

AfricanLII – An Approach to Developing Free Access to Law in Africa

Kerry Anderson

Mariya Badeva-Bright

Tererai Mafukidze

Context and background

The effort to provide free access to law via the Internet began with the establishment of the Legal Information Institute at Cornell Law School in 1992. Many Legal Information Institutes (LIIs) have been established since, loosely organizing in the Free Access to Law Movement. LIIs are independent Internet-based legal information providers, most often associated with an academic institution, and less frequently under the aegis of a court or independent trust. Some (notably in Australia, Canada, and Kenya) provide comprehensive access to all primary legal information in the country; others are more research-oriented, or specialize more narrowly in the materials they provide. In general, LIIs have been successful in leading by example, directly and indirectly shaping positive action by the creators of legal information to open up primary sources to the public at no cost. They exist under a variety of business and governance models, but it is fair to say that in recent years there has been increased emphasis on entrepreneurial models, sustainability, and rigorous self-evaluation as part of the basic structure of LII operations.

Access to Law in Africa: A major challenge

Access to law is important to civil society, the rule of law, and to the economic life of everyone in the region, but law is hard to get in Africa. In his book, *The Rule of Law*,¹ Lord Bingham discusses various principles that make up the common legal aphorism ‘Rule of Law’. He notes that one of the most important principles is the

¹ Tom Bingham, *The Rule of Law*, Penguin Books, 2010

accessibility of the law: *'The Law must be accessible and so far as possible intelligible, clear and predictable'*.

Lord Bingham justifies this principle of the Rule of Law on three grounds in the following words;

1. 'First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty.'²
2. 'If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations.'³
3. The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where parties' rights and obligations were vague or undecided.'⁴

The reasons vary from place to place. In some, there has never been a timely means of publishing judicial opinions, legislation, and policy documents. In others, access is late in coming or prohibitively expensive. Legal Information Institutes – open-access legal information publishers – promise free access for all; but structuring, starting up, and maintaining LIIs each pose complicated contextual challenges. The AfricanLII has been set up with the specific purpose of developing and supporting a sustainable community of African LIIs.

In Africa, real cases illustrate the problem of access to law. Precedent plays an important part in the legal system. Precedents are often binding and are the law. Access to precedents is central to the administration of justice. They ensure that there

² At page 37

³ At page 38

⁴ Ibid

is certainty in the law. They ensure that the judicial officer performs his or tasks in accordance with the law. In his seminal paper "*Why Write Judgments?*" delivered to an *Australian Supreme Court Judges' Conference*, **Sir Frank Kitto** notes:

"The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

In addition, precedent ensures that many unnecessary appeals are averted. Precedents represent a deliberate and organic development of the law. And yet precedents are often unavailable in their original form.

In *Masangano v Attorney General & Others* – an important Malawi prisoners' rights case decided in 2009 – the 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 stopped years ago and the electronic reporting of judgments was at the time in its infancy. Judge Mzikamanda resorted to an unorthodox method of supporting his judicial reasoning: he referred to the Southern Africa Litigation Centre's (SALC) blog as a source of information on the *Moyo* judgment. Happily, that report was an accurate one, even though SALC was reporting its role as an advocate and not the reasoning of the court. Even a story with a happy ending shows that adjudication is compromised and diminished by an absence of credible law reporting.

The African scenario has played itself in other parts of the world in some degree. It was once so desperate for the Court of Appeal of England and Wales to distribute a judgment that clarified a point of procedure that had caused a lot of confusion countrywide that it opened its 1997 judgment with this wish;

"The text of this judgment is to be made available immediately on the Internet. If this country was in the same happy position as Australia, where the

*administration of the law is benefiting from the pioneering enterprise of Australian Legal Information Institute (AUSTLII), we would have been able to make this judgment immediately available in electronic form to every judge and practitioner in the country without the burdensome costs that distribution of hard copies would necessarily impose"*⁵

Judges, lawyers, government, and the public all need comprehensive, accurate sources of primary legal materials meaningful access to law and justice. LIIs can, and have, provided those sources, but much remains to be done. Judgments of courts are law in countries that base their legal systems on precedent.

