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DIGITAL RIGHTS AND INCLUSION IN AFRICA REPORT

SOUTH AFRICA



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Digital Rights and Inclusion in Africa Report 2022

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South Africa



▶ Executive Summary

In 2022, South Africa championed legislation and policy to advance digital rights and the use of technologies. However, there were delays in implementing policy objectives and targets were often unmet. Continued delays in implementing ICT plans and strategies excludes underserved populations from accessing information and exercising other fundamental rights in digital spaces. On the whole, the Judiciary grappled with the issue of hate speech perpetuated online and has made interesting, albeit divergent, findings on online harms. This country report seeks to provide an overview of the advancements as well as some of the challenges and tensions in South Africa's digital rights landscape.



Introduction

South Africa is a constitutional democracy with an advanced human rights framework following its first democratic elections in 1994, which was the first step towards ending decades of racial segregation (although the country continues to grapple with racial discrimination). The country's progressive human rights framework is evidenced by South Africa's ranking of 79 out of 100 for its political rights and civil liberties in the 2022 Freedom in the World Report.¹ In 2022, South Africa recorded an internet penetration rate of 68.2 per cent and had 41.19 million internet users.²

Despite its advanced human rights framework, South Africa is not exempt from social and political tensions that contribute to online harms such as hate speech and cyberbullying. In 2022, it was reported that the anti-migrant and xenophobic hashtags on Twitter #OperationDudula ("dudula" translates roughly into "push away" in isiZulu and isiXhosa languages) received 15,697 mentions between July 1, 2022 and July 15, 2022 and the tag #PutSouthAfricansFirst received 13,257 mentions in the same period.³ Xenophobic online posts and hashtags also materialise in the physical mobilisation against foreigners in South Africa.⁴

South Africa has in place data protection legislation in the form of the Protection of Personal Information Act 4 of 2013 (POPIA), which establishes the Information Regulator as the regulatory authority responsible for its enforcement including protecting data subjects and holding data processors accountable for unauthorised data processing.⁵ The Constitution makes provision for the right to access information, which is given practical expression through the Promotion of Access to Information Act 2 of 2000 (PAIA).⁶ Other key pieces of legislation related to accessing and processing information include the Electronic Communications and Transactions Act 25 of 2002 (ECT) – which seeks to ensure universal access to electronic communications and transactions as well as to regulate and facilitate electronic communications,⁷ – as well as the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) 70 of 2002 and the Film and Publications Amendment Act of 2019. Broadly, in 2022, South Africa has been proactive in adopting legislation to enable and protect digital rights, but practical enforcement and implementation impede progress.

1 Freedom House 'Freedom in the World' (2022) <https://freedomhouse.org/country/south-africa/freedom-world/2022> (accessed December 7, 2022).

2 Data Reportal 'Digital 2022: South Africa' (2022) <https://datareportal.com/reports/digital-2022-south-africa?rq=south%20africa> (accessed December 8, 2022).

3 The Centre for Analytics and Behavioural Change 'Periodic report: Conversations on social media about foreign nationals in South Africa' (2022) https://cabac.org.za/wp-content/uploads/2022/08/Periodic-report-2-ForeignNationals_02.08.22.docx.pdf (accessed December 13, 2022).

4 *Id.*

5 Protection of Personal Information Act 4 of 2000 (POPI) <https://popia.co.za/>

6 Promotion of Access to Information Act 2 of 2000 (PAIA) https://www.saps.gov.za/resource_centre/acts/downloads/promotion_of_access_act2_2000.pdf

7 Electronic Communications and Transaction Act 25 of 2002 https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf

Country Analysis

INTERNET FREEDOM

INTERNET ACCESS AND DISRUPTIONS

Access to the internet is increasingly recognised as having a bearing on the realisation of the right to freedom of expression, access to information, and the right to vote, all of which enjoy constitutional protection.⁸ The internet supports the realisation of these fundamental rights in an age in which most people have an online presence and make use of the internet to advocate for their rights and hold public bodies accountable. South Africa has not experienced government-led internet shutdowns, a trend which continued in 2022, although incidents of throttling, blocking, and filtering have occurred in the past.⁹

South Africa has high levels of inequality in access to the internet, largely driven by atypically high mobile data costs. South Africa ranked 135 out of 233 countries for its data costs.¹⁰ With an average price of \$2.04 for 1GB of data, the cost of data in South Africa is attributed to inadequate infrastructure to enable 4G and 5G coupled with heavy reliance on the availability of broadband.¹¹ The Independent Communications Authority of South Africa (ICASA) published its bi-annual tariffs report for the period of January 2022 to June 2022 in which data costs by various mobile operators are outlined. Out of the four leading mobile network operators in South Africa – MTN, Cell C, Telkom Mobile, and Vodacom – three operators' data prices remained unchanged from 2021.

