FREE ACCESS TO THE LAW IN AFRICA

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Rule of Law and the Sustainable Development Goals

In the words of Geraldine Fraser-Moleketi:

> "Law, legal and judicial institutions are crucial to reducing poverty, strengthening social and economic equality, and achieving human security and development, and they should therefore be people centred. In that regard, rule of law, accessible legal and judicial institutions, and a legally empowered citizenry facilitate the enjoyment of social, economic and political justice and its benefits should be all inclusive and sustainable. Such an understanding helps to ground law and justice considerations in a sustainable human development agenda."[3]

In September 2015 the world agreed on a new sustainable development agenda. Countries, including many African countries, adopted the Sustainable Development Goals - a set of goals to end poverty, protect the planet, and ensure prosperity for all.[4] The Sustainable Development Goal 16 seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. The United Nations introduced Goal 16 in recognition of the fact that the rule of law and development "have a significant interrelation and are mutually reinforcing, making it essential for sustainable development at the national and international level."[5] Yet, the rule of law is hardly achievable if one does not have access to the law of the land. If the justice sector is not equipped to gather, critically analyse, apply and provide feedback on public policy and law, SDG16 cannot be attained.

In this regard, free access to law is vital to achieving the Sustainable Development Goals. It can provide for greater economic opportunity, ensure equality before and during the legal process, and reinforce the rule of law. We need to do a lot more to secure free access to law in Africa.

Access to the Law Affects the Justice Sector and Development

The arguments for free access to law have always been strong. The State needs access to its laws to function, the citizens - to know their rights and obligations, the lawyers - to advise their clients, and the media - to scrutinise the actions of those that govern. Accessing national laws should not be difficult, but in many African countries this is not the case. Resource constraints have left large gaps in the published law of many African nations. Judges, government officials, private lawyers, academics and students often do not have any access, even commercial, to the law of their land.

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3 G Fraser-Moelekti "Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices" *UNDP* (April 2013) iv.

4 A/RES/70/1 (21 October 2015).

5 "Goal 16: Promote just, peaceful and inclusive societies" *United Nations* (2016) available at http://www.un.org/sustainabledevelopment/peace-justice/ (last accessed: 19 November 2016).

Lack of access to the law disempowers citizens. Without public access to information it is difficult for citizens to know and protect their fundamental rights. Furthermore, it defeats transparency in judicial and government business. Without checks and balances on public power, a country cannot have effective institutions, thus threatening access to justice.

When the legal sector is unable to access and apply the relevant law to civil, criminal or commercial disputes, the rule of law is fundamentally undermined. When judges, magistrates, lawyers and government officials are restricted in their ability to access the consolidated statutes or relevant neighbouring countries' laws, one cannot claim to have a responsive justice sector.

A responsive justice sector is also a predicate for sustainable economic development. In 2016, the World Bank drew links between social and economic progress on one hand, and the rule of law and the effective protection of rights on the other. According to its Doing Business 2016[6] report, efficient and timely judicial systems are crucial for enforcing contractual obligations, which enhances the efficiency of market systems. Countries with better regulatory and enforcement systems are countries that have better developed credit markers, rank higher in overall development indices, and foster climates that facilitate the rapid growth of small firms. They are also able to attract foreign investments and secure tax revenues.[7]

Efficient legal institutions and a transparent judicial process are absolutely necessary to the efficiency of markets. While different elements may account for the transparency of any judicial system, it is noteworthy that the report, writing in the context of commercial disputes, observed that when countries make court judgments publicly available, citizens are encouraged to rely on existing case law and judges can develop the law consistently. This in turn enhances the "transparency and predictability" of the legal system.[8] Businesses are incentivised to invest because they are able to ascertain the scope of their rights by accessing publicly available court judgments. The report cites two examples to drive the point home. Singapore and South Korea have developed two of the most automated and efficient court systems in the world. Appositely, the report notes that both countries promote "judicial transparency and the development of consistent case law through the online publication of judgments rendered at all levels".[9] Unfortunately, it could only find two countries in sub-Saharan Africa that do this, out of 42 of the world's economies that do so through online publications or by publicly available gazettes.[10] These observations emphasise the importance of access to legal information in today's globalising market.