In now turn to economic benefits.

Legislatures, ministries, and regulatory agencies affect civil society and economic life in every sector in every country. A review of the *World Bank 2011 Report* on the ease of doing business in African countries juxtaposed with a view of the current availability of legal information in those African countries is striking. Although existing LIIs in Africa provide access to case law from Southern and East Africa, free access to legislation is still sparsely available for countries in this region. Legislation is more difficult to collect and consolidate due to the lack of government policies and the general lack of consolidated collections. Case law and legislation as free electronic resources are largely unavailable from West, Central and North Africa. South Africa has the most up to date commercially published law reports due to the stable internal demand. Namibia and Botswana also publish law reports but they are behind by about 2 years and the financial difficulties of recent years have made the future publication uncertain. The rest of the countries in Southern and East Africa (excluding Kenya) have years if not decades of unpublished legal precedent. Nearly all of the criteria that the World Bank uses in ranking the quality of economic life and the environment for business could be substantially affected for the better by wider availability of primary legal materials. Improved economic potential together with a society in which the rule of law is an accepted cornerstone of democracy ultimately

⁵Per Saville LJ, **Bannister v SGB plc and Ors and 19 other appeals** [1997] EWCA Civ 1524 (25th April, 1997)

promotes an environment of creativity, innovation, peace and prosperity for all citizens.

In order to reach citizens in African countries, LIIs must also consider local distribution constraints. For instance, bandwidth and infrastructure expense and unreliability limit the utility of an exclusively Internet-based distribution strategy for African LIIs. Whereas Internet penetration is at 10.9% (although it must be noted that use growth between 2000 and 2010 was 2,357.3%),⁶ Africa has become the fastest growing mobile market in the world with mobile penetration ranging from 100% to 30%.⁷ A recent example of the significant role mobile devices play in affording access to the Internet was provided by a young student of law at the University of Namibia: the student contacted SAFLII (the Southern African LII) to comment that – although the service SAFLII was offering was excellent – that problems of accessing the Internet from the University had caused him to rely on his mobile phone to access the Namibian precedent he required for his research. SAFLII subsequently created a mobile phone ready version of its website. In recent years, Zimbabwe, where Internet and mobile access is currently highly unreliable, a DVD distribution strategy has been successfully implemented. Demand for DVD products has grown, but as a strategy, this is not going to be encouraged. The emergence of Zimbabwe Legal Information Institute (ZimLII) will encourage more and more people to use internet based resources.

Solution

LIIs – open-access providers of caselaw, statutes, regulations, and policy documents – can solve these problems in both civil- and common-law countries. In South Africa and Kenya, they are well on their way to doing so. AfricanLII believes that a two-tiered regional approach is the best way to foster open access to law throughout Africa. A system of national LIIs, supported and advised by an umbrella organization

⁶ <http://www.internetworldstats.com>

⁷ <http://www.developingtelecoms.com>

(AfricanLII), provides unique possibilities for incubation, and ultimately a clear path to sustainability and long-term success.

Tier 1: AfricanLII

AfricanLII will establish itself as the regional partner for new and existing LIIs in Africa, acting to develop and support a community of African LIIs. All new LIIs when established have access to the wealth of experience and skills offered by other members of the Free Access to Law Movement. The AfricanLII will also filter and contextualize this knowledge into communities of practice geared specifically towards the needs of African National LIIs.

AfricanLII is already taking an active role in the establishment phase of each national LII, providing advice and monitoring activities to see where help is needed. As each LII becomes more adept at its work, the AfricanLII role will become less one of direct intervention and more that of a partner in creating sustainable activities involving others in the region. Specifically, such umbrella organization must, in the long term, avoid being seen in the role of a broker for financial support, as the resulting internal competition would be disruptive; it is better for AfricanLII to help others help themselves.

