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PERSPECTIVES ON UNIVERSAL FREE ACCESS TO ONLINE INFORMATION IN SOUTH AFRICA: FREE PUBLIC WI-FI AND ZERO-RATED CONTENT

SUMMARY

The ability to receive and impart information online, in particular through the internet, has become central to the exercise and enjoyment of fundamental human rights and freedoms. It enables people to engage in an array of learning experiences, build information and knowledge societies, foster public and private debate, establish organisations, and contribute to public interest innovation. Through the internet, all people with access, including those in remote and marginalised communities, are better able to exercise and protect their rights and realise their potential. Conversely, those without access are deprived of such protection and enjoyment.

The power and importance of the internet has been repeatedly recognised, both in domestic and international contexts. For instance, the United Nations' 2030 Sustainable Development Goals (SDGs) seek to "significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020."[1] The SDGs

1 United Nations General Assembly. (2015). Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, p. 21, Goal 9.c. www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E; see also La Rue, F. (2011). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27, at para 2, where he states that "the internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies." www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf; see, further, United Nations Human Rights Council Resolution A/HRC/20/L.13 of 29 June 2012 on "The promotion, protection and enjoyment of human rights on the Internet". www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.L.13_e n.doc

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further seek to "enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women."[2]

However, determining "access" is complex. The SDG indicators propose that access should be determined by the "proportion of the population covered by a mobile network, by technology."[3] However, this does not pay due regard to the complexities of access that continue to be defined; internet penetration rates, or the proportion of the population covered by a mobile network, do not fully cover the wide spectrum of connectivity levels,[4] and technology-specific indicators do not consider future innovations. For the internet to be truly the "most powerful tool of the 21st century", it must extend to all. The multiple facets of access must therefore be considered:

- Inequalities in access are more prominent in disadvantaged groups, particularly women, cultural minorities, people living on remote islands, and in least developed countries (LDCs).
- Limited coverage and slower internet speeds are more prominent in rural areas. In LDCs, this is often also a hallmark in peri-urban areas, particularly ones in which there are informal settlements and weak local government institutions.
- Access is less favourable to users on mobile networks, where broadband speeds are comparatively low and subject to metred access, traffic caps and high costs.
- Ownership structures in broadband and broadcast media face limited competition and, coupled with concerns around net neutrality, which is discussed in more detail below, this creates complications for "the free flow of information, the diversity and plurality of content and its dissemination in local languages, and the conditions of access to service provision."
- Challenges relating to access are closely aligned to broader social issues, including poverty, exclusion, cultural norms, education, ICT competencies, and buying power.[5]

In the African context, the International Telecommunication Union (ITU) suggests that not only internet penetration, but access itself is low on the continent. The ITU's ICT Facts and Figures 2016 report indicates that 75% of Africans are not using the internet, compared to only 21% of Europeans being offline. Further, while 28.4% of African men have access to the internet, only 21.9% of African women visit the online space. Tellingly, fixed broadband penetration remains below 1% in Africa, compared to 29.3% of Africans accessing the internet through mobile broadband subscriptions that are typically more costly. In almost all categories surveyed, the African continent ranks consistently either last or alongside LDCs.[6]

In South Africa, there are stark disparities among the levels of access enjoyed by members of the population. Although there is a stated intention on the part of the government to achieve universal access for all in South Africa, as well as policy measures aimed at realising this, the reality remains that many people in South Africa simply do not have access to the internet. According to the iPass Wi-Fi Growth Map, South Africa's Wi-Fi access has grown 4,240% since 2013,[7] but Internet Live Stats indicates that internet penetration is still only 52% in the country, with over 26 million South Africans unable to access online spaces.[8]

The complexities associated with determining what actually constitutes access also involve considerations such as: What constitutes sufficient access for the purposes of respecting, protecting, promoting and fulfilling human rights (which include, among others, freedom of expression, the right of access to information, the right to privacy, cultural rights, the right to health and the right to education)? With rapid technological developments and the increasing online presence of businesses, institutions of learning and governments, what level of access is necessary for people to actively and effectively engage in public and private affairs? What measures should be employed by the state and other key role players in order to bridge the digital divide? And should the internet be treated as a utility or a public good?

The purpose of this issue paper is to examine the background and legal framework that support a right to universal free access to online information, with a specific focus on the South African context. This paper is structured as follows:

2 Ibid., p. 18, Goal 5.b.
3 Inter-Agency and Expert Group on Sustainable Development Goal Indicators. (2016). Final list of proposed Sustainable Development Goal indicators (E/CN.3/2016/2), p. 13. https://sustainabledevelopment.un.org/content/documents/11803Official-List-of-Proposed-SDG- Indicators.pdf
4 Association for Progressive Communications. (2016). *Ending digital exclusion: Why the access divide persists and how to close it*. https://www.apc.org/sites/default/files/EndingDigitalExclusion_dig.pdf
5 Ibid.
6 International Telecommunication Union. (2016). *ICT Facts and Figures 2016*. https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf
7 Interestingly, South Africa's Wi-Fi access grew only 26% between 2013 and 2015, but it grew 2,817% between 2015 and 2016. https://www.ipass.com/wifi-growth-map
8 www.internetlivestats.com/internet-users-by-country
9 United Nations General Assembly. (2015). Op. cit.

- **Part I** examines the relation between information rights and universal access to the internet.
- **Part II** examines the international law position on access to the internet from a human rights perspective.
- **Part III** examines the South African context, and the regulatory and other initiatives being implemented to promote access to online information.
- Lastly, **Part IV** examines specific measures that can be implemented in building a model towards universal free access to online information, and the safeguards that should be put in place in doing so.

There are several points that should be noted at the outset. First, as a point of departure, it is noted that this paper focuses specifically on the question of access. While interrelated, matters relating to the availability (such as network infrastructure and equipment), affordability (such as the cost of data), and acceptability (such as the censorship of content online) of the internet fall outside of the scope of this paper, and are not addressed directly.

Second, it should be noted that reference to models for "free" access to online information relates to internet access being free for the user, with the costs associated with access inevitably being passed to other role players. The question of affordability – be it for the user or the telecommunications company – is material to the question of access, and there are currently efforts underway to explore questions of pricing and other relevant matters related to affordability. As mentioned, affordability falls outside the scope of this issue paper, save in respect of the discussion on the need for open and competitive markets, dealt with below.

Third, the rights to freedom of expression and access to information are commonly understood as, and accepted to fall within the category of, civil and political rights (or so-called "first-generation" rights). In general terms, civil and political rights are considered to be immediately realisable, because they do not ordinarily require the same levels of resource allocation as in the case of socioeconomic rights (or "second-generation" rights). In practice, however, the distinction has become blurred between civil and political rights on the one hand, and socioeconomic rights on the other. This paper explores the realisation of access to online information through the framework of progressive realisation, typically applied to socioeconomic rights, and relies on the international and domestic guidance relating to that framework to consider how universal free access to online information can be realised over time in South Africa.

Lastly, this paper highlights certain legislative and policy frameworks, as well as selected initiatives, aimed at promoting access to online information. This is not intended to provide an exhaustive account. In a similar vein, this paper explores two possible mechanisms for how universal free access to online information can be achieved – through free public access to Wi-Fi in public areas, and through zero-rated content – and the considerations, including the challenges, that arise in doing so. However, our focus on these initiatives and measures in no way discounts the value and importance of the others that are being implemented or developed.

PART I: THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND UNIVERSAL ACCESS TO THE INTERNET

The SDGs seek to "significantly increase access to information and communications technology" and "[e]nsure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements."[9] In terms of indicators, the SDGs propose assessing assurances on public access to information by considering the "[n]umber of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information."[10]

Before the finalisation of the SDGs, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) – of which South Africa is a member – published its leading-edge Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace,[11] which provides, in relevant part:

> 7. Member States and international organizations should promote access to the Internet as a service of public interest through the adoption of appropriate policies in order to enhance the process of empowering citizenship and civil society, and by encouraging proper implementation of, and support to, such policies in

10 Inter-Agency and Expert Group on Sustainable Development Goal Indicators. (2016). Op. cit.

11 UNESCO. (2003). Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace. www.portal.unesco.org/en/ev.php-URL_ID=17717&URL_DO=DO_TOPIC&URL_SECTION=201.html; see also World Summit on the Information Society. (2003). Declaration of Principles – Building the Information Society: a global challenge in the new Millennium. https://www.itu.int/net/wsis/docs/geneva/official/dop.html and International Federation of Library Associations. (2014). The Lyon Declaration on Access to Information and Development. www.lyondeclaration.org/content/pages/lyon-declaration.pdf

> developing countries, with due consideration of the needs of rural communities.
>
> […]
>
> 15. Member States should recognize and enact the right of universal online access to public and government-held records including information relevant for citizens in a modern democratic society, giving due account to confidentiality, privacy and national security concerns, as well as to intellectual property rights to the extent that they apply to the use of such information. International organizations should recognize and promulgate the right for each State to have access to essential data relating to its social or economic situation.[12]

Alongside the SDGs and the UNESCO Recommendation, the Open Government Partnership (OGP),[13] of which South Africa was one of the founding members, the Open Data Charter,[14] and the World Wide Web Foundation's Open Data Barometer[15] require proactive disclosure of public information. In terms of the OGP, members commit to open government data, which is the "idea that data should be freely available for everyone to access, use and republish as they wish, published without restrictions from copyright, patents or other mechanisms of control."[16] The commitment further provides:

> [W]here many public records, laws, and policies regulating the right to information have traditionally relied on reactive disclosure, meaning public information has to be requested before it is shared, a government fully engaged in open data is choosing to proactively disclose information – meaning public data is released as it is collected and before it is requested. Put another way, the vision of open data is for government information to be "open by default".[17]

South Africa currently has eight OGP commitments, which include developing: a pilot open data portal for South Africa to increase access to information and service delivery planning; a portal to provide public access to relevant information relating to the protection of environmentally sensitive areas; a system to ensure open and transparent budgeting to engage civil society and grassroot participation in governance; and a register of legal persons and arrangements which is available to the public in open data formats, in order to protect the integrity and transparency of the global financial and procurement systems.[18]

Regionally, the African Platform on Access to Information (APAI)[19] – a partnership between UNESCO, the African Union Commission (AUC) and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information – met in 2011 and identified a series of key principles on the right of access to information. In line with international law, the APAI states: "Access to information is a fundamental human right, in accordance with Article 9 of the African Charter on Human and Peoples' Rights. It is open to everyone, and no one should be privileged or prejudiced in the exercise of this right."