The exception was Cell C which reduced its mobile data costs by 25 per cent in 2022.¹²

The digital divide is still prevalent in South Africa and tends to impede access to specific



demographics such as women and children, rural communities, and persons with disabilities (PWDs).¹³ The worsening electricity crisis in South Africa is exacerbating the divide. In 2022, the country experienced the most intensive levels of load shedding,¹⁴ a colloquial local term for power cuts. By December 2022, the

8 Constitution of South Africa, 1996 (the Constitution)

9 Reuters 'Instagram looking into issues after user complaints' (2022) <https://www.timeslive.co.za/news/sci-tech/2022-10-31-instagram-looking-into-issues-after-user-complaints/> (accessed December 7, 2022); News 24 'Signal jamming in Parliament ruled unlawful' (2016) <https://businesstech.co.za/news/government/138483/signal-jamming-in-parliament-ruled-unlawful/> (accessed December 15, 2022)

10 Cable.co.uk 'Worldwide mobile data pricing 2022' (2022) <https://www.cable.co.uk/mobiles/worldwide-data-pricing/#regions> (accessed December 14, 2022)

11 ICASA 'Retail tariffs report Quarter 2, 2022/23 (Jan-June)' (2022) <https://www.icasa.org.za/tenders/retail-tariffs-report-quarter-2-2022-23> (accessed December 13, 2022) Above n 10.

12 *Id.*

13 Centre for Human Rights, 'Digital Rights Landscape in Southern Africa' (2022) <https://www.chr.up.ac.za/expression-information-and-digital-rights-unit-resources> (accessed on January 18, 2022)

14 Media release by the Council for Scientific and Industrial Research (CSIR) (2022) <https://www.csir.co.za/csir-releases-statistics-on-power-generation-south-africa-first-half-2022-and-loadshedding-data#:~:text=This%20year%20is%20the%20most,loadshedding%20than%20the%20entire%202020> (accessed on January 18, 2022).

country experienced over 200 days of power cuts.¹⁵ The effects of this are particularly stark from an education standpoint as the country aims to move towards technology-enhanced learning. Statistics South Africa conducted a survey which reveals that only 22 per cent of households own computers or laptops.¹⁶ In the healthcare sector, there have been calls to mobile network operators and the government to provide “free to use WhatsApp data packages” to allow under-served communities access to digital healthcare applications.¹⁷

Nevertheless, some positive developments include the conclusion of the spectrum auction in March 2022, which raised R14.4 billion to contribute towards reducing communications costs by the national government. The bidders for the spectrum auction, include Cell C, Liquid Intelligent Technologies, MTN, Rain Networks, Telkom, and Vodacom, who were all contesting for the 700MHz, 800MHz, 2600 MHz, and 3500MHz bands.¹⁸ In a notice published in November 2022, ICASA also introduced the Draft Radio Frequency Spectrum Assignment Plan,¹⁹ the next step towards completing the decade-long process of freeing up broadband space to enable internet access and improved connectivity. Freeing up the spectrum to enable faster, more affordable internet access would have far-reaching opportunities for connectivity.

Following the spectrum auction, ICASA requires the winners to provide zero-rated mobile content for public benefit, the zero-rated

websites will enable mobile phone operators to download educational resources and useful websites for free.²⁰

In June 2022, the Constitutional Court handed down judgment in the case of *e.TV v Minister of Communication and Digital Technologies*, which concerned the planned transition from analogue to digital television broadcasting.²¹ The Constitutional Court held that the previously determined analogue switch-off date of March 31, 2022 was unconstitutional and invalid. This decision required a balancing of several factors. On the one hand, the migration from analogue to digital will free up the radio frequency spectrum to be used by mobile network operators in improving internet access and connectivity. On the other hand, the switch-off will impact South Africans who primarily rely on free-to-air analogue TV to receive news and for entertainment purposes. South African civil society organisations formed a campaign under the #SaveFreeTV²² hashtag to advocate for the government to engage with all parties to come to a reasonable solution that considers differing perspectives and lived realities.