As an umbrella organization designed to help all African LIIs, the AfricanLII will be in a position to:

- a. Monitor the establishment of new LIIs as well as their ongoing work, intervening where necessary to address challenges based on the experiences of the AfricanLII to date in setting up LIIs in Malawi, Mozambique and Swaziland as well as with the advice and support of the broader Free Access to Law Movement.
- b. Facilitate the cross-regional utilization of resources and services.
- c. Convene workshops, training, and conferences using digital technologies where possible.

- d. Host self-organizing communities in fields of significance to Free Access to Law (such as legal publishing, legal librarianship, technical implementations, fundraising, grant-seeking and marketing).
- e. Provide advisory services in African legal systems, legal information management, information technology, organizational structure, and business development.
- f. Implement regionally-based monetization strategies that create revenue for participating LIIs.
- g. Advocate Free Access to Law and the role of African National LIIs (a particularly necessary but time-consuming activity for all, but especially for startup LIIs)

AfricanLII has determined that the establishment of African National LIIs will include three phases:

1. The identification of required collections and the establishment of document flows for these collections;
2. The establishment of streamlined work processes within the LII;
3. The introduction of sustainability models.

The phases may not be linear in their rollout.

AfricanLII Plans for 2011 – 2013

Country Selections

In its first year of operation (2011) AfricanLII will assist six African countries in the establishment of national LIIs. These LIIs would be selected based on a) the availability of a relatively sophisticated market for the LII and related services; or b) the opportunity for regionally-focused value offering; or c) geographically strategic positions on the continent. Countries which will be approached in 2011 for candidate LIIs are Lesotho, Rwanda, Seychelles, Zimbabwe, Burkina Fasso, Niger and Uganda.

This initial selection will be confirmed by the end of June through country visits, the hosting by AfricanLII of a conference for key stakeholders and the compilation of a report detailing opportunities and challenges for each new LII.

At the beginning of the second year, there will be an evaluation project based on the LIIs selected from the first stage. Over the course of the next two years, an added cadre of 18 proposed LIIs would be rolled out according to limitations of budget and resource availability of the AfricanLII. At present, the proposed candidate countries for the establishment of LIIs are: Botswana, Burundi, Cap Verde, Guinea-Bissau, Côte D'Ivoire, Democratic Republic of Congo, Ghana, Ethiopia, Liberia, Mali, Mauritania, Mauritius, Madagascar, Nigeria, Senegal, Sudan, Tanzania and Zambia.

AfricanLII will also continue to engage with and provide a forum for mutual support to established African LIIs, such as SAFLII, MozLII, ULII, MalawiLII, NamLII, Kenya Law Reports and SwaziLII.

New LII roll-out

Content collections and workflows

The initial reports on the selected countries will include an assessment of the availability of content collections and recommendations for the initial content workflows.

The establishment of streamlined work processes with the LII:

From past experiences of working with the courts and legislature in African countries, it is clear that one of the biggest challenges facing a new LII is ensuring timeous flows of new judgments from the courts and legislation from the legislature. In many courts, there exists only a small number of computers, with no or limited internet access. Many of the computers are not networked. The skills to use the computers for effective document preparation are in short supply or simply absent. In one instance,

the court prepared judgments on a computer but deleted the document immediately after printing. In other courts, judgments are still prepared by hand. There is seldom a process for the centralized storage of documents. The AfricanLII will work with key stakeholders to address these challenges.

The introduction of sustainability models:

African National LIIs already established and whose document flows and operations are reasonably well established (NamLII, MalawiLII, MozLII, and SwaziLII) will be used to pilot sustainability models with a review of results in the beginning of the second year. SierraLII has not yet managed to establish consistent document flows therefore the first year will focus on assisting them with this task rather than on piloting a sustainability model. The AfricanLII will itself become a model and potential source of revenue-sharing for African National LIIs through a series of strategies targeted at providing value added services for users.