Importantly, the APAI goes further, stating:

> Governments should ensure that the legal frameworks [on the right of access to information] create an enabling environment allowing individuals, civil society organisations including trade unions, media organisations, and private businesses to fully enjoy access to information, thus fostering active participation in socio-economic life by all, in particular people living in poverty and those discriminated against or marginalised." (Emphasis added.)

In relation to the role of communications technology, the APAI provides:

> Governments have an obligation to (i) use ICTs and other media to ensure maximum disclosure and dissemination of information; (ii) promote and facilitate unhindered public access to such technologies for all citizens and especially for disadvantaged minority groups and minority language speakers, as well as marginalised people such as women, children, rural people, the poor and persons with disabilities.[20] (Emphasis added.)

With regard to the above commitments, two clear principles arise: (1) there is an international and regional commitment – which is supported by the South African government – to ensure public access to information, which requires states to proactively disclose information and create an enabling environment conducive to the free flow of information; and (2)

12 Ibid.
13 https://www.opengovpartnership.org
14 https://opendatacharter.net
15 https://webfoundation.org/research/open-data-barometer-fourth-edition
16 Open Government Partnership. (2017). *Open Government Guide*. https://www.opengovpartnership.org/sites/default/files/open-gov-guide_all-themes_June2017_EN.pdf
17 Ibid.
18 Open Government Partnership South Africa. (2016). The 3rd South African Government Partnership Country Action Plan, 2016-2018. www.ogp.gov.za/documents/OGP%203rd%20Country%20Action%20plan%202016-2018.pdf
19 www.africanplatform.org
20 African Platform on Access to Information. (2011). The African Platform on Access to Information (APAI) Declaration. www.africanplatform.org/fileadmin/Content/PDF/APAI-Declaration- English.pdf

central to this commitment in the digital age is the need for states to facilitate maximum universal online access to, at a minimum, public and government-held records. In terms of both principles, and as detailed below, work in South Africa is already underway.

PART II: THE INTERNATIONAL LAW POSITION ON ACCESS TO THE INTERNET FROM A HUMAN RIGHTS PERSPECTIVE

Alongside the international and regional commitments detailed above, there is a developing discussion on whether international law – in isolation of the implications of access to the internet on the full realisation and enjoyment of information rights, including the right of access to information – acknowledges a self-standing human right of access to the internet.[21] While clear consensus has not yet been reached, there are various guidelines and commitments that clearly recognise the internet as an enabling mechanism, central to the exercise of human rights more broadly.

International human rights law is founded in the Universal Declaration of Human Rights (UDHR),[22] the International Covenant on Civil and Political Rights (ICCPR),[23] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[24] which together form the International Bill of Human Rights. The ICCPR and the ICESCR, which constitute binding international treaty law and which develop the rights contained in the UDHR, alongside other treaties, customary international law, general principles, regional instruments, and domestic law, express the core principles of human rights that are inherent to all people.

Among these core principles is the international commitment to the universality, inalienability and indivisibility of human rights, and the responsibility on states, national human rights institutions (NHRIs) and rights bearers to respect, protect and fulfil human rights commitments in line with the overarching values of non-discrimination, equality, justice and human dignity. Importantly, the obligation to fulfil human rights requires states to take positive steps to enable the full enjoyment of human rights.

By ratifying treaties and developing customary international law, states undertake to put in place domestic measures and legislation compatible with their treaty obligations. Domestic legal systems are therefore the primary interface for people to seek the protection of international human rights law.

In terms of Article 19(2) of the ICCPR, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." General Comment No. 34 to the ICCPR,[25] published in 2011, expands on the content of Article 19(2) and provides that "internet-based modes" of expression constitute a legitimate means of expression. The General Comment provides further that:

> States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto. (Emphasis added.)

More recently, the United Nations Human Rights Council (UNHRC) has reaffirmed, in a 2016 resolution,[26] that "quality education plays a decisive role in development, and therefore calls upon all States to promote digital literacy and to facilitate access to information on the Internet, which can be an important tool in facilitating the promotion of the right to education. The resolution further emphasises "the importance of applying a comprehensive human rights-based approach in providing and in expanding access to the Internet, and requests all States to make efforts to bridge the many forms of digital divide. In addition, it calls on all states to consider formulating, through transparent and inclusive processes with all stakeholders, and adopting national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core." (Emphasis added.)

21 Lara, J. C. (2015). *Internet access and economic, social and cultural rights*. Association for Progressive Communications. https://www.apc.org/sites/default/files/APC_ESCR_Access_Juan%20Carlos%20Lara_September201 5%20%281%29_0.pdf
22 www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
23 www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx
24 www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
25 www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf
26 A/HRC/RES/32/13, 18 July 2016. ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/13

In terms of binding treaty law, the Convention on the Rights of Persons with Disabilities (CRPD),[27] which was adopted in 2006 and which South Africa has ratified, expressly provides that "States Parties shall take appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet." The CRPD also provides that states parties, in ensuring that people with disabilities can exercise the right to freedom of expression and opinion, shall take all appropriate measures, including by "[u]rging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities."

On a regional level, Article 9(1) of the African Charter on Human and Peoples' Rights[28] recognises that "[e]very] individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinions within the law." The ACHPR has also recently issued, in 2016, Resolution 362 on the Right to Freedom of Information and Expression on the Internet in Africa.[29] Importantly, the resolution "[c]alls on States Parties to respect and take legislation and other measures to guarantee, respect and protect citizen's right to freedom of information and expression through access to internet services." (Emphasis added.)

Further reference to access to the internet in Africa is found in the civil society-led initiative of the African Declaration on Internet Rights and Freedoms (African Declaration).[30] The Declaration – which is cited by the 2016 ACHPR Resolution – provides, among other things, that:

> Access and affordability policies and regulations that foster universal and equal access to the internet, including fair and transparent market regulation, universal service requirements and licensing agreements, must be adopted.

Separate to the question of a stand-alone right of access to the internet is the question of the role that the internet plays in enabling human rights; the applicability of the ICESCR to the internet;[31] and the role that access to the internet can play in the progressive realisation of other rights.

As indicated above, access to the internet is now widely regarded as a central enabling mechanism, space and resource for the realisation of human rights, including "the right to hold opinions without interference, the right to freedom of expression and information, the right to freedom of assembly and association, the right to freedom of thought, conscience and religion, the right to be free from discrimination in all forms, the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language, and economic, social and cultural rights," as emphasised by the African Declaration.

In terms of Article 2 of the ICESCR, each state party undertakes to take steps, to the maximum of its available resources, to achieving progressively the full realisation of the rights to, among others, adequate food and housing,[32] health,[33] education (including access to higher education),[34] and cultural life.[35] Importantly, states are to ensure the progressive realisation of the rights contained in the ICESCR by all appropriate means, including particularly the adoption of legislative measures.

Within the context of the obligation on states to ensure progressive realisation "by all appropriate means", the internet is increasingly becoming a means necessary for the fulfilment of not only civil and political rights, but also economic, social and cultural rights.

Reference to access to the internet is made in, among others, the abovementioned General Comment, reports by UN special rapporteurs,[36] the 2016 UNHCR and ACHPR resolutions, and the CRPD. However, the United Nations, the ACHPR, and states parties to the relevant treaties are yet to expressly define access to the internet as a human right, or ratify a treaty or develop customary international law to introduce the stand-alone right of access to the internet into international human rights law. Access to the internet is, however, recognised as a central, and increasingly indispensable, enabling mechanism to facilitate the full realisation and enjoyment of, among others, information rights, the

27 www.un.org/disabilities/documents/convention/convoptprot-e.pdf
28 www.achpr.org/instruments/achpr/#a9
29 ACHPR/Res.362(LIX). www.achpr.org/sessions/59th/resolutions/362
30 www.africaninternetrights.org/wp-content/uploads/2015/11/African-Declaration-English-FINAL.pdf
31 Finlay, A., and Brown, D. (2016). Key considerations: Economic, social and cultural rights and the internet. In A. Finlay (Ed.), *Global Information Society Watch 2016: Economic, social and cultural rights and the internet*. Association for Progressive Communications and International Development Research Centre. https://giswatch.org/en/economic-social-and-cultural-rights-escrs/key- considerations-economic-social-and-cultural-rights-
32 Article 11.
33 Article 12.
34 Article 13.
35 Article 15.
36 See, for example, La Rue, F. (2011). Op. cit.

right to actively participate in democratic elections, the right to education, the right to health, and the rights of women and persons with disabilities. Moreover, universal access and the bridging of the digital divide, including the gender digital divide, in the absence of express treaty law, are clear international commitments that have been made by states parties, including South Africa, and their realisation is increasingly urgent in the digital age.

