

**The Model Law on Access to Information
for Africa and other regional instruments:
Soft law and human rights in Africa**

Edited by

Ololade Shyllon

Pretoria University Law Press
PULP

2018

The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa

Published by:

Pretoria University Law Press (PULP)

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Cover:

DN Ikpo, Centre for Human Rights, University of Pretoria

Painting: Pieter Cronje

ISBN: 978-1-920538-87-3

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ACKNOWLEDGMENTS

This book would not have been possible without the financial support provided by the Royal Norwegian Government, through its Embassy in Pretoria, to the Centre for Human Rights to host the conference on Soft Law and Human Rights in December 2015. The conference provided a robust platform for presenters and participants to discuss, analyse and contribute to the body of knowledge on the impact of the Model Law on Access to Information for Africa and other soft law human rights instruments in Africa.

I am sincerely grateful to the contributors for the rigour with which they approached the development of their chapters, and to the peer reviewers for their insightful comments and recommendations.

At the Centre for Human Rights, special thanks go to Professor Frans Viljoen for his persistent encouragement, Isabeau de Meyer whose language editing made this book a better read, Bonolo Makgale for editorial assistance and Lizette Hermann for the layout and typesetting. I must also acknowledge Pieter Cronje whose original painting is the cover page of this book, and David Ikpo for adapting the painting for this purpose.

Any opinion expressed in this book is solely that of the authors and is not necessarily that of the institutions they represent.

This book aims to inform ongoing scholarly debates about the value and impact of soft law standards.

Ololade Shyllon
Pretoria, South Africa
November 2018

PREFACE

Access to information, like many other rights, is a right in and of itself as well as an enabling right – a right that is necessary for the realisation of other human rights. Article 9 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right of every individual 'to receive information'. This provision, although initially exclusively regarded as providing for the right to freedom of expression, has now been interpreted as the foundation of the right of access to information in the African human rights system.

The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2002 to further elaborate on the right to freedom of expression includes a principle that sets out core elements of the right of access to information. The Declaration, together with the expansion of the mandate of the Special Rapporteur on Freedom of Expression (Special Rapporteur) to include access to Information in 2007, further cemented the recognition of access to information as a distinct right.

Despite these significant efforts by the African Commission to strengthen the normative and monitoring framework, there was no corresponding progress in the promotion and protection of access to information in Africa. In numerous state parties only a handful of access to information laws remained and several Bills were pending at various stages of the legislative process. The majority of these laws and Bills did not conform to regional and international standards.

This state of affairs was in sharp contrast to the prevailing atmosphere post the third wave of democratisation in Africa, when state parties had individually and collectively committed to good governance, respect for the rule of law, and adherence to democratic ideals. The renewed emphasis by states on openness, transparency and accountability, all of which lie at the heart of the right of access to information, was in essence not translating into the adoption and implementation of laws and policies in furtherance of this right. The role of legal frameworks on access to information in the realisation of socio-economic rights, whether as a tool for fighting corruption or in preventing the mismanagement of public funds, also seemingly was not a priority for addressing Africa's dire socio-economic situation.

Rather, what prevailed was a culture of secrecy which had been introduced by colonial powers and further strengthened by post-colonial governments as a means of exerting power and control over citizens. Added to this was the preoccupation of states with the issue of national security and the misconception that access to information was inimical to national security. There was also the widespread perception that access to information is a right exclusively for journalists and that enacting laws giving effect to this right would give media practitioners the freedom to disseminate unfavourable and even outright falsehoods about political figures, especially those in power.

The work of access to information advocates thus was cut out for them. It was essential to show governments that they hold information ‘not for themselves but as custodians of the public good’; that proactive disclosure of information is not a privilege but an obligation owed by elected representatives to the people; and that the creation and proper management of information not only was beneficial for the citizenry, but also imperative for the development and effective implementation of laws and policies. It was with this in mind that the African Commission authorised the Special Rapporteur to develop a Model Law on Access to Information for Africa (Model Law) in November 2010, and adopted it in February 2013.

The adoption of the Model Law was a landmark event in the access to information trajectory on the African continent. In many ways it was a first. It was the first time the African Commission had adopted a model law on any subject matter. It was also the first time that the African Commission had engaged in such extensive public consultations with high-level stakeholders prior to the adoption of a soft law instrument. Finally, it was the first time that the African Commission had launched an intensive advocacy campaign to create awareness and build capacity for the implementation of a soft law document that involved high-level meetings with the African Union Commission, regional economic communities and policy makers in state parties.

And so, there are many lessons to be learnt and questions to be asked about these ‘firsts’ of the Model Law in relation to other soft law instruments. Are there specific human rights issues that are best addressed through the development of a model law? Is multi-stakeholder participation in the development of a soft law instrument a necessary condition for its legitimacy and, by extension, a prerequisite for state compliance? Should a treaty body actively engage in advocacy efforts in support of a soft law it has adopted to supplement existing hard law? This book answers these questions and many more on soft law and human rights within the African human rights system.

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ABBREVIATIONS AND ACRONYMS

ATI	access to information
AIPPA	Access to Information and Protection of Privacy Act
AFIC	Africa Freedom of Information Centre
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
AUCIL	African Union Commission on International Law
APT	Association for the Prevention of Torture
CSOs	civil society organisations
CSPRI	Civil Society Prison Reform Initiative
CPTA	Committee for the Prevention of Torture in Africa
CHRI	Commonwealth Human Rights Initiative
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ESCR	economic, social and cultural rights
FIAPI	Federal Institute for Access to Public Information
IMPI	Information and Media Panel of Inquiry
IDEA	Institute for Democracy and Electoral Assistance
IDPs	internally-displaced persons
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
FIACAT	International Federation of Action by Christians for the Abolition of Torture
MIC	Media and Information Commission
NDC	National Democratic Congress
NHRIs	national human rights institutions
NPP	National Patriotic Party
NGOs	non-governmental organisations
OGP	Open Government Partnership
OAU	Organisation of African Unity
OAS	Organisation of American States
PAP	Pan-African Parliament
PAN	Partido Acción Nacional
PRI	Partido Revolucionario Institucional
PAIA	Promotion of Access to Information Act
PNDC	Provisional National Defence Council
RECs	Regional economic communities
RTI	right to information
RIG	Robben Island Guidelines
SMC	Seychelles Media Commission
SAHRC	South African Human Rights Commission
SADC	Southern African Development Community
STAR	Strengthening Transparency, Accountability and Responsiveness
SERAC	Social and Economic Rights Action Centre

SDGs	Sustainable Development Goals
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNAIDS	United Nations Programme on HIV/AIDS
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
ZMC	Zimbabwe Media Commission

**Part I: The Model Law and its
influence on access to information
in Africa**

Ololade Shyllon

1 Introduction

The demise of the Organisation of African Unity in 2001 gave way to 'respect for democratic principles, human rights, the rule of law and good governance'¹ by its successor, the African Union (AU). As part of this transformation, initiatives such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM) were established. The AU also introduced regional standards on democracy and good governance that required member states to adopt access to information laws to combat corruption,² as a prerequisite for democracy and governance³ and as an integral part of public service delivery.⁴

This new wave also impacted sub-regional institutions. The East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) have infused good governance and human rights standards into their originally purely 'economic' mandate. ECOWAS went further by initiating a process to develop a Supplementary Act incorporating issues of access to information, although this process now seems to have stagnated. Even the African Development Bank has developed policies regulating public access to information in its possession.⁵

1 Principle 4(m), Constitutive Act of the African Union, 2000.

2 See art 9 of the Africa Union Convention on Preventing and Combating Corruption.

3 See art 2(10) of African Charter on Democracy, Elections and Governance.

4 See art 6 of the African Charter on the Values and Principles of Public Service and Administration.

5 See the ADB's Disclosure and Access to Information Policy of May 2012, which entered into force in February 2013, http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_Disclosure_and_Access_to_Information.pdf (accessed 30 September 2018).

Despite this increased focus on access to information as a tool for democratic participation, good governance and accountability, access to information laws initially struggled to gain ground in Africa. The efforts of the African Commission on Human and Peoples' Rights (African Commission) and, in particular, the office of the Special Rapporteur on Freedom of Expression and Access to Information, then Commissioner Pansy Tlakula, initially had minimal impact on improving the number and strengthening the normative content of access to information laws on the continent. Thus, in her Activity Report at the 44th ordinary session of the African Commission in November 2008, Commissioner Pansy Tlakula reacted to the poor legislative access to information landscape on the continent by concluding that

there is an urgent need for the formulation of a model law or guidelines on access to information on the continent, to assist countries to draft laws which comply with international and regional standards and, at the same time, are simple, affordable and easy to implement.⁶

Another factor which provided impetus to the need and urgency for a regional standard-setting document on access to information was the response of the few member states who had adopted laws at the time, when taken to task on the non-conformity of their access to information laws with regional and international standards.

Consequently, in November 2010 the African Commission adopted Resolution 167 (XLVII), Resolution on Securing the Effective Realisation of Access to Information in Africa. Through this resolution, the African Commission decided to begin the process of developing a Model Law on Access to Information for Africa (Model Law), under the leadership of its Special Rapporteur. This marked the beginning of a two and a half year-long process managed by the Centre for Human Rights (CHR) of the University of Pretoria. The African Commission subsequently adopted the Model Law on 23 February 2013 and went on to launch it on 12 April 2013, during its 54th ordinary session.

Although non-binding, the Model Law was developed as a tool to assist African states in the development of new or the amendment of existing access to information laws in compliance with regional and international standards. Since the publication of the first draft of the Model Law in April 2012, the access to information landscape on the continent has improved significantly. There has been an increase in the number of African states with such laws from five to 22, and a noticeable trend of strengthened normative content of these laws.

6 Para 38, http://www.achpr.org/files/sessions/44th/inter-act-reps/104/freedom_of_expression.pdf (accessed 30 September 2018).

Following its adoption, the Centre for Human Rights developed an ‘implementation plan’, so to speak, to generate awareness and ensure the impact of the Model Law on the adoption and revision of laws on the continent. As part of this project, advocacy visits were conducted in six countries (Ghana, Kenya, Malawi, Mauritius, Mozambique and Seychelles) that were in the process of or had signified an intention to adopt access to information laws. During her visits, the Special Rapporteur met with a wide range of stakeholders, including all three branches of government and held discussions on their role in the adoption and implementation of an effective access to information law.

The aim of these visits was to encourage the speedy development or adoption of Bills that conformed with the Model Law and provide technical assistance where needed. In all but two of the countries visited, the Bills were passed into law, with varying degrees of assistance provided by the Special Rapporteur and her team of experts who supported her mandate and accompanied her on these visits.

The direct influence of the Model Law in fast-tracking the development of Bills or the adoption of laws is thus on record in some cases. However, in other instances, the role of the Model Law has been evident only by virtue of obvious similarities between the text of the Model Law and newly-developed Bills or adopted laws and other anecdotal evidence.

Thus, in an effort to provide empirical evidence of the use and impact of the Model Law in the drafting and adoption of these laws, the Centre for Human Rights hosted a conference on 9 December 2015. The conference was aimed at creating a forum to share opportunities, experiences and challenges of utilising the Model Law in the development and review of access to information laws, and then, drawing from these discussions, formulate new strategies to ensure increased adoption, review, and effective implementation of access to information laws in Africa.

Importantly, the conference also focused on the broader impact and implementation of similar emerging soft law standards within the African human rights system and the AU. This was important because being the first of its kind to be adopted by the African Commission, the Model Law formed an important landmark in the increasing elaboration of soft law standards under the auspices of the African Commission. Since the adoption of the Model Law, several General Comments have been adopted by the African Commission. The first were two different General Comments on article 14 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) on HIV/AIDS and on the sexual and reproductive rights of women. Another two General Comments have also since been adopted on the right to life and on redress against torture and other forms of cruel, inhuman or degrading treatment or punishment.

The AU has similarly adopted Model Laws such as the Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa (IDP Model Law), which is examined in this book. A reflection on the influence on the Model Law thus also provided an opportunity to inquire into the role and impact of soft law standards within the African human rights system and the AU generally. The extent to which these standards induced compliance, as well as the combination of factors that contribute to generating such compliance, are important for developing implementation strategies for future soft law instruments with maximum impact.

This book is a collection of some of the papers presented at the conference which was held on 9 December 2015 in Pretoria, South Africa, with the financial support of the government of Norway, through the Royal Norwegian Embassy in Pretoria. Following discussions and recommendations received during the conference, individual authors reworked their papers. Thereafter, each chapter was peer-reviewed and updated to include information available as at April 2018. This book is comprised of three parts with four chapters each. Part I provides an overview of the influence of the Model Law, including the role of constitutions in realising the right. Part II consists of country studies that provide insight into the adoption and implementation process of access to information laws, while the last part examines the influence of soft law within the African human rights system.

The first part of the book begins with an in-depth examination of the impact of the Model Law and its influence on the elaboration of the right of access to information on the continent. For this, Adeleke was commissioned and undertook an extensive inquiry into the extent to which the provisions of the Model Law have been relied upon in the adoption or development of access to information Bills on the continent; the interplay of factors that have led to a reliance on the Model Law by member states in the process of adopting the laws; and the role of the Special Rapporteur's advocacy visits in ensuring the speedy adoption of access to information laws in conformity with the Model Law.

What Adeleke's chapter really brings to the fore is that, while the adoption of normative standards to provide a basis for the implementation of access to information is important, such standards are unlikely to fulfil their purpose without advocacy to generate knowledge of their existence by stakeholders; the provision of technical support to member states willing to utilise the opportunity it presents; and support to civil society organisations to push for their adoption and effective implementation. For Adeleke, the advocacy visits by the Special Rapporteur were crucial as they were structured in such a manner as to address these issues and thus contributed to the adoption of access to information laws in Kenya, Malawi, Mozambique and Seychelles, as well as ongoing efforts in Ghana and Mauritius.

Adeleke concludes that the advocacy visits were ‘successful and effective’ and gave legitimacy to local efforts for the adoption of access to information laws. Although each visit was unique, he found commonalities. For one, states generally attested to a culture of access to information even in the absence of laws, which was routinely controverted by individuals and CSOs. In addition, adoption processes are often influenced by the strong desire of states to be perceived as transparent often to fulfil the criteria for membership of multi-stakeholder initiatives such as the Open Government Partnership. He nevertheless acknowledges the interplay of a multiplicity of factors that influence the decision of African states to adopt access to information laws. These include power dynamics that result in sometimes costly compromises being made by civil society to get laws passed; the reluctance of states to adopt laws capable of compromising national security; as well as the difficulties posed by the pervasive culture of secrecy and poor record management systems.

In chapter 3, Belalba and Sears examine the lessons learnt in Latin America with the adoption of a Model Law on Access to Information just prior to that of Africa, and the extent to which the lessons can assist Africa in the ‘implementation’ of its own Model Law. The Latin American experience is particularly important not only because of the similarities in the structures of both human rights systems but also the landmark decision of the Inter-American Court of Human Rights in *Claudio Reyes v Chile*, which upheld access to information as a separate and distinct right despite having its origins in the right to freedom of expression.

The authors examine the experiences of Brazil, Chile, Mexico and Paraguay, and reach similar conclusions as Adeleke on Africa. The first is that the coordinated involvement of multiple stakeholders, especially the media, academia and civil society, is critical to securing public support for and governmental action on the adoption of access to information laws. Furthermore, in Brazil, the point highlighted by Adeleke of states’ willingness to fulfil the criteria for eligibility for membership of multi-stakeholder initiatives served as a successful advocacy strategy for securing the adoption of an access to information law. Another key revelation is the experience in Paraguay illustrating that the willingness by the state and other stakeholders at the onset of the process to seek guidance from the Model Law is no guarantee that the law which emerges will conform with the standards contained therein. The overall lesson, therefore, is that strategies for adoption must be contextual and multifaceted involving things such as the use of media to generate awareness, proposing the text of a Bill for consideration, exerting pressure on presidential candidates to support adoption, and strategic litigation.

In chapter 4, Shyllon delves into the important role of constitutions in giving effect to access to information. In particular, the chapter examines the few express constitutional guarantees of the right of access to information on the continent and the various other formulations in

constitutions which are viable options for implementing access to information as a constitutional right. However, what is clear is that there are various challenges to the reliance on constitutional provisions for the realisation of human rights in general, which limits its effectiveness. Nevertheless, there is no doubt that the status of a constitution as the *grundnorm* – the norm from which all others derive their validity – makes constitutions a necessary mechanism for the enjoyment of the right of access to information in Africa and globally. However, Shyllon raises the point that many of the inherent deficiencies of the enforcement of the constitutional right of access to information can be addressed with the adoption of access to information laws, so as to create the processes to give effect to the constitutional right.

Part II of the book contains a series of country studies from across the continent that examine the adoption and implementation processes of access to information laws and the impact or otherwise of the Model Law on these processes.

Ghana's long journey towards the adoption of a 'Right to Information' Law is discussed by Ukaigwe in chapter 5. Somewhat echoing Shyllon's findings in the preceding chapter, the adoption of the 1992 Constitution which provides for a right to information has proven insufficient as the need for a law laying out the process remains important for the effective realisation of the right. Fortunately, the visit of the Special Rapporteur in 2014 resolved a deadlock in the process when parliament agreed to amend the Bill along the lines of civil society recommendations based on the Model Law. This undoubtedly showcases the usefulness of high-level third party intervention in addressing the lack of trust which often typifies relationships between governments and civil society. However, almost 20 years since the first Bill was tabled in parliament, there is still no law. Ukaigwe also examines existing practices that could hinder the effective implementation of the Bill once adopted. In so doing, emphasis is laid on the importance of a multi-stakeholder approach to the adoption of access to information laws and the need for a complete shift in the mindsets of state officials and empowerment of the citizenry, as crucial to effective implementation of the law once it finally emerges.

With respect to Kenya, Nderi in chapter 6 looks into the manner in which Kenya's access to information law has been adopted to complement the constitutional provision on access to information and the role of the Model Law in facilitating this process. For her, the advocacy efforts by the Special Rapporteur and the pan-Africanist approach of the government of the day contributed to the receptiveness of policy makers to being guided by the provisions of the Model Law in the development of the Kenyan access to information law. She also demonstrates, albeit anecdotally, the use of the Model Law by the Kenyan judiciary in cases before it. Furthermore, Nderi discusses gaps in the Kenyan access to information law using the Model Law as the standard and, in doing so, she reveals the

inherent weakness of a Model Law as a tool for state compliance with treaty obligations, which is also raised by Belalba and Sears. States are essentially free to pick and choose which provisions they will include with no strong mechanism to ensure that the final text is a reflection of the spirit and intent of the Model Law.

Chapter 7 discusses Sudan, where the process of adoption and the content of the law is a classic lesson on how not to establish an access to information regime. Khalil describes the Sudanese government as one which thrives on 'a culture of opacity' as a means of exerting control and power, and has thus structured the legal system in a manner that supports this culture. Unlike many other countries in Africa which had prolonged processes that involved public consultation and scrutiny in varying degrees, this Act was signed into law in February 2015 with no public participation whatsoever. This, according to Khalil, is a systemic anomaly that is emblematic of the law-making process in Sudan. This is illustrated by the fact that despite objections by the department of legislation to the inconsistency that plagued the Bill and the lack of participation in its development, it was nevertheless passed without following the proper legislative process. This quick and irregular process of adoption has the semblance of a rushed box-ticking exercise.

Khalil concludes, and reasonably so, that there was no knowledge about the existence of the Model Law at the time the Sudanese Access to Information Bill was being developed. Even if there were, the weak ties with African institutions and a general hostility towards international law would have made reference to the Model Law improbable. Rather, there was extensive reliance on the access to information laws of Yemen and Palestine, in line with the practice of drawing inspiration from the Arab-Islamic legal system. This has contributed to a Sudanese access to information law that fails to conform with basic regional and international standards, resulting in great uncertainty with respect to its implementation.

In chapter 8, Ngwenya examines the implementation of the infamous Access to Information and Protection of Privacy Act (AIPPA) of Zimbabwe. As in the case of Sudan, AIPPA is an example of what an access to information law should not look like. Often cited as a law which does little to facilitate access to information, it is not surprising that Ngwenya's chapter reveals its lack of effectiveness despite being one of the earliest laws to have been adopted in Africa. Ngwenya is at pains to emphasise that a major failure of the law is that it combines media regulation and access to information, with the former taking up the bulk of the provisions in the law. Fifteen years on, there is minimal demand and supply of access to information. On the demand side, there is a general lack of awareness among the citizenry of the existence, process and value of exercising the right. On the supply side, empirical research has revealed that requests for even the most basic and non-sensitive information are met by refusal, partial refusal or silence. Even the adoption of a new

Constitution in 2013 which expressly guarantees the right of access to information and mandates the adoption of an access to information law has done nothing to change the realisation of the right in Zimbabwe. AIPPA remains law, along with its problematic provisions on access to information, such as broad and vaguely-defined exemptions, and the absence of an oversight mechanism for monitoring and enforcement purposes. There is no doubt an urgent need for a new access to information law to be adopted to make the constitutional right a reality in Zimbabwe.

Part III of the book looks into the broader impact of a variety of soft law instruments which have been adopted by a variety of stakeholders in the African human rights system. These include Resolutions, Principles, General Comments and a Model Law.

In chapter 9, Kabumba engages with the theoretical aspects of the legitimacy of soft law instruments within the African human rights systems and demonstrates this by using the Pretoria Principles on Ending Mass Atrocities as a case study. He diligently clarifies the significance of legitimacy as a determinant of state compliance, which is critical in measuring the impact of norms. In turn, the legitimacy of soft law norms is determined by a combination of the process and eventual substance produced. Kabumba goes further to illustrate through his case study that soft law can be made 'hard' when the relevant treaty body legitimises it through the treaty-making process. However, it is important that in further elaborating this now hard law, care is taken to avoid watering down or weakening this hardness through, as with the Pretoria Principles, introducing conditions that the treaty did not provide. Perhaps this highlights the weakness of soft law adopted through a minimally consultative process. A two-day meeting, which may not necessarily have had the opportunity to include a wide range of experts to ponder all aspects of the proposed text, in the long run affects the depth and quality of the document that emerges. Thus, participation in relation to input was lacking. Also in terms of output, the effectiveness of the Principles has been reduced by this provision which is a core requirement of legitimacy.

In chapter 10, Biegon looks into the impact of resolutions of the African Commission and factors that contribute to or determine the impact of thematic resolutions, using three specific resolutions adopted by the African Commission as case studies: the 1999 and 2008 Resolutions on the Moratorium on the Death Penalty; the Robben Island Guidelines on Torture of 2002; and the Declaration of Principles on Freedom of Expression, also adopted in 2002. It is worth noting that although the African Commission in its earlier years adopted its soft law as resolutions, it has since moved away from this practice. Today, Principles, Guidelines, General Comments and other soft law are adopted as substantive documents and no longer as resolutions. This, however, does not detract from Biegon's findings. Despite the difficulties of establishing impact, he is able to show a link between the resolution on the Death Penalty and

Benin's efforts to abolish the death penalty, and, in Uganda, the reliance on the Robben Island Guidelines in the development of the anti-torture law. By far the most solid evidence of impact he finds is in relation to the Declaration of Principles as complemented by the Model Law. He concludes that both documents have played a significant role in increasing the number and improving the content of laws across the continent. However, Biegon is quick to point out that the empirical evidence of these links notwithstanding, other factors play a role in the resulting impact of resolutions, chief of which are the relevance of the substance of the resolution; and active civil society advocacy in collaboration with other stakeholders or the African Commission.

The General Comment on articles 14(1)(d) and (e) of the African Women's Protocol is dealt with in chapter 11. Durojaye examines in detail the steps states must take to protect women from HIV in light of the African Women's Protocol which addresses the unique sexual and reproductive health rights challenges of women in Africa. Like the Model Law, the General Comment was the first of its kind and its process and impact thus far is worth interrogating. In terms of process, unlike the Model Law, the adoption of the General Comment was completed within six months. This for Durojaye raises questions as to the legitimacy of the document, given the minimal participation by the public and stakeholders. He also identifies the receipt and use of 'donor funds' for the drafting and organisation of meetings in the process of the development of the General Comments as problematic. However, the human and financial resource constraints faced by the African Commission necessitate that stakeholders provide financial and technical support in the fulfilment of its mandate. Perhaps this legitimacy challenge can be ameliorated by ensuring as far as possible the maximum participation of stakeholders and the public at large. Unfortunately, the development process of the General Comment was defective in this regard.

In all, Durojaye highlights the potential ground-breaking impact of the General Comment while recognising that awareness amongst states, civil society and other stakeholders is crucial for its impact. He also flags the fact that the omission of a monitoring framework in the text of the General Comment combined with minimal compliance by states with the state reporting mechanism under the Women's Protocol is likely to severely diminish its impact. Another concern is the failure of the document to explicitly take into account the rights of marginalised groups in order to avoid controversy, as the African Commission was reluctant to deal with controversial issues related to sexual orientation and identity. This perhaps was a missed opportunity for the African Commission to display leadership on the intersectionality of rights in the context of HIV/AIDS.

In the final chapter Adeola looks at the Model Law on the Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (IDP Model Law).

The IDP Model Law was developed by the African Union Commission on International Law (AUCIL) and adopted by the Assembly of Heads of State in 2018, seven years after the process began. From her critical analysis, it is clear that the IDP Model Law falls short of the objectives of the treaty it was adopted to implement in many respects. It is vague, as it does not clearly define important concepts used. The point is also made that the document does not expressly outline which human rights standards states are required to adopt on a variety of issues or where it does, these standards are incorporated in a superfluous manner, rendering the document repetitive. What this demonstrates is that soft law can have the unintended consequence of limiting rather than enhancing the scope of protection offered by the hard law it seeks to reinforce.

Adeola's suggestion that these normative defects can be cured by the development of commentaries on the IDP Model Law in collaboration with the African Commission is a sound one. Such collaboration could serve the dual purpose of allowing the premier institution for the promotion and protection of human rights to contribute to the standard-setting process on this important subject matter, while at the same time drawing from the advocacy experiences of the African Commission on its soft law instruments.

A golden thread running through these chapters has been the fact that the legitimacy of soft law instruments is a major determining factor for compliance and, by extension, its impact. Of course, legitimacy, as Kabumba has explained, could be both in relation to the process of adoption or the substance of the document which finally emerges. What is clear, however, is that where the consultative process is not participatory, as with the General Comment and the IDP Model Law, it raises questions as to legitimacy in terms of process and substance.

Closely connected to this is the point made by Kabumba, that soft law has the potential to water down the hard law it was intended to strengthen. To avoid this, the process for the development of soft law documents should involve as many stakeholders as possible and provide sufficient time for their input. Having been part of the process of developing the Model Law on Access to Information and a few other soft law instruments adopted by the African Commission, this certainly resonates. The level of expertise possessed by drafters notwithstanding, the input from a wide range of stakeholders and other experts is invaluable and goes a long way towards determining the quality and, ultimately, the impact of the document.

Another factor determining the impact of a soft law instrument is its specific nature. Thus, while a Model Law by its very nature is framed as a statute, thereby lending itself more easily to 'domestication' as a Bill by member states, others such as General Comments would need to be studied and the implications for law and policy understood by policy

makers prior to any action being taken with regard to implementation. Given the bureaucracy of the legislative and policy-making process in member states, only sustained advocacy could ensure that issues not already prioritised by states would see the light of day. This certainly requires that attention is paid to ensuring that the format of the soft law adopted is well suited to its intended objectives.

This brings us to the issue of advocacy. As Adeleke, Biegon, Nderi and Ukaigwe have shown in their respective chapters, the importance of advocacy for the implementation of soft law instruments cannot be overemphasised. Advocacy is necessary to bring awareness of the existence and substance of soft law to the attention of relevant stakeholders and policy makers. While advocacy is often viewed solely as a custom-made role for civil society, the experience with the ‘implementation’ of the Model Law on Access to Information shows that, depending on the context, institutions authorised to establish soft law to supplement hard law can and should engage in advocacy and awareness-raising efforts. The work of the former Special Rapporteur, Pansy Tlakula, on the Model Law bears testimony to this.

This, however, does not in any way negate the advocacy role of civil society, which most certainly is indispensable. In fact, the success achieved in advocacy visits undertaken to popularise the Model Law could not have been possible without civil society organisations. They know the lay of the land and are able to advise on the strategy to be adopted during each advocacy visit. Carefully identifying which stakeholders the Special Rapporteur’s delegation should meet with, and identifying other like-minded organisations to be involved, made the advocacy visits a success. More importantly, following a particular visit, it is civil society organisations that stay engaged with the process and tirelessly seek or carve out opportunities to campaign for the adoption of access to information laws and, once adopted, it is civil society organisations that again shift the focus and energy to advocate and actively contribute to the effective implementation of these laws.

CHAPTER 2

THE IMPACT OF THE MODEL LAW ON ACCESS TO INFORMATION FOR AFRICA

Fola Adeleke

Abstract

The year 2013 was a significant year for access to information in Africa. When the Model Law on Access to Information for Africa was formally adopted by the African Commission on Human and Peoples' Rights in 2013, four African states (Côte d'Ivoire, Rwanda, South Sudan and Sierra Leone) also subsequently passed access to information laws, the highest number ever recorded in one year. The passage of the Model Law was the culmination of a three-year process that had been championed by a core group of academic and civil society organisations. The adoption of the Model Law held the promise that the Law would guide the development and review of national access to information laws in Africa as well as serve as an advocacy tool for the adoption of new access to information laws. Since the passage of the Model Law, ten countries have passed access to information laws in Africa, namely, Burkina Faso, Côte d'Ivoire, Kenya, Malawi, Mozambique, Rwanda, Sierra Leone, South Sudan, Sudan and Tanzania. The laws in these countries were passed after several years of in-country advocacy. In the case of Mozambique, after the passage of the Model Law there was a concerted advocacy effort in the country, led by the Special Rapporteur on Access to Information in Africa, which fast-tracked the passage of the law. There were similar top-down advocacy efforts in other countries such as Kenya, Malawi, Ghana, Mauritius and Seychelles. Arguably, these developments are victories for transnational non-state civil society actors. However, to what extent can these victories be replicated in other countries where access to information laws have not yet been adopted? For some of the African countries with recent access to information laws, these developments have been isolated from the developments around the adoption of the Access to Information Model Law. The reasons for this include the unique contestations for access to information driven locally; the desire of some states to attract foreign aid through claims of transparency; and the intention to join multilateral initiatives such as the open government partnership. However, the strong appeal to protect a state's right to regulate and the preservation of sovereignty, and the internal power dynamics between the state, the citizen and institutional non-state actors are crucial factors that have the potential of resisting the advancement of access to information regulation in Africa. The aim of this chapter is to determine

whether the Access to Information Model Law for Africa, as an attempt to develop a common approach and harmonisation of access to information laws, can conquer the resistance to access to information regulation in Africa. This chapter focuses on Kenya, Ghana, Malawi, Seychelles, Mauritius and Mozambique as case study countries that were the subject of targeted advocacy visits to promote the Access to Information Model Law by the former Special Rapporteur on Access to Information and Freedom of Expression in Africa.

1 Introduction

The Model Law on Access to Information for Africa was adopted in 2013 after several years of consultations, research and drafting driven by the Special Rapporteur on Freedom of Expression and Access to Information in Africa. The Special Rapporteur's office was established by the African Commission on Human and Peoples' Rights (African Commission) in 2004.¹ The initial mandate of the Special Rapporteur was exclusively focused on promoting, protecting and monitoring freedom of expression. However, when the mandate of the Special Rapporteur was renewed in 2007 at the 42nd session of the African Commission, the mandate of the Special Rapporteur was amended to include access to information in Africa.² As part of the expanded mandate of the Special Rapporteur, the African Commission in 2010 authorised the Special Rapporteur to initiate the process of developing a Model Law on Access to Information for Africa.³ To fulfil this mandate, the Special Rapporteur established a partnership with the Centre for Human Rights, University of Pretoria, to convene a panel of experts to inform the content of the Model Law and to constitute a drafting team.

During the drafting process of the Model Law, the Special Rapporteur and the panel of experts engaged in a number of continent-wide consultations that started in The Gambia at the 49th ordinary session of

1 Resolution 71 adopted at the 36th ordinary session of the African Commission.

2 To analyse national media legislation, policies and practice among member states; to monitor their compliance with freedom of expression and access to information standards, in general, and the Declaration of Principles on Freedom of Expression in Africa, in particular; and advise member states accordingly; to undertake fact-finding missions to member states from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and make appropriate recommendations to the African Commission; to undertake promotional country missions and any other activities that would strengthen the full enjoyment of the right to freedom of expression and the promotion of access to information in Africa; to make public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, including by issuing public statements, press releases, and sending appeals to member states asking for clarifications; to keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission; and to submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa.

3 Resolution 167 of the African Commission.

the African Commission.⁴ A series of further public consultations were consequently held in Maputo, Mozambique; Nairobi, Kenya; and Dakar, Senegal, and the final consultation was held in Tunis, Tunisia, in June 2012.⁵ The consultations consisted of government officials, academia, the media and civil society representatives. The aim was to obtain feedback on the draft Model Law.

In February 2013 the African Commission adopted the Model Law during its extraordinary session. The adoption of the Law was hailed as a milestone for the African Commission, as it 'provides for the first time a practical tool to assist states in complying with the obligation under article 1 of the ACHPR to adopt legislative, or other measures to give effect' to the rights in the African Charter on Human and Peoples' Rights (African Charter).⁶ The specific form in which states will adjust, adapt and adopt the Model Law is left to individual member states.

The adoption of the Model Law supports the call in several regional instruments for African states to adopt access to information laws. These regional treaties have been developed for the advancement of various themes, including the advancement of democracy, the combating of corruption and the promotion of appropriate values in the public service.⁷ Specifically, the Declaration of Principles on Freedom of Expression in Africa was adopted by the African Commission in 2002. The Declaration encourages states to adopt laws to protect access to information. The Model Law effectively aims to assist states in realising their obligations under the Declaration to adopt a domestic access to information law taking into account the legal systems of each country.

Prior to the adoption of the Model Law, only ten states had adopted an access to information law.⁸ Since the adoption of the Model Law, 12 additional states have adopted access to information laws. These countries are Burkina Faso, Côte d'Ivoire, Kenya, Malawi, Mozambique, Rwanda, Sierra Leone, South Sudan, Sudan, Tanzania and Togo. This chapter discusses the features of the Model Law, identifies some of the influencing factors that have aided the passage of access to information laws across the African continent and evaluates the six country advocacy missions conducted by the Special Rapporteur. This evaluation is done primarily through interviews with members of the mission as well as government and civil society representatives in the respective countries. The chapter

4 <http://www.saha.org.za> (accessed 29 November 2015).

5 SAHA (n 4 above).

6 Interview with member of Special Rapporteur's advocacy team, Lola Shyllon, 27 November 2015.

7 African Charter on Democracy, Elections and Governance; African Union Convention on Preventing and Combating Corruption; and African Charter on the Values and Principles of Public Service and Administration.

8 Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, South Africa, Tunisia, Uganda and Zimbabwe.

concludes with a number of findings and recommendations on the future of access to information laws in Africa.

2 Salient features of the Model Law on Access to Information for Africa

The Model Law on Access to Information provides that every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.⁹ In addition, every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.¹⁰

The Model Law introduces a new category of institutions that should be subject to the principles of public disclosure. These are referred to as 'relevant private bodies', and constitute bodies that are otherwise private bodies but utilise public funds or carry out a statutory or public function or service.¹¹ This category of institutions is important at a time where the line between public and private institutions is becoming increasingly blurred and states are beginning to favour public-private partnerships in the execution of their functions and services.

The Model Law provides that the law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure.¹² Non-disclosure is permitted only in exceptionally justifiable circumstances and any refusal to disclose information is subject to appeal.¹³

9 Sec 2(a) Model Law.

10 Sec 2(b) Model Law.

11 Definition section of the Model Law.

12 Sec 2(c) Model Law. In terms of the Model Law, a person who wishes to obtain access to information from an information holder (a public or private body) must submit a request in writing or orally; if a person submits a request orally, the official of the public body must reduce that oral request to writing and provide a copy to the requester; on receipt of a request, the public or private body must immediately provide a written acknowledgment of the request to the requester; a requester does not have to provide justification or a reason for requesting any information; a request must provide such detail concerning the information requested as is reasonably necessary for the information to be identified; if the requester believes that the information is necessary to safeguard the life or liberty of a person, a statement to that effect must be included, including the basis for the belief; if the request is to a private body, an explanation must be provided of why the requested information may assist in the exercise or protection of any right; identify the nature of the form and language in which the requester prefers access; and if the request is made on behalf of someone else, include an authorisation from the person on whose behalf the request is made. The Model Law further provides that information must be provided to a requester in such official language as the requester prefers. Where the information is not in the language the requester prefers, the information can be translated into the preferred language of the requester; and the reasonable costs associated with the translation can be recovered from the requester; art 22.

13 Sec 2(e) Model Law.

Given the resistance to access to information that states tend to have towards information disclosure, especially in the face of national security concerns confronting some African states, recognising the presumption of disclosure is an important expression of the inviolability of access to information as a human right.

The Model Law provides that to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of an information holder, nothing should limit or otherwise restrict any other legislative requirement for an information holder to disclose information.¹⁴

This provision relates to the necessity for access to information laws to be supreme, and what the Model Law proposes is significant given the presence of various laws on national security across African countries that limit the disclosure of information. Some of these laws are legacies of colonialism, while others are being enacted allegedly to close down access to government. An example of this is the Protection of State Information Bill in South Africa recently passed by Parliament, but awaiting presidential assent.

The Model Law provides that a decision following a request must be made within 21 days after the request has been submitted, subject to the payment of any applicable reproduction fee, translation fee and/or transcription fee.¹⁵ In cases where the information is necessary to safeguard the life or liberty of a person, the decision has to be made within 48 hours.¹⁶

The validity of information is dependent on the currency and separation of ordinary requests for information, and information necessary to safeguard life or liberty is one of the unique features of the Model Law. In South Africa, the access to information law allows public and private bodies to respond to information requests within a maximum of 60 days, which in practice naturally weakens the effectiveness of South Africa's access to information law. Consequently, limiting the time period for states to provide access to information, recognising the impact of delayed access to information may have on the protection of human rights is a novel development.

The Model Law provides that a request for information should only be refused if the harm to the interest protected under the relevant exemption

14 Sec 4 Model Law.

15 Section 1.5.

16 According to the Model Law, if the request is granted, the notice must state the applicable fee, the form in which access to the information will be given; and that the requester may apply for a review of the prescribed fee or form. The Model Law recommends the non-payment of fees except for reasonable reproduction or translation fees where necessary; secs 15 & 20.

that would result from the release of the information demonstrably outweighs the public interest in the release of the information. This is called a 'public interest override'.¹⁷

The introduction of the public interest override reaffirms the presumption of disclosure provision by stipulating that the exemptions in the disclosure are not absolute. This provision is further reaffirmed by the heavy reliance the Model Law places on proactive disclosure of information. The Model Law has a detailed provision on proactive disclosure. The proactive disclosure clause extends to both public and relevant private bodies, and the information subject to automatic disclosure includes¹⁸ detailed administrative information; policies; 'contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body'. It also includes reports, budgets, revenues and expenditure information.

Central to the disclosure of information detailed above are the issues of how to ensure that these categories of information are accessible by members of the public; how to ensure the organisation of the information so that it is relevant to the users; and to ensure that it is complete, accurate, free, timely and re-usable. For these objectives to be met, it is necessary to explore how African states have developed their own domestic access to information laws with the aim of understanding the motive behind the adoption of these laws, the extent to which these motives reflect the practice of implementation adopted within states and whether there is a future opportunity for the Model Law to influence the further development and implementation of access to information laws in African states.

3 From Model Law to national law: Influencing factors

The origins of the passage of access to information laws in Africa are varied. There has been a strong civil society campaign for the passage of these laws. For example, in Nigeria the campaign for an access to information law lasted 18 years. Zimbabwe, Angola, Guinea and Niger adopted access to information laws independent of the democratisation process with no clear indication on what motivated this. In the case of Zimbabwe, the law is designed to do more than grant access to information and includes the control of access to information. It contains provisions

17 Sec 25. The exemptions provided in the Model Law relate to personal information of a third party; commercial and confidential information of a public or private body or a third party; protection of life, health and safety of an individual; national security and defence; international relations; economic interests of the state; law enforcement; legally-privileged documents; academic or professional examination and recruitment processes; art 27-35.

18 See sec 7 of the Model Law.

that give the government extensive powers to control the media by requiring the registration of journalists and prohibits the 'abuse of free expression'.¹⁹

Noting the unique field of access to information across Africa, a study of historical perspectives on transparency and secrecy in Africa is necessary. Africa's colonial rule left a lasting legacy of a culture of secrecy, largely maintained in post-colonial governance.²⁰ Also, former liberation movements in Africa used secrecy as a pivotal and necessary weapon to fight the former oppressive governments. Consequently, it has been suggested that in their transition into government, this tool of secrecy was carried into government which makes the continued presence of many liberation movements as present-day governments in Africa a unique challenge for access to information advocates.²¹

It is within this long history of secrecy that access to information laws have been adopted and, as a result, the implementation of access to information laws has been slow. The development of state capacity to implement access to information laws has been very poor, and sometimes this has been due to inadequate political will on the part of governments. For example, regulations to aid the implementation of the Ugandan access to information law were passed six years after the passage of the law. In Ethiopia, no such regulations currently exist. In South Africa, the country with the oldest access to information law in Africa, despite the existence of the Law for over 17 years, the annual reports of the South African Human Rights Commission, the body originally tasked with monitoring compliance with the Law, has shown that compliance with access to information obligations has been consistently low.²²

The bureaucracy in accessing information embedded in access to information laws can resist the principle of disclosure in a number of ways. These include complicated requests for processing requests for information, such as the introduction of fees, forms in the case of South Africa, problems with the creation of records and their management, as well as dealing with the several exemptions to information disclosure.

The adoption of access to information laws hardly is the end of the road in demanding accountability from governments through accessing information. Adopting access to information laws is a means to an end, and ensuring the implementation of access to information laws requires several processes, including the training of public sector officials;

19 G Sedungwa & T O'Connor 'Global right to information update: An analysis by region' (2013) FOIANet 16-17.

20 As above.

21 As above.

22 The level of compliance was 60% by national government departments and 8% by local governments in 2014-2015. See South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2014) 29-30.

developing effective bureaucratic systems such as records management systems; as well as the allocation of adequate resources.

Sustaining political commitment to ensure the effective implementation of access to information laws is crucial. This will be dependent on the context in which an access to information law was adopted in a country. In cases where there was no specific advocacy by civil society for an access to information law, there has been limited interest on the part of the government to implement the law.

One of the problems related to the adoption and implementation of access to information laws by governments relates to its characterisation as a human right. This has led Darch to caution that in environments where political systems are patrimonial, bureaucracies have low capacities and politicians are largely not accountable to the citizenry, the rights character of access to information might not advance its cause.²³ Consequently, Darch has argued that while the normative claims made for access to information have not been matched with the reality, it is not necessarily the lack of political will, weak legal-administrative systems and poor implementation of the law that has caused this.²⁴ He argues that the inherently weak states in Africa after colonialism may be a cause for this due to the lack of well-established bureaucratic structures that might address issues of, for instance, the management of records.²⁵

Despite these constraints, there has been a boom in the passage of access to information laws in Africa. The passage of the Model Law and the consequent continent-wide advocacy effort by the Special Rapporteur are some of the reasons, and are scrutinised in this chapter. In a global context, the Obama-led administration in the United States introduced the Open Government Partnership (OGP), an initiative that encourages governments to raise the level of their openness in key areas to enable public participation. One of the conditions for membership of the OGP is an access to information law.²⁶

Other international organisations have also sought to use their positions to influence the adoption and implementation of access to information laws. The World Bank Institute has sponsored initiatives on the continent that favour the implementation of access to information laws among several other initiatives, including open contracting, which ensures fiscal transparency in the use of public funds for public services.²⁷

23 C Darch *Access to information in Africa: Law, culture and practice* (2013) 46.

24 As above.

25 As above.

26 Kenya was exempted from this requirement.

27 <https://www.open-contracting.org/about/> (accessed 6 July 2018).

Many African countries are also undergoing constitutional review processes and, in that sense, in embracing new norms and standards, there has been an internationalisation of constitutional law across African countries which includes the recognition of the right to information. Article 32 of Somalia's 2012 Constitution, for instance, recognises the right of access to information in the same language as the 2010 Kenyan Constitution, which is also the same language adopted in the 1996 Constitution of South Africa.

The next section considers the various social forces that potentially compromise the efficacy of access to information norms and standards in African countries.

3.1 Right to regulate and state sovereignty

For states, the sovereign right to regulate and govern is sacrosanct. As a result, interference in state affairs through multilateral governance is resisted because of the perceptions that these models of governance threaten state sovereignty. In recent times, states have clamped down on supranational institutions that have been perceived to interfere with state sovereignty. For example, in 2010 the summit of the Southern African Development Community (SADC) heads of state, on the recommendation of the Council of Ministers, decided to defer action against Zimbabwe for non-compliance by the state with a judgment of the SADC tribunal.²⁸ The summit decided rather to order a review of the role, responsibilities and terms of reference of the SADC tribunal by an independent consultant, which eventually led to the removal of the powers of the tribunal relating to human rights jurisdiction and individual access.²⁹ Similarly, the South African government took a decision for the powers of the International Criminal Court (ICC) to be reviewed after South Africa had refused to comply with a request for the President of Sudan to be arrested.³⁰ African governments have adopted the approach of opting for diplomatic missions when external influence is required in state governance. This is an approach often taken by the African Union (AU) in dealing with *coups d'état* within the region in recognition of the need to be deferential to the sovereignty of states.

Given this context, it is particularly difficult to advocate the adoption of laws that have not originated from within state structures. Indeed, this was a major reason for the strategic decision taken in Kenya during the Special Rapporteur's advocacy visit to the Minister of Information,

28 A Pillay 'SADC Tribunal dissolved by unanimous decision of SADC leaders' unpublished paper (2014) 4.

29 As above.

30 See South Africa's report to the African Commission, 57th ordinary session.

Communications and Technology not to mention Kenya adopting the Model Law on Access to Information.³¹

3.2 Power dynamics

There are several power actors in any given state with claims to legitimacy for the interests that they represent. As a result, the state competes with civil society, community groups, the media and other actors in representing various voices across society. These power dynamics also come into play where policy and regulation are concerned. Within the state itself, sub-national governments and state institutions lay claim to the mandate for policy developments seen to be within their scope of jurisdiction, while other actors contest the scope and content of these policies. These power plays manifest themselves in advocacy efforts and campaigns driven by civil society actors for access to information which often require compromises in the adoption of these laws. As a result of these unique contexts for different states, the shape of provisions in access to information laws differ from state to state depending on the way in which the power dynamics play out in the adoption of the law. The power dynamics also affect implementation in terms of the manner in which the law itself is implemented by the state, where the focus lies and the various agendas that are pushed by different actors both in usage and implementation.

3.3 Inherent states of secrecy

Other external influences that affect the passage of access to information laws involve the ‘culture of secrecy’ where public officials require the request for information to be justified. In a judgment passed shortly after the passage of the Nigerian Freedom of Information Act (FOIA), it was held by the court that the FOIA was flawed as it gave rights to citizens without obligations.³² The culture of secrecy also has a different dimension. It has been suggested that ‘information has a secret value in traditional African societies’ and, as a result, this particular mindset has been exported into government bureaucracies.³³ Furthermore, as stated earlier, colonial legacies as well as the historical nature of liberation movements that have transformed into governments have also sustained the inherent secretive nature of African governments.

31 Oral interview with Kenyan CSO representative, Henry Maina, in Banjul, The Gambia, 6 November 2015.

32 *Paradigm Initiative Nigeria v Dr Reuben Abati* Suit FHCABJ/CS/402/2013 4.

33 See Darch (n 23 above).

3.4 National security

The state of insecurity in some African states has also heightened the need for national security which has resulted in the clampdown on information disclosure to the public. Most civil society organisations are not well equipped to handle this resistance on the part of the state and, as a result, the realisation of open democracy is much more difficult to achieve. The rise of insurgencies, terrorism, and security fragile states³⁴ across the continent and globally has led to heightened state secrecy aimed at safeguarding different categories of information in the interests of national security.

3.5 Role of the citizen

Ultimately, in constitutional democracies power rests with the citizen. Their votes elect and remove governments and, on a balance of ideals, the voice of the citizen is of utmost importance. However, while citizens are to be regarded as the most powerful stakeholders, they are also often the most marginalised power brokers. Various interests assume the voice of the citizen and manipulate it.³⁵ The desires, interests, concerns and needs of the citizen, therefore, is often muffled in the contest for power and representation. The Model Law prescribes access to information to any person and does not limit it to citizens. This is an important distinction given the fact that citizenship is often an issue of powerful contestation. Citizenship is often used to play political games. The United Nations Children's Fund (UNICEF) estimates that almost two-thirds of sub-Saharan African children are not registered and, therefore, cannot prove citizenship.³⁶

An access to information regime will be successful with public pressure through usage of the law and demand for compliance by the state. While the Model Law was designed for African states, the law cannot automatically fit into different legal cultures and social relations. As a result, the adaptation of the Model Law and the success of the Law in application will be possible through every society's unique understanding and interpretation that is developed in terms of the cultures, desires, beliefs and traditions of the people because 'the more the new law interacts with society, the more it will be adapted, whether intended or not'.³⁷

34 National security is a potent defence against transparency, in terms of which a state can refuse a request for access to a record if its disclosure could reasonably be expected to cause prejudice to the defence of the republic or the security of the republic. In some instances, a state can even refuse to confirm or deny the existence of a record. See sec 41 of the Promotion of Access to Information Act 2 of 2000.

35 These include civil society organisations that claim representation of public voices, in some instances with no legitimate mandate.

36 J Hartshorn 'Can the Model Law on Access to Information for Africa fulfil expectations?' ECPR Conference on Regulatory Governance, Barcelona, Spain, 2014.

37 As above.

3.6 Institutional non-state actors

The discourse on accountability in African states requires a multifaceted approach and a challenge that confronts a number of states is how to promote popular participation and democratic ideals into the decision-making processes of African governments. Civil society organisations generally have a constituency base and they are obliged to communicate their constituency concerns to policy makers in government for the best decisions in the public interest to be made.³⁸

With civil society influencing the adoption of access to information laws and leading the advocacy around the adoption of the law, different agendas may creep in. In Nigeria, to facilitate the adoption of the access to information law, the coalition of non-governmental organisations (NGOs) had to deliberately lessen the visibility of media rights groups to deflate the claim by government that access to information is a media issue.³⁹ In addition, the influence of international NGOs causes some states to be weary of the influence of foreign states and leads to NGOs occasionally being treated with suspicion.⁴⁰

The expertise and experience of civil society organisations complement the existing gap in government and allow for practical useful solutions to problems. Civil society's role is to draw the attention of government to problems and to provide critical and constructive feedback in areas of public interest concern. Civil society organisations also act as a necessary constraint on the power of states when demanding transparency, accountability and scrutiny of government activities. However, it is important for civil society to note that their function is not to direct government but to serve as a guide in the development or implementation of initiatives that will be well received by their constituencies.⁴¹

3.7 The handicap of bureaucracy

For the successful implementation of an access to information law, resources are needed. These would include the appointment of officers; investment in an effective records management system; and, in some cases, the establishment of oversight institutions. Where resources are limited, the ability of the state to help the public to realise their right of access to information is hindered.

38 Darch (n 23 above) 45.

39 Media Rights Agenda *Unlocking Nigeria's closet of secrecy: A report on the campaign for a Freedom of Information Act in Nigeria* (2000) ch 2.

40 As above.

41 Harthsorn (n 36 above).

To further understand the factors influencing or hindering the adoption of access to information laws, it is necessary to contextualise these issues in the advocacy visits conducted by the Special Rapporteur across six countries to promote the adoption of the Model Law into national laws. In a series of interviews conducted with the Special Rapporteur, her advocacy team, government officials and civil society representatives that met with the Special Rapporteur during her country visits, a number of findings were made in relation to the strategies adopted in the campaign for the adoption of access to information laws and how the various factors identified above were dealt with.

4 Evaluating the access to information country advocacy missions of the Special Rapporteur

When the African Commission adopted the Model Law in 2013, it was the first time a model law on any subject had been commissioned by the Commission. The Model Law was drafted through a consultative process led by the Special Rapporteur on Freedom of Expression and Access to Information, Commissioner Pansy Tlakula, and facilitated by the Centre for Human Rights (CHR) at the University of Pretoria.

The CHR commissioned this research to assess the extent to which draft access to information legislation and recently-adopted access to information laws on the continent have been guided by the provisions of the Model Law. In order to provide empirical evidence on the use and impact of the Model Law in the drafting and adoption of these laws, the CHR sought to assess the extent to which the provisions of the Model Law had been relied upon in the adoption or development of access to information Bills on the continent; the interplay of factors that determined the decision by member states to include (or otherwise) specific provisions of the Model Law in the process of the adopting or developing access to information Bills on the continent; and an assessment of the role of the Special Rapporteur in the adoption of access to information laws. The CHR also wished to determine how effectively the advocacy visits conducted by the Special Rapporteur ensured the speedy adoption of access to information laws that conform to the standards set out in the Model Law. Ultimately, this research seeks to determine whether the advocacy engagement is a good case study for the adoption of access to information laws in Africa and, if so, why.

The Special Rapporteur's team, which consisted of members of the Working Group that drafted the Model Law, developed an advocacy strategy for the Special Rapporteur's mission. This strategy involved setting up meetings with state officials, particularly Ministers responsible for access to information issues, the judiciary, civil society organisations

and statutory bodies.⁴² An environmental scoping exercise was conducted by the Special Rapporteur's team to determine the soft points of entry to win over states in the adoption of access to information laws. The Special Rapporteur led the mission to open access to government for civil society.

The mission was firstly to determine the attitude towards access to information and freedom of expression in the six countries visited. These countries were Kenya, Ghana, Malawi, Seychelles, Mauritius and Mozambique.

In the second place, the Special Rapporteur visited these countries in order to give states the encouragement and support necessary to draft and adopt access to information laws.⁴³ The Special Rapporteur's objective was to offer support to both states and civil society organisations.

Third, the Special Rapporteur wanted to share awareness about the work of the African Commission and the duty of states to comply with the submission of human rights reports to the Commission.⁴⁴

In addition, the Special Rapporteur visited these countries to advocate the commencement of legal reforms in the countries and to ensure that the legal reforms are aligned with developments on the continent, such as the Model Law.⁴⁵

4.1 Kenya: Lessons in strategic advocacy

While the campaign for the adoption of an access to information law lasted several years, there was a renewed call for the adoption of the Law following the 2008 post-election violence in Kenya.⁴⁶ One of the recommendations made by the established commission of inquiry was the adoption of an access to information law.⁴⁷ This call led to the recognition of the right of access to information during the constitutional review process that led to the adoption of the 2010 Kenyan Constitution.⁴⁸

In Kenya, the right of access to information is officially recognised in article 35 of the 2010 Constitution. However, the access to information Bill was only introduced in 2015 and published as a private members' Bill in

42 Oral interview with member of Special Rapporteur's advocacy team, Chantal Kisoon, 28 November 2015.

43 As above.

44 As above.

45 As above.

46 Telephonic interview with Kenyan civil society member, Anne Nderi, 7 January 2016.

47 See the detailed Commission of Inquiry into Post-Election Violence Report 476, http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 6 July 2018).

48 Nderi (n 46 above).

Parliament. The Bill was eventually passed into law in 2016 to give effect to article 35.

Kenya has ratified all international instruments that contain freedom of information provisions, and has included access to information in the County Government Act. At the sub-national level, three of the 47 Kenyan counties already have access to information laws.⁴⁹

The provision of the Kenyan Constitution provides a basis for access to information. However, a legal framework to give it effect before the passage of the access to information law was lacking. In the past, the Official Secrets Act, 1992 had been used to fetter access to information in the guise that the information sought is classified information not falling within the ambit of information that can be released unless the information is declassified.⁵⁰ Also, the provisions of the Penal Code have been used by the state to fetter access to information since it provides for criminal libel, thereby making expression difficult for fear of being charged with criminal libel.⁵¹

In the absence of an access to information law, the state disseminated limited information and had not particularly done well on issues related to expenditure of public funds which is always shrouded in mystery.⁵² However, the previous government of Kenya was responsible for Kenya's membership in the Open Government Partnership and the widely-applauded open data initiative. As a result, the presence of these initiatives was seen as subtle pressure on the government to pass the access to information Bill and maintain the political momentum.⁵³

Despite the release of information under the open data initiative, information on developmental issues released by the state is regarded as partially accurate but incomplete.⁵⁴ The information gap that exists in Kenya mostly relates to planning, expenditure and government services.⁵⁵ Information on expenditure, which appears to be highly sought after in Kenya, is regarded as not always accurate or verifiable and this also applies to state plans which often have political undertones in the manner they are publicly released.⁵⁶ From a political perspective, Kenya's foreign policy in the current government has adopted a pan-African approach that has favoured a positive view towards the Model Law.⁵⁷

49 Maina (n 31 above).

50 Questionnaire interview with Kenya Human Rights Commissioner, Shatikha S Chivusia, 13 November 2015.

51 As above.

52 As above.

53 As above.

54 As above.

55 As above.

56 As above.

57 As above.

As far as the applicability of the Model Law is concerned to the access to information process in Kenya, while there was prior knowledge of the Model Law within civil society, it was re-emphasised by the Special Rapporteur during her visit.

The Special Rapporteur undertook an advocacy visit to Kenya in August 2015, accompanied by a delegation of three members of the Working Group that developed the Model Law, to meet with government officials and other stakeholders. During the visit, the Special Rapporteur met with the Cabinet Secretary for Information, Communication and Telecommunications, the Attorney-General, and the Solicitor-General.⁵⁸ As far as the judiciary is concerned, the Special Rapporteur met with the Deputy Chief Justice and the Director of the Judiciary Training Institute. The delegation also met the Chairperson and members of the Senate Committee on Information and Technology, as well as the Committee on Legal Affairs and Human Rights.⁵⁹

The Special Rapporteur also visited other government institutions, including the Constitution Implementation Commission; the Kenyan National Commission on Human Rights; the Commission on Administrative Justice; and the National Gender and Equality Commission.⁶⁰ The Special Rapporteur also had the opportunity of meeting civil society and the media to brief them on the outcome of her meetings and to formulate strategies for sustained advocacy towards a speedy adoption of the access to information law.⁶¹

Culturally, in Kenya there are challenges as a result of language barriers and the need for information dissemination in Swahili.⁶² In addition, public servants display a negative attitude towards releasing information to the public.⁶³ During the Special Rapporteur's visit, she emphasised the need for public servants to change their attitudes to ensure that citizens are able to receive information they desire once they have submitted a request.⁶⁴ The government appeared to appreciate these challenges with the Cabinet Secretary in charge of Information and Technology, acknowledging the fact that information may be available but not accessible.⁶⁵ It was also suggested by the ICT Minister during the Special Rapporteur's visit that the media needs to be more responsible with the handling and dissemination of information. This suggests the perception within the state that access to information is still narrowly viewed as an issue of media freedom.

58 Shyllon (n 7 above).

59 As above.

60 As above.

61 As above.

62 Chivusia (n 50 above).

63 As above.

64 Maina (n 31 above).

65 As above.

During the visit of the Special Rapporteur, she was informed that the Kenyan Cabinet had approved the access to information Bill and recommended to the Minister of ICT that it be forwarded to Parliament for consideration.

One of the outcomes of the Special Rapporteur's visit was that it allowed a multi-stakeholder engagement and resulted in the judiciary agreeing to conduct access to information training for all magistrates and High Court judges.⁶⁶

The success of the open data process in Kenya allowed the sustained resistance on the part of government to the development of an access to information law. Also, perceptions about corruption in Kenya was suggested as a disincentive for the passage of an access to information law as a result of concerns that 'it will be used as a rope to hang politicians'.⁶⁷ However, following the Special Rapporteur's visit, five meetings were held between the access to information coalition and Members of Parliament. These led to greater awareness on access to information issues within Parliament, and the law was eventually passed in September 2016.

Previously, there was opposition to an access to information law in Kenya as initial attempts on the Bill had been made from the ranks of opposition parties. However, the private members' Bill that eventually became law was tabled by a member of the ruling coalition. Eighteen organisations form the Kenyan access to information coalition and these organisations sustained the necessary political will for the law after the Special Rapporteur's visit.⁶⁸ The meetings with the Members of Parliament were choreographed around the strengths of the different organisations and targeted various issues and groups.⁶⁹

Another interesting strategy was developed after the Special Rapporteur's visit. The Kenyan access to information coalition, which was established in 2007, used the government's argument against it by making the claim that the intention of the government, to create the office of an information ombudsman – a decision seen as intended by government to have a measure of control as opposed to placing oversight within the Commission on Administrative Justice, which is an independent constitutional body – was too expensive.⁷⁰

A deliberate strategic decision was taken in Kenya not to encourage the adoption of the Model Law during the Special Rapporteur's meetings with the executive.⁷¹ This was a cautious decision not to undermine the

66 As above.

67 As above.

68 As above.

69 As above.

70 As above.

71 As above.

sovereignty of Kenya. The Special Rapporteur's overall message during her visit to Kenya was to offer her support to any state processes to pass the law.⁷²

The access to information law that was eventually passed, adopted some of the provisions in the Model Law which includes the definition of relevant private bodies, the primacy of the law as well as some of the exemptions in the Model Law. These are considered in more detail below.

4.1.1 Comparing Kenya's access to information law with the Model Law

The Model Law provides a guide for the interpretation of access to information laws. This approach has been adopted in the Kenyan access to information law, where the interpretation is based on a duty to disclose.⁷³ The Kenyan law is consistent with the Model Law by maintaining that nothing in the Act shall limit or restrict any other legislative requirement for a public entity or a private entity to disclose information.

Right of access to information

The Kenyan law provides for the right of access to information from any state body, and from any person where the information is required for the exercise of any right or fundamental freedom. This is not fully in line with the Model Law, which provides for the unconditional right of access to information from any public body, private body as well as 'relevant private body'.

Proactive disclosure

The Kenyan law provides for a lengthy list of information which 'may' be proactively disclosed in terms of section 5. Whilst the language is conditional, the list of information is consistent with section 7 of the Model Law.

Public interest override

While the Kenyan law provides for public interest override in the application of an exemption for disclosure, the wording of the law in section 6 is such that it is not mandatory: A body '*may* be required to disclose information where the public interest in disclosure outweighs the harm to protected interests'. This discretion is absent in the Model Law.