The AfricanLII will not attempt to roll out a single-template approach in providing services to new LIIs. Each country's unique environment necessitates a customized approach. In assisting new LIIs with their start up, the role of the AfricanLII will be to work with the new LII to accurately assess its environment and assist in defining strategies that will best achieve the goals of the LII. In order to effectively conduct this work, the AfricanLII will leverage its existing partnerships with the Southern African Legal Information Institute (SAFLII) and Kenya Law Reports (KLR) – the two most well-established and well-regarded Legal Information Institutes in Africa.

For example: the AfricanLII is currently working with SAFLII to expand its collections in Swaziland – SAFLII is able to provide funding and human resources to scan historical collections in Swaziland, and the AfricanLII will assist SwaziLII in setting up and maintaining the expanded collections as well as continuing its work with the ongoing monitoring and maintenance of Swaziland; KLR have provided training to MalawiLII on law reporting and are currently working with the AfricanLII on the potential establishment of an LII in Liberia, sharing the results of work they have already done in Liberia to provide advice on the formal structuring of law

reporting; KLR have also been working closely with SAFLII and the AfricanLII on the implementation of the Akoma Ntoso XML standard for presentation of judgments and legislation.

Tier 2: African National LIIs

Each LII will provide:

- a. current material – this means all judgments handed down within the past week from all superior courts as well as current legislation in an unconsolidated format (numbered acts), any consolidations of legislation that may exist as the product of, for example, law reform commissions, bills and preparatory works and the government gazette;
- b. content integrity – any user accessing information from the LII must be assured of its completeness and accuracy;
- c. a level of comprehensiveness to make the collections useful.

The AfricanLII's existing work with establishing new LIIs as well as the work conducted during the Global Study on Free Access to Law⁸ have identified some generic models for the institutionalization of LIIs within existing structures. These structures are universities, law societies and governments (represented by the judiciary or the Ministry of Justice). The models also identify significant and beneficial alliances for LIIs such as: alliances with bar associations and law societies; solid working relationships with the judiciary and parliaments; engagement with NGOs and law firms. The business community is an important partner to the LII both as potential users and as potential investors. If convinced of the public good, they have access to corporate social investment funds which may be used towards the LII. These partnerships will ultimately work to serve the citizenry by ensuring that the LII has access to financial, policy and in-kind support to maintain an environment conducive to creating the best product possible.

⁸ http://www.idrc.ca/uploads/user-S/12754256481Methodology_Guide.pdf

Regional monetization strategies

National LIIs, as well as AfricanLII, are likely to adopt a model of sustainability that draws on several sources of financial support. AfricanLII relies on the success of the regional sustainability activities for support to the smaller markets of some national LIIs. The AfricanLII will need to lead the way in proving that monetization strategies that do not compromise Free Access to Law can be successfully implemented in the region. This will be a significant step in creating an environment in which LIIs are established with a realistic and ultimate goal of self-sustainability. The first initiative undertaken by the AfricanLII at the regional level will be the implementation of the African Lawyer Directory.

Revenue Diversification

The AfricanLII and the LIIs it has helped to establish must, within the first year, have found alternative funders or sources of revenue. The sustainability of the initiatives is immediately compromised if its existence relies on one source of funds.

Relationship Building

The AfricanLII, as an umbrella organization, should facilitate the creation of effective communities of practice for all users of LII information: technical, legal or lay person. The website will host forums for users. The conferences and workshops will provide more conventional channels for information sharing and debates. All technologies will be leveraged by the AfricanLII in order to grow its relationships with partners and other stakeholders.

Advocacy

The AfricanLII is developing an advocacy programme. The programme will include contributions by subject matter experts (such as: Andrew Rens, former legal fellow of the Shuttleworth Foundation and an expert in copyright; Eve Gray, honorary research association at the University of Cape Town and project director of the OpeningScholarship Project). The Advocacy programme will ensure that AfricanLII actively promotes free access to law issues through appropriate channels. So far, this advocacy programme has targeted Chief Justices in the Southern and East African region, lawyer bodies etc. It is cheaper and easier to work with organisations that

operate at a regional level in addition to working with national stakeholder organisations. All pilot visits necessarily involve speaking to bar associations, government officials, civil society, the judiciary and in some cases, parliamentary officials. I must say that the local enthusiasm about our projects has been overwhelming.