PART III: SOUTH AFRICA IN CONTEXT: LEGAL FRAMEWORKS AND CURRENT INITIATIVES

OVERVIEW OF THE CURRENT CONTEXT

According to the World Bank, South Africa remains a dual economy, with one of the highest inequality rates in the world, perpetuating both inequality and exclusion.[37] Undoubtedly, having access to the internet, and in doing so being able to benefit from the wealth of information and opportunity that this provides, could serve as an equaliser that plays an important role in remedying this imbalance. As discussed, in addition to being critical to the enjoyment of information rights, such access also supports development by empowering all people, including those in remote and marginalised communities, to better exercise their political and socioeconomic rights; become more economically active and productive; learn and apply new skills; find better means for earning a livelihood; enrich their cultural identity and expression; participate in decision making; address personal development and social challenges; and enrich the collective knowledge-building process.[38]

Notably, broadband impact studies have revealed that increases in broadband penetration correlate with an increase in gross domestic product (GDP), new jobs, broadening of educational opportunities, enhanced public service delivery and rural development.[39] Furthermore, it is a critical enabler of new forms of scientific and industrial development, including for large science projects, and contributes to environmental sustainability and a greener economy through smart and green infrastructure.[40]

Significantly, as described by the Right2Know Campaign:

> The internet has been massively transformative as it has created new forms of social interactions, activities and organising. The internet has also supported the free flow of information worldwide and the speed and ease at which communities and individuals communicate with each other.[41]

South Africa has four mobile operators (MTN, Vodacom, Cell C and Telkom Mobile), and two fixed operators (Telkom and Neotel), with an extensive reach across the country.[42] According to the General Household Survey 2016, approximately 96.5% of households nationally had access to either landlines or cellular phones. Approximately 59.3% of households had at least one member who had access to or used the internet, either at home, work, place of study or internet cafés.[43]

As explained by the survey:

> Using mobile devices to access the Internet comprises access on cellular telephones or using mobile access devices such as 3G cards. It is clear that mobile access to the Internet has made it much more accessible to households in rural areas. Nationally, Internet access using mobile devices (53.9%) was much more common than access at home (9.5%), at work (15.8%) and elsewhere (9.8%). Although the use of mobile internet access devices in rural areas (38.3%) still lags its use in metros (61.6%) and urban areas (58.0%), it is much more common in rural areas than any of the alternative methods.

37 See www.worldbank.org/en/country/southafrica/overview

38 Association for Progressive Communications, International Federation of Library Associations and Institutions, & Technology & Social Change Group. (2014). *Public Access: Supporting DigitalInclusion for All – Maximising The Impact of Information and Communication Technologies (ICTs) For Inclusive Social and Economic Development.* https://www.apc.org/sites/default/files/APC_PublicAcccessBriefing_20140513.pdf

39 Department of Communications. (2013). South Africa Connect: Creating Opportunities, Ensuring Inclusion (South Africa's Broadband Policy). www.gov.za/documents/electronic- communications-act-south-africa-connect-creating-opportunity-ensuring-inclusion

40 Ibid.

41 Right2Know. (2015). *Expanding the right to communicate: An activist's guide to internet access.* www.r2k.org.za/wp-content/uploads/R2K-activist-guide-internet-access.pdf

42 Abrahams, L., & Pillay, K. (2015). *The Lived Costs of Communications: Experiencing the lived cost of mobile communications in low and very low income households in urban South Africa 2014.* Right2Know and LINK Centre. www.r2k.org.za/wp-content/uploads/R2K-lived-cost- communications.pdf

43 Statistics South Africa. (2017). General Household Survey 2016. www.statssa.gov.za/publications/P0318/P03182016.pdf

TABLE 1. HOUSEHOLD ACCESS TO THE INTERNET BY PLACE OF ACCESS, GEOTYPE AND PROVINCE, 2016

Source: Statistics South Africa, General Household Survey 2016.

Place of internet access	Geotype	Province (per cent)									
		WC	EC	NC	FS	KZN	NW	GP	MP	LP	RSA
At home	Metro	27.3	6.8	NA	8.2	9.0	NA	14.9	NA	NA	15.2
	Urban	16.6	5.8	6.3	4.7	6.7	6.6	13.8	5.4	5.2	8.3
	Rural	16.6	0.7	3.5	2.4	0.8	0.6	17.3	6.3	0.5	2.0
	Total	**23.6**	**3.9**	**5.5**	**5.4**	**5.2**	**3.5**	**14.7**	**5.9**	**1.6**	**9.5**
At work	Metro	25.0	20.9	NA	12.2	21.4	NA	25.4	NA	NA	23.9
	Urban	14.0	12.8	14.8	10.4	20.5	12.0	22.5	12.6	15.4	15.3
	Rural	9.0	2.5	4.6	2.7	4.4	3.4	25.4	5.4	2.7	3.9
	Total	**20.9**	**10.9**	**12.0**	**9.9**	**14.5**	**7.6**	**25.0**	**8.5**	**5.5**	**15.8**
Via mobile devices	Metro	64.5	67.0	NA	62.6	52.8	NA	62.2	NA	NA	61.6
	Urban	45.1	55.4	57.2	50.0	57.6	59.9	73.1	63.3	55.7	58.0
	Rural	25.8	29.9	39.4	41.0	35.5	45.2	58.8	50.0	35.5	38.3
	Total	**56.9**	**48.0**	**52.2**	**52.4**	**47.1**	**52.4**	**63.6**	**55.8**	**40.0**	**53.9**
At internet cafes or educational facilities	Metro	12.6	10.8	NA	6.8	15.9	NA	16.8	NA	NA	15.1
	Urban	11.3	9.0	3.5	8.5	8.9	5.4	14.7	5.9	3.7	8.5
	Rural	1.1	1.3	4.3	6.0	4.8	3.0	9.3	4.2	1.9	3.2
	Total	**11.6**	**6.2**	**3.7**	**7.7**	**9.9**	**4.2**	**16.4**	**4.9**	**2.3**	**9.8**

This emphasis towards mobile access to the internet is consonant with the rest of the region, as sub-Saharan Africa remains the fastest growing mobile market.[44] It is clear that there is an ever-increasing demand for digital content. A 2015 report titled The Lived Costs of Communications identified that the top three reasons for accessing the internet were reported as being: (i) looking for information about education, training or course offers; (ii) sending and receiving emails; and (iii) looking for a job or sending a job application. The report goes on to reflect the following trends in the types of information being accessed online in South Africa:

> Local online media in South Africa is extensive including the categories of business and finance; motoring; news, industry news, community news and current affairs; marketing; sport and other categories. Online educational media is a small but growing content area. Mobile advertising is big business and more than eight million adults had accessed the Internet from their mobile phone in the 7 days prior to the survey, in order "to read web/mobi sites, participate in social media such as Twitter and Facebook, watch video and other content." The survey reports that advertising via mobile includes SMS, call-me adds, mobile links to promotions, notification of deals available at the point-of-sale, e-newsletters and other forms of advertising.[45]

When considering the lived cost of accessing the internet, the stark reality is that many people still do not enjoy access to online information, and in particular, low-income and very low-income households are unable to easily move into the digital age, despite the fact that many households already have a mobile device. As noted in the report:

> If South Africa is to transition effectively towards experiencing digital futures in health, education and work; to transition towards living in "smart cities"; to see e-transformation influence social and economic development; then the participation of citizens in low and very low-income households in such digital futures and transformed social and economic environments should be constantly monitored and understood.[46]

There is a clear and urgent need in South Africa to ensure that all members of society enjoy access to the internet, in particular for the role that it plays in "link[ing] people

44 GSMA. (2017) *The mobile economy: Sub-Saharan Africa 2017*. https://www.gsma.com/mobileeconomy/sub-saharan-africa-2017

45 Abrahams, L., & Pillay, K. (2015). Op. cit.

46 Ibid.

and businesses, facilitating communication and the flow of ideas and information and coordinating economic activities and development."[47] While the trend towards mobile access is to be expected, there are downsides in that mobile access tends to be slower and more costly. It is clear from the statistics that people living in rural South Africa enjoy markedly less access to the internet and online information than those in urban and metropolitan areas, and that, across the country, a significant number of people do not enjoy any access whatsoever.

THE CONSTITUTIONAL FRAMEWORK

The Constitution of the Republic of South Africa, 1996[48] (Constitution) is the supreme law in South Africa, and any law or conduct that is inconsistent with the Constitution is invalid.[49] The Constitution imposes both positive and negative duties on the state, and requires it to respect, protect, promote and fulfil the rights in the Bill of Rights.[50] In addition to binding the state, the Bill of Rights also binds natural and juristic persons, if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[51]

The Bill of Rights contains a range of justiciable fundamental rights, including the right to freedom of expression (which includes the freedom to receive or impart information or ideas), and the right of access to information, contained in Sections 16 and 32 of the Constitution respectively. The Constitutional Court of South Africa, the highest court in the country on constitutional matters, has frequently recognised the importance of these rights. For instance, it has described the right to freedom of expression as a "sine qua non for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power,"[52] and "essential to the proper functioning of our constitutional democracy."[53]

With specific reference to the right of access to information, it has stated that:

> A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This […] reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.[54]

The constitutional imperative for universal access to online information has been recognised in two of the key ICT policies that are currently in place in South Africa: (i) South Africa Connect: Creating Opportunities, Ensuring Inclusion (South Africa's Broadband Policy) (South Africa Connect), published by the Department of Communications in November 2013;[55] and (ii) the National Integrated ICT Policy White Paper (ICT Policy White Paper), published by the Department of Telecommunications and Postal Services (DTPS) in September 2016.[56]

The ICT Policy White Paper draws a direct link between the provision of ICTs and the demands of the Constitution, noting in its introduction, with reference to the Preamble of the Constitution, that it is premised on "furthering the constitutional objective of improving 'the quality of life of all citizens' and freeing 'the potential of each person'." It further emphasises the interplay between access to the internet and the constitutional right to equality:

> Equality and the right of everyone to "full enjoyment of all opportunities in South Africa"[57] underpin all rights and freedoms enshrined in the Constitution. This founding law further compels Government to proactively intervene to address any inequality. In line with this constitutional injunction, this White Paper introduces a range of interventions to ensure that everyone in South Africa, regardless of who they are, where they live or their socio-economic

47 Statistics South Africa. (2017). Op. cit., p. 49.
48 www.gov.za/sites/www.gov.za/files/images/a108-96.pdf
49 Section 2 of the Constitution.
50 Section 7(2) of the Constitution.
51 Section 8 of the Constitution.
52 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7 at para 29. www.saflii.org/za/cases/ZACC/1996/7.html
53 *The Citizen 1978 (Pty) Ltd and Others v McBride* [2016] ZACC 30 at para 141. www.saflii.org/za/cases/ZACC/2016/30.html
54 *South African Broadcasting Corporation v Director of Public Prosecutions* [2006] ZACC 15 at para 28. www.saflii.org/za/cases/ZACC/2006/15.html
55 Department of Communications. (2013). Op. cit.
56 DTPS. (2016). National Integrated ICT Policy White Paper. https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Polic y_White.pdf
57 Section 9 of the Constitution.

