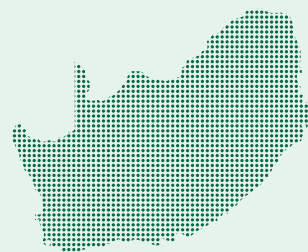


LONDA

SOUTH AFRICA DIGITAL RIGHTS AND INCLUSION

A PARADIGM INITIATIVE PUBLICATION



2020 REPORT

www.paradigmhq.org



     @ParadigmHQ

LONDA

SOUTH AFRICA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION

Published by Paradigm Initiative

374 Borno Way, Yaba, Lagos, Nigeria

Email: media@paradigmhq.org

www.paradigmhq.org

Published in April 2021

Report written by Tina Power

Editorial Team: 'Gbenga Sesan, Kathleen Ndongmo, Koliwe Majama, Margaret Nyambura Ndung'u,

Mawaki Chango, Nnenna Paul-Ugochukwu and Thobekile Matimbe.

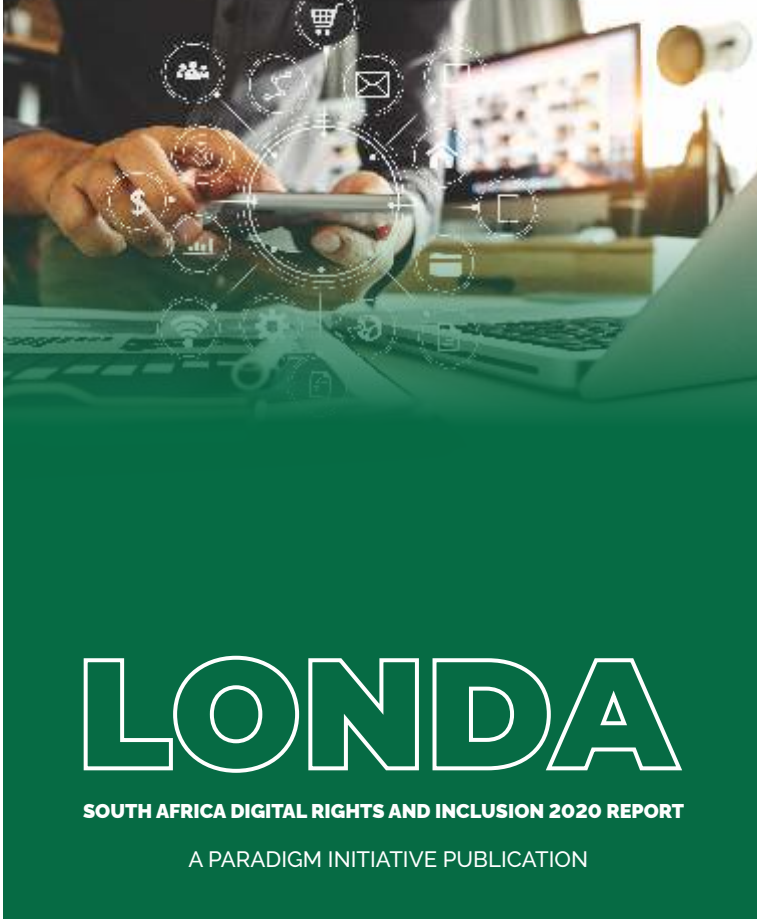
Design & Layout by Luce Concepts

This publication may be reproduced for non-commercial use in any form provided due credit is given to the publishers, and the work is presented without any distortion.

Copyright © 2021 Paradigm Initiative



Creative Commons Attribution 4.0 International (CC BY 4.0)



LONDA

SOUTH AFRICA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION

Civil society organizations continue to work to advance digital rights and inclusion in Africa, ensuring best practices are adopted into policy and legislation. This report analyses the state of digital rights and inclusion in South Africa, examining violations and gaps, investigating the use and application of policy and legislation, highlighting milestones and proffering recommendations for the digital landscape in South Africa. This edition captures among other issues, the digital divide worsened by the COVID-19 pandemic and unearths infractions on different thematic areas such as privacy, access to information, and freedom of expression with the legislative and policy background well enunciated.