Sustainability

Open-access legal information providers have long had sustainability problems stemming in part from the difficulties of generating revenue around the free distribution of any product, and in part because funders have traditionally been more willing to support the establishment of collections than provide for their ongoing maintenance. In recent years, LIIs have begun to experiment successfully with funding models based on the monetization of their websites, the offering of premium services, sale of related services based on core competencies (such as building websites for lawyers), and fundraising from private individuals and corporate sponsors. As with nonprofit organizations in other sectors -- for example, the symphony orchestra that sells both tickets and CDs -- it has been found that this can be done in ways that enhance rather than diminish core mission. In particular, entrepreneurship rests on a continuing, rigorous evaluation of product, processes and performance that is always beneficial.

The ideal combination of revenue-generating activities will vary from locale to locale; some (for example, a pan-African lawyer directory) will make more sense as regional operations undertaken by AfricanLII. But fledgling free-access providers are, by nature, ingenious, entrepreneurial, and committed. It will remain to us to provide structures, methods, and support that will develop those assets into sustainable programs. A competitive process for the selection of candidate LIIs, strict performance-based criteria for re-funding, the use of matching funds to encourage individual LIIs to seek local support, and the creation of governance structures that

result in committed, nimble organizations are all techniques that will help if they are built in from the beginning.

I must add here that it is important that sustainability is not seen in a parochial sense. Sustainability of the institution is not the same as the sustainability of Free Access to Law as a philosophy. If the idea of Free Access takes root, it should not be hard to get support for the institution. Sometimes a fervent and obsessive concentration on simple finances results donors sometimes ignoring the countries that may be poor and in difficulties preferring ones that can sustain institutions. However, the reality is that in the African sector, challenges relating to governance are often negatively impacting on economic performance. The result is that, that countries most desperate for the promotion of the rule of law, access to justice etc may in fact be the least able to afford contributing to these initiatives.

Evaluation

A major component of the AfricanLII project will be the evaluation of the continuous evaluation of the success of the AfricanLII itself and that of the national LIIs. AfricanLII's evaluation framework is based on the one developed for the Global Study of Free Access to Law.⁹

Most Free Access to Law initiatives tend to adopt a common purpose: to benefit society at large by providing free access to legal information. The public's right to know the laws that govern it (and reducing legal insecurity both in economic life and in society in general) is believed to be fulfilled by harnessing the principles of open government and open legal systems. That is achieved by providing widespread access to the law using the technology of the Internet. Benefits may also be somewhat more modest, affecting principally the users of the Free Access to Law initiative's resources, such as improved research capacity and access to up-to-date information. Benefiting society may not be an explicit common goal to all Free Access to Law

⁹ See above

initiatives, but providing free access to law is inevitably a universal Free Access to Law initiative goal. Success, therefore, can be understood in two ways:

1. On the one hand, an initiative can be successful internally. The internal success of these initiatives is defined as “the capacity to adopt practices that allow the initiative to produce the promised outputs”. Essentially, this is the same as asking *did the initiative do what it set out to do?* This definition presents two components for examination: organizational capacity (adoption of practices) and outputs (providing free access to law online). While free access to law initiatives share a lot in common in terms of the capacities they develop to conduct the publication of law for free, different, context-dependent practices are developed by each initiative to achieve context-dependent goals. Therefore, the notion of success of a free access to law initiative cannot simply be related to a list of free access to law assumptions, such as the transparency of the legal system. The notion has to be understood and interpreted based on what each free access to law initiative set out to accomplish.
2. On the other hand, transparency of the legal system, for example, cannot be excluded as a sign of success for an initiative. Success, indeed, can be external. External success relates to “the initiative's capacity to produce positive outcomes”. This definition basically translates into the question: *is putting the law online for free resulting in any measurable outcomes?* Again, two components arise through this definition: outcomes for the users of free access to law, and societal outcomes derived from the use of Free Access to Law. Outcomes for the users, as mentioned above, include improved research capacity or maybe reduced expenditures for legal information products. Societal outcomes derived from the use of free access to law can include elimination of legal insecurity, or an open government and legal system.