> status can improve the quality of their lives through accessing the benefits of participating in the digital society.

This was also expressly recognised in South Africa Connect, which stated that:

> [T]his policy gives effect of the Constitution of South Africa by creating the conditions in a modern electronic world "to improve the quality of life of all citizens and free the potential of each person" and, in doing so, enables equality in the rights, privileges and benefits of citizenship, including the guarantees of freedom of expression and association in the Bill of Rights. This aligns with the declaration by the Human Rights Council of the United Nations General Assembly that access to the internet is a basic human right which enables individuals to "exercise their right to freedom of opinion and expression".

As outlined above, there is a wide range of regional and international law instruments emphasising the connection between access to the information and the realisation of other rights, most notably the right to freedom of expression and the right of access to information. This is particularly relevant in the South African context, because the Constitution specifically provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law;[58] and that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation.[59]

The Constitution provides important guidance on how a right of access to online information should be realised, in line with South Africa's regional and international commitments. There is clear recognition from policy makers in South Africa that access to the internet and online information is integral to the enjoyment of a range of fundamental rights, and must be realised for those rights to be realised in turn. The next section explores the specific regulatory and policy measures in place in South Africa that seek to achieve this.

58 Section 39(1)(b) of the Constitution.
59 Section 233 of the Constitution.

THE REGULATORY AND POLICY FRAMEWORK

The National Development Plan 2030 (NDP)[60] aims to eliminate poverty and reduce inequality in South Africa by 2030, and integrates the need for better educational and economic opportunities for young people, as well as the need for focused efforts to eliminate gender inequality, throughout its aims. Chapter 4 of the NDP, which deals with economic infrastructure, contains a section dealing specifically with information and communications infrastructure. This section identifies "[a]n immediate policy goal to ensure that national ICT structures adequately support the needs of the economy, allowing for parties beyond the public sector to participate." The NDP set out its overall vision for ICTs in South Africa as follows:

> By 2030, ICT will underpin the development of a dynamic and connected information society and a vibrant knowledge economy that is more inclusive and prosperous. A seamless information infrastructure will be universally available and accessible and will meet the needs of citizens, business and the public sector, providing access to the creation and consumption of a wide range of converged services required for effective economic and social participation – at a cost and quality at least equal to South Africa's main peers and competitors. Within this vision, the underlying ICT infrastructure and institutions will be the core of a widespread digital communications system. This ecosystem of digital networks, services, applications, content and devices, firmly integrated in the economic and social fabric, will connect public administration and the active citizen; promote economic growth, development and competitiveness; drive the creation of decent work; underpin nation building and strengthen social cohesion; and support local, national and regional integration. Public services and educational and information products will be accessible

60 National Planning Commission. (2011). National Development Plan 2030: Our Future – Make It Work. www.nationalplanningcommission.org.za/Pages/NDP.aspx Universal access has early origins in South Africa's constitutional dispensation. In the Reconstruction Development Plan (RDP), the government's 1994 socioeconomic policy framework prepared as the African National Congress (ANC) assumed power in the post-apartheid era, it was stated that "[t]he RDP aims to provide universal affordable access for all as rapidly as possible within a sustainable and viable telecommunications system," and that "telecommunications services must be provided to all schools and clinics within two years."

to all, and will build on the information, education and entertainment role envisaged for public broadcasting. The human development on which all this is premised will have created an e-literate (online) public able to take advantage of these technological advances and drive demand for services.

There are a number of pieces of legislation and policy that impact on access to online information and ICTs generally, and seek to make this vision a reality. The Promotion of Access to Information Act (PAIA)[61] is the legislation that has been enacted to give effect to the constitutional right of access to information. Included in the objectives of the PAIA are to give effect to the constitutional obligations of the state of promoting a human rights culture and social justice;[62] and to promote transparency, accountability and effective governance of all public and private bodies, including by empowering and educating everyone to effectively scrutinise, and participate in, decision making by public bodies that affects their rights.[63]

The PAIA provides access to both public and private bodies, although in the case of private bodies, the requester must establish that the information is required for the exercise or protection of any rights.[64] Importantly, it does not distinguish between information held online and offline: it simply guarantees a right of access to records of information that are held (subject to certain restrictions, which may be overridden in the public interest). The PAIA provides both for requests for access to information to be made, as well as for the voluntary disclosure and automatic availability of certain records.[65]

While the PAIA does not distinguish between information held online and offline, it does contemplate the use of electronic means to enable access. For instance, a request may be submitted at a physical address, fax number or email address, and the requester may similarly choose to receive the information electronically.[66] Also of relevance is the Protection of Personal Information Act (POPI),[67] which entitles data subjects to request to be informed about what personal information is being held, and that such information be corrected or deleted if it is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully.[68] The POPI provides for the same manner of access as contemplated in the PAIA,[69] and similarly does not distinguish between information held online and offline.

Of specific relevance to ICTs are the Electronic Communications and Transactions Act (ECTA)[70] and the Electronic Communications Act (ECA).[71] According to its preamble, the ECTA aims, among other things, to provide for the development of a national e-strategy; to promote universal access to electronic communications and transactions, and the use of electronic transactions by small, medium and micro enterprises (SMMEs); and to encourage the use of e-government services. The ECTA contains the following key features:

- It requires that the Minister of Communications must develop a three-year national e-strategy, which must be submitted to Cabinet for approval; on acceptance of the e-strategy, Cabinet must declare its implementation to be a national priority.[72] Under the heading of "Universal Access", the ECTA requires that the national e-strategy must outline strategies and programmes to provide internet connectivity to disadvantaged communities; encourage the private sector to initiate schemes to provide universal access; foster the adoption and use of new technologies for attaining universal access; and stimulate public awareness, understanding and acceptance of the benefits of internet connectivity and electronic transacting.[73]

- Chapter IV of the ECTA deals with e-government services, and provides that a public body may accept the filing of documents in the form of data messages; issue permits, licences and approvals in

61 Act 2 of 2000. www.gov.za/documents/promotion-access-information-act; it is constitutionally- mandated by section 32 of the Constitution, and as stated in Section 5, enjoys supremacy over other legislation related to information disclosure.
62 Section 9(1)(c) of the PAIA.
63 Section 9(1)(e) of the PAIA.
64 Section 32(1) of the Constitution and section 9(1)(a) of the PAIA.
65 Section 15 of PAIA. In terms of section 15(1), this requires that the information officer of a public body must on a periodic basis submit a description of categories of records held by the public body that are automatically available without a person having to request access in terms of the PAIA, and how a person can obtain such records.
66 Section 18(1) of the PAIA (for public bodies) and Section 53(1) of the PAIA (for private bodies).
67 Act 4 of 2013. www.justice.gov.za/legislation/acts/2013-004.pdf
68 Sections 23 and 24 of the POPI.
69 Section 25 of the POPI, with reference to Sections 18 and 53 of the PAIA.
70 Act 25 of 2002. www.gov.za/documents/electronic-communications-and-transactions-act
71 Act 36 of 2005. www.gov.za/sites/www.gov.za/files/a36-05_0.pdf
72 Section 5 of the ECTA.
73 Section 6 of the ECTA.

TABLE 2: SOUTH AFRICA CONNECT NATIONAL BROADBAND POLICY TARGETS

Target	Penetration measure	Baseline (2013)	By 2016	By 2020	By 2030
Broadbaand access in Mbps user experience	% of population	33.7 Internet access	50% at 5 Mbps	90% at 5 Mbps 50% at 100 Mbps	100% at 10 Mbps 80% at 100 Mbps
Schools/ education	% of schools	25% connected	50% at 10 Mbps	100% at 10 Mbps 80% at 100 Mbps	100% at 1Gbps
Health facilities	% of health facilities	13% connected	50% at 10 Mbps	100% at 10 Mbps 80% at 100 Mbps	100% at 1Gbps
Public sector facilities	% of government offices		50% at 5 Mbps	100% at 10 Mbps	100% at 10 Mbps

the form of data messages; or make or receive payments in electronic form or by electronic means.[74]

- In April 2017, the National e-Government Strategy and Roadmap was published for public comment in terms of section 5(3) of the ECTA.[75] As noted therein, e-government "provides an opportunity to use ICTs for promoting greater accountability of the government, increase efficiency and cost-effectiveness and create greater constituency participation." It has not been adopted by Cabinet as yet.

The ECA seeks to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors, and to provide a legal framework for the convergence and licensing of these sectors.[76] Chapter 14 of the ECA provides for the continued existence of the Universal Service and Access Agency of South Africa (USAASA),[77] which is tasked with promoting the goal of universal access and universal service.[78] Furthermore, it is required to foster the adoption and use of new methods of attaining universal access and universal service.[79] Additionally, the ECA provides for the continued existence of the Universal Service and Access Fund (USAF),[80] as well as for the utilisation of the funds from the USAF, which must be used exclusively for the payment of subsidies to assist needy persons, underserviced areas, and public schools and public further education and training institutions.[81] The USAF is managed by USAASA, and is funded from levies payable by operators. USAASA is also required to provide incentives to electronic service licensees to construct, operate and maintain electronic communications networks in underserviced areas through the award of project grants.[82]

In 2013, the Department of Communications published South Africa Connect, South Africa's national broadband policy and associated strategy and plan, in terms of section 3(1) of the ECA, which was intended to give expression to the vision in the NDP for a seamless information infrastructure by 2030, and set a number of national broadband policy targets.[83]

South Africa Connect has a four-pronged strategy: digital readiness, digital development, digital future and digital opportunity. Under the discussion on the second of the four prongs, digital development, the policy outlined the following five requirements to serve as part of the digital development strategy of the policy:

- An expanded public service network that will provide high speed broadband connectivity to administrative and other facilities.

