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Open access to legal resources in South Africa: the benefits and challenges

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Open access to legal resources in South Africa: the benefits and challenges

Abstract

It is a constitutional right of all South Africans to have access to information held by the state or any other person especially if the information is required to protect a right (South Africa 1996). With this right comes the obligation on the state to ensure that whatever information it has in its possession, and can be reasonably shared, is distributed widely, openly, freely and fairly to the citizenry. Since the adoption of the Constitution in 1996, the Internet's reach in South Africa has increased significantly. The Internet has therefore become an attractive platform to distribute legal information. The South African legal system has embraced open access to legal information such as case law, legal documents, parliamentary bills, statutes, parliamentary debates, government gazettes, electronic books, theses, authoritative blogs and other Social Media. This study argues that Open Access to legal resources is beneficial for the country, its citizens, researchers and students of law. Open Access to legal resources strengthens the South African democracy and ensures equality before the law. Among the challenges include that many citizens still do not have access to the internet anyway. Open access to legal resources therefore only benefits those who have access to the Internet, and the legal awareness and skills to search and understand the information.

Open access, open justice, legal resources, case law, law journals, benefits of open access, challenges of open access

1. Introduction

It is often said that it is not enough to do justice but justice must be seen to be done (Actoty and Muratbaevna 2018). For justice to be seen to be done, the courts must ensure that their proceedings and documents are transparent (Hanh 2013). Transparency includes accessibility of information used to arrive to decisions and the results of the final outcome thereof (Actoty and Muratbaevna 2018). This is particularly critical in a country like South Africa where the courts were seen to be used to protect state interests and discriminating against certain sectors of the society during apartheid (Maharaj 1997; Endoh 2015). One of the cornerstones of the South African Constitution is the Bill of Rights which, among other rights, obligates the State to ensure that everyone has access to information (South Africa 1996). The Constitution itself is founded on the values of accountability, responsiveness, transparency, and openness (South Africa 1996). With Internet access in South Africa having reached close to 31 million people (Internet Society 2018), the Internet is one of the best platforms used to ensure that the right to access to information is realised.

This study seeks to discuss open access to legal resources in South Africa, its successes, benefits, and challenges. The basis for this study will be the literature written on the area of open access to legal resources. This paper discusses open access to legal resources in South Africa under the following

headings: the concept of Open Justice and Open Access, objectives of the paper, the literature review, findings and discussions, and conclusion.

2. The Concept of Open Justice and Open Access (OA)

In order to locate this study within its proper context, the concept of Open Access and the principle of Open Justice will be discussed.

Open Access

As far back as 2002, the Open Access Initiative defined Open Access as information that is freely available on the public Internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the Internet itself (Open Access Initiative 2002) . Czerniewicz and Goodier (2014) cautions against misconceptions that OA is free of copyright and other intellectual property laws. Most documents published on OA platforms retain a Creative Commons licence. There are two types of OA. Those are the green open access and the gold open access. The green OA is open access that can be achieved through self-archiving in an institutional repository. The gold open access is achieved through publishing in an OA journal. Both types of open access as it pertains to legal resources are the subject of this study.

Open Justice

Open Justice is a principle of the common law that proceedings ought to be open to the public, including the contents of court files and public viewing of trials (Duhaime.Org n.d.). Put simple, Open Justice is about accessibility, transparency and openness of the justice system (Moseneke 2015). Open Justice is achieved by ensuring that documents are publicly available from the time they are filed. This is to ensure public trust to the justice system.

Clearly, open access to court papers forms a critical part of open justice (Milo and Scott 2015). It would seem therefore that open access is consistent with the culture of the South African legal system which is leaning towards open justice according to Justice Moseneke (Moseneke 2015).

3. Objectives of the paper

The following are the objectives of this paper:

- To establish open access legal resources in South Africa.

- Identify accredited and non-accredited open access law journals in South Africa
- To outline the benefits of open access to legal resources in South Africa.
- To identify challenges associated with open access to legal resources in South Africa

4. Literature review

The literature review of this study is divided into the South African Constitution and open access, Open access legal resources, International Declarations on open access, the Legal Information Institutes, and the benefits and challenges of open access.