⁷² Chivusia (n 50 above).

⁷³ Sec 4(4).

Designation of information officers

Under section 7, the Kenyan law provides only for the designation of information officers for public entities. There is no mention of designation for private bodies. This is inconsistent with the Model Law, which provides for the designation of information officers for both public and private bodies.

Processing of information request applications

In keeping with the Model Law, section 9 of the Kenyan law provides that 'where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the application or not later than fourteen working days where the application is complex or relates to a large volume of information'. The latter aspect of this clause regarding the 14 days' extension for complex requests, however, is not a provision of the Model Law.

Penalties for information officers

Sections 9 and 10 of the Kenyan law provide that an information officer who does not respond to an information request in the prescribed time is guilty of an offence and liable to a fine or imprisonment. Whilst this is not a provision of the Model Law, this certainly demonstrates the seriousness with which this law will be implemented in Kenya.

Commission on Administrative Justice

The Kenyan law provides for the Commission on Administrative Justice (as previously established) as the oversight mechanism in respect of this Act. The Commission's powers include the review of access to information decisions made by a public or private body; the investigation of complaints made by any person regarding a violation of the provisions of the Act; requesting and receiving reports from public entities; conducting education programmes on the right of access to information and the right to protection of personal data; and the monitoring of state compliance with relevant international treaty obligations.

The Commission is further required to submit an annual report to Parliament which includes an overall assessment of compliance with the Act by government. In addition, the Commission is mandated to receive reports from public entities regarding information requests received in the year under review. This is in line with section 67 of the Model Law.

It is important to note that the Commission's powers are limited only to private bodies, which is not consistent with the Model Law.

Internal review

The Kenyan law does not provide for an internal review process, as outlined in the Model Law.

Protection of person making disclosure

The Kenyan access to information law provides that anyone making a public information disclosure in the public interest shall not as a result be penalised. While this is not outrightly provided for under the Model Law, section 87 of the Model Law provides protection against civil and criminal liability for the disclosure of information in good faith.

Record management

Section 17 of the Kenyan law provides for the keeping and maintenance of records, which also includes the creation and preservation of records ‘as are necessary to document adequately its policies, decisions, procedures, transactions and other activities’. This is consistent with section 6 of the Model Law.

4.1.2 Emerging outcomes in Kenya

The Kenyan judiciary has been liberal in terms of its willingness to adjudicate strategic litigation cases to test the content and limits of the constitutional right of access to information, especially in the Kenyan context where terrorism is a significant threat and national security a potential hindrance to access to information.⁷⁴ The state also regarded itself as open and providing access to information to the public, especially given its robust open data initiative that has been a model in Africa.

Kenya’s open data initiative and some of the robust judicial defences to the right of access to information certainly signifies an important reference point for the future development of access to information, particularly in the East African region.

4.2 Ghana: Slow but steady

Article 21(1)(f) of the 1992 Ghanaian Constitution provides that ‘all persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society’. Despite the absence of an access to information law, there are sectoral laws in Ghana that grant access to information. This primarily is the Local Government Act 462 of

74 Maina (n 31 above).

1993 which provides extensive provisions for public access to information from local governments. The passage of Ghana's Right to Information (RTI) Bill has been pending in Parliament since 2010. Recent legislative amendments were considered as proposed by the relevant parliamentary committee, and the Bill underwent its second reading in Parliament in November 2015.

The access to information regime in Ghana has been rather weak despite the recognition of access to information as a human right in the Constitution. A reason for this includes the bureaucratic processes and infrastructure in Ghana which have been limiting. Records are sometimes not created and information released may be incomplete.⁷⁵ In addition, public officers do not understand their role in terms of the release of information as they do not regard information disclosure as a right of the public.⁷⁶ As a result, changing the civil service culture and investing in data and records management are important considerations that need to be prioritised in Ghana if the access to information Bill currently under consideration is to be effective.

In July 2014 the Special Rapporteur undertook a three-day advocacy mission to Ghana. The Special Rapporteur met with the Speaker of Parliament as well as other parliamentary leaders, including the members of the select committee on constitutional legal and parliamentary affairs who are responsible for the access to information Bill.⁷⁷ The Special Rapporteur also met with the Minister of Information and the Minister for Gender, Children and Social Protection. The Special Rapporteur received assurances that an access to information law would be passed before the expiration of the tenure of the present government in 2016.⁷⁸

During the country advocacy mission to Ghana, there was notable resistance to the idea of the access to information law. However, this changed significantly after the Special Rapporteur's visit. The access to information Bill of Ghana was amended after the visit of the Special Rapporteur in 2014 and incorporated some of the salient features of the Model Law which are considered below. The visit of the Special Rapporteur was important as it challenged access to information as a foreign concept and presented access to information as a 'homegrown' initiative.⁷⁹ As a result, after the Special Rapporteur's visit, the Ghanaian access to information Bill was amended to introduce areas that were not previously covered in the Bill, such as the public interest override provision. It is understood that the Special Rapporteur as an external voice

75 Oral interview with Ghana civil society representative, Ugonna Ukaigwe, in Mexico City, 29 October 2015.

76 As above.

77 As above.

78 As above.

79 As above.

played a role of mediation that soothed the strained relations between civil society and government.

The Special Rapporteur met with the Chairperson of the special committee in Parliament considering the Bill and created a platform for civil society in Ghana to share the Model Law with members of Parliament. During her visit, The Special Rapporteur's main message was the need for the RTI Bill to be amended in line with the Model Law.⁸⁰

A prominent cultural issue in Ghana is the attitude of public servants towards non-disclosure of information. In response to this issue, the Special Rapporteur dealt with the idea of information being held for the public good and subject to information disclosure.⁸¹

With elections in Ghana in 2016, it was perceived that there might be an incentive for Parliament and the government to pass the access to information Bill before their term ended to bolster public legitimacy. However, this did not occur. In addition to this, Ghana is a member of the OGP, and political incentives such as these sustain the momentum for transparency in the country. However, concerns remain in Ghana regarding the perception of the access to information Bill as a media law. In a recent statement by the President, it was stated that the access to information Bill would not change the media landscape fuelling concern regarding government's view about the law.⁸²

Significantly, the visit of the Special Rapporteur to Ghana was seen as giving significant support to the work of the CSO Coalition. In the past, the coalition had been the only voice calling for the review of the access to information Bill. Civil society organisations took advantage of the visit and engaged the Special Rapporteur on some of the advocacy challenges, including the need to enhance the quality of the access to information Bill with particular reference to the Model Law.⁸³ Apparently, Parliament also gave reasons for the extended delay of the passage of the law, which included the prevailing misconception about the access to information Bill as a media law; inadequate public education on the Bill and its relevance; the poor record-keeping systems in government which would affect the implementation of the law; the prevailing culture of apathy among citizens; as well as the perception that the law would be used to witch-hunt political leaders.⁸⁴

However, in the report of the parliamentary committee presented to Parliament in December 2014, the committee made extensive references to

80 As above.

81 As above.

82 <https://www.ghanamma.com/2015/10/11/information-bill-wont-transform-media-landscape-mahama/> (accessed 6 July 2018).

83 Ukaigwe (n 75 above).

84 As above.

the Model Law and the Declaration of Principles on Freedom of Expression in Africa. In recognising and acknowledging the value of the Model Law, the Committee quoted the following message by the Special Rapporteur:⁸⁵

While the Declaration of 2002 and other such laws adopted by the AU Commission have expanded on state parties' obligations under the African Charter, they do not specifically provide guidance on the form and content of the legislation to be enacted to give effect to these obligations at the domestic level. The AU Commission on Human and Peoples' Rights has therefore gone further to provide a Model Law on Access to Information for Africa.

4.3 Malawi: Deepening understanding of using access to information to realise other rights

4.3.1 Advocacy visit

Section 37 of the Malawian Constitution provides that '[e]very person shall have the right to access all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of rights'.

Despite the recognition of a right to access to information, there are laws – such as the Official Secrets Act – that prevent disclosure of certain categories of information held by the government. Against this background, the government had an incentive to embrace transparency imperatives in Malawi in order to fulfil the ruling party's manifesto which promised the constitutional principles of good governance and transparency.⁸⁶ There was also a drive by the media and development partners to see the access to information law passed.⁸⁷

In Malawi, the public need for information primarily lies with the public interest in the expenditure of public funds, the status of high-profile criminal cases and the current status of healthcare facilities. Consequently, the campaign for an access to information law in Malawi started as far back as 2003. However, the Cabinet did not until 2014 adopt an access to information policy to clear the way for the drafting of the law. The access to information law was eventually passed in February 2017.

In May 2015 the Special Rapporteur embarked on an advocacy visit to Malawi and was accompanied by four members of the working group that developed the Model Law. During her visit, the Special Rapporteur met

85 P Tlakula in her preface to the Model Law on Access to Information for Africa, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf (accessed 6 July 2018).

86 Questionnaire interview with Legislative Counsel, Ministry of Justice and Constitutional Affairs of Malawi, Kahaki Jere, on 5 November 2015.

87 As above.

with the Minister of Information, Tourism and Civic Education and the Minister of Justice and Constitutional Affairs.⁸⁸ In Parliament, the Special Rapporteur met with the Speaker of Parliament, the Chairperson and members of the Committee on Media and Communication.⁸⁹ Other government institutions visited during the visit included the Malawi National Human Rights Commission, the Office of the Ombudsman and the Malawi Law Reform Commission.

The Special Rapporteur also met with a delegation of civil society organisations. Media organisations in Malawi have been central to the access to information advocacy in Malawi. The access to information law emanated from media organisations and had reached an advanced stage of drafting before the Special Rapporteur's visit. During the drafting process, the Model Law was used as a point of reference and some provisions were adapted to fit the context in which the law would be implemented.⁹⁰

Culturally, in Malawi the public is suspicious of government and a measure of political apathy exists.⁹¹ While this is changing, the process remains slow with civil society organisations taking an active role in creating public awareness and protecting human rights.⁹²

Despite this, Malawian civil society organisations have developed an understanding of the role of access to information in the realisation of other human rights and, as a result, they used the Special Rapporteur's visit to further canvass the usage of access to information in also realising other rights. The Special Rapporteur, in partnership with the Media Institute of Southern Africa and the Centre for Human Rights, had previously held a meeting with local stakeholders on the utility of access to information for the realisation of the sexual and reproductive health rights of women in Malawi.⁹³

After the Special Rapporteur's visit, the momentum to pass the access to information law increased, especially with the subsequent meetings of Parliament. The Malawian access to information law adopted some features of the Model Law and discarded others, such as the provision for an independent oversight mechanism as recommended in the Model Law, primarily as it is not economically feasible to create a new institution.⁹⁴ These are considered in more detail below.

88 Shyllon (n 7 above).

89 As above.

90 Jere (n 86 above).

91 As above.

92 As above.

93 As above.

94 As above.

4.3.2 Comparing Malawi's access to information law to the Model Law

Access to information as a human right

Notably, the law does not expressly conceive of the right of access to information as a human right. This is significant given that article 37 of the Malawian Constitution recognises access to information as a human right.

Private bodies

The Malawian law⁹⁵ does not extend the right of access to information to private bodies to the same degree as the Model Law. Section 5 of the Malawian law only extends the right to public and relevant private bodies in so far as they are required for the exercise of rights, and to private bodies who hold information about the person requesting.

Duty to keep records

While the Model Law provides for a duty upon information holders to create, keep, organise and maintain its information, section 13 of the Malawian law provides only for a duty to maintain and keep records but does not provide a duty to create records.

Information Commission

Sections 7 and 8 of the Malawian law designate the National Human Rights Commission as the body responsible for overseeing the implementation of the law and as being responsible for raising awareness, advising government, reviewing the decisions of information holders and making recommendations to government.

Exemptions

As far as public bodies are concerned, the Malawian law provides for exemptions along the lines of personal information; national security or defence; information necessary to preserve life, health and the safety of a person; legally-privileged information; ongoing academic and recruitment processes; international relations; and the protection of commercial and confidential information of a third party.⁹⁶ The exemptions in the Malawian law are broader than the provisions of the Model Law and potentially create loopholes to perpetuate a culture of secrecy.

95 Act 13 of 2017.

96 Sects 28-35.

Request procedure

The provisions in the Malawian law relating to the request procedure are largely in line with the Model Law. Where the Model Law provides for a 21-day response to an information request, section 19 of the Malawian law in fact provides that within 15 days of the request having been received, the public authority must provide written notice to the requester as to whether the record exists and whether it will be disclosed. It also provides for information to be disclosed within 48 hours if it relates to the life or liberty of an applicant. The Malawian law also provides that requests may be submitted orally or in writing.

4.3.3 Eventual outcomes in Malawi

Although Malawi is a poor country heavily dependent on aid, resources were not of significant concern in the passage of the access to information law. Malawi was more concerned with soliciting technical assistance in using article 37 of the right to access information in the absence of an access to information law.⁹⁷ As a result, specialised advocacy projects were favoured in Malawi to, for example, litigate for access to information on the basis of the right.⁹⁸

In Malawi, as in the case of the other countries visited by the Special Rapporteur, there was a great deal of awareness within civil society organisations, especially those working on media freedom issues. The civil society organisations had a deeper understanding of the relationship between access to information and human rights and were able to make linkages between access to information and the right to health, in particular.⁹⁹ One of the significant outcomes of the Special Rapporteur's visit was successfully convincing the Malawi Human Rights Commission to take on the oversight role once the access to information law had been passed.

The political incentive for an access to information law has been high in Malawi given the recent transition in government and the desire to change the old order in favour of better good governance practices. However, this political incentive was perceived as fading, given the initial decision of Parliament to withdraw the tabled Bill. The ambiguous reason given for the decision was that the Bill was flawed with several inconsistencies and needed to be redrafted.¹⁰⁰ This occurred after the delay in tabling the Bill before Parliament because of the initial lack of an access to information policy which was necessary before a law could be

97 Kisoona (n 42 above).

98 As above.

99 As above.

100 Jere (n 86 above).

passed.¹⁰¹ However, the Malawian press reported that the passage of the access to information law was one of the conditionalities imposed by the World Bank for the reinstatement of foreign aid. This suggests that external forces may have had a hand in the eventual re-introduction and the ultimate passage of the access to information law.

4.4 Mozambique: A case study in perseverance

4.4.1 *Advocacy visit*

A right to information law was passed in Mozambique on 31 December 2014. The adopted access to information law of Mozambique was drafted and tabled before Parliament by a group of civil society organisations coordinated by the Media Institute of Southern Africa (MISA) – Mozambique in 2005. The process of adopting the access to information law lasted 10 years from preparation to draft, deposit, discussion and adoption by Parliament. Since the passage of the law, there have been various challenges in implementation, which include a lack of public awareness on the law and a deficit in training of public officials to implement the law. However, in October 2015 Mozambique's Council of Ministers adopted a regulation to implement the law, which should aid the effective implementation of the law.

Prior to passage of the law, in June 2014 the Special Rapporteur embarked on an advocacy mission for the speedy adoption of the access to information Bill that at the time was before Parliament. During the visit, the Special Rapporteur met with the Chairperson of the Committee on Public Administration and Social Communication, which was responsible for the access to information Bill, the Minister of Justice and the president of the Supreme Court of Mozambique.¹⁰² The meeting with the Chairperson of the Public Administration Committee led to a personal undertaking by the Chairperson to ensure that the Bill was passed into law during the current sitting of Parliament.¹⁰³ He also requested that the Special Rapporteur and her team provide technical assistance in the form of providing feedback on the Bill, ahead of the debate in Parliament in relation to the Bill.¹⁰⁴ Despite the short window period available for the feedback, a comprehensive analysis of the Bill was provided by the Special Rapporteur and her technical team. However, only a few of the recommendations were adopted because the access to information Bill had reached an advanced stage in the parliamentary process, thus making it difficult to effect substantial changes.¹⁰⁵

101 As above.

102 Shyllon (n 7 above).

103 As above.

104 As above.

105 As above.

In Mozambique the influence of the Model Law extends beyond the advocacy visit of the Special Rapporteur. As part of the consultative process prior to its adoption, a regional consultation for Southern Africa on the Model Law had been held in Maputo in June 2011. The consultation had in attendance various stakeholders, including government officials and civil society organisations, and was held in collaboration with the Centre for Human Rights at the Eduardo Mondlane University. This fact ensured that in the run-up to the finalisation of the Bill by Parliament in 2014, local stakeholders who had been part of the June 2011 consultation, especially the Centre for Human Rights and the Eduardo Mondlane University, played an active role in ensuring that the Model Law was used as the template for the development of the Mozambican access to information Bill.¹⁰⁶

The imminent elections in Mozambique probably also aided the passage of the access to information law in December 2014. There was a concerted advocacy effort in Mozambique that resulted in several trips to the country to offer technical as well as political support to the state process of passing the access to information law. The good working relationship between government and civil society also aided the successful passage of the access to information law. The view by the government that it was already open also aided the passage of the law with little resistance from the government, which in fact initiated the passage of the law.

4.4.2 Comparing Mozambique's access to information law to the Model Law

Access to information as a human right

The opening provision of the law expressly states that the law is adopted 'in support of the constitutional principle of consistent democratic participation of citizens in public affairs and in establishing other related fundamental rights'.

Scope of application

The law applies to both public and private bodies. In particular, it applies to state organs and institutions, incorporated within the state's direct and indirect administration, its foreign-based representation and local authorities. It also applies to private entities, legally or contractually bound to carry out activities of general interest or that are in receipt of public funds regardless of the source, as well as those holding information of public interest.

106 As above.

Proactive disclosure

All private and public entities are to publish public interest information in their possession. Specific categories of information requiring publication include the content of decisions that impact on the rights and freedoms of citizens; work plans and annual budgets; reports of audits, inquiries and inspections; environmental assessment reports; minutes of proceedings for public tenders; and contracts concluded, including relevant income and expenditure accounts.

Process of accessing information

According to article 15, requests for information can be submitted in writing or orally. Where the request is made in writing, the information must be recorded in writing and a copy given to the requester. Persons with disabilities must also be assisted while ensuring that their request is processed. A requester also need not give reasons for a request, which request must be responded to within 21 days.

Public interest override

There is no public interest override provision in the law.

Appeals

According to sections 34 to 36, an appeal may be lodged first with the official who refused access to the information and thereafter through a hierarchical appeal within the same institution. However, the hierarchical appeal must be preceded by an opinion of the document review committee. Thereafter, an appeal can be lodged to the administrative courts.

Oversight of the law

The oversight responsibility for the law is shared jointly by the Ombudsman and the governing body of the State Archives National Information System (SANIS). The SANIS is responsible for preparing a report on the implementation of the law, which is then transmitted to the Ombudsman for inclusion in its annual report to Parliament.

4.5. Mauritius and Seychelles: Island states with resource constraints

Both Mauritius and Seychelles are island states in Africa with low population levels and limited resources in terms of capacity as well as finances. Both states were yet to draft access to information Bills but had

expressed a commitment and willingness to adopt access to information laws, thus leading to the visits undertaken by the Special Rapporteur. However, despite the enthusiasm expressed in both countries for the adoption of access to information laws, this enthusiasm has to be balanced with the reality that in both countries, access to information may not be considered a priority given the limited resources available. The visit of the Special Rapporteur possibly was also symbolic for both countries as both states had previously felt neglected in AU processes. It was revealed that both island states were unaware of the Model Law prior to the visit of the Special Rapporteur.

During the Special Rapporteur's visit to Mauritius, she met with the Prime Minister; the Speaker of Parliament; the Ministers of Technology, Communication and Innovation; social security, national solidarity and reform institutions; social integration, empowerment and training as well as labour, industrial relations, employment and training. The Special Rapporteur also met with the Chief Justice of the Supreme Court; the Acting Attorney-General, the Chairperson of the Mauritius National Human Rights Commission- the Electoral Commission- as well as civil society organisations. The adoption of an access to information law is in the manifesto of the ruling party, and this commitment was used by the Special Rapporteur to canvass for the quick development and adoption of the law.¹⁰⁷

The Special Rapporteur also undertook an advocacy mission to Seychelles in January 2015. The Special Rapporteur during her visit met with the President of Seychelles, Ministers, Members of Parliament and civil society organisations. The Special Rapporteur secured the commitment of the President towards the adoption of an access to information law.¹⁰⁸ A major outcome of the visit was the agreement by stakeholders, including the President, to have a national consultative meeting to discuss the need for the adoption of an access to information law and the scope and content of the law. Thus, on 25 and 26 May 2015, a symposium on developing an access to information law for Seychelles was organised by the Seychelles Media Commission and the Special Rapporteur.¹⁰⁹ At this symposium, the first day was devoted to demystifying the concept of access to information, while the second day involved in-depth discussions on the content of the Model Law as a template for an access to information law for Seychelles. With an imminent change in leadership in Seychelles, it appeared that there was an added political motive which influenced the commitment to adopt an access to information law.

107 As above.

108 As above.

109 As above.

In November 2016 the Seychelles government introduced an access to information Bill in the form of a White Paper. The Bill was modelled very closely along the lines of the Model Law and underwent several processes of consultation with stakeholders even after the change of leadership in government. The Bill was eventually approved by Cabinet in May 2018 and signed into law in July 2018.

5 Conclusion: Findings and recommendations

5.1 Findings

The emphasis of the Special Rapporteur was to present the Model Law as an ideal and did not prescribe to the states what they should do. There was general consensus in all states involved and among all participating stakeholders that the advocacy mission of the Special Rapporteur had been successful and effective. However, it should also be noted that it is difficult to assess the Special Rapporteur's missions, given the way in which both state and civil society parties played a 'good and cooperative' card during the missions. The missions gave the in-country efforts for the adoption of access to information laws a form of legitimacy and validation. Country governments had a renewed appreciation for the importance of access to information as a human right and were given fresh political incentives to adopt access to information laws. There were commonalities among the six states, which are worth highlighting below.

5.1.1 *Differing perspectives on openness*

From the perspective of the Special Rapporteur and her team, it was suggested that all six state governments viewed themselves as open and providing access to information to the public. For civil society organisations, however, the view was different, demonstrating the dynamics in the supply and demand for information. This heightened the need for targeted advocacy on portraying access to information as a human rights issue where the scope and content of the right should not be determined by the state but by the rights holders.

5.1.2 *Distinctions between access to information and media freedom*

Most states still regarded access to information as a media issue, although there was a deeper understanding of the relationship between access to information and other human rights. This understanding is not prevalent in state structures where access to information law is still seen as a nuisance law, which created the differing perspectives on the realisation of the right. The Special Rapporteur's success hinged on her emphasis that access to information was more than a media freedom issue and was linked

to socio-economic development. Despite this, however, in some of the states visited by the Special Rapporteur, media organisations were taking the lead in advocating the adoption of access to information laws, and they were far more sensitised on access to information issues than other civil society organisations. The role and relevance of the media in the access to information campaign, therefore, cannot be underestimated. The media coverage of the Special Rapporteur's visit also steered the public discourse towards the issue of access to information in the respective countries.

5.1.3 State security remains a significant obstacle

Across all states, state security remains a significant issue that is used by states to express concern on the levels of openness that should be acceptable. As a result, there will always be a need to balance the competing tensions between access to information and state security. During the Special Rapporteur's missions, the emphasis was on the reception of the state for the foundational idea of adopting an access to information law, and issues regarding implementation were not addressed in detail. Therefore, for states, balancing these competing issues still need to be addressed.

5.1.4 Hindrance of state bureaucracy

Across all states, the poor state of record management was highlighted as a significant hindrance to access to information. The sentiments expressed by non-state actors was the difficulty that governments would be confronted with when an access to information law is adopted in terms of providing information in the absence of the creation and organisation of records. Overall, the direct interaction with law makers, state officials and civil society gave a new meaning to regional integration and regional commitments that helped support and, in some cases, actualise the efforts for the adoption of access to information laws in different countries.

5.2 Recommendations

The Organisation of American States (OAS) was the first regional body that adopted a model law on access to information. The process of adopting the law began around the same period that the Model Law process began. However, the African Commission process took much longer as a result of the extensive consultative process that was undertaken, as indicated at the beginning of this article. With the benefit of more years

of using the Model Law as an advocacy tool, there are several lessons to be learnt from the OAS process.¹¹⁰

5.2.1 Harnessing the role of regional civil society organisations

For the OAS, the establishment of a Regional Alliance for the Freedom of Expression and Information,¹¹¹ a network of 23 CSOs from 19 different American countries that was created in October 2005, helped promote access to information through different activities, such as strategic litigation, training and technical assistance, advocacy, and applied research. A similar organisation exists in Africa, namely, the Africa Freedom of Information Centre,¹¹² an organisation that was established to play a continental role on access to information advocacy in Africa. While the organisation's role has largely been limited to advocacy for the adoption of access to information laws, it is important that it is co-opted to start playing a more significant coordination role for advocacy and implementation.

5.2.2 Continued support for the Special Rapporteur on Access to Information and Freedom of Expression

The Special Rapporteur's work so far has been aided by the support of external grants. While such continued external funding is required, the AU and the African Commission need to further strengthen the capacity of the Special Rapporteur through the political endorsement of her work. With the number of African states with access to information laws well below half, it is important that this political support is given for the adoption of laws as well as effective implementation.

5.2.3 Development of an implementation guide

The OAS developed an implementation guide for the Model Law to assist member states with implementation concerns that would otherwise not be included in the Model Law.¹¹³ At the national level, the idea of an implementation guide was useful in Nigeria for institutions to successfully implement the Nigerian FOIA. It is recommended that a similar approach should also be adopted for the Model Law.

110 A Sears & M Barreto 'Implementing a Model Access to Information Law in Africa: Lessons from the Americas' Conference paper at Model Law Conference, University of Pretoria, South Africa, December 2015.

111 Sears & Barreto (n 111 above); <http://www.alianzaregional.net/>. Perhaps a comparative institution in Africa would be the African Platform on Access to Information, <http://www.africanplatform.org/> (accessed 6 July 2018).

112 <https://africafoicentre.org/> (accessed 6 July 2018).

113 Sears & Barreto (n 111 above).

5.2.4 Strategic litigation and advocacy

It is important for civil society organisations to form strategic partnerships across states and within states to develop advocacy strategies that respond to the contexts of the various countries for the adoption and implementation of laws. These can also include, where necessary, strategic litigation at a national and regional level to raise awareness and increase pressure on member states as well as for the AU to prioritise access to information matters in Africa.

CHAPTER 3

IMPLEMENTING A MODEL ACCESS TO INFORMATION LAW IN AFRICA: LESSONS FROM THE AMERICAS

Marianna Belalba Barreto and Alan M Sears

Abstract

The Model Law on Access to Information for Africa portends a great opportunity in the promotion and protection of access to information in the region. The effective implementation of such a model law could benefit by looking towards other regional systems and how different strategies were used to advance legislation. In the Americas, there had been a progressive trend in the legal recognition of the right to access public information and the implementation of access to information legislation at the national level, and in 2010, the Organization of American States (OAS), with the support of civil society experts, developed a Model Law on Access to Information as well as an implementation guide for use by governments. This legislation, the Model Law, and the work of civil society have been instrumental in influencing the states in the region. It is thus through this lens that this chapter aims to provide strategies for the implementation of the Model Law in Africa. The chapter thus examines the adoption process of the model laws in both the Americas and Africa. It also discusses the main differences between the Inter-American Model Law and the African Model Law. We also consider litigation and advocacy strategies, among others, developed in the Americas, taking into account the differing political, social, economic and cultural contexts of both continents, which may shed some light on the development of access to information legislation in countries in Africa and the implementation of the African Model Law.

1 Introduction

With the rising influence that regional human rights systems have upon their member states, model laws concerning certain rights have become increasingly common. The Model Law on Access to Information for Africa portends a great opportunity in the promotion and protection of access to information in the region. However, there are lessons to be learnt in looking to other regional systems to analyse how their member states

came to enact access to information laws and the extent of the influence, if any, of the Model Inter-American Law on Access to Information.

In 2010, the Organization of American States (OAS), with the support of civil society experts, developed a Model Law on Access to Information as well as an implementation guide for use by regional governments. Before the Model Law was accepted, the Americas had been experiencing a progressive trend in the legal recognition of the right to access public information and the implementation of access to information legislation at the national level.¹ This legislation, the Inter-American Model Law, and the work of civil society has been instrumental in influencing the states in the region that did not have the right protected in law or that had legislation which did not comply with international standards.

It is thus through the lens of the enactment of access to information laws in the Americas and the Organization of American States' own Model Law on Access to Information that this chapter aims to provide strategies for the implementation of the Model Law in Africa. As the OAS system has 35 member states, the chapter will focus on selected countries that can provide a particular insight into the processes and strategies behind the adoption of their access to information laws.

The chapter first examines the adoption process of the Model Laws in both the Americas and Africa. Next, the main differences between the Inter-American Model Law and the African Model Law are discussed. Litigation and advocacy strategies, among others, developed in the Americas are then considered, resulting in recommendations for the implementation of the African Model Law on the African continent while taking into account the differing political, social, economic and cultural contexts of both continents.

2 Process of adoption: OAS and African model laws

Freedom of expression was recognised as a fundamental right worldwide with the adoption of the Universal Declaration of Human Rights (Universal Declaration)² and the American Declaration on the Rights and Duties of Man,³ both of which occurred in 1948. Since then, access to information has become well established in international human rights

1 Mexico, Panama and Peru had access to information legislation enacted in 2002; Ecuador, Jamaica and the Dominican Republic established such legislation in 2004; Honduras and Nicaragua did the same in 2006 and 2007, respectively; and Chile, Guatemala and Uruguay passed access to information laws in 2008. Right2Info, 'Constitutional provisions, laws and regulations', <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations> (accessed 20 August 2017).

2 Universal Declaration of Human Rights, General Assembly Resolution 217 A, art 19.

3 American Declaration of the Rights and Duties of Man, art IV.

law, both as part of freedom of expression and in its own right. The right of access to information has increasingly been codified and protected during the latter half of the twentieth and into the twenty-first century.

2.1 Americas

The right of freedom of expression in the Americas was first protected at the regional level in 1969. The American Convention on Human Rights guarantees the right to freedom of expression in article 13.⁴

In 1997, the OAS Special Rapporteur for Freedom of Expression was created by the Inter-American Commission on Human Rights (Commission).⁵ In the 1999 Annual Report, the Special Rapporteur stated:⁶

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters.

The Office of the Special Rapporteur for Freedom of Expression also worked on the Declaration of Principles on Freedom of Expression, which was approved by the Commission in 2000.⁷ In principle 4, it is recognised that

[a]ccess to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Not only were the regional human rights institutions in the Americas reaffirming access to information as a fundamental human right, but the associated political body also did so. Since 2003, the OAS General Assembly has issued several resolutions affirming the importance of the

4 American Convention on Human Rights, adopted at San José, Costa Rica, 22 November 1969, OAS Treaty Series 36, entered into force 18 July 1978.

5 Inter-American Commission of Human Rights Press Release 2/98, 6 March 1998, paras 14-15.

6 OAS 'Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression' 16 April 1999, OEA/Ser. L/V/II.102, Doc. 6 rev., ch III 24.

7 OAS Inter-American Commission on Human Rights, 108th regular session, 19 October 2000, <http://www.iachr.org/declaration.htm> (accessed 20 August 2017).

right of access to public information⁸ and instructing the Special Rapporteur for Freedom of Expression to prepare a special chapter in the annual report to assess the situation of access to information in the region.⁹

In 2006, the Inter-American Court of Human Rights, the apex authority as regards the interpretation of the American Convention, acknowledged the right of access to information in the *Claude Reyes v Chile* case. Regarding state-held information, the Court ruling affirmed that article 13 of the American Convention on Human Rights 'protects the right of the individual to receive such information and the positive obligation of the state to provide it'.¹⁰

Following all these developments – and especially the Inter-American Court ruling – the right of access to information became more fully entrenched in the Americas.¹¹ The countries that did not already have legislation in place started drafting and adopting their own laws.¹² The Model Inter-American Law on Access to Information was thus a natural outcome in the region.¹³

In 2009, the OAS General Assembly instructed that a model law on access to information and accompanying implementation guide be drafted by the Department of International Law in co-operation with the Inter-American Juridical Committee, the Special Rapporteur for Freedom of Expression, and the Department of State Modernisation and Good Governance, with the co-operation of member states and civil society.¹⁴

8 OAS General Assembly 'Access to Public Information: Strengthening Democracy' 5 June 2007, AG/RES. 2288 (XXXVII-O/07), https://www.oas.org/dil/AG-RES_2288_XXXVII-O-07_eng.pdf (accessed 20 August 2017); OAS General Assembly 'Access to Public Information: Strengthening Democracy' 3 June 2008, AG/RES. 2418 (XXXVIII-O/08), https://www.oas.org/dil/esp/AGRES_2418.pdf (accessed 20 August 2017).

9 OAS General Assembly 'Access to Public Information: Strengthening Democracy' 10 June 2003, AG/RES. 1932 (XXXIII-O/03), http://www.oas.org/juridico/english/ga03/agres_1932.htm (accessed 20 August 2017); OAS General Assembly 'Access to Public Information: Strengthening Democracy' 8 June 2004, AG/RES. 2057 (XXXIV-O/04), https://www.oas.org/dil/AG-RES_2057_XXXIV-O-04_eng.pdf (accessed 20 August 2017).

10 *Claude Reyes v Chile* IACHR 9 September 2006 Series C No 151 para 77.

11 Alianza Regional por la Libre Expresión e Información 'Saber Más VIII: Una Década de Acceso a la Información en las Américas' 3, <http://www.alianzaregional.net/wp-content/uploads/INFORME-SABER-MAS-SR-1.pdf> (accessed 20 August 2017).

12 OAS Special Rapporteur for Freedom of Expression 'The right to access to public information in the Americas: Specialised supervisory and enforcement bodies' para 4, <https://www.oas.org/en/iachr/expression/docs/reports/ACCESS/Thematic%20Report%20access%20to%20public%20information%202014.pdf> (accessed 20 August 2017).

13 Evidence and Lessons from Latin America (ELLA) 'The role of the Inter-American Human Rights system in the promotion of the right to information' 6, http://foiadvocates.net/wp-content/uploads/LEA2_Mod1_Week2-1_Role_of_IAHRS_in_the_promotion_of_RTI.pdf (accessed 20 August 2017).

14 OAS General Assembly 'Acceso a la Información Pública: Fortalecimiento de la Democracia' 4 June 2009, AG/RES. 2514 (XXXIX-O/09) para 9, https://www.oas.org/en/sla/dil/docs/AG-RES_2514-2009_eng.pdf (accessed 4 August 2017).

In order to fulfil the mandate, the Special Rapporteur, along with a group of experts, met three times to discuss, edit and finalise the Model Law and implementation guide.¹⁵ The final versions were approved in March 2010, and in April 2010 they were presented to a committee of the Permanent Council, which in turn submitted a resolution and the text of the Model Law to the General Assembly in May 2010.¹⁶ The General Assembly approved the resolution and Model Law one month later, in June 2010.¹⁷

The Model Law aims to set standards for access to information that countries in the region should follow when drafting access to information legislation, or in order to fill gaps or measure compliance in those countries that have already enacted access to information laws.¹⁸

2.2 Africa

Even though discussions concerning an access to information Model Law in Africa began in 2010, at nearly the same time as in the Americas, the African Model Law came into existence in 2013, a few years after the Inter-American version had been accepted. The realisation of the Model Law in Africa was different from that of the Americas because of a number of factors. First, the proceedings were more open and participatory, which might have contributed to lengthening the process in Africa as compared with the Americas. Second, many countries in the Americas had already enacted access to information legislation by the time the discussions started concerning a model law – 17 in the Americas versus six in Africa.¹⁹ It could be argued that the accumulated years of experience in the Americas facilitated the consultation process as many countries already had experience in drafting and enacting their own national legislation and

15 OAS Inter-American Commission on Human Rights 'Report of the Office of the Special Rapporteur for Freedom of Expression' para 14 4 March 2011, OEA/Ser.L/V/II. Doc 5, <https://www.oas.org/En/Iachr/Expression/Docs/Reports/Annual/Informe%202010%20P%20ENG.Pdf> (accessed 4 August 2017).

16 OAS Permanent Council and Committee on Juridical and Political Affairs, Model Inter-American Law on Access to Information 29 April 2010, OEA/Ser.G. CP/CAJP-2840/10 Corr.1, https://www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf (accessed 18 August 2017).

17 OAS General Assembly, Model Inter-American Law on Access to Public Information 8 June 2010, AG/RES. 2607 (XL-O/10), https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf (accessed 18 August 2017).

18 As above. In the Model Law it was recalled that the OAS General Assembly instructed a model law to be drafted 'to serve as a model for reform in the hemisphere'. See also OAS Special Rapporteur for Freedom of Expression 'The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks' (2012), <https://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20americas%202012%2005%2015.pdf> (accessed 4 August 2017). In this document, various countries' legal frameworks for access to information are compared with one another and with the standards set in the Model Law.

19 V Brobbey et al 'Active and passive resistance to openness: The transparency model for freedom of information acts in Africa – Three case studies' (undated) 1.

there had been almost a decade of work related to access to information performed by specialised institutions in the Americas.

The Special Rapporteur on Freedom of Expression in Africa was established in 2004. However, work leading towards a model law was still being carried out in the region before this. In 2002, the African Commission on Human and Peoples' Rights (African Commission) issued the Declaration of Principles on Freedom of Expression in Africa which recognised that '[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law'.²⁰

The process of debate and adoption of the Model Law lasted about two and a half years.²¹ In 2010, the African Commission decided to begin drafting a Model Law for access to information.²² The development of the draft was led by the office of the Special Rapporteur on Freedom of Expression and Access to Information, in collaboration with the Centre for Human Rights at the University of Pretoria, and with the participation of civil society organisations from across the continent.²³ The African Commission finally adopted the Model Law on Access to Information for Africa in February 2013.²⁴

Even though it took substantially longer to adopt the African Model Law than its Inter-American counterpart, it was a more involved process: The entire document was fully debated and the process was open to participation from civil society with no restrictions. In fact, the preface states:²⁵

To ensure further and more in depth consultation with stakeholders, between June 2011 and June 2012, four sub-regional consultations were held in Mozambique, Kenya, Senegal and Tunisia, to elicit feedback on the draft Model Law. Additionally, a public call for comments on the draft Model Law was made by the African Commission.

The influence of civil society had a marked effect upon the outcome of the document, some of which may be evidenced in the following section.

20 See African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression in Africa', <http://www.achpr.org/mechanisms/freedom-of-expression/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression%20in%20Africa/> (accessed 20 August 2017).

21 African Commission on Human and Peoples' Rights 'Model Law on Access to Information for Africa' Preface: Drafting Process 8.

22 African Commission on Human and Peoples' Rights ACHPR/Res.167 (XLVIII) 10: 'Resolution on Securing the Effective Realisation of Access to Information in Africa' adopted 24 November 2010, <http://www.achpr.org/sessions/48th/resolutions/167/> (accessed 20 August 2017).

23 G Sendugwa 'Secrecy on the wane in Africa' 29 April 2013, <http://www.osisa.org/law/blog/secrecy-wane-africa> (accessed 4 August 2017).

24 Adopted at the 53rd session of the African Commission on Human and Peoples' Rights.

25 Model Law on Access to Information for Africa (n 21 above) 9.

3 Comparative analysis of African and American Model Laws

This section does not pretend to analyse both documents in fine detail. However, it is useful to examine and compare what may be the strengths and weaknesses of both documents. This section will thus attempt to describe the main differences between the Model Laws.

In addition to the Model Law, the Inter-American system adopted an implementation guide in order to provide guidance for the application and interpretation of certain provisions of the Model Law. This guide is extremely useful as it also provides countries with practical recommendations for the implementation of access to information legislation. For example, guidelines are given to member states on how to establish a realistic budget and for initial capacity building.²⁶ The African Model Law was not accompanied by an implementation guide.

The African Model Law established a more expansive scope regarding the categories of bodies with obligations to disclose information. The Inter-American Model Law includes public bodies (including the executive, legislative and judicial branches at all levels of government), constitutional and statutory authorities, and 'non-state bodies that are owned or controlled by government'. The legislation also applies to 'private organisations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services', but only to the extent that information requested concerns those funds, public functions or public services.²⁷

In addition to the bodies listed in the Inter-American Model Law, the African Model Law includes private bodies more broadly to the extent that information they hold 'may assist in the exercise or protection of any right', regardless of whether the information requested is related to public funds or the performance of a public function or service.²⁸ Thus, this significantly expands the amount of information that may be requested from a private entity.²⁹ It could be argued that this provision as worded in

26 OAS Group of Experts on Access to Information 'Commentary and Guide for Implementation for the Model Inter-American Law on Access to Information' 25 and 53, OEA/Ser.G CP/CAJP-2841/10, https://www.oas.org/dil/cp-cajp-2841-10_eng.pdf (accessed 20 August 2017).

27 Model Inter-American Law on Access to Public Information (n 17 above) sec I art 3.

28 Model Law on Access to Information for Africa (n 21 above) sec 1 (definition of 'relevant private body') and secs 2(a) and (b).

29 African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression in Africa' principle IV (2), <http://www.achpr.org/mechanisms/freedom-of-expression/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression%20in%20Africa/> (accessed 20 August 2017).

the Law may be so broad as to have the potential to be used against private news organisations to release journalistic sources.³⁰

The Inter-American Model Law explicitly states that the requester can be anonymous,³¹ whereas a similar provision does not appear in the African Model Law. Being able to anonymously request information is important so that citizens can exercise the right of access to information without fear of repercussions. It should be noted that, although the African Model Law is silent on this issue, it also does not require the requestor to furnish his or her name. However, a requester must furnish his or her name when information about a third party is requested and a response must be given within 48 hours.³² Regarding this issue, in their comments to the draft Model Law, the Centre for Studies on Freedom of Expression and Access to Information stated: 'It is essential that any freedom of information legislation respect the right of a person to anonymously request information' and recommend to 'explicitly recognise the requester's right to anonymity'.³³

Both laws provide for a list of exceptions or exemptions to the disclosure of information.³⁴ However, the Inter-American Model Law further includes a provision stating that the 'exceptions in article 41 do not apply in cases of serious violations of human rights or crimes against humanity'.³⁵ This means that extra protection is explicitly provided in matters of grave importance.

Further, regarding exceptions, the Inter-American Law added another layer of protection by requiring that every limitation must be 'legitimate and strictly necessary in a democratic society, based on the standards and jurisprudence of the Inter-American system'.³⁶ The African Model Law does not include such a statement, but the list of exceptions is more developed with explanations that are more detailed. A more problematic difference could be the inclusion in the African Model Law of the exception that provides that '[a]n information officer may refuse a request if the request is manifestly vexatious'.³⁷ This exception has the potential to

30 Centre for Studies on Freedom of Expression and Access to Information (CELE) 'Draft Model Law for African Union States on Access to Information: Comments and Recommendations' 2, <http://www.palermo.edu/cele/pdf/investigaciones/AU-Draft-Model-Law-CELE.pdf> (accessed 20 August 2017).

31 See Model Inter-American Law on Access to Public Information (n 17 above) sec I art 5(d).

32 Model Law on Access to Information for Africa (n 21 above) sec 39(9).

33 CELE (n 30 above) 3.

34 Model Inter-American Law on Access to Public Information (n 17 above) sec IV para 41; Model Law on Access to Information for Africa (n 21 above) Part III, in particular secs 27-36.

35 Model Inter-American Law on Access to Public Information (n 17 above) sec IV para 45.

36 Model Inter-American Law on Access to Public Information (n 17 above) sec IV para 41.

37 Model Law on Access to Information for Africa (n 21 above) sec 37.

be interpreted extremely broadly to preclude the state from furnishing the requested information.

When requested information has been refused, a person may appeal the decision internally from the entity from which the information was requested, and externally from an oversight body. However, the internal appeal step is not mandatory in the Inter-American Model Law.³⁸ On the other hand, the African Model Law has a mandatory internal appeal procedure.³⁹ The relevant section in the African Model Law states:

A requester or third party may only apply to the oversight mechanism for the review of a decision of an information holder under section 71 if the requester or third party has exhausted the internal review procedure in Part IV of this Act.

It should be noted, however, that there are a few exceptions where one may appeal to the oversight mechanism without exhausting all of the internal appeal processes.⁴⁰ One may make use of the direct access procedure when:

- (1) ...
 - (a) the information requested is the personal information of the applicant and the initial request to the information holder has been refused;
 - (b) the information requested was previously in the public domain; or
 - (c) the head of the information holder is the information officer of that body.
- (2) A requester who requests access to information reasonably believed to be necessary to safeguard the life or liberty of a person and is
 - (a) refused access to the record within 48 hours of the request; or
 - (b) receives no notice of the decision of the information officer within 48 hours of the request.⁴¹

While these exceptions lessen the burden for a person seeking direct access to an independent oversight body when requested information has been denied, they only apply to relatively limited categories of information. At the essence of the right to access to information is that the process of disclosing information should be conducted in an expeditious manner.⁴² However, it could also be argued that 'appeals to the Commission or Courts would potentially be more costly in terms of time and resources'. Therefore, following the Inter-American implementation guide, 'whether

38 Model Inter-American Law on Access to Public Information (n 17 above) sec V.

39 Model Law on Access to Information for Africa (n 21 above) sec 73.

40 Model Law on Access to Information for Africa (n 21 above) sec 74.

41 Model Law on Access to Information for Africa (n 21 above) sec 74.

42 See Model Law on Access to Information for Africa (n 21 above) sec 2(a), which states: 'Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively'; Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organisation for Security

mandatory or optional, it is beneficial for the legislation to provide some system of internal appeals'.⁴³

As just explained, there are a number of distinctions between the Inter-American and African Model Laws on access to information. This list is not exhaustive of all the differences between the laws. However, these are several of the most important distinctions that have practical and significant effects on the exercise of the right.

4 Strategies of adoption: Litigation, training and advocacy

Out of the 35 member states of the OAS, 22 states have enacted national access to information legislation.⁴⁴ Seventeen of these countries had already passed legislation before the Inter-American Model Law was adopted in 2010, and five have done so in the years that followed. Of these five, Brazil and El Salvador passed their laws in 2011, and thus are unlikely to have been affected by the Inter-American Model Law since the process of drafting their laws started years before. This only leaves Guyana, which passed its law in 2013; Colombia, in 2014; and Paraguay, in 2014, as possible examples on how the Model Law was implemented.

Therefore, this chapter will look not only at the process of implementing the Inter-American Model Law, but also more generally at the process that surrounded enacting strong access to information laws in the Americas. Because both processes are not substantively different, the lessons learned from each are equally valuable when extrapolated to Africa.

In the following section, the chapter addresses the general mechanisms used in the promotion of access to information legislation in the region and will examine whether or not, and the extent to which, the Inter-American Model Law influenced these processes.

and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004), <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1> (accessed 4 August 2017), which states: 'Access to information is a citizen's right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost.'

43 OAS Department of International Law and Secretariat for Legal Affairs 'Model Inter-American Law on Access to Public Information and its implementation guidelines' 54, https://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf (accessed 20 August 2017).

44 OAS 'Comparative law database: National laws by country: Access to information', https://www.oas.org/en/sla/dil/access_to_information_base_CL_laws_country.asp (accessed 20 August 2017); Right2Info (n 1 above).

4.1 Regional

Within the broader region, there are several factors that contributed to both the strength of access to information laws and the number of countries that developed such laws. Both civil society and the regional mechanism were instrumental in this regard.

4.1.1 *Work of regional civil society networks*

An important part of the civil society story in the Americas, is the work of the Regional Alliance for the Freedom of Expression and Information (Alliance).⁴⁵ The Regional Alliance is a network of 23 civil society organisations (CSOs) from 19 different American countries that was created in October 2005 with the objective of ‘strengthening its members’ abilities and knowledge to perform interventions aimed at improving the conditions of access to information and freedom of speech in their countries, based on collective co-operation and action’.⁴⁶

The creation of a regional network of organisations is crucial to the success of an advocacy strategy. The experience of the Alliance reinforces this idea. One could argue that the ‘lack of co-ordinated advocacy work and co-operation undermines civil society’s capacity to push for greater transparency and freedom of expression, particularly at the regional level’.⁴⁷

The Alliance promotes access to information through different activities, such as strategic litigation, training and technical assistance, advocacy and applied research. All this work has had a significant impact on the adoption of access to information laws in the region.

The work of the Alliance in support of the creation of advocacy groups at the national level is of paramount importance. The Alliance has expertise on access to information that can be shared at the domestic level, and each national organisation can in turn adapt the lessons learnt from these experiences to the particular context of each country.

45 Alianza Regional por la Libre Expresión e Información, <http://www.alianzaregional.net/> (accessed 17 August 2017). Although a comparative institution in Africa exists, known as the Africa Freedom of Information Centre (AFIC), <http://www.africafoicentre.org/> (accessed 17 August 2017), the aim of this section is to provide some insight into the work of the Regional Alliance in the Americas.

46 See Alianza Regional ‘Miembros’, <http://www.alianzaregional.net/miembros/> (accessed 17 August 2017) (author’s translation from Spanish).

47 Evidence and Lessons from Latin America (ELLA) ‘Civil society’s regional network for advancing freedom of expression and access to information’ 1, http://ella.practicalaction.org/wp-content/uploads/files/120106_GOV_TraAccInf_BRIEF1.pdf (accessed 17 August 2017).

However, the expertise of the Alliance goes beyond advocacy and extends to intervening in litigation processes and research projects.⁴⁸ For example, the Alliance has intervened in litigation at the national level in the form of *amicus* briefs in order to emphasise and promote international standards on freedom of expression and access to information.⁴⁹

The Alliance played a vital role in the drafting process of the Inter-American Model Law⁵⁰ and has subsequently worked on the promotion of access to information in the region by encouraging states to adopt legislation in compliance with the standards developed therein. For example, it provided technical assistance in the drafting of access to information legislation in Honduras, Nicaragua, Guatemala, Colombia, Paraguay, El Salvador and Venezuela and in seminars about the Inter-American Model Law and Inter-American standards in Bolivia, Mexico and the Dominican Republic.⁵¹

It should be highlighted that not all civil society networks will be as efficient in tasks such as these. One aspect contributing to the influence of the Alliance is its permanent nature. The Alliance was not created with the aim of being a temporary collaboration among civil society organisations to promote a single issue. Instead, it is a stable network, with working rules, a fixed structure and funding for the activities it performs, and has its own identity separate from the organisations from which it is constituted.⁵²

4.1.2 Regional institutions

The OAS and its two organisms with the mandate to promote and protect human rights – the Inter-American Commission and the Inter-American Court of Human Rights – have also played an important role in the promotion of access to information. This has occurred not just by defining the contours of the right in the form of the Model Law, but also by putting pressure on states in the region to enforce the right of access to information.

Within the Inter-American Commission of Human Rights, the Office of the Special Rapporteur for Freedom of Expression has been paramount

48 For the research projects the organisation has undertaken, see Alianza Regional 'Investigación aplicada' <http://www.alianzaregional.net/contenidos/acciones/investigacion-aplicada/> (accessed 20 August 2017).

49 Alianza Regional 'Litigio Estratégico' <http://www.alianzaregional.net/contenidos/acciones/litigio-estrategico/> (accessed 20 August 2017). A number of strategic litigation initiatives throughout the region are outlined here, which include submitting *amici curiae* for cases in, *inter alia*, Honduras, Colombia and Argentina.

50 Alianza Regional por la Libre Expresión e Información (n 11 above) 5.

51 Alianza Regional por la Libre Expresión e Información (n 11 above) 5-6.

52 Alianza Regional 'Fuerza Colectiva: Aprendizajes de la Alianza Regional para la incidencia' 37, <http://www.alianzaregional.net/wp-content/uploads/FUERZA-COLECTIVA1.pdf> (accessed 20 August 2017).

in the development of access to information as a right and the enforcement of the right in the region. Since its creation, the right of access to information has been one of the recurrent topics of the annual reports and publications of the Office of the Special Rapporteur.⁵³ In these reports, the Special Rapporteur gives a very detailed explanation of the state of access to information in each country in the Americas, with special reference made to the adoption of access to information legislation. When applicable, these reports also give specific recommendations regarding the ways in which legislation may be improved in accordance with the Inter-American Model Law.

In addition, after the adoption of the Inter-American Model Law, the OAS created a specific project within the Department of International Law in order to '[i]mprove OAS member state capacities in transparency and equitable access to information, through promoting and publicising local implementation of the Model Law on Access to Public Information'.⁵⁴ The project aims to assist those countries which do not already have a specialised access to information law in place and that want such a law. Towards this end, it 'promote[s] the Model Law and Implementation Guide, and work[s] to generate consensus toward the adoption of national legislation in this area, in accordance with the most coherent, modern, and generally accepted legal practices in the Americas'.⁵⁵

The foregoing demonstrates that a collective effort has the potential of strengthening the work of individual organisations in the region and, therefore, further the access to information agenda. In addition, strong support from the regional mechanism can provide the necessary technical assistance, expertise, and possibly the political forum to debate access to information legislation.

In the following country-specific sections, more factors that benefitted – or that served as an impediment, where applicable – to the enactment of strong access to information laws are examined. As noted above, many countries in the Americas already had access to information laws in place, and only a few states have enacted such laws since the Inter-American Model Law was adopted. In such circumstances, the chapter will analyse the particular situations surrounding the enactment of some access to information laws in the region, such as Mexico, Chile and Brazil. In addition, Paraguay, a country whose access to information law was

53 OAS Special Rapporteurship for Freedom of Expression 'Annual Reports', <https://www.oas.org/en/iachr/expression/reports/annual.asp> (accessed 20 August 2017).

54 OAS Department of International Law 'Access to information project objective', https://www.oas.org/en/sla/dil/access_to_information_project_objective.asp (accessed 20 August 2017).

55 OAS Department of International Law 'Access to information project strategy', https://www.oas.org/en/sla/dil/access_to_information_project_strategy.asp (accessed 20 August 2017).

influenced by the Inter-American Model Law, will be contrasted with the aforementioned countries

4.2 Mexico

The Right of Access to Public Information is established in article 6 of the Political Constitution of the United States of Mexico.⁵⁶ In 2002, Mexico adopted the Federal Law for Transparency and Access to Public Governmental Information.⁵⁷

Before the eventual success of passing an access to information law in 2002, Mexico attempted three times to pass such legislation: once in 1977 after the adoption of the new Constitution; again in 1981-1982; and, finally, in 1997.⁵⁸ The political context was particularly special in 2000, due to the fact that for the first time in more than 70 years, the Partido Acción Nacional (PAN) won the presidential elections against the party Partido Revolucionario Institucional (PRI).

Mexico, like many of the other countries, experienced a mix of factors that contributed to the development of an access to information law. In this instance, it was the work of civil society organisations, the media, and a particularly beneficial context, namely, a shift in regime through presidential elections, which all positively contributed towards the development of the law.

Civil society largely drove the effort to enact the legislation and capitalised on the change in regime after the ruling party of 70 years was ousted in the elections of 2000.⁵⁹ An access to information Bill, developed as part of an anti-corruption initiative by an arm of the executive, was leaked to the press. This jump-started debate within civil society on the need to influence the direction of the access to information Bill.⁶⁰ This in turn led to the formation of the Oaxaca Group, which was an amalgamation of academics, non-governmental organisations (NGOs), social activists, journalists and mass media owners that convened to

56 Constitución Política de los Estados Unidos Mexicanos, art 6, <http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf> (accessed 20 August 2017).

57 See Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, <http://inicio.ifai.org.mx/LFTAIPG/LFTAIPG.pdf> (accessed 20 August 2017).

58 E Bertoni 'Freedom of information. Three harmless words? The role of the media and access to information laws' 5-6, <http://www.palermo.edu/cele/pdf/ATIandMedia.pdf> (accessed 20 August 2017).

59 A Puddephatt 'Exploring the role of civil society in the formulation and adoption of access to information laws: The cases of Bulgaria, India, Mexico, South Africa and the United Kingdom' 14, http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/04/03/000333038_20090403043021/Rendered/PDF/479920WBWP0Acc10Box338877B01PUBLIC1.pdf (accessed 4 August 2017).

60 Puddephatt (n 59 above) 15.

discuss best practices learned from other countries.⁶¹ The result was the Declaration of Oaxaca, which explained the Group's platform based on six democratic principles, which was disseminated to the public through mass media on 26 May 2001.⁶² The Group also created a draft Bill enshrining the right of access to information, which was endorsed by PRI (and other opposition parties) and presented as its own before congress after lobbying by the Group.⁶³ The Mexican government had also prepared its own Bill, which did not meet the Oaxaca Group's standards.⁶⁴ Due to the competing Bills,⁶⁵ the Mexican Congress called on both the government and the Oaxaca Group to participate in discussions concerning the legislation in order to produce a single united Bill.⁶⁶ This endeavour was successful and resulted in the Federal Law on Transparency and Access to Official Information, which was approved in April 2002 and passed into law later that year, in June.⁶⁷ After the adoption of the law, the Oaxaca Group decided to dissolve.

Ultimately, the media also played a crucial role in getting the access to information legislation enacted. For example, news outlets decided to publish principles developed by the Oaxaca Group on their front pages.⁶⁸ However, in previous attempts, the media could be said to have hindered the process due to a number of factors. Some commentators have noted that some media institutions relied on state subsidies to survive,⁶⁹ and

61 The name *Grupo de Oaxaca* was first used by the *New York Times* reporter Ginger Thompson, and subsequently caught on. It was so named because the group met in the city of Oaxaca in 2001. See G Thompson 'Mexicans move to pry open potentially explosive files' *The New York Times* 12 October 2001 <http://www.nytimes.com/2001/10/12/world/mexicans-move-to-pry-open-potentially-explosive-files.html> (accessed 3 August 2017).

62 Puddephatt (n 59 above) 16.

63 D Soto Abril 'The role of civil society in the recognition of access to information as a fundamental human right in the Americas' 227 https://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXV_curso_derecho_internacional_2008_Dario_Soto_Abril.pdf (accessed 4 August 2017). See also Human Rights Watch 'Lost in transition: Bold ambitions, limited results for human rights under Fox' 38 <https://www.hrw.org/reports/2006/mexico0506/mexico0506web.pdf> (accessed 4 August 2017). Ultimately, five opposition parties decided to sign and sponsor the Oaxaca Group's Bill. Puddephatt (n 59 above) 18.

64 Soto Abril (n 63 above) 227. See also Puddephatt (n 59 above) 18.

65 There was in fact a third proposed Bill by a major opposition party, Partido de la Revolución Democrática (PRD). Puddephatt (n 59 above) 18.

66 Soto Abril (n 63 above) 227; Puddephatt (n 59 above) 19; Human Rights Watch (n 63 above) 39.

67 Human Rights Watch (n 63 above) 39; Soto Abril (n 63 above) 227; Puddephatt (n 59 above) 19. This development did not occur without controversy, as many in civil society criticised the process as they were not part of the Oaxaca Group and thus did not take part in the deliberations.

68 JF Escobedo 'Movilización de opinión pública en México: el caso del Grupo Oaxaca y de la Ley Federal de Acceso a la Información Pública' 79, <http://historico.juridicas.unam.mx/publica/librev/rev/decoinc/cont/2/art/art3.pdf> (accessed 4 August 2017).

69 G Michener 'Engendering political commitment: The Grupo Oaxaca. Expertise, media projection and the elaboration of Mexico's access to information law', presented at the Southern Political Science Association 2005 conference.

others noted the controlling party's influence on parts of the media.⁷⁰ Additionally, in the 1977 attempt, reluctance on the part of the media was as a result of the proposed Bill regulating both access to information and media activity.⁷¹

At the time the Mexican law was enacted, it was one of only a few in the world to create an autonomous oversight body that had the authority to ensure compliance with an access to information legislation.⁷² This entity was known as the Federal Institute for Access to Public Information (IFAI).⁷³

Due to this and other aspects, this legislation has been regarded as one of the most progressive laws on the topic, and it has been exceptionally well-rated. When measured against a variety of factors, it scored 117 points out of a possible 150,⁷⁴ which places Mexico in the top 10 countries with the strongest access to information legislation in the world.⁷⁵

One of the important aspects of the success of the Oaxaca Group was that it was a temporary coalition with the sole goal of promoting the implementation of the law. This may be contrasted with the Regional

70 Bertoni (n 58 above) 6.

71 As above.

72 Evidence and Lessons from Latin America (ELLA) 'Video: From the law to practice: The creation of the Mexican Federal Institute for Access to Public Information and data protection', <http://ella.practicalaction.org/knowledge-multimedia/video-from-the-law-to-practice-the-creation-of-the-mexican-federal-institute-for-access-to-public-information-and-data-protection> (accessed 4 August 2017). According to ELLA, the Mexican law created the first true autonomous oversight body, as previously the oversight function was performed by the court system or an ombudsman. For example, the United Kingdom has had the Information Commissioner's Office, which was established in 1984, and has overseen compliance with the Freedom of Information Act 2000 since its inception; however, it is a semi-autonomous body that reports directly to parliament.

73 As the functions of the organisation has grown, so has its name. In 2010, the name changed to the Federal Institute for Access to Information and Data Protection (Instituto Federal de Acceso a la Información y Protección de Datos) (IFAI), and in 2015 it changed to the National Institute for Transparency, Access to Information and Data Protection (Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales) (INAI).

74 Access Info Europe (AIE) and Centre for Law and Democracy (CLD) 'Global Right to Information Rating', <http://www.rti-rating.org/> (accessed 3 August 2017). The Right to Information Rating is a programme founded by Access Info Europe and the Centre for Law and Democracy, which has a rating system whereby points are awarded based on whether the country's access to information legislation meets certain indicators for a possible total of 150 points. See <http://www.rti-rating.org/methodology> (accessed 20 August 2017). With the exception of Paraguay (61), other states that enacted legislation after the Model Law – such as Brazil (108), El Salvador (122) and Colombia (102) – were among the highest in the region. However, the states that already had legislation in place also fared quite well: Chile (93); Ecuador (73); Guatemala (94); Mexico (117); Panama (100); Peru (93); and Uruguay (91). Understandably, with Venezuela and Bolivia there was no data to be obtained as they have no legislation on the issue, and Argentina (66) scored low due to the limited protections provided by its comparatively less developed framework.

75 Access Info Europe (AIE) and Centre for Law and Democracy (CLD) 'Global Right to Information Rating: Mexico', http://www.rti-rating.org/view_country?country_name=Mexico (accessed 3 August 2017).

Alliance, which has a continuing influence and impact on the conditions of access to information in the region. The upshot of these two different approaches to advocacy is that these strategies can go hand-in-hand and may complement each other.