74 Section 27 of the ECTA.
75 DTPS. (2017). National e-Government Strategy and Roadmap. www.gov.za/sites/www.gov.za/files/40772_gon341.pdf
76 Preamble of the ECA.
77 Section 80(1) of the ECA.
78 Section 82(1)(a) of the ECA.
79 Section 82(1)(c) of the ECA.
80 Section 87 of the ECA.
81 Section 88(1) of the ECA.
82 Section 90(1) of the ECA.
83 Department of Communications. (2013). Op. cit. See also, Research ICT Africa. (2015). *South Africa Connect: Creating opportunities, ensuring inclusion*. https://www.researchictafrica.net/presentations/Presentations/2015%20Khan_Safia_ITU%20Broadband%20Policy%20Presentation.pdf

- Dedicated connectivity for all schools to be used by teachers, learners, administrators and other support staff for administrative, teaching and learning purposes.

- Dedicated connectivity for all public health care facilities, and greater digitisation of the health care system.

- Enabling communities to solve their own connectivity problems through the development of regulation supporting cooperatives, the promotion of import tax breaks for non-profit organisations and open access to the national backbone.

- Free public Wi-Fi to be made available at all public points reached by the public sector networks. As noted in the policy: "This will stimulate demand by allowing people to access the internet, including government services. Mechanisms will be explored to support and encourage municipalities to establish municipal-wide free [Wi-Fi] networks aimed at enabling access, and innovation."

The implementation of South Africa Connect has been fraught with challenges. In a presentation by the Department of Telecommunications and Postal Services to the Parliamentary Portfolio Committee in June 2017, it was noted that implementation would be achieved through a two-phase approach: phase 1 would see 6,135 facilities (eight district municipalities) connected by 31 March 2018, with ZAR 416 million to procure broadband services; and phase 2 would see 35,211 facilities (44 district municipalities) connected, with a business case having been developed and submitted to the National Treasury for funding.[84]

It was further noted in the presentation that the Department had planned to commence implementation of the first phase in eight pilot districts following an open tender process by the State Information Technology Agency (SITA). However, according to the briefing, there was no successful bidder among those who participated, resulting in the tender being cancelled in November 2016, and the Department having since decided to use the state-owned entities to implement the policy.

The ICT Policy White Paper was published in September 2016, with a view to provide the overarching policy framework for the transformation of South Africa to an inclusive and innovative digital and knowledge society.[85] It identifies one of its overall objectives as being "broadband for all", with its objective relating to accessibility providing that "[s]ervices, devices, infrastructure and content must be accessible for all sectors of the population, including persons with disabilities, so that all can equally enjoy and benefit from communication services." Accessibility is interpreted in the ICT Policy White Paper as "the ability of all people to use and access services regardless of education, disability, age, gender, etc."

Universal service and access is dealt with in Chapter 5. The ICT Policy White Paper distinguishes between "universal service" aimed at the provision of ICT services to individuals or households; and "universal access", aimed at increasing access to communication services on a shared basis, such as on a community or village-wide level. It states that "[w]hile universal service is the ultimate objective in South Africa, universal access strategies will be put in place to achieve communications for all in communities, and categories of persons in need of demand side subsidies, in the medium term." (For reference, we note that when we refer to "universal access" elsewhere in this paper, we do not circumscribe in the same way; instead, we use the term "public access" to distinguish public facilities that provide access on a shared basis.)

The ICT Policy White Paper identifies the following priority areas:

- Increasing coverage to rural, remote and underserviced areas, including through the use of universal service funds.

- Digital inclusion of all segments of society, with priority being given to support persons with disabilities, persons with limited or no income, and public institutions fulfilling specific public needs (such as schools, clinics and hospitals, and police stations).

It is clear that there have been a number of important regulatory and policy measures that have been taken, including the operations of USAASA and the USAF; the imposition of Universal Service Obligations (USOs) that enable the regulator to impose service and access obligations on designated licensees; and through e-rating, which provides for a discount of at least 50%

84 DTPS. (2017). Progress on SA Connect: Presentation to the Parliamentary Portfolio Committee. www.ellipsis.co.za/wp-content/uploads/2017/03/170613saconnect.pdf

85 DTPS. (2016). Op. cit. See also Department of Planning, Monitoring and Evaluation. (2016). Socio- economic impact assessment system (SEIAS) for the draft National Integrated ICT Policy White Paper: Final impact assessment (phase 2). www.ellipsis.co.za/wp- content/uploads/2017/01/SEIAS_ICT-Policy-Review_Inputs2dtps_26_02_2016_Final.pdf

on internet services provided to public health establishments, schools, colleges, public further education centres, training institutions and higher education institutions.[86] However, significant challenges have been experienced in implementation, oversight and accountability for such frameworks. As noted in South Africa Connect, notwithstanding the dedicated agency and funds based on operator levies and obligations, the demand for communication services over the preceding two decades has been primarily met through market reforms and the provision of commercial mobile communications services, rather than through dedicated universal access and service policy intervention.[87] In addition, there has been a failure to enforce USOs and utilise universal service funds in a timely manner for the purposes intended.[88]

CURRENT INITIATIVES TO PROMOTE ACCESS TO ONLINE INFORMATION

In its recent presentation to the Parliamentary Portfolio Committee in June 2017 on the progress with South Africa Connect, the DTPS identified the following initiatives as being among its highlights:

- Provincial initiatives in Gauteng, the Western Cape, Limpopo and the North West in order to connect various government sites and provide public access to the internet.
- Through the USO rollout that forms part of the licence obligations for MTN, Vodacom, Neotel and Cell C, the connection of 3,641 schools since the project commenced in 2015/2016. The project has an annual target of 1,050 schools, with an overall target of 5,250 schools in five years.
- Use of the USAF by USAASA to connect underserved areas in the OR Tambo District Municipality (King Sabata Dalindyebo and Mhlontlo Local Municipality), with 210 of the planned 609 sites having been provided with connectivity.[89]

It appears, however, that the targets contained in South Africa Connect are far from having been met. Challenges persist in respect of the oversight and implementation of the policy, as well as considerations regarding the selection of the beneficiaries and the particular public-private partnerships being engaged, as well as assessment of whether the specific initiatives are achieving the desired outcomes.

In addition to the measures being implemented by the state, there are a range of other initiatives currently underway in South Africa to facilitate access to online information, either for free or at significantly reduced costs, driven by the private sector and/or community-led initiatives, frequently in collaboration with the different spheres of government. The rationale behind these initiatives varies, from efforts to increase the user market, to improve one's competitive position, or for altruistic reasons. The examples that follow are by no means exhaustive, and simply provide an indication of the range being seen.

From the private sector, zero-rated services are a key feature. Zero-rating refers to free access for users to content online, and is dealt with in more detail below. The zero-rated services offered by mobile operators in South Africa, as at 2016, are illustrated in Table 3.[90]

A particularly important development has been in the sphere of community networks, which refer to the communications infrastructure deployed and operated by citizens to meet their own communication needs, and are increasingly being proposed as a solution to connect those who are unconnected.[91] A December 2016 map of community network initiatives in Africa sets out more than 15 community initiatives currently being undertaken in South Africa.[92] Two prominent initiatives include:

86 DTPS. (2016). Op. cit.
87 Ibid.
88 Ibid. For a further discussion on the USAF and USAASA, and an alternative proposal on how the funds from the USAF can be used, see Lewis, C. (2015). *Establishing a Local Content Fund: The Experience of Funding Universal Access and Service.* LINK Centre. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663055. In its discussion, at pages 11-13, some of the issues raised with regard to universal service funds include that expenditure from the USAF has lagged behind collections; concerns regarding the effectiveness of projects funded by the USAF, and potential scope for corruption and misappropriation of funds.
89 DTPS. (2017).Op. cit.
90 Research ICT Africa. (2016a). *Much ado about nothing? Zero-rating in the African context*. www.researchictafrica.net/publications/Other_publications/2016_RIA_Zero-Rating_Policy_Paper_-_Much_ado_about_nothing.pdf
91 Rey-Moreno, C. (2017). *Supporting the creation and scalability of affordable access solutions: Understanding community networks in Africa*. Internet Society. https://www.internetsociety.org/wp- content/uploads/2017/08/CommunityNetworkingAfrica_report_May2017_1.pdf
92 Rey-Moreno, C., & Graaf, M. (2016). *Map of the community network initiatives in Africa*. https://www.researchgate.net/publication/309291449_Map_of_the_Community_Network_Initiatives_in _Africa

TABLE 3. ZERO-RATED SERVICES OFFERED BY MOBILE OPERATORS

Operators	Fully-zero-rated products	Partially-zero-rated products (i.e., only available as a component of a paid operator plan/package)	Features
Cell C	Free Basics		Facebook image and messaging functionality (but not videos and calling), plus other selected public interest sites
		WhatsApp	Free WhatsApp in Trace Mobile package
Vodacom	Vodacom e-school		Educational learning app
		Pnet. jobmail and careers24.com job sites	Free to browse career websites if on Vodacom NXT LVL tariff plan
MTN	Twitter		
		Wikipedia Zero	Only when accessed on Opera Mini
	D6 communicator service		A service that allows schools to communicate with parents (100 MB data cap)
		MTN Play	Selected download sites for MTN Play subscribers
		MTN Vu	Zero-rated video-streaming for Max Vu subscriptions

- Zenzeleni:[93] Through this initiative, in Mankosi in the Eastern Cape, the community created its own internet and telephone company, through which local calls are free, calls to other networks cost half of what they would on other networks, and data costs a tenth of the market price. The initiative makes use of mesh networking, through which small, cheap devices called Mesh Potatoes would be placed in certain households and can all communicate with each other.[94]

- Shika Moto:[95] This initiative by Media Monitoring Africa enables messages, files and pictures to be shared for free through an application. It is a Wi-Fi network that uses Wi-Fi to allow users to communicate for free, and intends to expand in the future to introduce limited access to the internet through selected sites.