FREE SPEECH AND MEDIA FREEDOMS

Free speech in South Africa is protected under section 16(1) of the Constitution. It provides everyone with the right to freedom of expression, including freedom of the press, freedom of artistic creativity, freedom to share information, and academic freedom. The right

15 TechCentral, ‘South Africa passes 200 days of load shedding in 2022’ (2022) (accessed on January 18, 2022)

16 N Ngqambela, ‘South Africa must bridge the digital divide to best benefit from 4IR’ (2022) <https://mg.co.za/opinion/2022-11-10-south-africa-must-bridge-digital-divide-to-best-benefit-from-4ir/> (accessed on January 18, 2023)

17 H Adams, ‘Bridging the SA digital healthcare divide - no person left behind’ (2022) <https://www.itweb.co.za/content/KBpdg7pmWaPMLEew>

18 ICASA ‘ICASA concludes successful spectrum auction and collects more than R14.4 billion proceeds’ (2022) <https://www.icasa.org.za/news/2022/icasa-concludes-successful-spectrum-auction-and-collects-more-than-r14-4-billion-proceeds> (accessed December 13, 2022)

19 ICASA ‘Erratum the draft radio frequency assignment plan for frequency band 1518 to 1525 MHz’ (2022) <https://www.icasa.org.za/legislation-and-regulations/erratum-the-draft-radio-frequency-assignment-plan-for-frequency-band-1518-to-1525-mhz> (accessed December 7, 2022)

20 T Kahn “Zero-rated online content for public benefit bodies hailed as breakthrough” (2022) <https://www.businesslive.co.za/bd/national/education/2022-03-30-zero-rated-online-content-for-public-benefit-bodies-hailed-as-breakthrough/> (accessed December 14, 2022)

21 *e.TV (PTY) Limited and Others v Minister of Communication and Digital Technologies and others* (89/22; CCT 92/22) [2022] ZACC 22; 2022 (9) BCLR 1055 (CC) <https://collections.concourt.org.za/bitstream/jid/61394/CCT%2089-22%20and%20CCT%209222%20etv%20and%20Others%20v%20Minister%20of%20Communications%20and%20Others.pdf> (accessed December 7, 2022)

22 See #SaveFreeTV site: <https://savefreetv.org.za/>

does not, however, extend to speech that incites violence, hate speech, and propaganda for war.²³ The right to freedom of expression has been lauded by the Constitutional Court as being “of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm”.²⁴

In 2022, South Africa scored 75.56 per cent on the media freedom index, placing it 35 out of 180 countries, with no journalists killed or arrested in the year under review.²⁵ The 2022 ranking is three places higher than the 2021 score and can be attributed to South African courts viewing unreasonable limitations to media freedom with circumspection. Despite these rankings and the Judiciary’s efforts, South African journalists continue to be publicly attacked by political leaders.²⁶

One notable instance of this was former President Jacob Zuma’s private prosecution against legal journalist Karyn Maughan (together with state prosecutor Billy Downer). Zuma’s private prosecution against Maughan was initiated in October 2022 and has been described as an abuse of process and “blatant intimidation” of a journalist.²⁷ The former president essentially accuses Maughan for disclosing his medical records. An example of the cyberbullying and harassment which journalists may be subjected to is from April 2022, which saw online abuse hurled at an entertainment reporter, Julia Madibogo.²⁸

Madibogo laid charges for the abuse, which is reported to have been perpetuated by fans of a social media influencer.

South Africa remains a polarised country in the aftermath of its past and has been plagued by xenophobic sentiments and proliferation of racism online and offline. In November 2022, a white woman was arrested for a WhatsApp voice note that called for black men to be killed and black women to be prevented from reproducing.²⁹ With respect to xenophobic speech, a video which made headlines in the country depicted the MEC of Health in the Limpopo province, Dr Phophi Ramathuba, accusing a foreign national (Zimbabwean) patient in a hospital bed of straining the healthcare system.³⁰

In February 2022, the Supreme Court of Appeal (SCA) handed down judgment in a matter concerning tweets about colonialism³¹ that were made in 2017 by Helen Zille while she was the Premier of the Western Cape province.³² Following the tweets, several complaints were laid against Zille to the Public Protector who found the tweets to have been irrational and insensitive thus violating the constitutional right of freedom of expression.³³ In its review of the Public Protector’s findings, the SCA overturned the decision of the Public Protector citing it as irrational for failing to read the tweets within the context they were made, and for unjustifiably limiting Zille’s

23 Section 16(2)(a) to (c) of the Constitution

24 *S v Mamabolo* (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) <http://www.saflii.org/za/cases/ZACC/2001/17.html> (accessed December 14, 2022)

25 Reporters without Borders ‘South Africa’ (2022) <https://rsf.org/en/country/south-africa> (accessed December 14, 2022)

26 F Patel ‘Niehaus calls Karyn Maughan a ‘dog’ that must be ‘kicked’ in Twitter rant’ (2022) <https://www.citizen.co.za/news/south-africa/niehaus-karyn-maughan-dog-twitter/> (accessed December 14, 2022)

27 *Id.*

28 SANEF, ‘SANEF condemns cyberbullying of City Press Journalist’, (2022) <https://sanef.org.za/sanef-condemns-cyberbullying-of-city-press-journalist/>

29 C Bhengu ‘SAHRC to investigate voice note by woman who wants black people ‘banned’, not pit bulls’ (2022) <https://www.news24.com/news24/southafrica/news/sahrc-to-investigate-voice-note-by-woman-who-wants-black-people-banned-not-pit-bulls-20221125> (accessed December 7, 2022)

30 N McCain ‘You are killing my health system: Limpopo MEC under fire over comments on Zimbabweans’ (2022) <https://www.news24.com/news24/southafrica/news/watch-limpopo-health-mec-under-fire-over-comments-blaming-zimbabweans-for-huge-strain-on-hospitals-20220824> (accessed 14 December 2022).