Another important element was the diversity of the Group: It included not only civil society organisations, but also the media and academics.⁷⁶ This diversity played a central role since it combined disparate interests into one goal. The integration of the media provided a platform whereby civil society and academics could reach a much broader audience than by themselves, allowing them to explain to most members of society the benefits in having, as well as the need for, an access to information law.

However, one must also be mindful of the potential for such a group to become exclusionary. The Oaxaca Group became such an important part of the debate and adoption of the law that some civil society organisations resented it and argued that it should be a more participatory process as the Group did not represent the whole spectrum of civil society.⁷⁷

Mexico illustrates the importance the media can play in adopting an access to information law, as well as the impact civil society can have when it comes together to promote a single cause.

4.3 Chile

Chile adopted a specific law in 2008, the Transparency Law of Public Service and Access to Information of the State's Administration, which entered into force on 20 April 2009.⁷⁸

This legislation is the result of a historical decision made by the Inter-American Court of Human Rights in the *Claude Reyes v Chile* case. In this case, the Inter-American Court called on Chile to, among other things, 'adopt, within a reasonable time, the necessary measures to ensure the right of access to state-held information, pursuant to the general obligation to adopt provisions of domestic law established in article 2 of the American Convention on Human Rights'.⁷⁹

The case was initiated in Chile in 1998, when the Terram Foundation, a Chilean environmental NGO, filed a request for information with the Chilean Foreign Investment Committee regarding a major logging

76 Puddephatt (n 59 above) 16.

77 Puddephatt (n 59 above) 19.

78 This legislation is available at <http://www.leychile.cl/Navegar?idNorma=276363> (accessed 4 August 2017).

79 *Claude Reyes v Chile* (n 10 above) para 77.

operation, known as the Condor River project. The requests were ignored and subsequent appeals were dismissed.⁸⁰

After this decision, the Terram Foundation decided to take the case to the Inter-American Commission on Human Rights, which in turn lodged an application against Chile with the Inter-American Court of Human Rights. At this point in time, the Court had only tangentially referred to the right of access to information.⁸¹ Civil society came together and devised a strategy to encourage the Court to recognise access to information as a fundamental right, and several NGOs and academics submitted *amici curiae* in support of this position.⁸² The end result of this combined effort was the first decision by an international body recognising access to information as a human right.

Without a doubt, the Inter-American Court decision was fundamental for the later development of legislation in Chile.

4.4 Brazil

Since 1988, access to information has been protected by Brazil's Constitution.⁸³ More than 20 years later, in 2011, the Law of Access to Public Information was adopted and entered into force 180 days thereafter.⁸⁴

The discussions surrounding the access to information law in Brazil were also led by civil society. In 2003, the first Bill on the subject was drafted and proposed by a legislator.⁸⁵ This was followed by another that included a broader consultation process.⁸⁶ Then, in the lead-up to the presidential elections of 2007, civil society organisations pressured the candidates to commit to adopting an access to information law if they were elected to office.⁸⁷ All the candidates agreed to this commitment. By 2009, a new proposal by the executive was sent to the legislature to be reviewed along with the older 2003 proposal.⁸⁸

80 Resolution of Corte Suprema de Chile, para 31, 18 August 1998.

81 Soto Abril (n 63 above) 232.

82 As above. Eg, the Asociación por los Derechos Civiles (ADC) and the Centre for Legal and Social Studies (CELS) were NGOs that submitted *amici* for this case.

83 Constitution of the Federative Republic of Brazil, art 5, XIV and XXXIII.

84 Brazil Câmara dos Deputados, Decree 7.724, 16 May 2012, <http://www2.camara.leg.br/legin/fed/decret/2012/decreto-7724-16-maio-2012-612993-norma-pe.html> (accessed 20 August 2017).

85 Article 19 'Brazil: New Access to Information Law becomes effective today' 16 May 2012, <https://www.article19.org/resources.php/resource/3208/en/brazil:-new-access-to-information-law-becomes-effective-today> (accessed 17 August 2017).

86 'Brazil' <http://www.freedominfo.org/regions/latin-america/brazil/> (accessed 14 August 2017).

87 As above.

88 See history of the approval process, 'Lei de acesso a informações públicas: um breve histórico', http://informacaopublica.org.br/?page_id=1948 (accessed 14 August 2017).

A number of contextual factors favoured the passing of access to information legislation in Brazil. One was the commitment by the executive – two different presidential candidates’ support for such legislation applied pressure on their political parties. Civil society also played a significant role in the process. Over the years, it became extremely well organised, and in 2011 civil society was able to involve the general public and to explain the importance of the right and its potential positive impact on their lives.⁸⁹ The diversity of the groups – which included human rights groups, anti-corruption groups and right to truth groups – was also influential. Initially, the media was not involved in the process as much as could have been expected. However, upon seeing the extent to which the public was interested in the issue, the media started to cover the process in more detail and campaigned to send the Bill to the legislature in 2008. In the end this proved to play a crucial role.⁹⁰

Towards the end of the process, in 2011 Brazil assumed a commitment at the international level through the Open Government Partnership (OGP). President Rousseff of Brazil was going to announce the Partnership at the opening session of the United Nations (UN) General Assembly, and civil society realised that the Bill would likely not be passed by the time she was going to make her remarks. Civil society then used this potential hypocrisy to leverage the government – it would be shameful to go abroad to discuss a partnership on transparency while not being able to pass access to information legislation at the national level.⁹¹

Pressure was also applied in other areas throughout this process. For example, in 2007 the Brazilian Board of Lawyers filed a direct action in the Federal Supreme Court challenging the constitutionality of certain provisions of the National Archive Policy Law and the Documents Classification Law that allowed for the unconstrained classification of documents.⁹²

The combined effect of pressure on a number of fronts was instrumental to the enactment of a strong access to information legislation

89 See, eg, Fórum de Direito de Acesso a Informações Públicas ‘Sobre o Fórum’, http://informacaopublica.org.br/?page_id=2 (accessed 14 August 2017); S Harlow ‘Brazil pushing forward with information access law, joining US for transparency partnership’, <https://knightcenter.utexas.edu/blog/brazil-pushing-forward-information-access-law-joining-us-transparency-partnership> (accessed 17 August 2017).

90 G Michener ‘Why isn’t the Brazilian press covering the freedom of information law? (Analysis)’, <https://knightcenter.utexas.edu/blog/why-isn%E2%80%99t-brazilian-press-covering-freedom-information-law-analysis> (accessed 17 August 2017).

91 The Freedom of Information Advocates Network (FOIANet) ‘Podcast – The process of approval of the Freedom of Information Act in Brazil’, http://foiadvocates.net/?avada_portfolio=podcast-the-process-of-approval-of-the-freedom-of-information-act-in-brazil (accessed 14 August 2017).

92 Particularly, these were the National Archive Policy Law (8.159/91) and the Documents Classification Law (11.111/05). See ‘Brazil’, <http://www.freedominfo.org/regions/latin-america/brazil/> (accessed 14 August 2017).

in Brazil. The legislation's rating reflects this with a score of 108 out of 150, and it is rated among the top 20 worldwide.⁹³

4.5 Paraguay

In Paraguay, Law No 5282 On Free Citizens' Access to Public Information and Governmental Transparency was promulgated on 18 September 2014.⁹⁴

The process started with a Supreme Court decision, *Daniel Vargas Télles v Municipality of San Lorenzo*, that ordered the judicial branch to deliver information on the salaries of the public officials employed there. The decision of the Supreme Court was one of the first instances where the principles established by the Inter-American Court of Human Rights case of *Claude Reyes v Chile*, discussed above, was applied.⁹⁵

In 2013, a Bill supported by civil society organisations was introduced in parliament.⁹⁶ This Bill was influenced by the Inter-American Model Law.⁹⁷ However, the Bill went through several modifications and certain portions of the Bill were hotly debated. For instance, one such area was the proposed exceptions regime. Among the modifications introduced in this regard was a provision that stated:⁹⁸

Confidentiality would be granted to information on public security or national defence, information that might prejudice international relations or negotiations and information that could damage the financial stability of the state, among other things.

In light of regressive suggested changes such as these, civil society organisations, supported by the Regional Alliance, demanded that the access to information law should meet the international standards

93 Access Info Europe (AIE) and Centre for Law and Democracy (CLD) 'Global Right to Information Rating: Brazil', http://www.rti-rating.org/view_country?country_name=Brazil (accessed 14 August 2017).

94 Inter-American Press Association (IAPA) 'Paraguay enacts new law on access to information and transparency' 25 September 2014, https://www.ifex.org/paraguay/2014/09/25/access_info_law/.

95 Instituto de Derecho y Economía Ambiental (IDEA) 'Paraguay tiene su ley de acceso a la información/Paraguay has its law on access to information', <https://web.archive.org/web/20151023165921/http://www.idea.org.py/v1/paraguay-tiene-su-ley-de-acceso-a-la-informacion-paraguay-has-its-law-on-access-to-information/> (archived version, accessed 7 August 2017).

96 'Seven Senators offer FOI Bill in Paraguay drafted by NGOs', <http://www.freedominfo.org/2013/10/seven-senators-offer-foi-bill-in-paraguay-drafted-by-ngos/> (accessed 14 August 2017).

97 'Paraguayan NGOs launch campaign to pass FOI law', <http://www.freedominfo.org/2010/09/paraguayan-ngos-launch-campaign-to-pass-foi-law/> (accessed 14 August 2017).

98 'Paraguayan senate passes access law amendments', <http://www.freedominfo.org/2013/12/paraguayan-senate-passes-access-law-amendments/> (accessed 14 August 2017).

described in the Inter-American Model Law. In a letter to the legislative branch, the Regional Alliance stated:⁹⁹

The Regional Alliance along with academics and journalists have been supporting the Institute for Environmental Law and Economics (IDEA) in the process of drafting, discussion and review of the original project that was submitted by the Steering Group on Access to Information (GIAI). That submission met all the minimum standards that we hope will serve as a basis and guidance for the legislative process.

Even though civil society was satisfied with the approval of the access to information law, it appears that the final law did not comply with international standards set in the Inter-American Model Law. Paraguay's legislation was rated 61 out of 150 points, placing it in the bottom 15 of the countries ranked.¹⁰⁰

The most problematic aspects of the legislation, which also probably explains the lower rating, is that it neither includes an exceptions regime nor an oversight mechanism.¹⁰¹

Regarding the latter issue, the Special Rapporteur of the Inter-American system noted that 'Law 5282 does not provide for the creation of an authority in charge of applying the law and controlling its fulfilment' and that such a body 'is of fundamental importance to achieve effective satisfaction of the right'.¹⁰² The Office of the Special Rapporteur also

urged the countries to adapt their legislation to strengthen the institutional structure for supervision and implementation of laws for access to public information, pursuant to the highest standards in this field, such as those adopted by the General Assembly of the OAS, in its Resolution AG/RES. 2607 (XL-O/10), by means of which it adopts the 'Model Inter-American Law on Access to Information'.¹⁰³

Furthermore – and in contrast with the Mexican case – according to Ezequiel Santagada, a lawyer for the Paraguayan Environmental Law and Economy Institute,¹⁰⁴ the press, or a portion of it, was not in support of the adoption of an access to information law.¹⁰⁵

99 Alianza Regional 'Ref: Ley de Acceso a la Información Pública de la República del Paraguay', <http://rendiciondecuentas.org.mx/wp-content/uploads/2013/12/Carta-al-Presidente-del-Senado-del-Paraguay-por-proyecto-de-ley-de-acceso-a-la-informaci%C3%B3n.pdf> (accessed 20 August 2017) (author's translation from Spanish).

100 Access Info Europe (AIE) and Centre for Law and Democracy (CLD) (n 93 above).

101 As above.

102 OAS 'Annual Report of the Inter-American Commission on Human Rights 2014, Volume II, Annual Report of the Office of the Special Rapporteur for Freedom of Expression' 9 March 2015, OEA/Ser. L/V/II., Doc. 13, para 844, <https://www.oas.org/en/iachr/expression/docs/reports/annual/Annual%20Report%202014.pdf> (accessed 20 August 2017).

103 As above.

104 Known in Spanish as the Instituto de Derecho y Economía Ambiental de Paraguay.

105 Bertoni (n 58 above) 3 fn 9.

Paraguay may serve as a cautionary tale. Even with a strong model law and legal precedent in place, Paraguay exemplifies how the process of enactment may be derailed so that the resultant legislation is weakened.

5 Conclusion

This article highlights useful experiences in the Americas region concerning the development of access to information legislation in light of particular contexts, international jurisprudence, advocacy strategies and the Inter-American Model Law. These experiences may shed some light on the development of access to information legislation in countries in Africa and the implementation of the African Model Law.

It is important to recognise the differences in the political, economic and cultural contexts of both regions. Most of the countries in the Americas, by the time the access to information debate started to develop, had already transitioned from dictatorial regimes and civil war to more democratic forms of governance. The public's need to know about the relatively recent human rights violations that were committed, as well as the opportunity to build and strengthen democratic institutions, provided the perfect platform for a broad discussion on access to information and transparency. These differences may also have resulted in divergence in the adoption process of the model laws, as well as the several significant differences in the substance of the model laws from both regions.

The lessons learned from the experiences of civil society and other actors in the Americas may be translated to the African region in order to develop effective strategies to foster the implementation of access to information laws. As shown above, there are a number of ways in which civil society may encourage the implementation of such laws, whether it is through the effective use of the media and proposing a draft Bill, using contextual situations to an advantage and exerting pressure on presidential candidates, or through strategic litigation. It is also important to keep in mind that the existence of a model law does not necessarily mean that the domestic law will live up to the model's standards.

More specifically, the role of regional human rights institutions is paramount and the use of its expertise to develop further and more specific guidelines for the implementation of access to information. In this regard, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, working with civil society organisations, could use the example of the OAS so as to develop an implementation guide to the Inter-American Model Law. Such a document would be useful in guiding each member state on implementation issues that are not usually included in a model law, such as budgeting for the implementation of the access to information law or initial capacity building.

Furthermore, it is important to strengthen regional coalitions – such as the Africa Freedom of Information Centre (AFIC) – in relation to the implementation of access to information legislation on the continent. These institutions should have a specific budget to carry out the necessary activities, such as monitoring access to information legislation on the continent, advocacy at the international and national level, and to perform research on the subject.

Strategic litigation at the national and regional levels could also be potentially useful to initiate the debate about access to information in a particular country. Sensitive information that is more likely to attract the attention of the general public could be used to create a broader campaign about the need for access to information. Therefore, civil society organisations could create spaces to share experiences and best practices on the continent as well as litigation and advocacy opportunities.

Finally, regional institutions should prioritise the right of access to information on the continent and, among other activities, should create a project with the objective of assisting states to develop access to information legislation.

THE IMPLEMENTATION OF THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION IN AFRICA: OPPORTUNITIES AND CHALLENGES

Ololade Shyllon

Abstract

Unlike most other internationally-recognised human rights, access to information is an offshoot of a separately-recognised human right – the right to freedom of expression. However, these provisions on freedom of expression have been progressively interpreted and expanded by regional and international human rights bodies to include the right of access to information held by the state as a separate and distinct right. As with international human rights standards, most African constitutions do not contain a right of access to information. Thus, this chapter examines existing avenues for the constitutional recognition of access to information and their utility for the enjoyment of the right in Africa. The chapter finds that, although the inclusion of an express provision on access to information in African constitutions is ideal, the absence of a constitutional guarantee of access to information is not a barrier to the enjoyment of this right. However, several factors, such as the notoriety of Africa as a continent emblematic of ‘constitutions without constitutionalism’, and the fact that the nature of constitutional rights is such that the avenues for their enforcement are far beyond the reach of the ordinary African, make the constitutional recognition of access to information a necessary but insufficient avenue for the enjoyment of the right of access to information in Africa.

1 Introduction

The independence constitutions of most African states were modelled closely along the lines of those of their former colonial masters. The legitimacy of these constitutions was subsequently questioned due to the lack of popular participation that characterised their development,¹ and the minimal attention they devoted to continent-specific problems, such as

¹ J Hatchard *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-19.

ethnic tensions and rivalries.² Not surprisingly, soon after independence many constitutions were amended under the guise of fostering nation building and socio-economic development.³ In many instances, however, the constitutional amendments led to the growth of dictatorial and authoritarian regimes⁴ symbolised by successive military *coups*⁵ and one-party states.⁶ While military *coups* inevitably suspended the operation of constitutions, many constitutions were amended to legitimise one-party rule,⁷ or to solidify the concentration of power in the hands of the executive.⁸

The 'third wave of democracy',⁹ the increasing emphasis on good governance at the regional level¹⁰ and its use as a condition for eligibility for receipt of financial aid,¹¹ and the 'radical change of heart' by former colonial powers towards former colonies,¹² brought with it a flurry of constitution making in many African states.¹³ Between 1990 and 2004, all

- 2 See generally B Munslow 'Why has the Westminster model failed in Africa?' (1983) 36 *Parliamentary Affairs* 218; R Howard 'Legitimacy and class rule in Commonwealth Africa: Constitutionalism and the rule of law' (1985) 7 *Third World Quarterly* 323.
- 3 C Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling roles of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 1.
- 4 HW Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African paradox' in I Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991); LC Keith & A Ogundele 'Legal systems and constitutionalism in sub-Saharan Africa: An empirical examination of colonial influences on human rights' (2007) 29 *Human Rights Quarterly* 1065 1068.
- 5 The first military *coup* in Africa took place in Togo on 13 January 1963 and, by 1992, almost 90% of sub-Saharan Africa had either experienced a *coup*, a *coup* attempt or a *coup* plot. See generally JC Jenkins & A Kposowa 'The political origins of African military *coups*: Ethnic competition, military centrality and the struggle over the postcolonial state' (1992) 36 *International Studies Quarterly* 271.
- 6 In 1987, Zimbabwe became a one-party state and was the 35th African state to do so. See generally P Slinn 'A fresh start for Africa? New African constitutional perspectives for the 1990s' (1991) 35 *Journal of African Law* 1; P Nyong'o 'Africa: The failure of one-party rule' (1992) 3 *Journal of Democracy* 90.
- 7 Several independence constitutions were amended to introduce one-party rule, such as those of Ghana (in 1964), Tanzania (in 1965), Malawi (in 1966), Zambia (in 1972) and Sierra Leone (in 1978).
- 8 In Kenya, eg, the 1963 Independence Constitution was amended over 30 times, mostly to expand presidential power, while whittling down provisions ensuring checks and balances by the legislature and the judiciary. See Hatchard (n 1 above) 19-21.
- 9 S Huntington *The third wave: Democratisation in the twentieth century* (1991).
- 10 The transformation of the Organisation of African Unity to the African Union in 2000 brought with it a greater focus on issues of democracy, human rights and good governance.
- 11 See M Sinjela 'Constitutionalism in Africa: Emerging trends' in 'The Evolving African Constitutionalism' (1998) 60 *The Review* (Special Issue) 25, where then British Foreign Secretary, Douglas Hard, was quoted as saying that '[g]overnments which persist with repressive policies, corrupt management, wasteful discredited economic systems, should not expect us to support their folly with scarce aid resources which could be used better elsewhere'.
- 12 F Reytsjens 'The winds of change. Political and constitutional evolution in Francophone Africa' (1991) 35 *Journal of African Law* 44.
- 13 See generally J Wiseman 'Democracy and the new political pluralism in Africa: Causes, consequence and significance' (1993) 14 *Third World Quarterly* 439; R Joseph 'Democratisation in Africa after 1989: Comparative and theoretical perspectives' (1997) 29 *Comparative Politics* 363.

independence constitutions were either entirely replaced or amended to place a greater focus on issues such as human rights and democratic governance.¹⁴ This period saw the liberalisation of the political systems in most African states and has been termed the 'second independence',¹⁵ 'second liberation'¹⁶ or 'new winds of change'.¹⁷

A common feature of these newly adopted constitutions was the introduction of the constitutional protection of human rights, for the first time in some states.¹⁸ In others states, there was an expansion of categories of human rights guaranteed under previous constitutions.¹⁹ One such right that found its way into constitutions during this period is the right of access to information. This inclusion signifies that in Africa, like in other parts of the world, there is growing recognition of the importance of access to information as a right necessary for creating and sustaining democratic governance by fostering a culture of transparent, participatory and accountable governance. Hence, access to information was increasingly included as a separate and distinct constitutional right, rather than by virtue of the equally-acceptable practice of reading in this right into freedom of expression provisions.

Since 2010, most newly-adopted constitutions in Africa have provided for the right of access to information as a human right.²⁰ Examples are Angola (2010);²¹ Kenya (2010);²² Morocco (2011);²³ Zimbabwe (2013);²⁴ and Egypt (2014).²⁵ Against this background, this chapter investigates the actual and potential avenues for the recognition of access to information as

14 Keith & Ogundele (n 4 above) 1066. See also B Dressel 'Strengthening governance through constitutional reform' <https://www.adb.org/publications/strengthening-governance-through-constitutional-reform> (accessed 9 February 2018).

15 C Legum 'The coming of Africa's second independence' (1990) 13 *Washington Quarterly* 129.

16 L Diamond & M Plattner (eds) *Democratisation in Africa: Progress and retreat* (1999) ix.

17 See J Ihonvbere & T Turner 'Africa's second revolution in the 1990s' (1993) *Security Dialogue* 349; S Riley 'Africa's "new wind of change"' (1992) 48 *The World Today* 116.

18 The independence constitutions of most former French colonies did not contain human rights provisions, although their Preambles often made reference to human rights in the context of the Universal Declaration of Human Rights. Today, it is only the Constitutions of Cameroon and Comoros that do not contain a 'Bill of Rights' but merely affirm commitment to the principles of the Universal Declaration of Human Rights, the United Nations Charter and the African Charter on Human and Peoples' Rights.

19 Eg, although the Independence Constitution of Ghana of 1957 had no constitutional provisions on human rights, the Constitution of 1969 did. A comparison of the Bill of Rights in the 1969 Constitution and that of 1992 (as amended in 1996) shows that the categories of human rights guaranteed were expanded.

20 See table below p 94 for provisions of the 13 stand-alone access to information provisions in Africa. A distinction is made between mere constitutional amendments and the adoption of an entirely new constitutional text or, more specifically, the review of the human rights provisions in constitutions.

21 Art 200(4) Constitution of Angola 2010.

22 Sec 35 Constitution of Kenya 2010.

23 Art 27 Constitution of Morocco 2011.

24 Sec 62 Constitution of Zimbabwe 2013.

25 Art 68 Constitution of Egypt 2014.

a constitutional right, the challenges to this constitutional recognition and what these challenges mean for the overall promotion and protection of the right of access to information on the continent.

2 Theoretical justifications for the adoption of access to information as a constitutional right in Africa

The end of the Cold War brought with it a progressive end to the blatant disregard for the normative and actual application of principles of democracy, constitutionalism and human rights in many African states, even though sometimes only superficial.²⁶ As the 'winds of change' blew across Africa, African leaders, including formerly unapologetic dictators who had metamorphosed into 'born-again' democrats,²⁷ embraced constitutionalism and human rights as an imperative for democracy and good governance.²⁸ The constitution, being the *grundnorm* or the supreme law of the land from which all other laws derive their validity,²⁹ and the alignment of constitutional provisions with democratic principles became a method of affirming commitment to constitutionalism and respect for human rights. As a result, reform predicated on establishing constitutionalism with human rights protection as a central component became widespread, at the very least as a token sign of constitutional legitimacy.³⁰

Despite the perceived insincerity of this focus on human rights in African constitutions, the relationship between both concepts is clear. The promotion and protection of human rights are core elements of constitutionalism and have even come to be regarded as 'central to genuine

26 C Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 6.

27 C Fombad 'Constitutional reforms and constitutionalism in Africa: Some reflections on current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1021.

28 This was both individual and collective. Individually, this was mostly reflected in constitutional reforms. Collectively, this was evident in the transformation of the OAU into the AU and the new continental focus on democracy, human rights and good governance as evidenced by the Constitutive Act of the AU and subsequent treaties it adopted. See generally C Fombad 'The Constitution as a source of accountability' (2010) 2 *Speculum Juris* 41.

29 The *grundnorm* or the 'basic norm' was developed by positivist philosopher, Hans Kelsen, to describe the basic rules that underlie any legal system. For Kelsen, in law there exists a hierarchy of norms, with each norm deriving its validity from the other. The *grundnorm*, from which all norms derive their validity, however, is not justified by reference to other norms, but from a 'fundamental assumption made by people in society about what would be treated as law'. See H Kelsen *General theory of law and state* (1961).

30 L Backer 'From constitution to constitutionalism: A global framework for legitimate public power systems' (2009) 113 *Pennsylvania State Law Review* 671.

constitutionalism',³¹ the 'overall purpose of constitutionalism',³² and the 'very essence of constitutional government'.³³ In essence, a constitution containing comprehensive human rights provisions is an indispensable first step towards engendering constitutionalism. However, beyond the interconnectedness between constitutionalism and human rights, constitutionalism shares a specific link to the right of access to information in particular. Access to information is a multi-faceted tool for combating the arbitrary exercise of government power, corruption and mismanagement of national resources and for ensuring that in all its dealings, governments act 'rationally and with due deliberation'.³⁴ At the same time, at the core of constitutionalism lies a progressive adherence to the foundational values of the constitution, through a combination of rules and mechanisms established by the constitution, in such a manner as to enable the governed to hold the government accountable and to limit arbitrary action.³⁵ In other words, both concepts are concerned with limiting the arbitrary exercise of government power. Thus, the constitutional guarantee of this right is essential for all states that genuinely aspire towards constitutionalism.

It is, therefore, no wonder that access to information activists persistently canvass for the inclusion of a stand-alone provision on access to information in constitutions, as a way of laying a strong foundation for the exercise of the right. In doing so, two main justifications are generally relied upon. First, and in true reflection of the concept of the interdependence and indivisibility of rights, is the important role that access to information plays in the realisation of other rights. This assertion, which has been proven severally, has led to the right being commonly referred to as an 'enabling right'.³⁶ The second justification is the role of access to information in fostering democracy, transparency and accountability, which, together with human rights protection, are all 'essential elements of constitutionalism'.³⁷ Thus, states – all of which theoretically aspire towards constitutionalism – ideally should include

31 Quoting Carl Friedrich in R Chandler et al *The constitutional law dictionary: Individual rights* (1987) 35.

32 P Sigmund 'Carl Friedrich's contribution to the theory of constitutionalism-comparative government' in J Pennock & J Chapman (eds) *Constitutionalism: Nomos XX* (1979) 39.

33 B Nwabueze *Constitutionalism in the emergent states* (1973).

34 I Currie & J de Waal *The Bill of Rights handbook* (2005) 684.

35 O Shyllon 'The contribution of legal frameworks on access to information to socio-economic progress in Africa: Case studies from Nigeria, South Africa and Uganda' LLD thesis, University of Pretoria, 2016.

36 See generally 'Access to information: An instrumental right of empowerment' <https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf> (accessed 8 February 2018).

37 In identifying the nature and scope of the term 'constitutionalism', several authors have advanced what they have termed 'features' 'characteristics', 'components' or 'elements' of constitutionalism. Henkin, eg, lists nine 'essential elements' of constitutionalism as government according to the constitution; separation of powers; popular sovereignty and democratic government; constitutional review; independence

provisions facilitating the realisation of these objectives in the text of their national constitutions.³⁸

Support for the inclusion of access to information as a distinct constitutional right has been expressed even before Seychelles introduced the first stand-alone access to information provision on access to information in Africa into its 1993 Constitution. Shivji, for example, had called for access to information to be 'constitutionally entrenched'.³⁹ Bovens has reasoned that the constitutional protection of access to information makes the obligation for states to respect, fulfil, promote and protect the right more tangible, in line with international human rights law.⁴⁰ Bovens goes as far as suggesting that in addition to the traditionally-recognised civil, political, and social rights in constitutions, a fourth category of 'information rights' should be added.⁴¹

Bovens bases his insistence on the constitutional recognition of access to information on the important role information plays in the life of citizens – the 'element of citizenship' concept. This concept views access to information as important to citizens as subjects, as *citoyen* and as members of society.⁴² He explains that as subjects, citizens need to act with 'legal certainty, lawfulness and cognisance', and this is only possible if subjects are certain of being informed timeously and adequately about their rights and duties. As *citoyen*, citizens' contribution to democratic accountability and control of the executive and legislature through participation in the making of laws and policies is impossible without information from the state. Finally, as members of society, individuals need information to make rational decisions and plan their lives accordingly. He also sees a social justice element in that the constitutional guarantee of access to information to some extent could address the inequalities in accessing information between the wealthy, who have the means to do so, and the poor who do not.⁴³

of the judiciary; control of the police; civilian control of the military; individual/human rights; limitation of suspension and derogation; and strict conditions for constitutional amendments. See L. Henkin 'Elements of constitutionalism' in International Commission of Jurists 'The evolving African constitutionalism' (1998) 60 *The Review* (Special Issue) 11-22. See also L. Henkin 'A new birth of constitutionalism: Genetic influences and genetic defects' (1993) 14 *Cardozo Law Review* 533.

38 Currie & De Waal (n 34 above) 692.

39 I. Shivji 'State and constitutionalism: A new democratic perspective' in I. Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 43.

40 M. Bovens 'Information rights: Citizenship in the information society' (2002) 10 *Journal of Political Philosophy* 317.

41 As above.

42 As above.

43 As above. However, there is unease about the use of the term 'citizenship' to illustrate his point. This is because a fundamental principle of access to information is that the enjoyment of this right should not be restricted only to citizens but to 'everyone'. To do so would deprive this very 'meaningful existence' to all those who are not citizens but residents of a given country and are therefore subject to its legal system.

Peled and Rabin also posit a four-fold justification for access to information as a constitutional right, namely, political-democratic, instrumental, proprietary and oversight/transparency.⁴⁴ The political-democratic justification entails that the centrality of access to information for public participation makes its inclusion a condition for any constitutional democracy and also for the exercise of other rights, such as freedom of expression. Their instrumental justification of access to information lies in its instrumentality to the realisation of other rights. The proprietary justification means that information held by the state is the property of citizens and residents, as it is gathered by a public service funded for that purpose by tax payers. As 'owners' of the information, therefore, citizens and residents are entitled to this information subject only to the need to protect the interests of other 'owners'.⁴⁵ Last is the oversight justification, which relates to the role of constitutions in ensuring good governance through the oversight of government to ensure transparency and to fight corruption.

Thus, the multi-functional, multi-dimensional and multi-rationale nature of the right of access to information,⁴⁶ the centrality of human rights to constitutionalism, and the aspirational and transformational role constitutions play in society, make the express constitutional protection of access to information an ideal for any democratic state.

3 Overview of the constitutional protection of access to information in Africa

The Republic of Seychelles was the first African country to incorporate the right of access to information as a stand-alone right in its Bill of Rights. This occurred with the coming into force of the 1993 Constitution of Seychelles, following its approval in the June 1993 constitutional referendum.⁴⁷ This pioneering constitutional recognition of access to information was replicated in quick succession by Malawi, Uganda and South Africa.⁴⁸ After South Africa's 1996 constitutional provision on access to information, which at the time was the most progressive on the

44 R Peled & Y Rabin 'The constitutional right to information' (2011) 42 *Columbia Human Rights Law Review* 357.

45 This view is shared by R Snell & P Sebina in 'Information flows: The real art of information management and freedom of information' (2007) 35 *Archives and Manuscripts* 54 65.

46 R Calland 'The right of access to information: The state of the art and the emerging theory of change' in F Diallo & R Calland *Access to information in Africa: Law, culture and practice* (2013) 21.

47 MC Twomey 'Seychelles country report, Oxford constitutions of the world' http://www.icla.up.ac.za/images/country_reports/seychelles_country_report.pdf (accessed 9 February 2018). For full details of all 13 constitutional provisions on access to information, see annexure 2.

48 Access to information was introduced into the newly-drafted Constitution of Malawi in 1994, the Constitution of Uganda in 1995 and the Constitution of South Africa in 1996. Note that sec 23 of the interim Constitution of South Africa 1993 did guarantee

continent,⁴⁹ it took almost another decade and a half for access to information to once again be constitutionally entrenched in another African constitution.⁵⁰ Between 2010 and 2014, the Constitutions of Angola, Guinea, Kenya, Niger, Morocco, South Sudan, Somalia, Zimbabwe and Egypt guaranteed access to information as a human right. In total, therefore, access to information has been constitutionally entrenched as a stand-alone human right in 13 countries across the continent.

There are three broad categories of constitutional provisions on access to information in Africa. In the first category are those constitutions that expressly provide for access to information held by the state as part of its Bill of Rights. In another category are those provisions that recognise a 'right to' or 'freedom of' information, usually as part of freedom of expression. However, the majority of African constitutions fall within the third category of constitutional provisions that make no reference to access to information in their protection of freedom of expression. These three categories are now discussed.

3.1 Express constitutional protection of access to information in Africa

A brief overview is undertaken of the 13 express constitutional provisions on access to information in Africa to provide some insight into the variations in their normative content and the possible impact on the practical enforcement of the right.

3.1.1 Categories of persons who can access information

Ideally, the right of access to information should be granted to every person – citizens and non-citizens alike.⁵¹ Of the 13 constitutional provisions guaranteeing the right of access to information, six grant the right to 'everyone', 'every person', 'individuals' or the 'public' in general.⁵² Six other provisions restrict this right only to its citizens. Section 62 of Zimbabwe's Constitution, however, is unique, in that it expressly guarantees the right of access to information to citizens, permanent

access to information on a much narrower basis than the subsequent Constitution of 1996.

49 The access to information provision in the interim Constitution of 1993 was substantially modified in the 1996 Constitution.

50 Although the 1997 Constitution of Eritrea adopted during this period includes the right of access to information, it has never entered into force. As a result, none of its provisions are of any effect, and are not considered.

51 Art 9 has been interpreted as guaranteeing the right to access information to 'everyone'. Thus, Principle IV(2) of the Declaration of Principles on Freedom of Expression in Africa refers to the right of 'everyone' to access information held by public and private bodies.

52 These are Angola, Malawi, Niger, Seychelles (the public), Somalia and South Africa.

residents and 'every person', as opposed to all others that grant the right either only to citizens or to everyone.

However, there are differences in the circumstances giving rise to the application of the right by these three different categories in Zimbabwe. On one hand, all citizens and permanent residents have the right to access any information held by 'the state or by any institution or agency of government.' On the other hand, 'every person' can access information held by any person 'including the state', only when the information is 'required for the exercise or protection of a right'. In essence, persons who are neither citizens nor permanent residents only have a right to access information where they can prove that such information is needed to protect or exercise another right.

This novel formulation in the Constitution of Zimbabwe attempts to strike a balance between the reluctance of many states to grant an unrestricted right of access to information to non-citizens, and the reality that the failure to extend the right to residents or any other person on Zimbabwean territory could allow the violation of various other human rights. However, as will be shown below, the restriction on the categories of persons entitled to the right in many cases could defeat some of the very objectives the provision seeks to achieve, that is, transparency and accountability of public institutions.

The negative impact of restricting the application of this right only to citizens is illustrated by two decisions of Kenyan courts. In *Famy Care Ltd v Public Procurement Administrative Board*,⁵³ the High Court of Kenya held that section 35 of the Constitution of Kenya accords the right of access to information only to citizens. The Court went on to interpret the right as one that could be exercised neither by juristic persons nor natural persons who were not citizens of Kenya, as defined by the citizenship provisions in the Kenyan Constitution.⁵⁴ The plaintiff, a company registered in India, therefore did not qualify as a citizen. It was irrelevant that the plaintiff sought access to documents to prove irregularities in a procurement award by a public body, thus a matter of public interest.⁵⁵

In *Nairobi Law Monthly Co Ltd v Kenya Electricity Generating Company*,⁵⁶ the plaintiff in a defamation case sought access to documents to prove the truth of the statement in question. The High Court, following the earlier decision in the *Famy* case, held that a company incorporated in Kenya was a juristic person with 'Kenyan nationality' and thus was incapable of

53 Petition 43 of 2012, 2012 Kenya Law Reports, <http://kenyalaw.org/caselaw/cases/view/88265> (accessed 8 February 2018).

54 Para 25.

55 Paras 29-30.

56 Petition 278 of 2011, http://kenyalaw.org/CaseSearch/view_preview1.php?link=32814989894189150344229 (accessed 8 February 2018).

relying on section 35(1) of the Constitution which was applicable only to natural persons with Kenyan citizenship.⁵⁷

The requirement that a person seeking to access information must be a citizen was taken to a somewhat illogical conclusion in both cases, particularly in the *Nairobi Monthly* case. The courts in both cases ought to have adopted a purposive and generous interpretation of the Kenyan Constitution, instead of a strict literal interpretation. This is particularly so given the fact that the High Court of Uganda, faced with the same issue, has interpreted 'citizen' to include corporate bodies, stating that 'corporate bodies can enforce rights under the Bill of Rights, for they are taken as persons in law, though not natural persons'.⁵⁸

The adoption of the Access to Information Act of Kenya in 2016, however, has settled the issue in a positive manner. Section 2 of the Kenyan Access to Information Act defines 'citizen' to mean 'an individual who has Kenyan citizenship and a private entity that is controlled by one or more citizens'. As a result, a recent attempt to rely on the previous interpretation of 'citizen' based on section 35(1)(a) of the Constitution has been rejected by the High Court in *Katiba Institute v President's Delivery Unit*.⁵⁹ In this case it was held that the interpretation of section 35(1)(a) of the Constitution and of section 2 of the Access to Information Act was that 'a juristic person whose director(s) is a citizen, is considered a citizen for the purpose of exercising the right to access information' under the Constitution and the Access to Information Act.⁶⁰

3.1.2 Scope of application

A distinction is often made between the types of institutions that must make information available. Generally, the constitutional application of access to information tends to be only vertical, that is, against the state, and not horizontal, namely, against individuals or private entities. Thus, at the barest minimum, information held by all public institutions ought to be accessible. In this regard, the constitutions of all 13 countries guarantee a right of access to information held by the state⁶¹ or public authorities or administration.⁶² Some constitutions ensure that the scope of applicability is clear by expressly stating that the right applies to any information held

⁵⁷ Paras 75-82.

⁵⁸ See *Greenwatch Ltd v Attorney-General & Another* Case HCT-00-CV-MC-0139 of 2001, (2002) UGHC, 28. Part of the reasoning of the judge in this case was that sec 237 of the Constitution provides that land belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure system provided in the Constitution. Since a limited liability company such as the plaintiff was allowed to own land, it could be regarded as a citizen, albeit a corporate citizen.

⁵⁹ Constitutional Petition 468 of 2017, <http://kenyalaw.org/caselaw/cases/view/144012/> (accessed 1 March 2018).

⁶⁰ Constitutional Petition 468 of 2017 (n 59 above) para 43.

⁶¹ Egypt, Kenya, South Africa, Somalia, South Sudan, Malawi, Uganda and Zimbabwe.

⁶² Seychelles, Morocco and Niger.

by the state and any of its 'institutions', 'organs' 'agencies' and at 'every level'.⁶³ Although the Constitutions of Angola and Guinea do not expressly indicate the institutions from which information is to be obtained, it can be deduced from the types of information that can be accessed (such as archives and administrative records in Angola and public information in Guinea) that such information will ordinarily be held by the state.

Some constitutional provisions go further by including in their definition of 'the state' bodies that perform a public function or public service. Thus, in Morocco, the right of access to information is extended to 'elected authorities and organs performing public services' and, in Seychelles, to 'authorities performing government functions'. This is in recognition of the growing trend in Africa and elsewhere of ordinarily private bodies to perform public services or functions on behalf of the state, either as a result of privatisation of former state entities or the conclusion of service level agreements between states and private entities.

A final category of constitutional provisions are those allowing the right to access not only the information held by the state, but also that of private entities. However, this extension of the right to private bodies is restricted to cases where the information 'is necessary for the exercise or protection of a right'. This progressive provision can be found in the Constitutions of Kenya, Somalia, South Africa and Zimbabwe. With the exception of Kenya, this right is guaranteed to all persons in these countries and not only to citizens.

3.1.3 Proactive disclosure

The overarching aim of legal frameworks on access to information is to make proactive disclosure of information the norm and secrecy the exception. Yet, only the Constitution of Kenya in section 35(3) provides that 'the state shall publish and publicise any important information affecting the nation'. Thus, the High Court in the *Famy* case in interpreting article 35(3) has held that the state has a duty not only to proactively publish information of public interest, but also to provide open access to such specific information individuals may require from the state.⁶⁴ The utility of including the principle of proactive disclosure of information in constitutional provisions on access to information cannot be overemphasised. It sends a clear message to the state and all those required to provide access to information that there is a positive obligation to create systems for doing so and, to the public, that the need to request access to information should be the exception and not the rule.

63 South Sudan, Malawi, Uganda and Zimbabwe.

64 *Famy* case (n 53 above) para 34.

3.1.4 Exemptions

Access to information, like most other rights, is not an absolute right. There are a variety of instances in which access to information can be justifiably restricted, such as for purposes of national security or the protection of the privacy of others. While the constitutional provisions on access to information in Egypt, Kenya, Guinea, Niger, South Africa and Somalia are silent on the matter, all other constitutions specify categories of information to be exempted from disclosure. The scope of such exempted information vary considerably between narrow and broad exemptions and between those that subject exemptions to further tests and those that do not.

The constitutional provisions of South Sudan and Uganda are narrow as they exempt information only when its disclosure is likely to prejudice the right to privacy of others and 'public security' or 'the security or sovereignty of the state' respectively. Much broader exemptions include 'interests of defence, public security, or professional confidentiality';⁶⁵ 'security and defence matters, state secrecy, criminal investigation and personal privacy';⁶⁶ national security, prevention and detection of crime; compliance with an order of a court; legal privilege; protection of the privacy of others;⁶⁷ national defence; the internal and external security of the state; the private lives of persons; the protection of constitutionally-guaranteed rights; and the protection of sources and domains specified by law.⁶⁸

In the case of Seychelles and Zimbabwe, the wide exemptions are mitigated by the subjection of their application to objective tests which would determine, on a case-by-case basis, whether these exemptions should be applied or not. In Seychelles, the application of exemptions is subject to two conditions: It must be prescribed by law and must also be necessary in a democratic society. In Zimbabwe, the test is even more stringent. Exemptions must be provided by law and must be 'fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'. This progressive test, however, is significantly constrained by the curious general restriction placed on the right to access information from the state only where 'the information is required in the interests of public accountability'.⁶⁹ A restrictive interpretation of the term 'public accountability' could lead to the application of the test in most cases becoming redundant.

65 Zimbabwe.

66 Angola.

67 Seychelles.

68 Morocco.

69 Sec 62(1).

Generally, most other constitutions have general limitation clauses containing a test to be applied to justify limitations to all or some of the rights guaranteed by the Constitution. Relevant examples are the Constitutions of Angola,⁷⁰ Egypt,⁷¹ Kenya,⁷² Malawi,⁷³ Niger,⁷⁴ Nigeria,⁷⁵ Seychelles,⁷⁶ Somalia,⁷⁷ South Africa,⁷⁸ Uganda⁷⁹ and Zimbabwe.⁸⁰ In essence, the exemptions contained in constitutional provisions on access to information as well as those contained in the provisions of the respective access to information laws, where these have also been adopted, are subject to the these general limitation clauses.

3.1.5 Requirements to adopt implementing legislation

Another feature of constitutional provisions on access to information in Africa is the imposition of an obligation to adopt a law to give effect to the constitutional right. This is the case with regard to the Constitutions of Egypt, Somalia, South Africa, Uganda and Zimbabwe. Only two of these countries have so far fulfilled this obligation. In South Africa and Uganda, access to information laws were adopted in 2000 and 2005, respectively.⁸¹ In the case of Somalia, non-compliance with the obligation to adopt access to information legislation is probably due to the fact that it is generally regarded as a failed state.⁸²

The case of Zimbabwe is somewhat unique in that, in spite of the existence of an access to information law since 2002, the new Constitution, when adopted in 2013, specified that 'legislation must be adopted to give effect to the right'.⁸³ Perhaps the inclusion of this provision is not unconnected with the widely-held perception that the Access to Information and Protection of Privacy Act (AIPPA) is a bad law the real aim of which is to restrict access to information, while at the same placing undue restrictions on the media and the practice of journalism in Zimbabwe. Thus, in 2015, the government established a 25-member

70 Art 57 Constitution of Angola 2010.

71 Art 92 Constitution of Egypt 2014.

72 See sec 24 Constitution of Kenya 2010.

73 See art 44 Constitution of Malawi 1995.

74 Art 45 Constitution of Niger 2010.

75 Sec 45(1) Constitution of Nigeria 1999.

76 Secs 47 & 48 Constitution of Seychelles 1993.

77 Art 38 Constitution of Somalia 2012.

78 Sec 36, Constitution of South Africa 1996.

79 See art 43 Constitution of Uganda 1995.

80 See sec 86 Constitution of Zimbabwe 2013.

81 These are the Protection of Access to Information Act and the Access to Information Act, respectively.

82 From 2008 to 2012, the Foreign Policy and Global Policy for Peace's Failed States Index featured Somalia in the top position. Since 2014, Somalia has moved to second place below South Sudan, except for 2016, during which it briefly regained the top spot as the most fragile state in the world. Note that the index has since 2014 been renamed the 'Fragile States Index', <http://fundforpeace.org/fsi/country-data/> (accessed 9 February 2018).

83 See sec 62(1) Constitution of Zimbabwe 2013.

Information and Media Panel of Inquiry (IMPI) and tasked it with, amongst other things, inquiring into the policy and legal adequacy of the information sector.⁸⁴ The IMPI report concluded that AIPPA in fact did not provide for access to information, especially to the extent envisaged by the Constitution, and recommended as follows:⁸⁵

AIPPA should be repealed and replaced with a law that specifically provides for access to information with ample provision for protecting this right, including its expansion to information held by non-public bodies as envisaged in section 61 of the Constitution, while media regulation issues are provided for under a separate law.

The majority of the constitutional provisions on access to information, however, are silent on the issue of the adoption of laws to give effect to the right.⁸⁶ Of these, Angola, Guinea, Malawi, Morocco, Niger, Seychelles⁸⁷ and South Sudan have in fact adopted access to information laws.⁸⁸

While one may be quick to assume that the imposition of the enactment of legislation to give effect to the constitutional right of access to information is necessary, if only to hasten or guarantee the enactment of the law, the above shows that this may not always be the case. As indicated above, seven countries in which no such obligation was imposed have gone ahead to enact the necessary legislation and three other countries are at advanced stages of doing so. If the experience of Uganda, which took ten years after the constitutional entrenchment of access to information to enact legislation, is anything to go by, the inclusion of the requirement for the adoption of a law does not guarantee its speedy fulfilment. However, one thing is clear: The existence of a constitutional right of access to information provides much-needed impetus for the adoption of an access to information law. At the very least, it presents a potent tool to advocate for the adoption of an access to information law, making the question of adoption one of when the law will be adopted, rather than whether it will be adopted.

From all the above, it is clear that it is important that constitutional provisions on access to information are as progressive as possible, irrespective of whether they will form the singular basis for the enforcement of the right of access to information or as a precursor to the

84 The terms of reference of the IMPI can be found in its report 'Report of the Official Inquiry into the State of the Media and Information Industry in Zimbabwe' of 2014 (on file with author).

85 Report (n 84 above) 441.

86 These are Angola, Guinea, Kenya, Malawi, Morocco, Niger, Seychelles and South Sudan.

87 Seychelles is the latest country to adopt an ATI law in July 2018.

88 A Draft Law on the Right to Access Information was adopted by the Justice, Legislation and Human Rights Committee of the second house of Parliament on 2 January 2018. See <https://www.morocoworldnews.com/2018/01/237651/access-information-act/> (accessed 5 February 2018).

enactment of an access to information law. As the supreme law of the land, a progressive constitutional guarantee on access to information ensures that the effect of the adoption of a restrictive access to information law can be mitigated by the constitution, where necessary.

3.2 Alternative constitutional protection of access to information in Africa

Apart from the 13 countries that expressly guarantee access to information as a stand-alone right, there are three categories of alternative constitutional provisions through which access to information can be anchored in the framework of African constitutions. These are through the general information rights guaranteed by the constitution, whether independently or as part of constitutional provisions on freedom of expression, and, finally through general constitutional provisions on freedom of expression. In all three instances, there is the option of reading-in the right of access to information into the relevant constitutional provision, as discussed below.

Domestic courts have since 1969 been reading-in access to information into constitutional provisions on freedom of expression, when the Supreme Court of Japan found that a 'right to know' was an integral part of freedom of expression as guaranteed by article 21 of the Japanese Constitution.⁸⁹ Similarly, the Supreme Court of India, in *SP Gupta v Union of India*,⁹⁰ held that the right to know was implicit in the right to freedom of speech and expression guaranteed by article 19 of the Constitution.⁹¹ In South Korea, the Constitutional Court in the *Forests Survey Inspection Request* case⁹² found that freedom of speech and of the press as guaranteed by article 21 of the Constitution could not be fulfilled without the right of 'access, collection and processing of information'.

The Israeli Supreme Court has also found that for the realisation of freedom of expression, several other rights, such as 'the right to receive information', must be recognised, which in turn imposes an obligation on the state to provide that information.⁹³ Also, in *Ontario (Public Safety and Security) v Criminal Lawyers Association*,⁹⁴ the Supreme Court of Canada held that access to information can be derived from freedom of expression provisions of the Constitution, if it is shown that 'access is necessary for the

89 *Kaneko v Japan*, Supreme Court 1969, 11. 26, Keishu 23-11-1490.

90 1982 AIR SC 149 234.

91 *Gupta* (n 90 above) para 66.

92 (1989) 1 KCCR 176, 88Hun-Ma22, delivered on 4 April 1989, http://www.right2info.org/resources/publications/case-pdfs/south-korea_forests-survey-inspection-request-case-petitioner-v-supervisor-of-county-of-ichon (accessed 8 February 2018).

93 HCJ 1601/90, 8 May 1990, 48(3) PD 353 [1990] (Isr).

94 2010 SCC 23, [2010] 1 SCR 815.

meaningful exercise of free expression on matters of public or political interest'.⁹⁵

Domestic courts have also relied on other human rights provisions in their constitutions to give effect to access to information. Thus, in *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers, Bombay Pvt Ltd*, the Indian Supreme Court found that access to information was a right guaranteed as part of the right to life under article 21 of the Constitution.⁹⁶ In Argentina, the Supreme Court has held that article 1 of the Constitution, which declares Argentina a republic, imposes an obligation of transparency which requires that information held by the state must be disclosed to the public.⁹⁷

In essence, the lack of a constitutional provision which is expressly worded as guaranteeing a right to access information held by the government (or private entities) is not necessarily a barrier to its enforcement as a constitutional right. There are alternative constitutional provisions that can be relied upon in reading in the right, as discussed below.

3.2.1 General information rights guaranteed by the Constitution

The constitutions of 12 African countries guarantee the 'right to information' or 'freedom of information' either as a component of freedom of expression, as is the case of Burkina Faso,⁹⁸ the Central African Republic,⁹⁹ Congo,¹⁰⁰ the Democratic Republic of the Congo (DRC),¹⁰¹ Mozambique¹⁰² and Rwanda,¹⁰³ or without necessarily a reference to freedom of expression, as in Côte d'Ivoire,¹⁰⁴ Ghana,¹⁰⁵ Guinea

95 Para 37.

96 1988 (004) SCC 0592 SC para 234.

97 9 Acordada de la Corte Suprema de Justicia de la Nación No 1/2004 Exp. 315/2004 Adm. Gral. See L Yagel (ed) 'Disclosing justice: A study on access to information in Latin America' Due Process of Law Foundation: USA 2007 7, <http://www.dplf.org/uploads/1196288246.pdf> (accessed 25 October 2014).

98 Art 8 of the Constitution of Burkina Faso guarantees the right to information.

99 Art 13 of the Constitution of Central African Republic guarantees 'freedom of information'.

100 Art 19 of the Constitution of Congo guarantees the 'right to information'.

101 Art 24 of the Constitution of the DRC guarantees the 'right to information'.

102 Art 48 of the Constitution of Mozambique guarantees the 'right to information'. However, the Right to Information Law of Mozambique in its Preamble refers to this provision as the basis for its enactment.

103 Art 19 of the Constitution of Rwanda guarantees 'freedom of information'.

104 Art 24 of the Constitution of Côte d'Ivoire guarantees the 'right to information'.

105 Art 21(1)(f) of the Constitution of Ghana guarantees the 'right to information'. In April 2015 (*Lolan Kow Sagoe-Moses v Minister for Transport and Attorney-General*, Suit HR 0027/2015), the Human Rights Division of the High Court of Ghana held that sec 21(1)(f) conferred the right to access information held by government, thus reading in this right.

Bissau,¹⁰⁶ Madagascar,¹⁰⁷ Senegal¹⁰⁸ and Tunisia.¹⁰⁹ Generally, these provisions are not formulated precisely in a manner which expressly imposes a positive obligation on states to allow access by the public to information it holds. However, the use of word 'information' has led many to conclude that these provisions guarantee a stand-alone right of access to information. However, it is submitted that these provisions at the time of their adoption did not envisage such interpretation. Nevertheless, it is reasonably acceptable to interpret these provisions in such a manner as to give effect to the right of access to information. Thus, in *Lolan Kow Sagoe-Moses v Minister for Transport and Attorney-General*,¹¹⁰ the Human Rights Division of the High Court of Ghana held that section 21(1)(f), which guarantees the right to information to all persons, 'subject to such qualifications and laws as are necessary in a democratic society' conferred a right to access information held by the government.

3.2.2 *Information rights guaranteed as part of freedom of expression*

Thirteen African countries have constitutional provisions on freedom of expression in similar words as in the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (African Charter) and the European Convention on Human Rights, namely, 'the right to seek, receive and impart information', all of which have been expanded and interpreted to guarantee the right of access to information. Thus, it can reasonably be expected that, in line with the corresponding provisions of the ICCPR, to which all but two African states are party,¹¹¹ the constitutional provisions on freedom of expression in Botswana,¹¹² Cape Verde,¹¹³ Ethiopia,¹¹⁴ Lesotho,¹¹⁵ Liberia,¹¹⁶

106 Art 34 of the Constitution of Guinea Bissau guarantees the 'right to information'.

107 Art 11 of the Constitution of Madagascar guarantees the 'right to information'.

108 Art 8 of the Constitution of Senegal guarantees the 'right to a variety of information'.

109 Art 18 of the Constitution of Tunisia guarantees the 'right to information'.

110 Suit HR 0027/2015.

111 Only Comoros and Sudan have not ratified the ICCPR.

112 Sec 12 of the Constitution of Botswana guarantees the 'freedom to receive ideas and information'.

113 Art 45(2) of the Constitution of Cape Verde guarantees the 'freedom to inform and be informed, to search for, receive and disseminate information and ideas'.

114 Art 29(2) of the Constitution of Ethiopia guarantees the 'freedom to seek, receive and impart information'.

115 Sec 14(1) of the Constitution of Lesotho guarantees the 'freedom to receive ideas and information'.

116 Art 15 of the Constitution of Liberia guarantees the 'freedom to receive and impart knowledge and information'.

Mauritius,¹¹⁷ Nigeria,¹¹⁸ Sierra Leone,¹¹⁹ Sudan,¹²⁰ Swaziland,¹²¹ Tanzania,¹²² Togo¹²³ and Zambia¹²⁴ can be interpreted within the domestic legal domain as establishing a right of access to information.

However, the Constitution of Liberia has a peculiar provision that makes it easier to interpret article 15 on freedom of expression as guaranteeing a right of access to information. Article 15(c) provides that with regard to the right, 'there shall be no limitation on the public right to be informed about the government and its functionaries'.

3.3 Constitutional provisions on freedom of expression

Another 16 African constitutions guarantee the right to freedom of expression, but make no specific reference to the word 'information' in guaranteeing this right. However, applying the broad interpretation that domestic courts in other parts of the world have given to freedom of expression as foundation of the right of access to information based on the interconnectedness of both rights, these constitutional provisions can be interpreted as conferring the right of access to information. These countries are Algeria,¹²⁵ Benin,¹²⁶ Burundi,¹²⁷ Chad,¹²⁸ Djibouti,¹²⁹ Equatorial

117 Art 12(1) of the Constitution of Mauritius guarantees the 'freedom to receive and impart ideas and information'.

118 Sec 39(1) of the Constitution of Nigeria guarantees the 'freedom to receive and impart ideas and information'. Note that Nigeria has domesticated the African Charter by incorporation. Hence, art 9 of the Charter is directly applicable.

119 Sec 25(1) of the Constitution of Sierra Leone guarantees the 'freedom to receive and impart ideas and information'.

120 Sec 39 of the Constitution of Sudan guarantees the 'right to reception and dissemination of information'.

121 Sec 24 of the Constitution of Swaziland guarantees the 'freedom to receive ideas and information'.

122 Art 18 of the Constitution of Tanzania guarantees the 'freedom to seek, receive and impart or disseminate information'.

123 Art 26 of the Constitution of Togo guarantees the 'freedom to express and disseminate information'.

124 Sec 20 of the Constitution of Zambia guarantees the 'freedom to receive ideas and information'.

125 Sec 41.

126 Art 24. Note that art 7 of the Constitution of Benin makes the African Charter an integral part of the Constitution of Benin. Hence, art 9 of the African Charter, which has been interpreted by the African Commission as guaranteeing the right of access to information, is directly applicable.

127 Art 31. Note that according to art 19 of the Constitution of Burundi, the Universal Declaration and the African Charter are an integral part of the Constitution. Thus, art 9 of the African Charter, interpreted by the African Commission as guaranteeing the right of access to information, is directly applicable.

128 Art 27.

129 Art 15.

Guinea,¹³⁰ Gabon,¹³¹ The Gambia,¹³² Libya,¹³³ Mali,¹³⁴ Mauritania,¹³⁵ Namibia,¹³⁶ São Tomé and Príncipe¹³⁷ and Western Sahara.¹³⁸

The Constitutions of Cameroon and Comoros are unique in that the substantive parts of the Constitution contain no provisions on freedom of expression. However, the Preamble to the Cameroonian Constitution 'affirms attachment' to the rights contained in the Universal Declaration and the African Charter, and other ratified treaties based on certain principles which includes freedom of expression. In addition, both the Universal Declaration and the African Charter are attached as annexures to the Constitution. Presumably, both these treaties can be directly relied upon to find a constitutional guarantee of the right of access to information. Likewise, the Constitution of Comoros in its Preamble 'emphasises commitment' to principles and rights contained in the Universal Declaration and the African Charter, including freedom of expression. Unlike Cameroon, the Constitution of Comoros explicitly declares that the Preamble 'is an integral part of the Constitution'.¹³⁹

4 Impact of constitutional recognition of access to information in Africa

There is no denying that the constitutional protection of access to information has contributed to the enjoyment of the right in Africa. The experience has been that by virtue of the supreme status of the constitution within the domestic system, the failure to adopt a law to give effect to a constitutional provision on access to information has not prevented the enjoyment of the right. Courts have proceeded to affirm the right irrespective of implementing legislation. Thus, in the *Lolan Kow Sagoe-Moses* case,¹⁴⁰ the Court held that failure to adopt a right to information law could not be relied upon by the Ghanaian government to justify non-compliance with a constitutional right.

Even where such a law exists, the constitution has still served as the basis for the interpretation and implementation of the law. In Uganda, where access to information was included in the 1995 Constitution, the right was given effect to in numerous instances by courts notwithstanding the 10-year delay in the adoption of an access to information Act and a

130 Art 13.

131 Art 1(2).

132 Sec 25(1).

133 Art 14.

134 Art 4.

135 Art 10.

136 Art 21.

137 Art 28(1).

138 Art 29.

139 See the final sentence of the Preamble to the Constitution of Comoros.

140 *Lolan Kow Sagoe-Moses* (n 110) above.

further delay in adopting regulations to bring that Act into force, which occurred only in 2011. Thus, on the basis of article 41 of the Constitution, the content of a Power Purchase Agreement between the government and a foreign power supply company was released for public scrutiny;¹⁴¹ an Act prohibiting employees and members of parliament from disclosing the content of documents considered in parliament without permission of the speaker or clerk of the assembly was declared unconstitutional;¹⁴² and provisions of the Evidence Act rendering documents relating to 'affairs of the state' inadmissible without the consent of the relevant head of department was also declared unconstitutional.¹⁴³

By contrast, in South Africa, the adoption of the Promotion of Access to Information Act (PAIA) has meant that PAIA and not the Constitution must be directly relied upon in enforcing the right. This inapplicability of the Constitution is based on the principle of constitutional avoidance, which requires that a court must avoid deciding a case as a constitutional issue if the relevant legislation can be interpreted in a manner consistent with the Bill of Rights.¹⁴⁴ The principle of subsidiarity also requires that redress must first be sought within the confines of legislation before recourse is had to direct constitutional remedies. Despite these restrictions, the Constitution can be directly relied upon where the argument is that the PAIA is inconsistent with the Constitution,¹⁴⁵ or where access to information has been breached but the PAIA does not adequately provide for redress.¹⁴⁶

Nevertheless, the implementation of the PAIA is inextricably linked to the origin of its formulation as a legislative imperative under the Constitution. As a result, the intended transformative role of access to information, in moving away from the apartheid culture of secrecy to one of transparency and openness, has been a central consideration of South African courts in adjudicating PAIA-related cases. Effectively, the Constitution is an anchor for the PAIA. Thus, the Constitutional Court in *Stefan Brummer v Minister of Social Development* stated:¹⁴⁷

141 *Greenwatch v Attorney-General & Another* HCT-00-CV-MC-0139 of 2001.

142 As above.

143 *Zachary Olum v Attorney-General* Constitutional Petition 6 of 1999; (2000) UGCC, 3.

144 *Major General Tinyefuza v Attorney-General*, Constitutional Case 1 of 1996; (1997) UGHC, 3.

145 In *Stefan Brummer v Minister of Social Development* 2009 (6) SA 323 (CC), the argument before the Constitutional Court was whether the 30-day period within which PAIA required an appeal to courts after the refusal of access to a record was inconsistent with sec 32 of the Constitution. Thus, reference had to be made directly to the Constitution. See also *My Vote Counts v President of the Republic of South Africa* 2016 (6) SA 501 (WCC).

146 See *La Lucia Sands Share Block Ltd v Barkhan* 2010 (6) SA 421 (SCA), where PAIA was inapplicable as its wording expressly exempted the requested information from disclosure. Thus, the Constitutional Court relied on sec 32 in interpreting sec 113 of the Companies Act, which allowed for access to the register of members of companies, in such a manner as to give effect to the right of access to information.