A further initiative has been Mzansi Libraries Online, a programme of the National Library of South Africa in collaboration with the Department of Arts and Culture and the provincial library services in all nine provinces, and which forms part of the Global Libraries Programme.[96] Funded by the Bill and Melinda Gates Foundation, it aims to provide free access to library spaces, technologies and services, coupled with trained librarians and other technicians to assist users.[97]

Furthermore, earlier this year, the Internet for All initiative was launched in South Africa, which plans to connect 22 million South Africans to the internet by 2020.[98] The initiative is a partnership between the DTPS and its social partners, and the World Economic Forum. The initiative has the express aim of identifying areas with the highest need and channelling resources to provide skills in those areas, and will focus on extending ICT infrastructure to underserved areas, lowering the costs of being online and offering cheaper devices, digitising local content, and providing digital and ICT skills. The initiative will be coordinated by the Internet for All Steering Committee.

93 www.zenzeleni.net/
94 Right2Know. (2015). *Zenzeleni: Do it yourself – An introduction to community telecommunications networks.* www.r2k.org.za/wp-content/uploads/Zenzeleni-booklet-web1.pdf
95 www.shikamoto.org/
96 www.mzansilibrariesonline.ac.za/
97 SA News. (2015, 8 May). R32m for free internet at public libraries. *South African Government News Agency.* www.sanews.gov.za/south-africa/r32m-free-internet-public-libraries
98 Matshediso, M. (2017, 24 May). 'Internet for All' by 2020. *South African Government News Agency*. www.sanews.gov.za/south-africa/internet-all-2020

TABLE 4. ARGUMENTS FOR AND AGAINST ACCESS TO THE INTERNET AS A HUMAN RIGHT

Arguments in favor	Arguments against
• Necessity. There is a certain consensus on not only the usefulness of the internet but its crucial role as an "indispensable tool" for human rights and development in the current century. • Implied existence under current international human rights law. Freedom of expression, participation in cultural life and enjoyment of scientific benefits require access to the internet. Current standards of living include participation in the broader community in different ways, through the connection to the internet. • Inevitability. A number of countries including Greece, Estonia, Finland, Spain, Costa Rica and France have asserted or recognised some right of access in their constitutions, legal codes, or judicial rulings. • Inseparability. Technological progress changes how people enjoy their rights and governments should address the link between those rights and their current methods of enjoyment. • Progression. The notion of rights themselves has the ability to change, as social contexts change. The growing importance of the internet in changing social contexts makes it necessary to ensure access to it. • Public support. Worldwide surveys show a single predominant attitude towards access to the internet: that it should be recognised as a right.	• No international treaty directly creates a right of access to the internet. In simple terms, it is not a human right if the international community has not recognised it as such in a binding instrument, and there is no discussion of a new treaty to do so in any forum. • Analogy to other forms of media. There is no right to the telephone, the television, the printed press (either for publishing or receiving it) or any other similar medium that has imposed a duty on states to provide it to its citizens and cover its costs. • Universality. Access to the internet is not an economic right that can be construed from Article 11 of the ICESCR and Article 25 of the UDHR, for they are representative of standards of living that cannot be considered on the same scale for countries in much different stages of development. • Nature as a right. Even if there is a legal consideration of access, it is established not as much as an individual right but as an obligation for states, in an economic key, to provide populations with opportunities for development. • Means to an end. Access to the internet consists of technology, which is a tool, not a right itself. • Access to the internet is not absolutely necessary for participation in a political community. A big part of the world's population is without internet access, but there is little outcry if states are unable to provide access. It is only when such participation already exists and is taken away that it deserves attention. • Inflation. Claiming that an interest is a basic, fundamental or human right, without considering the conditions under which it can really be realised, inflates the number of rights, diminishing the forcefulness of core traditional human rights. • Flexibility of existing human rights. It is not necessary to "create" new rights aside from those already recognised, but to ensure their exercise and enjoyment in changing technological contexts. • Side effects. Digital inclusion policies carry concerns regarding the true beneficiary. On one hand, access policies will benefit those users with devices with the ability to access the internet, therefore exacerbating inequalities. On the other hand, lack of control by governments would lead to the need for investment in private telecommunications companies, therefore granting them economic benefit before citizens.

PROGRESSIVE REALISATION AND UNIVERSAL FREE ACCESS TO ONLINE INFORMATION

The arguments for and against whether access to the internet should be considered a human right have been summarised in an issue paper produced by APC in 2015, Internet access and economic, social and cultural rights, and are set out in Table 4.[99]

As discussed above, while there is still no binding commitment on states to provide universal free access to online information, there are nevertheless developing norms under international human rights law that lend support to recognition for this – at a minimum, as an enabler for the enjoyment of other fundamental rights, with arguable scope for it to be extended as a self-standing right. In the South African context, this is bolstered by the government's own commitments and stated intention to achieve universal access to the internet in order to meet its constitutional and international duties and undertakings.

There are, however, a myriad of complexities in determining the ambit of the right. As a point of departure, the negative duties on the state are relatively clear: the state must respect the rights of internet users, and refrain from taking unjustifiable measures that negatively interfere with or harm the enjoyment of access to the internet, such as through intentional network disruptions or the censorship of content online.

Establishing the ambit of the positive duties on the state is more challenging. While full, free access for all may be the ideal, one cannot ignore the pragmatic considerations in making this a reality, particularly in a country with limited resources. In South Africa, there is no full, free access to any basic service (including water and electricity), although there are measures to facilitate such provision, such as subsidies for certain categories of households, and free services only in cases of proven need.[100]

The South African Constitutional Court has previously recognised that:[101]

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

This statement is particularly relevant in the context of the transformative power that access to the internet has been recognised to have. The Constitutional Court has further acknowledged that "[a] society must seek to ensure the basic necessities of life are accessible to all",[102] and that the state has a duty to "accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation."[103] The term "progressive realisation" finds application both in international law and domestic constitutional law, and refers to the state's obligation to take progressive steps to realise the full enjoyment of certain rights, typically socioeconomic rights. There are certain key components that may be distilled in this regard:

- There is both an immediate and continuing obligation: an immediate obligation (which some jurisdictions refer to as a "minimum core" obligation) to realise the right of those who are in acute vulnerability, and an ongoing obligation to roll out the right on an ongoing basis to a wider demographic.

- The lowering of hurdles: this requires that legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time, in order to ensure that the right is made more accessible, both quantitatively and qualitatively, to a greater number of people over time.

99 Lara, J. C. (2015). Op. cit.

100 Research ICT Africa. (2016b). *Developing Smart Public Wi-Fi in South Africa*. www.researchictafrica.net/publications/Other_publications/2016_Public_Wi-Fi_Policy_Paper_-_Developing_Smart_Public_Wi-Fi_in_South_Africa.pdf. Section 1 of the Local Government Municipal Systems Act 32 of 2000 defines a "basic municipal service" as "a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment." www.energy.gov.za/files/policies/act_municipalsystem_32of2000.pdf

101 *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17 at para 8. www.saflii.org/za/cases/ZACC/1997/17.html

102 *Khosa v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11 at para 52. www.saflii.org/za/cases/ZACC/2004/11.html

103 *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14 at para 705. www.saflii.org/za/cases/ZACC/2005/14.html

- Reasonableness: progressive realisation requires a standard of reasonableness to be applied when assessing state policy, taking into consideration the social, economic and historical context in which the right is to be realised. The reasonableness standard applies both to the policy itself, as well as to the implementation of such policy.

- Policy review: all policies adopted by the state to progressively realise rights require flexibility, adaptability and, most importantly, proper implementation.

- Procedural fairness: there must be proper planning, orderly and predictable processes, and fair procedures made known in advance to realise the right.

In the context of the constitutional right of adequate housing in South Africa, the Constitutional Court held that the right of access to adequate housing differed from the right to adequate housing: the latter is a direct right, whereas the former is a right of access, which conveys that the state must, through legislative and other measures, enable others in society including individuals to provide housing. The judgment stated further that those in positions of economic vulnerability require specific attention, which feeds into the creation of an enabling environment for the continued realisation of the right.[104]

As stated in the issue paper on Internet access and economic, social and cultural rights, mentioned above:

> The realisation of [economic, social and cultural rights (ESCRs)], especially in a framework of progressive achievement, is thus closely linked to the internet. The continuing obligation of duty bearers is to adopt measures (legislative, economic or other) in those key areas where ESCR realisation should be acted on, which encompasses digital inclusion for many developing countries. But it is important to note that governments are central stakeholders, but not the only ones. It can be argued that private entities and companies have a responsibility, as much as each context allows, to provide and to not prevent or hinder provision of goods and services central to ESCR realisation, fulfilling the roles demanded by society and by statute. Who those stakeholders will be, as either duty bearers or rights holders, will depend on each goal. At the same time, it is important that each stakeholder be held accountable for their action or inaction in the enforcement of ESCRs in the relevant venues and relative to what can be enforced. The UN Guiding Principles on Business and Human Rights provide a framework for such responsibility, relying on business to, at the very least, avoid adverse human rights impact through their activity.[105]

Through its domestic and international commitments, South Africa has undertaken to take steps towards achieving universal access to online information. In the existing socioeconomic climate, these commitments cannot be achieved without providing for a level of free access, in particular for disadvantaged and marginalised groups who would otherwise not be able to enjoy access. In order to fulfil these commitments, the government must take reasonable steps towards progressively realising universal access to online information, both within the government itself and through engagements with private entities and other stakeholders.

PART IV: BUILDING A MODEL TOWARDS UNIVERSAL ACCESS TO ONLINE INFORMATION

Through domestic, regional and international initiatives, it is apparent that globally there is an ever-increasing groundswell of support recognising the importance of access to online information as a prerequisite for the enjoyment of an array of fundamental rights. While full free access may not be attainable, there are measures that can be put in place by the state to ensure that a basic standard of access is still enjoyed by all sectors of the population. As stated earlier, reference to free access relates to it being free for the user, with the cost to be borne by another role player, such as the mobile operator or content provider.[106]

In this section, we set out relevant considerations in respect of two such measures: (i) through basic minimum levels of access to free public Wi-Fi in public areas; and

104 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 at para 35 and 36. www.saflii.org/za/cases/ZACC/2000/19.html

105 Lara, J. C. (2015). Op. cit.

106 Larsen, S. (2016, 9 June). No Such Thing As Free Internet (Zero-Rating Explained). *Web We Want*. https://webwewant.org/news/no-thing-free-internet-zero-rating-explained/

(ii) through zero-rated content. A coordinated, properly implemented plan by the government in this regard, together with relevant stakeholders, could see significant strides being made in the attainment of universal free access to online information, that would serve to complement other existing initiatives. In addition, certain safeguards will be proposed in order to work towards building a model that is sustainable, effective and cognisant of the rights of all users.

