CHAPTER 7

THE SUDANESE ACCESS TO INFORMATION ACT 2015: A STEP FORWARD?

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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 Cabinet[27] 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 it 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 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.