4.1 The South African Constitution and Promotion of Access to Information Act

The history of open access to legal resources in South Africa can be traced back to the constitution of the country from 1993 onwards. Conscious of her status as a secretive closed society, South Africa adopted the Interim Constitution in 1993 which sought to ensure the right of access to all the information held by the state enshrined in the constitution (South Africa 1993). Chapter two of the South African Constitution which was inspired by the international Universal Declaration of Human Rights (United Nations 1948) retained this right for the citizens of the country (South Africa 1996). The South African Constitution declares that everyone has a right of access to any information held by the state as well as held by another person provided that the information is required to protect or exercise a right. This clause is in many ways similar to Article 19 of the Universal Declaration of Human Rights which state that each individual has a right to access or impart information to others in any media available including the Internet (United Nations 1948). The South African Constitution itself is founded on the principles of participatory democracy that seeks to ensure that all are equal before the law. It can be argued therefore that the South African Constitution acts as a mechanism through which OA to legal resources is enforced in our country.

In order to realise the right of access to information, South Africa passed the Promotion of Access to Information Act in 2000. The Act acknowledges the history of South Africa as a secretive, unresponsive state known for abusing the law to protect apartheid (South Africa 2000; Endoh 2015). Besides being a vehicle for the promotion of open access to legal resources, the Act further acknowledges that not all legal documents can be openly accessible. Documents to be used in legal proceedings, and records containing privileged information in legal proceedings are exempt from the Act.

4.2 Open access legal resources in South Africa

The Department of Higher Education of South Africa (DHET) is responsible for accrediting journals where researchers based in public academic universities are to publish for purpose of subsidisation. Among the criteria considered by the Department for accrediting South African journals is the quality of articles accepted by the journal, the extent of distribution of the journal, the calibre of the editorial board members, and others (South Africa n.d). In 2018, this list composed of a list of journals selected from Scopus, Web-of-Science, Norwegian List of accredited journals, Scientific Electronic Library Online (SciELO), International Bibliography of the Social Sciences (IBSS), and the DHET List of South African accredited journals. In 2018, there were a number of legal open access journals on this list (North-West University, 2018a). Bopape (2016) names three of those journals as Fundamina, the African Human Rights Law Journal, and the Potchefstroom Electronic Law Journal. Bopape (2016) proceeds to name the Southern African Legal Information Institute (SAFLII), the African Journal Archive (AJA), and open access journals by Sabinet Online as other sources of open access knowledge in South Africa. Other major sources of free legal information in South Africa are institutional repositories which are dominated by electronic theses and dissertations (Bopape 2016).

4.3 International Declarations on open access

The development of OA to legal resources in South Africa is not entirely divorced to the international developments. As part of the global village, the country is influenced and influences the developments in other parts of the world. Below is a brief overview of developments of OA to legal resources internationally. Declarations are important drivers to OA to legal resources internationally. By signing a declaration, organisations seek to bind themselves to the decisions of a meeting or conference. By signing, they in turn hope to influence others to follow suit. Various declarations relevant to the open access to legal resources in South Africa are outlined below:

Declaration on Free Access to Law - 2002

First made in Montreal in 2002, this declaration calls for the maximisation of access to legal information. This information should be available to all free of charge (Free Access to Law Movement 2002).

Budapest Open Access Initiative – 2002

This initiative calls for literature published by scholars without payment to be freely accessible online (Open Access Initiative 2002)

Berlin Declaration – 2003

The Berlin Declaration call for information to be “made widely and readily available to society. New possibilities of knowledge dissemination not only through the classical form but also and increasingly through the open access paradigm via the Internet have to be supported.” (Open Access Movement 2003)

Durham Statement on Open Access to Legal Scholarship – 2008

This statement was developed by directors of pre-eminent law schools in United States. It calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication coupled with a commitment to keep the electronic versions available in stable, open, and digital formats (United States Law librarians 2008).

4.4 The Legal Information Institutes

As far back as 1990, through the Hermes Project, United States citizens could access Supreme Court of the United States’ decisions on a computer (Yelin 1995). The Legal Information Institute of the Cornell Law School maintains an open access database of the most important decisions of the Supreme Court of the US since its inception. The Institute has been open access since 1992. This gave rise to the Canadian Legal Information Institute in 1993. This was followed by the Australasian Legal Information Institute in 1995 and a number of other Legal Institutes including the Southern African Legal Institute which will be discussed at a later stage. Since the first legal institute in Cornell, more than 54 entities are listed as legal institutes on the Internet. These play a major role in ensuring OA to legal resources internationally.