CONTENTS

INTRODUCTION	1
IMPACT OF COVID-19 ON DIGITAL RIGHTS AND INCLUSION	2
FREEDOM OF EXPRESSION	3
THE RIGHT TO PRIVACY	6
INTERNET ACCESS	7
CONCLUSION AND RECOMMENDATIONS	10





South Africa, with a population of 58.5 million,¹ is ranked as the second-largest economy in Africa, but remains one of the world's most unequal societies.²

INTRODUCTION

DIGITAL RIGHTS AND INCLUSION IN SOUTH AFRICA

Notably, South Africa retains a good reputation in respect of internet rights and freedoms, being ranked as the continent's best-performing country in the Inclusive Internet Index for 2020.³ In recent years, there have been increased efforts to move towards an inclusive digital environment. However, South Africa still faces substantial hurdles in advancing digital rights, and many of the existing inequalities, barriers to access, and structures of discrimination have been magnified by the global pandemic.⁴



Inclusive digital environment

To demonstrate some of the key developments in 2020, this report predominantly relies on desktop research as well as insights from practical experience of working on digital rights in South Africa. This report focuses on key developments throughout 2020 relating to the triad of information rights.⁵

1. The World Bank, (2019) "Population, total – South Africa", <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=ZA>

2. Statistics South Africa, (2019) "Inequality Trends in South Africa: A multidimensional diagnostic of inequality" <http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>. See also, International Monetary Fund (IMF) (2020) "Six Charts Explain South Africa's Inequality", <https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality>. See Bloomberg, (2020) "Nigeria Tops South Africa as the Continent's Biggest Economy", <https://www.bloomberg.com/news/articles/2020-03-03/nigeria-now-tops-south-africa-as-the-continent-s-biggest-economy>

3. Inclusive Internet Index 2020, (2020) <https://theinclusiveinternet.eu.com/explore/countries/ZA/>. For further context on internet access in Africa and South Africa, see International Telecommunications Union, (2019) "Time series of ICT data for the world", https://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2019/ITU_Key_2005-2019_ICT_data_with%20LDCs_28Oct2019_Final.xls, and Statista, "Internet user penetration in South Africa from 2017 to 2023", <https://www.statista.com/statistics/484933/internet-user-reach-south-africa/>

4. See University of Chicago Law School - Global Human Rights Clinic, (2020) "Access Denied: Internet Access and the Right to Education in South Africa" <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1000&context=ghrc> and Freedom House, (2020) "South Africa", <https://freedomhouse.org/country/south-africa/freedom-net/2020>

5. The triad of information rights includes access to information, freedom of expression, and the right to privacy.

First, the report reflects on the impact of COVID-19 on the advancement of digital rights. Second, it discusses recent developments in relation to freedom of expression. Third, the report touches on South Africa's privacy landscape. Fourth, the challenges pertaining to internet access and digital exclusion are highlighted. The report concludes with a set of brief recommendations that seek to navigate South Africa's trajectory towards one of access, inclusion, and respect of fundamental rights.

IMPACT OF COVID-19 ON DIGITAL RIGHTS AND INCLUSION

Several of the South African government's responses to COVID-19 implicated, to varying degrees, the triad of information rights. Commendably, through the adoption of regulations, the Independent Communications Authority of South Africa (ICASA) temporarily released a high demand spectrum to assist with easing network congestion, to ensure good quality broadband services, and to facilitate the lowering of costs for internet users.⁶ Additionally, regulations were published on zero-rating health and educational sites.⁷ Mobile network operators MTN and Vodacom further provided zero-rated access to websites providing health and educational resources.⁸ These were important steps for digital inclusion, and illustrated the potential for more meaningful efforts to advance universal access to the internet.

However, of concern, were the regulations that implicated the right to freedom of expression. The dissemination of disinformation in the context of the pandemic was noted as a major concern, prompting the publication of regulations in terms of which it is an offence to publish any disinformation, through any medium, including social media about COVID-19.⁹ Further directions required electronic communications services, licensees, over-the-top providers and internet



6. Information and Communications Technology ("ICT") COVID-19 National Disaster Regulations Notice 238 of 2020, <https://www.icasa.org.za/legislation-and-regulations/ict-covid-19-national-disaster-regulations>. This has recently been extended to March 2021, with an inclusion of licensing fees. See ICASA, "Fees for the extended use of the temporary radio frequency spectrum", 27 November 2020: <https://www.icasa.org.za/news/2020/fees-for-the-extended-use-of-the-temporary-radio-frequency-spectrum>

7. Amendment of ICT COVID-19 National Disaster Regulations 43707 of 2020, https://www.gov.za/sites/default/files/gcis_document/202009/43707gen500.pdf