31 The tweets stated that claiming that the legacy of colonialism was not only negative - Zille expressed that colonialism contributed to the establishment of an independent Judiciary, transport infrastructure, and piped water.

32 *Premier, Western Cape v Public Protector and Another* (771/2020) [2022] ZASCA 16; [2022] 2 All SA 95 (SCA); 2022 (3) SA 121 (SCA) <http://www.saflii.org/za/za/cases/ZASCA/2022/16.html> (accessed December 14, 2022). Zille was also the leader of the opposition political party, the Democratic Alliance,

33 *Id.*

freedom of expression. The SCA was tasked squarely with focusing on whether Zille breached specific sections of the Executive Ethics Code when she posted the impugned tweets. Despite the narrow question before it, the Court acknowledged the gravity of words and expressed that colonialism is widely-considered to be abhorrent.³⁴ This acknowledgement is a significant one given South Africa's traumatic past and its present racial dynamics.

Before the decision of the SCA, the Constitutional Court in *Qwelane v the South African Human Rights Commission* made an order directing Parliament to remedy the defects in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).³⁵ PEPUDA allows for criminal prosecution for hate speech. Alongside this law reform process, Parliament is still seized with the Prevention and Combating of Hate Crimes and Hate Speech Bill.³⁶

The Bill provides a comprehensive framework for prosecuting those found guilty of hate speech. Importantly, it also recognises hate speech perpetuated through electronic means.³⁷ Criticism against the Bill centres on its broad definition of hate speech – including if the subject reasonably believes that a statement caused them any degree of harm – may potentially discourage free speech on topics of national and public interest.³⁸ The Bill covers a wide array of grounds of discrimination which, in turn, offers protection to a broad group of individuals in one consolidated document.

The express intolerance for hate crimes by the courts was further expressed in the judgement in *South African Human Rights Commission v Masuku and another* from February 2022 which found that the anti-Semitic utterances made by Masuku were harmful, incited harm, propagated hatred and amounted to hate speech.³⁹ The Court ordered Masuku to apologise to the Jewish community within 30 days of the order. The Equality Court matter of *South African Human Rights Commission (SAHRC) v Matumba* engaged with issues pertaining to online expression.⁴⁰ The case involved content amounting to harassment that was posted online through an allegedly false social media account, argued to have been run by Matumba. The Equality Court dismissed the application primarily on procedural grounds and concerns with witness testimonies, ultimately finding that the Twitter account could not be linked to Matumba.⁴¹ While the Equality Court did not fully grapple with whether the content amounted to harassment, the case raises interesting questions about online anonymity. For future cases, there may be a scope to consider. Although the African Commission on Human and People's Rights (ACHPR) Declaration of Principles on Freedom of Expression and Access to Information,⁴² the applicable regional instrument, advocates for the right to online anonymity and the use of pseudonyms, there is still a balance which is required when it comes to online harms. Anonymity and pseudonyms should not be used to perpetuate hate speech.

The Constitutional Court also heard an important application concerning free

34 Above n 32 at paras 1 and 2.

35 (686/2018) [2019] ZASCA 167; [2020] 1 All SA 325 (SCA); 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) <https://collections.concourt.org.za/bitstream/handle/20.500.12144/36639/Revised%20Judgment%20%2024%20August%202021%20CCT%201320%20Qwelane%20v%20SAHRC%20and%20Another.pdf?sequence=60&isAllowed=y> (accessed December 14, 2022)

36 Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) https://www.gov.za/sites/default/files/gcis_document/201804/b9-2018preventioncombatingofhatecrimeshatespeecha.pdf (accessed December 14, 2022)

37 *Id* at section 4(2)

38 PdeVos 'Hate speech Bill could be used to silence free speech' (2019) <https://www.dailymaverick.co.za/opinionista/2019-02-26-hate-speech-bill-could-be-used-to-silence-free-speech/> (accessed December 8, 2022)

39 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and another* (CCT 14/19) [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) <https://www.saflii.org/za/cases/ZACC/2022/5.html> (accessed December 14, 2022)

40 *South African Human Rights Commission (SAHRC) v Matumba 1/2020 2022* (no link to transcript).