4.5 Benefits and challenges of open access to legal resources

Previous literature on the benefits and challenges of open access to legal resources focussed on the benefits as they pertain to legal scholars (Carroll 2006; Britz 2009; Bopape 2016). Carroll (2006) points out that open access publishing has benefits to legal scholars in that it ensures the visibility and impact of their research. According to Carroll (2006), open access ensures that legal research is accessible and cited across disciplines and in different countries and continents. Carroll (2006) further points out that open access publishing ensures access for legal scholars who would otherwise have not had access to the legal resources due to financial constraints. This means that open access has the potential to close the gap between those who afford the expensive commercial databases and those who do not (Bopape 2016). Britz (2009) argues that open access cannot be equated to universal access. The researcher points out that some of the challenges or barriers to open access in Africa are the inadequate and expensive Information and Communications Technology (ICT) infrastructure, and lack of knowledge by researchers. According to Britz (2009), many researchers in South Africa view any work published in

open access journals with suspicion. The benefits and challenges of open access to legal resources in the context of South Africa are discussed under the findings and discussions.

Methodology

This is a qualitative study that relies on literature review. Onwuegbuzie, Leech, and Collins (2011) point out that a literature review can be used as a research method. As a method of research, literature review research method involves “identifying, recording, understanding, meaning-making, and transmitting information pertinent to a topic of interest” (Onwuegbuzie *et al.* 2011). According to Du Plooy-Cilliers, Davis & Bezuidenhout (2014) agrees pointing out that a literature review involves searching, finding, studying and interpreting what has already been done on a topic. Further, Du Plooy-Cilliers and others (2014) point out that literature review involves the researcher making a sense of what has already been done on a field. It requires critical thinking. Therefore, for purposes of this research, the literature on open access legal resources was reviewed. Websites that contain information about open access to legal information in South Africa were also visited and reviewed. The research is also based on the experiences of the researcher as a law librarian. This study is not a simple cut-and-paste exercise or recycling of literature on the subject. It also involves a contribution by the researcher on the benefits and challenges of open access to legal resources in South Africa.

5. Findings and discussions

The findings of this study respond to the objectives which are to establish open access legal resources in South Africa, its benefits and challenges. The findings and discussions are divided into open access to legal resources in South Africa, legislation, government gazettes, bills, benefits, and then challenges of open access to legal resources in South Africa.

5.1 Open access to legal resources in South Africa

This section is divided into three parts which are, open access to case law in South Africa, open access to legal journals in South Africa, and institutional repositories.

5.1.1 Open Access to Case Law in South Africa

Open Access to case law in South Africa is achieved through the Southern African Legal Information Institute and through the various courts in collaboration with universities.

Southern African Legal Information Institute (SAFLII) SAFLII was launched in 2003 as a joint initiative between the Australian Legal Information Institute and Wits Law School. On its website

SAFLII states that it publishes legal information for free public access which comprises mainly of case law and legislation from South Africa. Fourteen other Southern African countries are covered on this database (Southern African Legal Information Institute 2018) . Those are Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Seychelles, Swaziland, Tanzani, Uganda, Zambia, and Zimbabwe. SAFLII is the most comprehensive open access database of South African case law. The URL for SAFLII is <http://www.saflii.org/>

Constitutional Court Cases and Judgments

The Constitutional Court Judgments are accessible via the Constitutional Court website. The judgments are searchable by keyword (Constitutional Court of South Africa 2018). The URL for the Constitutional Court Cases and Judgments is <https://collections.concourt.org.za/handle/20.500.12144/1>

Supreme Court of Appeal of South Africa: Judgments

The SCA keeps a list of its judgments from 1999 to 2017 (Supreme Court of Appeal of South Africa 2018). This list is browsable by year or alphabetically. The URL for the Supreme Court of Appeal of South Africa: Judgments is http://www.justice.gov.za/sca/judgments/judgem_sca.htm

Polity website

Though this website describes itself as a privately owned website. It reports on on-going court cases of political interest. Further, judgments are posted on the website once the case is decided. This website maintains legal briefs, keeps policy documents, Acts, and Bills among other legal documents. The URL for Polity is <http://www.polity.org.za/>