The World Bank Group is not the only entity to highlight the connection between having an accessible and predictable legal system and growing a healthy economy. There is also a salient political dimension to the growing awareness around the importance of accessible legal systems. Political actors should see the economic benefits of a well-documented legal system, and use it to garner the necessary political will and economic resources to make it happen. This would, in turn, be an important step within the broader context of sustainable development and building stable, inclusive societies.

6 "Doing Business 2016: Measuring Regulatory Quality and Efficiency" *World Bank* (2016).
7 *Id*.
8 *Id* 95.
9 *Id* 96.
10 *Id* 95.

Investors avoid investing in countries that lack a transparent judiciary or clear legislative framework. They prefer operating in jurisdictions with effective and transparent legal systems that can easily deal with issues like enforcing contracts or securing property rights. Goal 16 clearly expects effective, accountable and transparent governance, compliance with laws and regulations, no corruption and public access to information in a country.

Public access to legal information should be prioritised as legal information provides the critical infrastructure needed to successfully implement many of the Sustainable Development Goals.

State of Access to the Law in Africa

It is difficult to access basic legal materials in the majority of African countries. Judgments, even those of the highest courts, are not regularly published. If cases are published, it is usually through hard copy law reports which are only available at court libraries in the major cities. These can be difficult to reach by both lawyers and judges. Where available, purchasing a full set of law reports is prohibitively expensive for many young lawyers. Bound law reports tend to be significantly out of date; sometimes by many years. Lawyers and judges find it hard to confirm that the cases in them are still good law.

The situation is even worse in respect of statutory materials. Gazettes are almost never published online and the print circulation is often so low that even government libraries are unable to purchase copies and maintain comprehensive collections. Collections of consolidated statutes tend to be very far out of date, except for countries like South Africa, Kenya and the Seychelles. Even if a lawyer or judge does have access to a physical edition of collected statutes, she will have no easy way of knowing which sections of the statutes have been repealed or amended.

The difficulty in accessing law is illustrated by real cases. Precedent is the cornerstone of every common law jurisdiction, yet precedents are unlikely to be available in their original form. In a 2009 case, *Masangano v Attorney General and Others*,[11] the Malawi High Court refers to a landmark case (*Moyo*) decided earlier the same year in the same Division. The *Moyo* judgment was never published; the public law reporting in Malawi had been stalled for years and the electronic reporting of judgments was in its infancy.[12] Judge Mzikamanda resorted to an unorthodox method of supporting his judicial reasoning: he referred to the Southern Africa Litigation Centre's blog as a source of information on the *Moyo* judgment. Although unorthodox, the report was an accurate one. The judge, in this instance, was able to source supporting legal precedent, but he should not have needed to depend on an advocate's publication to reference important precedent. This story illustrates how adjudication in Africa is compromised and diminished by the absence of a credible, current and comprehensive publication of court judgments.

Judges, legal practitioners and government lawyers are required at all times to be aware of new developments in law. Yet this is not always possible. An AfriMAP research cites a senior Zambian

11 *Masangano v Attorney General and Others* (15 of 2007) [2009] MWHC 3 (an important Malawi prisoners' rights case).

12 Today the Malawi judiciary, with significant help from development partners, has resumed publication of printed law reports, which now appear with satisfactory regularity. Additionally, the MalawiLII website provides electronic law reporting, thanks to a joint effort of the Malawi judiciary and the Malawi Law Society. This is available at http://www.malawilii.org (last accessed: 19 November 2016).

legal practitioner, who has been at the Bar for 36 years, who stated that even adjudicators are sometimes unaware of new legislation. She described a time when a court had to adjourn proceedings in order to enable her to acquire, for the judge, a copy of the Anti-Gender Based Violence Act enacted in April 2011. The problem also affects magistrates in rural provinces, who at the time did not have copies of the Penal Code and the Anti-Gender Based Violence Act.

