

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

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### 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)<sup>1</sup> 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,<sup>2</sup> 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,<sup>3</sup> 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)<sup>4</sup> and article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> 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.<sup>6</sup> 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](http://www.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;<sup>7</sup> 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'.<sup>8</sup> 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'.<sup>9</sup> 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'.<sup>10</sup> 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.<sup>11</sup> 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](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](http://www.africancommission.org/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](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](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.<sup>12</sup> 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,<sup>13</sup> 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:<sup>14</sup>

- (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](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.<sup>15</sup> 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.<sup>16</sup> A sample of some of the principles and content borrowed from the Model Law are highlighted below.

<sup>15</sup> Kenya Foreign Policy, November 2014.

<sup>16</sup> 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 Act<sup>17</sup> mirrors the provisions of the Model Law.<sup>18</sup> Specifically, the provision extends the enjoyment of the right to access information and an obligation to disclose information to both public and private bodies.<sup>19</sup> 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.<sup>20</sup> 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;<sup>21</sup> others, such as South Africa, have adopted the title Promotion of Access to Information Act.<sup>22</sup>

The Model Law provides a guide for the interpretation of Access to information laws.<sup>23</sup> This approach has been adopted by the Kenyan law, which contains provisions for an interpretation based on a duty to disclose information.<sup>24</sup> 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.<sup>25</sup> In addition, similar to the Model Law, this provision also seeks to provide a framework for accessing information<sup>26</sup> and to protect whistle blowers who release information of public interest in good faith.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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’.<sup>30</sup>

Principles of proactive disclosure contained in the Model Law<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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’.<sup>35</sup> 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.<sup>36</sup> This affirms the principle of maximum disclosure,<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

Additionally, the Kenyan law recognises records management as a critical and important component of facilitating access to information. Based on the Model Law,<sup>40</sup> the law obligates public bodies to maintain and manage records to facilitate the right of access to information.<sup>41</sup> 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](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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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*.<sup>45</sup> 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:<sup>46</sup>

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 earlier<sup>47</sup> and found in both the Model Law and the Kenyan law:<sup>48</sup>

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,<sup>49</sup> 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.'<sup>50</sup>

The judge specified, as does the Model Law,<sup>51</sup> 'that a requester should not have to show any particular interest or reason for their request',<sup>52</sup> 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'.<sup>53</sup>

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'.<sup>54</sup> 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'.<sup>55</sup>

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.<sup>56</sup>

This is consistent with the Model Law section on exemptions and public interest override.<sup>57</sup>

## 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.'<sup>58</sup>

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,<sup>59</sup> 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'.<sup>60</sup> 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',<sup>61</sup> which in itself guarantees the right of access to information to all persons.<sup>62</sup> 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,<sup>63</sup> 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.