As a free access to law initiative matures, it's expected that it will move from (1) organizational success, to (2) successful production of outputs, which leads to (3) outcomes for users and (4) positive societal outcomes as a result. As this process takes place, it is expected that it also change directions: the outcomes shape the outputs, and influence the processes of the organization. This is the beginning of sustainability: as

an initiative is successful in each of these four components, the chances of sustainability are incrementally improved. It is important to highlight, however, that although internal and external outputs and outcomes are distinct in this conceptual model so that they may be evaluated using distinct research methods, success must truly be understood as a holistic concept. Success components will be investigated separately, but evaluated comprehensively.

Qualitative Evaluation

For evaluation purposes, the success components thus described will be annually evaluated qualitatively through a series of interviews with project team members of all Africa based LIIs and through feedback mechanisms (such as polls and online questionnaires) distributed to users.

Quantitative Evaluation

Quantitative evaluation of the success of the Free Access to Law initiatives will be used to substantiate the qualitative data collected through interviews and questionnaires.

Organizational Success

Organizational success metrics will take the form of two main components: 1) quantity, and 2) quality of the collections. It is a reasonable assumption that the initiative's capacity to deliver is also indicated by these two components. The metrics will be substantiated for relevance to the community it serves by website utilization statistics.

Quality: key indicators are the number of databases and the number of documents available. Each initiative will be assessed for the number of databases online by the end of September 2011; the increase in the number of databases since October 2010

or – if the initiative did not exist – the number of databases at initiative launch. Similarly, the initiative will be assessed for then number of documents per database available by the end of September 2011; the increase in documents since October 2010 or since the initiative’s launch.

Quality: key indicators are: whether – or to what extent - the initiative has achieved the goals it set itself at inception (these are individual goals set per initiative and are encouraged to have a metric component); comprehensiveness of collections measured against available material such as law reports and government gazettes.

Website utilization statistics: since the website collections exist to serve the information purposes of its users, it is evidently insufficient to have collections that are not being used. Utilization statistics will be gathered that indicate: the most used collection on the website and by whom they are being used (lawyers, universities, government, international, national); increase in number of unique visitors to the site over the funded period or since initiative inception; and provenance of access.

External Success

External success of the initiatives can be measured by the societal outcomes derived from the use of the initiative by Legal Education, Policy and Law making institutions. This is an abbreviated list of potential beneficiaries of Free Access to Law since all the manifestations of societal improvements are not understood in a way that would currently support the gathering of quantitative metrics. For example, since there are no clearly established metrics for measuring changes in the transparency of the legal system and Rule of Law or changes in the efficiency of the judiciary, these will be evaluated qualitatively through the interviews and questionnaires alluded to in the previous section.

Quantitatively, we can review academic course materials to see if the initiative is included in the distributed course materials for students or registration of the faculty on the initiative’s website (all registration is voluntary); website utilization statistics can also be assessed for searches indicating comparative research. Policy and law

making institutions will be asked to provide inputs to formal quantitative-based questionnaires designed to assess whether the existence of the initiative is assisting in the legal drafting process.

Conclusion

In Africa, pioneering efforts by the South African Legal Information Institute (SAFLII) and Kenya Law Reports demonstrate that the potential can become a reality that benefits judges, lawyers, government, corporate and private citizens. Throughout most of Africa the state of access to legal information remains deplorable. We believe that this situation can be transformed -- realistically and relatively quickly -- by the establishment of in-country open-access publishers (LIIs) operating with the support of a regional partner (AfricanLII) that provides facilities and services aimed at providing substantive expertise, technical assistance, business services, and a setting for dialogue and exchange.