147 *Stefan Brummer* (n 145 above).

The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.

However, this is not to say that access to information laws do not offer any positive advantage other than clearly articulating the process for the implementation of the right. In Kenya, for example, the narrow limitation of the right of access to information to citizens, which was based on the interpretation of the constitutional provision on access to information, has been cured by the subsequent adoption of a definition of 'citizen' in the Access to Information Act, as discussed above.¹⁴⁸

5 Challenges to the constitutional protection of access to information

It is apparent that there are three main avenues for the constitutional protection of access to information at the domestic level: the express incorporation of a provision on access to information in the constitution; the interpretation of constitutional provisions on 'information whether as a component of freedom of expression or otherwise'; and the expansion of existing constitutional rights on freedom of expression to include access to information by reading-in the right.¹⁴⁹

However, a number of factors that affect the utility of these avenues, specifically in the African context, should be highlighted. First, the possibility of an express constitutional guarantee of access to information is often more apparent than real, considering that for most states, constitution-making is not a frequent occurrence. Furthermore, the alternative path of reviews or amendments of constitutions is often a complex process, and rightly so, since one of the features of constitutionalism is the existence of a rigorous process for the amendment of a constitution.¹⁵⁰ As a result, all African states that have incorporated specific stand-alone constitutional provisions on access to information

¹⁴⁸ See sec 3.1.1 above.

¹⁴⁹ This is an option in countries such as Comoros where the Universal Declaration and ICCPR are directly applicable, or in Benin where, by virtue of art 7 of the Constitution, the African Charter forms 'an integral part' of the Benin Constitution. This will not be a new phenomenon as the Constitutional Court of Benin in *Okpeitcha v Okpeitcha* (2002) AHRLR 33 (BnCC 2001).

¹⁵⁰ See generally C Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) 11 *International Journal of Constitutional Law* 382.

from the state have done so not as amendments, but as part of the enactment of an entirely new constitution.

Furthermore, African constitutions have generally acquired the infamous label of 'sham',¹⁵¹ or 'façade',¹⁵² constitutions. This is so because, while on the face of it they comprise those core elements engendering constitutionalism, in reality they are often not complied with, either because the process of enactment lacks legitimacy or because the balance of state power renders the existing democratic institutions too weak to compel effective implementation and compliance, or a combination of both.

More importantly, the expansion of existing constitutionally-protected rights and the direct application of normative standards of international human rights law and of judicial decisions of the relevant judicial bodies are wholly dependent on the inclination of domestic courts towards this. This, in turn, is dependent on several other factors such as the extent of international human rights law awareness within the judiciary; the status of foreign and international law within the domestic legal system; and judicial independence. Consequently, while this possibility exists in theory, in reality it may be difficult to achieve.

A general criticism that may be presented against the constitutional recognition of access to information is the minimalist position that the continuous expansion of human rights contributes to 'rights inflation' which weakens the overall implementation of human rights and dilutes their significance.¹⁵³ To prevent this, scholars such as Ignatieff suggest that only 'negative liberties', such as life, liberty, property and security, should be protected.¹⁵⁴ Likewise, Cranston believes that only those rights that are capable of being translated into real positive rights have a universal character and amount to 'fundamental freedoms' or 'primary social

151 See generally D Law & M Versteeg 'Sham constitutions' (2013) 101 *California Law Review* 863. The authors define a sham constitution as a constitution that 'its provisions are not upheld in practice'. According to them, this lack of adherence may be as a result of a variety of factors: The constitution bears no relationship with reality; is descriptively accurate but has no effect on anyone's behaviour; was never intended to be more than window dressing; or fails to include core elements such as the rule of law.

152 The term 'façade' or 'fake constitutions' appears to have been coined by Giovanni Sartori. He distinguishes between proper (*garantiste*), nominal and façade constitutions. For him, 'façade constitutions take on the appearance of a true constitution but are disregarded'. See G Sartori 'Constitutionalism: A preliminary discussion' (1962) 56 *American Political Science Review* 861.

153 See M Ignatieff *Human rights as politics and idolatry* (2001) 90, where he states that '[r]ights inflation – the tendency to define anything desirable as a right – ends up eroding the legitimacy of a defensible core of rights. That defensible core ought to be those that are strictly necessary to the enjoyment of any life whatever.'

154 Ignatieff (n 153 above) 67.

goods¹⁵⁵ should be recognised as human rights.¹⁵⁶ These minimalist views have been criticised for failing to appreciate the interdependence and interrelatedness of human rights, which makes it practically impossible to strictly separate rights.¹⁵⁷

In any event, the multi-dimensional, multi-functional and multi-rational nature of human rights makes access to information perfectly capable of falling within the strict confines that minimalists such as Ignatieff and Cranston have set out as what amounts to rights. Such is the versatility of access to information. Unfortunately, however, the history of constitutionalism in Africa is proof that the singular act of including human rights provisions in a constitution is no foreteller of the extent to which it will take root in society. Thus, the impact of a constitution to a large extent is also dependent on the institutions implementing it.¹⁵⁸

6 Conclusion

Despite the intricacies connected with the constitution-making process in Africa and the sometimes apparent disconnect between constitutional provisions and their implementation, the constitutional protection of rights, in general, and of access to information, in particular, remains of utmost importance. The anchoring role of constitutions within the domestic legal framework, the centrality of human rights to the pursuit of constitutionalism and of access to information to the realisation of all human rights make it imperative that access to information is expressly guaranteed as a stand-alone right by African constitutions. Doing so also establishes a firm foundation for the adoption, interpretation and implementation of access to information laws or other generic laws furthering the right of access to information.

By their nature, at least with regard to human rights provisions, constitutions contain general 'declaratory principles' that states undertake to abide by. These declarations must then ideally be translated into specific laws that address in detail the human right in question. Thus, while a constitutional provision on the right of access to information is essential for

155 This concept was developed by John Rawls who described it as those 'that any rational person prefers more than less off, whatever her final aims'. See J Rawls *Theory of justice* (1971).

156 M Cranston 'Human rights, real and supposed' in DI Raphahe (ed) *Political theory and the rights of man* (1967) 43. See also M Cranston 'Are there any human rights?' (1983) 112 *Daedalus* 1.

157 See generally C Beitz 'Human rights as a common concern' (2001) 95 *American Political Science Review* 269; G Dinsmore 'Debate: When less really is less – What's wrong with minimalist approaches to human rights?' (2007) 15 *Journal of Political Philosophy* 473; M Deveau 'Normative liberal theory and the bifurcation of human rights' (2009) 2 *Ethics and Global Politics* 171.

158 See, generally, J Ihonvbere 'Politics of constitutional reforms and democratisation in Africa' in T Lumumba-Kasongo (ed) *Dynamics and policy implications of the global reforms at the end of the second millennium* (2000).

establishing a culture of openness through the free flow of information, it is insufficient to singlehandedly bring about the structural and systemic transformation from secrecy to openness.

Furthermore, constitutionally-protected rights require litigation for their enforcement where they have been or are likely to be violated by acts or omissions by the state or individuals. However, the reality is that in Africa, the fact remains that the vast majority of the population is poor, illiterate, generally lack awareness on constitutional rights and face substantial practical difficulties in accessing legal representation and accessing courts. Thus, navigating the complex world of constitutional litigation is left to civil society organisations with the expertise and financial resources to do so on their behalf. If successful, these organisations then must map out and implement the needed advocacy to translate judicial decisions upholding the right of access to information into tangible results. Herein lies the need for simple and inexpensive processes for exercising the right of access to information that is accessible to ordinary people and is established by law.

Therefore, access to information laws fill the necessary practical gaps that constitutional provisions are incapable of addressing. Specifically, they lay down in clear and detailed terms, the processes for the proactive disclosure of information, requesting information, the obligation of public bodies (and, where applicable, private bodies) in terms of responding to such requests for information, as well as appeal and enforcement mechanisms, all of which constitutional provisions do not provide. Overall, the combination of a constitutional guarantee of access to information and an access to information law creates a more formidable prospect for the effective enforcement of the right. However, this does not negate reliance on other generic laws within domestic legal systems giving effect to the right of access to information, although not specifically adopted for that purpose.¹⁵⁹

Country	Access to information provision
Angola	Article 200(4) Constitution of Angola 2010 Individuals shall be guaranteed the right to access archives and administrative records, without prejudice to the legal provisions for the security and defence matters, state secrecy, criminal investigation and personal privacy.
Egypt	Article 68 Constitution of Egypt 2014 Information, data, statistics, and official documents, are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organise rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.

Guinea	Article 7 Constitution of Guinea 2010 The right of access to public information is guaranteed to the citizen.
Kenya	Section 35 Constitution of Kenya 2010 35(1) Every citizen has the right of access to – (a) information held by the state; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The state shall publish and publicise any important information affecting the nation.
Malawi	Section 37 Constitution of Malawi 1994 (as amended in 2010) Subject to any Act of Parliament, every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights.
Morocco	Article 27 Constitution of Morocco 2011 The citizens [feminine] and citizens [masculine] have the right of access to information held by the public administration, the elected institutions and the organs invested with missions of public service. The right to information may only be limited by the law, with the objective [but] of assuring the protection of all which concerns national defence, the internal and external security of the state, as well as the private life of persons, of preventing infringement to the fundamental freedoms and rights enounced in this Constitution and of protecting the sources and domains determined with specificity by the law.
Niger	Article 31 Constitution of Niger 2010 Everyone has the right to be informed and to have access to information held by public authorities under the conditions determined by law.
Seychelles	Article 28(4) Constitution of Seychelles 1993 (as amended in 2011) The state recognises the right of access by the public to information held by a public authority performing a governmental function subject to limitations contained in clause (2) and any law necessary in a democratic society. Article 28(2) The right to access information shall be subject to such limitations and procedures as may be described by law and are necessary in democratic society including – (a) for the protection of national security; (b) for the prevention and detection of crime and the enforcement of law; (c) for the compliance with an order of a court or in accordance with a legal privilege; (d) for the protection of the privacy rights or freedoms of others.

159 Examples include laws relating to whistle-blowing, public procurement, anti-corruption, environmental impact assessment and asset declaration.

Somalia	<p>Article 32 Provisional Constitution of the Federal Republic of Somalia, 2012</p> <p>(1) Every person has the right of access to information held by the state.</p> <p>(2) Every person has the right of access to any information that is held by another person which is required for the exercise or protection of any other just right.</p> <p>(3) Federal Parliament shall enact a law to ensure the right of access to information.</p>
South Africa	<p>Section 32 Constitution of the Republic of South Africa, 1996</p> <p>(1) Everyone has the right of access to –</p> <p>(a) any information held by the state; and</p> <p>(b) any information that is held by another person and that is required for the exercise or protection of any rights.</p> <p>(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.</p>
South Sudan	<p>Section 32 Transitional Constitution of South Sudan 2011</p> <p>Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.</p>
Uganda	<p>Article 41 Constitution of Uganda 1995 (as amended in 2005)</p> <p>(1) Every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of any other person.</p> <p>(2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.</p>
Zimbabwe	<p>Section 62(1) Constitution of Zimbabwe 2013</p> <p>Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or any by and institution or agency of government at every level, in so far as the information is required in the interests of public accountability.</p> <p>Section 62(2)</p> <p>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 or protection of a right.</p> <p>Section 62(4)</p> <p>Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security, or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.</p>

Part II: Country studies

THE MODEL LAW ON ACCESS TO INFORMATION FOR AFRICA AND THE STRUGGLE FOR THE REVIEW AND PASSAGE OF THE GHANAIAN RIGHT TO INFORMATION BILL OF 2013

Ugonna Ukaigwe

Abstract

The Model Law on Access to Information for Africa has proven to be a significant development in respect of access to information in Africa. Amidst claims that the right to information is a Western agenda which is foreign to the African socio-cultural context, the Model Law provides a home-grown, comprehensive and practical standard for member states to the African Charter on Human and Peoples' Rights on their legislative obligations with respect to access to information. This chapter describes the influence of the Model Law on the review of the Ghanaian Right to Information Bill 2013, the ongoing assiduous work by RTI advocates in Ghana towards ensuring the review and adoption by Parliament of the RTI Bill, and the difficult but successful path to this review by the 6th Parliament in 2014. The analysis examines this journey of over a decade and what informed the utilisation of the Model Law in the review of the Bill by the Parliamentary Select Committee. The discussion also looks at efforts made by the Special to support civil society organisations in Ghana in their advocacy for the passage of an effective RTI law. Most importantly, an analysis is undertaken of the disclosure practices of public institutions which may hinder the effective implementation of the law once passed.

1 Introduction

Access to information held by public institutions and agencies is globally recognised as a fundamental human right under various international and regional instruments. This right was derived from the Universal Declaration of Human Rights (Universal Declaration) adopted in 1948, which in article 19 guarantees the right to freedom of expression and opinion as well as the right to seek, receive and impart information through any form of media.

This was followed in 1966 by the International Covenant on Civil and Political Rights (ICCPR), which in article 19 recognises this right in similar wording as the Universal Declaration as follows:

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.

The ICCPR goes further to state in article (19)3:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

- (a) for respect of the rights or reputations of others;
- (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

This implies that every person, whether acting as an individual or group, has a right to all information in the custody of public institutions or agencies and other relevant private bodies except where there is an overriding public interest justifying non-disclosure. Access to information is premised on the principle that 'public officials hold information not for themselves but as trustees for the public good';¹ as such all information generated by public officials in the exercise of their public duty is for public consumption and should be accessible by the public.

In Africa, access to information as a right is not an entirely novel concept. The adoption of constitutional democracies by various countries in the region has resulted in the recognition by some countries, in their national constitutions, of citizens' rights to information. For instance, the constitutions of several African countries – Burkina Faso, Cameroon, Guinea, the Democratic Republic of the Congo, Senegal, Eritrea, Ghana, Guinea Bissau, Cape Verde, Kenya, Madagascar, Malawi, Morocco, Mozambique, Seychelles, South Africa, Tanzania and Uganda – provide guarantees of access to information,² even though the citizens of some of these countries in reality may have no access to public documents. In the absence of specific access to information laws in most of these countries, civil society organisations (CSOs) have used constitutional guarantees to the right to demand access to official information and to initiate robust advocacy for the passage of specific access to information laws.

1 See Declaration of Principles on Freedom of Expression in Africa, 2002, <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html> [accessed 11 November 2015]

2 Africa Freedom of Information Centre (AFIC) 'Status of freedom of information in Africa (legislation and ratification)' May 2013, <https://africafoicentre.org/about-africa-freedom-of-information-centre-afic/> [accessed 11 November 2015]

Interestingly, the origin of the law on the continent has been mixed. In South Africa and Nigeria, for example, CSOs have campaigned for access to information laws and secured its passage as part of the fight for transparent and accountable governance. However, the governments of Angola, Guinea-Conakry, Niger and Zimbabwe adopted the laws on their own ingenuity but not as part of a democratisation process.³ In Niger and Guinea-Conakry, the military juntas adopted the law a few months before leaving office in 2010 and 2011 respectively. Zimbabwe's Access to Information and Protection of Privacy Act (AIPPA)⁴ was designed mainly to control the free flow of information as it contains provisions that give the government extensive powers to control the media. Some writers have described the Act as access to information in name only because, whilst its title refers to access to information, its provisions are to the contrary.⁵

Under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur) of the African Commission on Human and Peoples' Rights (African Commission) in 2013 developed a Model Law on Access to Information for Africa (Model Law) which is aimed at providing guidance to member states in the adoption, review or amendment of existing access to information laws.⁶ The Model Law also aims to serve as a tool for access to information advocates in Africa to stimulate public debate on access to information at the national level and to raise awareness of the cross-cutting nature of the right to information, and the potential of this right to address issues such as poor service delivery, underdevelopment and the effective functioning of the justice system.⁷

Prior to the adoption of the Model Law, state parties to the African Charter have relied on access to information principles and legislation developed elsewhere in the process of adopting laws. As a result, most existing and draft laws on access to information did not adequately take into consideration the African socio-economic context, such as the poor record-keeping culture and pervasive culture of secrecy prevalent within the public service in Africa, the high levels of illiteracy and poverty, among others.⁸ Since the adoption of the Model Law, it has been the remit of the Special Rapporteur to popularise the Model Law and its principles among member states and to encourage the adoption of national legislation on access to information. In the discharge of this responsibility, the Special

3 Freedom of Information Advocates Network (FOIANet) 'Global right to information update: An analysis by region' July 2013.

4 Access to Information and Protection of Privacy Act (AIPPA) of 2002, amended in 2003 by the AIPPA Act of 2003.

5 M Memeza 'An analysis of weaknesses in access to information laws in SADC and in developing countries' [http://www.fxj.org.za/PDFs/access to informationP/access to information%20weaknesses%20analysis%20sadc1.pdf](http://www.fxj.org.za/PDFs/access%20to%20informationP/access%20to%20information%20weaknesses%20analysis%20sadc1.pdf) (accessed 11 November 2015).

6 African Commission on Human and Peoples' Rights 'Model Law on Access to Information for Africa' (2013).

7 As above.

8 As above.

Rapporteur has carried out several advocacy visits, and continues to visit countries yet to adopt access to information laws. One of the countries that have benefited from these advocacy visits is the Republic of Ghana, which currently has a Bill awaiting passage by Parliament.

Against this backdrop, this chapter discusses the efforts of CSOs in Ghana towards ensuring the review and passage of the RTI Bill, including the recent outcomes of this struggle, as well as the visit to Ghana by the Special Rapporteur.

In discussing these issues, the chapter looks at what informed the visit of the Special Rapporteur to Ghana, the activities she embarked upon during her three-day advocacy visit, the stakeholders she engaged with while in Ghana, as well as the outcomes of those engagements. Also analysed are the processes leading to the review of the RTI Bill by the Select Committee on Constitutional, Legal and Parliamentary Affairs, the Committee charged with working on the Bill, and how the Model Law was interpreted and applied in the review process by this Committee. Additionally, the disclosure practices existing in various public institutions are analysed against the principles contained in the Model Law.

2 Advocacy for the passage of access to information legislation in Ghana

According to a human rights report published in 1991, the call for the passage of an access to information law in Ghana dates back as far as 1989, when a group of Ghanaian journalists called for the adoption and implementation of a law that would give the public the right to access information.⁹ This was during the Provisional National Defence Council (PNDC) era headed by Flight Lieutenant Jerry Rawlings, the then Chairperson of the PNDC. However, it is not clear whether the call at the time was sustained by the media and whether there was an enabling environment for CSO involvement in the pursuit of this agenda. Indeed, the Rawlings administration witnessed a number of human rights abuses including attacks on the independent press. Journalists whose coverage the government deemed 'offensive' suffered harsh reprisals.¹⁰ Some journalists were arrested and detained without any charges.¹¹

Following a referendum in 1992, a new Constitution was adopted providing for a multi-party political system and a Bill of Rights which included citizens' rights to information, amongst other rights. With the

9 Human Rights Watch 'Abdication of responsibility, the Commonwealth and human rights' October 1991, <https://www.hrw.org/reports/pdfs/g/general/general2910.pdf> (accessed 10 November 2015).

10 Human Rights Watch (n 9 above) 6.

11 Human Rights Watch 7.

adoption of the 1992 Constitution, democracy, the protection of rights and the quality of governance in the fourth republic have steadily improved, so much so that the country is globally regarded as the beacon of democracy in the region.¹² In terms of access to information, article 21(1)(f) of the 1992 Constitution of Ghana guarantees citizens the right to information as follows: 'All persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society.'

Following pressure from CSOs,¹³ efforts by government to operationalise the right to information began in 1999 when the first Bill was prepared.¹⁴ However, the Bill was not tabled in Parliament until 11 years later, in the year 2010.¹⁵ Even though the Bill had been reviewed three times (in 2003, 2005 and 2007)¹⁶ before being presented in Parliament, CSOs remained unsatisfied with the version finally submitted to Parliament and campaigned tirelessly but unsuccessfully for the review of the Bill by the fifth Parliament.

Prior to the introduction of the Bill in 2010, a coalition of CSOs known as the Right to Information Coalition, established in 2003 under the leadership of the Commonwealth Human Rights Initiative (CHRI), had raised several criticisms on the Bill.¹⁷ These concerns were compiled and sent to various stakeholders, including members of parliament, the then Minister of Information, Mr Dan Botwe, and the Government Spokesperson on Good Governance, Mr Frank Agyekum.¹⁸ The government in power, then led by President John Agyekum Kuffour, assured the RTI Coalition that it would examine the critique and ensure that the proposals by the Coalition are incorporated into the Bill. The Coalition was further assured of government's willingness to pass the Bill.¹⁹ Unfortunately, the Bill did not make it to Parliament until that Parliament lapsed in 2008.

12 CHRI 'Critique of draft RTI Bill' http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/ghana/CHRI%20critique%20of%20draft%20RTI%20bill.pdf (accessed 23 August 2017).

13 The first Bill was prepared in 1996 by the Institute of Economic Affairs (IEA), a non-governmental organisation, and submitted to government in 1999.

14 Referred to in Ghana as the Right to Information Bill.

15 The RTI Bill was first tabled in parliament on 5 February 2010, <http://www.ghana.gov.gh/index.php/media-center/news/2565-parliament-begins-consideration-of-rti-bill> (accessed 23 August 2017).

16 Select Committee on Constitutional, Legal and Parliamentary Affairs 'Report on the Right to Information Bill' December 2014.

17 These criticisms were contained in a document titled Options Paper, developed by the RTI Coalition in 2005.

18 The author is privy to this information due to her involvement in the activities of the RTI Coalition.

19 Commonwealth Human Rights Initiative (CHRI) Africa Office 'Report on Access to Information activities' January-December 2005, http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/ghana/ghana_rti_excerpt_from_2005_annual_report.pdf (accessed 23 August 2017).

In 2010, when the Bill was introduced to Parliament, the committee in charge of the Bill – the Joint Committee on Communication and Constitutional, Legal and Parliamentary Affairs (Committee) – embarked on a nation-wide consultation with support from the World Bank, to seek the views of Ghanaians on the Bill. Following concerns raised by CSOs during the consultation process, the Joint Committee requested the RTI Coalition to provide alternative provisions on the major areas of concern raised, in the form of an Options Paper, to guide the Committee in its review of the Bill. The Coalition granted this request and submitted an Options Paper (otherwise known as Zero Draft) to the Committee.²⁰ Apart from critiquing the Bill, the Options Paper proposed amendments to specific clauses to ensure that the Bill conformed with international best practice standards on the right to information.²¹ The RTI Coalition in its critique of the Bill and suggested amendments, relied heavily on the then draft Model Law.²² However, the Committee did not take any steps to amend the Bill, even though several promises to that effect had been made. All efforts by the RTI Coalition to ensure the review and passage of a Bill that conforms with international best practices and the Zero Draft submitted to Parliament yielded no result. Surprisingly, the Committee never made available to the public the report of the nationwide consultation carried out with donor funds. All the press conferences held, statements issued and demonstrations organised by CSOs fell on deaf ears until the tenure of that Parliament lapsed in 2012.

The elections held in December 2012 brought in a seemingly new yet old administration, which appeared to be forward-looking in terms of the citizens' rights to information. The administration was new in the sense that a different candidate emerged as the winner of the presidential elections, yet old as the ruling party – the National Democratic Congress (NDC) – had again won the 2012 elections. Thus, the supposedly new President, who had been the Vice-President at the time of the CSO struggle for the review and passage of the Bill by the fifth Parliament, eventually became President after the demise of the then sitting President, John Evans Atta Mills, in 2011. Following his assumption of office, President John Dramani Mahammmah in November 2013 reintroduced the RTI Bill in Parliament. The Bill was read for the first time and referred to the Select Committee on Constitutional, Legal and Parliamentary Affairs in accordance with articles 106(4) and (5) of the 1992 Constitution and Order 179 of the Standing Orders of Parliament.

20 See <http://www.ghananewsagency.org/politics/rti-coalition-supports-parliament-with-option-paper-45217> [accessed 23 August 2017]

21 The Right to Information Coalition 'An Options Paper/Zero draft on the Ghana Right to Information Bill 2010' (internal document of the RTI Coalition submitted to parliament). The Options Paper is available at http://www.rticampaignghana.com/publications/news/index.php?fn_mode=fullnews&fn_id=19 (accessed 23 August 2017).

22 The draft Model Law was released for public comment in April 2011.

3 Review of the RTI Bill by the Select Committee on Constitutional, Legal and Parliamentary Affairs

The Parliamentary Select Committee, at the time chaired by the majority leader, Alban Bagbin, took a radical approach in terms of engagement with civil society. First, the Committee invited the public to submit memoranda on the Bill. Second, based on the memoranda received, the Select Committee invited stakeholders to a meeting organised by the Committee, held in Koforidua in the eastern region of Ghana from 5 to 6 May 2014. The main aim of the meeting was to provide a platform for all the stakeholders that had submitted memorandums to discuss their concerns with the Committee. Various CSOs made presentations at the forum with key recommendations regarding areas of amendment. The CSOs in attendance raised the following concerns on the provisions of the Bill.²³

- (a) There were excessively long time lines within which to access information. This constituted a major setback to the right to information. The Bill contained numerous extensions of timelines, such that it could take up to 160 days from the time of a request for information to the time of disclosure. This was untenable, as timely access to information is critical to the value of the information, and unduly long timelines would only amount to a subversion of the right to information.
- (b) The payment of fees for accessing information should not be an impediment to accessing information. Ideally, the only fees paid should be for the actual cost of reproducing the information, not for the effort of collating information from different departments or agencies or the difficulties in retrieving such information.
- (c) A practical internal appeal mechanism should be included. Appeals emanating from an information request should be dealt with at the administrative level of public institutions so as to avoid delays, rather than by the relevant Minister who is a political appointee and who may not have the time to review the decisions taken by information officers. These internal reviews should also be conducted by senior information review officers appointed for that purpose within the organisation, in order to promote easy access to information. Further appeals from the decisions of public institutions should be made to an independent commission rather than the Supreme Court as provided by the Bill. In particular, the prohibitive costs, physical distance, time constraints and complexity of appealing to the Supreme Court will deter people from appealing against denial of requests. Furthermore, it was not clear why the Bill provided for appeals to the Supreme Court, rather than the High Court, which has the primary responsibility of enforcing fundamental human rights in terms of the Ghanaian Constitution.

23 Options Paper (n 21 above).

- (d) An independent oversight mechanism should be established. There was a need for an independent commission to oversee the implementation of the Bill and enforce compliance when passed, instead of the Ministry of Justice and Attorney-General, as proposed in the Bill. Placing the oversight responsibility in the hands of the Ministry would have created an irresolvable conflict of interest. Furthermore, the nature of RTI legislation is such that it requires massive public education for the law to be effective. As such, what was required was a dedicated institution to monitor, enforce and ensure compliance with the law.
- (e) There were broad exemptions which did not conform with international standards on the right to information. The Bill exempted from disclosure all information emanating from the office of the President, Vice-President and Cabinet, without providing the parameters for such exemptions. The exemptions were not subject to the 'harm or public interest test' as required by international standards. Additionally, the Bill needed to include in its scope of application private bodies, as leaving the application of the law to private bodies to the discretion of the Minister of Justice to decide would not be in the public interest. Furthermore, the categories of private bodies to be covered by the law should be specified to include private bodies that are funded by the public purse, perform statutory functions of public bodies and exploit the nation's natural resources.

These views expressed by CSOs were collated for consideration by the Committee. In the words of the Chairperson:²⁴ 'The Committee will diligently work on the Bill taking into consideration all the comments received and ensure that a report is presented to Parliament during the next session.'

4 Visit by the Special Rapporteur on Freedom of Expression and Access to Information²⁵

Given the past experience of CSOs with regard to several failed promises by previous administrations to pass the Bill, the RTI Coalition was not willing to take any more chances in their advocacy. The Coalition ensured that it took advantage of all available opportunities to engage government.

Consequently, in 2014 the Coalition extended an invitation to the Special Rapporteur to visit the country as a way of lending support to CSOs and putting additional pressure on Parliament to review the Bill and pass it into law without any further delay. The main objective of the visit was to support the Coalition's ongoing advocacy towards the passage of an effective and efficient RTI Bill and also to officially introduce the Model

24 The Chairperson's statement was made at a forum organised by the Select Committee on Constitutional, Legal and Parliamentary Affairs in 2014.

25 The author organised and also participated in the various meetings with the Special Rapporteur.

Law on Access to Information for Africa. During the three-day visit, which took place from 1 to 3 July 2014, the Special Rapporteur held meetings with various stakeholders, including the Minister for Information; the Minister for Gender, Children and Social Protection (a former RTI campaigner); the Speaker of Parliament; the majority and minority leaders of Parliament; and the Select Committee on Constitutional, Legal and Parliamentary Affairs. She also interacted with CSOs, including various professional and religious bodies as well as the media.

Prior to the visit by the Special Rapporteur, the RTI Coalition had been working with the Model Law and had distributed copies of the Law to various stakeholders. However, Ms Tlakula's visit afforded the opportunity for popularising the Model Law and for stakeholders to have a deeper understanding of its object and purpose. Contrary to the notion of some sections of the public, including that of some politicians, that the right to information is a Western idea imposed on Africans and that Ghana was not ready for such legislation,²⁶ the Special Rapporteur's advocacy visit to Ghana and the official introduction of the Model Law showcased the fact that a home-grown access to information standard had been developed which takes into account the regional realities and the socio-economic context of Africa.

5 Outcomes of the visit by the Special Rapporteur

Significantly, the visit of the Special Rapporteur to Ghana lent huge support to the work of the RTI Coalition. In the past, the Coalition had been a lone voice calling for the review of the Bill and the passage of an effective RTI law in Ghana, while politicians had employed various tactics to delay the passage of the Law, including making promises that never materialised. These failed promises by politicians created the impression that they were made merely to get the RTI Coalition off their backs, albeit temporarily. However, CSOs took advantage of the Special Rapporteur's visit and engaged her on some of the advocacy strategies that had been adopted and their outcomes. The Special Rapporteur was briefed on the advocacy challenges, including the need to enhance the quality of the Bill with particular reference to the Model Law, and on developing a road map for the speedy passage of the Bill, taking cognisance of experiences from other African states. The briefing re-echoed the fact that Ghana as a nation had managed to put itself on a high pedestal in terms of democratic governance, and that all efforts had to be made to maintain that position and sustain all initiatives which had enabled the country to attain that height.

26 As one Ghanaian commentator stated: 'Ghana is not yet mature for such a law.' This was a view expressed during a one-on-one engagement with stakeholders on the RTI Bill.

During the three-day interactions with the Special Rapporteur, stakeholders spoke quite frankly, and voiced their opinions generally on the advocacy for and, in particular, the passage of the Bill. Specifically, stakeholders from the legislature identified the following as the reasons for the delay in the passage of the Bill during the previous decade:

- (1) a misconception about the RTI Bill as a press Bill. It was observed that public discussions on the Bill were largely limited to the press, creating the impression that the Bill was mainly for the benefit of the press.
- (2) poor public awareness on the potential impact of the Bill. The inadequate public education on the Bill and its relevance to ordinary citizens had led to low levels of public interest in its passage.
- (3) poor record-keeping culture in the public service. Stakeholders noted that the implementation of the Bill when passed into law would be challenging, due to the poor record-keeping and maintenance culture at the institutional level.
- (4) the culture of apathy among citizens. The entrenched Ghanaian culture of silence and indifference was perceived as having impacted negatively on the passage of the Bill. In their view, this was also likely to have an impact on the implementation of the Bill when passed into law.
- (5) the negative perception within the legislature and executive of the CSO advocacy strategy. It was observed that advocacy for the passage of the Bill until recently had been tailored to create the impression that the Bill was meant to monitor the corrupt deeds of the legislature and the executive. In the view of the Committee, this negative impression has made it difficult for the two arms of government to fully support the passage of the Bill for over a decade.

Interestingly, this was the first time that public officials – members of parliament in particular – had come out openly in unison to state quite expansively what in their view had been the reason for the delay in the passage of the Bill,²⁷ to the chagrin of most CSOs. Crucially, the Special Rapporteur and her team as well as representatives of the RTI Coalition present, made the point that the nature of the Bill did not permit an easy understanding and appreciation of its objectives by the ordinary citizen and, therefore, was unlikely to result in the majority of Ghanaians calling for its passage into law. Furthermore, Parliament was requested to ensure that the Bill was amended to embody the minimum international and regional standards on RTI as outlined in the Model Law.

Following subsequent pressure from CSOs, coupled with support from a donor partner, Strengthening Transparency, Accountability and Responsiveness in Ghana (STAR Ghana), CSOs were invited by the Select Committee to a meeting, two months after the Special Rapporteur's visit, to discuss proposed amendments to the Bill. At the meeting, which took place in September 2014, it was discovered that the Committee's proposed

27 Some officials have in the past individually made comments regarding the Bill.

amendments had captured most of the recommendations that previously had been made by the RTI Coalition to the Committee. Subsequently, in the report of the Select Committee presented to Parliament in December 2014, the Committee made extensive references to the Model Law and the Declaration of Principles on Freedom of Expression in Africa. In recognising and acknowledging the value of the Model Law, the Committee stated:²⁸

While the Declaration of 2002 and other such laws adopted by the AU Commission have expanded on state parties' obligations under the African Charter, they do not specifically provide guidance on the form and content of the legislation to be enacted to give effect to these obligations at the domestic level. The AU Commission on Human and Peoples' Rights has therefore gone further to provide a Model Law on Access to Information for Africa.

The report by the Committee, which has been made available to the public, paved the way for discussions by Parliament on the RTI Bill. The second reading of the Bill was concluded on 24 July 2015, and the Bill was referred to the next stage in the parliamentary process – the consideration stage which involves a clause-by-clause discussion of all the provisions in the Bill. The sixth Parliament had promised that the Bill would be passed by 2016. Following the elections held in December 2016 and the expiration of the sixth Parliament on 7 January 2017, the RTI Bill reverted back to the executive for reintroduction to the seventh Parliament. The National Patriotic Party (NPP) government finally introduced a retrogressive RTI Bill to Parliament in March 2018.

6 Current challenges to the realisation of the right of access to information in Ghana

The 1992 Constitution of Ghana guarantees every citizen the right to information. However, attempts to exercise this right have faced several challenges. This section discusses some of the key challenges with the current RTI regime.

6.1 Disclosure practices in public institutions

One of the major challenges that may hinder the effective implementation of the right to information law is the disclosure practices that are prevalent in government institutions and agencies. In Ghana, for example, the experience has been that there is little or no investment in data preservation and management. As a result, it becomes an ordeal for public institutions to grant requests for information in the desired form. Again, the lack of understanding among civil servants of what citizens' rights to information

28 Select Committee on Constitutional, Legal and Parliamentary Affairs (n 16 above).

entails is a major challenge to accessing information. Public officials often respond to information requests based on a very narrow understanding of what their obligations are under the law. A monitoring of disclosure practices in Ghana, carried out by the RTI Coalition and the Commonwealth Human Rights Initiative (CHRI), Africa Office, in five regions of Ghana in 2014 and in Accra in 2015,²⁹ revealed the lack of willingness to release information in the following circumstances:

6.1.1 The form in which the request is made

Public institutions prefer to receive and acknowledge requests submitted in writing, stating the name, date and signature appended, except where the request is by an illiterate person. However, this is inconsistent with the provisions of the Model Law, which requires a person (whether literate or illiterate) who wishes to obtain information to make the request either in writing or orally and, where a person makes a request orally, the information officer must reduce that oral request to writing and provide a copy to the requester.³⁰

6.1.2 Non-disclosure of the reason or purpose of the request

The failure to provide justification for a request for information has on several occasions been a ground for refusal to grant requests for information by some public institutions in Ghana. Some public officials have argued that providing justification will help them to determine whether or not they will give priority to the request.³¹ The Model Law provides that except where the information requested is necessary to safeguard the life or liberty of a person and where the request is to a private body, a requester does not have to provide justification or a reason for requesting any information.³²

6.1.3 Affiliation of the requester

Applicants who have made requests for information based on their affiliation with particular institutions have often had their requests granted, unlike individual citizens who have no affiliation. The impression this creates is that ordinary citizens have no right to information and that requests for information should emanate only from individuals who are affiliated with particular institutions or organisations. This is contrary to the provisions of the Model Law and the 1992 Constitution, which guarantee this right to every person whether affiliated or not. Every person

29 Report on file with author.

30 Model Law sec 13.

31 Sentiments shared by participants at an experience-sharing forum organised by the Coalition with support from UNESCO.

32 Model Law sec 13(5).

has an enforceable right to access information from a public body or relevant private body, and a private body where the information may assist in the exercise or protection of any right.³³

6.2 Poor record-keeping and management systems of public institutions

The poor record-keeping and management systems in public institutions have also been a basis for refusal to grant requests for information. The experience is that some public institutions that are not bold enough to admit that they do not have a record management system in place prefer to adopt delay tactics as a way of making requesters grow weary and give up on their request.³⁴ Section 6 of the Model Law obliges every public institution to create, keep, organise and maintain information in a manner that facilitates access to information. In furtherance of this obligation, the Model Law requires that every public body must arrange all information in its possession systematically and in a manner that facilitates prompt and easy identification, and keep all information in its possession in good condition and in a manner that preserves the safety and integrity of its contents.³⁵

6.3 Failure to designate information officers

In practice, requests for information have gone unanswered because of the lack of internal policies on information disclosure to the public. Most institutions do not have information officers or officers designated to manage information collection and retrieval. The result is that requests are either unnecessarily delayed or denied. The Model Law requires that every information holder must designate competent information officers and deputy information officers who will be responsible for dealing with information requests. Where a public institution fails to do so, the head of that institution will be the information officer for the purposes of the relevant law.³⁶

Furthermore, as a result of the lack of understanding of what the right to information entails due to the absence of an internal information policy, most public servants are not certain what type of information they should disclose or make public upon request. As a result, any information requested, no matter how minor and whether sensitive or not, is submitted to the head of the institution for authorisation to disclose. Sometimes, district assembly heads have to wait for authorisation to disclose from the Minister who resides in the state capital, before releasing information that

33 Model Law sec 13.

34 Experiences shared by requesters who were part of the RTI monitoring exercise.

35 Model Law secs 6(2)(b) & (c).

36 Model Law sec 10.

ought ordinarily to be proactively disclosed. One of the key contributions of the Model Law is that it itemises the types of information that ought to be proactively disclosed by public institutions both annually and within 30 days of receiving or generating that information. These include all contracts; licences; permits; authorisations and public-private partnerships granted by the public body or relevant private body; the yearly band of remuneration for each public employee and officer, including the system of compensation as provided in its laws; the procedures followed in its decision-making process, including channels of supervision and accountability and detailed travel and hospitality expenses for each employee and officer; and gifts, hospitality, sponsorships or any other benefit received by each employee and officer,³⁷ to mention a few.

7 Conclusion

The Model Law is a proactive step by the African Commission to promote the adoption of access to information legislation on the continent. It reaffirms the efforts of civil society organisations and legitimises their desire for transparency and political participation in the region. However, in the face of authoritarian regimes and the lack of political will on the part of more democratic regimes, civil society pressure remains one of the most effective tools to ensure the adoption of access to information legislation in Africa and its effective implementation once passed. More significantly, the Model Law, as a product of robust African CSO collaboration and engagement, has facilitated its ownership and usage by African states and the CSOs advocating for the adoption of such laws, making the enjoyment of the right of access to information a reality in the lives of ordinary Africans. The Special Rapporteur's access to information advocacy and Model Law dissemination strategy, if continued, will no doubt assist in opening up the space for more public awareness on access to information, increase the pressure for the passage of effective laws and their implementation by African states, and strengthen the work of CSOs in their quest for the passage of these laws.

Furthermore, the important role of CSOs in the adoption of access to information laws cannot be overemphasised. The passage of an access to information law without input by CSOs may produce restrictive access to information legislation. However, for CSO advocacy to be fruitful and long-lasting in Ghana and in other African countries, it must involve all stakeholders, including civil servants and politicians, either as members of the CSO Coalition or as access to information champions within their own terrain. More importantly, training on the Law for civil servants and all arms of government, including the judiciary, must be a priority. An access to information regime requires a change of attitude and mindset which is

37 Model Law secs 7(1) & (2).

in sharp contrast to the colonial culture of secrecy already entrenched in our societal structures, and further strengthened by oaths of secrecy commonly sworn by public officers and other secrecy laws remaining in statute books. Indeed, the criteria for measuring the success of implementation of access to information legislation involve not the number of cases litigated, but the number of requests granted without the need for recourse to litigation. Therefore, the benefits of such legislation should be seen not only in its very progressive ability to compel public officials through litigation to release information, but rather in the power it gives to the citizenry to monitor the activities of government and to ensure effective service delivery.

The passage of an access to information law in itself is not sufficient to engender transparency. Public officials need to understand the import of the law, on the one hand and, on the other, the citizenry must be empowered to use the law. The implementation of the law may be impossible without adequate public pressure. Without continuous information requests from the public, adequate CSO pressure for compliance and the monitoring of implementation, governments may not be eager to put in place the structures that will enable the law to be effectively implemented. Specifically, proactive disclosure is key, particularly in countries where citizens are unaware of or are apathetic to their rights, which is very common in developing countries such as Ghana. Additionally, effective record-keeping and management systems are an important infrastructure for an effective access to information legal regime.

While it is rather surprising, if not disappointing, that a country such as Ghana has marked time for far too long on this one single most important instrument in the fight against corruption, CSOs in Ghana as well as the general public should not wait for the passage of the law. With a Constitution that recognises and guarantees the right to information, efforts must be made to enforce the right as guaranteed. This will help to identify and possibly address the challenges that may hinder implementation when the RTI Bill finally is passed. Thus far, the courts have shown a willingness to enforce this right as guaranteed by the Constitution. In the case of *Lolan Kow Sagoe-Moses & Others v The Honourable Minister & Attorney-General*³⁸ Justice Anthony Yeboah very clearly stated that '[i]t is not the legislation that vests the right to the individual; the individual has the right to information as both a human right and a constitutional right'.

38 Suit HR 0027/2015.

CHAPTER 6

THE IMPACT OF THE MODEL LAW ON ACCESS TO INFORMATION FOR AFRICA ON KENYA'S ACCESS TO INFORMATION FRAMEWORK

Anne Nderi

Abstract

The access to information is a fundamental human right enshrined in international, regional and national legal frameworks to which Kenya is a party. After years of advocating for the adoption of a legal framework on access to information in Kenya, the access to information was enshrined in article 35 of the Constitution of Kenya of 2010. As part of efforts to implement the access to information, efforts were made to advocate the enactment of a freedom of information law. The African Commission Model Law provided the impetus for Kenya's access to information advocacy process by providing key lessons for the implementation and content of the Access to Information Bill, which was subsequently enacted into law. The support was proved by drawing key principles of access to information from the African Commission Model Law, support from the office of the African Union Special Rapporteur on Access to Information, and the adoption of key rights to information principles by the courts in adjudicating on access to information. This chapter highlights lessons drawn from the African Model Law during the process of adoption and content of the Kenyan Access to Information Act of 2016.

1 Introduction

The right to information or access to information plays an essential role in the achievement of human rights and democratic principles and, as such, its realisation is of central interest to Kenyan society. This chapter examines the role and impact of the Model Law on Access to Information for Africa (Model Law)¹ on Kenya's access to information framework. The article argues that the Model Law provides a best practice guide for freedom of information that has shaped national debate and knowledge on access to information in Kenya, and substantially informed the content of

1 Model Law on Access to Information for Africa, African Commission on Human and Peoples' Rights (Model Law).

various legislations, including the Kenyan Access to Information Act of 2016 and the development of jurisprudence. I first highlight the legal framework on access to information, then examine how the Model Law has impacted the treatment of access to information in Kenya and point to the remaining gaps between best practices and the Kenyan framework.

2 Access to information: Legal framework

Sweden's Freedom of the Press Act of 1766 granted the public access to government documents and indeed was the first law on access to information in the world,² followed by that of Finland in 1951. Progress has since been made regarding the adoption of access to information laws over the world guaranteeing public access to government records subject to certain exemptions.

The right to information, or freedom of information,³ is gaining recognition at the international, regional and national levels. At the international level, article 19 of the Universal Declaration of Human Rights (Universal Declaration)⁴ and article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁵ recognise the right to access information.

At the African regional level, various African Union (AU) instruments protect and promote the right to information. Article 9(1) of the African Charter on Human and Peoples' Rights (African Charter) entitles every individual to the right to receive information and outlines the principles that should govern the exercise of this freedom.⁶ The African Youth Charter recognises access to information and obligates state parties to

2 L Weibull 'Freedom of the Press Act of 1766: Swedish legislation' *Encyclopædia Britannica* 21 December 2015, <http://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766>.

3 The United Nations Educational, Scientific and Cultural Organisation (UNESCO) defines freedom of information as 'the right to access information held by public bodies', 'Communication and information: Freedom of information' 2016, <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/>.

4 '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.' United Nations General Assembly Universal Declaration of Human Rights, 10 December 1948, Resolution 217 A(III), art 19, <http://www.un.org/en/universal-declaration-human-rights/>.

5 '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 form of art or through any other media of his choice.' United Nations General Assembly International Covenant on Civil and Political Rights, 16 December 1966, Treaty Series, Vol 999 171, art 19, treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.

6 'Every individual shall have the right to receive information.' Organisation of African Unity (OAU) African Charter of Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), art 9(1), <http://www.achpr.org/instruments/achpr/> (African Charter).

provide access to information so that young people become aware of their rights and of opportunities to participate in decision making and civic life;⁷ article 6 of the African Charter on Values and Principles of Public Service and Administration recognises the right to information and provides, among other things, that '[p]ublic service and administration shall make available to users information on procedures and formalities pertaining to public service delivery'.⁸ In addition, the AU Convention on Preventing and Combating Corruption obligates African governments to adopt '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'.⁹ The African Charter on Elections, Democracy and Governance provides that '[e]ach state party shall guarantee conditions of security, free access to information, non-interference [and] freedom of movement'.¹⁰ It is clear from these legal provisions that significant strides have been made in the African region to recognise, protect and promote the right of access to information in various sectors of governance and human rights. The major question remains as to why most African countries are yet to adopt legal frameworks on access to information to implement the regional instruments and, in some cases, national constitutions.

The Model Law on Access to Information for Africa is a significant and deliberate step by the African Commission on Human and Peoples' Rights (African Commission) to recognise and elevate the status of the right to information as a fundamental human right and a key component for the promotion of good governance and democracy. The Model Law complements other AU regional instruments that recognise the right to information, and provides a best practice guide on the definition, application and interpretation of the right to information in Africa. The Model Law was drafted by the African Commission. The Law was adopted and launched in 2013 during the Commission's 53rd ordinary session.¹¹ The Model Law provides impetus for African countries struggling with the adoption of national laws, and offers a guide for shaping legislative content and promoting discourse on access to information.

7 African Youth Charter, 2 July 2006, arts 4(2) & 11(2)(e), http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf.

8 African Charter on Values and Principles of Public Service and Administration, 31 January 2011, art 6(1), au.int/en/sites/default/files/treaties/7798-treaty-0042_african_charter_on_the_values_and_principles_of_public_service_and_administration_e.pdf.

9 African Union Convention on Preventing and Combating Corruption 11 July 2003, art 9, http://www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf.

10 African Charter on Democracy, Elections and Governance 30 January 2007, art 19(2), http://www.ipu.org/idd-E/afr_charter.pdf.

11 Centre for Human Rights, University of Pretoria 'Official Launch of the Model Law on Access to Information in Africa' 12 April 2013, <http://wwwi.chr.up.ac.za/index.php/centre-news-2013/1115-official-launch-of-the-model-law-on-access-to-information-in-africa.html>.

3 History of Kenya's access to information legislation

Kenya has recently made progress in meeting its obligations under international and regional instruments through the passage of various legislation, including a constitutional provision that expressly protects citizens' rights to information and, second, through the adoption of national policies and guidelines that support transparency and the disclosure of information to the public. This constitutional provision has been given meaning by the recent enactment of the Kenyan Access to Information Act, 2016. The passage of this law is the culmination, over 15 years, of Kenyan civil society and other non-state actors' campaign for the adoption of a access to information law.¹² The last Freedom of Information Bill was tabled in Parliament in 2007 as a private members' Bill. Unfortunately, this Bill lapsed at the first reading, with the end of the tenth Parliament. Following the 2008 post-election violence in Kenya, there were calls for the adoption of an access to information law, with the Commission of Inquiry into Post-Election Violence making recommendations for the enactment of an access to information law to allow for more accountability and to assist in investigations into the violence,¹³ as well as to assist transitional justice processes such as the Truth, Justice and Reconciliation Commission. The Freedom of Information Bill of 2008 was thus drafted as a government Bill and was to be presented to Cabinet for discussion and later to Parliament. Unfortunately, the Bill did not see the light of day. Following the post-election violence, it was a priority for the cabinet to deal with issues that would bring about stability at the time, and a access to information law was not enacted. The constitutional review process that led to the adoption of the Constitution of Kenya of 2010 provided the greatest opportunity for Kenya to advance the access to information, and advocacy initiatives by the Freedom of Information Network led to the inclusion of article 35 on access to information, which provides:¹⁴

- (1) Every citizen has the right of access to –
 - (a) information held by the state; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

12 C Odote 'Access to information law in Kenya: Rationale and policy framework' Kenyan Section of the International Commission of Jurists (ICJ Kenya) 2015 viii.

13 Commission of Inquiry into Post-Election Violence Report, 16 October 2008 476, http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

14 Constitution of Kenya, 27 August 2010, art 35.

- (3) The state shall publish and publicise any important information affecting the nation.

As mentioned above, the passage of the Kenyan Access to Information Act of 2016 brings meaning to the constitutional right to information by providing a framework for the realisation of the right to information.

4 Impact of the African Model Law on Kenya's access to information law

In Kenya, the Model Law became a reference point and a best practice guide in the struggle for the adoption of a legal framework on access to information. It (i) informed Kenya's foreign policy; (ii) helped shape national legislation; (iii) expedited the process of access to information legislation; and (iv) directed courts dealing with access to information cases.

First, the administration of President Uhuru Kenyatta has shaped Kenya's foreign policy to reflect an assertive pan-Africanist approach, tying Kenya's future to that of her African neighbours and making commitments to the larger pan-Africanist agenda.¹⁵ This pan-African approach by Kenya demonstrates a commitment to pan-African initiatives, thus providing a suitable environment to popularise the Model Law. As a result of pan-African sentiments, lobbying for an access to information law in Kenya has been easier or deemed safer by policy makers due to the existence of the Model Law. Kenya found it safer to adopt an access to information law based on the argument that other African countries have also adopted access to information laws, as well as the existence of the Model Law which provides best practices for African countries in this regard.

Secondly, the Model Law has in various respects positively shaped the content of the Kenyan Access to Information Act of 2016. The Freedom of Information Bill of 2015 and the policy that was adopted into law in 2016 were developed based on key principles contained in the Model Law and recognised as such. In addition, various visits to Kenyan policy makers by the Special Rapporteur on Freedom of Expression and Access to Information in Africa (at the time Advocate Pansy Tlakula) and her delegation to support the Kenyan legislative process expedited the legislative process on access to information.¹⁶ A sample of some of the principles and content borrowed from the Model Law are highlighted below.

¹⁵ Kenya Foreign Policy, November 2014.

¹⁶ The Special Rapporteur on Access to Information and her delegation met Kenyan policy makers in August 2015 to support the Kenyan access to information campaign.

The clause containing the objectives of the Kenyan Access to Information Act¹⁷ mirrors the provisions of the Model Law.¹⁸ Specifically, the provision extends the enjoyment of the right to access information and an obligation to disclose information to both public and private bodies.¹⁹ The expansion of the scope of the Act to the private sector is significant in light of the increasing number of public-private partnerships entered into by the government on behalf of its citizens and the increasing number of private bodies that carry out public functions. In addition, this provision borrows from the Model Law in promoting principles of transparency, accountability and public participation.

The Model Law is titled Model Law on Access to Information for Africa.²⁰ Similarly, the Kenyan law adopts the title Access to Information Act 2016. The title Access to Information mirrors the contents and object of the law, which is to create a framework to facilitate access to information held by public and private bodies. Various jurisdictions, such as India, have adopted the title of the law as Right to Information Act;²¹ others, such as South Africa, have adopted the title Promotion of Access to Information Act.²²

The Model Law provides a guide for the interpretation of Access to information laws.²³ This approach has been adopted by the Kenyan law, which contains provisions for an interpretation based on a duty to disclose information.²⁴ In addition, the Kenyan access to information law contains an objects and purpose clause that mentions the objectives of the law, which will be to give effect to the right to information.²⁵ In addition, similar to the Model Law, this provision also seeks to provide a framework for accessing information²⁶ and to protect whistle blowers who release information of public interest in good faith.²⁷ The protection of whistle blowers is a progressive provision in the Kenyan context in the absence of a legislative framework on whistle blower protection. The protection of whistle blowers in the access to information framework, therefore, is necessary to encourage the disclosure of information by public bodies, and promotes the objective of the Act and the principle of maximum disclosure of information.

17 Access to Information Act (Kenya), No 31 of 2016, sec 3 (Access to Information Act).

18 Model Law (n 1 above) sec 3.

19 Access to Information Act (n 17 above) sec 3(b); Model Law, sec 3(a)(i).

20 Model Law (n 1 above).

21 Right to Information Act 22 of 2005 (India).

22 Promotion of Access to Information Act 2 of 2000 (South Africa).

23 Model Law sec 5.

24 Access to Information Act (n 17 above) sec 4(4).

25 Access to Information Act sec 3(a).

26 Access to Information Act sec 3(c).

27 Access to Information Act sec 3(e).

The Kenyan law lacks a primacy clause. This would be a progressive provision as contained in the Model Law.²⁸ This provision is very significant in the wake of existing pieces of legislation and government directives that promote secrecy, thereby going against the spirit of access to information laws. In its statute books, Kenya maintains a host of draconian pieces of legislation that impede the right to access information, such as the Official Secrets Act.²⁹ The Kenyan Access to Information Act provides for consequential amendments to existing legislation that impede the right to information. While this is an important step, the Kenyan legal framework lacks an express provision similar to that of the Model Law that gives it primacy by providing that 'this Act applies to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of an information holder'.³⁰

Principles of proactive disclosure contained in the Model Law³¹ have been maintained throughout the content of the Kenyan Access to Information Act. The principles laid out are clear and consistent with the duty to disclose information in their possession. The principle extends a duty to proactively disclose information to public and private bodies.³² In addition, the Kenyan law has taken into consideration the need to disseminate information to persons with disabilities, including flexibility in language and method of communication.³³

In part III, the access to information law in Kenya places the responsibility to release information on the chief executive officers of public entities as the designate access to information officer.³⁴ However, the chief executive officer is allowed to delegate the function to an information officer within a public entity. This is borrowed from the Model Law, which provides that '[t]he head of every information holder must designate an information officer for the purposes of this Act'.³⁵ This best practice facilitates access to information from a public or private body throughout.

In addition, the Kenyan Access to Information Act sets out the process of accessing information, including timelines and the procedure for the processing of information. Key principles of access to information have been incorporated for the Model Law. For instance, to promote access to information, the Model Law states that a person's right to access information is not affected by any reason the person gives for seeking access to information, nor by the public entity's belief as to the person's

28 See Model Law sec 4(1).

29 Official Secrets Act, 1970, rev 2009, ch 187.

30 Model Law sec 4(1).

31 Model Law secs 2(f) & 7.

32 See Access to Information Act (n 17 above) secs 3(b) & 5.

33 Access to Information Act secs 5(2) & 8(2).

34 Access to Information Act secs 7(1) & 9.

35 Model Law sec 10(1).

reasons for seeking access. The same principle is borrowed in the drafting of section 4(2) of the Kenyan Access to Information Law.³⁶ This affirms the principle of maximum disclosure,³⁷ stating that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances, in order to avoid instances where public entities have unreasonably withheld information from the public.

The Model Law sets out various classes of information that are exempted from disclosure.³⁸ The list set out in the access to information law has been criticised as being very broad and against international best practices, including aspects of the Model Law. For instance, the definition of exceptions in relation to national security, defence and subversive or hostile activities. The Model Law provides a comprehensive analysis of what amounts to national security as an exemption to information, offering a guide for Kenya's legislative development. Other exemptions – including personal information, commercial and confidential information, national security and defence, and professional privilege – mirror provisions of the Model Law.³⁹

Additionally, the Kenyan law recognises records management as a critical and important component of facilitating access to information. Based on the Model Law,⁴⁰ the law obligates public bodies to maintain and manage records to facilitate the right of access to information.⁴¹ This is an important development for Kenya's efforts to align public administration processes with requirements of transparency and accountability and to adopt an access to information framework.

Second, civil society made proposals for the Act to include a clause that shifts the burden of proof to public bodies and public officials to consider whether the public interest protected in denying information outweighs the public interest in the release of information, and to demonstrate that the harm to their interests outweighs the public interest in the release on information. This proposed amendment is borrowed from the provisions of the Model Law on public interest override.

36 Access to Information Act (n 17 above) sec 4(2); see Model Law sec 13(5).

37 See Article 19 'The public's right to know: Principles on freedom of information legislation' International Standard Series 1999, http://www.ipu.org/splz-e/sfe/foi_ps.pdf.

38 Model Law secs 24-37.

39 Access to Information Act, sec 6.

40 See Model Law sec 6.

41 Access to Information Act, sec 17.

5 Adoption of the Model Law principles by the courts

The Model Law provides guidelines for Kenyan courts to apply and promote access to information rights. Kenyan courts have had opportunities to interpret the right of access to information in Kenya based on petitions filed for the interpretation and protection of the right of access to information.⁴² Prior to the adoption of an access to information law in Kenya, courts have been the main determinants of disputes relating to the interpretation of human rights and, in some cases, courts could develop the law to favour the realisation of human rights. This responsibility has been recognised by the Kenyan Constitution, which provides that

[i]n applying a provision of the Bill of Rights, a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom.⁴³

This constitutional provision provides an opportunity for Kenyan courts to advance and protect human rights, such as the right of access to information. Based on petitions filed to interpret the right as guaranteed by article 35 of the Constitution, courts in Kenya have adopted a narrow definition of the right. The provision of the Constitution which guarantees the right to information to citizens has been initially interpreted by courts to apply only to *natural* Kenyan citizens. Courts had been hesitant to make a pronouncement based on the universality of human rights.⁴⁴ Therefore, previously, in the absence of a legal framework on access to information in Kenya, courts have relied on best practices such as those provided by the Model Law on the scope and framework for the enjoyment of the access to information.

Nevertheless, principles contained in the Model Law were adopted in the judgment of *Nairobi Law Monthly Company Limited*.⁴⁵ The High Court relied heavily on principles contained in the Model Law. Although the petition was dismissed on the grounds that the right extends only to natural citizens, which is contrary to the universality of human rights and the

42 See eg *Family Care Limited v Public Procurement Administrative Review Board & Another* Petition 43 of 2012; *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*, Petition No 278 of 2011, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, eKLR; *Friends of Lake Turkana Trust v Attorney-General & 2 Others* ELC Suit 825 of 2012, Environment and Land Court at Nairobi, reported by BA Ikamari & K Mwendu.

43 Kenyan Constitution art 20(3).

44 See *Nairobi Law Monthly Company Limited* (n 42 above). This has however changed, with the Decision of the court in *Katiba Institute v President's Delivery Unit*, Constitutional Petition 468 of 2017.

45 As above.

provisions of the Model Law, the judge acknowledged the principles contained in the Model Law in her reasoning.

The judge admitted the importance of the constitutional right of access to information.⁴⁶

First, as the petitioner, ICJ and the *amici curiae* have submitted, the right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution.

The judge also acknowledged the principle of maximum disclosure mentioned earlier⁴⁷ and found in both the Model Law and the Kenyan law.⁴⁸

The recognised international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances.

The judge even recognised, as the Model Law warrants,⁴⁹ that the right of access to information should apply to all persons, and not just Kenyan citizens: 'Anyone, not just citizens, should be able to request and obtain information.'⁵⁰

The judge specified, as does the Model Law,⁵¹ 'that a requester should not have to show any particular interest or reason for their request',⁵² and 'that '[i]nformation' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information'.⁵³

The judge also made observations with regard to the procedure for accessing information. The observations made, mirror the provisions of the Model Law on accessing information 'expeditiously and inexpensively'.⁵⁴ The Court observed that 'requests for information [should be] processed rapidly and fairly, and the costs for accessing

46 *Nairobi Law Monthly Company Limited* para 31.

47 See Article 19 (n 37 above); see also Model Law sec 2(c); Access to Information Act (n 17 above) sec 4(4).

48 *Nairobi Law Monthly Company Limited* (n 42 above) para 36.

49 See Model Law secs 12(1) & 3(a); see also African Charter art 9. Note that the Kenyan Act limits its application to citizens (see sec 4(1)).

50 *Nairobi Law Monthly Company Limited* (n 42 above) para 36.

51 Model Law sec 13(5) (on the requester not having to show reasons for a request); sec 3(a)(i) (on 'information' including all information held by a private body); sec 38 (on the burden of proof for exempted information lying with the information holder).

52 *Nairobi Law Monthly Company Limited* (n 42 above) para 36.

53 As above.

54 See Model Law sec 2(a).

information should not be so high as to deter citizens from making requests'.⁵⁵

Finally, she asserted that

as correctly submitted by the 1st Interested Party and the *amici curiae*, the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought.⁵⁶

This is consistent with the Model Law section on exemptions and public interest override.⁵⁷

6 Remaining gaps between the Model Law and the Kenyan legislation

An analysis of the access to information law reveals various gaps when compared with the Model Law. Civil society organisations have highlighted these gaps and suggested a series of amendments to the address them.

First, the current law lacks a primacy clause which could serve to provide supremacy of the Act on the topic of access to information. A memo submitted to the Parliamentary Committee by different civil society organisations proposed an amendment to mirror the provisions of the Model Law that states: 'Save for the Constitution, this Act applies to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information.'⁵⁸

Second, there was a proposal to include a severability clause consistent with section 36 of the Model Law. The proposal includes the development of a clause providing that where a portion of a record or document containing requested information is exempt from release under this part, the exempt portion of the information must be severed or redacted from the record or document and access to the remainder of the information must be granted to the requester.

Third, the Kenyan Access to Information Act does not require that a public information officer handling requests for information to be qualified and competent to handle such requests. The provisions of the Model

55 *Nairobi Law Monthly Company Limited* (n 42 above) para 40.