41 *Id.*

42 (ACHPR) Declaration of Principles on Freedom of Expression and Access to Information (2020) https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf (accessed on December 14, 2022)

speech that involved a mining company that sued environmental activists for defamation seeking relief of R14 million.⁴³ The environmental activists requested the Court to develop the common law to recognise the defence of Strategic Litigation Against Public Participation (SLAPP).⁴⁴ SLAPP is litigation that is intended to frustrate and undermine public participation and dissent by trapping activists in perpetual and costly litigation. It is recognised as a mechanism to undermine freedom of expression and discourage public participation. On November 14, 2022, in a landmark judgment, the Constitutional Court found that the recognition of the SLAPP defence did not require the development of our common law because it was already accommodated in the doctrine of abuse of process.⁴⁵

In July 2022, the Competition Commission of South Africa⁴⁶ published a provisional report regarding the Online Intermediation Platform Market Inquiry (OIPMI).⁴⁷ The OIPMI investigated competition in the digital economy. Some of its findings were targeted at dominant players such as Google for declining to include media freedom in the digital sphere in its mandate.⁴⁸ The South African National Editors Forum (SANEF), a key role player in these discussions, published a position paper focused on the interaction between the

digital advertising industry and journalism freedom and sustainability.⁴⁹ The SANEF paper recommends inclusion and transparency in advertising payment terms and collective bargaining that does not undermine online platforms and protects the media industry.⁵⁰

With respect to online safety the Domestic Violence Amendment Act 14 of 2021 was signed into law in early 2022.⁵¹ The Act is a notable development in addressing gender-based violence in South Africa. It recognises the contribution that online platforms make in exposing its users to harassment and sexual abuse online, through digital audio, text, video, images, or simulated or manipulated content, and enables victims and survivors of online harms to obtain legal protection against such conduct.⁵²

It further adopts an intersectional approach relying on gender-neutral language to extend protections beyond binary gender identities. A constitutional challenge was launched towards the end of 2022 which seeks to amend the law to reflect an objective test for content in terms of sexual offences.⁵³ The challenge includes references to various sexual offences, including the harmful disclosure of sexually explicit content via electronic means.⁵⁴ The litigation is still in the early stages, however, and should the challenge be successful, this may impact

43 *Mineral Sands Resources (Pty) Limited and another v Christine Reddell and others* (CCT 66/21) [2022] ZACC 37 [https://collections.concourt.org.za/bitstream/id/62058/\[Revised%20Judgment\]%20CCT%206621%20Mineral%20Sands%20Resources%20\(Pty\)%20Ltd%20and%20Others%20v%20Reddell%20and%20Others%20\(PDF\).pdf](https://collections.concourt.org.za/bitstream/id/62058/[Revised%20Judgment]%20CCT%206621%20Mineral%20Sands%20Resources%20(Pty)%20Ltd%20and%20Others%20v%20Reddell%20and%20Others%20(PDF).pdf) (accessed December 8, 2022)

44 *Id.*

45 Above n 43.

46 The Competition Commission is established in terms of the Competition Act 89 of 1998. Its mandate is to regulate competition between different entities through, among other, investigative means, and ensuring market transparency in the market.

47 Competition Commission of South Africa 'Online Intermediation Platform Market Inquiry: Provisional Summary Report' (2022) <https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-SummaryReport.pdf> (accessed December 15, 2022)

48 *Id.*

49 SANEF, 'The sustainability of journalism and competition in the digital economy' (2022) <https://sanef.org.za/download/the-sustainability-of-journalism-and-competition-in-the-digital-economy/#> (accessed on January 18, 2023)

50 *Id.*

51 Domestic Violence Act 14 of 2021 <https://www.justice.gov.za/legislation/acts/2021-014.pdf> (accessed December 14, 2022)

52 T Power, 'The DVA Act: one step closer to online safety' (2022) ALT Advisory (<https://altadvisory.africa/2022/02/22/the-dva-act-one-step-closer-to-online-safety/>) (accessed January 19, 2023).

53 *Embrace Project & Another v Minister of Justice and Correctional Services & Others* (48656/22) (<https://powersingh.africa/2022/12/01/the-embrace-project-npc-and-another-v-minister-of-justice-and-correctional-services-and-others/>) (accessed January 19, 2023).

