflict with democratic principles and values emphasising maximum disclosure, transparency, citizen participation, and accountability. Arguments against the protection of the confidentiality of such agreements find support in several international law instruments, among them the Declaration of Principles on Access to Information (Principle IV), which affirms that information held by public bodies must be accessible on request from interested parties and goes so far as to define the role of these bodies as that of 'custodians', rather than proprietors or owners, of such information.

Although the right to access information held by public bodies is also subject to limitation inasmuch as it must be 'subject only to clearly defined rules established by law', the issue is not that such an exemption has been provided – the issue is how to ensure that it, and other exemptions like it, are not manipulated to serve unconstitutional and illegal agendas. Indeed, an ATI law like Uganda's serves no effective purpose if it is simply ignored or if the exemptions in it are used to facilitate the corrupt activities of an elite. For example, it is reported that although section 43 of the Act requires each Minister to make available reports on requests for ATI and state therein whether or not the requests were granted, this provision has never been complied with and there appears to be no political will to ensure that it ever will be; this provision therefore has been rendered virtually redundant (CIPESA 2017).

Uganda attracts significant foreign direct investment but annually loses at least USD 739 million, or 2.6 per cent of its gross domestic product as a result of illicit financial flows, making this 'a major source of domestic resource leakage, which drains foreign exchange, reduces tax collections, restricts foreign investments, and worsens poverty in [one of the world's] the poorest developing countries' (SEATINI 2015). In the light of these facts, the intersection of economic growth and illicit financial flows is clearly apparent. It is thus imperative that laws

which support transparency and accountability should be developed and properly enforced.

Moreover, Uganda is a signatory to the Convention on Mutual Administrative Assistance in Tax Matters (CMAATM), a major multilateral transparency and disclosure initiative to enable the automatic exchange of information among participating countries. It has proven to be a formidable tool in fighting unlawful activities that entail illicit financial flows such as tax evasion. Against a background of globalisation, African countries often find themselves vulnerable to illicit financial flows due to a lack of capacity to monitor and respond to financial trends. The CMAATM therefore promotes a support system that, founded on ATI principles, facilitates the exchange of information on a broad range of taxes. In particular, it provides for the automatic exchange of certain kinds of information (article 6) and for the spontaneous exchange of information even where no prior request was made (article 7).

Furthermore, the only limitation the CMAATM places on disclosure of trade, business, industrial, commercial, and professional information is where such disclosure could be construed as contrary to public policy (article 21(d)). This is a provision that gives significant support to efforts to address the context within which illicit financial flows occur and sets a new international benchmark in information exchange. Unfortunately, as at 26 March 2018, only a handful of African countries had signed this convention, namely, Burkina Faso, Cameroon, Gabon, Ghana, Kenya, Mauritius, Nigeria, Senegal and South Africa.

As noted, Nigeria is also a signatory to the CMAATM. Its economy has been negatively impacted by illicit financial flows, which between 2002-2009 amounted to 182 billion USD (Global Financial Integrity Report 2014). The key economic sectors of agriculture, energy, tourism, mining and manufacturing have suffered with especial severity, exacerbating the country's widespread poverty, low standards of living, and rising unemployment (High Level Panel Report 2015). Such pronounced financial leakages point to



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institutional incapacity as well as to complicity between governmental and private-sector role-players in facilitating illicit financial flows. Hence, transparency and accountability measures must be strengthened through Nigeria's existing laws as well through the adoption of new legislation and initiatives to this end.

Fortunately, in Nigeria the right of access to information held by the state is an established legal principle by virtue of the Freedom of Information Act (section 1(1)). This right formed the basis of an application brought against the government by the Socio-Economic Rights and Accountability Project (SERAP v Nigeria), which requested that the government disclose information about public funds stolen pre-1999. When the government denied this request, SERAP approached the Federal High Court of Nigeria, which found in favour of the applicant, stating that failure to disclose the information about stolen public funds amounted to a breach of the fundamental principles of transparency and accountability as well as the principles enunciated in the African Charter (sections 9, 21 and 22).

However, as a result of non-compliance with the judgment, SERAP commenced contempt proceedings against the government. The fact that the latter had still not complied with the Court's ruling several years after it was handed down is testimony to how a lack of political will can impede efforts to combat illicit financial flows and improve the economy.

Conclusion

The cases of Uganda and Nigeria illustrate the relevance of ATI laws to eradicating illicit financial flows, which are a significant contributor to economic stagnancy in developing countries. However, the two countries are among only a handful of those which have incorporated the right to information in their domestic legislation. African states need to appreciate that while limited transparency and disclosure pose a risk to the effective administration and governance of any economy, this risk is far greater in developing countries in view of their dependency on foreign direct assistance and developmental aid. Furthermore, developing domestic ATI laws will equip African countries to access information on multinational companies and increasingly sophisticated taxation systems, given that illicit financial flows are both a national and global dilemma.

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