In Ghana, the Supreme Court ruled on the important matter of elections.[13] It did so without the benefit of being able to obtain a piece of legislation which regulates the district elections in Ghana. The Supreme Court in its judgment said:

> "...there was reference to a C. I. 78 which, it was contended, could, before the coming into force of C. I. 85, govern the commencement of the upcoming District Level Elections, slated for 3/3/2015. The reference to the said C. I. 78 proved illusory as its existence cannot be fathomed. This mysterious legislation is not even listed in the manual of the Electoral Commission entitled Electoral Laws."[14]

Constitutional Instrument 78[15] has a Gazette notification date of 4 September 2012 and date of entry into force of 3 October 2012. This case outlines the extent of the problem in Ghana: the Supreme Court did not have access to a statute that could be dispositive on the outcome of an election.

While access to the law is important for an efficient, fair and progressive judicial system, and all the benefits that this entails for citizens and business, it is also important for informing citizens about the work of courts, parliament and other government departments. Transparency ensures quality. To draw an academic parallel, writing improves when it is closely scrutinised and the quality of the opinion analysed critically. In addition, the legal community has a duty to elucidate the meaning of legal developments for intermediaries and the general public. Journalists are some of the most important intermediaries between legal institutions and the general public.

In the early days of free access to law in South Africa, an interesting case involving a high profile judge was unfolding in the Gauteng High Court.[16] Media, while allowed to hear the ruling delivered in open court, were denied access to the actual judgment and court documents relating to the case. This resulted in incorrect media reports of the outcome of the case. The public did not know the actual outcome until the Southern African Legal Information Institute (SAFLII), obtained and published a copy of the judgment. SAFLII alerted its users and the media to the availability of the judgment. At the time, this was the only place where members of the public could obtain and read it. The Independent Online newspaper later that day wrote:

> "The case has been shrouded in secrecy and Judge Mojapelo removed the court file - a public document - from the court registry for weeks, blocking media access to the file. After repeated requests by the Saturday Star and its lawyers, court officials finally allowed brief access - but only after the hearing was over. A court official allowed access for only '20 to 30 minutes', and refused permission to photocopy any documents in the thick file.

13 *Mensah v Chairman, Electoral Commission and Others* (Writ No.JI/11/2015) (27 February 2015).

14 *Id.*

15 Representation of the People (Parliamentary Constituencies) Instrument (2012).

16 The case in question was *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289.

> Read the full judgment of *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289 (26 September 2008) at the Southern African Legal Information Institute".[17]

A young online law reporting facility was able to inform the media efficiently. More importantly, the availability of this information provided an opportunity for people to engage with and critically examine the reasoning of judges.

Civil society also needs access to legal information. A recent study on the legal information needs of civil society in Zambia, found that civil society organisations, labour unions, and legal practitioners face severe limitations both in terms of access to legal documents (laws, statutory instruments, court judgements, etc.) and the capacity to understand those documents.[18] The authors point out that in Zambia, sometimes the only source of legal information are government institutions. Accessing legal information through this avenue requires physically retrieving it or receiving a paid subscription. The study found that obtaining information in person was a time-consuming bureaucratic task, even for those with legal training who knew exactly what they were looking for. For many others, retrieving legal information can be nearly impossible.[19] Where information was available, such as newly enacted legislation on the Parliament's website, it was not sufficiently well-presented to allow citizens to find the legal information their context required.[20]

Citizens in African countries require consistent, up-to-date, contextually relevant access to the law of their land. The solution requires a concerted effort and commitment from justice sector stakeholders in each country, to institute processes and policies that contribute to better access to their internal legal information. Because of these needs, Legal Information Institutes (LIIs) in Africa began to work with judiciaries and the Southern African Chief Justices Forum a decade ago to open up access to court judgments from the continent.