54 Section 11A of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (<https://www.gov.za/documents/criminal-law-sexual-offences-and-related-matters-amendment-act>) (accessed 19 January 2023).

cases relating to the non-consensual sharing of sexual content by requiring an objective threshold for consent.⁵⁵

PRIVACY AND SURVEILLANCE

In 2022, the Information Regulator applauded the Department of Basic Education for issuing POPIA-compliant consent forms to 900,000 final year high school pupils for the processing of their personal information and examination results.⁵⁶ The enforcement powers of the Information Regulator were exercised once more in August 2022, when the Information Regulator instituted legal proceedings against the South African Police Service (SAPS) for making public the personal information of victims/survivors of sexual violence.⁵⁷

In this case, the victims/survivors were filming a video with a production crew when they were attacked by a group of about 20 armed men in the Krugersdorp area.⁵⁸ This incident received coverage in the media and the victims/survivors names, ages, home addresses, and details pertaining to the assault were leaked by SAPS officials. It is unclear what progress has been in this matter.

From a surveillance standpoint, there have not been many noteworthy developments in 2022.

In January 2023, the Minister of Health confirmed that although Covid-19 restrictions had all been lifted, genomics surveillance has continued under the Network for Genomic Surveillance of South Africa.⁵⁹

Considerations around online safety, particularly where it relates to children, are important. In April 2022, MTN, a mobile network operator, launched the Child Safety



Online Africa Portal.⁶⁰ This portal is a reporting mechanism to combat the spread of abusive and exploitative material of children online. Also on the topic of online child exploitation, in November 2022, a report published by the Disrupting Harms project indicated that the prevalence of this type of harm had increased in South Africa (as well as a few other African states).⁶¹ The Cybercrimes Act is also expected

⁵⁵ *Id* at section 5(2)(a)

⁵⁶ Information Regulator 'The Regulator commends the Department of Basic Education for compliance with POPIA and obtaining consent from matriculants' (2022) https://infoeregulator.org.za/wp-content/uploads/2022/11/MEDIA%20STATEMENT%20THE%20REGULATOR%20COMMENDS%20THE%20DEPARTMENT%20OF%20BASIC%20EDUCATION%20FOR%20COMPLIANCE%20WITH%20POPIA%20AND%20OBTAINING%20CONSENT_.pdf (accessed December 14, 2022).

⁵⁷ Information Regulator 'Information Regulator issues a summons against South African Police Service' (2022) https://infoeregulator.org.za/wp-content/uploads/2020/07/MEDIA-STATEMENT_-REGULATOR-ISSUES-A-SUMMONS-AGAINST-SOUTH-AFRICAN-POLICE-SERVICE-.pdf (accessed December 14, 2022).

⁵⁸ Michalsons, 'Information Regulator versus SAPS. The scalding tea' <https://www.michalsons.com/blog/information-regulator-versus-saps-t-he-scalding-tea/59455> (accessed on January 18, 2022).

⁵⁹ Media Statement, 'Minister Joe Phaahla on recent Covid-19 developments' (2023) <https://www.gov.za/speeches/minister-health-dr-joe-phaahla-10-jan-2023-0000> (accessed on January 18, 2023)

⁶⁰ N Morafo, 'Child Safety Online Africa Portal launched' (2022) <https://mg.co.za/opinion/2022-04-11-child-safety-online-africa-portal-launched/> (accessed on January 18, 2023)

⁶¹ Disrupting Harm 'Disrupting Harm in South Africa: Evidence on online child sexual exploitation and abuse' <https://www.end-violence.org/sites/default/files/2022-11/2023%20DH%20SOUTH%20AFRICA%20REPORT%20%281%29.pdf> (2022) (accessed on January 18, 2023)

to curb online harms. The Act covers offences such as unlawful interception of data, cyber fraud, cyber extortion, and the non-consensual distribution of intimate images.

With respect to cybersecurity, on November 9, 2022, notice was published in the Government Gazette by a Member of Parliament proposing the establishment of the Office of the Cyber Commissioner as a Chapter 9 institution, alongside the Public Protector and other Chapter 9 institutions.⁶² The Office of the Cyber Commissioner would advise the public sector on cyber security, support the establishment of core standards for cyber security, and protect fundamental rights that may be violated through cybercrime. At the time of writing, being January 2023, there had been no traction on this. South Africa is yet to ratify the African Union Convention on Cyber Security and Personal Data Protection (the Malabo Convention).⁶³ The Malabo Convention obliges State Parties to adopt legislation which criminalises certain forms of online content, including insulting language based on protected characteristics, child sexual exploitation, and discriminatory content.⁶⁴

DATA GOVERNANCE

POLICY FRAMEWORK

South Africa has a relatively established data protection legal framework, having enacted POPIA. At the heart of POPIA are eight conditions for the lawful processing of data. To foster understanding of POPIA, the Information Regulator routinely publishes guidance notes on various aspects of the Act. For example, guidance notes on the processing

of children's personal information and special personal information are accessible on the Regulator's website. While there are separate pieces of legislation which respond to specific areas of data protection – for example, POPIA is South Africa's data protection act and The Cybercrimes Act 19 of 2020 sets out cybercrimes – there is no coordinated data governance strategy or policy. Such a strategy or policy would ideally take into account people, processes, and the use of technology with respect to data.⁶⁵ If South Africa were to formulate a data governance policy, the intersection between the Department of Communications and Digital Technologies and regulators such as ICASA and the Information Regulator would need to be clear.