8. Business Tech, (2020) "MTN announces massive price cuts and free data", <https://businesstech.co.za/news/telecommunications/383443/mtn-announces-massive-price-cuts-and-free-data/>, and Fin24, (2020) "Vodacom to slash data prices by at least 30%, clients get free access to some websites", <https://www.news24.com/fin24/Companies/ICT/vodacom-to-slash-data-prices-by-at-least-30-20200310>

9. Regulations issued in terms of the Disaster Management Act 57 of 2002 (2020) at regulation 11, https://www.gov.za/sites/default/files/gcis_document/202003/regulations.pdf

service providers to remove fake news related to COVID-19 from their platforms.¹⁰ Finally, a much-debated response pertains to the contact tracing methods adopted by the government. Responses in this regard have gone through several iterations, but ultimately resulted in regulations that incorporated several important privacy safeguards, including user notification and an express provision that the interception of the content of communications is not permitted. Notably, a judge was appointed to exercise oversight of the contact tracing program.¹¹ The most recent development in this regard is the COVID Alert SA app, that uses Bluetooth contact-tracing, which is said to rely on privacy-protecting technology.¹² Some of these responses have raised concerns among privacy activists.¹³

FREEDOM OF EXPRESSION

By in large the constitutionally protected right to freedom of expression is well respected in South Africa.¹⁴ In 2020, the Constitutional Court reaffirmed that “it is no exaggeration to characterise the right to freedom of expression as the lifeblood of a genuine constitutional democracy that keeps it fairly vibrant, stable and peaceful. More importantly, free expression is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability.”¹⁵ Despite this, there are some developments relating

to freedom of expression both on and offline that warrant further monitoring.

■ ENJOYMENT OF FREEDOM OF EXPRESSION ONLINE IN 2020

The use and enjoyment of freedom of expression online is becoming increasingly popular in South Africa, particularly as more users join social media networks to access and disseminate information. It is estimated that there are 22 million active social media users in South Africa.¹⁶ Online spaces create new and exciting opportunities for the advancement of freedom of expression. However, some challenges have arisen when navigating these contemporary spaces. Highlighted below are some of the interesting developments relating to freedom of expression online.

The first relates to a case about a defamatory Tweet.¹⁷ In November 2020, the Supreme Court of Appeal finding that the statement published on Twitter was defamatory and unlawful, accepted that “the rise of social media will continue to focus attention on this area of the law”, noting the far reach of content published by ordinary members of society.¹⁸ The Court further referenced concerns around mis- and disinformation on social media.¹⁹ This marks a noteworthy step towards the development of legal understandings of defamation in the context of social media in South

10. Electronic Communications, Postal and Broadcasting Directions issued under Regulation 10(8) of the Disaster Management Act 57 of 2002 (2020) at regulation 5.1, <https://powersingh.africa/wp-content/uploads/2020/03/COVID-19-Electronic-Communications-Postal-and-Broadcasting-Directions-issued-in-terms-of-the-Disaster-Management-Act-26-March-2020.pdf>

11. Id.

12. See COVID Alert SA App, (2020), <https://sacoronavirus.co.za/covidalert/>

13. See for example Razzano, (2020) “Digital Hegemonies for COVID-19”, <https://globaldatajustice.org/covid-19/digital-hegemonies-south-africa> and Nortier, (2020) “COVID Alert SA app: The fine balance between public health, privacy and the power of the people”, <https://www.dailymaverick.co.za/article/2020-10-13-covid-alert-sa-app-the-fine-balance-between-public-health-privacy-and-the-power-of-the-people/>

14. Section 16 of Constitution provides that “everyone has the right to freedom of expression” subject to certain forms of speech that are not protected. South African Constitution, (1996), <https://www.gov.za/documents/constitution-republic-south-africa-1996>

15. Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another [2020] ZACC 25 at para 1, <http://www.saflii.org/za/cases/ZACC/2020/25.html>

16. Datareportal, (2020) “South Africa”, <https://datareportal.com/reports/digital-2020-south-africa>

17. The case was brought by Trevor Manuel, a prominent South African politician and former Minister of Finance against the Economic Freedom Fighters (EFF), South Africa's third-largest political party, as a result of a statement published by the EFF on Twitter in March 2019. Manuel v Economic Freedom Fighters and Others [2019] ZAGPJHC, <http://www.saflii.org/za/cases/ZAGPJHC/2019/157.html>. This matter raised interesting questions about Twitter defamation, the ordinary social media user, and the implication of ongoing publication. For further commentary see Singh, (2019) “Social Media defamation online: Guidance from Manuel v Eff”, <https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/>

18. EFF and Others v Manuel [2020] ZASCA 172, at paras 57 and 64, <http://www.saflii.org/za/cases/ZASCA/2020/172.pdf>

19. Id at paras 112-113.



The use and enjoyment of freedom of expression online is becoming increasingly popular in South Africa, particularly as more users join social media networks to access and disseminate information.