The Solution

Provision of free access to the law using the Internet has a history nearly as long as the history of the Internet itself, with the first project (named Legal Information Institute) launched at Cornell Law School in 1992. Today the Free Access to Law Movement (FALM)[21] is a collective of free legal access projects from across the world, spanning over fifty members. A quarter of these members operate in Africa.

Legal Information Institutes, commonly known as LIIs, directly publish or facilitate others' efforts to publish freely accessible legal information online. This includes information such as case law, legislation, treaties, law reform proposals and legal scholarship. The Montreal Declaration outlines the defining features of a LII. These institutes:

17 L Flanagan "Hlophe wins one case, but still on trial" IOL (27 September 2008) available at http://www.iol.co.za/news/south-africa/hlophe-wins-one-case-but-still-on-trial-417999 (last accessed: 19 November 2016).

18 M Masson and O Tahir "The Legal Information Needs of Civil Society in Zambia" (2016) 4(1) *Journal of Open Access to Law*.

19 *Id* 19.

20 See M Mason "The Legal Information Needs of Civil Society in Zambia" *AfricanLII* (2016) available at http://www.africanlii.org/blogs/marc-masson/legal-information-needs-civil-society-zambia (last accessed: 19 November 2016).

21 See FALM's website available at http://fatlm.org/ (last accessed: 19 November 2016).

> "Publish via the internet public legal information originating from more than one public body;
> Provide free and anonymous public access to that information;
> Do not impede others from obtaining public legal information from its sources and publishing it".[22]

The Montreal Declaration defines public legal information as "legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding."[23]

Legal Information Institutes have been operational in Africa for over a decade, with pioneering efforts in Zambia, South Africa and Kenya. During that time LIIs have overcome challenges and provided:

a) Current legal material – this means judgments handed down within the past week as well as the most recent legislation passed by parliaments;
b) Integrity – any user accessing information from the LII must be assured of its completeness and accuracy, as that information is usually sourced directly from courts or Government Gazettes; and
c) Level of comprehensiveness of legal information that makes the collections useful to researchers in-country and regionally.

The Southern African Legal Information Institute (SAFLII) started off as a pilot project at the University of the Witwatersrand in 2003.[24] In 2006, SAFLII moved to the Constitutional Court of South Africa. The Court and the Southern African Chief Justices Forum sought to develop SAFLII into a regional website that would publish courts' decisions and assist in regional legal research.[25] With the firm support of the Chief Justices, the SAFLII team went in-country in several jurisdictions and scanned archives of judgments, placing them immediately on the Internet to be accessible without any restrictions. What started as a centralised operation, later transformed into a capacity-building initiative called the African Legal Information Institute (AfricanLII).[26] It helped courts create a standard-compliant collection of materials that were then made publicly available. Today, LIIs operate in Namibia, Swaziland, Lesotho, South Africa, Zambia, Zimbabwe, Malawi, Uganda, Seychelles, Sierra Leone, Liberia, Ghana and Nigeria. Although they are at different stages of operation, they all affirm the principle that legal information should be accessible.

22 *Montreal Declaration on Free Access to Law* (2002) available at http://fatlm.org/declaration/ (last accessed 19 November 2016).

23 *Id.*

24 "About SAFLII" Southern African Legal Information Institute, available at http://www.saflii.org/content/about-saflii-0 (last accessed 19 November 2016).

25 See BJ Odoki CJ *Speech at the Opening of the Conference of the Southern African Judges Commission* Entebbe, Uganda (4 February 2005) available at http://www.venice.coe.int/SACJF/2005_02_UGA_Entebbe/rep_odoki.htm (last accessed: 19 November 2016); see also Constitution of the SAJC (2005) available at http://www.venice.coe.int/SACJF/Basic_texts/SACJF_Constitution.pdf (last accessed: 19 November 2016).

26 See website available at www.africanlii.org (last accessed: 19 November 2016).

Policy and Standard Issues of Access to Legal Information

The requirement that all laws must be made public pre-dates printing. Town criers ensured that the word of government reaches the common people. Similarly, the open court principle recognises the right of citizens to attend court hearings and obtain records of court cases. Modern access to information legislation mandates that government should generally make information available to citizens. In addition, copyright regimes usually exclude legislative, policy and judicial documents, proclaiming them free of copyright. The law is unequivocal: access to the law should be open. But, there may be restrictions.