56 *Nairobi Law Monthly Company Limited* para 54.

57 Model Law sec 25.

58 Model Law sec 4(1).

Law,⁵⁹ if adopted, would contribute to a more comprehensive framework on access to information.

Fourth, upon a review of decisions by the Commission to release information, a proposal is made to include a provision stating that where no decision has been received within the time limits set, the request should be deemed rejected and an appeal may be lodged with the High Court.

Fifth, the Model Law extends the right of access to information to all persons, while the Kenyan law only extends the right to citizens. Indeed, the Model Law states that 'every person has an enforceable right to access information'.⁶⁰ It also states as an objective to 'give effect to the right of access to information as guaranteed by the African Charter on Human and Peoples' Rights',⁶¹ which in itself guarantees the right of access to information to all persons.⁶² The Kenyan Law, on the contrary, limits its application to citizens: 'Every citizen has the right of access to information.' While the Constitution restricts this right only to citizens,⁶³ ideally this right should be enjoyed by all persons.

Finally, the Kenya law could adopt the Model Law provision allowing for an extension of the period for disclosure, to allow public officials to comply with the law. The provision of the Model Law in section 9(3) reads as follows:

The information officer to whom a request is made under 9(2) may extend the period to respond to a request on a single occasion for a period of not more than 14 days if –

- (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the original time limit would unreasonably interfere with the activities of the information holder concerned'; or
- (b) consultations are necessary to comply with the request that cannot be reasonably completed within 21 days.

7 Conclusion

The Model Law has played a significant role in shaping public debate on access to information in Kenya. It helped shape foreign policy surrounding access to information and foster a favourable sentiment towards access to information in Africa; it substantially informed the drafting of the Kenyan Access to Information Act of 2016, which significantly borrows from the

59 Model Law sec 47.

60 Model Law sec 12(1).

61 Model Law sec 3(a).

62 African Charter art 9.

63 Kenyan Constitution art 35(1).

Model Law; and it provided a basis for jurisprudential developments, allowing judges to draw from the principles contained in the Model Law. However, despite these gains, various provisions of the current Access to Information Act fall short of meeting international standards and principles of access to information. Based on the Model Law, civil society has engaged in making proposals for amendments to improve the quality of the legislation. The many actors involved and the vigour of the debate augurs well for the future of access to information in Kenya and in Africa.

CHAPTER 7

THE SUDANESE ACCESS TO INFORMATION ACT 2015: A STEP FORWARD?

Ali Abdelrahman Khalil

Abstract

A Sudanese Access to Information Act was adopted in January 2015. Aside from examining its origin and its relation to the Model Law on Access to Information for Africa adopted by the African Commission on Human and Peoples' Rights, this chapter analytically compares the provisions of the Sudanese Act and the provisions of the African Model Law. The author concludes that the Model Law has had minimal influence on the Sudanese Act, due to Sudan's weak ties to Africa and African institutions; and its general hostility towards international law.

1 Introduction

This chapter considers the possible influence of the Model Law on Access to Information for Africa (Model Law) of the African Commission on Human and Peoples' Rights (African Commission) in drafting the Sudanese Access to Information Act 2015. The Act has as yet not been practically tested. However, this is also an opportunity to examine the text with reference to the Model Law with the intent to identify the Act's shortcomings and *lacunae*, if any, without ignoring its positive aspects. The chapter provides a brief descriptive and critical account of this long-awaited piece of legislation. First, the chapter examines the origin of the Bill, and proceeds to assess the extent to which the Act conforms with, or deviates from, the Model Law.

A case study on Sudan is of significance in assessing the impact of the Model Law in enhancing the right of access to information in countries where the culture of opacity prevails and where governments tend to monopolise access to information.

2 Background

Sudan is one of those countries governed by totalitarian regimes that tend to maintain a monopoly over information and are intent on controlling its flow. This is because monopoly of information is crucial to the very existence of these regimes. Therefore, such regimes do not tolerate interference with their exclusive power over information.¹

The civil service, as well as the legal system as a whole in Sudan, promotes a culture of opacity. This culture and practice are entrenched by numerous laws. More than 60 laws were identified as infringing the Bill of Rights of the Interim Constitution of 2005 and, accordingly, declared unconstitutional. Although various recommendations were made to the government to amend these laws to bring them into conformity with the Constitution, so far very little has been done.²

A few examples of these practices bring to the fore the situation in Sudan. The first is the case of the police officer, Abuzaid Abdalla, who reported cases of corruption in the police to his senior managers. The result was to refer him to trial before the police court for alleged crimes of defamation of the police and incitement of unrest among his colleagues, in addition to violations of the police's disciplinary regulations. His service in the police was terminated and he was convicted of the alleged offences. He approached the Constitutional Court challenging the constitutionality of his trial by the police court. The Constitutional Court accepted his arguments and consequently annulled the proceedings on grounds that his trial had been unconstitutional.³

A similar recent example is the case of the former Deputy Secretary of the Ministry of Justice who allegedly exploited his public office at the Department of Lands to unduly acquire several plots of land. When a leak from the Registry of Lands revealed these corrupt acts, he instituted a criminal case against the alleged whistle-blower, a land registration officer, under the charges of disclosure of official information and disobeying the law with intent to cause harm. The court dismissed the case.⁴

In another case, in May 2011, the Minister of Finance unlawfully detained a journalist at his office in the Ministry of Finance, to compel him

1 See A Sulaiman 'Access to information within regimes monopolizing the information: Sudan as an example (in Arabic)' <http://anwarleman.blogspot.com/2015/05/1995-2015.html> (accessed 20 November 2015). See also AM Abdelgadir *Fences of silence: Systematic repression of freedom of the press, opinion and expression in Sudan* (2012).

2 See A Teir & B Badri (eds) *Law reform in Sudan: Collection of workshop papers* (2008).

3 Constitutional Suit 199/2013, 9 November 2014 (unpublished). As a consequence of this judgment, the government managed to amend the Sudan National Interim Constitution 2005 to render such trials by the police courts as in conformity with the Constitution.

4 Criminal case 3090/2014 (Khartoum East Criminal Court) 16 November 2015.

to disclose the source through which he had obtained a copy of the employment contract signed between the Ministry and the chief executive officer of the Khartoum Stock Exchange. The journalist considered the contract as giving the CEO a large remuneration as compared to other senior officials. When the journalist refused to disclose his source, the Minister ordered his guards to arrest the journalist and to surrender him to the National Security Service, where he was later released.⁵

These examples reveal how deeply the secrecy culture is rooted in Sudan and how it is promoted and entrenched by those in power as a tool for retaining their positions. The result is severe difficulties in access to the minimum amount of information needed by the public to exercise scrutiny over their affairs.

From the above, it is not surprising that the promulgation of the Access to Information Act has not been met with celebration, or even welcomed by commentators, lawyers, activists and journalists. Rather, the true reaction among stakeholders has been one of ignorance, caution and suspicion.⁶ Mohammed Abdelsalam, the Director of the Centre for Human Rights at the University of Khartoum, has contended that the Act should rather be called the 'denial of access to information' Act. He stated that this was because of the broad and vague exceptions which the Act imposes.⁷ It has also been argued that the promulgation of any access to information Act, howsoever consistent with international standards, is futile in the absence of other guarantees of the rule of law and good governance.⁸

This is not to negate any positive aspects in passing the Act. The mere existence of an Access to Information Act creates momentum for freedom of information and dissemination of a culture of access to it. It is now up to non-governmental organisations (NGOs) and other civil society organisations to seek the engagement of the public towards enhancing transparency and accountability.

3 Access to information as a constitutional right in Sudan

Article 39(1) of the Sudan Interim Constitution provides that '[e]very citizen shall have an unrestricted right to freedom of expression, reception

5 E Satti 'When an official violates the Constitution: The Minister of Finance as an example' <http://www.sudaress.com/sudanile/27767> (accessed 24 November 2015).

6 Interviews conducted by the author with different activists.

7 MA Babiker 'The UN Convention against Corruption: Can this landmark document work in a context of entrenched corruption and lack of good governance?' Paper presented at the conference Anti-Corruption Measures in Sudan: The Concept and the Law, Faculty of Law, University of Khartoum, 9 November 2015.

8 Sulaiman (n 1 above).

and dissemination of information, publication, and access to the press without prejudice to order, safety or public morals as determined by law'. It may be posited that this is not an expressly clear-cut stipulation of the right of access to information. However, freedom of 'reception and dissemination' of information necessarily entails a right to access information held by the state or public bodies. According to the General Comment 34 of the United Nations (UN) Human Rights Committee, freedom to seek, receive and impart information and ideas of all kinds as provided for in article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) embraces a right of access to information held by public bodies.⁹

Article 27(3) of Sudan National Interim Constitution provides that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'.¹⁰ Although it is obvious that this provision renders the relevant international human rights conventions self-executing, its practical implementation is controversial. This monist-based approach was intended to render all the rights enshrined in these treaties, to which Sudan is a party, as constitutional Sudanese rights and, accordingly, to incorporate these international rights into Sudanese municipal law.

It is not certain whether it is useful to invoke article 19(2) of the ICCPR, which Sudan ratified in March 1986,¹¹ as a directly-claimed right to strike down this legislation as unconstitutional.¹² The outcome of such action is uncertain. In practice, the Constitutional Court has avoided the application of this provision in the few cases in which this provision was invoked.¹³

In any case, one may raise the issue of the constitutionality of the Act. There is reasonable doubt that this Act, with the many unlimited and vague exceptions, will pass the test of constitutionality. It appears that it may be possible to challenge the constitutionality of the Act before the Constitutional Court of Sudan under article 39(1) of the Constitution.

Furthermore, the Act may not be in conformity with the proviso in article 27(4) of the Interim Constitution of 2005, which provides that '[l]egislation shall regulate the rights and freedoms enshrined in this Bill

9 General remark 18, General Comment 34, UN Human Rights Committee, July 2011.

10 Sudan National Interim Constitution 2005, art 27(3).

11 Law 22/1986.

12 Art 19(2) of the ICCPR provides: '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.'

13 See *Elhaj Elmakki v Izzeldin Elhassan and Sudan Government* (2011) Sudanese Constitutional Court Law Reports 228.

and shall not detract from or derogate any of these rights'. As a principle, the power to impose restrictions or limitations on fundamental rights must be used to regulate the exercise of these rights, not to curtail or extinguish them.

4 Origin of the Access to Information Act 2015

The Sudanese Access to Information Act was passed by the National Assembly of Sudan on 27 January 2015 and became effective upon signing by the President of the Republic on 22 February 2015.¹⁴ The lack of clarity in the process of law making in Sudan is not confined to this Act. It is a general feature of the legislative process in the country. Generally, a Bill originates from the relevant ministry or department and then is referred to the Department of Legislation in the Ministry of Justice for legislative drafting.¹⁵ Once drafted, the Bill is presented to Cabinet for approval, and then tabled in Parliament for promulgation.¹⁶

One failure of the system of law-making in Sudan is the lack of an institution in charge of law review and reform. Rather, laws are enacted arbitrarily in the absence of any clear policy, philosophy or even prioritisation. The Access to Information Act was not an exception to this practice. The need for such a law reform commission has repeatedly been articulated by scholars, to no avail.¹⁷ The law-making process in Sudan is largely influenced by the political will of the governing political party with very little participation by other stakeholders and with an absence of public scrutiny. The role of the Department of Legislation and parliamentary counsel has largely shrunk to the minimum. There are instances in which the relevant senior official disregarded the advice of the legislative drafters and directly opposed it. The drafting and promulgation of the Access to Information Act serves as an example.¹⁸

It is on record that the process of adopting the Access to Information Act originated from the Ministry of Science and Communication.¹⁹ It appears that the process commenced with a draft Bill prepared by the legal

14 Law 15 for the year 2015, published in the Legislative Annex to the Gazette on 15 April 2015.

15 According to sec 5(2)(e) of the Ministry of Justice Organisation Act 1983, one of the roles assigned to the Minister of Justice is to 'draft bills and all legislative measures in the state'. The Minister does this through the Department of Legislation in the Ministry of Justice.

16 The Regulations of the Organisation of the Cabinet Business 2001 and the Regulations of the National Assembly Business 2015.

17 See eg MI Khalil 'Sudan legal system and problems of law reform' in Teir & Badri (n 2 above).

18 File MJ/Legislation Department/1181, personally accessed by the author, December 2015.

19 As above.

counsel at the Ministry of Science and Communication.²⁰ Surprisingly, the draft was modelled after the access to information laws of Palestine, Yemen and Jordan. Copies of those Acts were annexed to the draft Bill as its sources. One may ask whether the Acts of these Arab countries, with very young and unfortunate experiences in law, generally, were the best models for guidance of the Sudanese legislature in drafting its Access to Information Act. Again, this raises questions about the law-making process in Sudan and, in particular, the extent to which national and regional standards on a subject matter are drawn upon for inspiration in the legislative drafting process in Sudan.

The draft Bill was sent by the Minister of Science and Communication to the Minister of Justice on 22 December 2014, to start the process of passing it into law.²¹ The Minister of Justice referred the draft Bill to the Department of Legislation for the required study.²² In its report, the Department concluded that the draft was defective and inconsistent with the established legislative drafting praxis in Sudan.²³ The report went on to state that the draft was a mere assembly of inconsistent provisions derived from the different experiences and different sources without having due regard to consistency.²⁴ The Department recommended that the draft Bill not be approved and instead subjected to further studies and consultations. In spite of this recommendation, the draft was passed into law by Parliament only nine days later.²⁵ In spite of the recommendation to the opposite, it seems that the draft Bill obtained the required rubber stamp of the Ministry of Justice.

It seems that there was a rush to pass the Bill into law before the closure of the last parliamentary session and the dissolution of Parliament, ahead of the approaching general elections of April 2015. Around the same time 15 controversial new Acts of Parliament and amendments to existing

20 The legal counsels of the ministries are part of the Ministry of Justice. They are affiliated with the Ministry of Justice but assigned to different departments of the government, including ministries, to provide legal assistance to these departments. See the Ministry of Justice Organisation Act 1983. Although the legal counsels at the different ministries assist the ministers in suggesting new laws and preparing initial drafts, the primary responsibility of drafting Bills is that of the Department of Legislation at the Ministry of Justice according to the Regulations of the Ministry of Justice Organisation Act of 1983. These Regulations provide that every Bill of law should be accompanied by a certificate from the Department of Legislation that the Department drafted the Bill, before the Bill can be tabled before the National Assembly.

21 File MJ/Legislation (n 18 above).

22 According to the Regulations of the Ministry of Justice Organisation Act of 1983 and Circular of the Minister of Justice on the Requirements of Passing of Laws 1996.

23 The author consulted File MJ/Legislation (n 18 above).

24 As above.

25 The report is dated 18 January 2015 and the Act was passed by the National Assembly on 27 January 2015. See n 16 and n 20 above.

Acts were passed.²⁶ Even more revealing is the fact that the Bill did not pass through the office of the Legal Counsel of the Cabinet²⁷ as it is required to do.²⁸ This suggests that, after obtaining the approval certificate of the Ministry of Justice, the Bill went directly from the Minister of Science and Communication to Parliament for adoption into law without passing through the Cabinet and its legal counsel.

This account of the adoption process of the Access to Information Act makes it reasonable to infer that the passing of the Act was a mere cosmetic process intended to whitewash the unpleasant record of the Sudanese government on issues of transparency and accountability. According to the then Minister of Communication,²⁹ Tahani Abdalla Attia, the prime benefit from passing the Act is the amelioration of the ranking of Sudan in the transparency index.³⁰

It is clear that there is no connection between the Sudanese Access to Information Act and the Model Law. There is no trace in the file of the Act that suggests that the Model Law was even consulted at any stage in the process of drafting the Act. This opens the door for questions about the reasons behind this missed opportunity.

5 Possible reasons for not relying on the Model Law in drafting the Access to Information Act

The most likely reason behind the failure to rely on the Model Law in drafting the Sudanese Access to Information Act is the weak ties with Africa and African institutions. It is even doubtful whether the relevant officials of the Sudanese government are aware of the existence of the Model Law. Again, this forms part of the cultural identity and orientation issues affecting the legal system in Sudan. It has been argued that 'the intertwined model of the Islamic-Arab cultural identity accelerates the assimilation of the heterogeneous African ethnic and religious diversities in Sudan into a homogeneous national identity defining Sudan as an Islamic-Arab state'.³¹

26 Including 18 very controversial constitutional amendments affecting the entire federal system, on the one hand, and purporting to legitimise the status of militias used by the National Security Service to suppress rebel movements all over the country and to enhance the oppressive apparatus of the security forces, on the other. See 'Sudan: Constitutional amendments give Bashir new powers' <http://english.aawsat.com/2015/01/article55340104/sudan-constitutional-amendments-give-bashir-new-powers> (accessed 23 November 2015).

27 This office is equivalent to the office of parliamentary counsel in other jurisdictions.

28 Interview with a parliamentary counsel.

29 The official title now is the Minister of Communications and Information Technology. See www.mcit.gov.sd (accessed 30 September 2015).

30 <http://www.aljazeera.net/programs/newsreports/2015/1/28/report> (accessed 30 September 2015).

31 K Jok 'Conflict of national identity in Sudan' dissertation, University of Helsinki, 2012.

This is well reflected in the drafting of laws and in shaping the legal system as a whole. Since the independence of Sudan in 1956 to date, a wide debate has always existed about the type of legal system and type of laws to be adopted in Sudan. The conflict between those who advocated the continuation of the guidance by English law, on the one hand, and those who supported the adoption of Egyptian, Arab and Islamic laws, on the other, escalated during the 1970s and early 1980s. The Islamists and pan-Arab movement took the lead in 1983. A comprehensive Islamisation process subsequently took place, the result of which is still in existence.³²

The same laws and the same minds, fortified by the ruling junta, still dominate the legal arena in Sudan. Generally speaking, the legislator in Sudan, when drafting a new law or when amending existing law, always looks for guidance to Arab and Muslim countries. The Access to Information Act of 2015 is a prime example of this mentality. Otherwise, what logic or reason justifies copying from Palestinian and Yemeni laws?

This situation can also be partially explained by the hostility towards international law in Sudan, whether black letter law or soft law. This attitude is commonly shared by all branches of government, including the courts. For instance, in the case of *Izzeldin Elhaj Elmakki v The Government of Sudan*,³³ the Constitutional Court put forward, though in an *obiter dictum*, what could be termed a flimsy reasoning to avoid the application of article 27(3) of the Constitution, which provides that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'.³⁴ In the decision by Justice Abdallah Ahmed, it was stated that the Bill of Rights was not part of the Constitution and that its provisions were not binding on the courts. The judge argued that articles 27(1), (2) and (3) were mere directives addressed to the legislature and not the courts. He added that these provisions only set out plans and goals to be achieved by the legislature through incorporating these rights by way of Acts of Parliament. However, this absurd opinion had overlooked the clear provision in article 48 of the same Bill of Rights, which states that 'the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts'.

Another explanation may be the language issue. Laws in Arabic may be a handy source for copying. The way in which the draft Bill was prepared suggests that the drafter was not acquainted with endeavours that resulted in the adoption of the Model Law by the African Commission, including the fact that the Model Law is available in Arabic.

32 See AA Khalil 'The new *lex mercatoria* in the Sudanese legal system' (2015) 29 *Arab Law Quarterly* 1.

33 *Elmakki* (n 13 above).

34 Sudan National Interim Constitution 2005.

6 Analysis of the Access to Information Act of Sudan

6.1 An overview

The Access to Information Act of 2015 is a relatively short piece of legislation. It consists of 19 sections divided into eight chapters.³⁵ The first chapter is divided into two sections, the title of the Act, its commencement and definitions. The second chapter consists of only one section that provides for the objectives of the 'Commission of access to information'. Chapter three contains two sections on the establishment of the Commission and its competences. The fourth chapter provides, in three sections, for the appointment of the commissioner, the powers and competences and the process of appealing decisions of the commissioner. In chapter five, there are three sections providing for the right to access information, the procedure for exercising this right and the exempted information. The sixth chapter comprises one section that provides for the executive powers of the commissioner. Chapter seven contains three sections relating to the financial provisions of the commission. Lastly, the eighth chapter is for miscellaneous provisions relating to the primacy of the Act over inconsistent legislation, violations and sanctions and the power of delegated legislation.

6.2 Comments on the provisions of the Act

Some comments and thoughts on the provisions of the Act as compared to the Model Law are worth discussion, especially in terms of the areas in which the Act falls short.

6.2.1 Inconsistency in structure and format of the Act

The first observation from the above general overview of the provisions of the Act is the lack of consistency and logical sequence of some provisions. For example, in chapter two, the objectives of the commission are listed before providing for the establishment of the commission itself in the third chapter. Furthermore, the second chapter is titled 'objectives and goals of the commission', whereas it should in fact be the objectives of the law itself and not of the commission. In fact, it was written correctly as such in the draft Bill before it was tabled in Parliament. This change, therefore, was made by Parliament. The reason behind the change is not clear, as is the question whether it was deliberately made to weaken the effect of the Act. It may be posited that the result of the drafting is to render the Act

35 Compared to the Model Law which consists of 88 detailed and well-drafted sections.

inoperative until the establishment of the Commission. The equivalent provision in the Model Law is section 3 titled ‘Objectives of the Act’ and obviously not the objectives of the oversight body. What are set as the objectives of the Commission in the Act are nearly commensurate with the objectives mentioned in section 3 of the Model Law.

However, it should be noted that a few of the drafting flaws in the Act were later rectified by the Ministry of Justice in the revised edition of the statute book issued later in 2016, under the Revised Edition of Laws Act 1974. For example, the revised edition restored the alphabetical sequence of the terms defined in section 2.

6.2.2 *Duty to create, keep, organise and maintain information*

The Act does not impose upon information holders any duty to create, keep, organise or maintain their information. In the Model Law, this is provided for in section 6. This omission, whether made deliberately or not, assists in the enhancement of the culture of secrecy prevailing in Sudan.

6.2.3 *Proactive disclosure of information*

The Act lacks a provision for the obligation of proactive disclosure by information holders as contained in section 7 of the Model Law. Section 7 of the Model Law is a detailed and well-drafted provision which imposes upon information holders the duty to publish, within 30 days of its generation and annually, all the relevant information that the public may need to know about the concerned body. Again, the omission of this in the Sudanese Act does not assist in the enhancement of transparency.

6.2.4 *Scope of application*

Section 9 of the Access to Information Act 2015 provides for scope of application of the Act. It states:³⁶

Every person shall have the right to access and obtain information from its original sources from governmental departments and units at all levels of government, public sector institutions, public companies, companies in which the government holds any percentage of shares and any public body the Competent Minister considers as doing work akin to that of public sector and civil society organisations.

This raises two issues. First, the use of the words ‘every person shall have the right’ suggests that access to information is not restricted to Sudanese

36 Translated by the author.

citizens; everyone, as in the Model Law, has the right to access information.

On the other hand, the Act, unlike the Model Law, only applies to public bodies and not private bodies and relevant private bodies as in section 12 of the Model Law.

6.2.5 Fees

Section 10(g) of the Act provides that the public body may charge fees, upon approval by the commissioner, to meet the costs of preparing and providing the information. It is not clear whether the costs of preparing and providing the information includes the time of preparing the required information and costs other than costs of reproduction of the information. Section 23 of the Model Law expressly prohibits the charging of fees for the time spent in preparing the information and any fees other than the reasonable costs of reproduction of the requested information.

6.2.6 Failure to designate information officers

According to section 10(b) of the Act, the access to information request should be submitted in writing to the information officer in the relevant public body. However, the Act does not provide a solution in cases where an information officer is not designated by the relevant body. Therefore, the non-designation of an information officer may be used as an excuse by the information holder for not accepting the information request. The non-appointment of such officer should not affect the right of access to information or hinder the enjoyment by individuals of this right. This issue is addressed by the Model Law in section 10(2), which states that in case of failure of the information holder to designate an information officer, the head of the body is regarded as the information officer.

6.2.7 Vague and broadly-framed exemptions

A major defect of the Act is that the exemptions are drafted so vaguely that they give too much leeway for the information holder to evade providing the requested information. A good example is the exemption based on national security and defence, which excludes from disclosure 'secrets pertaining to national defence, state security or foreign policy which has not been in existence for fifty years'.³⁷ However, the Act does not define what security or defence means. On the other hand, the Model law not only clearly and narrowly defines what security and defence means, but also sets a high threshold for the application of this exemption, by only permitting the non-disclosure of information which would cause

37 Sec 12(c) of the Act.

substantial prejudice to the security or defence of the state.³⁸ Another exemption in the Act relates to information that would ‘affect unfinished negotiations’.³⁹ This is also vague. The term ‘negotiation’ is not defined, and it is not clear with whom and in respect of what the negotiation is being held.

6.2.8 *Public interest override*

Section 25 of the Model Law provides that an information holder can only refuse to release the requested information if the harm which may be caused by the release ‘demonstrably overweighs the public interest in the release’.

This section lays down the criteria according to which the exemptions can be resorted to when refusing requests for information. It is the standard by reference to which the refusal to provide the requested information can be tested to check its justifiability.

However, this important guarantee is absent from the Act. The only imposed requirement, as provided for in section 10(f) of the Act, is that in case of refusal of the request, the decision of refusal shall be reasoned and justified. This opens the door for information holders to arbitrarily refuse access to information based only on the broad and vaguely-drafted exemptions provided for in section 12 of the Act.

6.2.9 *Burden of proof in the application of exemptions*

As a guarantee against the abuse of the exemptions, the Model Law imposes in section 38 the burden of proof on the information officer to show that the refusal to disclose information is in accordance with the provisions of the law. Section 38 also imposes on the information officer who refuses to disclose requested information, the burden of proving that the public interest override has been applied in reaching the decision on non-disclosure. These guarantees are absent in the Act. The implication of the absence of this guarantee is to pave the way for the information holder to arbitrarily refuse the release of the requested information with no obligation to justify their actions on the basis of the public interest override.

6.2.10 *Administrative review of requests for information*

While sections 40 to 44 of the Model Law provide for the right to internal administrative review in case of refusal and for the procedure to be followed in these cases, the Act does not provide for such a right. The Act

³⁸ Sec 30 of the Model Law.

³⁹ Sec 12(g) of the Act.

only provides for appeals to the oversight mechanism, the commissioner. This raises the question as to whether or not the general administrative law allowing for such appeals applies. It also raises questions about whether or not it is preferable, in terms of time and the possibility of obtaining an administrative remedy, to allow the opportunity of internal review before having recourse to the oversight mechanism.

6.2.11 *Right of appeal*

Whereas section 8 of the Act provides for judicial review and the right to appeal to court where a request for information is not granted, it does not designate the competent court. Usually in Sudanese legislation, the definition section contains a reference to the competent court having jurisdiction over disputes under the Act. This is one of the shortcomings of the Act. The effect of this omission is to open the door to a conflict of jurisdiction between different courts. There is thus a risk that a claimant starts the judicial review process in the wrong court and then loses the case when the right court is eventually approached on the technicality of the lapse of the stipulated two weeks' time frame within which to appeal.

6.2.12 *Oversight mechanism*

Section 4 of the Act provides for the establishment of a Commission, but according to section 6 only one commissioner is appointed by the Cabinet. In fact, there is no Commission; all the powers of the so-called Commission are in the hands of this commissioner. The Act does not designate the entity that appoints any other part-time members of the Commission, nor does it provide for their competences and powers.

Furthermore, the Act does not contain guarantees for impartiality and independence of the commissioner as detailed in sections 46 to 49 of the Model Law relating to appointment, the term of office and termination of office of the oversight mechanism. Instead, the Act provides that the commissioner shall be appointed by the Cabinet.

Section 46 of the Model Law provides for guarantees for the transparency in the procedure for the selection and appointment of the oversight mechanism. It requires the call for nominations to be made public, that the process is transparent and that due consideration should be paid to gender balance.

Section 47 of the Model law also provides for the criteria of selection of members of the oversight mechanism. It requires that members should be fit and proper persons; have requisite academic qualifications and working experience; are publicly-recognised human rights advocates; are independent, impartial and accountable; have demonstrable knowledge in access to information, transparency or public and corporate governance;

and do not hold political office at any level of the state or occupy a position within a political party at the time of nomination, or have held such office or position in the five years preceding the nomination. Section 49 of the Model Law provides for the basis on which a commissioner's appointment can be terminated before the expiry of the term of office.

The Act is also silent on the remuneration of the Commissioner, which is important for independence. However, section 14 of the Act provides for the financial resources of the Commission. This consists of the appropriations allocated by the state; contributions by institutions and individuals; funds obtained for the services it provides; and any other resources as may be accepted by the Commission with the consent of the competent Minister.

6.2.13 *Offences and penalties*

The Act provides for the criminalisation of the unjustified denial of access to information. The penalties include imprisonment and fines. Section 18 provides that whoever intentionally prevents access to any information under the provisions of the Act, or destroys, distorts, forges or deletes, whether for a particular purpose or not, information or documents of a competent authority, is deemed to have committed a criminal offence.

However, the Act also vaguely provides for the criminalisation of and punishment for acts violating its provisions. It states that '[w]hoever contravenes the provisions of this Act or the regulations issued thereunder shall be punished with imprisonment for a term not exceeding two years or with a fine or with both'. This general criminalisation provision is not consistent with the principles of criminal law that require provisions to be precise, certain and clear.

Section 88 of the Model Law distinguishes between two cases. The first is the case of a person who with intent to deny a right of access to information under the Act destroys, damages or alters information; conceals information; falsifies information or makes a false record; obstructs the performance by an information holder of a duty under the Act; interferes or obstructs the work of the oversight mechanism; or directs, proposes, counsels or causes any person in any manner to do any of the above. This is regarded as a criminal offence and is liable to a fine or imprisonment or both.

The other case is where a person without reasonable cause refuses to receive a request; has not responded to a request within the time specified; has given incorrect, incomplete or misleading information; or obstructs in any manner the release of information. In this case, the oversight mechanism or an appropriate court may impose a financial penalty each day until the request is received or determined.

6.3 Positive aspects of the Act

6.3.1 Time frame for responding to requests

One positive aspect of the Act is that it provides for a shorter term for the information holder to respond to the request. While section 15(1) of the Model Law fixes the term at 21 days, section 11(1) of the Act allows the information holder only 14 days within which to respond.

Further, section 11(2) of the Act provides that if the request is for information necessary to protect somebody's life or freedom, the public body shall provide the information immediately within a time not exceeding two days from the date of receiving the request. Section 15(2) of the Model Law provides for the same.

6.3.2 Requests can be made orally

Section 10(c) of the Act provides for requests to be made orally. However, this is only open to illiterate persons and persons with disabilities. Section 10(c) states that any person who is not able to submit a written request to access information, whether he or she is illiterate or has a disability, may submit a verbal request which shall be reduced to writing by the information officer in the public body with the name of the requester and the name of the information officer together with his or her designation and shall deliver a copy of the request to the requester.

6.4 Status of implementation of the Act

It is unfortunate that, in addition to the deficiencies of this law, nothing has happened since it came into force; no steps have been taken to implement this Act. To the best of the available information, the Commission which it establishes is yet to be constituted; the commissioner has not been appointed; nor has the Act been invoked by any authority. This adds considerable weight to the opinion that the government is not serious in availing access to information and that the Act was a mere attempt to create the false appearance within the international community of an open and transparent Sudan.

7 Conclusion

One may conclude that the intention behind the passing of the Access to Information Act seems far from the declared one. However, this is not to negate any benefit from passing this law. It may be the first step in a long way in a tough jurisdiction such as Sudan. However, an access to

information Act, however impressive in drafting, cannot function in isolation.

Nevertheless, it is important to consider developing mechanisms of communication with African countries to ensure that all countries have recourse to the Model Law in drafting new access to information laws in Africa. Devising such a mechanism for follow-up with member states of the AU is crucial for the success of the Model Law in achieving its goal. In particular, it is important that the Special Rapporteur engages with the government of Sudan to ensure the implementation and, if possible, the amendment of the law to bring it into conformity with international and regional standards.

It is also the role of civil society organisations and activists in the relevant states to consider better ways, mechanisms and strategies for lobbying and advocacy for law reform in their respective countries. Further, civil society and the press in Sudan are called upon to test the law by invoking its provisions to request information as a strategy to force the government and its different departments to establish mechanisms for the implementation of the Act and putting it into action instead of maintaining the *status quo* of the Act as the outcome of a mere ticking-the-box process.

CHAPTER 8

COMPLIANCE THROUGH DECORATION: ACCESS TO INFORMATION IN ZIMBABWE

Nhlanhla Ngwenya

Abstract

This chapter examines the impact of the Access to Information and Protection of Privacy Act in Zimbabwe, which has been in place since 2002, making the country one of the first African countries to have legislation seeking to promote the right to information. The chapter specifically assesses the extent to which the Act addresses citizens' rights to information held by both public and private bodies. This is measured against the best practice in promoting and protecting the right to information as espoused in both regional and international instruments, specifically the Model Law on Access to Information for Africa. Besides benchmarking the AIPPA against the Model Law, the chapter also examines the extent to which the Act, as currently framed, complies with the provisions of the new Constitution, which was adopted in 2013, more than 10 years after the enactment of the AIPPA. One of the main criticisms of the Law has been that it does the opposite of its legal intent through its imposition of restrictive administrative and procedural processes on those seeking to access information held by public bodies. It is against this perception that the chapter seeks to establish the source of such misgivings through the use of case studies on efforts made in putting the Law to the test and lessons drawn therefrom. In conclusion, the chapter makes recommendations on how to improve the legislative framework to ensure that the right to information is not merely a legal decoration but a reality for the majority of Zimbabweans.

1 Introduction

Zimbabwe is one of the first countries to enact an access to information law in Africa. This it did in 2002, attracting a barrage of criticism from freedom of expression and access to information advocates.¹ This is because the Access to Information and Protection of Privacy Act (AIPPA)² does the opposite of what is intended of an access to information law. However, this was to be expected when one examines the circumstances that led to the formulation of the law and the context within which it was enacted, which both betray the real motivation behind the government's adoption of the controversial legislation.

Following the formation in 2000 of a strong opposition party, the Movement for Democratic Change, the government resorted to enacting patently repressive laws to give a legal veneer to its power retention schemes anchored on three pillars.³ These were control; sowing siege mentality; and self-preservation. The first included the freezing of the airwaves; the criminalisation of expression; and the annihilation of channels of criticism and spaces of activism while setting the agenda and entrenching hegemony through controlling the public sphere. The second involved inculcating a siege mentality by relentlessly projecting the country's sovereignty as under threat of Western military might, through the domineering media outlets the state controlled. The third entailed the preservation of the ruling elite, who were sold to Zimbabweans as the best custodians of their democratic and developmental aspirations as enunciated in the ethos of the country's liberation struggle. Any alternative thus was presented as neo-colonial, treasonous and a threat to Zimbabwe's political and socio-economic fibre. These reasons – singularly and collectively – became the mould for the legislative framework at the time the AIPPA was enacted.

It was hardly surprising that between 2000 and 2008, at the height of strong opposition to the ruling Zimbabwe African National Union – Patriotic Front (ZANU PF) government, Zimbabwe witnessed the enactment and implementation of several laws that completely eroded

1 IFEX report; see https://www.ifex.org/zimbabwe/2002/03/18/president_enacts_access_to_information/ (accessed 12 February 2018). Also see an analysis by the Crisis Coalition Zimbabwe, a grouping of Zimbabwean civil society organisations, http://www.humanrightsinitiative.org/programs/ai/rti/news/aippa_analysis.pdf (accessed 12 February 2018).

2 Access to Information and Protection of Privacy Act (Chapter 10:27) was passed by the Zimbabwean parliament in January 2002 and signed into law in March of the same year. The passage of the law was not smooth-sailing as the opposition MDC fought against it. Its arguments were based on the Parliamentary Legal Committee's report that had found the law to be in violation of some constitutional provisions. However, the ruling ZANU PF used its majority to force the passage of the law.

3 B Raftopoulos & A Hammar 'Zimbabwe's unfinished business: Rethinking land, state and nation' in A Hammar, B Raftopoulos & S Jensen (eds) *Zimbabwe's unfinished business: Rethinking land, state and nation in the context of crisis* (2003) 1-47).

basic liberties such as the right to free speech, assembly and association as well as media and artistic freedoms, among a raft of other fundamental rights. It became apparent that the laws that were being enacted were not motivated by the desire to promote freedom, but to give the ruling party's repressive measures a veneer of legality.⁴

This chapter will outline the constitutional provisions providing for the right of access to information, mentioning the other regional instruments to which Zimbabwe is a state party that promote this fundamental freedom. It then analyses the provisions of the AIPPA and assesses its compatibility with the Model Law on Access to Information for Africa (Model Law). This is done to identify defects in the law when compared to generally-accepted regional standards and principles on promoting the right to information. The chapter also highlights the way in which the Law has since its enactment been applied in Zimbabwe, before concluding by way of recommendations on the need to review the law and align it to the country's Constitution and structure it in accordance with the Model Law.

2 Constitutional framework and regional instruments

In May 2013, Zimbabwe adopted a new Constitution to replace the old Lancaster House Constitution, which was basically a post-liberation war document meant to balance the interests of the warring colonial administration and liberation movements in an independent Zimbabwe. The new Constitution, which has been hailed as progressive, provides for adequate safeguards for the exercise of the right to freedom of expression, media freedom and access to information. Whereas the previous supreme law lumped all these rights together and one could only enjoy the right to access information through inference, the new Constitution explicitly provides for these freedoms as well as the right to privacy of communication. Most importantly, as regards the right of access to information, article 62 of the Constitution states:

- (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
- (2) 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 or protection of a right.

4 Human Rights Watch *Sleight of hand: Repression of the media and the illusion of reform in Zimbabwe* (2010).

- (3) Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the state or any institution or agency of the government at any level, and which relates to that person.
- (4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

This provision makes Zimbabwe one of the more than 16 African countries⁵ of which the constitutions guarantee the right of access to information. However, despite this provision, the government is still to review the AIPPA to ensure that it is in line with the new Constitution.

Besides the constitutional framework providing for the right to information, Zimbabwe is a state party to some of the regional instruments that also recognise the fundamentality of this right. These include article 9 of the African Charter on Human and Peoples' Rights (African Charter)⁶ and Principle 4 of the Declaration of Principles on Freedom of Expression in Africa.⁷ The right to information is also enunciated in article 19 of the Universal Declaration of Human Rights (Universal Declaration)⁸ and article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁹

However, while in the past Zimbabwe could easily wish away its obligations under international human rights instruments, the new Constitution enjoins it to incorporate these into domestic law. Article 34 of the new Constitution states: 'The state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.'

This means that the country is duty bound to review its access to information law and to ensure that it not only conforms with the Constitution, but also to regional and international instruments on promoting and safeguarding the right of access to information.

5 Open Society Justice Initiative overview of Constitutional Protection of the Right to Information <https://www.right2info.org/constitutional-protections>.

6 Zimbabwe ratified the African Charter on Human and People's Rights in May 1986.

7 The Declaration of Principles on Freedom of Expression in Africa was adopted at the 32nd session of the African Commission on Human and Peoples' Rights in October 2002 in Banjul, The Gambia. Principle XVI of the Declaration obligates state parties to the African Charter, including Zimbabwe, to make every effort to give practical effect to the principles.

8 As a member of the United Nations, Zimbabwe is also bound by the Universal Declaration of Human Rights.

9 Zimbabwe ratified the ICCPR in 1991.

3 Architecture of the law: The AIPPA versus the Model Law

From the very outset, the AIPPA failed to pass the democratic test when it was tabled before Parliament in March 2002. Presenting its views on the law, the Parliamentary Legal Committee, chaired by the late ZANU PF official Eddison Zvobgo, noted:¹⁰

The Bill in its original form was the most calculated and determined assault on our liberties guaranteed by the Constitution ... What is worse, the Bill was badly drafted in that several provisions were obscure, vague, overbroad in scope, ill-conceived and dangerous ... Ask yourself whether it is rational for a government in a democratic and free society to require registration, licences and ministerial certificates for people to speak. It is a sobering thought.

A close analysis of the law highlights the reasons behind such adverse comments by the Legal Committee.

The law merges the practice of journalism with citizens' rights of access to information. In that scope, while it purports to promote the right to information, it imposes restrictions on the media's right to the establishment and practice of journalism, which are key in enhancing access to information.

Since its enactment and enforcement, numerous media practitioners have been refused registration, deregistered, harassed, persecuted, arrested, detained, maliciously prosecuted, and ultimately silenced.¹¹ In fact, four newspapers were closed down in succession soon after the law was passed in 2002, thereby preventing the free flow of alternative news and information to the public. These included the *Daily News*, the *Daily News on Sunday*, the *Tribune* and the *Weekly Times*.

The closure resulted in self-censorship by the media, 'underground' journalism, and the fleeing of journalists and other media practitioners from Zimbabwe in search of safer environments. This development left the state-controlled media the dominant source of news and information, simply amplifying the voices of the governing elite.

10 Minutes of the 9th meeting of the Parliamentary Legal Committee held on 23 January 2002.

11 MISA-Zimbabwe Report (2010), Media Laws in Zimbabwe: An analysis of amendments to media laws in Zimbabwe since the year 2005.

Since its adoption in 2002, the AIPPA has undergone several amendments. Although the law was first amended in 2003, this amendment was not intended to make it more democratic, but to address administrative gaps that could potentially weaken its repressive nature.¹² Subsequent amendments in 2004 followed a similar route, ensuring that the law did not provide primacy of the right to information when it came to state secrets and the business of Cabinet.¹³

Even as the Southern African Development Community (SADC), through the mediation efforts of former South African President Thabo Mbeki, pushed for legislative reforms including democratising the media ahead of the 2008 elections, the outcome of such interventions remained largely marginal. The 11 January 2008 amendments to the AIPPA remained a far cry from what had been expected as the law's repressive provisions with regard to access to information, freedom of expression and media freedom remained intact. The amendments introduced the following key aspects:¹⁴

- It established a statutory Zimbabwe Media Commission (ZMC) to replace the Media and Information Commission (MIC). Besides the name change and its reconstitution, the ZMC essentially had similar functions to that of its predecessor, the MIC. The functions of the ZMC included upholding and developing freedom of the press; accrediting journalists and monitoring mass media; investigating and dealing with complaints against any media or journalist; and promoting and enforcing good practice and ethics in the media as well as acting as an appeals body on issues related to access to information.
- It introduced a procedure for appeals and enforcement of ZMC decisions.
- It set up the Media Council of Zimbabwe to assist the ZMC in developing codes of conduct for media practitioners, and to exercise disciplinary control over them.
- It increased the period of validity of a mass media registration certificate from two to five years and set out procedures for the renewal of such registration certificates and the circumstances in which the ZMC may cancel, suspend or refuse to register a mass media service.
- It provided the Minister with an absolute discretion to exempt from registration those mass media services in which non-Zimbabweans hold a controlling interest, but these services had to be 'approved' by the Minister.

12 The 2003 Amendment redefined what was meant by 'mass medium', and dealt with the composition of the media and Information Committee, the qualifications for media ownership, the protection of information related to public safety as well as criminalising the abuse of freedom of expression.

13 The 2004 amendments criminalised the practice of journalism by unaccredited journalists by imposing a fine or imprisonment for a period not exceeding two years or both; introduced the nomination of some of MIC members to be appointed from nominees of media houses association; as well as prescribing procedures for the dismissal and suspension of committee members.

14 See n 9 above.

- It maintained the criminalisation of operating mass media services without a registration certificate.
- It laid down new procedures and conditions for accreditation; introduced a roll of accredited journalists; substituted journalistic rights with privileges which can only be enjoyed on condition of accreditation; and laid down penalties of up to two years' imprisonment for a breach of the requirements for accreditation.
- It significantly reduced the powers of the Minister responsible for the administration of the AIPPA. However, it bestowed these powers on the President, for example, in relation to the appointment of members of the ZMC.

The following provisions relating to access to information remained intact in the Act:

3.1 Scope of application

In Zimbabwe, the right to access information does not extend to persons who are not citizens or permanent residents of Zimbabwe or who are not lawfully working or studying in Zimbabwe.¹⁵ It also excludes information held by private bodies, unlike similar laws in other countries, such as South Africa's Promotion of Access to Information Act 2 of 2000.

The restriction of the application of the AIPPA to only public bodies is contrary the Declaration of Principles on Freedom of Expression in Africa (Declaration), which provides in Principle 4: 'Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.' The exclusion of private bodies is also in conflict with Part II of the Model Law, which provides for access to information held by relevant private bodies and private bodies.¹⁶ According to the Model Law, a relevant private body is¹⁷

- (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or
- (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service.

A private body is defined as

- (a) a natural person who carries on or has carried on any trade, business or profession or activity, but only in such capacity;
- (b) a partnership which carries on or has carried on any trade, business or profession or activity; or

15 Sec 5(3)(a) AIPPA.

16 Sec 2 Model Law.

17 See definition of terms in Part 1 of the Model Law.

- (c) any former or existing juristic person or any successor in title; but excludes public bodies and relevant private bodies.

The inclusion of these types of private bodies that perform public functions or receive public funds is critical in ensuring accountability even among private entities that use public resources.

3.2 Proactive disclosure

While the Model Law provides for a broad framework for proactive disclosure, the AIPPA fleetingly does so and in the context of information pertaining to third parties in section 28. The provision also limits circumstances upon which proactive disclosure could be made. These include information concerning the risk of significant harm to the health or safety of members of the public; significant harm to the environment; matters related to the prevention, detection or suppression of a crime; as well as threats to national security and public order and security. Even so, threats to public security or public order are not to be disclosed to the general public but to the relevant law enforcement authorities. This means that an applicant or even affected persons would remain uninformed about such critical public interest matters.

By contrast, section 7 of the Model Law provides for two categories of information to be proactively disclosed by public bodies and relevant private bodies. On one side are those categories that must be made available within 30 days of their being generated or received. These include (i) manuals, policies, procedures or similar documents which are prepared for or used in discharging that body's functions, exercising powers and handling complaints, making decisions or recommendations or providing advice to persons outside the body with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons may be entitled; (ii) the names, designations and other particulars of the information officer and deputy information officer for the purposes of submitting requests for information; (iii) any prescribed forms or procedures for engagement by members of the public with the public body or relevant private body; (iv) details of any existing avenues for consultation with, or representation by, members of the public in the formulation or implementation of policies or similar documents; (v) whether meetings are open to members of the public and, if so, the process for direct or indirect engagement; (vi) details of any subsidy programmes implemented with public funds; (vii) contracts, licences, permits, authorisations and public-private partnerships granted; (viii) reports of surveys, studies or tests, including scientific or technical reports and environmental impact assessment reports; and (ix) any other information directed to be proactively disclosed by the oversight mechanism.

On the other side are those categories of information to be proactively published annually by public and relevant private bodies. These are (i) particulars of its organisation, functions and duties; (ii) interpretations or particulars of Acts or policies administered; (iii) details of processes for creating, keeping, organising and maintaining information; (iv) a list of categories of information held or under its control; (v) a directory of employees and their powers, duties and title and the band of remuneration; (vi) the annual band of remuneration for each public employee and public officer, including the system of compensation as provided in its laws, the procedures followed in its decision-making process, including channels of supervision and accountability; (vii) travel and hospitality expenses for each employee; (viii) composition, functions, and appointment procedures of the boards and other bodies constituted for the purpose of providing advice to or managing it; (ix) detailed budget, revenue, expenditure and indebtedness for the current financial year; (x) the annual report; and (xi) any other information so directed to be proactively disclosed by the oversight mechanism.

3.3 Primacy

Contrary to the Model Law, which requires states to establish the primacy of an information law over all other national legislation save the Constitution,¹⁸ the AIPPA does not explicitly spell this out in promoting the right of access to information. As a result, access to information can easily be derogated though other pieces of legislation such as the Official Secrets Act, which is used to broadly embargo information held by government bodies and agencies. In reality, therefore, the effectiveness of the AIPPA in giving effect to the right of access to information is seriously limited by the provisions of numerous other laws in the Zimbabwean legal system which promote secrecy over transparency.

3.4 Cumbersome procedures for access

Persons seeking information held by a public body have to go through a cumbersome procedure under the AIPPA, making it practically difficult for these persons to obtain such information.

According to the law, for one to obtain information from a public body, they have to make a formal request in writing to the head of such public body. The official has 30 days in which to respond to the application, and in certain circumstances this can be extended to for a further 30 days or indefinitely with the permission of the Zimbabwe Media Commission. No justification is given in relation to these long timelines, which are unnecessarily long and insensitive to the needs of those seeking

18 Sec 4 Model Law.

information, especially if it is key to addressing an urgent and serious matter. The Model Law, on the other hand, provides for a response within 21 days after the submission of a request and within 48 hours if the information 'is necessary to safeguard the life or liberty of a person'.¹⁹

Further, the AIPPA does not provide for oral requests to cater for illiterate persons. It also does not provide for persons living with disabilities when it relates to requests for information. However, the Model Law not only allows for oral requests,²⁰ but also requires that where a request is made by a person living with a disability, the relevant official 'must take all necessary steps to assist such person to make a request in a manner which meets their needs'.²¹

The cumbersome modalities one has to contend with to access information from state bodies under the AIPPA and the lack of flexibility and assistance to vulnerable groups severely restricts the exercise of the right to information and is antithetical to relatively simpler procedures enunciated in the Model Law.

3.5 Refusals and exemptions

Under the AIPPA, the head of a public body is entitled to decline access to a record of information if they deem disclosure is not in the public interest.²² There is no precision or guidance on the meaning of the term 'public interest', leaving the provision susceptible to abuse. It is acceptable international practice that any legal provision of which the effect is to curtail the enjoyment of fundamental rights of people ought to be clear enough to allow people to appropriately modify their conduct.²³ One such example is the ICCPR, which provides for a narrow scope within which states can derogate fundamental freedoms.²⁴

Access to information can also be denied if its disclosure would prejudice 'national security',²⁵ which again is vague and broad. There are no specifications as to what constitutes 'national security' and the extent to which the disclosure of information would be prejudicial to national security. Consequently, access to information can be arbitrarily restricted on the pretext that disclosure is not in the 'public interest' or would prejudice 'national security' when the information is merely politically sensitive and its disclosure would not be in the interest of the ruling elite.

19 Sec 15(2) Model Law.

20 Secs 13(1) & (2) Model Law.

21 Sec 14(2) Model Law.

22 Sec 9(4)(c) AIPPA.

23 See n 7 above.

24 Art 4 of the ICCPR allows for limitations and circumstances for state parties to derogate from their responsibilities under the Covenant. However, state parties may not derogate from arts 6, 7, 8 (paras I & 2), 11, 15, 16 & 18.

25 Sec 17(1) AIPPA.

Other categories of protected information include deliberations of Cabinet and local government bodies; advice relating to policy; information of which disclosure will be harmful to law enforcement processes; information relating to inter-governmental relations or negotiations; financial or economic interests of a public body of the state; and information relating to the conservation of heritage sites, among other broad exemptions.

While it is standard practice for states to classify certain information, the exemptions in the AIPPA are too wide to the extent of impeding the public and the media from accessing information from public bodies which should be subject to public scrutiny.²⁶ The impact of such provisions is that they disable citizens' ability to fully participate in the governance of their own resources from an informed position as well as to hold their leadership to account. Together with stringent regulations controlling media practice under the AIPPA and other laws criminalising media freedom, the exemptions are also harmful to free and investigative journalism, which is an essential tool for entrenching the free flow of information necessary for accountable governance.

Although the Model Law also recognises exemptions, these exemptions are clearly and narrowly defined, and are also subjected to different levels of thresholds to prevent reliance on them by public and private institutions as a pretext for maintaining secrecy.²⁷

Measured against the Model Law, the AIPPA falls far too short in promoting access to information. In fact, 'the list of 'excluded information' under sections 4 and 5 of the AIPPA is too long and broad to the extent of detracting the right of access to information to unacceptable levels.²⁸ For example, while documents pertaining to client-attorney privilege²⁹ could justifiably be legally confidential, the protection of, for example, 'a personal note' or of 'teaching materials' constitutes irrational limitations that are not justifiable or reasonable in a democratic society³⁰ and, thus, is in contravention of section 62(4) of the Constitution as well as provisions of the Model Law. Further, the limitations in the AIPPA have the effect of unjustifiably curtailing the right of access to information. For example, while section 9(1) read with section 46(1)(d) of the Constitution mandates that the state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution, the grounds for limiting the access to information outlined in the AIPPA militate against the

26 UNESCO and MISA Report (2004) *Undue restriction: Laws impacting on media freedom in the SADC*.

27 See generally part III of the Model Law.

28 n 9 above.

29 Sec 16 AIPPA.

30 As above.

attainment of these values. This is particularly the case for the following reasons:

3.5.1 *Undefined and vaguely-worded limitations*

Some of the grounds for limitations are undefined and potentially compromise the transparent, open and accountable governance envisaged in the Constitution.³¹ The terms include ‘public interest’ (section 9(4)) and the requirement for disclosure to ‘authorised persons’ only.

While public interest is a ground for refusal of disclosure of information, there is no definition of what is considered to be or not to be in the public interest, leaving that to the discretion of the public official approached.

Furthermore, whereas section 14(1) of the AIPPA prohibits the disclosure of cabinet deliberations to persons who are not ‘authorised’, it does not define who an ‘authorised person’ is or how one becomes so authorised. This provision read with the provisions of the Official Secrets Act gives a blanket denial of the public’s access to key governmental decisions and processes, amounting to a denial of critical information on state policy and processes.³²

Finally, there is no precise definition of the ground upon which a refusal can be granted with regard to the disclosure of information that may cause harm to the planning, financial and economic interests of a public body or of the state, such as financial, commercial, scientific or technical information that belongs to a public body or to the state and has a monetary value.³³ This is contrary to the principles of public financial management outlined in section 298(1) of the Constitution, such as (a) transparency and accountability in financial matters; and (b) transparent, prudent and effective expenditure of public funds. It is also contrary to other provisions of the Constitution, such as the requirement for state-controlled commercial entities to establish transparent and open procurement systems.³⁴

31 MISA Zimbabwe position paper on the defects of AIPPA that seeks to influence the realignment of laws with the 2013 Constitution. The paper was produced on behalf of Zimbabwe Civil Society Constitution Monitoring Consortium.

32 Centre for Applied Legal Research Constitutional Alignment Discussion Paper Series – Discussion Paper 4, Access to Information and Protection of Privacy Act [Chapter 10:27] on Amendments to Provisions Relating to Access to Information 15.

33 See sec 19 of AIPPA. The section forms part of Part III of the Act, which provides for broad limitations to access to information.

34 See sec 195(2) of the Constitution.

3.5.2 Unjustifiable limitations³⁵

Section 18(1)(a)(i) of the AIPPA restricts access to information relating to inter-governmental relations or negotiations, including the disclosure of information that may affect the relations between the government and a municipal or rural district council.

This limitation flouts the grounds provided for in section 62(4) of the Constitution, which permits the restriction of the right to information in the instance where the restriction is fair and ‘justifiable in a democratic society based on openness’. This is more so when the provisions of sections 62(4) and 86(2)(b) are read together with the values of openness, responsiveness, transparency and accountability that are outlined in sections 3, 8, 9 and 194(1)(f) of the Constitution on which basis laws and policies must be crafted. Juxtaposed with these constitutional provisions, it can be argued that the status of the relationship between government and a council cannot justifiably outweigh the public interest override, public accountability and the exercise and protection of rights, which access to information is supposed to facilitate.

3.6 Public interest override

Under the AIPPA, the concept of ‘public interest’ is relied upon broadly and vaguely as criteria for determining the categories of information that can legitimately be exempted from disclosure. This is directly contrary to international best practice, which instead requires that information be disclosed if public interest so demands, even where such information falls within exempted categories of information under the relevant law.

Section 25(1) of the Model Law states:

Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.

The AIPPA, as it is currently structured, completely ignores this key principle in promoting access to information, opting rather to use this internationally-recognised best practice standard as a means of withholding information.

35 See n 17 above.

3.7 Oversight mechanism

Although the AIPPA sets up a very weak oversight mechanism by delegating oversight powers and duties to the Zimbabwe Media Commission (ZMC) established under the same Act, this body was in 2013 transformed into a constitutional body. However, the ZMC yet has no specific oversight function with regard to overseeing the promotion of the right of access to information as stipulated under the Model Law. The functions of the new constitutional ZMC only vaguely refers to access to information. While article 249(f) states that one of the functions of the Commission is to 'ensure that the people of Zimbabwe have access to information', article 249(h) mandates the Commission 'to encourage the adoption of new technology in the media and in the dissemination of information'. Because article 2 of the new Constitution provides for the supremacy of the Constitution, it may be argued that currently there is no properly-constituted, independent and functional oversight mechanism to promote and monitor the implementation of the AIPPA as enunciated in the Model Law.

Part V of the Model Law establishes an independent and impartial oversight mechanism comprised of information commissioners. Their purpose includes the promotion, monitoring and protection of the right of access to information. The Model Law also outlines the appointment procedure for commissioners as well as the selection criteria, which includes requisite academic qualifications and working experience; publicly-recognised human rights advocates; independence, impartiality and accountability; and demonstrable knowledge regarding access to information, transparency or public and corporate governance. All these provisions targeted at ensuring the establishment of an independent and effective oversight mechanism are glaringly lacking under both the AIPPA and the Constitution.

4 The deviation: Combining media regulation and access to information

Instead of extensively concentrating on other key elements as contained in the Model Law, which would ensure that the right of access to information is a living reality in Zimbabwe, the law detours into issues of media regulation and the practice of journalism. The entangling of access to information issues with media issues has over the years cast the AIPPA as simply a media-policing Act and not an access to information law. This is because, apart from the fact that media regulation and control make up the largest chunk of the law, the Act has not been implemented in such a manner as to give effect to access to information in the country.

With regard to the media, the Act imposes statutory regulation of the media; stringent requirements for establishing and operating media houses as well as practising journalism, and redefines media freedom through the practice of journalism as a privilege. Clearly, privileges are not guaranteed and can be waived, altered or withdrawn more readily than rights. Some of the privileges in terms of the law include

- (1) visiting parliament and any public body as a journalist;
- (2) accessing records permitted in terms of the AIPPA;
- (3) attending national events as a journalist;
- (4) attending any public event as of right; and
- (5) making recordings in parliament, national events and public meetings, with the use of audio-video, photography and cine- photography.³⁶

The AIPPA goes further to criminalise the practice of journalism and impose disproportionate penalties such as prison terms and heavy fines for those deemed to have violated the law by exercising their right to freedom of expression through unsanctioned journalism. All these provisions singularly and collectively erode freedom of expression and access to information through multiple and diverse media platforms.

In effect, the fact that, on the one hand, the Act purports to promote information while, on the other, it negates the same through stringent media-policing provisions making it one of the most conflicted pieces of legislation found in the country's statutes. Thus, the aim of AIPPA is not really to promote and safeguard the exercise of Zimbabweans' rights, but to handicap their active agency while insulating the governing elite's excesses from the public glare.

The repressive nature of the provisions of the AIPPA was clearly underscored by the African Commission on Human and Peoples' Rights in the case of *Scanlen and Holderness v Zimbabwe*.³⁷ In this case, the Commission held in 2009 that the accreditation of journalists – even for the sake of protecting 'public order', safety and the rights and reputation of others – was a violation of the right to freedom of expression and media freedom as protected under the African Charter.³⁸ Despite the African

36 Sec 78 AIPPA.

37 (2009) AHRLR 289 (ACHPR 2009). The Independent Journalists Association of Zimbabwe, Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa (Zimbabwe) approached the African Commission to express dissatisfaction about secs 79 and 80 of AIPPA, which they argued contravened art 9 of the African Charter by imposing the compulsory licensing of journalists and criminalising the profession. The complaint was filed with the African Commission in 2005.

38 See details of the case and ruling at http://www.achpr.org/files/sessions/6th-eo/communications/297.05/achpreo6_297_05_eng.pdf (accessed 4 February 2018). Also see news report by Kubatana.Net, 'Amend AIPPA: African Commission', <http://archive.kubatana.net/html/archive/media/090828misaz.asp?sector=MEDIA> (accessed 17 November 2015).

Commission's ruling, no substantive changes were made to the AIPPA to bring about a positive effect on access to information, freedom of expression or press freedom.³⁹

5 Application of the AIPPA in Zimbabwe

It is a matter of public record that the AIPPA has been selectively applied to target the independent media with a view to silencing voices critical of the governing elite. Almost all cases of media and journalists that have fallen foul of the Act work for the private media.⁴⁰ While the selective application of the law has been obvious with regard to media regulation, there is little evidence to demonstrate that the government has used the law to empower citizens' rights of access to information held by public bodies, nor have there been concerted efforts by members of the public to put the law to the test.

This appears to be largely due to the prevalent ignorance among citizens about their right to access information, the value of exercising this right and how to do so. The few isolated cases of active demands for information emanate mostly from selected civil society organisations, of which MISA-Zimbabwe is one. Over the years, this organisation has sought to put the law to the test in a bid to ascertain the degree to which the AIPPA fosters access to information as it purports to do. The results have been less than encouraging.

Between 2015 and 2016, MISA-Zimbabwe sent requests for information to 35 public bodies in line with procedures prescribed in the AIPPA, seeking what can easily pass for innocuous records of their operations as public entities.⁴¹ Of these, only 12 bodies responded positively while the rest either openly refused to provide information or simply did not respond. Even so, fewer than half of those that responded gave written responses. Others referred MISA to chief executive officers of institutions, partly answered questions sent to them and declined responding to others, and were hostile towards persons who were requesting information. This is despite the fact that the questions sent could hardly be considered sensitive but simply bordered on seeking a

39 See n 11 above.

40 MISA-Zimbabwe *Access to Information and Protection of Privacy Act: Five years on* (2005).

41 MISA-Zimbabwe annually conducts research to assess the openness of public bodies in providing information to citizens. This is part of MISA's regional *Golden key and padlock* research conducted in Southern Africa, to examine the accessibility of information held by public bodies, with a view to using the findings as an advocacy tool to push for greater openness in the provision of information which is beneficial to citizens.

greater understanding of the administrative and operational issues of the organisations, which are matters of public interest.⁴²

These statistics illustrate just how difficult it is to obtain information under the prevailing access to information law, and this is when the information sought is not particularly sensitive. It is not difficult to imagine how much more difficult it is to seek information that is regarded as politically sensitive. In fact, with the broad exemption clauses contained in the AIPPA, it will not be difficult for public bodies to find an excuse not to divulge information they hold on grounds of 'national security' or 'public order', among other such vague parameters.