Africa.²⁰

The second development concerns a trend in which companies are misusing court processes to quash freedom of expression, to stifle and restrict speech, and to intimidate those who are critical of them.²¹ In April 2020, amidst South Africa's lockdown occasioned by COVID-19, a mining house operating in South Africa unsuccessfully sought to prevent community activists from using the media and social media to level concerns and criticism against the mine. The application if successful would have set a dangerous precedent which would have a chilling effect on free speech both on- and offline.

Fortunately, the application was withdrawn, and the community activists can continue sharing information and express opinions.

The third is the publication of the Draft Films and Publications Amendment Regulations by the Minister of Communications and Digital Technologies.²² The Regulations were set to provide greater clarity and direction on how content that is distributed online for commercial gain is classified.²³ However, the regulations caused an uproar, with concerns that the regulations were draconian and an attempt to censor the internet.²⁴ Civil society organisation Media Monitoring Africa (MMA)

20. It is necessary to note that this matter did not relate to criminal defamation. criminal defamation remains in South Africa, it is not frequently used, and there have been suggestions to do away with it. See Freedom House above n 4.

21. Right2Know Campaign, (2020) "Mine abandons attempt to silence community activists", <https://www.r2k.org.za/2020/09/23/statement-mine-abandons-attempt-to-silence-community-activists/>

22. Films and Publications Act, 65 of 1996, as amended, Draft Films and Publications Amendment Regulations, 2020, https://www.gov.za/sites/default/files/gcis_document/202007/43495gen361.pdf

23. Kamineth et al, (2020), "Film and Publications Amendment Act: Protecting, not censoring, our citizens in the digital age", <https://www.dailymaverick.co.za/article/2020-08-27-film-and-publications-amendment-act-protecting-not-censoring-our-citizens-in-the-digital-age/>

24. Malinga, (2020), "Citizens reject 'Internet Censorship Act', threaten court action", <https://www.itweb.co.za/content/rxP3jqBmBe9MA2ye>

submitted comments on the Draft Regulations noting that there are “significant consequences for the exercise of rights online, particularly the right to freedom of expression”.²⁵ Further to this, MMA submitted that it is concerned that the Draft Regulations create a framework that is unenforceable and unworkable, which is far from ideal given that “the current regulatory and policy framework regarding ICTs and online content in South Africa is confusing, uncertain and uncoordinated, which may be exacerbated by the broad scope of the Draft Regulations.”²⁶ There is likely to be further movement on the Draft Regulations in 2021, either in the form of a further amendment, or in the form of publication.

■ HATE SPEECH AND INCITEMENT

In terms of unprotected expression, it is necessary to note that the legal understanding of hate speech in South Africa is under consideration. This follows a finding by the Supreme Court of Appeal in 2019 which found the hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) unconstitutional.²⁷ The Constitutional Court is currently seized with two hate speech matters that are likely to have a significant bearing on South Africa’s legal definition for hate speech which will in turn impact how hate speech is tested both on- and offline.²⁸ Unfortunately, and amidst the legal uncertainty, there has also been a rise in the dissemination of

hurtful and harmful content across social media platforms, with online manifestations of xenophobia,²⁹ gender discrimination and harassment,³⁰ and racial tensions.³¹

A further notable development relates to the recent ruling by the Constitutional Court regarding incitement.³² The Constitutional Court declared the provision relating to incite in the Riotous Assemblies Act inconsistent with the right to freedom of expression.³³ This matter concerned statements that allegedly encouraged people to occupy land, resulting in a criminal charge for inciting people to trespass. The majority of the Constitutional Court made some notable pronouncements regarding the import of the right to freedom of expression. While this matter was not about online incitement it is important to note that the Cybercrimes Bill, which was passed by both Houses of Parliament on 2 December 2020 and is now pending before the President for signature, deals with incitement in Chapter 2.³⁴ This judgment may have an impact on how malicious communication is circumscribed in the Bill, which could impact how incitement online is understood and addressed.

Online manifestations of xenophobia, gender discrimination, harassment and racial tensions.

