CHAPTER 1

INTRODUCTION

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 governance[3] 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_Acess_to_Infomation.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.