6 Conclusion and recommendations

Since Zimbabwe has voluntarily ratified and is a state party to some key international and regional human rights instruments that contain protections in relation to press freedom, freedom of expression and the right to access information, it is duty bound to abide by these treaties. In this vein, it is therefore critical that government either completely repeals the AIPPA and replaces it with new access to information legislation or extensively amends the law to bring it in line with the new Constitution. If the law is repealed, it will be important that the new Act is a stand-alone access to information law that is divorced from media regulation. This is to enable the effective and practical implementation of the right of access to information. Such an Act will be in line with article 62(4) of the Constitution, which enjoins the government to enact a law that will give effect to the right to information.⁴³

The new law should also be anchored on the Model Law, the Declaration of Principles on Freedom of Expression in Africa, and key principles on promoting access to information as pronounced in the African Platform on Access to Information.⁴⁴

42 See MISA Regional Report Government Openness in an Information Age: 2015 Report on Open and Secretive Public Institutions in Southern Africa. http://www.freedominfo.org/wp-content/uploads/Padlock-survey-2015_v11.pdf. See also 'MISA Transparency Assessment: 2016 Report on Open and Secretive Public Institutions in Southern Africa' <http://misa.org/wp-content/uploads/2016/10/TransparencySurvey2016.pdf>.

43 MISA-Zimbabwe position paper submitted to government-sponsored Information and Media Panel of Inquiry in 2013.

44 The African Platform on Access to Information (APAI) Declaration was adopted at the Pan-African Conference on Access to Information (PACAI) on 19 September 2011, held in Cape Town, South Africa, upon a motion for adoption moved by Advocate Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission and seconded by Norris Tweah, Deputy Minister of Information, Culture and Tourism for the Republic of Liberia. The document lists a number of key principles intended to advance the right of access to information in all its dimensions, nationally, regionally and internationally. See <http://www.africanplatform.org/> (accessed 4 February 2018).

If the government decides to tow the path of an amendment, it is critical that the following issues relating to access to information, together with those relating to media regulation, are addressed:

- (1) Section 5(1) should be repealed and replaced by a provision which, among other things, ensures that the Act provides for access to 'information' and not merely records held by public bodies as is currently the case. The provision should also be expanded to include relevant private and private bodies as contained in the Model Law.
- (2) Amendments must ensure the simple, quick and easy exercise of the right of access to information and do away with the current cumbersome procedures of requesting information.
- (3) Sections 4 and 5 should be amended to substantially narrow down the compass of exemptions which are presently too broadly defined.
- (4) An independent oversight mechanism should be established that will ensure the monitoring and enforcement of provisions of the law as clearly enunciated in the Model Law.
- (5) The primacy of the access to information law and the public interest override must be clearly stipulated in the law.

A report by a government-sponsored Information and Media Panel of Inquiry (IMPI), which was set up to assess problems bedevilling information and the media sector, also recommends action with regard to the AIPPA.⁴⁵ It states:

This (AIPPA) law should be repealed and replaced with a law that specifically provides for access to information with ample provision for protecting this right, including its expansion to information held by non-public bodies as envisaged in ... the Constitution ... Media regulation issues are provided for under a separate law.

No action has to date been taken to implement the IMPI recommendations.

It is crucial that Zimbabwe separates access to information from media regulation. This will ensure that the right of access to information is not subsumed or conflated with media freedom issues. Media regulation should be provided for under a different media law. A separate access to information law will ensure that the right is not viewed as a journalistic privilege but as a basic right that should be enjoyed by citizens. The danger of merging access to information with journalism is that the right to know

⁴⁵ IMPI was set up by the government to investigate challenges affecting the media and the information industry as well as to carry out public consultations on how to address these. The Panel started its work in 2014 and submitted its final report in March 2015. The report contains broad recommendations, including the need for legislative reforms. Among a host of laws that the Panel identified for review is AIPPA, and the government has pledged to be guided by the report as it aligns the laws with the new Constitution.

tends to fall victim to state actors' paranoia against robust media, thereby disabling citizens' ability to access relevant information with which they can meaningfully participate in the governance of the country, hold their leaders accountable and entrench transparency.

Part III: Influence of soft law within the African human rights system

SOFT LAW AND LEGITIMACY IN THE AFRICAN UNION: THE CASE OF THE PRETORIA PRINCIPLES ON ENDING MASS ATROCITIES PURSUANT TO ARTICLE 4(H) OF THE AU CONSTITUTIVE ACT

Busingye Kabumba

Abstract

The phenomenon of soft law has generated significant debate, and controversy, in international legal scholarship. Nevertheless, soft law instruments remain an increasingly important feature of norm generation in international society. This chapter suggests that the resilience of soft international law can only be properly understood by having regard to another contemporary idea in international law – the concept of legitimacy. To this end, the chapter proposes a general theory for understanding the interaction between soft law and legitimacy in international law. This theory is then applied as a lens for analysing the nature, role and impact of soft law in the African Union system, using the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union as a case study. The chapter demonstrates that soft law can be a powerful tool in the hands of non-traditional actors in international law, one which should be applied conscientiously and deliberately to democratise and humanise international law, rather than to entrench its more hegemonic aspects.

1 Introduction

Soft law norms have been as important a feature of the normative framework of the African Union (AU) as they were of its forerunner, the Organisation of African Unity (OAU). Whether in their own right, or as forerunners of 'hard law' instruments, these instruments and documents have had, and continue to have, important effects in shaping and constraining the behaviour of organs and members of the AU. At the same time, insufficient scholarly attention has been paid to the nature, role and impact of these instruments.

This chapter seeks to address the dearth of scholarship in this important area, and further seeks to enquire into the legitimacy of these instruments as a feature of contemporary norm generation in the AU. The

enquiry is located within a legitimacy paradigm precisely because of the grey area which such legal instruments occupy – in so far as, while they are not quite recognisable under the framework of traditional legal instruments, at the same time they duly attract attention in terms of their impact and effects. In particular, the chapter seeks to conceptualise and categorise ‘soft law’ instruments in the AU framework; assess their nature, role and impact in the AU; and, finally, interrogate their legitimacy as a form of norm generation in the AU – both in terms of input legitimacy (using participation and other criteria) and output legitimacy (in terms of the efficacy and substantive quality of the norms thereby generated).

To this end, the chapter begins by proposing a general theory for understanding the relationship between the phenomenon of ‘soft law’ and the concept of ‘legitimacy’ in international law. This theory then is applied as a basis for analysing the role of soft law in the AU system, using the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union (Pretoria Principles) as a case study.

2 A general theory of the interaction between soft law and legitimacy

The idea of ‘soft law’ is one of the more controversial issues in contemporary international legal discourse,¹ and a respectable body of scholarship exists that challenges the validity and utility of this concept.² In addition, there is limited agreement, even among authors who accept a potential role for soft law in the international legal system, as to the precise meaning of the term. According to one approach, the term ‘soft law’ is more appropriately used in relation to weak norms expressed in traditional or ‘hard’ international legal instruments, as opposed to stipulations in instruments that are *stricto sensu* non-binding.³ On the other hand, a number of scholars conceive of a wider catchment for ‘soft law’ which would include both weak norms in traditionally-binding instruments as well as norms contained in non-traditional instruments. According to Abbott and Snidal, for instance, ‘the realm of “soft law” begins once legal arrangements are weakened along one or more of the dimensions of

1 B Kabumba ‘Soft law and legitimacy in international law: A case study of the Doha Declaration on the TRIPS Agreement and Public Health’ unpublished LL.D. thesis, University of Pretoria, 2014 1 4.

2 See, eg, J Klabbers ‘The redundancy of soft law’ (1996) 65 *Nordic Journal of International Law* 167; L Blutman ‘In the trap of a legal metaphor: International soft law’ (2010) 59 *International and Comparative Law Quarterly* 605; J d’Aspremont ‘Softness in international law: A self-serving quest for new legal materials’ (2008) 19 *European Journal of International Law* 1075; P Weil ‘Towards relative normativity in international law?’ (1983) 77 *American Journal of International Law* 413.

3 See, eg, D Shelton ‘Soft law’ George Washington University Law School, Public Law Research Paper 322 (2008) 3.

obligation, precision and delegation'.⁴ In the author's view, the latter approach is preferable in terms of taking proper account of the phenomenon of soft law as a feature of obligation and norm generation in contemporary international law.

That said, it may be possible to identify three broad categories of soft law instruments, depending on their source or authorship: (i) state-generated soft law; (ii) non-state generated soft law; and (iii) quasi-state generated soft law.⁵ The first category relates to instruments generated by states; the second to those issued by non-state actors (such as academics, non-governmental organisations (NGOs), private think tanks and similar groups); and the third to those developed by state-created bodies, such as treaty bodies. These distinctions might be useful in appreciating the disparate fortunes of certain soft law instruments as opposed to others. However, as will be demonstrated later in the chapter, these distinctions as to authorship, in themselves, are neither dispositive nor conclusive.

For its part, the concept of legitimacy is as current, if not as controversial, as that of soft law in international legal scholarship. Although it has a much longer tradition in the field of political science,⁶ reflection upon the significance of legitimacy in international law is gaining currency.⁷ Perhaps the most important work in this regard has been that by Franck, who conceptualised legitimacy in terms of the ability

4 KW Abbott & D Snidal 'Hard and soft law in international governance' (2000) 54 *International Organisation* 421-422.

5 Kabumba (n 1 above) 21-22.

6 For early work in the field, see C Schmitt *Legality and legitimacy* (1932).

7 See, eg, TM Franck 'Why a quest for legitimacy?' (1987) 21 *UC Davis Law Review* 535; TM Franck *The power of legitimacy among nations* (1990); Kabumba (n 1 above); M Kumm 'The legitimacy of international law: A constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 907; R Wolfrum & V Röben *Legitimacy in international law* (2008); A Buchanan 'The concept of legitimacy as applied to international law and institutions' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 79; J Tasioulas 'Legitimacy as "the right to rule"' in Besson & Tasioulas (above) 97 *et seq*; J Brunnée & SJ Toope *Legitimacy and legality in international law: An interactional account* (2010); S Wheatley *The democratic legitimacy of international law* (2010); NA Molinero 'Legality and legitimacy in the use of force' (2008) http://www.frde.org/download/COM_Legalidad_legitimidad_ENG_jul08.pdf (accessed 4 December 2015); PH Brietzke 'Law, legitimacy and coercion: One view from law and economics' (1991) 25 *Valparaiso University Law Review* 343; TL Meares 'Norms, legitimacy and law enforcement' (2000) 79 *Oregon Law Review* 391; J Jackson et al 'Why do people comply with the law? Legitimacy and the influence of legal institutions' (2011) 52 *British Journal of Criminology* 1051; D Luban 'Fairness to rightness: Jurisdiction, legality and the legitimacy of international criminal law' Georgetown University Law Centre, Georgetown Public Law Research Paper 1154117 (2008); SW Schill 'Enhancing international investment law's legitimacy: Conceptual and methodological foundations of a new public law approach' (2011) 52 *Virginia Journal of International Law* 57; D Bodansky 'The legitimacy of international governance: A coming challenge for international environmental law?' (1999) 93 *American Journal of International Law* 599; DM Bodansky 'The concept of legitimacy in international law' University of Georgia, School of Law, Research Paper Series 07-013 (2007); R Wolfrum 'Legitimacy of international law and the exercise of administrative functions: The example of the International Seabed Authority, the International

of a rule to attract consensual compliance on the part of those to whom it is addressed.⁸

2.1 Soft law as a framework for legitimatisation and delegitimisation

The intersection between the concepts of legitimacy and soft law may be understood as being located in the central question of *compliance*. A legitimacy-based enquiry seeks to understand why certain legal rules are complied with as opposed to others, even where the rules thus violated or ignored attract significantly high actual or potential sanctions.⁹ The concept of 'soft law', with the paradox it necessarily carries, similarly represents an attempt to grapple with the challenge of situating norms which, while not manifesting within the rigid and traditionally-acceptable forms of 'law', nevertheless appear to enjoy a certain normative weight and significance, especially in terms of their appearing to attract voluntary compliance.

There thus appears to be a reflexive and natural relationship between the concept of soft law, on the one hand, and that of legitimacy, on the other, in so far as they both provide lenses for understanding the reality of norm generation, reception and compliance in contemporary international relations.¹⁰

Soft law may serve as a framework through which various actors in the international community may make claims and counterclaims as to the (il)legitimacy of certain norms manifested in 'hard' international law.¹¹ On the one hand, through the generation of soft law, actors in the international legal system can collectively legitimise a particular normative position.¹² On the other hand, soft law may be used to collectively delegitimise a normative position.¹³ Often, these processes – of legitimisation and delegitimisation – occur contemporaneously, insofar as the legitimisation of a particular norm might involve the delegitimisation of an alternative normative position, and *vice versa*.¹⁴

Maritime Organization (IMO) and International Fisheries Organizations' (2008) 9 *German Law Journal* 2039; JL Cohen *Globalisation and sovereignty: Rethinking legality, legitimacy and constitutionalism* (2012); DD Caron 'The legitimacy of the collective authority of the Security Council' (1993) 87 *American Journal of International Law* 552; I Clark *Legitimacy in international society* (2005); EU Petersmann (ed) *Reforming the world trading system: Legitimacy, efficiency and democratic governance* (2005).

8 Franck (1987) (n 7 above); Franck (1990) (n 7 above).

9 Kabumba (n 1 above) 11-12.

10 For a fuller account of this reflexive relationship, see, generally, Kabumba (n 1 above).

11 Kabumba 117-147.

12 Kabumba 117-118.

13 Kabumba 119-120.

14 Kabumba 119-120 145-146.

That said, for soft law to have this power – to legitimise or delegitimise contending normative positions – it is important that the soft law instrument in question itself enjoys a high degree of legitimacy.¹⁵ This brings to the fore the question as to the criteria for the determination of (i) legitimacy – whether this is of soft law or of the normative positions it seeks to challenge or establish. Two limbs of legitimacy may be broadly identified in this regard, namely, (i) input or process legitimacy; and (ii) output or substantive legitimacy.¹⁶

Process legitimacy has been conceived as being predicated upon the following: (i) systemic validation; (ii) democratic participation; and (iii) jurisdiction.¹⁷ Systemic validation refers to the proximity of the norm-generation process to traditional modes of rule making in the system.¹⁸ Democratic participation refers to the ‘nature and quality of participation’ that attends the generation of the norm.¹⁹ Finally, jurisdiction refers to the extent to which the norm relates to a subject matter more amenable to action by the international community rather than individual states.²⁰

For its part, output or substantive legitimacy is informed by the following aspects: (i) determinacy; (ii) coherence; (iii) effectiveness; and (iv) justice. Determinacy refers to the extent to which a rule is able to communicate a clear message as to the obligation entailed.²¹ Coherence relates to the degree to which the rule is rationally linked to both its own sub-rules as well as to other norms in the field of its operation.²² Effectiveness or ‘functional legitimacy’ relates to the ability of the rule to meet the purposes for which it was developed.²³ Justice refers to the extent to which the application of the rule would result in a reasonable outcome.²⁴

2.2 Assessing the legitimacy of soft law

Having outlined the criteria for legitimacy in section 2.1 above, we can attempt an assessment of the legitimacy of soft law, on the basis of the

15 Kabumba 120-121.

16 Kabumba 39-40.

17 Kabumba 40-47.

18 Kabumba 40-42. According to Franck, two separate elements are hereby implicated, namely, (i) symbolic validation (which may take the form of ritual or pedigree or both); and (ii) adherence (the vertical link between a ‘primary rule of obligation’ and secondary rules identifying the sources of rules of obligation); Franck (1990) (n 7 above) 91-97. According to Kabumba, however, these are better understood as one broad element – ‘systemic validation’ – denoting the degree to which the process of norm generation can be located within, or approximated to, traditional or recognised forms of rule making in the particular community; Kabumba (n 1 above) 40-42.

19 Kabumba 42.

20 Kabumba 46-47, citing Kumm (n 7 above) 920-922.

21 Kabumba 48, citing Franck (1990) (n 7 above) 50-54.

22 Kabumba 50, citing Franck (1990) (n 7 above) 144-152 180.

23 Kabumba 51-52.

24 Kabumba 54.

notion that the (de)legitimizing power of soft law is directly linked to the degree of legitimacy of the soft law instrument in question.²⁵

From the outset, it is worth noting that the very concept of soft law faces a legitimacy-based challenge,²⁶ although much of this critique manifests in the nature of challenges to the *legal* validity of soft law as a source of obligation in the international legal order.²⁷ An enquiry into the legitimacy of soft law itself, therefore, is not only important but, in many ways, inescapable. It is to this examination that we now turn, based on the broad criteria outlined in section 2.1 above.

2.2.1 Input or process legitimacy

Systemic validation

To the extent that a number of soft law instruments are either not formulated by states or, if they are, emerge through processes that do not follow the formal or traditional modes for the creation of what are traditionally understood to be 'binding' legal obligations, it may be said that most soft law instruments lack a degree of systemic validation.²⁸ In particular, non-state and quasi-state-generated soft law instruments suffer a deficit of systemic validation insofar as they do not have the imprimatur of direct state consent.²⁹

The case of state-generated soft law is somewhat more complex in this regard since, in certain circumstances, such instruments may be deemed to provide evidence of state practice or *opinio juris* – the two elements required for the emergence of customary international law norms.³⁰ That said, even though state-generated soft law instruments enjoy a degree of consent, it might be argued that the choice to enshrine a norm in a 'declaration' as opposed to a 'treaty'³¹ is an indication, at least in the short term, of an intention by states not to be bound by the norm in question, as a treaty-based obligation, in the strict or traditional legal sense.

25 See sec 2.1 above.

26 M Goldmann 'We need to cut off the head of the king: Past, present, and future approaches to international soft law' (2012) 25 *Leiden Journal of International Law* 336 338.

27 See, eg, Klabbers (n 2 above) 167; Blutman (n 2 above) 605; D'Aspremont (n 2 above) 1075; Weil (n 2 above) 423; H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.

28 Kabumba (n 1 above) 125-130.

29 For a classic statement of the primacy of state consent in international law, see *The Case of the SS 'Lotus' (France v Turkey)* PCIJ Rep Series A No 10.

30 See Blutman (n 2 above) 617-618, especially at fn 55, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 99-100, paras 188-189 and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 254-255 paras 70-73.

31 It is acknowledged that a treaty does not have to be expressly so called to be deemed one under international law, the important quality being the intention of the parties to be bound; see art 2(1)(a) of the Vienna Convention on the Law of Treaties 1969.

On the whole, therefore, it may be said that many soft law instruments generally lack a degree of systemic validation, with this deficit being particularly suffered by non-state and quasi-state-generated soft law.

Democratic participation

The higher the degree and quality of participation in the process of its development, the higher the degree of legitimacy that a particular soft law instrument will enjoy.

Soft law instruments differ greatly in this respect. Some are generated by small groups of experts,³² while others are generated through widely-consultative processes involving a wide range of participants – both state and non-state.³³

The greater the participation of a wide variety of state and non-state actors in the generation of a soft law instrument, the higher the degree of legitimacy it will enjoy.

Jurisdiction

In this respect also, soft law instruments differ greatly. Where, as is usually the case, the instruments deal with subjects that are more appropriately dealt with through international action and co-operation than by individual state action, the soft law instruments enjoy a high degree of jurisdictional legitimacy. These would include soft law instruments in fields such as human rights, the environment, trafficking in persons, and so forth. Instruments touching on more ‘domestic’ leaning fields – such as taxation and administrative matters – are more suspect in this regard.

2.2.2 Output or substantive legitimacy

Determinacy

It is worth noting that some ‘soft law’ norms are precisely so called because of their low degree of determinacy, their expression in ‘binding’

32 See, eg, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), developed by a ‘distinguished group of international human rights experts’ at a meeting in Yogyakarta, Indonesia, <http://www.yogyakartaprinciples.org/> (accessed 7 December 2015).

33 A good example in this regard is the process leading up to the development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which included both states and indigenous persons themselves. See M Barelli ‘The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 960 970.

instruments notwithstanding. Frequently cited examples in this regard include certain provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.³⁴

Apart from the above, the question as to the determinacy of soft law depends on the particular instrument. A good example in this regard is provided by a comparison between the 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), on the one hand; and the 2006 Montreal Declaration of the International Conference on LGBT Human Rights (Montreal Declaration), on the other. These are both non-state-generated soft law instruments. However, while the Yogyakarta Principles are expressed in clear and precise terms as to legal obligation, the Montreal Declaration is couched in more oblique and equivocal language.³⁵ As such, the Yogyakarta Principles have a higher degree of determinacy than the Montreal Declaration.

Coherence

A number of soft law instruments meet this criterion of legitimacy. Indeed, soft law instruments are sometimes generated primarily to ameliorate deficiencies – including in respect to coherence – of ‘hard’ law positions.

The coherence of soft law instruments may be enhanced by their reference to existing ‘hard’ law, and in addition by the reference, in ‘hard’ law to them. Either of these, and particularly where both occur, helps to demonstrate that the soft law instrument in question fits logically within the framework of legal obligation applicable in a particular field or with respect to a particular matter.

Effectiveness

In this regard, a number of soft law instruments fair reasonably well. Indeed, as acknowledged in the scholarship (on all sides of the soft law question), there is no gainsaying the fact that soft law instruments are complied with, with increasing frequency, in a wide range of contexts and fields.³⁶

34 See, eg, art 2(1) of the ICESCR, which enjoins each state party to ‘take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.

35 Kabumba (n 1 above) 137-138.

36 See, eg, D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2000); C Koutalakis & A Buzogany ‘When soft law hits hard: On the effectiveness of new regulatory approaches in pollution prevention and control in the EU’ <http://regulation.upf.edu/dublin-10-papers/4C1.pdf> (accessed 5 December

Moreover, in some instances, soft law appears to have emerged as a direct response to the ineffectiveness of existing 'hard' law normative frameworks.³⁷ A good example in this regard is the Responsibility to Protect (R2P) doctrine, which developed as a result of the apparent absence of an effective response, under traditional or 'hard' law, to situations of mass atrocities.³⁸

Justice

This 'reasonableness' criterion arguably is met by the great majority of soft law instruments, especially where these norms are deliberately developed to mitigate any harsh effects that might flow from the application of 'hard' law.

A good example in this respect is the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration). As its full title suggests, the Doha Declaration – a state-generated soft law instrument – was formulated in 2001 as a direct response to concerns over the negative impact of the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) on the life and health of large numbers of people, particularly in developing countries.³⁹

In sum, as the analysis in this section demonstrates, soft law instruments may enjoy a high degree of legitimacy. Although they are usually weak in terms of systemic validation, a large number of them score well in terms of other criteria of legitimacy. In principle, therefore, particular soft law instruments can enjoy the high degree of legitimacy required for them to have the power to legitimise or delegitimise normative positions in the international legal system.

2015); A Schaefer 'Resolving deadlock: Why international organizations introduce soft law' paper presented at the EUSA Ninth Biennial International Conference, University of Austin, Texas, 31 March-2 April 2005; A Power & O Tobin 'Soft law for the internet, lessons from international law' (2011) 8 *SCRIPTed* 31; M Koppel 'The effectiveness of soft law: First insights from comparing legally binding agreements with flexible action programs' (2009) 21 *Georgetown International Law Review* 821; A Flückiger 'Why do we obey soft law' in S Nahrath & F Varone *Rediscovering public law and public administration in comparative policy analysis: A tribute to Peter Knoepfel* (2009), cited in Kabumba (n 1 above) 142 fn 58.

37 Kabumba (n 1 above) 143.

38 Kabumba 143, citing B Halt 'The legal character of R2P and the UN Charter' (2012) 1 2, <http://www.eir.info/2012/08/08/the-legal-basis-of-the-responsibility-to-protect/> (accessed 5 December 2015). This is further explained in sec 3.1 below.

39 For a more detailed analysis in this regard, see Kabumba (n 1 above) 148-279.

3 Soft law and legitimacy in the African Union system: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union

The preceding section suggests a theory for understanding the interaction between soft law and legitimacy in international law. In this section, the framework of analysis developed in section 2 above is applied with regard to the phenomenon of soft law in the AU system, using the Pretoria Principles as a case study.⁴⁰

In order to properly analyse the status and potential effect of soft law in the AU, in general, and the Pretoria Principles, in particular, it is critical to begin with an enquiry into the traditional or formal structure for norm generation under the AU framework. In this regard, it may be noted that in 2002 the AU emerged out of the OAU, which itself had been created in 1963.⁴¹ Under the new AU structure, the Assembly of Heads of State and Government is the supreme decision-making body of the Union.⁴² Although there exists a Pan-African Parliament (PAP), which is intended 'to ensure the full participation of the African peoples in the development

40 Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the African Charter, <http://www.chr.up.ac.za/index.php/pretoria-principles.html> (accessed 1 September 2017).

41 African Union Commission and New Zealand Crown *African Union handbook* (2014) (AU handbook) 10 <http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf> (accessed 6 December 2015). The OAU was created by 32 independent African states. An additional 21 states joined the OAU with the result that by 2002, when the AU was created, the OAU had a total of 53 members. The membership of the AU later grew to 54 states with the admission of South Sudan; AU handbook 10. After decades of dialogue regarding the reform of the OAU, a concrete step in this regard was taken in 1999 when the OAU Heads of State and Government concluded the Sirte Declaration, and committed to 'a speedy process for the creation of the African Union'; PR Seka 'The road to African integration: A historical perspective' (2009) 1 (8) *Journal of Public Administration and Policy Research* 159. Following upon the 1999 Sirte Declaration, further concrete steps were soon adopted by the OAU Heads of State and Government, namely, the 2000 Lomé Summit, at which the AU Constitutive Act was adopted; the 2001 Lusaka Summit, at which a clear roadmap for the actualisation of the AU was agreed; and the 2002 Durban Summit, at which the AU was launched and wherein the first Assembly of Heads of State and Government was conducted. See, generally, J Cilliers 'Hopes and challenges for the peace and security architecture of the African Union' in H Besada (ed) *Crafting an African security architecture* (2016) 42; O Babarinde 'The African Union: Finally in the path of the EU?' in J Roy & R Domínguez (eds) *Regional integration fifty years after the Treaty of Rome: The EU, Asia, Africa and the Americas* (2008) 53-71.

42 Art 6(2) African Union Constitutive Act, https://au.int/sites/default/files/pages/32020-file-constitutivact_en.pdf (accessed 30 August 2017) (AU Constitutive Act). The AU Assembly of Heads of State and Government succeeded the Assembly of Heads of State and Government which had formerly been established under arts VII-XI of the Charter of the Organization of African Unity, https://au.int/web/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf (accessed 30 August 2017) (OAU Charter).

and economic integration of the continent',⁴³ and although the 'long-term aim' of the AU is for this Parliament to 'exercise full legislative powers', at the moment this body is only empowered to 'exercise advisory and consultative powers'.⁴⁴

Other mechanisms to note are the African Commission on Human and Peoples' Rights (African Commission), which was established under the African Charter on Human and Peoples' Rights (African Charter), 'to promote human and peoples' rights and ensure their protection in Africa',⁴⁵ and the African Court on Human and Peoples' Rights (African Court), established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).⁴⁶ In terms of article 45 of the African Charter, the African Commission is empowered to, among other things, (i) collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and 'should the case arise, give its views or make recommendations to governments';⁴⁷ (ii) formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation;⁴⁸ (iii) ensure the protection of human and peoples' rights under conditions laid down by the African Charter, including through the consideration of individual and inter-state communications;⁴⁹ and

43 Art 17(1) AU Constitutive Act.

44 AU Handbook (n 41 above) 68. Under the 2001 Protocol to the Abuja Treaty relating to the Pan-African Parliament, the duties of the Parliament include (i) to facilitate the effective implementation of the OAU/African Economic Community's (AEC's) policies and objectives 'and, ultimately, the AU'; and (ii) to familiarise the peoples of Africa with the objectives and policies aimed at integrating the African continent within the framework of the AU's establishment. To this end, it is intended in the long run to have members of the Parliament elected by universal suffrage; AU Handbook (n 40 above) 68. See also, generally, BR Dinokopila 'The role of the Pan-African Parliament in the promotion of human rights in Africa' unpublished LLD thesis, University of Pretoria, 2013 http://repository.up.ac.za/bitstream/handle/2263/53215/Dinokopila_Role_2014.pdf?sequence=1&isAllowed=y (accessed 30 August 2017). It should be noted that the African Union General Assembly, in its 23rd session, held in Malabo, Equatorial Guinea, 26-27 June 2014, approved a new Protocol, aimed at vesting the Pan-African Parliament with a significant legislative mandate under the AU structure. See Decisions by the African Union General Assembly, 26-27 June 2014, Malabo, Equatorial Guinea, Doc.Assembly/AU/Dec.517-545(XXIII). The Protocol, however, is yet to enter into force.

45 Art 30 African Charter, https://au.int/sites/default/files/treaties/7770-file-banjul_charter.pdf (accessed 30 August 2017). The African Charter was adopted in Nairobi on 27 June 1981 and entered into force on 21 October 1986.

46 Art 1 African Court Protocol, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (accessed 1 September 2017). The Court Protocol was adopted by member states of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.

47 Art 45(1)(a) African Charter.

48 Art 45(1)(b) African Charter.

49 Art 45(2) & 47-59 African Charter.

(iv) interpret all the provisions of the African Charter at the request of a state party, an institution of the [African Union] or an African organisation recognised by the [African Union].⁵⁰ For its part, the African Court is mandated to render judgments in respect of all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.⁵¹ The African Court is also entitled to issue advisory opinions on any legal matters relating to the African Charter or any other relevant human rights instruments, at the request of any member state of the [African Union], the [African Union] itself, any of its organs, or any African organisation recognised by the [African Union].⁵²

That said, to the extent that from their mandates neither the African Commission nor the African Court is vested with an affirmative *legislative* role under the AU framework, the competence of the Assembly of Heads of State and Government, in the traditional sense, strictly speaking remains exclusive in this regard. To this extent, norms generated other than by the Assembly of Heads of State and Government may be placed in the 'soft law' category for purposes of the determination of AU law. These would include Recommendations, General Comments⁵³ and Resolutions⁵⁴ of the African Commission; judgments and advisory opinions of the African Court; and other instruments such as Declarations, Model Laws and Principles developed either by organs of the AU or by individual states or groups of states, NGOs, individual experts and policy makers and other actors.⁵⁵

Thus far, it does not appear that the development of soft law in the AU system has been the source of much controversy. Indeed, soft law, especially state-generated soft law, was a prominent feature in the institutional life of the AU's predecessor, the OAU, being the forerunner of many 'hard law' instruments adopted under the aegis of the Organisation. Moreover, as noted above, the AU itself was initially

50 Art 45(3) African Charter.

51 Art 3(1) African Court Protocol.

52 Art 4 African Court Protocol.

53 See, eg, the African Commission General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <http://www.achpr.org/instruments/general-comment-two-rights-women/> (accessed 7 December 2015).

54 See, eg, the African Commission Resolution on Access to Health and Needed Medicines in Africa, <http://www.achpr.org/sessions/44th/resolutions/141/> (accessed 7 December 2015).

55 For analyses of the phenomenon of 'resolutions' and 'General Comments' issued by the African Commission, which appear to claim a kind of legislative or quasi-legislative competence, see, respectively, JP Biegon 'The impact of resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016 (on file with author); E Durojaye 'The General Comments on HIV adopted by the African Commission on Human and Peoples' Rights as a tool to advance the sexual and reproductive rights of women in Africa' (2014) 127 *International Journal of Gynaecology and Obstetrics* 305.

conceived in a soft law instrument – the 1999 Sirte Declaration. Nevertheless, as soft law instruments become more ubiquitous in the AU framework, it is to be expected that they, especially non-state and quasi-state-generated soft law, will come under increasing scrutiny by individual member states and groups of member states of the AU, the Assembly of Heads of State and Government, the African Court as well as, perhaps, by the Pan-African Parliament, especially if the Parliament eventually is cloaked with law-making power.⁵⁶

An enquiry into the legitimacy of soft law as a feature of norm generation within the AU framework, therefore, is critical, and it is to this that we now turn, using the Pretoria Principles as a case study. The Pretoria Principles address themselves to article 4(h) of the AU Constitutive Act, which itself drew closely upon the Responsibility to Protect (R2P) doctrine that had emerged in the international legal system.⁵⁷ It is, therefore, necessary to start with a consideration of the R2P doctrine, as a foundation for an examination of article 4(h) and, eventually, the Pretoria Principles.

3.1 Evolution of the Responsibility to Protect doctrine in the international legal system

The modern articulation of the R2P doctrine may be traced to a 1999 report of the UN Secretary-General to the General Assembly, in which he outlined, in broad strokes, the competing imperatives facing the international community.⁵⁸ In his report, after referring to the situations in Afghanistan, Angola, the Balkans, Cambodia, East Timor, Kosovo, Rwanda, Sierra Leone and Sudan; the Secretary-General noted that while the world had learnt that it could not be passive in the face of gross and systematic violations of human rights, at the same time it had also learnt that any intervention had to be based on 'legitimate and universal

56 An indication of the turf wars to come in this regard might be provided by an examination of the experiences with soft law in the European Union, and especially the approaches to the concept adopted by the European Court of Justice (see, eg, Case C-322/88 *Grimaldi* [1989] ECR 4407 and Case C-57/95 *France v Commission* [1997] ECR I-1627); and the European Parliament (see, generally, European Parliament, Resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)) C 187 E/77, A6-0259/2007 / P6-TA PROV (2007)0366 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0366+0+DOC+XML+V0//EN> (accessed 7 December 2015)).

57 See, eg, R Goldstone 'Foreword' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) xvi ('the right of intervention under art 4(h) of the AU Constitutive Act is mirrored in the doctrine of the "responsibility to protect" (R2P), which was unanimously adopted at the United Nations (UN) World Summit in 2005').

58 Press Release, Secretary-General presents his annual report to General Assembly UN Doc SG/SM/7136/GA/9596 (20 September 1999) <http://www.un.org/press/en/1999/19990920.sgsm7136.html> (accessed 6 December 2015).

principles' if it were to be supported by the international community.⁵⁹ To this end, the Secretary-General observed that although the 'developing international norm' in support of intervention to protect civilians from large-scale slaughter might be met by 'distrust, skepticism, even hostility', the norm and an evolved understanding of state sovereignty that was incidental to it ought to be welcomed.⁶⁰

In response to the challenge posed by the Secretary-General, the then Canadian Prime Minister, Jean Chrétien, at the UN Millennium Assembly in September 2000, announced an intention to establish an independent International Commission on Intervention and State Sovereignty (ICISS).⁶¹ The Commission was launched on 14 September 2000 by the then Canadian Foreign Minister, Lloyd Axworthy, who identified its mandate as being to foster dialogue and promote global consensus as to how the international system might act in the face of massive violations of human rights.⁶² Although it had been hoped that the Commission would be able to complete its work within one year,⁶³ the report of the Commission was finally issued in December 2001. The ICISS Report took a cautious approach, one emphasising UN Security Council approval for interventions to protect civilians facing mass atrocities.⁶⁴ Where such approval was not forthcoming, the Report recommended action by the UN General Assembly under the Uniting for Peace Resolution.⁶⁵

Following a series of reports which additionally considered the R2P doctrine, such as the December 2004 report of the United Nations High-

59 As above.

60 As above. See also S Gumedze 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 135-138. The Secretary-General's thoughts would be even more clearly and affirmatively laid out in his 2000 report on the role of the United Nations in the 21st century. See in this regard Secretary-General, *Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century* UN Doc A/54/2000 (27 March 2000) http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf (accessed 6 December 2015), cited in M Payandeh 'With great power comes great responsibility? The concept of the responsibility to protect within the process of international lawmaking' (2010) 35 *Yale Journal of International Law* 469-472.

61 See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS Report) December 2001 81, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 6 December 2015). The Commission was co-chaired by Gareth Evans (Australia) and Mohamed Sahnoun (Algeria). Other members of the Commission were Gisèle Côté-Harper (Canada), Lee Hamilton (United States), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel V Ramos (Philippines), Cornelio Sommaruga (Switzerland), Eduardo Stein Barillas (Guatemala) and Ramesh Thakur (India).

62 ICISS Report (n 61 above) 81.

63 Payandeh (n 60 above) 472-473. This would allow the Canadian government to present the Commission's findings and recommendations to the 56th session of the United Nations General Assembly; Payandeh (n 60 above) 472-473.

64 Payandeh 473.

65 Payandeh 473-474, citing Uniting for Peace, GA Res 377 (V), UN Doc A/1775 (3 November 1950).

Level Panel on Threats, Challenges and Change⁶⁶ and the March 2005 report by the UN Secretary-General,⁶⁷ the doctrine was further elaborated by the World Summit held in October 2005, of which the outcome document contained specific recommendations for its conceptualisation.⁶⁸ It was after the World Summit, in particular, that 'the concept of the responsibility to protect entered into discussions and statements of organs of the United Nations, regional organisations, and representatives of states'.⁶⁹

Since that time, the R2P doctrine has been supported by the UN Security Council,⁷⁰ the UN Secretary-General⁷¹ and the UN General Assembly.⁷²

3.2 Article 4(h) of the African Union Constitutive Act and the Responsibility to Protect doctrine

It is a matter of some coincidence that the transition from the OAU to the AU occurred at a time when the R2P doctrine was first being conceived in the international legal system. In the event, the framers of the AU foundational document – the Constitutive Act of the African Union

66 The High-Level Panel on Threats, Challenges and Change was established by the UN Secretary-General in 2004, with a mandate to 'evaluate the adequacy of existing policies and institutions with regard to current threats to international peace and security'; Payandeh (n 60 above) 474. The Panel delivered its report in December 2004. See Report of the High-Level Panel on Threats, Challenges and Change: A more secure world: Our shared responsibility UN Doc A/59/565 (2 December 2004) cited in Payandeh (n 60 above) 474.

67 Secretary-General *Report of the Secretary-General, In larger freedom: Toward development, security and human rights for all* UN Doc A/59/2005 (21 March 2005) cited in Payandeh (n 60 above) 475.

68 2005 World Summit Outcome, GA Res.60/1, UN Doc A/Res/60/1 (24 October 2005) cited in Payandeh (n 60 above) 475-476. According to para 138 of the World Summit Outcome Document, '[e]ach individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means'.

69 Payandeh (n 60 above) 476.

70 See Goldstone (n 57 above) xvii, citing UN Security Council Resolution 1674 of April 2006.

71 See Secretary-General *Report of the Secretary-General, Implementing the Responsibility to Protect* UN Doc A/63/677 (12 January 2009) cited in Payandeh (n 60 above) 478 and Goldstone (n 57 above) xvii.

72 According to Payandeh, further discussion was conducted during the 63rd session of the UN General Assembly, held in October 2009, resulting in a Resolution that further clarified the international consensus at the time; GA Res 63/308, UN Doc A/RES/63/308 (7 October 2009) cited in Payandeh (n 60 above) 479. Similarly, Goldstone notes that the Secretary-General's report of January 2009 generated debate in the UN General Assembly, during which it appeared that there was a divergence of views regarding the scope and application of the doctrine. While most states were in favour of the doctrine, some raised a number of critical issues regarding its implementation, including as to its consistency with the UN Charter rules relating to the use of force. There was also some discussion around the role of regional organisations, such as the AU, in the enforcement of the doctrine; Goldstone (n 57 above) xvii.

(Constitutive Act)⁷³ – established in article 4(h) ‘the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.⁷⁴

The articulation of article 4(h) of the Constitutive Act has been said to have been the AU’s response to Kofi Annan’s 1999 challenge to the international community.⁷⁵ As such, in a very real sense, through article 4(h) of its Constitutive Act, the AU appears to have deliberately chosen to adopt, as a ‘hard law’ norm under the AU legal framework, a concept which at the time could at best be said to be ‘soft law’ in the international legal system.

The AU position was in part also informed by the continent’s unique experiences of mass atrocities, on the one hand, and the absence of effective international intervention, on the other, with the 1994 Rwandan genocide serving as perhaps the most egregious example in this regard.⁷⁶ This is a critical point, especially if it is recalled that, as the large majority of African states were under colonial domination at the time of the adoption of the UN Charter in 1945, there was very limited African involvement in the formulation of the contemporary international legal framework for the regulation of the use of force.

This view of article 4(h), as a deliberate and considered African response to a problematic international legal framework, is supported by a review of the AU’s subsequent practice. For instance, in March 2005, in the course of the 7th extraordinary session of the Executive Council of the AU, the AU developed a consensus regarding proposed reforms to the UN system, which was articulated in a document entitled the Common African Position on the Proposed Reform of the United Nations (also known as the Ezulwini Consensus).⁷⁷ In this document, the AU re-affirmed its stance regarding the R2P doctrine, noting in particular that the UN General Assembly and Security Council, in part due to their geographical distance from the theatre of many African conflicts, were not

73 Adopted 11 July 2000 and entered into force 26 May 2001.

74 The intervention has to be sanctioned by the Assembly, whose decisions are taken by consensus or, where this cannot be obtained, by a decision of a two-thirds majority of the member states of the AU; Gumedze (n 60 above) 149–150 citing Article 7 (1) of the Constitutive Act.

75 See Gumeze (n 60 above) 139 ([p]arallel to the work of the ICISS, the AU took the lead in entrenching the responsibility of protecting in its founding document, the Constitutive Act’).

76 See Gumedze (n 60 above) 139 ([i]t could be argued that the Rwandan genocide (which could have been avoided had the UN intervened) was one of the most important considerations for entrenching the responsibility to protect in the Constitutive Act as this affected African states directly’); Goldstone (n 57 above) xvii ([t]he horrendous genocide in Rwanda in 1994 could have been prevented or at least minimised with the kind of intervention contemplated by art 4(h)).

77 Gumedze (n 60 above) 141.

always well suited to properly evaluate such situations.⁷⁸ In terms of the Ezulwini Consensus, therefore, the AU felt that it was more prudent for regional organisations, which were situated closer to the sites of such conflicts, to be authorised to quickly intervene, on the understanding that UN Security Council approval could be sought and obtained after the fact.⁷⁹ In addition, the R2P doctrine was further enshrined in article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSCAU Protocol).⁸⁰

It does bear noting that the AU is yet to invoke article 4(h) as a basis for the use of force.⁸¹ At the same time, however, article 4(h) is yet to be legally challenged, 'supporting the notion that the international community tacitly consents to the newly emerging regional norm',⁸² which might be with good reason.⁸³

In sum, the history of article 4(h), which is inevitably intertwined with that of the R2P doctrine, reveals the radical, but deliberate, nature of this provision of the AU Constitutive Act. Essentially, through article 4(h), the AU established as a regional 'hard law' norm a principle which until that point had, in the international system, only been a political commitment at least, or a 'soft law' obligation, at most.⁸⁴

3.3 Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union

The Pretoria Principles were formulated and adopted at a conference held on 6 and 7 December 2012 at the University of Pretoria, organised by the

⁷⁸ As above.

⁷⁹ AU Executive Council 'The Common African position on the proposed reform of the United Nations: The Ezulwini Consensus' http://www.africa-union.org/News_Events/Calender_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext_%20EXCL2%20VII%20Report.doc (accessed 5 December 2015) cited in Gumedze (n 60 above) 141.

⁸⁰ Entered into force 26 December 2003, cited in Gumedze (n 60 above) 148. Art 4(j) of the PSCAU Protocol provides that the Council shall be guided by 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act'. The PSCAU replaced the Declaration on the Establishment within the OAU of the Mechanisms for Conflict Prevention, Management and Resolution (Cairo Declaration); Gumedze (n 60 above) 148 fn 57.

⁸¹ M Kunschak 'The role of the United Nations Security Council in the implementation of article 4(h)' in Kuwali & Viljoen (n 57 above) 66.

⁸² Kunschak (n 81 above) 67.

⁸³ As Kunschak notes: 'Ambiguity does not necessarily constitute only a problem of legal insecurity, but also offers the opportunity of a more flexible reaction to critical situations. Article 4(h) provides the AU with a legal tool to act without having to wait for the international community and its political considerations in the face of imminent danger'; Kunschak (n 81 above) 67.

⁸⁴ In terms of the relationship between art 4(h) and the R2P doctrine, Goldstone observes that '[w]hile the doctrine of R2P is a political commitment of the UN member states, art 4(h) is a legal obligation on AU member states'; Goldstone (n 57 above) xvii.

University's Centre for Human Rights and the Department of Political Science.⁸⁵ Participants at the conference comprised 'interdisciplinary academics, policy makers and practitioners in the areas of international peace and security with a special focus on Africa'.⁸⁶ The Pretoria Principles, therefore, fall within the category of non-state-generated soft law. According to what appears to be the official website of the Principles, they were intended 'to provide greater clarity and inform action by the African Union, sub-regional actors, governments and practitioners on how to enhance their respective roles in ending mass atrocities in Africa pursuant to article 4(h)'.⁸⁷

In the first place, as with most non-state-generated soft law instruments, the Pretoria Principles begin with a legitimacy deficit, especially in terms of input or process legitimacy. As noted in section 2 above, input legitimacy may be analysed with reference to three indicators, namely, (i) systemic validation; (ii) democratic participation; and (iii) jurisdiction. In so far as the Pretoria Principles were formulated by a relatively small group of experts, acting in their individual capacities, the process of formulating the Principles had a low degree of democratic participation, and little, if any, systemic validation. The one measure of input legitimacy of which the Principles do reflect a high degree relates to jurisdictional legitimacy. This is because the Principles relate to an issue – the prevention of mass atrocities – which is clearly of concern to the international community as a whole, rather than a matter within the exclusive domain of any individual state or states.

This being the case, it is even more critical that the Principles reflect a substantial degree of output or substantive legitimacy, to offset or perhaps even overcome the input legitimacy deficit they suffer. Indeed, to the extent that the Principles are said to be aimed at providing 'greater clarity' and guiding 'action' by the AU and other relevant actors, it would appear that the Principles themselves invite precisely this kind of enquiry. It will again be recalled, from the discussion in section 2 above, that output legitimacy may be assessed in terms of four considerations: (i) determinacy; (ii) coherence; (iii) effectiveness; and (iv) justice. We now turn to an assessment of the substantive legitimacy of the Pretoria Principles, based on these indicators. In this section, determinacy and coherence are treated separately, while effectiveness and justice are jointly considered.

85 See <http://www.chr.up.ac.za/index.php/pretoria-principles.html> (accessed 1 September 2017).

86 As above.

87 As above.

3.3.1 *Determinacy*

It may be said that the Pretoria Principles cover some ground in terms of elaborating and clarifying the meaning of article 4(h) – that is to say, enhancing the *determinacy* of that provision as an aspect of its substantive legitimacy. According to the Principles, while every state has the primary responsibility to protect its citizens,⁸⁸ in terms of article 4(h), the AU is clothed with the right to intervene in a member state pursuant to a decision of the AU Assembly of Heads of State and Government, in respect of grave circumstances, that is to say, war crimes, genocide and crimes against humanity.⁸⁹ Therefore, such intervention by the AU is triggered only where it is clear that the target state is ‘unable or unwilling to discharge its primary responsibility’ to protect its citizens.⁹⁰

The Pretoria Principles also make the important acknowledgment that article 4(h) is a manifestation, in ‘hard’ international law, of the R2P doctrine which hitherto had mainly found expression in ‘soft’ international instruments. According to the Principles, by the terms of article 4(h), the AU Constitutive Act ‘codifies’ the R2P doctrine expressed in the 2005 World Summit Outcome Document.⁹¹ To this end, according to the Principles, the ‘right’ under article 4(h) ‘implies a legal entitlement or prerogative’ which should ‘as far as feasible be interpreted to imply a duty to intervene to prevent or halt mass atrocities’.⁹² Although this appears to be a significant stretch of the language of article 4(h), in my view this approach is consistent with the spirit of that provision.⁹³

The Pretoria Principles thus appear to enhance, to some degree, the determinacy – and therefore substantive legitimacy – of article 4(h). However, I return to an assessment of this criterion in section 3.3.3 below.

88 Principle 1 Pretoria Principles.

89 Principles 1 & 3 Pretoria Principles. Principle 3 provides in part that ‘[b]y consenting to article 4(h), member states of the AU have accepted that sovereignty is not a shield but rather a responsibility, particularly when populations are at risk of war crimes, genocide and crimes against humanity’.

90 Principle 4 Pretoria Principles. See also Principle 9 Pretoria Principles.

91 Principle 5 Pretoria Principles. Principle 5 notes, however, that art 4 h) relates, in particular, to the third of the three foundational pillars of the R2P doctrine, that is to say, the use of military intervention as a last resort.

92 Principle 6 Pretoria Principles.

93 A similarly broad, and likewise contextually appropriate, reading of art 4(h) is represented by the terms of Principles 8 (which is to the effect that ‘accountability through criminal prosecution to deter potential perpetrators, for example by arresting perpetrators, may also be part of an article 4(h) intervention’) and 10 (under which it is provided that ‘[c]onsidering the speed with which mass atrocities occur and that the threshold for article 4(h) intervention is high, difficult to prove and amenable to political discretion, in deciding on article 4(h) intervention, the AU must prioritise the imperative to save lives over technical or overly legalistic ascertainment of the commission of war crimes, genocide and crimes against humanity’).

3.3.2 Coherence

One of the major assertions contained in the Pretoria Principles is reflected in Principle 11, which is to the effect that ‘*as a matter of legal requirement*, the AU requires the authorisation of the UN Security Council for article 4(h) intervention’ and that ‘the UN Security Council has the responsibility to authorise the use of force in the implementation of article 4(h) intervention’.⁹⁴ It is not difficult to understand the motivation for this assertion, which seems to have been founded on a concern to remain within the bounds of the UN Charter framework for the maintenance of international peace and security,⁹⁵ especially having regard to the claim, under article 103 of the Charter, of normative superiority of obligations under that document over competing arrangements and obligations.⁹⁶ To this extent, therefore, it could be said that the Pretoria Principles enjoy a great degree of coherence – as an aspect of substantive legitimacy – in so far as they provide a reading of article 4(h) which is more closely aligned with the broader international legal framework for the maintenance of peace and security.

In addition, the Pretoria Principles could be said to reflect an additional measure of coherence – in institutional terms – especially with regard to the articulation of the roles of various AU stakeholders in preventing mass atrocities in Africa,⁹⁷ including through the use of the AU’s Continental Early Warning System.⁹⁸ The stakeholders identified in this regard include AU member states,⁹⁹ civil society organisations (CSOs),¹⁰⁰ regional economic communities (RECs),¹⁰¹ regional and sub-regional organisations,¹⁰² the African Commission,¹⁰³ the African Court,¹⁰⁴ the AU Assembly,¹⁰⁵ the AU Peace and Security Council,¹⁰⁶ the

94 My emphasis.

95 In particular, the prohibition of the use or threat to use force under art 2(4) of the UN Charter, which has been recognised to be a norm of *jus cogens*; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, 1986 ICJ Reports 14 para 190.

96 According to art 103 of the UN Charter: ‘In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. On this question, see, generally, E de Wet & J Vidmar (eds) *Hierarchy in international law: The place of human rights* (2012) and R Bernhard ‘Article 103’ in B Simma et al (eds) *The Charter of the United Nations: A commentary* (2002) 1293.

97 Principles 13-31 Pretoria Principles.

98 Principles 15 and 22 Pretoria Principles.

99 Principles 13, 16 & 29 Pretoria Principles.

100 Principles 17 & 31 Pretoria Principles.

101 Principle 17 Pretoria Principles.

102 Principle 28 Pretoria Principles.

103 Principles 17-20 Pretoria Principles.

104 Principles 17 & 21 Pretoria Principles.

105 Principle 18 Pretoria Principles.

106 As above.

Panel of the Wise;¹⁰⁷ the Pan-African Parliament;¹⁰⁸ the Economic, Social and Cultural Council;¹⁰⁹ the African Peer Review Mechanism (APRM);¹¹⁰ the African Standby Force;¹¹¹ the UN Special Procedures;¹¹² and the international community as a whole.¹¹³ In this way, the Pretoria Principles outline a vision for article 4(h) which includes a proactive role for the AU, working in concert with other stakeholders, in preventing mass atrocities in Africa.

The Pretoria Principles, therefore, seem to improve upon the coherence, and thus substantive legitimacy, of article 4(h). Nonetheless, as with the case of the criterion of determinacy above, we shall return to an assessment of the element of coherence in section 3.3.3 below.

3.3.3 *Effectiveness and justice*

It should be recalled that the major significance of article 4(h) was the decisive stance it represented with regard to action by the AU in the face of mass atrocities on the continent. As noted in section 3.2 above, through this provision the AU deliberately and thoughtfully chose to *claim* for itself, on the African continent, authority granted, in the international legal system, primarily¹¹⁴ to the UN Security Council under article 24 of the UN Charter. This position was partly in response to the UN Secretary-General's 1999 challenge to the international community, and was further informed by the continent's own painful experiences of mass atrocities in the face of international indifference and inaction. The lack of reference in article 4(h) to UN Security Council authorisation, therefore, was neither an omission nor an oversight, but rather a deliberate affirmation, in a 'hard law' instrument of what at the time had been a 'soft' obligation under consideration by the international community. In article 4(h), the softness of the R2P doctrine had found some solidification, and the provision could serve as a useful reference point in the continuing conversation, in the international legal system, towards the further advancement of the doctrine.

In asserting UN Security Council authorisation as a requirement for the implementation of article 4(h), the Pretoria Principles effectively diminish the significance of the provision, as a radical challenge, from the African continent, to an international legal framework for the use of force

107 Principle 23 Pretoria Principles.

108 Principle 24 Pretoria Principles.

109 Principle 25 Pretoria Principles.

110 Principle 26 Pretoria Principles.

111 Principle 27 Pretoria Principles.

112 Principle 20 Pretoria Principles.

113 Principle 30 Pretoria Principles.

114 For judicial clarification that 'primary' responsibility does not mean 'exclusive' responsibility, see *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) 1984 ICJ Reports para 95.

which has been proven to suffer from a high degree of ineffectiveness and injustice (as elements of output legitimacy). Put differently, article 4(h) was aimed at enhancing the *effectiveness* and *justice* – as aspects of substantive legitimacy – of the international legal framework for the use of force, in terms of its ability to allow for decisive regional action to prevent mass atrocities. As such, by re-emphasising and re-centring the need for UN Security Council authorisation as a prerequisite for decisive AU intervention, the Pretoria Principles arguably undermine the effort and thought reflected in article 4(h).

Moreover, the Pretoria Principles do not offer definitive guidance with regard to what the AU can, or should, do should such authorisation not be forthcoming. In this respect, the Principles only note that '[w]here the UN Security Council is unwilling or indecisive in authorising intervention, the conferment of the right to intervene on the AU by member states of the AU provides greater space for the AU to act in the face of war crimes, genocide and crimes against humanity on the continent'.¹¹⁵ With respect, it is difficult to understand what 'greater space' means as used in this context. In this regard, therefore, aside from the concerns over effectiveness and justice, the Pretoria Principles further suffer from deficits with regard to *determinacy* and *coherence* – as elements of substantive or output legitimacy.

The approach adopted by the Pretoria Principles with respect to the requirement for Security Council authorisation as a condition for intervention under article 4(h) is even more difficult to understand given the recognition, in the Principles themselves, that '[t]he proximity to the conflict provides sub-regional organisations with a better understanding of its dynamics, key players, context-specific management and resolution options and makes them better placed to initiate rapid and less expensive responses to conflict than the AU and the UN'.¹¹⁶ If sub-regional organisations have a better understanding of 'context-specific management and resolution options' with respect to conflicts, then it would follow that, as envisaged in article 4(h), the AU similarly has a better understanding than the UN Security Council with respect to conflicts on the continent, and should be accorded a measure of deference especially with regard to the prevention of mass atrocities. Indeed, as noted earlier, a major consideration that informed the framing of article 4(h) was the strong feeling on the part of AU member states that, given their greater proximity to and interest in conflicts on the continent, they were better placed than the UN Security Council to evaluate the need to intervene, including militarily, in such situations. The language of Principle 11 does not demonstrate sufficient consideration of, and respect for, this important concern, which is a major failing of that Principle. Thus, unfortunately, through a rigid, and arguably insufficiently context-sensitive approach,

¹¹⁵ Principle 11 Pretoria Principles.

¹¹⁶ Principle 28 Pretoria Principles.

Principle 11 of the Pretoria Principles unduly ‘softens’ an important normative ‘hard law’ advancement, in the AU framework, of what had prior to article 4(h) only been articulated as ‘soft law’ in the international legal system.

3.3.4 General legitimacy-based assessment of the Pretoria Principles

In sum, it bears reiterating that article 4(h) of the AU Constitutive Act was a deeply-considered response to a number of critical failures of the UN Charter framework for collective security, particularly as experienced in Africa. In this sense, the Charter framework could be said to have manifested a degree of output illegitimacy, especially in relation to its capacity to effectively protect persons at risk of mass atrocities. It is precisely this legitimacy deficit that article 4(h) sought to mitigate. To address this, article 4(h) effectively ‘hardened’, at the regional level, a soft law norm which was beginning to be articulated at the international level, with regard to the importance of preventing mass atrocities through decisive action when necessary.

Through asserting a requirement for UN Security Council authorisation for such action, which article 4(h) had deliberately omitted, the Pretoria Principles arguably undermine the potential of that provision in terms of enabling the AU to quickly intervene to prevent mass atrocities and, by extension, perpetuate the prevailing output illegitimacy of the international legal framework for the use of force.

This is made even more problematic by the fact that the Principles themselves do not provide any definitive guidance as to the position where the UN is either unwilling or unable to act, and further by the contradiction between Principle 11 (which emphasises the need for UN Security Council authorisation) and Principle 28 (which emphasises geographical proximity to conflict as an important consideration for determining the best-placed intervener).

As such, in my view, the Pretoria Principles suffer legitimacy deficits in terms of both input or process legitimacy and output or substantive legitimacy. Unfortunately, in so far as they specifically address themselves to article 4(h) of the AU Constitutive Act, they share the normative space occupied by that provision, and operate, in that space, to somewhat undermine the radical challenge it represents.

4 Conclusion

This chapter has sought to demonstrate the challenges and opportunities presented by soft law in the AU, through an analysis of the interaction between the R2P doctrine (a ‘soft law’ doctrine in the international legal system), article 4(h) of the AU Constitutive Act (a ‘hard law’ instrument)

and the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union (a 'soft law' instrument).

In my view, the case of the Pretoria Principles at once demonstrates the potential role as well as pitfalls of soft law, particularly non-state and quasi-state-generated soft law. On the one hand, soft law instruments can be powerful tools for advancing normative claims and building systemic consent in the direction of important positions. At the same time, they can serve to diminish and undermine nascent forms of resistance and bold action attempted by weaker actors in the international community. There is real and 'hard' power – economic, ideational,¹¹⁷ reputational, institutional and otherwise – often at play in the formulation of 'soft' law; and, like all power, this power should be wielded with great introspection.

Although as a union of states the AU has the capacity to generate 'hard' international law, its economic and other limitations, as compared to a number of other actors – state and non-state – in the international community continue to undermine the AU's capacity to be relevant to the lived realities of many of the peoples of the continent.¹¹⁸ The AU thus is 'weak' or 'soft' in this sense. This weakness notwithstanding, the AU identified the need to intervene decisively to prevent mass atrocities on the continent, and sought, through article 4(h), to create a legal mechanism to support this position, incorporating in its stride the R2P 'soft law' doctrine, which at the time was only just being articulated in the international legal system. In my view, the AU's position deserved support and validation, as a regional, bottom-up, effort to enhance the outcome legitimacy of the international legal framework for the use of force.

It might be the case that the position adopted by the Pretoria Principles better reflects traditional legal doctrine and, especially, the UN Charter framework. However, the Pretoria Principles might have better served the context-specific concerns of the African continent if they supported, and validated, the regional legal position the AU had asserted for itself; one which arguably had, and continues to have, the potential for the realisation of more just outcomes with regard to the prevention of mass atrocities in

117 For reflections on the concept of 'ideational power', see C Deere *The implementation game: The TRIPS Agreement and the global politics of intellectual property reform in developing countries* (2009); M Elsig *Different facets of power in decision-making in the EU* NCCR Trade Regulation, Working Paper 2006/23 (2006) http://phase1.nccr-trade.org/images/stories/publications/IP2/WP_ELSIG_FACETSOFPPOWER.pdf (accessed 7 December 2015); R Falk, M Juergensmeyer & V Popovski (eds) *Legality and legitimacy in global affairs* (2012); H Baumgärtner *Patents, power and rhetoric* Working Paper 4, Faculty of Humanities and Social Science, Universität Luzern (2011).

118 As Kuwali & Viljoen observe: 'The failings of art 4(h) intervention are ultimately not due to legal lacuna or the lack of legal arguments, but arise from the lack of political commitment ... political will is inextricably linked to enforcement capacity, which includes military means. The African Standby Force, therefore, needs to become fully operational, and should be provided with resources to make it less reliant on the contribution of external donors'. D Kuwali & F Viljoen 'Conclusion' in Kuwali & Viljoen (n 57 above) 346.

Africa. In my view, from a politico-legal perspective, activists engaged in the creation of 'international law from below',¹¹⁹ including through the articulation of non-state and quasi-state-generated soft law, should be more deliberate in employing the undeniable power of 'soft law' in the advancement of more substantively legitimate outcomes. Put simply, in my view, the power of 'soft law' should as far as possible be employed to further democratise and humanise international law, rather than to entrench and validate its more hegemonic or manifestly illegitimate features and outcomes.

119 For a detailed analysis of this phenomenon, see, generally, B Rajagopal *International law from below* (2003).

Japhet Biegon

Abstract

The African Commission on Human and Peoples' Rights has entrenched the practice of adopting resolutions during its ordinary and extraordinary sessions. Three categories of resolutions have emerged from this practice: thematic; country-specific; and administrative. This chapter examines the impact of the African Commission's thematic resolutions. While this category of resolutions may be put to great use and impact, a good number of the resolutions 'die' as soon as they are adopted. They simply do not gain traction. Other thematic resolutions have a once-in-a-lifetime impact or are quickly overtaken by political and other relevant developments. Only a few thematic resolutions take on a life of their own and stand the test of time. By analysing the extent to which three specific thematic resolutions have been incorporated into the domestic laws of African countries, this chapter provides insights into why some resolutions remain scraps of paper while others go on to become important and cherished normative instruments.