25. Media Monitoring Africa, (2020), “Draft Films and Publications Amendment Regulations, 2020: Written Submission by Media Monitoring Africa”, <https://mediamonitoringafrica.org/wp-content/uploads/2020/08/200817-MMA-Submission-on-the-Films-and-Publications-Amendment-Regulations.pdf>
26. Id.

27. The case concerned statements published in a news article which allegedly contravened section 10 of the Equality Act for advocating hatred based on sexuality. This prompted a challenge to the constitutionality of section 10. In 2019, the Supreme Court of Appeal declared the section unconstitutional and invalid. The Constitutional Court must decide whether to confirm the declaration of unconstitutionality. *Qwelane v South African Human Rights Commission and Another* [2019] ZASCA 167, <http://www.saflii.org/za/cases/ZASCA/2019/167.html>

28. See *South African Human Rights Commission v Masuku* case resources, <https://collections.concourt.org.za/handle/20.500.12144/36612?show=ful>.

29. Centre for Analytics and Behavioural Change (2020) “Interim report on xenophobia on South Africa Social Media”, <https://drive.google.com/file/d/1aEKfwQfo-gower4Te9FIWRBj5NYqI2li/view>

30. Iyer et al, (2020) “Alternate Realities, Alternative Internets: African Feminist Research for a Feminist Internet”, https://www.apc.org/sites/default/files/Report_FINAL.pdf, See further, Gender Links (2018) “Glass Ceilings: Women in South African Media Houses”: <http://www.womeninnews.org/ckfinder/userfiles/files/Glass-Ceilings-Report-19-October-2018.pdf>

31. Barlett, (2020) “In South Africa, Racial Tensions Simmer Amid a Pandemic”, <https://foreignpolicy.com/2020/06/12/south-africa-coronavirus-pandemic-racial-tensions/>

32. *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* above n 15.

33. Section 18(2)(b) of the Riotous Assemblies Act criminalises the incitement of others to commit “any offence”. The South African Parliament has until November 2022 to rectify the constitutional defect in the Act.

34. Cybercrimes Bill B6D-2017, <https://pmg.org.za/bill/684/>



■ MIS- AND DISINFORMATION

Further to the above, concerns regarding the criminalisation of mis- and disinformation are on the rise following oscillating responses to disinformation by the South African Police Service (SAPS). SAPS has on two separate occasions issued warnings regarding the dissemination of disinformation being shared across social media. The first warning suggested that the publication, distribution, disclosure, transmission, circulation or spreading of false information or fake news is an offence.³⁵ In the second warning SAPS pleaded to members of the public to not disseminate disinformation.³⁶ Apart from the COVID-19 regulations disinformation is not a criminal offence in South Africa. Prior to this, South Africa had signalled its election not to criminalise disinformation. This is most notably illustrated in the marked difference between the Cybercrimes and Cyber Security Bill³⁷ and the more recent Cybercrimes Bill.³⁸ The former criminalised the dissemination of false data messages.

This has been removed from the most recent version of the Cyber Bill which does not include provisions that would make it an offence to publish inherently false data messages. Therefore, the remarks by SAPS are concerning and appear to align with troubling regional trends towards disinformation.³⁹

THE RIGHT TO PRIVACY

South Africa's privacy landscape has seen important data protection developments and potential advancements around digital IDs on the one hand, and a lack of adequate protection in relation to various surveillance practices on the other. While the right to privacy is constitutionally protected in South Africa,⁴⁰ its application in the digital environment is an emerging concept for many people who are beginning to grapple with evolving understandings of why privacy is important, what personal information means, and the implications of different ways in which state and non-state actors may be eroding privacy rights.

■ DATA PROTECTION AND DIGITAL IDS

During 2020, the President brought the substantive provisions of South Africa's data protection law – the Protection of Personal Information Act (POPIA)⁴¹ – into force, with a one-year grace period for compliance. This was a welcomed development for data protection, both to ensure much needed regulatory compliance, but also to ensure that the right to privacy is meaningfully realised in the information age.⁴²

35. SAPS, (2020) "Media Statement: Angry protesters harm racehorses at stables in Port Elizabeth", <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=28349>

36. SAPS, (2020) "Media Statement: Police caution the public against the incessant peddling of fake news relating to human trafficking and kidnapping of women and children", <https://www.saps.gov.za/newsroom/selnewsdetails.php?nid=28467>

37. No. 40487 of 2016 at section 17(2), <https://www.justice.gov.za/legislation/bills/CyberCrimesBill2017.pdf>

38. Cybercrimes Bill above n 34.

39. See Communique of the 40th Ordinary Summit of SADC Heads of State and Government, (2020)

https://www.sadc.int/files/8115/9767/2537/Communique_of_the_40th_SADC_Summit_August_2020_-ENGLISH.pdf. During the Summit Member States were urged to take pro-active measures to mitigate external interference, the impact of fake news and the abuse of social media, especially in electoral processes.