Standards

Electronic access to legal information should conform to the universal standards which protect access to information. In addition, this access should take into account the peculiarities of legal research and the information necessary to properly conduct it. Judicial institutions around the world have strategically pursued these standards.[27] Our view is that courts in Africa, where they have not, should adopt and apply the below standards in their dissemination strategies.

Comprehensiveness

Legal Information Institutes have employed the vast powers of Information Technology to publish law in Africa. This has meant that, unlike print operations, LIIs are not constrained by capacity restrictions. LIIs can publish comprehensive legal information; reportable and non-reportable judgments. They can all be published online, irrespective of their research value. This ensures that LIIs serve not only research, but also transparency purposes. Where possible, LIIs publish judgments from the lower courts, to allow the full history of a case to be accessible: from the lowest court, to the final, appellate jurisdiction. This ensures that the public is presented with a full record of the case, and allows lawyers to understand and scrutinise the reasoning in overturned lower court cases.

Authoritativeness

LIIs source materials directly from the court, tribunal or legislative body producing the information whenever possible. Scanned copies of the printed material are provided online, alongside the web version, to assure the users that the information is complete and untampered. Furthermore, judgments are posted in their original language. Whenever a translation is made available, it is clearly indicated in the text of the posting.[28] Should the court issue subsequent corrections of a judgment, this is usually indicated in the body of the document to ensure users can track changes over the course of the life of the document.

27 For example, the Canadian Judicial Council includes an active Information Technology Advisory Committee, see website available at http://www.courts.ca.gov/itac.htm (last accessed 19 November 2016).

28 See for example the SAFLII collection of translated Afrikaans judgments, available at http://saflii.org/za/other/ZAENGTR/ (last accessed: 19 November 2016).

Currency

LIIs in Africa work with government departments to ensure that the most current legal information is published online. Because legal documents today are mostly produced in word processing software, it is usually possible to quickly and cheaply disseminate the information. Some LIIs, such as SAFLII, have achieved a standard whereby judgments from the top courts are processed and posted on the website within two hours of receipt from the courts.

Citation in the electronic environment

The legal profession relies on authority (case-law and legislation) and persuasive secondary legal literature (scholarly works, preparatory works, dictionaries, etc.) to build and present legal arguments. The core purpose of case law citation is to accurately identify a judicial opinion or a part thereof.

In traditional law reporting, case citations do not reflect information about the case itself, but rather identify the year, volume and page number of the law report that contains the judicial opinion. References to specific parts of a judicial opinion (pinpoint referencing) are also in general based on the page number and the paragraph letter.

The digitisation of the judicial opinions allows courts to make judgments available immediately through the Internet or other media, in comparison to commercial publishers who may take months or years to publish a judgment in the law reports. While the greater accessibility of judicial opinions is a positive development, the legal profession and the media still need a reliable method for referencing such electronic decisions. Substitutes for the commercial publishers assigned citations and for page numbers must accompany such judgments.

A survey of international practices in this regard shows that courts have taken steps to address these issues by introducing Medium Neutral Citations (MNC) and paragraph numbering within the final versions of judgments.

MNC allow a resource such as a judgment to be cited irrespective of its publishing medium. The MNC serves as a permanent unique identifier assigned by the author of the judgment and should remain associated with the judgment wherever it is published in various media or publications. The MNC standard, together with paragraphing of judgments, has now been officially adopted by many courts in Southern Africa. The availability of judgments on the Internet has spurred this development. This citation standard is also rapidly being adopted by judges, who use MNC interchangeably with print citations.