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) rightly and justifiably regards itself as the 'premier' human rights treaty body in Africa.¹ Established in 1987 under the auspices of the Organisation of African Unity (OAU) – the predecessor to the present-day African Union (AU) – the 11-member quasi-judicial body is principally charged with the mandate of supervising state implementation of and

1 37th Activity Report of the African Commission on Human and Peoples' Rights, para 43. See also 'Impact of the African Charter on domestic human rights in Africa' <http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/> (accessed 9 September 2017).

compliance with the African Charter on Human and Peoples' Rights (African Charter).² This mandate translates into several interconnected and mutually-reinforcing functions and activities. These include the dissemination of the African Charter; examination of state party reports; the determination of inter-state and individual communications; undertaking country visits; issuing advisory opinions; and intervening in cases where the enjoyment of human rights is severely threatened.³ These functions are more or less similar to those performed by the other regional and global quasi-judicial human rights treaty bodies.

Another key activity of the African Commission is the adoption of resolutions. It is an institutional practice that is now well entrenched and regarded as one of the African Commission's 'commendable innovativeness'.⁴ At most of its sessions, the African Commission adopts resolutions, either addressing a thematic issue, the human rights situation in a specific country, or a particular procedural or administrative matter. Thus, three categories of resolutions have emerged from practice: thematic; country-specific; and administrative. Human rights activists and non-governmental organisations (NGOs) often spend a great deal of time and energy lobbying the African Commission to adopt specific resolutions. As of September 2017, the African Commission had adopted a total of 376 resolutions. On matters addressed, the resolutions are considered 'formal expressions of the Commission's opinion'.⁵

The resolutions are targeted towards a variety of actors, but states are the primary audience, and in this regard are expected to take specific actions in compliance with the standards or recommendations contained in the resolutions. However, the impact of the resolutions remains an issue of speculation. Little is known about the fate of the resolutions after they have been adopted. International human rights actors and NGOs usually greet the adoption of resolutions with excitement and celebration.⁶ State parties, who are ultimately responsible for implementing the resolutions, hardly share in the excitement. Whilst it is relatively consistent in adopting resolutions, the African Commission has not established a mechanism for

2 OAU Doc CAB/LEG/67/3/Rev.5, adopted 27 June 1981, entered into force 21 October 1986.

3 See African Charter, arts 45-59 & 62.

4 Opening address by Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights, delivered at the opening ceremony of the 52nd ordinary session of the African Commission, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire.

5 As above.

6 See, eg, 'UN rights office hails adoption of Africa-led resolution on people with albinism' http://www.un.org/apps/news/story.asp?NewsID=46504#.VhS8GWcw_IU (accessed 9 September 2017); 'African Commission adopts landmark resolution on LGBT rights' <http://www.ishr.ch/news/African-commission-adopts-landmark-resolution-lgbt-rights> (accessed 9 September 2017); 'KHRC applauds African Commission resolutions from 56th ordinary session' <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/346-khrc-applauds-african-commission-resolutions-from-56th-session.html> (accessed 9 September 2017).

tracking and documenting their impact. As a result, it does not have concrete information at its disposal to demonstrate the value of the resolutions. Scholarly literature on the impact of the resolutions is equally lacking. As the African Commission celebrated its thirtieth anniversary in 2017 and entered its fourth decade of existence, it is imperative that the impact of its work is examined and appropriate lessons are drawn.

This chapter is an attempt to fill the above-mentioned gap in the literature. However, rather than documenting the impact of all three categories of the African Commission's resolutions, the chapter pursues a narrower and more manageable task. It examines the impact of the African Commission's thematic resolutions by analysing the incorporation of these resolutions into the domestic laws of African countries. Incorporation is a relatively good indicator of the impact of a thematic resolution as it denotes state acceptance and willingness to implement it in practice. The scope of the chapter is further narrowed down to only three thematic resolutions. These are the 1999 Resolution Urging States to Envisage a Moratorium on the Death Penalty as supplemented by the 2008 Resolution Calling on States to Observe the Moratorium on the Death Penalty; the 2002 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); and the 2002 Declaration of Principles on Freedom of Expression in Africa.

In terms of the structure of the chapter, this introduction is followed by an overview of the role and structure of the African Commission's thematic resolutions in section 2. Section 3 examines the legal status and soft law character of the resolutions. Section 4 makes the case for the application of the concept of incorporation or domestication to the African Commission's thematic resolutions. It is important to make such a case as the concept of incorporation or domestication is traditionally associated with treaty law as opposed to soft law. Section 5 proceeds to analyse the available evidence on the incorporation of the three selected thematic resolutions into the domestic laws of African countries. Section 5 draws the analysis to a conclusion and filters out the important insights of the chapter.

2 Role and structure of thematic resolutions

The African Commission's thematic resolutions are similar to the General Comments of the UN human rights treaty-monitoring bodies. They reflect the thinking and interpretation of the African Commission on particular themes or substantive provisions of the African Charter. Although the

African Charter is progressive in certain respects,⁷ it contains many vague and ambiguous provisions.⁸ It is also replete with claw-back clauses.⁹ These provisions are neither the products of oversight nor of poor drafting. They are a fruit of the era during which the African Charter was adopted. The African Charter was drafted and adopted at a time when the principle of non-interference in domestic affairs was, in the words of Viljoen, 'as firmly rooted in African soil as an unwavering baobab'.¹⁰ The drafters of the Charter were conscious of this fact and, as such, they adopted a minimalist approach to ensure that the document received the blessing of states.

When the African Commission was inaugurated in 1987, it had before it a skeletal document that needed a new breath of life. By way of thematic resolutions, the African Commission has clarified the normative content of most of the rights guaranteed under the African Charter. In this sense, thematic resolutions are an attempt by the African Commission to elaborate in greater detail upon the substantive provisions of the African Charter. While their primary purpose is to clarify the normative content of the rights already guaranteed under the African Charter, there are several instances where the African Commission has used thematic resolutions to address new developments that were not envisioned at the time of adopting the African Charter. For instance, the African Commission has utilised thematic resolutions to express its opinion about the human rights implications of HIV,¹¹ climate change,¹² and illicit capital flight.¹³ The normative effect of these resolutions is to expand the scope and reach of the African Charter.

There are also some thematic resolutions which neither clarify nor expand the African Charter. Instead, they are concerned with states' expression of commitment to human rights through the ratification of

7 Eg, the African Charter incorporates both civil and political rights and socio-economic rights. For a review of the major substantive provisions of the African Charter, see F Viljoen *International human rights law in Africa* (2012) 212-241.

8 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643.

9 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667.

10 Viljoen (n 7 above) 158.

11 Resolution on HIV/AIDS Pandemic – Threat against Human Rights and Humanity, ACHPR/Res.53(XXIX)01 adopted at the 29th ordinary session, Tripoli, Libya, 23 April-7 May 2001.

12 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153(XLVI)09 adopted at the 46th ordinary session, Banjul, The Gambia, 11-25 November 2009.

13 Resolution on Illicit Capital Flight from Africa, ACHPR/Res.236(LIII)2013 adopted at the 53rd ordinary session, Banjul, The Gambia, 9-23 April 2013.

treaties,¹⁴ strengthening of institutional frameworks,¹⁵ and implementation of recommendations directed at them by the African Commission.¹⁶ Udombana offers a succinct summary of the role of thematic resolutions, when he states that they are

consequential rules from the experiences of the Commission, elaborated to give practicality and eliminate confusion from the broad formulae sometimes offered by the African Charter. They express the direction in which the law is evolving in Africa. They also serve as useful guidelines to give operational effect to certain Charter provisions and, consequently, the expectations that can, with the benefit of clarity, be placed on the African Commission. The resolutions are of considerable value in better understanding the norms and implementation problems in the legal systems of African countries.¹⁷

As of September 2017, the African Commission had adopted a total of 126 thematic resolutions. These resolutions cover a wide variety of themes. In particular, the resolutions address at least the following 10 broad subjects: the justice system; elections and governance; discrimination and vulnerable groups; treaties and institutions; expression rights; socio-economic rights; the death penalty and torture; implementation; and conflict and terrorism.

The structure of thematic resolutions is fairly uniform. After enunciating in the Preamble the basis for adopting a specific resolution, the African Commission makes its pronouncement in the operative paragraphs. The titles of thematic resolutions, however, vary. A few thematic resolutions are titled as guidelines, principles or declarations. There appears to be no particular criterion for the use of these titles by the African Commission. In the tradition of the United Nations (UN), a 'declaration' is used when 'principles of great and lasting importance are being enunciated'.¹⁸ For a long time, only the Universal Declaration of Human Rights (Universal Declaration) carried the title 'universal declaration'. Later, one other instrument was given the same title,¹⁹ leading an expert tasked to assess the UN human rights system to speculate

14 See, eg, Resolution on the Ratification of the Additional Protocol on the Creation of an African Court on Human and Peoples' Rights, ACHPR/Res.29(XXIV)98 adopted at the 24th ordinary session, Banjul, The Gambia, 22-30 October 1998.

15 See, eg, Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, ACHPR/Res.76(XXXVII)05 adopted at the 37th ordinary session, Banjul, The Gambia, 27 April-11 May 2005.

16 See, eg, Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97(XXXX)06 adopted at the 40th ordinary session, Banjul, The Gambia, 15-29 November 2006.

17 N Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 299 306.

18 UN Doc E/CN.4/L.610 (1962).

19 Universal Declaration on the Eradication of Hunger and Malnutrition, adopted on 16 November 1974 by the World Food Conference convened under General Assembly Resolution 3180 (XXVIII) of 17 December 1973 and endorsed by General Assembly Resolution 3348 (XXIX) of 17 December 1974.

as to ‘whether sufficient consideration is being given to the choice of terms such as “universal declaration” and “declaration” rather than to alternatives that might accurately describe the content and significance of the instrument’.²⁰

There is nothing concrete that suggests that the African Commission follows the practice of the UN. However, it is notable that only a handful of thematic resolutions are referred to as either ‘guidelines’, ‘principles’ or ‘declaration’.²¹ Most thematic resolutions that carry these titles are drafted in a series of workshops over a long period of time and by a wide range of stakeholders. This kind of procedure differs from the approach followed in drafting ‘ordinary’ thematic resolutions which originate from and are drafted by a small drafting committee during the short period of time available during the ordinary or extraordinary sessions of the African Commission.

3 Legal status of thematic resolutions

The African Commission’s thematic resolutions fall under a category of human rights soft law which Shelton refers to as ‘secondary soft law’. She defines secondary soft law as pronouncements of ‘institutions whose existence and jurisdiction are derived from a treaty and who apply norms contained in the same treaty’.²² The field of human rights is flooded with secondary soft law mainly because of the proliferation and prominent role of human rights treaty bodies both at the global and regional levels. Shelton cites the following as examples of secondary soft law: ‘recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms’.²³ According to Shelton’s categorisation, the African Commission’s resolutions are secondary soft law, as are its Concluding Observations, Recommendations and General Comments.

20 *Report of effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, A/44/668, 8 November 1989 (Philip Alston Report) 168-170.

21 Notable examples include Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002 (Robben Island Guidelines); Declaration of Principles on Freedom of Expression in Africa; Declaration on Economic, Social and Cultural Rights in Africa (Pretoria Declaration); Declaration on the Right to a Fair Trial, 1999 (Dakar Declaration); Principles and Guidelines on Economic, Social and Cultural Rights (Nairobi Guidelines); Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 2014 (Luanda Guidelines); Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, 2015.

22 D Shelton ‘Commentary and conclusions’ in D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2000) 449 451.

23 As above.

Secondary soft law should be distinguished from 'primary soft law', another term introduced by Shelton. Primary soft law are 'normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization'.²⁴ At the global level, the most famous and oft-cited example of primary soft law is the Universal Declaration. In the African context, examples of primary soft law include the Grand Bay (Mauritius) Declaration and Plan of Action and the Kigali Declaration.

Conflicting viewpoints exist in literature on the binding effect of secondary soft law generated by human rights treaty bodies such as the African Commission. The position taken by many is that the outputs of these bodies are not legally binding, but that they do have some legal significance. As Rodley observes, 'the outcomes of the [UN human rights] committees' (Concluding Observations, General Comments and jurisprudence) are not per se legally binding, but they have real legal significance'.²⁵ This means that although the outputs of human rights treaty bodies are intrinsically recommendatory, they have a persuasive effect on their addressees as they are an authoritative interpretation of the relevant treaty. The International Court of Justice (ICJ) has thus relied on the Concluding Observations and case law of the UN Human Rights Committee to delineate certain state obligations.²⁶ These outputs may also reflect subsequent state practice within the meaning of article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).²⁷ In other words, states acquiesce to an interpretation of a treaty advanced by a human rights treaty body when and if they do not object to that interpretation.²⁸

Human rights treaty bodies tend to ascribe a binding status to some, if not all, of their outputs or secondary soft law. The UN Human Rights Committee, for instance, has long held that its final views regarding complaints against state parties to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) are binding. It consistently includes a paragraph in its final views emphasising that state

24 Shelton (n 22 above) 449-450.

25 N Rodley 'The role and impact of treaty bodies' in D Shelton (ed) *The handbook of international human rights law* (2013) 621-632. See also M O'Flaherty 'The Concluding Observations of United Nations human rights treaty bodies' (2006) 6 *Human Rights Law Review* 27-32-37; C Blake 'Normative instruments in international human rights law: Locating the general comment' Centre for Human Rights and Global Justice Working Paper No 17 (2008) 30.

26 *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory* (2004) ICJ Reports 184; *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (2010) ICJ Reports 639 para 77.

27 According to art 31(3)(b) of the VCLT, a treaty should be interpreted taking into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

28 M Scheinin 'Characteristics of human rights norms' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2009) 19-21. See also International Law Association *Final report of findings of the United Nations treaty bodies* (2004) 5.

parties are bound by its views and should give effect to them.²⁹ Several authors support the position taken by the Human Rights Committee, albeit with some reservations.³⁰ Like the UN Human Rights Committee, the African Commission asserts that its decisions on complaints are binding,³¹ a view supported by several authors.³² However, it does not make a similar argument in respect of resolutions. Instead, it relies on the authoritative interpretation argument to urge states to implement the resolutions. In particular, the African Commission recognises that its thematic resolutions provide authoritative interpretations of the provisions of the African Charter. The following statement of the African Commission's Special Rapporteur on Freedom of Expression and Access to Information is instructive:³³

Though not legally binding, states parties should have the political will to look beyond the non-binding nature of the Declaration [of Principles on Freedom of Expression] and have a broader recognition of the effectiveness of its principles which are meant to expand the content of article 9 of the African Charter. They should put in place strategies to implement the Declaration at the national level, while NGOs and other stakeholders should continue to raise awareness for a better understanding of the same.

The above statement is more strategic and pragmatic than arguing that the African Commission's thematic resolutions are legally binding. However, by suggesting that the implementation of resolutions depends almost entirely on states' political will, the statement ends up weakening the legal significance of the African Commission's resolutions. A stronger position would be to argue that resolutions invoke state obligations, albeit indirectly. Rodley makes a similar point in relation to the General Comments of the UN Human Rights Committee when he observes that

29 For further discussion, see F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1 14-15.

30 J Davidson 'Intention and effect: The legal status of the final views of the Human Rights Committee' (2001) *New Zealand Law Review* 125; F Pocar 'Legal value of the Human Rights Committee's views' (1991-1992) *Canadian Human Rights Yearbook* 119.

31 See, eg, *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 113 & 116. See also Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties, ACHPR/Res.97(XXXX)06 adopted at the 40th ordinary session, Banjul, The Gambia, 15-29 November 2006.

32 See, e.g., G Mukundi & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465 474.

33 Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa: Viewed in 25 years of the Commission, presented by Adv Pansy Tlakula, 52nd ordinary session, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire, http://www.achpr.org/files/sessions/52nd/inter-act-reps/183/activity_report_sp_freedom_expression_eng.pdf (accessed 7 September 2017). See also *Hadi & Others v Sudan*, Communication 368/09, 54th ordinary session, 4 June 2014.

their legal impact is 'perforce less direct'.³⁴ Given that they are issued by a body established by treaty, the African Commission's thematic resolutions prompt obligations which states already have undertaken to perform by ratifying the treaty. The resolutions do not create new obligations; they fortify existing obligations. In particular, the resolutions prompt three specific obligations.

First, states have an obligation to implement the African Commission's resolutions because they have undertaken to give effect to the African Charter which establishes the African Commission. Article 1 of the African Charter provides that 'member states shall recognise the rights under the Charter and shall undertake to adopt legislative or other measures to give effect to them'. Commentators agree that the reference to 'other measures' in article 1 is sufficiently broad to include compliance with and implementation of the African Commission's recommendations.³⁵ The African Commission has on numerous occasions held that article 1 indeed imposes such an obligation.³⁶ This argument is usually applied to recommendations emanating from the complaints procedure, but it certainly applies also to the African Commission's resolutions.

Second, states are expected to implement thematic resolutions as they have an obligation to co-operate with the African Commission. The duty to co-operate is not expressly indicated in the African Charter. Nonetheless, the African Commission has held that by ratifying the African Charter, state parties have indicated their 'commitment to co-operate with the African Commission and to abide by all decisions it takes'.³⁷ A similar argument has been used to make the case for state co-operation with the UN Charter-based human rights mechanisms such as the defunct UN Commission on Human Rights (UNCHR) and the special procedures established by the UNCHR.³⁸

Third, states have an obligation to implement the African Commission's thematic resolutions to the extent that these resolutions are considered to be AU decisions. Article 54 of the African Charter provides that the African Commission 'shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities'.

34 Rodley (n 25 above) 639. See also R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 13: 'We would adopt the position that, rather than label the findings as binding/non-binding, we would consider them in terms of the range and variety of obligations that they may impose on states.'

35 Viljoen & Louw (n 29 above) 7; Mukundi & Ayinla (n 32 above).

36 See, eg, *International Pen & Others v Nigeria* (n 31 above) paras 113 & 122.

37 *Democratic Republic of the Congo v Burundi* (2004) AHRLR 19 (ACHPR 2003) para 53. See also Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Doc.II/EX/ACHPR.

38 See T Kamminga 'The thematic procedures of the UN Commission on human rights' (1987) 34 *Netherlands International Law Review* 299 322; M Lempinen *The United Nations Commission on Human Rights and the different treatment of governments* (2005) 121.

Article 59(3) further provides that '[t]he report on the activities of the African Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government'. The role of considering the African Commission's activity reports has since been delegated to the AU Executive Council. Upon considering the African Commission's activity reports, the Executive Council takes a 'decision' adopting the report and authorising its publication. The attendant effect of this act of adoption is to convert the report of the African Commission into that of the Executive Council.³⁹ By adopting the African Commission's activity reports, the Executive Council assumes responsibility for their contents.⁴⁰ In other words, the African Commission's resolutions, by extension, become the Executive Council's decisions which states are duty bound under the AU Constitutive Act to implement or comply with.

4 Applying the concept of incorporation to thematic resolutions

The concept of incorporation or domestication is traditionally associated with treaty law. In this regard, almost all human rights treaties require state parties to put in place specific legislative or policy measures at the domestic level. It may thus be argued that the concept of incorporation does not tidily apply to soft law such as the African Commission's thematic resolutions. However, practice tells a different story. States occasionally undertake to and actually domesticate soft law.⁴¹ Several thematic resolutions actually do contain a domestication requirement. To give one example, Guideline 44 of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) provide that 'states shall adopt legislative, administrative, judicial and other measures to give effect to these guidelines'. Furthermore, the African Commission occasionally recommends to state parties to incorporate provisions of specific thematic resolutions into domestic law. For example, following a promotional visit to Uganda in 2013, the African Commission recommended that Uganda should

develop a legal framework for the protection of human rights defenders in conformity with the UN Declaration on Human Rights Defenders 1998 and the Commission's Resolutions on Human Rights Defenders including

39 Viljoen & Louw (n 29 above) 10.

40 As above.

41 See International Conference on Great Lakes Region (ICGLR) Protocol on the Protection and Assistance to Internally Displaced Persons, art 6. Several countries in Africa, including Angola, Burundi, Kenya, Liberia, Sierra Leone, Sudan and Uganda, have enacted laws to domesticate the UN Guiding Principles on Internal Displacement. See C Beyani 'The politics of international law: Transformation of the Guiding Principles on Internal Displacement from soft law into hard law' (2008) 102 *American Society of International Law Proceedings* 194.

ACHPR/Resolution 69 (XXV) 04, ACHPR/Resolution 119 (XXXXII) 07, and ACHPR/Res. 196 (L) 11.⁴²

Perhaps more importantly, the expectation that relevant provisions of the African Commission's thematic resolutions should be incorporated into domestic laws flows from the African Charter itself. According to the African Charter, the functions of the African Commission include 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations (*sic*)'.⁴³ This provision is the clearest statutory basis for the Commission's practice of adopting thematic resolutions. It specifically envisages that such resolutions will be the basis of the relevant national laws.

How then does one assess the incorporation of the African Commission's thematic resolutions into the domestic laws of African countries? Claiming that a thematic resolution has been incorporated into the domestic legal order requires one to draw a causal link between the resolution and the national law(s) in question. This would not be problematic in cases where explicit reference to the resolution is made in a national law or during the drafting history of such law. In the real world, explicit references to international human rights law in national laws are not very common. This is the case even in instances where the language in a national law is lifted *verbatim* from international human rights law. For this reason, it is imperative to look beyond explicit reference for evidence of incorporation. Other factors to consider include the content of national law and the drafting history.⁴⁴

Another relatively good piece of evidence of incorporation is a state's acknowledgment, say before the African Commission, that it has adopted a law to give effect to a specific thematic resolution. However, this kind of acknowledgment is scarce and random. In any event, even when a state does acknowledge that its domestic law has been influenced by a thematic resolution, it is difficult to tell whether the acknowledgment is genuine or mere posturing. Apart from the challenge of comprehending state motivation, other methodological factors make it difficult to produce a comprehensive picture of the extent to which the African Commission's

42 Report of the Joint Promotion Mission to the Republic of Uganda, 25-30 August 2013, presented to the 55th ordinary session of the African Commission, 28 April-12 May 2015, Luanda, Angola 62.

43 African Charter, art 45(1)(b).

44 F Viljoen 'The impact and influence of the African regional human rights system on domestic law' in S Sheeran & N Rodley (eds) *Routledge handbook of international human rights law* (2013) 445 451-452, noting: 'Naturally, viewed from the domestic perspective, it does not matter what the source or inspiration of a law is; it only matters if it embodies human rights principles, or whether it is otherwise progressive. The influence of the [African] Charter should therefore not be restricted to instances of explicit reference.'

thematic resolutions have inspired the enactment or content of domestic laws.

First, the sheer number of the African Commission's thematic resolutions, 96 by the end of 2014, makes it difficult to trace the potential journey of each resolution into domestic law. It is equally challenging for states to keep pace with the rate of adoption of the resolutions. Second, the resolutions are addressed to all state parties to the African Charter. A survey of the relevant national laws of all these countries is almost impossible to undertake. Most laws and transcripts of parliamentary debates are not easily available, and it would take vast resources to conduct country-to-country reviews. Third, most thematic resolutions are not exemplars of meticulous drafting. The obligations they attempt to impose, the directives they issue, or the rights they articulate, are not couched in the clearest language. Fourth, domestic laws often are the result of multiple inspirations and the efforts of a multitude of local and international actors. Isolating the specific influence of the African Commission's thematic resolutions is an arduous task.

The above-mentioned challenges leave one with very few plausible methods of determining the extent of incorporation. One technique is to analyse the information provided to the African Commission by states, notably through the state reporting procedure. The African Commission's several sets of guidelines for state reporting require states to submit information demonstrating incorporation of the African Charter into domestic law.⁴⁵ Some thematic resolutions also demand this information. For instance, Guideline 47 of the Luanda Guidelines provide that '[s]tate parties to the African Charter, in their periodic reports ... shall provide information on the extent to which national legislation, policy and administration pertaining to the use and conditions of arrest, police custody and pre-trial detention are consistent with these Guidelines'. Similarly, in operative paragraph 5 of Resolution 105 on the Prevention and Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁶ the African Commission urges state parties to include information on 'the concrete measures that they are taking to implement and operationalise the Robben Island Guidelines' in their periodic reports.

45 According to the Guidelines for State Reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, state parties are required to provide 'an explanation as to whether the Protocol is directly applicable before national courts or if it has to be incorporated into domestic law'. The Commission's State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) provides in para 2(a) that states should indicate 'whether the state party has adopted a national framework law, policies and strategies for the implementation of each right'.

46 ACHPR/Res.105 (XXXXI) 07.

Admittedly, the African Commission's state reporting procedure is not a perfect method of gathering information that one would need to make credible claims about incorporation. States hardly observe the reporting cycle. A number of countries, such as the Comoros, Equatorial Guinea, Eritrea, Guinea Bissau, São Tomé and Príncipe and Somalia, have never even submitted the initial report. More importantly, states do not consistently provide information on domestication of the African Charter, let alone of thematic resolutions. When they do, the information is sparse and generally subjective. It also does not help that the *modus operandi* adopted by the African Commission during the review of state party reports does not allow for the rigorous verification of information.⁴⁷

For these reasons, caution must be taken when considering reliance upon information contained in state reports. In particular, the information provided by states must be cross-checked and the particular influence of thematic resolutions isolated. The potential to exaggerate impact is relatively high if state information is not verified. Quoting the state party reports of Zambia and Cameroon, Maikassoua, for instance, has claimed that these countries developed national policies on the fight against AIDS 'to comply' with the African Commission's Resolution on the HIV pandemic.⁴⁸ However, he fails not only to draw the causal link between the resolutions and the national policies, but also does not indicate whether there were other influences apart from the African Commission's resolution. This is true of his other claims and that the resolutions on fair trial and the Robben Island Guidelines influenced the enactment of laws relating to prisons in Egypt, Ethiopia and Kenya.⁴⁹

Beyond the state reporting procedure, one may also analyse information gathered by the African Commission through such means as research and visits to state parties.⁵⁰ The African Commission, for example, maintains a torture prevention database that contains a list of national anti-torture laws.⁵¹ By tracking the legislative process of the laws listed in the database, one may deduce whether the relevant thematic resolution has influenced the enactment or content of the listed laws. The African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur) also gathers data on

47 Viljoen (n 7 above) 359: 'The procedure adopted by the Commission is also hardly conducive to true dialogue. A series of questions is posed in quick succession by each of the 11 commissioners, followed by the response to some of these questions by an often-bewildered representative. The process is more akin to a series of critical statements, followed by a statement in defence of the report.'

48 R Maikassou 'Implementation of the African Charter on Human and Peoples' Rights by the states parties', paper presented at the 52nd ordinary session of the African Commission on Human and Peoples' Rights, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire (on file with the author).

49 As above.

50 African Charter, art 45(1)(a).

51 See <http://www.achpr.org/mechanisms/cpta/torture-db/> (accessed 9 September 2017).

the extent to which the Declaration of Principles on Freedom of Expression in Africa has been implemented at the domestic level.⁵² In this context, the Special Rapporteur has since 2008 steered a research project which monitors progress in the adoption of access to information legislation.⁵³

5 Evidence of incorporation: Three case studies

The analysis that follows focuses on thematic resolutions that specifically call on states to enact legislation or those for which there is a general consensus that effective implementation requires domestic legislation. In this regard, the analysis narrows down to resolutions on three specific themes, namely, the death penalty; torture; and freedom of expression and access to information. The law, with all its inadequacies, is regarded as the strongest means of abolishing the death penalty. According to Viljoen, '[in] so far as the law allows for the possibility of capital punishment, the law must also be the means for its abolition'.⁵⁴ Similarly, the existence of a legal framework for prohibition and punishment is considered a critical component of any torture prevention strategy.⁵⁵ Thus, under the Convention against Torture (CAT), state parties must make torture a specific offence punishable under criminal law.⁵⁶

For reasons of research expediency, resolutions on the three themes were also selected as attempts are already in place at the systematic tracking of progress in enacting domestic legislation and collection of laws on these themes by not only the African Commission, as mentioned above, but also by other organisations. For instance, the International Federation

52 The Special Rapporteur is mandated not only to 'analyse national media legislation, policies and practice within member states, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise members accordingly', but to also 'submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa'. Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) 02; Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom and Access to Information in Africa, ACHPR/Res.122(XXXII) 07.

53 Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented during the 43rd ordinary session of the African Commission, 7-22 May 2008, http://www.achpr.org/files/sessions/43rd/inter-act-reps/110/achpr43_specmec-fexp_actrep_2008_eng.pdf (accessed 9 September 2017). The research project is a collaborative initiative between the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Centre for Human Rights, University of Pretoria, South Africa.

54 L. Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) vii.

55 B Bernath *Preventing torture: An operational guide for national human rights institutions* (2010).

56 Committee against Torture, General Comment 2, Implementation of article 2 by States Parties, para 8.

of Action by Christians for the Abolition of Torture (FIACAT) tracks the progress in abolishing the death penalty in Africa. Similarly, the Association of Prevention of Torture (APT) maintains a database of relevant laws on torture, while the Centre for Human Rights at the University of Pretoria provides technical assistance to countries formulating access to information laws.

5.1 Death penalty resolutions

The African Charter provides that the right to life must be respected and not arbitrarily taken away.⁵⁷ The African Charter is silent on the question of the death penalty, which is an emotive and controversial issue in Africa. In response to demands by civil society organisations (CSOs), and to bring the African Charter in line with the international trend toward the abolition of the death penalty, the African Commission in 1999 adopted the Resolution Urging States to Envisage a Moratorium on the Death Penalty.⁵⁸ In the Resolution, the African Commission urged states to (i) ensure that persons accused of capital offences are afforded all the guarantees in the African Charter; (ii) apply the death penalty to the most serious crimes only; (iii) consider establishing a moratorium on executions; and (iv) reflect on the possibility of abolishing the death penalty. At its 37th ordinary session held in 2005, the African Commission established a Death Penalty Working Group to lead its work on this theme.⁵⁹

In 2008, the African Commission renewed its 1999 appeal. It adopted another resolution on the death penalty: the Resolution Calling on States to Observe the Moratorium on the Death Penalty.⁶⁰ This time round, the African Commission went further and explicitly mentioned that states should observe a moratorium 'with a view to abolishing the death penalty'.⁶¹ The African Commission was also more specific, requiring states to ensure that persons accused of capital offences are afforded 'all the guarantees of a fair trial included in the African Charter'.⁶² The African Commission also urged states that had not yet ratified the Second Option Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (ICCPR Optional Protocol) to do so.⁶³

57 African Charter, art 4.

58 ACHPR/Res.42 (XXVI) 99 adopted at the 26th ordinary session, Kigali, Rwanda, 1-15 November 1999.

59 Resolution on the Operationalisation of the Working Group on Death Penalty, ACHPR/Res.79 (XXXVIII) 05 adopted at the 38th ordinary session, Banjul, The Gambia, 21 November-5 December 2005.

60 ACHPR/Res.136 (XXXIV) 08 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008 (Resolution 136).

61 Resolution 136, operative para 2.

62 Resolution 136, operative para 1(b).

63 Resolution 136, operative para 3.

The litmus test for the African Commission's death penalty resolutions is the extent to which they have prompted and framed national debates, nudged states to observe a moratorium and, perhaps more importantly, inspired the enactment of national laws abolishing the death penalty. In proposing the adoption of the 2008 Resolution, the Death Penalty Working Group indicated that the number of countries applying the death penalty had reduced considerably.⁶⁴ The Working Group also says that the resolutions have influenced the attitudes of states.⁶⁵ A total of 17 African states have abolished the death penalty in law. Seven of these countries, Benin, Burundi, Côte d'Ivoire, Gabon, Rwanda, Senegal and Togo, did so after 1999. This research found that the African Commission's death penalty resolutions had a very limited influence on these countries. Speaking of the 1999 resolution, Curry observed that '[a]lthough the resolution was encouraging for death penalty abolitionists, its tentative language did little to influence government action'.⁶⁶

One country in which there is an observable impact of the resolutions is Benin. In 2004, Benin initiated a national debate on the death penalty in direct response to the 1999 Resolution. In its second periodic report, Benin informed the African Commission as follows:⁶⁷

In a bid to implement the resolution of the African Commission on Human and Peoples' Rights and to give effect to the commitments made by Benin with respect to the right to life, the government has initiated a debate on whether to abolish or maintain the death penalty. In fact, the eighth session of the National Human Rights Consultative Council, held from 23 to 25 February 2004 in Cotonou, was the forum for such debate.

After a drawn-out period spanning approximately seven years, the Beninese National Assembly enacted a law in April 2011 mandating the executive to accede to the Optional Protocol.⁶⁸ The country acceded to the Optional Protocol in July 2012. It subsequently amended its laws to remove all references to the death penalty. Undoubtedly, the African Commission's twin resolutions on the death penalty inspired and framed the debate that ultimately led to Benin's accession to the ICCPR Optional Protocol and the abolishment of the death penalty.

64 Intersession Activity Report Presented by Commissioner Sylvie Zainabo Kayitesi, 44th ordinary session, Abuja, Nigeria, 10-24 November 2008.

65 Inter-session Activity Report of the Working Group on the Death Penalty and Extrajudicial Killings, Summary of Arbitrary Killings in Africa (April 2014-April 2015), presented by Commissioner Sylvie Zainabo Kayitesi during the 56th ordinary session of the African Commission on Human and Peoples' Rights, 21 April-7 May 2015, Banjul, The Gambia, para 53.

66 T Curry 'Cutting the hangman's noose: African initiatives to abolish the death penalty' <http://www.wcl.american.edu/hrbrief/13/3curry.pdf> (accessed 9 September 2017).

67 Periodic Report of the Republic of Benin on the Implementation of the Rights and Freedoms Enshrined in the African Charter on Human and Peoples' Rights (2008) 9, http://www.achpr.org/files/sessions/45th/state-reports/2nd-2000-2008/staterep2_benin_2008_eng.pdf (accessed 11 September 2017).

68 Act 2011-11 of 25 August 2011.

However, it would be misleading to claim that the resolutions operated in isolation. The successful abolition of the death penalty in Benin should also be attributed to the existence of 'a dynamic and active civil society' that organised itself into an abolition movement or network.⁶⁹ Benin-based CSOs partnered with international CSOs with observer status before the African Commission and a long history of working on death penalty issues to lobby for abolition.⁷⁰ The African Commission's resolutions on the death penalty (and those of the UN General Assembly)⁷¹ were essential normative tools of advocacy. Country-based abolition movements may also be credited for the abolition of the death penalty in Togo and Niger. In these two countries, FIACAT organised training for its members on the subject of the death penalty, using the African Commission's death penalty resolutions as training tools. The FIACAT members then held advocacy meetings with state officials in their respective countries. In essence, therefore, the African Commission's death penalty resolutions indirectly influenced the enactment of laws abolishing the death penalty in both countries.

Overall, there is limited incorporation of the African Commission's death penalty resolutions into the domestic laws of African countries. This state of affairs is partly related to the strong views held on the question of the death penalty on the African continent. That many African countries are reluctant to abolish the death penalty became abundantly clear in 2015 when the AU Specialised Technical Committee on Legal Affairs neglected to discuss the African Commission's Draft Protocol on the Abolition of the Death Penalty.

5.2 Robben Island Guidelines

The Robben Island Guidelines (RIG) are officially referred to as the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.⁷² Adopted in 2002, these Guidelines are a culmination of a process conceived and driven by the Association for the Prevention of Torture

69 FIACAT *What strategies towards the abolition of the death penalty in West Africa? Report of the symposium in Dakar* (2012) 38.

70 The international NGOs included the International Federation of Action by Christians for the Abolition of Torture (FIACAT) and Amnesty International. The local CSOs included Action by Christians for the Abolition of Torture Benin (ACAT-Benin); Amnesty International-Benin; Women Lawyers Association in Benin (AFJB); Solidarity among the Children of Africa and the World (ESAM); Social Dimension (DS); and Association for the Struggle against Racism, Ethnocentrism and Regionalism (ALCRER).

71 Resolution 62/149 of 18 December 2007; Resolution 63/168 of December 2008; Resolution 65/206 of 21 December 2010.

72 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, or Degrading Treatment or Punishment in Africa, ACHPR/Res.61 (XXXII) 02 adopted at the 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002 (Robben Island Guidelines).

(APT), an international CSO based in Geneva, Switzerland, and with observer status before the African Commission. The RIG spells out the measures that states should take in order to effectively implement article 5 of the African Charter under which states are obligated to prohibit torture. The measures include the criminalisation of torture in law; the ratification of relevant international human rights treaties; the establishment of national prevention mechanisms; and the provision of procedural safeguards for persons deprived of their liberty. Parallel to adopting the Guidelines, the African Commission established a follow-up committee to promote and facilitate their domestic implementation. The follow-up committee changed its name in 2009 to the Committee for the Prevention of Torture in Africa (CPTA).⁷³

Torture is a significant problem in Africa, and it is thought that the effectiveness of efforts to prevent and eradicate the practice is contingent on 'the existence of an adequate legal framework, *incorporating the RIG* and other relevant texts'.⁷⁴ The question then arises: To what extent are the Guidelines incorporated into domestic anti-torture laws? According to the African Commission, the RIG 'have established a solid basis upon which the CPTA has advised and advocated for the formulation of anti-torture policies, legislation and administrative rules across Africa'.⁷⁵

As is set out below, this research found evidence of the impact of the RIG in Madagascar, South Africa and Uganda. The RIG played a role, albeit modest, in the enactment of the anti-torture laws in the three countries. In all the cases, the Guidelines were introduced by external actors into the discussions leading to the enactment of the laws: the APT in Madagascar; the national human rights institution and local CSOs in South Africa; and the African Commission, APT, and local CSOs in Uganda. Although it could not be established whether the Guidelines were referenced and discussed during debates in the respective parliaments, the content of the laws in the three countries largely conform to the dictates of the RIG. However, it must be mentioned that the laws also had other inspirations, and in particular from the UN Convention against Torture.⁷⁶ The complexity of isolating the specific influence of the Guidelines is

73 Resolution on the Change of Name of the 'Robben Island Guidelines Follow-up Committee' to the 'Committee for the Prevention of Torture in Africa' and the Reappointment of the Chairperson and Members of the Committee, ACHPR/Res.158 (XLVI) 09 adopted at the 46th ordinary session, Banjul, The Gambia, 11-25 November 2009.

74 J Niyizurugero & GP Lessene 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6 *Essex Human Rights Review* 67 81.

75 African Commission on Human and Peoples' Rights 'Concept paper on the development of a general comment on article 5 of the African Charter on Human and Peoples' Rights (2015)' <http://www.achpr.org/news/2015/05/d182> (accessed 9 September 2017).

76 The South African and the Ugandan laws specifically indicate that they were enacted with a view to domesticating the UN Convention against Torture.

underlined by the fact that the RIG provisions were borrowed from numerous international hard and soft law instruments.⁷⁷

In Madagascar, the impact of the RIG is directly linked to the key role that the APT played in the drafting of the anti-torture law.⁷⁸ In particular, the APT conducted a drafting workshop during which key national actors, including representatives of parliament and the Ministry of Justice, considered a draft text of the law. The APT used the workshop to speak about the elements of an ideal anti-torture law and 'the usefulness of the Robben Island Guidelines for the prevention of torture in such a process on the drafting of an anti-torture legislation'.⁷⁹

In South Africa, the national human rights institution and several local NGOs made reference to the RIG during public consultations on the Prevention and Combating of Torture of Persons Bill. The South African Human Rights Commission (SAHRC) included in its written submission, an entire section on the relevance of the RIG.⁸⁰ The SAHRC argued that on the question of prevention of torture, the Guidelines are particularly useful because in comparison to the CAT Optional Protocol, they are more specific on what preventive measures state parties should take. The Civil Society Prison Reform Initiative (CSPRI) also made reference to the RIG in its submission, which was endorsed by 15 other local NGOs and one international NGO (APT).⁸¹ It cited Guideline 12 of the RIG in proposing that the law should specify that the gravity of the offence should be taken into account in sentencing individuals found guilty of torture.⁸² The CSPRI also referenced the RIG to argue that the law should contain a provision imposing on the state a duty to provide redress, including compensation, to victims of torture or their families.

In the broader scheme of things, the attention given to the RIG in the drafting of the South African anti-torture law has been described as 'scant'.⁸³ Apart from the SAHRC and CSPRI, other stakeholders that

77 D Long & R Murray 'Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?' (2012) 12 *African Human Rights Law Journal* 311 341.

78 Law No 8/2008 of 25 June 2008 on Torture and Other Cruel, Inhuman and Degrading Treatment.

79 'Madagascar: Drafting a national anti-torture law' http://www.apr.ch/en/news_on_prevention/madagascar-drafting-a-national-anti-torture-law/#.vfQzx51BvIU (accessed 9 September 2017).

80 'Prevention and combating of torture of persons Bill [B21-2012] submission to the Portfolio Committee on Justice and Constitutional Development, 31 July 2012', <http://www.justice.gov.za/legislation/acts/2013-013.pdf> (accessed 12 September 2015).

81 CSPRI 'Submissions on Combating of Torture of Persons Bill [B21 – 2012]' http://acjr.org.za/resource-centre/CSPRI_Torture_Bill_submissions-1082012.pdf (accessed 9 September 2017).

82 Guideline 12 reads: 'Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.'

83 L Muntingh 'Guidelines and principles on imprisonment and the prevention of torture under the African Charter on Human and Peoples' Rights: How relevant are they for

made submissions on the Bill did not reference the RIG.⁸⁴ More importantly, the proposals to integrate certain provisions of the RIG (and those of the CAT) into legislation were not taken into account by the National Assembly. According to Muntingh, who keenly followed the legislative process:⁸⁵

What the legislature was evidently resistant to embark on was crafting legislation that is as comprehensive as possible in giving effect to the UNCAT and the RIG. A comprehensive approach was indeed what civil society organisations were arguing for ... The approach of the legislature was to meet the minimum requirements, and the Act deals with the definition and criminalisation of torture, sentences to be imposed on perpetrators, establishing extra-territorial jurisdiction, *non-refoulement*, and the state's general responsibility to promote awareness of the prohibition of torture. Assessed against the UNCAT and the RIG, there are consequently notable obligations that could have been addressed in the Act but are not.

Muntingh concludes that in South Africa, as in other parts of the continent, 'the RIG has remained relatively obscure in the prison reform and torture prevention discourses'.⁸⁶

In Uganda, the RIG played an instrumental role in guiding the drafting of the 2012 Prevention and Prohibition of Torture Act. Uganda indicated in its fifth periodic report to the African Commission that it was prompted to fast-track the enactment of the legislation by Commissioner Catherine Dupe Atoki, who at the material time was the Chairperson of the CPTA. The relevant part of the report reads as follows:⁸⁷

It should be recalled that Commissioner Catherine Dupe visited Uganda in October 2009 and emphasised the need to expedite the adoption of the Prevention and Prohibition of Torture Bill. I am now pleased to report that on April 26th 2012 Parliament of Uganda passed the Prohibition and Prevention of Torture Bill 2010. It was assented to by the President of the Republic of Uganda on 27th July and gazetted on September 18th 2012 and is now the Prevention and Prohibition of Torture Act.

As the primary objective of her visit was to 'promote the Robben Island Guidelines in Uganda',⁸⁸ it goes without saying that Commissioner Atoki used the Guidelines to launch her plea. The enactment of the anti-torture law in Uganda is also the fruit of concerted and joint efforts of three

South Africa?' (2013) 17 *Law Democracy and Development* 363 368.

84 See, eg, 'Lawyers for Human Rights submissions on the prevention and combating of torture of persons Bill: submitted on 31 July 2012', <http://www.lhr.org.za/policy/lhr-submission-prevention-and-combating-torture-persons-bill-b21-2012> (accessed 9 September 2017).

85 Muntingh (n 83 above) 369.

86 Muntingh 369.

87 Fifth Periodic Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples' Rights (2013) 15-16.

88 The Activity Report of the Chairperson of the Follow-up Committee of the Robben Island Guidelines, presented during the 46th ordinary session of the African

different actors: a member of parliament who tabled the Bill in the national assembly; the Uganda Human Rights Commission (UHRC) which published regular reports on the situation of torture in the country; and local CSOs that formed the Coalition Against Torture as far back as 2004.⁸⁹ The UHRC reviewed the draft law against the provisions of the RIG to ensure compatibility.⁹⁰

5.3 Declaration of Principles on Freedom of Expression

The Declaration of Principles on Freedom of Expression in Africa (the Declaration) was adopted by the African Commission in 2002.⁹¹ It is the result of a joint initiative between the African Commission and Article 19, an international CSO working on freedom of expression issues. The Declaration supplements the provisions of article 9 of the African Charter which guarantees the right to receive information and to express and disseminate opinions. The issues it addresses are diverse. These include conditions for restrictions on freedom of expression; the promotion of diversity; elements of appropriate public service broadcasters and regulatory bodies; and attacks on media practitioners. At its 36th ordinary session held in November 2004, the African Commission established the office of the Special Rapporteur on Freedom of Expression in Africa to, *inter alia*, 'analyse national media legislation, policies and practice within member states' and to monitor state compliance with the Declaration.⁹² Commissioner Pansy Tlakula held the office for 12 years (2005-2017) and relinquished the office in November 2017 when her term as a commissioner came to an end.

A central aspect of the Declaration is the requirement that states enact legislation to give effect to access to information (ATI). Principle IV of the Declaration provides that 'the right to information shall be guaranteed by law', and proceeds to outline the principles which should be followed in enacting such a law. States are also obligated to amend secrecy laws and

Commission on Human and Peoples' Rights, http://www.achpr.org/files/sessions/46th/inter-act-reps/131/achpr46_specmec_rig_actrep_2009_eng.pdf (accessed 9 September 2017).

89 See 'The right to freedom from torture, cruel, inhuman or degrading treatment or punishment: Uganda's experience', presented by Wilfred Niwagaba, Member of Parliament Republic of Uganda' http://www.achpr.org/files/news/2012/08/d51/hon_niwagabas_presentation.ppt (accessed 11 September 2015).

90 Murray & Long (n 34 above) 77.

91 Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) 02 adopted at the 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002.

92 Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, ACHPR/Res.71 (XXXVI) 04. The title and mandate of the Special Rapporteur was modified in 2007 to be 'Special Rapporteur on Freedom of Expression and Access to Information in Africa'. See Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, ACHPR/Res.122 (XXXXII) 07 adopted at the 36th ordinary session, Dakar, Senegal, 23 November-7 December 2004.

to ensure that their legislation relating to defamation conforms to certain minimum standards.⁹³ The extent to which the Declaration has been incorporated into domestic laws cannot be examined without taking into account an important recent development: the adoption by the African Commission in 2013 of the Model Law on Access to Information for Africa.

The Model Law, the first in the history of the African Commission, aims to guide states in translating their obligations under the African Charter and the Declaration into domestic legislation. It is a template that states are expected and encouraged to adapt whilst bearing in mind the provisions of their constitutions and the structure of their legal systems.⁹⁴ The Model Law was drafted over a period of two and a half years by a ten-member expert working group co-ordinated by the Centre for Human Rights, University of Pretoria, and under the overall leadership of the Special Rapporteur. It is also important to note that in June 2016, the African Commission embarked on a process of revising the Declaration to ensure that it duly reflects recent developments in the areas of freedom of expression and access to information.⁹⁵

What then is the impact of the Declaration (and the Model Law)? The Special Rapporteur's regular assessment of the status of adoption of ATI legislation in Africa cumulatively reveals:

In the years following the adoption of the Declaration of Principles of Freedom of Expression in Africa, there has been an increase in the number of African states taking steps to adopt legislation on access to information, especially in countries where the right is expressly recognised by the Constitution. In some instances, progress towards legislation has been made in countries where the provisions on freedom of information is subsumed under the right to freedom of expression and even in a few cases where no mention is made of such right.⁹⁶

The African Commission adopted the Declaration at a time when only three countries on the continent, all from Southern Africa (Angola, South Africa and Zimbabwe) had access to information laws. A total of 17 more states have since joined the list of countries with access to information laws. These states are Côte d'Ivoire, Ethiopia, Guinea, Kenya, Liberia,

93 Principles IV(2) and XII(1). See also Resolution on Repealing Criminal Defamation Laws in Africa, ACHPR/Res.169 (XLVIII) 10 adopted at the 48th ordinary session, Banjul, The Gambia.

94 African Commission on Human and Peoples' Rights, Preface: Model Law on Access to Information for Africa (2013) 7-8.

95 Resolution to Revise the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.350 (EXT.OS/XX) 2016 adopted at the 20th extraordinary session, Banjul, The Gambia, 9-18 June 2016.

96 Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Adv Pansy Tlakula, presented to the 44th ordinary session of the African Commission on Human and Peoples' Rights, 10-24 November 2008, Abuja, Nigeria.

Malawi, Mozambique, Nigeria, Niger, Rwanda, Sierra Leone, Seychelles, South Sudan, Tanzania, Tunisia, Togo and Uganda. The Declaration initially experienced difficulties penetrating the domestic sphere. A paltry four states (Ethiopia, Guinea, Liberia and Uganda) enacted access to information laws between the adoption of the Declaration in October 2002 and the end of 2010, translating to an average of one access to information law in two years. The influence of the Declaration in the adoption of the laws in these four countries could not be established.

The pace of adoption of national laws accelerated with the initiation of the African Commission's project on a Model Law,⁹⁷ and in particular the development of the first draft of the Model Law in April 2011. In only four years, between 2011 and 2014, six states adopted access to information laws (Côte d'Ivoire, Mozambique, Nigeria, Niger, Rwanda and South Sudan). A review of these laws reveals that neither the Declaration nor the Model Law is explicitly referenced.⁹⁸ However, there are distinct similarities between the content of these laws and the provisions of the Model Law. In fact, there is near uniformity in the language and terminology used in recently-enacted access to information laws. This is in contrast to access to information laws enacted prior to the Model Law, the contents of which are quite diverse and, in some cases, outrightly incompatible with the African Charter.⁹⁹ In essence, the recent spread of access to information laws on the continent may largely be traced back to the Declaration and the Model Law. However, this does not negate the fact that recently-adopted access to information laws may have been inspired by sources other than the Model Law.

There is sufficient evidence to suggest that the Declaration and the Model Law played a significant role in fast-tracking the development of recent access to information laws, some of which had for many years been stuck in the legislative pipeline. Advocacy for the adoption of access to information laws is quite a struggle,¹⁰⁰ and the task would have been even more difficult in the absence of the Declaration and the Model Law. The Special Rapporteur has particularly used the two documents in her

97 Resolution on Securing the Effective Realisation of Access to Information in Africa, ACHPR/Res.167 (XLVIII) 10 adopted at the 48th ordinary session, Banjul, The Gambia, 10-24 November 2010.

98 Save for the Liberian access to information law, the rest of the laws do not even mention the African Charter.

99 In the case of *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009), the African Commission found certain provisions of the Zimbabwean Access to Information and Protection of Privacy Act to be in violation of the African Charter.

100 See JV Hartshorn 'Can the model law on access to information for Africa fulfil expectations?' ECPR Conference on Regulatory Conference, Barcelona, Spain, 2014, <http://reggov2014.ibei.org/bcn-14-papers/66-212.pdf> (accessed 9 September 2017).

advocacy visits to state parties. She has made advocacy visits to Botswana, Ghana, Kenya, Malawi, Mauritius, Mozambique and Seychelles.¹⁰¹

More importantly, as an advocacy tool in the hands of the Special Rapporteur, the Model Law has directly influenced the content of access to information laws and Bills in several countries. It has become the Special Rapporteur's tool for advocating the speedy enactment of access to information laws where Bills had been pending for years (Ghana and Mozambique), or where a state party is embarking on drafting legislation (Mauritius, Malawi and Seychelles).¹⁰² The Special Rapporteur has also used the Model Law as a benchmark to comment on and suggest language for proposed access to information laws in countries such as Malawi and Mozambique. In Seychelles, the Special Rapporteur, in collaboration with the Centre for Human Rights and the Seychelles Media Commission (SMC), organised a symposium on the right of access to information during which 'focused discussions were held on the proposed content of the ATI Bill, using the Model Law as a guide'.¹⁰³ A similar workshop took place in Mauritius in February 2016.¹⁰⁴ In July 2018, Seychelles adopted an access to information law, the contents of which drew heavily from the Model Law.

Interestingly, countries such as Ghana and Nigeria have relied on the Model Law despite the fact that it was still in draft form.¹⁰⁵ The Declaration was also relied upon by a coalition of CSOs in their submission to the Nigerian House of Representatives.¹⁰⁶ They listed the Declaration as one of the 'legal bases' for enacting an access to information law in Nigeria. In several other countries, including Botswana and Zambia, CSOs have also used the Model Law to influence the content of access to information Bills.¹⁰⁷

101 See Activity Reports of the Special Rapporteur <http://www.achpr.org/mechanisms/freedom-of-expression/> (accessed 21 September 2017).

102 Activity Report of Adv Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented during the 56th ordinary session of the African Commission on Human and Peoples' Rights, paras 4-22.

103 'Symposium on the right of access to information in Seychelles' <http://www.chr.up.ac.za/index.php/centre-news-a-events-2015/1482-symposium-on-the-right-of-access-to-information-in-seychelles.html> (accessed 9 September 2017).

104 'Workshop on the right to access to information held in Mauritius' <http://www.chr.up.ac.za/index.php/ati-news.html> (accessed 11 September 2017).

105 Interview with Lola Shyllon, Programme Manager, Centre for Human Rights, University of Pretoria, September 2015.

106 Memorandum on the Freedom of Information Bill, submitted to the House of Representatives by the Freedom of Information Coalition.

107 'Making progress on freedom of expression in Africa' <http://www.opensocietyfoundations.org/voices/making-progress-freedom-information-africa> (accessed 9 September 2017). See also Activity Report by Adv Pansy Tlakula as the Special Rapporteur on Freedom of Expression and Access to Information in Africa and member of African Commission on Human and Peoples' Rights, presented during the 54th ordinary session of the African Commission on Human and Peoples' Rights, 22 October-5 November 2013, Banjul, The Gambia, para 29.

6 Conclusion

The African Commission's database of thematic resolutions may be described as a quiver of normative arrows that can be put to great use and impact. In practice, a good number of the resolutions 'die' as soon as they are adopted as little is heard of them after adoption. They simply do not gain traction. Other resolutions have a once-in-a-lifetime impact and are rendered obsolete as soon as they have achieved their goals. Some resolutions are quickly overtaken by events. Only a few resolutions take on a life of their own and stand the test of time. By analysing the extent to which three specific thematic resolutions have been incorporated into the domestic laws of African countries, this chapter provides important insights into why some resolutions remain scraps of paper while others go on to become important and cherished normative documents. Two particular determinants of impact can be filtered out of the above analysis.

The first determinant is the relevance of a thematic resolution. The analysis reveals that a resolution is likely to have an impact when its relevance is clear, either because it fills a vacuum, introduces an entirely new issue, or covers an area where states have not made much progress. As the chapter illustrates, it is relatively easy to isolate the impact of the Declaration of Principles of Freedom of Expression (and the Model Law on Access to Information) as it addresses an emerging field clearly deserving of attention. In 2002, when the African Commission adopted the Declaration of Principles of Freedom of Expression, there were only four African states with legislation on access to information. The call in the Declaration for the enactment of access to information laws in domestic legal systems was distinct and relevant. The death penalty resolutions cover an area with little progress. However, the impact of the resolutions has been limited as they operated in a field dominated by UN General Assembly resolutions. The impact of the Robben Island Guidelines is equally constrained by the fact that the Guidelines do not fill any specific normative gap. The Guidelines borrow from and restate existing provisions contained in the UN Convention against Torture.

The second determinant is the presence and activism of NGOs in a country. This chapter finds that the three thematic resolutions have registered the most impact in countries where domestic NGOs, working individually or in collaboration with international NGOs, use them to lobby for the enactment of relevant domestic laws. The incorporation of the death penalty resolutions into the legal orders of Benin, Niger and Togo is directly linked to the presence and advocacy work of NGOs in these countries, and so is the incorporation of the Robben Island Guidelines into the anti-torture laws of Madagascar, South Africa and Uganda. Similarly, the enactment of access to information laws in countries such as Malawi, Nigeria, Mozambique and Seychelles may be

traced back to the collaborative work between the African Commission's Special Rapporteur and NGOs.

There are certainly more determinants of the impact of the thematic resolutions of the African Commission. This chapter has established the groundwork for further academic research in this area. Hopefully, it will also provoke critical reflection within the African Commission on the impact of its resolutions.

GENERAL COMMENT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: A SOURCE OF NORMS AND STANDARD SETTING ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

Ebenezer Durojaye

Abstract

In 2012, during its 52nd ordinary session in Côte d'Ivoire, the African Commission on Human and Peoples' Rights for the first time adopted a General Comment, and did so to clarify the content of articles 14(1)(d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa. The General Comment details steps and measures states must take to protect women from HIV. These include addressing cultural practices that perpetuate the low status of women; ensuring access to comprehensive, reliable, non-discriminatory information on women's health; and ensuring universal access to sexual and reproductive health services. This chapter argues that although the General Comment is not binding on African governments, it serves as a useful tool to set norms and standards on HIV and human rights in Africa. It also examines measures that states and civil society groups, including national human rights institutions, can take to ensure the effective implementation of the General Comment at the national level. Drawing experience from the international human rights system, the chapter examines the role of soft law in creating useful standards in the promotion and protection of human rights in general and sexual and reproductive health and rights in particular.

1 Introduction

More than three decades into the HIV epidemic, Africa continues to bear the greatest burden of AIDS. In particular, sub-Saharan Africa remains the epicentre of the epidemic. According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), an estimated 26 million people were living with HIV in sub-Saharan Africa at the end of 2016, representing approximately 70 per cent of the global total.¹ In the same vein, it was reported that of the 1 million HIV-related deaths globally, the

¹ UNAIDS *Global AIDS update report* (2017) 12.

region accounted for about one quarter.² While this was a significant reduction in the number of deaths from previous years globally, Africa remains the region with highest number of HIV-related deaths. More importantly, the number of people on anti-retroviral therapy worldwide increased from 24 per cent in 2010 to approximately 60 per cent (about 20 million people) with about 60 per cent in sub-Saharan Africa at the end of December 2016.³ Despite the significant progress made in curbing the spread of the epidemic in the region – with a decline in new HIV infections and a significant increase in access to anti-retroviral treatment – HIV remains one of the leading causes of death in sub-Saharan Africa.⁴ Moreover, the region continues to face serious social, legal and policy challenges, including stigma, discrimination, gender inequality and other negative norms and practices that render people vulnerable to HIV and hinder access to HIV services.

One of the greatest challenges militating against curbing the spread of the epidemic in sub-Saharan Africa relates to the issue of stigma and discrimination as well as human rights violations. In this regard, the foremost human rights body in Africa, the African Commission on Human and Peoples' Rights (African Commission) has an important role to play in addressing human rights violations in the context of HIV/AIDS. The African Commission, through its broad mandate of promoting and protecting human rights, can assist in setting important human rights norms and standards African governments should adopt in addressing the various human rights challenges raised by the HIV epidemic.

The adoption in 2003 by the African Union (AU) of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) signified a milestone in the advancement of women's rights in the region.⁵ Prior to this, the foremost African human rights instrument – the African Charter on Human and Peoples' Rights (African Charter)⁶ – had been criticised for inadequately protecting women's fundamental rights. With the entry into force of the African Women's Protocol in 2005, great opportunities exist for African governments to address the gender dimension of the HIV pandemic. The Protocol, hailed for its radical stance, contains a number of important provisions crucial to advancing women's fundamental rights, in general, and sexual and reproductive

2 As above.

3 As above.

4 CD Mathers et al 'Global and regional causes of death' (2009) 92 *British Medical Bulletin* 27.

5 Adopted by the 2nd ordinary session of the African Union General Assembly in 2003 in Maputo, Mozambique, CAB/LEG/66.6 (2003) entered into force 25 November 2005.

6 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

health and rights, in particular.⁷ It breaks new ground on sexual and reproductive health and rights in a number of ways, not least of which are the recognition of women's vulnerability to HIV as a human rights issue; the explicit recognition of women's sexual and reproductive health rights; and access to abortion, albeit on limited grounds.⁸ Indeed, the African Women's Protocol is the first human rights instrument to explicitly recognise women's vulnerability to HIV as a human rights issue. Article 14(1)(d) 'protects a woman's right to self-protection and to be protected from HIV', while article 14(1)(e) protects a woman's right to know her status and that of her partner.⁹ However, these provisions are not clear as to what measures and steps African governments must adopt to fulfil their obligations in this regard. Hence, during its 52nd ordinary session in October 2012, the African Commission for the first time in its 25 year history adopted a General Comment to specifically clarify the nature of states' obligations under articles 14(1)(d) and (e) of the African Women's Protocol.¹⁰

This chapter examines the content and importance of the African Commission's General Comment on articles 14(1)(d) and (e) of the African Women's Protocol as a tool for advancing women's rights in the context of HIV. It argues that although the General Comment is not binding on African governments, it serves as a useful tool to set norms and standards on HIV and human rights in Africa. The chapter also examines the extent to which the General Comment has been put to use, as well as measures that states, civil society groups and national human rights institutions can take to ensure its effective implementation at the national level. Drawing on experiences from the international human right system, the chapter discusses the role of soft law in creating useful standards in the promotion and protection of human rights, in general, and sexual and reproductive health and rights, in particular.

2 Background to the General Comment

The idea of a General Comment was first brought to the attention of the NGO Forum during the 51st ordinary session of the African Commission

7 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; see also E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol to the Rights of Women' (2006) 6 *African Human Rights Law Journal* 187.

8 C Ngwenya & E Durojaye 'Strengthening the protection of sexual and reproductive health and rights in the African region through human rights: An introduction' in C Ngwenya & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 1.

9 African Women's Protocol (n 5 above).

10 General Comment on arts 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012, <http://www.achpr.org/news/2012/11/d65/> (accessed 28 August 2017).

that took place in Banjul, The Gambia from 18 April to 2 May 2012. The NGO Forum, which usually precedes the ordinary sessions of the African Commission, is one of the largest gatherings of non-governmental organisations (NGOs) and civil society groups in Africa. Thereafter, an initial draft of the General Comment was produced by the Centre for Human Rights, University of Pretoria.¹¹ This was followed by two separate meetings – one in Pretoria, South Africa and the other in Dakar, Senegal – to discuss and build on the initial draft.

The meeting in Pretoria was attended by academics, experts on sexual and reproductive health and rights and civil society organisations focusing on women's rights and HIV, mainly from Eastern and Southern Africa.¹² At the end of this meeting, the draft was updated and then widely circulated across the region for comments. The second meeting in Dakar also comprised academics, experts on sexual and reproductive health and rights and civil society groups working on women rights and HIV, mainly from West and Central Africa.¹³ Representatives of two special mechanisms of the African Commission – the Special Rapporteur on the Rights of Women in Africa and the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV – also participated in this meeting, which yet again updated the draft text of the General Comment. This final draft was considered and adopted with minor amendments by the African Commission in Yamoussoukro, Côte d'Ivoire, in October 2012.