40. Section 15 of the South African Constitution.

41. 4 of 2013, <https://www.justice.gov.za/inforeg/docs/InfoRegSA-POPIA-act2013-004.pdf>

42. Singh, (2020) "Why POPIA is about rights – not just compliance", <https://altadvisory.africa/2020/06/23/why-popia-is-about-rights-not-just-compliance>

POPIA will come into effect on 1 July 2021.⁴³ In December 2020, the Official Identity Management Policy was published for comment.⁴⁴ The Policy forms part of South Africa's efforts to enhance identity management and digital identity development. The Policy, still in a nascent stage, will likely have a significant bearing on South Africa's identity management framework which is set to enable an inclusive digital population register that is secure, accurate and confidential.

■ SURVEILLANCE

From a surveillance perspective, there have been two interesting jurisprudential developments. A constitutional challenge to various provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA),⁴⁵ which authorises state surveillance, is presently before the Constitutional Court.⁴⁶ It has been argued that RICA is unconstitutional for failing to provide adequate safeguards, and for creating a chilling effect on the right to privacy and associated constitutional rights, including freedom of expression, freedom of the media, and access to courts. Another notable development relates to developing jurisprudence in response to applications for the roll-out of CCTV video surveillance networks in the city of Johannesburg.⁴⁷ Privacy activists are concerned that this is being done in the absence of an enabling

legal framework which is contrary to the constitutionally protected right to privacy.⁴⁸ It is hoped that effective and appropriate safeguards will be implemented soon as the use of new technologies may threaten the enjoyment of privacy rights.

INTERNET ACCESS

■ PROHIBITIVELY HIGH DATA COSTS

South Africa's prohibitively high data costs remain a primary obstacle to access and connectivity, and in turn a primary barrier to the exercise of digital rights.⁴⁹ Recent statistics suggest that approximately 63% of people in South Africa are part of the digital population as internet users; however, it appears that only 10.4% of South African households can access the internet at home, for people living in rural areas this figure sits at 1.7%.⁵⁰ The stark rural/urban digital divide remains a concern. Fortunately, there have been several indicators that state and non-state actors are seeking to facilitate access to the digital environment. Following the 2019 recommendations of the Competition Commission that data prices in South Africa were too high and that pricing structures are "anti-poor",⁵¹ mobile telecommunications networks have begun decreasing their prices. This is likely to contribute positively to advancing internet access in South⁵²

43. The Presidency, (2020) "Commencement of certain sections of the Protection of Personal Information Act, 2013", <http://www.thepresidency.gov.za/press-statements/commencement-certain-sections-protection-personal-information-act%2C-2013>

44. Department of Home Affairs, (2020) "Draft Official Identity Management Policy", https://static.pmg.org.za/Draft_Official_Identity_Management_Policy_Version_with_Call_for_Comments.pdf

45. 70 of 2002, https://www.gov.za/sites/default/files/gcis_document/201409/a70-02.pdf

46. See Constitutional Court case resources for access to pleading and updates on the matter, <https://collections.concourt.org.za/handle/20.500.12144/36631>

47. Vumacam (Pty) Ltd v Johannesburg Roads Agency and Another 14867/2020, <https://powersingh.africa/wp-content/uploads/2020/07/vumacam-judgment.pdf>

48. .Id. See further written submissions by Right2Know Campaign who intervened as amicus curiae, <https://powersingh.africa/2020/07/22/vumacam-pty-ltd-v-johannesburg-roads-agency-and-another/>

49. UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2011) (accessible at https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

50. Statista, (2020) "Digital population in South Africa as of January 2020" <https://www.statista.com/statistics/685134/south-africa-digital-population/> and Statistics South Africa, (2018) 'General Household Survey' (2018)

51. Competition Commission Data Services Market Inquiry, (2019) (accessible at <http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf>)

52. ICASA, (2020) "Communications & Digital Technologies Ministry and ICASA welcome steps taken by the Competition Commission to facilitate data prices reduction at the retail level of the market", <https://www.icasa.org.za/news/2020/communications-digital-technologies-ministry-and-icasa-welcome-steps-taken-by-the-competition-commission-to-facilitate-data-prices-reduction-at-the-retail-level-of-the-market>



Africa. Additionally, ICASA has begun an application process for the allocation of high demand spectrum.⁵³ ICASA is also working with various stakeholders to better understand, among other things, the state of the mobile retail market.⁵⁴ The final outcome of this process will likely have a positive impact on access and connectivity in South Africa. These steps by ICASA are set to generate a significant improvement in accessing the digital environment. A further development set to improve access was seen in the performance agreement signed by President Ramaphosa and Communications and Digital Technologies Minister Stella Ndabeni-Abrahams.⁵⁵ The agreement confirms that the Minister must ensure that 80% of the population have access to the internet by 2024 and the current cost of mobile data must be reduced by 50%.