5.1.2 Open Access to Scholarly Journals in South Africa

Bopape (2016) laments limited access to legal journals and books compared to cases and legislation in South Africa. Bopape's lamentations extends to the fact that most OA legal journals in South Africa are general law journals. This is as a result of the fact that South Africa has been a late comer to the OA movement (Bangani 2018). It was not until 2015, that the National Research Foundation made it a requirement for all researchers who have been awarded research grants by it to publish in open access institutional repositories (National Research Foundation, 2015). Most published secondary legal resources in South Africa are still held by commercial publishers (Bopape 2016). There are a number of open access legal peer-reviewed scholarly journals currently published in South Africa and accredited and unaccredited by the Department of Higher Education and Training (North-West University 2018a). These are discussed in this section.

5.1.2.1 DHET accredited South African open access law journals

African Human Rights Law Journal (AHRLJ)

The AHRLJ started publishing in 2001. This journal is published by the Faculty of Law at the University of Pretoria. On its website it states its aim as: to publish peer-reviewed contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa (University of Pretoria 2018). The journal appears on the International Bibliography of the Social Sciences (IBSS) (University of Pretoria 2018). The AHRLJ can be accessed here <http://www.ahrlj.up.ac.za/>

Constitutional Court Review (CCR)

The CCR journal is devoted to the Constitutional Court of South Africa and its decisions. The journal publishes peer-reviewed articles of relevance to the highest court in South Africa. According to its website, the journal is sponsored by the University of the Witwatersrand, the University of Johannesburg, the Konrad Adenauer Stiftung, Juta Law, the Constitutional Law of South Africa, and the South African Institute for Advanced Constitutional, Public, Human Rights and International Law. The Constitutional Court Review can be accessed at the following website <http://www.constitutionalcourtreview.co.za/>

De Jure

Published by the Faculty of Law of the University of Pretoria, De Jure has been open access since 2011 (University of Pretoria 2014). De Jure aims to publish original research and cutting-edge national and international legal research. However, the journal has a business model that requires that authors be charged for each page before publication to offset its publication losses (University of Pretoria 2014). De Jure can be accessed on the following website <http://www.dejure.up.ac.za/>

Fundamina: a journal of legal history

Published by the UNISA Press in collaboration with the Southern African Society of Legal Historians, Fundamina aims to provide a platform for legal-historians to publish their scholarly work (Sabinet 2018). The scope of the journal is not limited to Southern Africa but covers legal-historical topics worldwide (Sabinet 2018). The journal can be accessed at <https://journals.co.za/content/journal/funda>

Law, Democracy and Development (LDD)

The LDD is published by the University of the Western Cap's Law Faculty (Reference). The journal has been online since 2010 and is available open access (University of the Western Cape 2018). The journal

focuses on legal and socio-legal issues and aims to strengthen institutions of democracy (University of the Western Cape 2018). It is accessible online here www.idd.org.za/

Potchefstroom Electronic Law Journal (PER)

The PER journal is considered as a pioneer in providing free open access to legal scholarly information in South Africa (Erlank and Du Plessis 2016). However, PER charges a processing fee of ZAR120 per page and 15% vat with effect 1 April 2018 (North-West University 2018b). The journal was started in November 1998 (Erlank and Du Plessis 2016). Since then the journal is among the top law journals in the world as it is listed in some of the top international databases like Web-of-Knowledge, IBSS, HeinOnline, and Jstor among others (North-West University 2018a). Potchefstroom Electronic Law Journal is accessible at <http://law.nwu.ac.za/per>

Speculum Juris

This journal is published by the University of Fort Hare's School of Law (University of Fort Hare 2018). The journal covers all aspects of law. Speculum Juris can be accessed here <http://www.ufh.ac.za/speculumjuris/>

South African Journal of Bioethics and Law

This journal covers ethics, law, human rights and related matters (Health and Medical Publishing Group 2014). Though the main target of this journal are health professionals, articles in this journal are also relevant for legal scholars. Its URL is <http://www.sajbl.org.za/index.php/sajbl>

5.1.2.2 Non-DHET accredited South African open access law journals

Crime Research in South Africa (CRISA)

CRISA is a journal that forms part of the open access African Journals Online. The journal focuses on theoretical, empirical and methodological issues on crime. It is accessible through the following URL <https://journals.co.za/content/journal/crisa>