Privacy of personal information in judgments

Judgments should be accessible to the public. Justice Spigelman AC, Chief Justice of New South Wales, stated:

> "The fundamental rule is that judicial proceedings must be conducted in an open court to which the public and the press have access. A court cannot agree to sit in camera, even if that is by the consent of the parties. The exceptions to the fundamental rule are few and are strictly defined."[29]

29 JJ Spigelman "The Principle of Open Justice: A Comparative Perspective" (2006) 29 (2) *UNSW Law Journal* 147, 151.

Many rules of procedure have arisen from this requirement of open and public justice. One in particular has highlighted the conflict between open justice and privacy: the principle that judicial accountability requires publication of the reasons for a decision. The rule requires publication not only to the parties but to the public.

In *S v Mamabolo*,[30] the South African Constitutional Court noted:

> "Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately such free and frank debate about judicial proceedings serve more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the more important aspirational attributes prescribed for the judiciary by the Constitution."[31]

This affirms the view that the public's access to court proceedings is vital for democracy and a vital check on the public powers of the judiciary. However, the right to know is limited in certain circumstances. As Van der Westhuizen J (as he then was) drew the line at information that is private:

> "It is a well-known principle in our law and public life that, proceedings before this court should take place in public. [...] The principle and the ideal of a public hearing should not lightly be departed from. The Prinsloos' case is by no means special, as argued by counsel for the applicant. Intimate personal details are often disclosed out in courtrooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done. It is not uncommon for a nervous, embarrassed and emotionally fragile plaintiff in a divorce court to have to explain under oath in a courtroom filled with a large number of onlookers, how a spouse committed adultery or how alcoholism, drug abuse, family violence, or even incest wrecked a marriage, and for the victims of violent crime to have to explain in front of the public and the media how the death, rape or mutilation of oneself or a loved one, such as a child, was experienced and how it may have ruined people's lives. In this case aspects of the private lives of the Prinsloos - and of course the previous litigation - have already been the topic of sensational reporting for a considerable time." [32]

With the advent of electronic law reporting, private facts and personal data are no longer protected by the practical obscurity the archive of the court's registry provides. The law places obligations on judges, publishers and lawyers with respect to personal, confidential, secret or sensitive information. Although regulations differ from jurisdiction to jurisdiction, it is clear that judges, lawyers and litigating parties should all exercise care in allowing certain details into the public domain. The first line of defence is drawn by judges, who write judgments and detail only the information that is absolutely necessary to deliver a properly reasoned judgment. It has also

30 *S v Mamabolo* (CCT 44/00) [2001] ZACC 17.

31 *Id* para. 29.

32 *Prinsloo v RCP Media Ltd t/a Rapport*, 2003 (4) SA 456 (T) 462.

meant that courts participating in the LII programme have had to develop privacy protocols and circulate redacted judgments for use beyond the court's system and for publication purposes. This is the practice at the Supreme Court of Appeal in South Africa, the Constitutional Court of South Africa, as well as many courts in non-African foreign jurisdictions with established electronic law reporting facilities.[33]

Practice has shown that electronic law reporting is usually welcomed by African judiciaries. However, the use of the technology needs to be properly regulated. It is counterproductive and contrary to the public benefit, the principles of open justice and the rule of law, to use privacy and secrecy concerns as a pretext to suppress information. AfricanLII has recommended that judiciaries and law publishing operations in Africa continue to update their privacy protocols to ensure the ethical and legal dissemination of legal information, in a way that protects the rights and freedoms of the very African citizens it aims to inform.

Conclusion

Government, development partners, NGOs and business are all coordinating and participating in various actions leading to the promotion and achievement of the targets of Goal 16. Chief among those is the need to strengthen relevant national institutions in the justice sector - the judiciary, law society, and legal academia. This can be accomplished through international cooperation to build capacity at all levels to sustain the rule of law. All of these programmes require clear, accessible and widely available legal information. Legal information is a critical piece of infrastructure required by the justice sector to function according to the tenets of democratic governance and the rule of law. Legal Information Institutes provide a tested and proven method for public free access to legal information in Africa.

33 See "Use of Personal Information in Judgments and Recommended Protocol" *Judges' Technology Advisory Committee, Canada* (2005).