DIGITAL IDS

The Draft Official Identity Management Policy was published in 2020 to ensure that South Africa's identity management aligns with modern technological advancements.⁶⁶ According to the implementation strategy of the Policy, the policy and legal framework for the population register and National Identity System (NIS) were expected to have been in place by March 2022, but there have been no reports on whether the NIS has been implemented yet.⁶⁷

In other developments, in September 2022, the Department of Home Affairs announced its plans to digitise over 350 million civic paper records dating back to 1895.⁶⁸ This is a collaborative project with the Department of Employment and Labour. It is also part of an initiative to employ prospective Information Technology candidates in these departments. It is envisaged that this initiative would

62 General Government Notice 1390 of 2022 https://static.pmg.org.za/the-constitution-eighteenth-amendment-bill-2022-notice-of-intention-to-introduce-a-private-members-bill-into-parliament-and-invitation-for-public-comment-thereon_20221109-GGN-47478-01390.pdf (accessed November 7, 2022)

63 African Convention on Cyber Security and Personal Data Protection (Malabo Convention) https://au.int/sites/default/files/treaties/29560-treaty_0048_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf (accessed on December 8, 2022)

64 *Id.*

65 V Kalanjee, 'POPIA drives data governance best practice to top priority' (2021) <https://www.itweb.co.za/content/KA3WwMdDxJNMrydZ> (accessed on January 19, 2023)

66 Department of Home Affairs 'Draft Official Identity Management Policy' (2020) https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf (accessed December 7, 2022)

67 *Id.*

68 South African Government 'Home Affairs on the progress of digitisation project' (2022) <https://www.gov.za/speeches/verification-assessment-and-interview-candidates-dha-digitisation-project-underway-6-sep> (accessed December 8, 2022)

contribute to innovative ways of updating the country's record-keeping mechanisms while creating employment opportunities.

THE UNIVERSAL SERVICE AND ACCESS FUND

The Universal Service and Access Fund was established to bridge the digital divide and ensure internet access for underserved communities by providing "ICT for all."⁶⁹ The latest report by the Universal Service Fund was published in 2018/19. Generally, the fund's targets are directed at improving internet penetration in schools, healthcare facilities, public sector facilities, and broadband access,



but it has largely been unsuccessful in meeting

these targets.⁷⁰ The poor performance of the fund has been attributed to the deficient execution of its operations and the slow implementation of digital migration plans.

Although the fund aimed to establish smart villages in underserved areas, advance digital broadcast connectivity and improve accountability for its infrastructure projects, the Department of Communications and Digital Technologies has resolved to dissolve the Universal Service and Access Agency of South Africa (USAASA) by March 2023.⁷¹

In December 2022, MTN SA and MTN Global Connect in partnership with 2Africa undersea cable launched the 45,000km cable in the Western Cape province, the undersea cable will provide improved internet connectivity and access by allowing mobile network operators access to data centres. The undersea cable will become fully operational in 2023 and will provide much-needed infrastructure to bring South Africa up to speed with growing demands for internet connection and access.⁷² In its 2022 *State of ICT Sector Report*, ICASA indicated that the rural population in all nine provinces have 2G and 3G network coverage and that two of the nine provinces have two per cent coverage of the 5G network.⁷³

DEVELOPMENTS IN ICT AND EMERGING TECHNOLOGIES

AI GOVERNANCE

South Africa is ranked 68 out of 160 countries for AI readiness and is encouraged to develop AI skills to train young learners.⁷⁴ However, the country does not have a national AI

69 Universal Service and Access Agency of South Africa 'Vision Statement' (n.d.) <http://www.usaasa.org.za/about/strategic-overview.html> (accessed December 14, 2022)

70 Universal Service and Access Fund 'Annual Report 2018/19' (2019) http://www.usaasa.org.za/export/sites/usaasa/resource-centre/download-centre/downloads/USAF-2019_V19.pdf (accessed December 13, 2022)

71 S Mzaekandaba 'Communications ministry reveals key timelines for USAASA' (2021) <https://www.itweb.co.za/content/KA3WwqdDnz5qrydZ> (accessed December 14, 2022)

72 MTN 'MTN GlobalConnect, MTN South Africa land 2Africa subsea cable in Western Cape to strengthen internet connectivity' (2022) <https://www.mtn.com/mtn-globalconnect-mtn-south-africa-land-2africa-subsea-cable-in-western-cape-to-strengthen-internet-connectivity/> (accessed December 14, 2022)