De Rebus

This journal is published by the Law Society of South Africa (Law Society of South Africa 2018). It has been OA since 2012. This journal was accredited until 2013 by the DHET. De Rebus is accessible at <http://www.derebus.org.za/>

Journal for Estate Planning Law

The Journal of Estate Planning Law is published by the Faculty of Law of the University of the Free State (University of the Free State 2018). The journal deals with all aspects of estate planning law. It can be accessed here <http://apps.ufs.ac.za/kovsiejournals/default.aspx?journal=2>

Juta's Business Law

Published by Juta Company, this journal seeks to publish articles that deal with aspects of law and business (Sabinet 2018). It can be accessed here https://journals.co.za/content/journal/ju_jbl

There are at least twelve open access legal journals in South Africa. Eight of those are accredited by the Department of Higher Education while four are not. The next section discusses the institutional repositories as gateways to open access legal resources in South Africa.

5.1.3 Institutional Repositories (IR's)

At least twenty-two of the South African universities maintain an IR (Bangani 2018). Of those institutions, 17 have a fully-fledged Law Faculty. Table 1 contains the list of institutional repositories of institutions with fully fledged law faculties.

Table 1: South African Universities with Law Faculties and Institutional Repositories

Name of University	URL of Institutional Repository
University of Cape Town	https://open.uct.ac.za/
Fort Hare University	http://vital.seals.ac.za:8080/vital/access/manager/Community/vital:33
University of the Free State	http://scholar.ufs.ac.za:8080/xmlui/handle/11660/607
University of Johannesburg	https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output
University of Kwazulu-Natal	https://researchspace.ukzn.ac.za/
University of Limpopo	https://www.ul.ac.za/index.php?Entity=Online%20Repository
Nelson Mandela University	http://vital.seals.ac.za:8080/vital/access/manager/Index?site_name=Nelson%20Mandela%20Metropolitan%20University
North-West University	https://repository.nwu.ac.za/handle/10394/26463
University of Pretoria	https://repository.up.ac.za/
Rhodes University	http://vital.seals.ac.za:8080/vital/access/manager/Community/vital:42
University of South Africa	http://uir.unisa.ac.za/handle/10500/506
Stellenbosch University	https://scholar.sun.ac.za/

University of Venda	
Walter Sisulu University	http://vital.seals.ac.za:8080/vital/access/manager/Community/vital:40
University of the Western Cape	http://etd.uwc.ac.za/
Witwatersrand University	http://wiredspace.wits.ac.za/handle/10539/45
University of Zululand	http://uzspace.uzulu.ac.za/handle/10530/388

Most institutional repositories in South Africa at the moment contain electronic theses and dissertations of masters and doctoral students (Bangani 2018; Bopape 2016). Some of the documents contained are legal resources (Bopape 2016). With the National Research Foundation's (NRF) requirement for researchers to deposit their research outputs to institutional repositories of their institutions, journal articles are set to replace electronic theses and dissertations as the dominant content of IR's (Bangani 2018). Even in their current form, IR's provide priceless open access legal resources for all.

National Electronic Theses and Dissertations (ETD) Portal

The National ETD Portal is a joint venture of South Africa's National Research Foundation and the Committee of Higher Education Libraries of South Africa. Its aim is to coordinate, manage, monitor and support the development of electronic theses and dissertations in public universities in South Africa (Webley Chipeperekwa and Suleman 2011). The National ETD Portal allows researchers to browse across various university IR's without having to search those IR's individually.

5.2 Legislation, government gazettes, Bills

Legislation in South Africa can be found from various OA sources. In terms of legislation, you are likely to find any legislation that affects a department on that department's website. As an example, the South African Department of Justice and Constitutional Development which sets to ensure "transparent, responsive and accountable justice services for all" has a list of all legislation divided by an area of law. There is also a list of the courts of South Africa and the court rolls and other documents that are of legal interest (South Africa 2018). The Department provides a complete list of all legislation Pre-Union of South Africa through to the current democratic dispensation. Other legislative documents listed include the Constitution of the Republic of South Africa, Regulations, Bills, Government Gazette Notices and Proclamations, and Rules and Practice Directions. Besides government websites, Craemer and Federl (2015) point out that a number of statutory bodies and Non-Governmental Organisation operating in the legal arena also provide access to legislation, case law, government gazettes, and Bills.