KEY CONSIDERATIONS

The need to promote demand and digital skills

In making universal free access to online information a reality in South Africa, it is crucial that strategies aimed at addressing the supply side do not ignore the demand side as well. This includes, for instance, developing digital literacy skills, fostering relevant capabilities, and ensuring the provision of appropriate, relevant and meaningful content for users. In doing so, this not only has the potential for meaningfully realising existing demand, but also for unleashing "untapped" demand. Without stimulating the demand side, efforts at expanding the supply side will fail to achieve the desired impact to the extent intended. This needs to be encapsulated both in the broadband value chain and the broadband policy framework.

Central to the question of demand is to ensure that there is investment in digital content, as well as in the applications that allow for such content to be accessed. This should include local content in local languages, on subject matter that is pertinent to local communities. As identified in South Africa Connect, the development or generation of content should be fostered through, for instance: (i) encouraging the production, supply and use of public sector information and content; this includes promoting the digitisation and distribution of public sector information and improving access to public sector content; (ii) promoting demand for local digital content through increasing public sector efficiency and facilitating public demand aggregation, particularly in rural and remote areas; (iii) enhancing access to local content, diversity of content supply and use; (iv) encouraging the development of e-skills in primary, secondary and tertiary education; and (v) promoting research and development in ICT applications, content and services locally.[107]

107 Department of Communications. (2013). Op. cit.

The need for open and competitive markets

Experience has shown that an open, competitive market has the potential to deliver lower prices and improved quality and speed of services in the ICT sector.[108] In South Africa, a lack of access to the internet is directly affected by the lack of competitive, open markets, which is exacerbated by the difficulties that new entrants to the market experience, including in respect of onerous licensing requirements and limited access to spectrum.

It is imperative that any measures taken to improve access to online information should ensure that a consequence of this is not to entrench the existing trends in market dominance subsidised by public funds, to the detriment of an open and competitive market. For instance, providing subsidies from the USAF to mobile operators to zero-rate access to certain services could arguably result in the monopoly of large operators being entrenched by receiving back the funds that they have contributed to the USAF. The allocation of funds should also consider funding for community-based initiatives that will genuinely contribute to the development of the local economy and generate sustainable income, as opposed to communities being used for labour alone, and foster competition within the sector.

Careful scrutiny is required from the appropriate regulatory authorities, including the competition authorities, to ensure an open and competitive market. In respect of data pricing, in August 2017, the Competition Commission of South Africa published the terms of reference of a data services market inquiry, that will ultimately serve to make recommendations to government on how the market could be made more competitive and inclusive and how data prices can be reduced, and to the Independent Communications Authority of South Africa (ICASA) on the competitive impact of the regulatory framework.[109] In addition to benefitting users, improved competition in the market will also likely serve to stimulate research and innovations in the sector more broadly.

108 Ibid.
109 https://www.ellipsis.co.za/wp-content/uploads/2017/08/Competition-Act-ToR-Data-Inquiry-18- August-2017.pdf

The need for safeguards to protect the rights of users

It is important that persons making use of measures or initiatives to enable free access to online services are not prejudiced in the enjoyment of their other rights. There is a risk that through these mechanisms, a range of improper conduct may be fostered that runs foul of acceptable standards, such as data harvesting, the tracking of user behaviour, monitoring, and so on. As such, minimum safeguards should be established and implemented, that may include the following:

- Protections for privacy and security online: Providers of free access to online information should guard against using it as an opportunity to exploit the privacy rights of users. The collection, retention and further sharing of personal information should be in line with data protection laws and best practices. The services provided should also be subject to adequate standards of digital security that protect users online.

- Adequacy, appropriateness and quality of the service provided: The technical quality of the service provided, including the speed of the service, should be appropriate to meet the needs of the users, and should not unduly impinge on their ability to fully enjoy the potential of access to the internet. Furthermore, subject to considerations of reasonable network management, the provider should avoid to the extent possible imposing regulatory restrictions on access or measures that impede neutrality online, such as through censorship of content, or the blocking, filtering or throttling of the service. In this regard, the general principle of net neutrality should be upheld (i.e. that there should be an overarching principle of non-discrimination for different forms of internet traffic across networks, with operators not being allowed to block or charge for prioritising an application provider's traffic).[110] Importantly, the provider needs to balance the user's demands for unlimited access and unrestricted content against its own ability to use the bandwidth available effectively, and resist the temptation to block internet applications and content to try and control the pipeline, restrict competition and limit consumer choice.[111]

- Digital literacy and disadvantaged groups: Due regard should be had for the varying levels of digital literacy, and support should be provided to help those who require assistance to access information online. A key component of this is also to ensure that persons accessing such information are aware of the potential risks and dangers involved. In particular, measures to enable access for disadvantaged groups, such as people living with disabilities and women,[112] should be identified as priority areas for implementation.

There is a further consideration in this regard relating to the question of the demand-side end of the relationship between the user, the content and the service provider. While providing access to infrastructure is important, this is not in itself enough. In this regard, the question of access must include broader considerations and measures in respect of capacity building at various levels; local content creation; intermediary skills and services; information literacy skills; institutional capacity to understand what people need; and ensuring that these needs are met in a way that is meaningful, useful and accessible.

MECHANISMS TO REALISE UNIVERSAL ACCESS TO ONLINE INFORMATION

Access to free public Wi-Fi in public areas

As indicated above, certain policy documents distinguish between the terms "universal service" and "universal access"; however, for the purpose of this paper, we use the term "public access" when referring to public areas in which members of the public can enjoy access to free Wi-Fi. In some cases, public access may also refer to community centres that provide the hardware facilities to access online information as well,[113] although the

110 ITU. (2013). *Regulation and consumer protection in a converging environment*. https://www.itu.int/en/ITU-D/Regulatory- Market/Documents/Regulation%20and%20consumer%20protection.pdf

111 Ibid.

112 Chair, C. (2017, 14 July). Access and beyond: Gendered barriers to internet use. *GenderIT.org*. www.genderit.org/feminist-talk/column-access-and-beyond-gendered-barriers-internet-use

113 Association for Progressive Communications, International Federation of Library Associations and Institutions, & Technology & Social Change Group. (2014). Op. cit. According to research conducted by the Technology & Social Change Group at the University of Washington, there remains a need for public access and alternatives to mobile broadband for the foreseeable future, and locating public access services in existing institutions situated in the community, such as libraries and post offices, is a particularly effective method of deploying public access.

focus for present purposes specifically relates to access to free Wi-Fi for users in public areas.

As already noted, South Africa Connect identifies free public Wi-Fi at selected points reached by the public sector networks as one of the network requirements under its digital development strategy. It goes on to identify the following required action: the integration of Wi-Fi into the public sector, schools, health and community networks; and the fast-tracking of the implementation of Wi-Fi at public facilities by agencies responsible for these facilities and networks where the capacity already exists.[114]

Research conducted by Research ICT Africa and others details a range of public Wi-Fi initiatives around the country in South Africa. BMI-TechKnowledge reports that there are currently approximately 2,100 public hotspots in South Africa, of which approximately 80% are in Gauteng, with data allowances varying from 250 MB per month to 500 MB per day; Telkom and VAST Networks are two of the key providers in this regard.[115] According to a recent report by Research ICT Africa, Tshwane Free Wi-Fi is the most advanced in terms of scale and impact.[116] The City of Tshwane, for instance, has had significant success in providing 600,000 people access to 15 GB of data a month at 15 Mbps through Project Isizwe.[117] Other municipalities, however, have been more cautious in rolling out similar Wi-Fi programmes, out of concern that they may not have the funds to continue to sustain them in the long term. Project Isizwe offers three possible models for the provision of free Wi-Fi:

- Municipal-funded free Wi-Fi, through which the municipality is in full control. This will always need to be subsidised, but may be supplemented through advertising revenue.
- Municipal-traded free Wi-Fi, through which the municipality trades rights for free Wi-Fi. Through this model, free Wi-Fi is a condition placed on companies in exchange for something else, such as advertising space.
- Privately-funded free Wi-Fi, for instance, in low-income shopping malls and taxi ranks. The concern, however, is that this may be sporadic and unstrategic in its deployment, although it nevertheless has the potential to educate, connect, and improve the political awareness of a large number of people.[118]

According to Research ICT Africa, the following considerations support the provision of free public Wi-Fi: (i) smartphone penetration is already high, and growing; (ii) smartphones offer a convenient and worthwhile experience for general consumption; (iii) most South Africans access the internet primarily via mobile phones; and (iv) public buildings are the ideal locations for Wi-Fi access points as the costs of providing connectivity, power and security are already covered by existing budgets, and they can be found in both city centres and remote rural locations. Additionally, it is recommended that the following public spaces be prioritised for free public Wi-Fi: educational institutions, clinics, public open spaces, libraries, and cultural buildings.[119]

It should also be noted that in some countries, such as the United States, the internet is treated as a public utility.[120] The argument in favour of treating the internet as a basic service relies on it being essential to the activity of day-to-day life.[121] As pointed out by Right2Know, such an approach could see, for instance, more emphasis being placed on the role of municipalities to ensure adequate access to online information, which could be of particular benefit in rural communities.[122] For example, it has been argued that municipality ownership of fibre infrastructure is a viable pathway to large-scale connectivity in South Africa. However, there are a number of challenges in this regard, most notably infrastructure financing. The desired outcomes could be achieved even without drastic measures being put in place.[123]

114 Department of Communications. (2013). Op. cit.
115 BMI Tech Knowledge. (2016, 2 August). Public and commercial wi-fiWi-Fi in South Africa – are the municipalities delivering? www.bmi-t.co.za/content/public-and-commercial-wi-fi-south-africa-are-municipalities-delivering
116 Research ICT Africa. (2016b). Op. cit.
117 Project Isizwe. (2017, 6 June). Free Wi-Fi Press Release. www.projectisizwe.org/free-wi-fi- press-release
118 Ibid.
119 Research ICT Africa. (2016b). Op. cit.
120 See *United States Telecom Association et al v Federal Communications Commission and United States of America* (14 June 2016). https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/%24fil e/15-1063-1619173.pdf
121 Brand, D. (2014). *Could Wi-Fi be regarded as a basic service?* Stellenbosch School of Public Leadership. www.projectisizwe.org/wp-content/uploads/2014/12/SPL-justification-for-WiFi-as-a-basic- municipal-service.pdf
122 Right2Know. (2015). *Alternatives to privatised telecommunication: Right2Know's campaign for a more democratic information system in South Africa*. www.r2k.org.za/wp-content/uploads/R2K- alternatives-privatisation-telecoms.pdf. The report discusses the role that municipalities can play by "municipalising telecommunications services", with reference to successful projects that have been seen in the United States and Sweden.
123 Ibid.