■ DIGITAL INFRASTRUCTURE

Further to the above efforts, there have been promising indicators illustrating the advancement of South Africa's digital infrastructure. 5G has been the most notable digital infrastructure development of 2020. Most major mobile networks are offering or working towards offering access to 5G networks for its clients.⁵⁶ The Draft Policy on the rapid deployment of electronic communications networks was published in 2020.⁵⁷ The draft policy is intended to "provide clarity on the deployment of electronic communications networks and facilities".⁵⁸

The publication of the Report of the Presidential Commission on the 4th Industrial Revolution was an important moment for South Africa's digital landscape.⁵⁹

53. ICASA, (2020) "Invitation to Apply (ITA) notice to invite applications for the radio frequency spectrum licences for International Mobile Telecommunication (IMT) Spectrum band", <https://www.icasa.org.za/legislation-and-regulations/ita-for-the-radio-frequency-spectrum-licences-for-imt-spectrum-bands>.

54. ICASA, (2020) "Public Hearings on the Mobile Broadband Service Inquiry", <https://www.icasa.org.za/news/2020/public-hearings-on-the-mobile-broadband-services-inquiry>. This follows the 2019 publication and call for comment on the Discussion Document which makes various preliminary findings in respect of the current state of the retail market, spectrum, site access, roaming and mobile virtual network operators. See ICASA, (2019) "Discussion Document on The Markey Inquiry Into Mobile Broadband Services", <https://www.icasa.org.za/legislation-and-regulations/discussion-document-on-the-market-inquiry-into-mobile-broadband-services>.

55. Performance agreement between President Cyril Ramaphosa and Minister of Communications and Digital Technologies, (2020), https://www.gov.za/sites/default/files/The_PA_comm-dig-ndabeni-abrahams.pdf

56. Labuschangne, (2020) "South Africa's 5G prices and coverage – Vodacom vs MTN vs Rain", <https://mybroadband.co.za/news/5g/369289-south-africas-5g-prices-and-coverage-vodacom-vs-mtn-vs-rain.html#:~:text=Rain%20was%20the%20first%20to,Vodacom%20and%20MTN%20in%202020.&text=Rain%20claims%20its%20Premium%205G,150Mbps%2D200Mbps%20given%20enough%20spectrum>

57. Proposed policy and policy direction on rapid deployment of electronic communications networks and facilities, (2020), <https://www.ellipsis.co.za/wp-content/uploads/2015/11/Draft-Policy-Direction-on-Rapid-Deployment-of-Electronic-Communications-Networks-and-Facilities-22-July-2020.pdf>

58. It is necessary to note that the draft policy has caused a significant public outcry, chiefly, because the policy envisages permitting electronic communications network service licensees the right to enter upon and use private land for the deployment of such networks and facilities. See Winks, (2020) "Stella's 5G rollout plan raises tempers and questions of constitutionality", <https://citizen.co.za/news/south-africa/government/2330147/stellas-5g-rollout-plan-raises-tempers-and-questions-of-constitutionality/>

The Report indicates that digital literacy and the development of 4IR infrastructure will be prioritised. Further, the Report recommends that South Africa develops a geostationary telecommunications satellite, which would provide quality connectivity to marginalised communities in the SADC region.