In addition to what government departments provide, the Parliament of South Africa website publishes the Hansard, schedule of committee meetings, and other material meant to educate the general public about the work of parliament in a democracy (Parliament of the Republic of South Africa 2018).

From the discussions above, it is clear that international role-players, constitutional framework, legal framework, courts, government, universities, and research institutions all played a critical role in the development of OA to legal resources in South Africa. OA to legal resources in South Africa has been driven by both international and national drivers. There have been successes as shown by the accessibility of case law, journals, and theses and dissertations. There have been many benefits but also some challenges.

5.3 Benefits of OA to legal resources in South Africa

The benefits of open access to legal resources in South Africa are numerous. These are discussed in this section.

Strengthens democracy

South Africa is constitutional democracy which means the power of the government, its definition, its limits, and distribution rests with a legal document – the constitution (Way n.d). Not understanding the constitution therefore is tantamount to not understanding the governance of the country as a whole. This means that the legal system forms the bedrock of the South African democracy (Endoh 2015). In most cases, it is the courts that are manipulated by bad governments to control the communities (Endoh 2015; Moseneke 2015). This they do by taking decisions that are secretive and irrational behind closed doors. Moseneke (2015) maintains that “[d]emocracies die behind closed doors”. Openness therefore is a natural state of democracy. As a young democracy the South African democracy require that the courts as final arbiters of disputes are trusted by the community they serve. Open access to legal documents help inform the community of their rights. According to Actoty and Muratbaevna (2018) citizens that are informed develop enough legal awareness to understand their role in the democratic space. Poulin (2004) states that when the citizenry is legally aware chances of corruption diminishes as the corrupt prefer to operate in the darkness of secrecy. When citizens know their right they are more likely to blow the whistle on corrupt practices and other ills befitting the society. Through knowing their rights the community can seek justice through the justice system to assert them (Actoty and Muratbaevna 2018). Open access to legal resources ensures that the public see the legal system as part of them. Legal aware citizens are more likely to participate meaningfully in democratic processes of the state (Poulin 2004).

Open access goes a long way to assure the public that the courts do not have anything to hide regarding their conduct and decisions.

Provides the public access to authoritative legal information

Open access to legal information helps the society to access accurate and reliable legal resources that they would otherwise not have had access to (Poulin 2004). That way they are able to know what is legally permissible and what is not, for ignorance of law is not normally taken as an excuse to commit crime in the courts of law (Poulin 2004). Accessing this information would mean the public is able to grasp how the legal system functions. This in turn enhances the public's confidence in the legal system.

Better understanding of the justice system

Providing OA to legal resources will earn the justice system public trust. The public will be free to decide on the fairness of proceedings, evidence, and judgments and therefore are likely to understand and accept the decisions of the courts. When the public understands the decisions of the courts they are also likely to critique the processes and judgments from a better informed position (Poulin 2004).

Assures the public that all are equal before the law

Given the history of apartheid in South Africa (Endoh 2015), many people may still hold a view that we are not all equal before the law. By embracing OA, the legal system is likely to go a long way to dispel the fears of the public about the fairness of and equality before the justice system.

Ensures better synergy between the lower courts and higher courts

Lawyers in lower courts are able to access decisions of higher courts immediately. Inconsistencies within the legal system will be minimised (Poulin 2004).

Normalisation of legal education

Access to commercial legal documents is very expensive (Poulin 2004). By making the legal documents OA our legal system asserts the right to education for all as students of Law, Governance, Public Administration, and related disciplines have better access to legal documents. This will also ensure some level of equality as students have access to the same material. Researchers and academics are kept up to date about what is happening in legal practice. Through OA scholarly journals they have free access to peer-reviewed journals. They are able to write better articles, books, and conference papers using up-to-date information. It is also easier to identify instances of academic dishonesty when the information is freely available online.

Though OA to legal resources has many benefits, it also has some challenges.

5.4 Challenges of open access to legal resources in South Africa

Open access is predicated on the ability to access the Internet, understand the information needed, search the information, and use the information in an ethical manner. Those who do not have access and the qualities required to access and use the information will not even realise that the information is freely accessible. In a way, the challenges of open access to legal resources mirror the challenges that are caused by inequalities in South Africa in terms of access, education, resources and status. This section discusses those challenges.