3 Why a General Comment?

During the process leading to the adoption of the General Comment, one of the important issues that came up for consideration was the relevance or viability of adopting a General Comment, and not another resolution, by the African Commission. Some of the participants at the expert meeting gave several reasons in favour of a General Comment rather than a resolution. First, it was believed that the African Commission had issued so many resolutions, including some specifically on HIV/AIDS,¹⁴ with no clear indication as to their importance or significance, particularly in the

11 The Centre for Human Rights in conjunction with two special mechanisms of the African Commission (Special Rapporteur on the Rights of Women in Africa and the HIV Committee) co-ordinated the drafting process that led to the adoption of the General Comment.

12 This meeting took place in March 2012 and was hosted by the Centre for Human Rights, University of Pretoria.

13 This meeting took place in July 2012 in Dakar, Senegal.

14 See, eg, Resolution on the HIV/AIDS Pandemic – Threat against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res.53/(XXIX)01; also ACHPR/Res 141 (XXXXIII) 08: Resolution on Access to Health and Needed Medicines in Africa.

absence of proof that states adhere to them.¹⁵ Altogether, the African Commission has issued about 300 resolutions, including thematic, administrative and country-specific resolutions.¹⁶

Second, resolutions are declarations that do not necessarily carry significant legal weight when compared to a General Comment. While both resolutions and General Comments technically are not legally binding, experience has shown that the latter provide interpretative guidance to specific provisions of a treaty. Moreover, judging from the experience of UN treaty-monitoring bodies, General Comments or recommendations have been well received by states, academics, civil society groups and other stakeholders.¹⁷ Third, the wording or content of resolutions are often brief and do not afford the African Commission the opportunity to clearly outline states' obligations regarding important human rights issues.¹⁸ While the guidelines by the African Commission are more elaborate than resolutions, they have been criticised for being vague and sometimes unduly verbose.¹⁹ It was further contended that adopting a General Comment would be consistent with the approach of UN human rights treaty bodies of clarifying the provisions of human rights treaties.²⁰ Moreover, a General Comment would afford the African Commission the opportunity to explicitly outline steps and measures states should take in order to fulfil their obligations in articles 14(1)(d) and (e) of the African Women's Protocol.

Perhaps one of the strongest arguments in favour of a General Comment was the fact that it could be used as an interpretative guide for the provisions of the African Women's Protocol.²¹ This issue is addressed further below.

Another issue that came up relates to the scope of the General Comment, bearing in mind that article 14 of the African Women's Protocol contains ground-breaking provisions on sexual and reproductive health and rights in general. From the outset, the drafters of the General

15 For a detailed analysis of the impact of the Resolutions of the African Commission, see J Biegon 'An analysis of the impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016; see also J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618.

16 Available on the website of the African Commission.

17 Eg, General Comment 14 of the ESCR Committee on art 12 of the ICESCR has frequently been referred to as the benchmark for determining whether a state is meeting its obligation to realise the right to health.

18 Perhaps due to administrative reasons, most of the resolutions of the African Commission are couched in a few paragraphs.

19 See F Viljoen *International human rights law in Africa* (2012) 372.

20 Virtually all the UN treaty-monitoring bodies issue General Comments to clarify specific rights or provisions of human rights treaties.

21 For a detailed discussion, see M Geldenhuys et al 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e)' (2014) 14 *African Human Rights Law Journal* 681.

Comment, made up of academics, activists, members of the African Commission and civil society groups, were clear about its aim. It was aimed at clarifying states' obligations relating to the provisions on HIV/AIDS. While it was recognised that the provisions on HIV intersect with other provisions in article 14, it was believed that limiting the General Comment to HIV/AIDS alone would achieve better results, as opposed to trying to develop an omnibus General Comment for article 14. This was a strategic move. Given that this was the first time the African Commission would be adopting a General Comment, it was important that its contents steered clear of controversy so as to enjoy the support of the African Commission and other stakeholders, including state representatives. Participants at the drafting stage noted that to enjoy the support of the members of the African Commission in adopting the General Comment, its language must be as clear and simple as possible. Indeed, after the adoption of the first General Comment, another General Comment was adopted to deal with other provisions of article 14.²² While this chapter does not intend to focus on General Comment 2 by the African Commission, the discussion in the chapter relating to the way in which the first General Comment can become a useful tool for setting norms and standards on sexual and reproductive health and rights equally applies to General Comment 2.

4 Content of the General Comment

The General Comment is divided into four broad parts: the introduction or Preamble; the normative content; states' obligations; and specific obligations.

4.1 Preamble

In the Preamble, the African Commission identifies the various forms of discriminatory practices against women based on age, sex, gender, socio-economic circumstances and cultural practices, and how these practices prevent them from realising their 'right to self-protection and to be protected'.²³ The African Commission reaffirms that African women have the 'right to the highest attainable standard of health, including sexual and reproductive health and rights'.²⁴ It further explains that while the focus of the General Comment is to clarify the provision of articles 14(1)(d) and (e), this 'should not be read and understood in isolation from other provisions of the Protocol dealing with other aspects of women's human rights'.²⁵

22 General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014).

23 General Comment on arts 14(1)(d) and (e) (n 10) above.

24 General Comment (n 10 above) para 4.

25 As above.

Implicit in this is the fact that the provisions of the African Women's Protocol should not be 'compartmentalised', but should rather be interpreted as an integral whole. In essence, the rights guaranteed in article 14 are intrinsically linked to other rights in the instrument.

This clarification by the African Commission is very important in that it facilitates a better understanding of the African Women's Protocol and affirms the indivisibility, interdependence and interrelatedness of all human rights. Moreover, this observation of the African Commission tallies with other UN treaty-monitoring bodies, such as the Committee on Economic, Social and Cultural Rights (ESCR Committee)²⁶ and the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee),²⁷ both of which have noted that the enjoyment of the right to health of individuals, in general, and women, in particular, is dependent on other rights such as the rights to life, dignity, privacy and non-discrimination.

Indeed, the African Commission has applied the indivisibility approach in some of its decisions, such as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*²⁸ and *International Pen and others (On behalf of Ken Saro-Wiwa) v Nigeria*,²⁹ where it held that a violation of the right to health would impugn the rights to life and other rights. This approach thus requires African governments to adopt a holistic and purposive interpretation of articles 14(1)(d) and (e).

4.2 Normative content

The African Commission explains that while the African Women's Protocol makes the distinction between the right to self-protection and the right to be protected from HIV in article 14(1)(d), this provision is interpreted to refer to 'states' overall obligation to create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected'.³⁰ Furthermore, an enabling environment must respect women's sexual autonomy and discourage coercive testing or treatment in general. This clarification tallies with the International Guidelines on HIV and Human Rights³¹ and the views of other commentators who have

26 The Right to the Highest Attainable Standard of Health; UN ESCR Committee General Comment 14, UN Doc E/C/12/2000/4.

27 General Recommendation 24 of CEDAW on Women and Health, UN GAOR, 1999, Doc A/54/38 Rev 1.

28 (2001) AHRLR 60 (ACHPR 2001).

29 (2000) AHLR 212 (ACHPR 1998).

30 General Comment (n 10 above) para 12.

31 Office of the United Nations High Commissioner for Human Rights International Guidelines on HIV and Human Rights 2006 consolidated version adopted during the third international consultation on HIV and human rights, 25-26 July 2002, Geneva, Switzerland.

argued that a friendly legal environment will go a long way towards addressing discriminatory practices against women, especially in relation to HIV.³² Ultimately, this will minimise the human rights violations often experienced by women.

Ensuring an enabling environment where women's fundamental rights and freedoms are respected and protected requires states to repeal antiquated and obnoxious laws and practices that are potentially discriminatory against women. At the same time, it also requires that states adopt laws and policies that not only protect women from discrimination, but also advance their fundamental rights. In addition, states must refrain from enacting laws that may further fuel or perpetuate discrimination in society. Thus, laws criminalising HIV transmission, including perinatal transmission of HIV, may be counter-productive and fuel discriminatory practices.³³

According to the African Commission, the 'right to be informed on one's health status includes the right of women to access adequate, reliable, non-discriminatory and comprehensive information about their health'.³⁴ Conversely, the African Commission reasons that 'the right to self-protection and to be protected' includes women's rights to access information, education and sexual and reproductive health services.

The right to self-protection and the right to be protected are also intrinsically linked to other women's rights, including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence.³⁵ The African Commission discourages the disclosure of an individual's HIV status, unless done in accordance with international standards. Specifically, the African Commission adopts the exceptions for disclosure as provided by the International Guidelines on HIV and Human Rights.³⁶

For many years, the disclosure of an individual's HIV status has remained a thorny issue in many parts of Africa, not least because of the stigma and discrimination still associated with the epidemic. At the wake of the HIV epidemic, caution was thrown overboard and an individual's HIV status was disclosed without regard to ethical considerations. This led to violent reactions and gross violations of human rights.³⁷

32 C Albertyn 'Using rights and the law to reduce women's vulnerability to HIV' (2000) 5 *Canadian HIV/AIDS Policy Law Review* 72.

33 See the Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health on Criminalisation of Same-Sex Relationships, Sex Work and HIV Transmission, 27 April 2010, A/HRC/14/20.

34 General Comment (n 10) para 14.

35 General Comment para 13.

36 International Guidelines on HIV and Human Rights (n 31 above).

37 See eg Centre for the Right to Health (CRH) *HIV/AIDS and human rights: Experiences of people living with HIV in Nigeria* (2001).

Studies have shown that women are more likely to suffer violence and human rights abuses when their partners become aware of their HIV status.³⁸ This has often led to a state of denial among the public, making it difficult for partners to share their HIV status with each other. Healthcare providers sometimes tend to compromise the confidentiality of patients, particularly female patients, through the disclosure of their HIV status to their partners or relatives.³⁹ This not only is unethical but also a violation of the right to privacy and confidentiality of patients.

In this context the General Comment recommends that the disclosure of the HIV status of a person should only take place after attempts have been made to counsel the infected person unsuccessfully, or where the infected person has refused to disclose, a real risk exists of infecting others, and the infected person is not likely to be at risk of violence. This is in line with internationally-accepted standards. It is hoped that policy makers across Africa will ensure that health care providers in both public and private health care institutions adhere to this very important recommendation of the African Commission.

4.3 Nature of states' obligations

Consistent with obligations under international human rights law, the General Comment reiterates that African states are obligated under articles 14(1)(d) and (e) to respect, protect, promote and fulfil women's rights in the context of HIV.

The General Comment explains that the obligation to respect 'requires states to refrain from interfering directly or indirectly with the rights to self-protection, to be protected, and the right to be informed on one's health status and the health status of one's partner'.⁴⁰ Furthermore, it notes that the obligation to protect 'requires states to take measures that prevent third parties from interfering with these rights'.⁴¹

According to the African Commission, the obligation to promote 'requires states to create legal, social and economic conditions that enable women to exercise their rights in relation to sexual and reproductive health'.⁴² The African Commission explains that the obligation to fulfil 'requires states to adopt all necessary measures, including allocation of adequate resources for the full realisation of the right to self-protection and

38 '2001 Global: Stigma, HIV/AIDS and prevention of mother-to-child transmission: A pilot study in Zambia, India, Ukraine and Burkina Faso' (2001).

39 See, eg, C Obermeyer et al 'Facilitating HIV disclosure across diverse settings: A review' (2011) 10 *American Journal of Public Health* 1011; see also A Roux-Kemp 'HIV/AIDS: to disclose or not to disclose: That is the question' (2013) *Potchefstroom Electronic Law Journal* 201.

40 General Comment (n 10 above) para 21.

41 General Comment para 22.

42 General Comment para 23.

to be protected, and the right to be informed of one's health status as well as that of one's partner'.⁴³ An important point to note here is that protecting women from HIV infection requires the political will of African governments. In particular, it requires African governments to allocate more resources towards realising universal access to sexual and reproductive health services.

The General Comment further explains that states have specific obligations under articles 14(1)(d) and (e). These include providing access to information and education, which 'should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity'.⁴⁴

The need to address gender stereotypes and taboos in many African countries cannot be overemphasised. This is due to the challenges women, in general, and young women, in particular, often encounter regarding access to sexual and reproductive health information and services in the region.⁴⁵ It has been noted that due to religious beliefs and cultural sentiments around sexual issues, young women are being deprived of crucial information that could enable them lead a healthy life.⁴⁶ In essence, unless women and girls have access to sexual and reproductive health information, they will be unable to enjoy the rights guaranteed under articles 14(1)(d) and (e).

4.4 Specific obligations

In a language similar to that of General Comment 14 of the ESCR Committee, the African Commission notes that states are to 'ensure availability, accessibility, acceptability and quality sexual and reproductive health care services for women'.⁴⁷ States are further enjoined to create an enabling legal and policy framework, which includes 'a supportive, legal and social environment that allows women to control their sexual and reproductive choices in order to prevent HIV transmission'.⁴⁸ Adopting a holistic approach to safeguarding women's rights in the context of HIV, the African Commission requires states to also 'provide access to sexual and reproductive health procedures, technologies and services' that are 'women-centred, appropriate and evidence based; remove barriers to sexual and reproductive health rights; commit resources to provide a

43 General Comment para 24.

44 General Comment para 26.

45 G Kangaude & T Banda 'Sexual health and rights of adolescents: A dialogue with sub-Saharan Africa' in Ngwenya & Durojaye (n 8 above) 251.

46 K Stefiszyn 'Adolescent girls, HIV, and state obligations under the African Women's Rights Protocol' in Ngwenya & Durojaye (n 8 above) 155.

47 General Comment (n 10 above) para 28.

48 General Comment para 33.

comprehensive range of services for the prevention and treatment of every person's sexual and reproductive health and provide redress for sexual and reproductive health violations'.⁴⁹

One of the major threats to women's protection from HIV is their inability to enjoy their sexual and reproductive rights. Women, particularly young women, often lack access to basic information about their sexual and reproductive well-being. Barriers to sexual and reproductive health information and services for young women include the judgmental attitudes of health care providers, and religious or customary practices and laws that often require parental consent before treatment is provided.⁵⁰

During the International Conference on Population and Development in Cairo⁵¹ and the Fourth World Conference on Women in Beijing,⁵² the international community affirmed that women should enjoy their sexual and reproductive health and rights without hindrances, discrimination or violence. It was further agreed that states should prioritise sexual and reproductive health and the rights of women in laws and policies at the national level.⁵³

More recently, the international community has shown more commitment to realising women's rights and addressing gender inequality. This is reflected in the adoption by the UN in September 2015 of the Sustainable Development Goals (SDGs).⁵⁴ Goal 5 aims at achieving gender equality and empowering women and girls. One of the targets is to eliminate harmful practices that undermine the rights and well-being of women and girls.

Despite these developments, African women and girls are still subjected to inhuman and degrading cultural practices, such as widow inheritance, which further predispose them to HIV infection. In some countries in the region, laws still exist that perpetuate inequality by treating women almost as minors or second-class citizens.⁵⁵ Respecting the sexual and reproductive health and rights of women is crucial to reducing susceptibility to HIV. Moreover, access to vital information on sexual and reproductive health for young women will empower them to make

49 General Comment para 38.

50 See E Durojaye 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) Vol 44 *Comparative and International Law Journal of Southern Africa* 1.

51 Report of the International Conference on Population and Development, 5-13 September 2014, UN Doc A/CONF.171/13.

52 Report of the Fourth World Conference on Women, Beijing, 15 September 1995, A/CONF.177/20.

53 As above.

54 UN General Assembly, adopted in September 2015 with 17 major goals to eradicate poverty by 2030.

55 MP Eboh 'The woman question: African and Western perspectives' in E Eze (ed) *African philosophy: An anthology* (1997) 333-337.

informed decisions regarding their sexual well-being. By calling on African governments to invest in sexual and reproductive health services and establish youth-friendly services in their jurisdictions, the African Commission would seem to be echoing the Abuja Declaration.⁵⁶ According to this document, African governments agreed to commit at least 15 per cent of their annual budgetary allocations to the health sector in order to combat the HIV epidemic and address other diseases, such as malaria and tuberculosis, that are affecting the continent. Therefore, it is hoped that this clarification will serve as a wake-up call to African governments and propel them to recommit themselves to the promises made in Cairo and Beijing.

Decisions in some African countries reveal that courts are beginning to take a proactive stance in striking down laws and practices that continue to discriminate against women. Examples of such decisions include the *Bhe* case in South Africa,⁵⁷ where the Constitutional Court rejected and declared as unconstitutional the primogeniture customary practice, which tends to favour male over female children in inheritance matters. According to the Court, this practice is discriminatory and violates the equality clause in the South African Constitution. Similarly, the Nigerian Supreme Court in *Ukeje v Ukeje*⁵⁸ held that a cultural practice among the Igbo in the eastern part of the country that denies inheritance rights to female children is discriminatory and in contravention of the provision of section 42 of the Nigerian Constitution. Also, the Court of Appeal in Botswana has struck down a similar customary practice that denies the right of inheritance to a female child.⁵⁹ The Court held that, given Botswana's commitment to human rights standards, as evidenced by the ratification of international and regional human rights instruments, this discriminatory cultural practice could not be justified. The Court declared that the customary practice was inconsistent with the spirit and letter of the Constitution of Botswana. These cases reaffirm the willingness of courts in Africa to address discriminatory practices against women in the region.

5 What is the legal significance of a General Comment?

As noted earlier, a General Comment is not legally binding on states. However, it may serve as an interpretative guide for a better understanding of the specific provisions of a human rights treaty. To this extent, General Comments may be regarded as 'soft law'. Under international law, 'soft

56 Abuja Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3.

57 *Bhe & Others v Magistrate Khayelitsha* 2005 (1) BCLR 1 (Constitutional Court).

58 (2014) LPELR-22724 (SC).

59 *Ramantele v Mmusi & Others* (CACGB-104-12) [2013] BWCA 1 (Botswana Court of Appeal).

law' is described as quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often contrasted with soft law by being referred to as 'hard law'.⁶⁰ Examples include resolutions or declarations of international bodies such as the UN General Assembly, consensus statements and principles.

According to the Vienna Convention on the Law of Treaties,⁶¹ it may be necessary to consider extraneous documents in interpreting a provision of a treaty. Specifically, articles 31 and 32 lay down the procedures to follow in interpreting treaties. Article 31(1) provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose'. Furthermore, article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Implicit in this provision is the fact that a General Comment may become a source of interpretation of a treaty such as the African Charter or its Women's Protocol. In other words, the African Commission and national courts can use the General Comment to assess a state's commitment to realising women's rights in the context of sexual and reproductive health rights.

Under the UN system, General Comments issued by treaty-monitoring bodies have served as important sources of clarification or interpretation of the provisions of treaties. Examples abound in relation to the work of the ESCR Committee. For instance, General Comment 3 of the Committee on the nature of states' obligations remains an authoritative guidance on what is expected of states in relation to fulfilling their obligations under the Covenant.⁶² Also, General Comment 14 on the right to the highest attainable standard of health is the most authoritative clarification on the meaning and scope of the right to health ever provided. Furthermore, General Comments 12 and 15 on the rights to food and

60 For a detailed discussion, see FC Castaneda 'A call for rethinking the sources of international law: Soft law and the other side of the coin' (2013) *Anuario Mexicano de Derecho Internacional* 355; T Guzman & TL Meyer 'International soft law' (2010) *Journal of Legal Analysis* 173.

61 Vienna Convention on the Law of Treaties 1969 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.

62 ESCR Committee General Comment 3: The nature of states parties' obligations (art 2, para 1, of the Covenant) 5th Session 1990 E/1991/23.

water, respectively, serve as normative articulation of states' obligations regarding these rights.⁶³ This is more so since the content and nature of these rights are sketchy under international law.

It should be noted that some of these General Comments have created norms and standards on specific rights they relate to, such that courts often refer to them as interpretative guides in their decisions. For instance, in the *Grootboom*⁶⁴ and *Treatment Action Campaign*⁶⁵ cases, the South African Constitutional Court referred to General Comments 3 and 14 of the ESCR Committee to clarify the government's obligations in arriving at its decisions. Even though the Constitutional Court rejected the minimum core approach expounded by the ESCR Committee in its General Comments, the Court was nonetheless influenced by the clarification provided by the ESCR Committee regarding the nature of obligations imposed on states to realise socio-economic rights. A Kenyan High Court in *POA & Others v Attorney-General*,⁶⁶ which relates to the constitutionality of the Anti-Counterfeiting Act, again referred to the General Comment of the ESCR Committee. Specifically, the Court relied on General Comment 14 of the Committee in finding that the Counterfeiting Act constituted an impediment to access to life-saving medications for people living with HIV in the country.

In addition, the General Comments of the ESCR Committee have influenced some of the jurisprudence of the African Commission. For instance, in the *Purohit* case,⁶⁷ the African Commission's decision was based on the reasoning of the ESCR Committee as provided in some of its General Comments. More importantly, the Principles and Guidelines on the Implementation of Socio-economic Rights under the African Charter,⁶⁸ particularly the section on the right to health, draw extensively from the General Comments of the ESCR Committee. This clearly attests to the importance of the General Comments of the Committee as sources of norms and standards on socio-economic rights.

The General Comment of the African Commission can play a similar influential role on the continent, if it is well disseminated among civil society groups and government institutions. In determining the obligation of a state in relation to articles 14(1)(d) and (e) of the African Women's Protocol, courts can use the General Comment as the 'marking scheme' for this purpose. For instance, the landmark decision by Malawi's High

63 ESCR Committee General Comment 12 on the right to adequate food, 20th session 1999 E/C.12/1999/5; ESCR Committee General Comment 15: The right to water (arts 11 and 12 of the Covenant) 29th session 2002.

64 *Government of the Republic of South Africa v Grootboom* 2000 3 BCLR 227 (CC).

65 *Minister of Health v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).
66 [2012] eKLR.

67 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

68 Adopted by the African Commission on Human and Peoples' Rights during its 48th ordinary session in 2010.

Court declaring forcible HIV testing of sex workers as unlawful and a violation of their rights to privacy, equality, dignity and freedom from cruel, inhuman and degrading treatment, could have benefited from the content of the General Comment.⁶⁹ There was no evidence that the General Comment had been canvassed before the Court in that case as there was no reference to it in the judgment. Given the strong wording of the General Comment on the need for consent to be obtained before HIV testing and the need to create an enabling legal environment for all individuals, the Court could have invoked it to find the Malawian government in breach of its obligation under the African Women's Protocol to protect female sex workers from HIV infection. It was a missed opportunity for the Court to use the General Comment as an important standard-setting document at the national level. This testifies to the lack of knowledge about the General Comment and the fact that more effort is required for creating awareness among civil society groups and other stakeholders at the national level. Crucially, African governments will need to show more commitment to ensuring the proper implementation of the General Comment at the national level.

However, it needs to be stated that the General Comment fails to strongly canvass the rights of vulnerable and marginalised groups, such as gay, lesbian and transgender people. Given that it was the first attempt to adopt a General Comment and the need to win the support of states as well as some conservative members of the African Commission at the time, there was some compromise in the language of the General Comment. At the time of the adoption of the General Comment in 2012, the African Commission was perceived as very reluctant to address human rights violations based on sexual orientation or identity.⁷⁰ More recently, the Commission has shown more willingness in denouncing human rights violations based on gender identity or sexual orientation.⁷¹

6 Putting the General Comment into effective use

While the General Comment is not a binding instrument, it serves as an authoritative interpretation of articles 14(1)(d) and (e) of the African Women's Protocol. This provides great opportunities for civil society groups across Africa to engage with their governments on the importance

69 See *S v Mwanza Police & Others* unreported High Court decision of Malawi decided on 25 May 2015.

70 See, eg, A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263.

71 See, eg, Resolution 275 on Protection against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, adopted during the 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014; see also African Commission on Human and Peoples' Rights Report on *HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses* (2017) <http://www.achpr.org/news/2017/12/d317/> (accessed 9 February 2018).

of the General Comment. It is important that the General Comment is put into effective use by courts and policy makers at the national level. Therefore, civil society groups and the African Commission will need to create awareness about the existence of the General Comment. In this regard, the General Comment may be used as a tool for advocacy and for interacting with policy makers at the national and regional levels.

Furthermore, it will be necessary to organise a series of workshops or seminars where the importance and relevance of the General Comment are discussed. The General Comment can also be simplified and translated into local languages that can be widely disseminated to organisations working on women's issues in rural areas as well as policy makers and other stakeholders. This is very important as most women in rural or disadvantaged areas often lack formal education and are unable to assert their rights. They are thus susceptible to human rights abuses and HIV infection. Sadly, most of these women do not know how to seek redress for such violations.

Human rights organisations can urge courts or quasi-judicial bodies such as national human rights institutions (NHRIs) to develop norms and standards on women's rights in the context of HIV, drawing inspiration from the General Comment. The African Commission should continuously engage with states and civil society organisations on the implementation of the General Comment. More importantly, the African Commission should require state parties to include in their state reports⁷² steps they have taken to effectively popularise and implement the provisions of the General Comment in their respective jurisdictions.

Currently, however, there is little evidence to show that the General Comment has been put into use by states at the national level. While some civil society groups have continued to disseminate and popularise the General Comment, many African states are yet to embrace the General Comment. Since the African Commission adopted the General Comment, no framework has been established to monitor how states have applied it in their jurisdictions. This would seem to be a major gap which may undermine the significance of the General Comment. To further compound the situation, only few African countries (including Burkina Faso, Malawi, Mauritania, Namibia, Nigeria, Rwanda, Senegal and South Africa) have so far submitted their state reports on steps and measures taken regarding the implementation of the African Women's Protocol.⁷³ This is disappointing and shows that African countries merely pay lip service to advancing women's rights in the region. This state of

72 State parties to the African Charter and African Women's Protocol are required to submit periodic reports every two years to the African Commission outlining the steps and measures they have taken to implement the provisions of these instruments.

73 See, eg, Inter-session Activity Report of the Special Rapporteur on the Rights of Women in Africa presented during the 60th ordinary session of the African Commission from 8-22 May 2017, Niamey, Niger.

affairs has not afforded the African Commission the opportunity to interact with states on their commitments to the African Women's Protocol and to engage with them on how the General Comment has been put into use in their countries. Further, a report on the impact of the African Women's Protocol in selected African countries has revealed mixed reactions as to the extent the instrument is put into effective use.⁷⁴ Surely, much more is expected from the governments on a continent where threats to women's sexual and reproductive health and rights are most severe. The African Commission should require member states to establish national frameworks to oversee the implementation of the General Comment at the national level.

As noted earlier, some civil society groups have already engaged in advocacy work to educate the public and disseminate the General Comment among vulnerable and disadvantaged groups.⁷⁵ However, many organisations focusing on women's rights are still not using the General Comment as expected. Crucially, there is no evidence to show that the General Comment is being cited before courts at the national level across the region. This may suggest that civil society groups engaging in public interest litigation on sexual and reproductive health issues would need to do more by citing the General Comments before courts whenever the opportunity arises.

Some reasons that may account for the low utilisation of the General Comment have to do with the fact that it has not been well received among some civil society groups. First, there have been questions about the legitimacy of these General Comments as some civil society groups this author engaged with have argued that the processes leading to their adoption were far from being representative and participatory. Although some of the drafts of the General Comments were placed on the websites of the African Commission for a few days, many organisations would have wished for more time to enable them engage more with the draft documents before their final adoption.

Second, some civil society groups are of the view that the current process for adopting a General Comment leaves much to be desired. This is because some of the meetings leading to the adoption of the General Comment were sponsored by donor organisations. The initial drafting of a General Comment is sometimes done by consultants or experts hired by donor organisations. While it should be noted that there is nothing wrong

74 See A Ayeni (ed) *The impact of African Charter and the Maputo Protocol in selected African states* (2016).

75 Eg, the Centre for Human Rights at the University of Pretoria has made efforts to simplify the General Comment and has engaged with relevant state delegates and institutions about its importance; also the Dullah Omar Institute, University of the Western Cape has provided training to relevant government institutions about the importance of the General Comment.

with donor organisations supporting the process for the adoption of a General Comment, however, this should be done without any agenda.

7 Conclusion

The General Comment on articles 14(1)(d) and (e) of the African Women's Protocol no doubt is an important milestone in the history of the African Commission. It serves as an authoritative clarification of the obligations of African governments to protect women from HIV infection. In addition, it creates an opportunity for African governments to double their commitment to promoting and protecting women's rights, in general, and sexual and reproductive health and rights, in particular. However, the important clarifications provided by the African Commission in the General Comment will amount to a mere paper promise if adequate efforts are not made for its implementation at the national level. Thus, African governments and civil society organisations will need to forge good partnerships to ensure the full implementation of the General Comment at grass roots level. Moreover, the African Commission will need to re-evaluate the process for the adoption of its General Comments to ensure more transparency and participation by relevant stakeholders. It will also be crucial that civil society groups that litigate at the national level make reference to the General Comment before the courts. Equally, national courts need to take cognisance of the General Comment and apply it in their decisions.

Romola Adeola

Abstract

The African Union Model Law on Internal Displacement sets out to guide states on how to implement the IDP Convention. Adopted at the January 2018 Summit of Heads of State and Government in Addis Ababa, Ethiopia, the IDP Model Law provides a detailed roadmap for states in incorporating the provisions of the IDP Convention in national laws and policies. This chapter analyses pertinent strengths and weaknesses of the IDP Model Law and concludes with a way forward on how it can be improved and utilised as a guide for national laws and policies in the realisation of sustainable solutions to the challenge of internal displacement in Africa.

1 Introduction

The problem of internal displacement has been a pressing human rights concern in Africa. In addressing the issue, the African Union (AU) adopted the AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa (IDP Convention) in 2009.¹ In 2012 the IDP Convention came into force and since its creation has been recognised as an important regional instrument of global significance, in that it is the first of its kind to create obligations on states with respect to addressing the root causes of internal displacement. In the same year, the AU developed a Model Law for the Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (IDP Model Law).²

1 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted at the Special Summit of the African Union Heads of State and Government in Kampala, Uganda, 19-23 October 2009 (IDP Convention).

2 Model Law for the Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (IDP Model Law) (on file with author).

The IDP Model Law was developed to serve as a guide for national legislation on internally-displaced persons (IDPs). Since its creation, the IDP Model Law has been used to sensitise relevant stakeholders in some states that are parties to the Convention, including Nigeria, Swaziland, Gabon, Zimbabwe, Rwanda, Uganda, Malawi and Sierra Leone.³ The provisions of the IDP Model Law set a standard on internal displacement for state parties to the IDP Convention by elaborating on the provisions of the Convention. As a model according to which national efforts may be assessed, this chapter considers the normative prospects of the IDP Model Law. The chapter further assesses the challenges of the IDP Model Law through an assessment of its strengths and weaknesses, and provides recommendations on how the IDP Model Law provisions can effectively be applied in addressing the issue of internal displacement in Africa.

In advancing the discourse, the chapter is divided into three parts. The first part examines the development of the norms, namely, the IDP Convention and the IDP Model Law. Following this discussion, the chapter critiques the IDP Model Law, highlighting its normative prospects and some of its challenges, and how national legislation can efficiently respond to these challenges. The chapter concludes with a way forward on how the IDP Model Law can be improved and utilised as a guide for national laws and policies in the realisation of sustainable solutions to the problem of internal displacement in Africa.

2 Development of norms

In response to the global concern about internal displacement, the former United Nations (UN) Special Representative on Internally Displaced Persons, Professor Francis Deng, developed a set of Guiding Principles on Internal Displacement in 1998.⁴ The essence of the Guiding Principles was to provide guidance to states in protecting IDPs. However, despite the existence of the Guiding Principles at the UN level, the issue of internal displacement remained a pressing concern in Africa. In 2000, for instance, more than a third of the world's IDPs found themselves in Africa.⁵ As at 2003, half of the world's IDPs reportedly were on the African continent. Because of the severity of the issue, the AU took a decisive step at the early

3 The first meeting of the Conference of State Parties to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, April 2017.

4 Commission on Human Rights Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1997/39 – Addendum – Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998.

5 See 'Trends in displacement, protection and solutions, 2005' (2007) *UNHCR Statistical Yearbook* 180-181; 'Trends in displacement, protection and solutions, 2010' (2011) *UNHCR Statistical Yearbook* 70; 'Trends in displacement, protection and solutions, 2014' (2015) *UNHCR Statistical Yearbook* 53.

turn of the century by creating a continental legal framework. The next section discusses this response.

2.1 African Union Convention on Internal Displacement

In 2004, the African Union Executive Council (Executive Council) mandated the AU Commission (AUC) to develop a lasting solution, in the form of a legal framework, to the issue of internal displacement in Africa.⁶ Within the AUC, the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Department of Political Affairs was saddled with the mandate of developing this legal framework.⁷ To this end, the AUC engaged the services of independent experts, including Professor Chaloka Beyani, the UN Special Rapporteur on Internally Displaced Persons, in the development of the IDP Convention.⁸

At the 2006 Second African Union Ministerial Conference on Refugees, Returnees and Internally Displaced Persons held in Ouagadougou, Burkina Faso, the Ministers made a commitment to address the issue of internal displacement on the continent and, as such, emphasised 'zero tolerance' to the issue of internal displacement on the continent.⁹ The Executive Council endorsed the outcome of this meeting and requested the AUC to prepare for a Special Summit of the Assembly on the issue of refugees, returnees and IDPs. While noting the progress made in the establishment of a legal instrument on IDPs, the Executive Council requested the AUC to 'expedite ... efforts in collaboration with the PRC Sub-Committee on Refugees, Returnees and Internally Displaced Persons and with the participation of relevant partners at the appropriate instance'.¹⁰ Between 2007 and 2009, the draft IDP Convention was discussed, debated and reviewed.¹¹ At the Third AU Ministerial Conference on Refugees, Returnees and Internally Displaced Persons in 2008, the draft Convention was adopted.¹²

6 AU Executive Council, 5th ordinary session, 25 June-3 July 2004, Addis Ababa, Ethiopia, Decision on the Meeting of Experts on the Review of OAU/AU Treaties, Doc EX/CL/95 (V) para 4(i).

7 AU Economic, Social and Cultural Council (ECOSOCC) *Making the Kampala Convention work for IDPs: Guide for civil society on supporting the ratification and implementation of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (2010) 20.

8 See C Beyani 'Recent developments: The elaboration of a legal framework for the protection of internally displaced persons in Africa' (2006) 50 *Journal of African Law* 187.

9 Beyani (n 8 above) 187 195.

10 AU Executive Council, 9th ordinary session, 25-29 June 2006, Banjul, The Gambia, Decision on the Situation of Refugees, Returnees and Displaced Persons, Doc EX.CL/254 (IX), para 9.

11 'Explanatory note on the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)' 2 [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/5A1FC4CC9028079DC12577450048DE13/\\$file/Kampala%20Convention%20-%20Explanatory%20Note.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/5A1FC4CC9028079DC12577450048DE13/$file/Kampala%20Convention%20-%20Explanatory%20Note.pdf) (accessed 14 March 2013).

12 As above.

Following a series of postponements, the Special Summit of the Heads of State and Government was eventually held at Kampala, Uganda, in October 2009.¹³ There were three significant outcomes of the Special Summit, namely, the IDP Convention; the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (Kampala Declaration); and the endorsement of the Recommendations of the African Union Ministers in Charge of Forced Displacement Matters (Ministers' Recommendations).¹⁴ While the IDP Convention incorporated the legal obligations of states in relation to the protection and assistance of IDPs, the Kampala Declaration adopted by the Assembly endorsed the recommendations by the Ministers.¹⁵ Paragraph 41 of the Ministers' Recommendations expressed a commitment by states to align domestic laws on the issue of displacement with international legal standards. Member states were obliged to fulfil this commitment through 'the African Union Commission and in collaboration with co-operating partners'.¹⁶

For the purposes of speeding up the signature and ratification of the IDP Convention and of ensuring the domestication and popularisation of the IDP Convention, the AUC developed a Plan of Action.¹⁷ With regard to domestication, the Plan of Action proposed the development of a Model Law on IDPs. The AU Commission, Members of Parliament in collaboration with specialised Agencies and Institutions were tasked with carrying out this responsibility, along with other domestication activities of the IDP Convention.¹⁸ In July 2010, the Executive Council welcomed the advancements made on the implementation of the Special Summit outcomes, particularly the Plan of Action and the Ministers' adoption of the Plan of Action.¹⁹ Subsequently, the Executive Council endorsed the Plan of Action and requested states, the AUC, AU institutions, sub-

13 AM Abebe 'The African Union Convention on Internally Displaced Persons: Its codification background, scope and enforcement challenges (2010) 29 *Refugee Survey Quarterly* 28 40.

14 IDP Convention (n 1 above); Recommendations of the African Union Ministers in Charge of Forced Displacement Matters (2009) (Ministers' Recommendations); Kampala Declaration on Refugees, Returnees and Internally Displaced Persons (2009) (Kampala Declaration).

15 Kampala Declaration (n 14 above).

16 Ministers' Recommendations (n 14 above), para 41.

17 Plan of Action for implementation of the outcomes of the AU Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa, Annex to AU Executive Council, 9th ordinary session, 19-23 July 2010, Kampala, Uganda, Report of the meeting of Ministers in charge of forced displacement, Addis Ababa, Ethiopia (1-5 June 2010), Doc EX.CL/591 (XVII) 4.

18 Plan of Action (n 17 above) 10.

19 AU Executive Council, 17th ordinary session, 19-23 July 2010, Kampala, Uganda, Decision on the Situation of Refugees, Returnees and Internally Displaced Persons Doc. EX. CL/Dec 558 (XVII), para 4 http://www.au.int/en/sites/default/files/decisions/9631-council_en_26_30_january_2009_executive_council_fourteenth_ordinary_session.pdf (accessed 5 December 2015).

regional organisations and partners to ‘work closely on the implementation of the Plan of Action’.²⁰

2.2 African Union Model Law on Internal Displacement

The development of the IDP Model Law started in 2011 under the auspices of the AUC as part of the strategy for the realisation of the IDP Convention.²¹ Within the AUC, the African Union Commission on International Law (AUCIL) was mandated to draft the IDP Model Law with the support of the Office of the Special Representative of the United Nations High Commissioner for Refugees (UNHCR).²²

The AUCIL appointed one of its members, Ambassador Minelik Alemu Getahun, as Special Rapporteur for the development of the IDP Model Law. The first draft of the IDP Model Law was presented by the Special Rapporteur to the AUCIL at its fourth session in April 2012.²³ Following the presentation of the report by the Special Rapporteur, members of the AUCIL made comments and requested the inclusion of human rights and humanitarian terminology in the IDP Model Law.²⁴ The AUCIL endorsed questionnaires for comments on the draft IDP Model Law at its seventh session in November 2013 and invited member states to comment on the draft IDP Model Law.²⁵ Between 2013 and 2014, the AUCIL examined the development of the text, including comments and observations from member states, the UNHCR, the International Committee of the Red Cross (ICRC) and the African Commission on Human and Peoples’ Rights (African Commission).²⁶

20 AU Executive Council, 17th ordinary session, 19-23 July 2010, Kampala, Uganda, Decision on the Implementation of the Plan of Action for the Outcomes of the Special Summit on Refugees, Returnees and Internally Displaced Persons Doc. EX. CL/Dec 591 (XVII), para 2 http://www.au.int/en/sites/default/files/decisions/9631-council_en_26_30_january_2009_executive_council_fourteenth_ordinary_session.pdf (accessed 5 December 2015).

21 AE Iyanda Presentation on the AU IDP Model Law for the implementation of the African Union Convention for the Protection and Assistance to Internally Displaced Persons in Africa at the training workshop on the Kampala Convention: From ratification to domestication and operationalisation – Developing national laws and policies on internal displacement, AU Headquarters, Addis Ababa, Ethiopia, 1 December 2015.

22 Iyanda (n 21 above) 2-3.

23 Report of the 4th ordinary session of the African Union Commission on International Law, Addis Ababa, Ethiopia, 4-14 April 2012, AUCIL/Legal/Rpt (IV) paras 48-50.

24 Report (n 23 above) para 49.

25 AU Commission on International Law, 9th ordinary session, 27 November-10 December 2014, Addis Ababa, Ethiopia, Report of the draft AU IDP Model Law for the implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa by Minelik Alemu Getahun (Ambassador), AUCIL Special Rapporteur (27 November 2014) AUCIL/Legal/Doc 6 (IX) para 45.

26 As above.

In the development of the IDP Model Law, the Special Rapporteur consulted various normative standards beyond the IDP Convention.²⁷ Sources included global and regional human rights and humanitarian law instruments; the Great Lakes Protocol on Internally Displaced Persons; the UN Guiding Principles on Internal Displacement; and the UN International Law Commission Framework on the Protection of Persons in the event of Disasters.²⁸ The laws and policies of countries with national frameworks, including Angola, Burundi, Liberia, Sierra Leone, Sudan and Uganda, were also consulted. The essence of the broad normative base of the IDP Model Law was to ensure a comprehensive national legal framework that fills the gaps in the IDP Convention and elaborates on provisions that are not explicit.

At its ninth session in 2014, the AUCIL adopted the draft IDP Model Law and transmitted the document for adoption by AU policy organs.²⁹ While adoption of the IDP Model Law by the Assembly had initially been slated for January 2016, this was postponed as the Ministers of Justice of member states had as at December 2015 not considered the IDP Model Law.³⁰ The draft IDP Model Law was adopted by the Specialised Technical Committee on Justice and Legal Affairs in 2017 and was transmitted to the Assembly for formal adoption. A formal adoption by the Assembly was effected at the January 2018 Summit.

3 Provisions of the IDP Model Law

The IDP Model Law has 63 articles divided into 14 chapters that set out to explicitly detail the provisions of the IDP Convention.³¹ As with the IDP Convention, the IDP Model Law specifically recognises three main root causes of internal displacement, namely: disaster, conflict and development projects. In critiquing the norms, this chapter considers these three root causes of internal displacement and the institutional response to internal displacement specifically provided for by the IDP Model Law.

27 Report (n 25 above) paras 9-30.

28 Report (n 25 above) para 23.

29 Report (n 25 above) para 49.

30 The significance of the consideration of the IDP Model Law by the Ministers of Justice derives from the fact that as national legal advisers of states, they can provide legitimacy for the utilisation of the IDP Model Law in the domestication process of the IDP Convention.

31 Iyanda (n 21 above) 5.

3.1 Normative content on the root causes

3.1.1 Disasters

The third chapter of the IDP Model Law focuses on internal displacement caused by disasters.³² In this chapter, there are six main articles focusing on disaster-induced displacements, namely, the protection of internally-displaced persons; the protection of internally-displaced persons during evacuations; a needs assessment and initiation of international assistance; the termination of international assistance; and safeguards and relocation procedures during disasters.

Article 6: Disaster-induced displacements

Article 6 of the IDP Model Law elaborates on the obligations of states in the context of disaster-induced displacements, specifically recognising 'climate change', 'environmental hazards' and 'other disasters'. Its emphasis on climate change as a root cause of internal displacement spotlights the provision of article 5(4) of the IDP Convention which was motivated by the need for the IDP Convention to be 'futuristic'.

Article 6 of the IDP Model Law emphasises five significant obligations of states in the context of disaster-induced displacements. Article 6 iterates (i) the primary duty on competent authorities to protect IDPs affected by disasters; (ii) the need for competent authorities to take steps in avoiding and mitigating displacements; (iii) the pertinence for these authorities to take targeted steps in mainstreaming the issue of internal displacement in contingency planning and in adaptation strategies; (iv) the meaningful and informed participation by groups likely to be displaced in processes initiated at domestic levels relating to disasters; and (v) the full participation by and consultation of groups bound to be affected in mitigation strategies and the compliance of such strategies with a human rights framework.³³

While article 6 details significant obligations on states in the context of disasters, it does not explicitly provide for disaster risk assessment significantly within the context of climate change which is recognised under article 5(4) of the Kampala Convention.

32 In the definition section, one of the innovations of the IDP Model Law is that it offers an insight into the meaning of disasters which, although used in the IDP Convention seven times, is not defined. In line with this provision, disaster refers to a 'calamitous event or series of events' that as a consequence leads to 'widespread loss of life, great human suffering and distress, displacement of population or large-scale material or environmental damage thereby seriously disrupting thereby seriously disrupting the functioning of society'. IDP Model Law (n 2 above) art 2.

33 IDP Model Law art 6.

Article 7: Protection of internally-displaced persons

Article 7 of the IDP Model Law sets out 11 specific obligations of ‘competent authorities’ in the protection of IDPs. These obligations are to ensure (i) access by IDPs to basic amenities in line with their needs; (ii) that IDPs are protected from likely hazards and disasters; (iii) the security of disaster-induced IDPs through effective strategies; (iv) that camps are created only as a final resort where self-support or fast recovery aids are not present; (v) that law and order is preserved in camps and their environs and in locations where IDPs inhabit unplanned; (vi) that specific groups, such as groups with a special attachment to land, unaccompanied and separated children, single-headed households, persons with disabilities, elderly persons and women, are afforded priority; (vii) that displaced persons have access to psychosocial help and social amenities and that the need of specific groups are accorded due attention; (viii) that natural or human-made disaster-induced displacements do not occur unless these occurrences are premised on the need to ensure the health and safety of displaced persons; (ix) that effective remedies are provided to displaced persons in accordance with the provisions of Chapter 11 on durable solutions; (x) that mechanisms are set up to track missing persons and that the next-of-kin are duly informed; and (xi) that the remains of deceased individuals are collected, identified and processes for the return to their next-of-kin or respectful disposal are accelerated.³⁴

While article 7 emphasises protection, it does not mention issues of assistance, which is one of the two main pillars of the IDP Convention.³⁵ Importantly, article 7 omits financial assistance to IDPs for the reconstruction of livelihood, which is an important aspect of ensuring adequate support in situations of disaster-induced displacement. The IDP Convention, however, reflects this in part by requiring states to make ‘reparation to internally-displaced persons for damage when such a state party refrains from protecting and assisting internally-displaced persons in the event of natural disasters’.³⁶

Article 8: Protection of internally-displaced persons during evacuation

Article 8 of the IDP Model Law sets out the modalities for evacuation of IDPs in situations where imminent natural disasters create ‘a serious risk for the life, physical integrity or health’³⁷ of those bound to be affected. According to article 8, competent authorities are to act consistently with international human rights standards and, as such, (i) protect vulnerable

34 IDP Model Law art 7.

35 IDP Convention (n 1 above) art 5.

36 IDP Convention art 12(3). See R Adeola & F Viljoen ‘The right not to be arbitrarily displaced in Africa’ (2017) 25 *African Journal of International and Comparative Law in Africa* 459-481.

37 IDP Convention art 8.

groups; (ii) ensure that the evacuation process is done with full regard for the 'right to life, dignity, liberty and security'³⁸ of the evacuated persons and, specifically, vulnerable groups. For this purpose, competent authorities are mandated to (a) protect the properties left behind by evacuated individuals; (b) register those evacuated and oversee evacuation; (c) ensure that evacuated persons are adequately protected and assisted; and (d) guarantee that following the emergency stage, those evacuated are afforded the freedom to determine whether to move back to their homes, to remain in the place of displacement or move to another part of the state.

However, the right of choice to return is subject to the provisions of law and to the protection of national safety, security, the preservation of public order, health, morals and the freedom of others.³⁹ Two significant omissions in this provision are the requirements that evacuation sites should have proper accommodation and that, during evacuation, families should not be separated.⁴⁰

Article 9: Needs assessment and initiation of international assistance

Article 9 of the IDP Model Law mandates the national co-ordination mechanism,⁴¹ to conduct a needs-based assessment in consultation with other relevant departments in the state in order to determine whether local capacities are adequate in responding to the needs of IDPs. Where local capacities are inadequate, the national co-ordination mechanism is mandated to advise the 'highest executive organ'⁴² to request international assistance. Thereafter, there should be a regular review of the sufficiency of local capacities and the need for international assistance to respond to the needs of IDPs and affected communities.⁴³ However, a significant omission in this provision is the fact that it fails to include IDPs in the consultation process relating to the needs-based assessments. It also fails to explicitly provide for the consultation of vulnerable groups such as women, children, persons with disabilities and the elderly.

38 IDP Convention art 8(2).

39 See art 8(3) of the IDP Model Law.

40 IDP Convention art 9(2).

41 The duties of this mechanism include appraising the needs of IDPs and host communities; conducting periodic reviews on the state of human rights of IDPs in conjunction with relevant institutions, including the National Human Rights Institution; promoting training programmes; creating awareness on internal displacement; promoting the participation of IDPs in decision-making processes on internal displacement; collaborating with relevant regional and international institutions; facilitating humanitarian assistance to IDPs; establishing rules and procedures for the participation of IDPs in decision-making processes relating to their protection and assistance; establishing rules of collaboration and partnership with relevant international agencies including the UN; and conducting other duties necessary for its effective functioning.

42 IDP Model Law art 9(1).

43 See art 9(2) of the IDP Model Law.

Article 10: Termination of international assistance

Article 10 of the IDP Model Law requires that any decision to end international assistance provided to IDPs should be based on an 'effective assessment of the needs' of these persons and the affected communities. This yardstick for the termination of assistance does not appear to correspond to the objective of the IDP Model Law of ensuring durable solutions for IDPs. A more durable solution-inclined yardstick would be for the termination of assistance to be based on an assessment of the sustainability of the protection and assistance provided to IDPs. This is significant given that its focus is on ensuring that IDPs can sustain themselves after international assistance has been terminated. Article 10(2) requires the termination of assistance to be revealed three months before the date of termination. However, a more appropriate time frame should be six months to a year to afford reasonable time to test sustainability. Article 10(3) requires actors providing disaster response to take measures in order to minimise the 'negative impacts' on IDPs and affected population.⁴⁴

Article 11: Safeguarding and relocation procedures during disasters

In line with article 11 of the IDP Model Law, measures taken to relocate persons displaced by disasters must be 'proportionate and necessary', must respect their rights and should be based on consultation of and participation by IDPs.⁴⁵ Although enforcement agencies are required to comply with international human rights standards in relocating IDPs,⁴⁶ the IDP Model Law fails to reference the relevant human rights standards that these agencies must adhere to.

Furthermore, while article 11 also requires that groups affected by disasters should be informed about (a) the disaster; (b) mitigation strategies; (c) early-warnings; and (d) existing humanitarian assistance and entitlements,⁴⁷ there is no explicit obligation that groups should be informed about resettlement and the social services available in resettlement sites. However, states are required to ensure that measures are taken to protect the assets left behind by displaced persons.⁴⁸

44 While this provision within the context of art 10 relates to the termination of international assistance, it is worded vaguely as it does not explicitly provide what negative impacts should be minimised. See IDP Model Law art 10(3).

45 IDP Model Law art 11(1).

46 IDP Model Law art 11(3).

47 IDP Model Law art 11(4).

48 IDP Model Law art 11(5).

3.1.2 Conflicts

The provision in chapter 4 contains three articles relating to the obligations of state and non-state actors, the protection of IDPs and penalties. While article 7 of the IDP Convention incorporates the protection of IDPs in relation to armed conflict, the IDP Model Law expands the notion of conflict-induced displacement to include situations of internal displacement caused by human rights violations and generalised violence, in addition to armed conflict. However, it neither defines these different forms of conflict-induced displacement, nor does it set a threshold for determining when any of the three situations has occurred.

Article 12: Obligations of the government and non-state actors

According to article 12 of the IDP Model Law, ‘competent authorities, armed groups and ... other persons’ are required to respect the international human rights and humanitarian law obligations flowing from the obligation to prevent internal displacement.⁴⁹ However, the provision does not explicitly set out the obligation of these actors in relation to displacement induced by human rights violations, armed conflict and generalised violence.⁵⁰ In the context of armed conflict, for instance, reference to the provisions of article 49 of the fourth Geneva Convention would have provided clarity on the duties of actors.

Article 13: Protection of internally-displaced persons

Article 13(1) of the IDP Model Law mirrors the fourth Geneva Convention by articulating the obligation on parties to displace civilian population only for reasons of military exigency or the protection of civilians.⁵¹

While the provisions of this article seek to emphasise the protection of internally-displaced persons, it rehashes chapter six of the IDP Model Law which focuses specifically on the protection of IDPs, which tends to give

49 IDP Model Law art 12(1).

50 Generally, however, art 12 enjoins ‘all parties’ to desist from attacking settlement sites of IDPs and to respect the rights of IDPs to return to their place of residence. IDP Model Law arts 12(2)-(4).

51 Art 13(2) of the IDP Model Law requires that IDPs should be protected against certain crimes, including rape, genocide, terror, exploitation, forced conscription and starvation. Art 13(3) provides that where displacement occurs, measures should be taken to ensure that those displaced receive satisfactory shelter, health, nutrition, safety and support, and to ensure that they are not separated from their families. Art 13(4) incorporates a significant provision requiring that the property of IDPs should be protected. In line with art 13(5), IDPs must not be relocated unless informed and given options. While art 13(6) requires that the freedom of movement of IDPs should be guaranteed, art 13(7) provides that families must be protected and children must not be conscripted into hostilities. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention) art 49.

the IDP Model Law a verbose outlook. This provision should rather have emphasised situations where displacements in situations of armed conflict will be considered arbitrary and what states should do to ensure that arbitrary conflict-induced displacement is prohibited.

Article 14: Penalties

The IDP Model Law levies punishment on anyone who causes arbitrary displacement by violating the provision of chapter four.⁵² Furthermore, orders given by enforcement agencies may not be used to vindicate arbitrary displacement.⁵³

3.1.3 Development projects

Chapter 5 of the IDP Model Law, which focuses specifically on displacement induced by development projects, has six specific outlining principles and obligations, namely, environmental and socio-economic impact assessment; relocation; protection during project-related displacement; safeguards and procedures during relocation; and effective remedies.

Article 15: Principles and obligations

Article 15 of the IDP Model Law sets out specific obligations of states relating to displacement caused by development projects. While this provision mirrors the relevant provision of the IDP Convention, it does not elaborate on the phrase ‘as much as possible’ as used in the IDP Convention.⁵⁴ Furthermore, the IDP Model Law does not define key terms in the provision of article 10(2) of the IDP Convention, such as ‘feasible alternatives’, ‘consultation’ and ‘information’.⁵⁵ However, unlike the provision of article 10 of the IDP Convention, the IDP Model Law recognises the right of IDPs to resettlement which seeks to afford IDPs legitimate and enforceable claims.⁵⁶

Article 16: Environmental and socio-economic impact assessment

Article 16 of the IDP Model Law seeks to elaborate on the IDP Convention which provides that ‘states parties shall carry out a socio-

52 IDP Model Law art14(1).

53 IDP Model Law art14(2).

54 IDP Convention art10(1).

55 For a discourse on what these should entail, see R Adeola ‘The legal protection of development-induced displaced persons in Africa’ (2017) 10 *African Journal of Legal Studies* 91-104; R Adeola ‘The responsibility of businesses to prevent development-induced displacement in Africa’ (2017) 17 *African Human Rights Law Journal* 244-264.

56 IDP Model Law art 15(4).

economic and environmental impact assessment of a proposed development project prior to undertaking such a project'.⁵⁷ In doing so, the IDP Model Law mandates competent authorities to initiate 'comprehensive and holistic environmental and socio-economic impact assessments'. However, the IDP Model Law, similar to the IDP Convention, provides neither the yardstick for measuring these impacts, nor does it refer to internationally-recognised standards for impact assessments.

To its credit, the IDP Model Law requires that the assessment should comprise 'exploration of alternatives and strategies for minimising harm',⁵⁸ and proceeds to require that the differential impacts of eviction on certain categories of persons, including women, children, the elderly and vulnerable groups, should be taken into account.⁵⁹

Article 17: Relocation

The IDP Model Law incorporates certain guarantees with respect to the relocation of displaced persons in situations of displacement caused by development projects. Relocation may only be undertaken by legally-competent authorities.⁶⁰ Furthermore, prior to relocation, persons bound to be displaced must have access to information regarding the reasons for displacement; the procedure to be followed; compensation to be given and the relocation.⁶¹ While article 17(3) requires that the free, prior and informed consent of displaced persons must be prioritised, it recognises the power of the state to retain 'legitimate enforcement action as measures of last recourse'.⁶² However, the article does not indicate what legitimate enforcement actions entails, given that states often engage in arbitrary displacement which, though not lawful, can be legitimate for political or social reasons. While article 17(9) contemplates the protection of indigenous peoples and ethnic minorities, it avoids the actual usage of the term 'indigenous peoples' in a form similar to the IDP Convention. In line with article 17(10), competent authorities are enjoined to give 'due consideration to alternative plans proposed'⁶³ by IDPs. However, the IDP Model Law does not elaborate on what 'due consideration' entails.

Article 18: Protection during project-related displacement

The IDP Model Law recognises that the dignity and rights of IDPs must be protected during displacement; vulnerable groups must be protected; all

57 IDP Convention art 10(3).

58 IDP Model Law art 16(2).

59 IDP Model Law art 16(3).

60 IDP Model Law art 17(1).

61 IDP Model Law art 17(2).

62 IDP Model Law art 17(3).

63 IDP Model Law art 17(10).

forms of discrimination must be prevented; the property of IDPs involuntarily left behind must be protected; and IDPs must have access to basic services, including food, water and health services. However, while this provision explicitly states specific protective measures that must be afforded to IDPs, it is not specific about the issues resonating from displacement caused by development projects.⁶⁴ Within the context of project-related displacement, two specific provisions that should have been included in line with international human rights standards are the prohibition of demolition of property prior to full compensation, and the provision of adequate notice prior to eviction.⁶⁵ The inclusion of general provisions, while necessary in order to emphasise basic requirements, only rehashes chapter 6 of the IDP Model Law which relates specifically to the protection of internally-displaced persons and generally incorporates the rights of IDPs that should be protected in situations of internal displacement.

Article 19: Safeguards and procedures during relocation

While the title of article 19 of the IDP Model Law indicates that it provides for safeguards and procedures during relocation, it is an exact replication of the provisions of article 17. It is not clear why the drafters of the IDP Model Law deemed it necessary to duplicate this provision. Rather than replicating article 17, this provision should have detailed basic provisions that should be made available to IDPs to ensure adequate relocation. Thus, to the extent that it appears to merely recap article 17, it should ideally be dispensed with.

Article 20: Effective remedies

Article 20 of the IDP Model Law provides for reparation. According to this provision, fair and just reparation must be provided, the assessment of which must be made by competent authorities. However, the IDP Model Law does not define 'competent authorities'. The IDP Model Law further provides for a list of circumstances for which reparation should be made, including 'economically quantifiable damages'⁶⁶ and 'psychological and social services'.⁶⁷ It is also explicitly provided that men and women must be co-beneficiaries of reparation packages and competent authorities must provide 'free legal advisory services for affected indigent persons.'⁶⁸ However, the article does not recognise the peculiarity of ethnic minorities

64 IDP Convention art 10.

65 Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr Miloon Kothari – Annex I – Basic principles and guidelines on development-based evictions and displacement, UN Doc A/HRC/4/18 annex I, 5 February 2007.

66 IDP Model Law art 20(3).

67 As above.

68 IDP Model Law art 20(5).

and indigenous peoples by providing that reparation must be culturally appropriate.⁶⁹

4 Institutional response to internal displacement

One of the notable provisions of the IDP Model Law is its elaboration of a National Co-ordination and Implementation Mechanism on Internal Displacement (National Mechanism) for the implementation of the IDP Convention.⁷⁰

The National Mechanism is mandated with the co-ordination of efforts geared towards the protection of IDPs and is mandated to oversee the implementation of national legislation and to co-ordinate efforts geared towards the management of IDPs.⁷¹ Significantly, the membership of the National Mechanism includes IDPs in addition to government agencies, civil society and humanitarian agencies.⁷²

While the function of the National Mechanism is elaborate, one specific function which the IDP Model Law omits is the interrelationship between the National Mechanism and the regional institutions specifically tasked with implementation in article 14 of the IDP Convention namely: the Conference of State Parties; the African Commission and the African Peer Review Mechanism.⁷³

As part of the National Mechanism, article 51 establishes a National Disaster Early Warning, Preparedness and Management Mechanism.⁷⁴ The significance of this mechanism is the emphasis on the prevention of disaster-induced displacement and the need for appropriate assistance to disaster-induced displacees, which resonates in both the IDP Convention and the IDP Model Law. However, early warning systems are equally relevant in situations of conflicts and development projects. Thus, the function of the mechanism should be expanded to include early warning of conflict and development project-induced displacements.

5 Conclusion

While the IDP Convention provides a regional framework on internal displacement, it does not expound on the modalities for the protection and assistance of IDPs. Hence the relevance of the IDP Model Law. For its

⁶⁹ See Kothari Guidelines (n 65 above).

⁷⁰ Art 3(2)(b) of the IDP Convention mandate states to designate a national organ to co-ordinate activities aimed at the protection and assistance of IDPs.

⁷¹ IDP Model Law arts 50(1)-(13).

⁷² IDP Model Law art 49.

⁷³ IDP Model Law art 14.

⁷⁴ IDP Model Law art 51.

part, the IDP Model Law provides guidance to states and fills the normative gap of the IDP Convention. However, the IDP Model Law contains certain normative weaknesses that need to be addressed for a comprehensive legal framework on internal displacement in Africa. To address these weaknesses, it is essential for the AUCIL to develop a commentary on each of the 63 provisions of the IDP Model Law. This commentary would serve two significant purposes. First, it will further detail what relevant actors should do in the context of the articles in the IDP Model Law and, by extension, the IDP Convention. Second, it will serve to fill the normative gaps that are not specifically contained in the articles. It is proposed that this commentary should be developed together with the African Commission, which has a regional mandate with respect to human rights protection and has developed norms, conducted studies and developed reports relating to various rights contained in regional human rights instruments.

As the essence of the IDP Model Law is to serve as a normative guide for states in the development of national laws and policies on internal displacement, it is important that concrete regional advocacy strategies be developed following the adoption of the IDP Model Law. These advocacy strategies should be geared towards sensitising states and relevant actors on the IDP Model Law and providing national parliaments with blueprints for the localisation of the IDP Convention in line with the IDP Model Law. As the AUC is tasked with the mandate of realising the commitment of member states to align domestic laws with international legal standards, it is important that the AU Commission performs a lead role in the process. In this regard, the consultative strategy of the African Commission's Special Rapporteur on Access to Information in the promotion of the Model Law on Access to Information for Africa can be adopted as good practice.

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