Access to zero-rated content

Another possible step towards the full provision of access to the internet may be through the provision of zero-rated services, which means free access to certain websites or services. In this way, users are able to upload and download online content without incurring charges or having usage counted against data usage limits. This is already being provided to some extent in the private sector, through arrangements reached between telecommunications companies and social media networks, such as Facebook's Free Basics, WhatsApp, Twitter or Wikipedia, although these have raised some controversy.[124]

The "promotion of 'open data' by government" is identified as a key mechanism in South Africa Connect to realise digital opportunity. As stated therein:

> Government recognises that it is a key collector and producer of large amounts of data that, when released publicly for reuse, can be used in new and innovative ways. A key roadmap project for the Broadband Council in support of ensuring digital opportunities are met, will be to advise the Minster of Communication on the requirements of an open data policy. Implementation of such a policy would promote free access to different spheres of government data, such as bus timetables, electoral registers, clinic schedules, so that it may bolster economic activity and efficiency, and in particular spur the development of locally relevant content and applications. The Council will need to advise on the necessary privacy policy to protect the rights of citizens, but this is likely to be compensated for by increasing transparency through access to open data.[125]

The benefits of zero-rated services include that it allows for unlimited, no-cost access to certain services, and has the potential to drive demand for further internet access.[126] Conversely, there are concerns that zero-rating fosters discrimination among providers of online content and applications, and may challenge the principles of net neutrality.[127] Proponents of the principle of net neutrality – that all content on the internet should be equal, discussed further below – argue that zero-rating certain services and allowing free access violates the rights of consumers to access the open web.[128] However, others argue that net neutrality and zero-rating can coexist.

According to Research ICT Africa, zero-rating can usefully provide a gateway to the internet for first-time and price-sensitive users, and can enhance competition if employed by non-dominant mobile network operators. This, in turn, has the potential to drive demand for general-purpose mobile internet access, and stimulate demand for paid data services in the future. In response to the critique that zero-rating fosters discrimination among providers of online content and content applications, and that this runs contrary to the principle of net neutrality, Research ICT Africa notes that zero-rated services may provide the gateway to an open internet, and cautions against an approach that prioritises the technical principle of net neutrality over other key public interest considerations.[129]

Furthermore, in response to the critique that zero-rating can constitute an anti-competitive practice, Research ICT Africa argues that zero-rating should be allowed to the extent that it does not establish or entrench anti-competitive practices or long-term market dominance. In instances where zero-rating is found to have anti-competitive outcomes, such practices should be subjected to policy and regulatory remedies. It is recommended that any potential anti-competitive outcomes should be subjected to policy and regulatory measures to address the outcomes at the level at which they occur, rather than through a blanket ban.

If there is, in principle, agreement in favour of zero-rated services as a step towards realising a right of full access, the next question is what should be zero-rated. At a minimum, this should include access to government websites and services online – including, for instance, Chapter 9 Institutions (a group of organisations established in terms of Chapter 9 of the South African Constitution to guard democracy) – by designating certain domain names for this purpose.[130] This should arguably be treated as a priority, as it may serve to ensure a more active citizenry and participative democracy. Additionally, it

124 Research ICT Africa. (2016b). Op. cit.
125 Department of Communications. (2013). Op. cit.
126 Research ICT Africa. (2016a). Op. cit.
127 Ibid.
128 Larsen, S. (2016, 9 June). Op. cit.
129 Research ICT Africa. (2016a). Op. cit. For further discussion on the impact that zero-rating can have in South Africa, see also Research ICT Africa. (2015). *Zero-rated services: What is to be done?* https://www.researchictafrica.net/publications/Other_publications/2015_RIA_Facebookzerorating_poli cy_paper.pdf
130 Section 59 of the ECTA establishes a juristic person known as the .za Domain Name Authority to assume responsibility for the .za domain name space. The functions of this entity include administering and managing the .za domain name space, complying with international best practice in the administration of the .za domain name space, and licensing and regulating registries.

could enable the government to provide better and easier access to services, such as in making payments. The concern, however, is that access to government information – in instances where one may not have ease of access to other sources of information – may lead to particular biases in favour of the government, or the information that is publicly available. Considerations in this regard should include possible measures to ensure that the information provided on such websites is accurate and balanced, and measures to facilitate counter-views should be considered.

Access to matters of public affairs is also a key consideration. In this regard, it would be imperative to ensure a plurality of information, both to counter potential bias as well as to cater for concerns regarding net neutrality. Zero-rated access to encyclopaedia services, such as Wikipedia,[131] is also a model to be considered, with due regard for the need to ensure the accuracy, verification and up-to-date nature of such information. Aligned to considerations of public affairs is the zero-rating of platforms that enable mobilisation and association online through, for instance, access to social media platforms.

This leads to a myriad of questions relating to what content and information should be provided, in what language, for which users, and from which sources. Importantly, in order for zero-rated measures to be meaningful and have the desired impact, these questions should not be determined in the abstract. Rather, this must ultimately be driven by user needs, through a rights-based approach, and with a particular emphasis on those users who will be the predominant beneficiaries.

A nuance on the current zero-rating discussion is a proposal made by Steve Song in 2015 for mobile network operators to offer low-bitrate, generic zero-rating, providing internet access in the same manner that the operators connect phones to their networks.[132] According to his calculations, free 2G data for all South Africans would consume less than 1% of the design capacity of the international submarine cables landing in South Africa.

While Song notes that the calculation is rough, and does not take into consideration, among other things, whether the existing mobile networks could handle this capacity within their current spectrum allocations and technology, he goes on to note that generic low-speed zero-rating of mobile networks could have a range of positive impacts, including: spurring the adoption of data services; legitimising data as a means of government/civic communication; decreasing the digital divide; opening up vast new markets to data service providers; and spurring innovation in low-data-consumption applications. As Song argues, on the surface of this model at least, it would appear that the benefits to both the public and private sector would dramatically outweigh the costs of implementing this.

OVERSIGHT AND ACCOUNTABILITY

As a point of departure, the success or failure of any model or intervention requires a clear, consistent policy framework that clearly designates authority, and provides for transparency and accountability for the implementation of the framework. Three questions need to be asked: (i) are there adequate regulatory frameworks to govern all matters that require attention; (ii) are the existing frameworks being implemented and adapted as necessary; and (iii) who is responsible for the oversight and accountability if there is a lack of implementation?

With regard to the implementation of, and accountability for, existing frameworks, the current position in South Africa, for instance, is somewhat murky. There has been some uncertainty regarding the roles to be played by the Department of Communications and the DTPS. Indeed, the need for coordination has been acknowledged within the existing policies in place. The ICT Policy White Paper, for instance, provides that Cabinet establish a Digital Transformation Inter-Ministerial Committee, answerable to the Executive, to facilitate coordination and the roll-out of ICT solutions in relevant focus areas. South Africa Connect, on the other hand, established the National Broadband Council, made up of public, private sector and civil society representatives and experts, to advise the Minister of Communications on the design and implementation of broadband by the government.

Differing bodies with competing mandates pose the risk of leading to inefficiencies and a lack of ultimate accountability for the monitoring and evaluation of implementation. Additionally, any body that is established for this purpose should include participation from experts and members of civil society, given its complex and far-reaching impact. Furthermore, the authority in this regard should not vest with national government alone; in line with the constitutional dictates of cooperative

131 Research ICT Africa. (2016a). Op. cit.
132 Song, S. (2015, 25 November). Zero-Rating: A Modest Proposal. *Many Possibilities.* https://manypossibilities.net/2015/11/zero-rating-a-modest-proposal

government,[133] the other spheres of government should be engaged as well, in particular local government, whom the Constitution enjoins "to ensure the provision of services to communities in a sustainable manner" and "to promote social and economic development."[134] Importantly, independent bodies with constitutional mandates, such as the South African Human Rights Commission (which is mandated to monitor the progressive realisation of socioeconomic rights) and the Information Regulator (which is mandated to safeguard information rights, including the right of access to information), can be invaluable in ensuring that the mandate is effectively met with an appropriate rights-based approach.

CONCLUSION

For the internet to be truly the "most powerful tool of the 21st century", access to the information that it holds must extend to all, including the most marginalised in society. In examining the background and legal frameworks that support a right to universal free access to online information, with a specific focus on the South African context, this paper has explored how universal free access to online information might be achieved in South Africa, and the safeguards and other considerations relevant to meet this aim and protect the rights of free internet users. The South African government has made multiple regional and international commitments to open data, and domestically work is well underway towards achieving universal access. But inequality persists and more can be done. Universal free access to online information in South Africa is achievable with the requisite will, stakeholder engagements, and strategic partnerships.

133 Sections 40 and 41 of the Constitution.
134 Sub-section 152(1)(b) and (c) of the Constitution.

Internet and ICTs for social justice and development

APC is an international network of civil society organisations founded in1990 dedicated to empowering and supporting people working for peace, human rights, development and protection of the environment, through the strategicE use of information and communication technologies (ICTs).

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