Lack of Equality of Access to Information

Britz (2009) and Hanh (2013) argues that information and communication technologies play a critical role in improving access to open access information. This means that open access is only as good as your ability to access the information. For those who do not have access to information, open access remain a cliché and a pipedream. Open access to legal resources only ensures access to information for all those who have access to the Internet. South Africa is a country affected by high levels of the digital divide. Close to 54% of the population has access to any kind of Internet according to the Internet Society (Internet Society 2018). This means that 46% of the population does not have access to the open access legal resources. Only those who have access to the Internet have access to open access legal resources. To those who do not have access, open access remains meaningless. Open access, therefore, can widen the gap of knowledge between those who have access to the Internet and those who do not.

High levels of illiteracy and language as a barrier to open access

There are different types of literacies including information literacy, computer literacy, academic literacy, digital literacy and other forms of literacies. South Africa has low literacy levels almost in all kinds of literacies required to make use of the open access legal resources (Help2read 2016). Open access, therefore, ensures that those with the skills to search, understand, analyse, evaluate and use the information develop enough legal awareness to participate in law-making (Actoty and Muratbaevna 2018). Far from ensuring equal access to information for all, open access may increase the divide between the literate and the illiterate with regards to access to legal resources. Another barrier associated with high levels of illiteracy is language. According to the South African Constitution, there are eleven official languages in the country (South Africa, 1996). These languages are also the most spoken in the country (Statistics South Africa 2011). English, the dominant language of scholarship and education in South Africa (Mwaniki 2014), is only spoken as a first language by 9.6% of the population

(Statistics South Africa 2011). Many of those who are considered literate may struggle to understand legal terminology as they are not first language speakers. This means that even though the documents may be freely available online, they may not have the sufficient grasp of the language that most of them are written in to understand their meaning. Even though the documents may be online and freely available, the majority of the people may feel excluded due to the language they are written in.

General distrust of the legal justice system

The South African legal system has a history of being manipulated for the benefit of the minority and the rich. According to Endoh (2015), law played a major role to sustain the apartheid system of government in South Africa. In the main it was used as a tool to suppress and oppress the majority. Twenty-four years after the formal disbandment of Apartheid, many citizens of the country still have a general indifference towards the legal system.

The aftermath of the Oscar Pistorius judgment where the presiding judge was heavily criticised on Social Media and newspapers bears testimony to this (Legal Brief 2014). OA and Open Justice may have an opposite effect to what is intended as people will try to compare different judgments without taking into account the complex legal matters involved or without enough legal knowledge to understand some legal principles (Johnson 2016). Far from dispelling public perceptions of the legal system as unequal, the tendency towards openness can fuel it (Johnson 2016).

Another challenge of open access is that once a judgement is made available online it can be distributed widely with no note that it is on appeal. As a result, judgments that have been overturned can be taken, at face value, as final judgments by layman and novice lawyers.

6. Conclusion

This paper pointed out that openness is consistent with the South African legal system. The pace of OA to case law and legislation has been faster than secondary formats of legal information like journals and books as these are published mainly by commercial publishers (Bopape 2016; Craemer and Federl, 2015). Seven out of twelve OA legal journals published in South Africa are published by university law faculties and the government plays a critical role in subsidising those journals. The DHET also plays a critical role in promoting publishing in open access journals in South Africa as it accredits eight of the twelve open access journals in the country (North-West University 2018a). It appears that there are no book publishers devoted to OA publishing of legal resources in South Africa. University presses are likely to play a critical role in this area in future. The NRF Open Access directive of 2015 that requires

all researchers sponsored by the NRF to publish on Open Access IR's will have a major impact in terms of accessibility of journal articles.

This paper has implications for South Africa and other countries in the developing world. It argues that the distribution of legal information to the citizenry will, in the long run, have positive spinoffs for the rule of law in the developing world as citizens become aware of their rights and start to assert them. Open access contributes not only to a more legal conscious citizenry but also to an active one. However, open access to legal resources can never be fully realised where many citizens do not have access to the Internet or where they do not have the literacy skills to search and comprehend the information. This also places a responsibility on law librarians to teach law students and scholars about the open access platforms. Open access also have implications for judges and lawyers as it places a responsibility on them to ensure that they explain legal principles in their judgements in a manner and language that would be understandable by the man on the street. This will ensure that not only is justice done but it is also seen to be done by the general public.

It is recommended that like public universities, large private law firms should consider creating institutional repositories and placing some of their resources on open access platforms for access by everybody.

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