■ DIGITAL EXCLUSION

Unfortunately, the efforts towards access and infrastructure may remain inconsequential without appropriate steps to bridge the digital divide and meaningfully advance digital literacy skills.⁶⁰ Without the requisite skills, meaningful and active participation with online services is unlikely.⁶¹

In South Africa, the pervasive digital divide runs across historical lines of oppression and is exacerbated in the context of access to digital literacy skills.⁶² A recent report found “the discriminatory access to the internet further undermines the right to equality and non-discrimination, guaranteed both by the Constitution and under international human rights law.”⁶³ In the context of health care, particularly when it comes to accessing health-related information during times of crisis, digital exclusions can have a significant impact on information rights, which in turn may implicate an array of other rights.⁶⁴

The gender-digital divide, while not as pervasive in South Africa as other parts of the region, still exists with 60% internet access for men and 52% for women.⁶⁵ However, a key concern in the context of equality and inclusion relates to online gender-based violence.⁶⁶ It is necessary to note that during the lockdown in South Africa, United Nations Women released a statement calling for an end to cyber violence against women and girls in South Africa, while no statistics were referenced, the statement in and of itself is indicative of a significant problem.⁶⁷

Markedly, a multi-stakeholder group has called for a responsible approach to regulating domestic violence facilitated by technologies.⁶⁸ This follows a law reform process in which South Africa’s Parliament is revising various laws to address the scourge of gender-based violence in the country. It is hoped that through this process there will be a greater recognition that South African laws need to be responsive to contemporary and evolving challenges.

The discriminatory access to the internet further undermines the right to equality and non-discrimination



59. Report of the Presidential Commission on the 4th Industrial Revolution, (2020), <https://altadvisory.africa/wp-content/uploads/2020/11/Report-of-the-Presidential-Commission-on-the-Fourth-Industrial-Revolution.pdf>

60. Universal Access to the Internet and Free Public Access in South Africa (2019) (Universal Access) (accessible at <https://internetaccess.africa/universal-access/>)

61. Media Monitoring Africa (2020) “Submissions on the Draft National Youth Policy for 2020-2030 (NYP2030)”, <https://mediamonitoringafrica.org/wp-content/uploads/2020/03/200316-MMA-Submission-on-the-NYP2030.pdf>

62. Violence Prevention Through Urban Upgrading, ‘Bridging the New Digital Divide’ (2019) (accessible at <http://vpuu.org.za/ict4d/digital-divide-south-africa/>)

63. Global Human Rights Clinic of the University of Chicago Law School; ALT Advisory, Acacia Economic and MMA, ‘Access Denied: Internet access and the right to education in South Africa’ (2020) at 17 (accessible at <https://internetaccess.africa/wp-content/uploads/2020/09/Access-Denied-Report-2020-FINAL-min.pdf>)

64. Association for Progressive Communications (APC), (2020), “Closer than ever: Keeping our movements connected and inclusive – APC’s response to the covid-19 pandemic”, https://www.apc.org/sites/default/files/closerthanever_pp.pdf


65. Sornger et al, (2020), “Bridging the Gender Digital Gap”, https://www.g20-insights.org/policy_briefs/bridging-the-gender-digital-gap/. See also Power, (2020) “The gender digital divide and COVID-19: Towards feminist internet regulations in Southern Africa”, https://africaninternetrights.org/sites/default/files/Tina_Power.pdf

66. Iyer et al above n 30.

67. UN Women, (2020) “Press statement: Calls for attention to cyber violence and its devastating effect on women and girls in South Africa”, <http://www.un.org.za/press-statement-calls-for-attention-to-cyber-violence-and-its-devastating-effect-on-women-and-girls-in-south-africa/>

68. Research ICT Africa, et al (2020) “Submissions on the Domestic Violence Bill”, <https://altadvisory.africa/wp-content/uploads/2020/10/Domestic-Violence-Amendment-Bill-B20-%E2%80%932020-Joint-Submissions-by-RIA-APC-ALT-FWA.pdf>

CONCLUSION AND RECOMMENDATIONS



The trajectory in advancing digital rights in South Africa has had some promising developments; however, barriers to access, the existing gaps in legal frameworks and certain regulatory developments have raised cause for concern.

Three key recommendations arise.

- First, efforts towards effectively advancing meaningful access and digital literacy need to be prioritised, with universal, meaningful access for all persons in South Africa being the target.
- Second, jurisprudential developments and law reform processes need to be responsive to contemporary challenges, and need to ensure that adequate and effective protections are afforded to all those who need it.
- Finally, all decisions, at a legislative, policy or institutional level, must be informed by the Constitution and South Africa's commitments to international human rights law.

South Africa stands at a critical junction: one path tends towards a harmful digital environment that neglects human rights imperatives, whereas the other advances the formation of a safe, accessible, and inclusive online world. The hope is that as we move into 2021, South Africa chooses the latter.

LONDA

SOUTH AFRICA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION



Paradigm Initiative

374 Borno Way, Yaba, Lagos, Nigeria

Email: media@paradigmhq.org

www.paradigmhq.org

     @ParadigmHQ