73 ICASA 'The State of the ICT Sector Report in South Africa' (2022) <https://www.icasa.org.za/uploads/files/State-of-ICT-Sector-Report-March-2022.pdf> (accessed December 15, 2022)

74 Oxford Insights 'Government AI Readiness Index 2021' (2021) https://static1.squarespace.com/static/58b2e92c1e5b6c828058484e/t/61ead0752e7529590e98d35f/1642778757117/Government_AI_Readiness_21.pdf (accessed December 14, 2022). The report uses 42 indicators to assess AI readiness based on the government's readiness, the technology sector's readiness, and data and infrastructure to support AI. tools and deliver them to citizens.

strategy. Regarding the protection of personal information, POPIA provides for automated decision-making when processing personal information. Section 71 prohibits automated decision-making about a data subject where the decision made has legal implications.

In November 2022, the Department of Science and Technology, in collaboration with the University of Johannesburg and Tshwane University of Technology, established the Artificial Intelligence Institute of South Africa (AIISA).⁷⁵ The AIISA aims to support the private and public sectors in driving creative AI technology and knowledge, and generate knowledge and AI applications to enable the country to become a more competitive player globally. It is anticipated that AIISA will play a catalytic role in prompting further AI governance developments in the country, particularly in regulating its ethical and human rights consequences. This initiative is in addition to the Commission of the Fourth Industrial Revolution (4IR) that the President appointed in 2019 to support government efforts toward the digital revolution, including the use of AI, and is composed of 30 people.⁷⁶

ICTS IN OTHER POLICY FRAMEWORKS

South Africa has incorporated ICTs into its development planning in various ways. There were some notable developments in 2022. In November, the Cabinet approved the Science, Technology, and Innovation (STI) Decadal Plan.⁷⁷ This is part of a medium-term strategy of the Department of Science and Innovation that will prioritise ICTs and smart systems in health innovation, sustainable energy, and education.

⁷⁵ South African Government 'Minister Khumbudzo Ntshavheni launches Artificial Intelligence Institute of South Africa and AI hubs' (2022) <https://www.gov.za/speeches/minister-khumbudzo-ntshavheni-launches-launch-artificial-intelligence-institute-south> (accessed December 8, 2022)

⁷⁶ The Presidency of the Republic of South Africa 'President appoints Commission on Fourth Industrial Revolution' (2019) <https://www.thepresidency.gov.za/press-statements/president-appoints-commission-fourth-industrial-revolution> (accessed December 14, 2022)

⁷⁷ Department of Science and Innovation 'The Science, Technology and Innovation Decadal Plan' (2022) https://static.pmg.org.za/220202STI_Decadal_Plan.pdf (accessed December 7, 2022)

Conclusion and Recommendations

The year 2022 somewhat saw positive developments for digital rights. There is certainly room to increase access to the internet and bridge the digital divide. Proactive measures which include freeing up spectrum, lowering mobile data costs, and actioning proposed policies, in addition to investing in much-needed digital literacy training programmes for children and underserved communities, should remain on the agenda in 2023. The following recommendations are made for each of the various actors in the digital rights landscape.

GOVERNMENT	PRIVATE SECTOR	CIVIL SOCIETY
<p><i>Regulators:</i></p> <ul style="list-style-type: none"> Regulators should take enforcement measures and be seen to take enforcement measures. For example, the outcome of the Information Regulator's assessment on the leaking of victims'/ survivors' personal information by SAPS is unclear despite having been raised by the Regulator some time ago. The finalisation of the spectrum auction process will provide much-needed certainty to different mobile operators. It may also be useful to ICASA to facilitate participation by smaller telecommunications businesses and promote competition. 	<p><i>Mobile network operators and private companies:</i></p> <ul style="list-style-type: none"> Companies in the private sector should fully immerse themselves in business and human rights. There is no doubt that the migration away from analogue television is going to involve contracting with the private sector. Accordingly, it is imperative that private sector actors understand and uphold constitutional values, as well as international instruments pertaining to business and human rights. Mobile network operators can prioritise efforts which advance digital rights in their Corporate Social Responsibility (CSR). As highlighted 	<p>Civil society organisations:</p> <ul style="list-style-type: none"> On the digital rights front, civil society organisations should continue to grapple with new and existing questions around digital rights and emergent technology. For example, the widespread impact of genomics surveillance is yet to be understood. By remaining engaged in public participatory processes, civil society can continue to hold levers of power accountable and foster the protection of human rights in the creation of law and policy.

GOVERNMENT	PRIVATE SECTOR	CIVIL SOCIETY
	<p>in the report, the intensifying electricity crisis in South Africa is contributing to the digital divide. Sectors which may need support include education, healthcare, and small, medium, and micro enterprises (SMMEs).</p>	



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