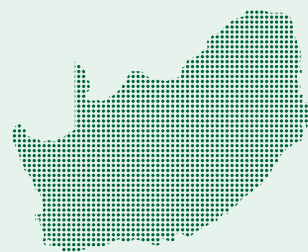


LONDA

AFRIKA KUSINI HAKI ZA DIGITALI NA UJUMUISHAJI




UCHAPISHAJI WA PARADIGM INITIATIVE



**RIPOTI
YA 2020**

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Iliyochapishwa mnamo Aprili 2021

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Mawaki Chango, Nnenna Paul-Ugochukwu and Thobekile Matimbe.

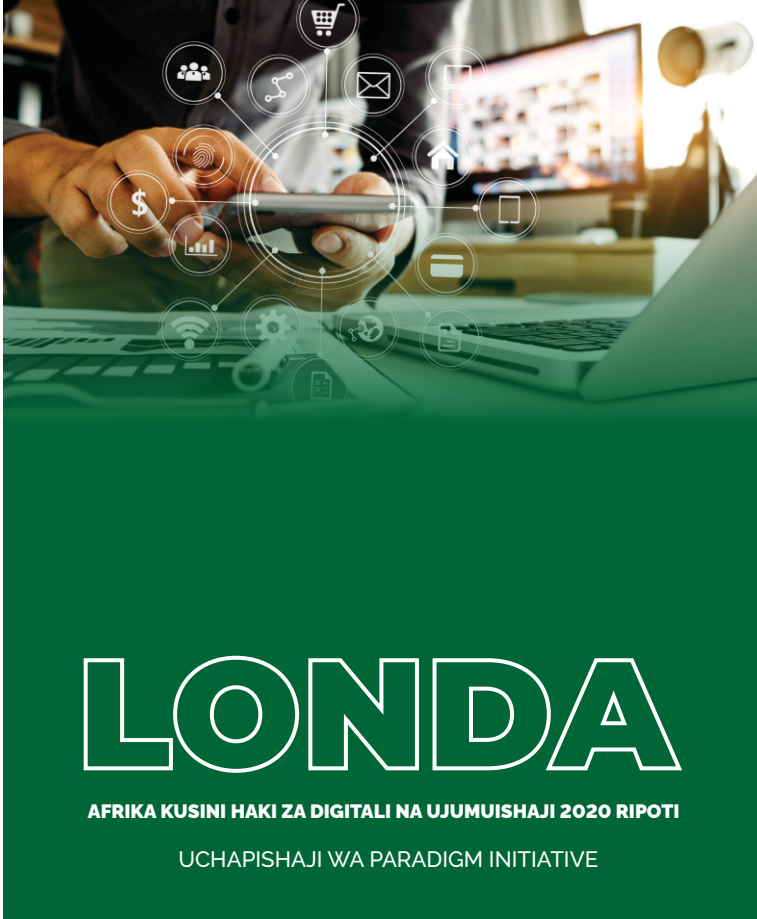
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LONDA

AFRIKA KUSINI HAKI ZA DIGITALI NA UJUMUISHAJI 2020 RIPOTI

UCHAPISHAJI WA PARADIGM INITIATIVE

Asasi za kiraia zinaendelea kufanya kazi ili kuendeleza haki za dijitali na ujumuishi barani Afrika, kuhakikisha njia bora zinapitishwa katika sera na sheria. Ripoti hii inachambua hali ya haki za dijitali na ujumuishi nchini Afrika Kusini, ikichunguza ukiukaji na mapungufu, ikiangazia utumiaji na utekelezwaji wa sera na sheria, ikiangazia hatua muhimu na kutoa mapendekezo kwa mandhari ya dijitali nchini Afrika Kusini. Pamoja na ripoti kutoka nchi 20, toleo hili linaangazia kati ya maswala mengine, pengo la kidijitali lililozidishwa na janga la COVID-19 na kufichua ukiukaji kwenye nyanja tofauti kama vile faragha, ufikiaji wa habari, na uhuru wa kujieleza na msingi wa sheria na sera ulioelezwa vizuri.

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Afrika Kusini, yenye idadi ya watu milioni 58.5,¹ imeorodheshwa kama uchumi wa pili kwa ukubwa barani Afrika, lakini inabaki kuwa moja ya jamii ambazo hazina usawa ulimwenguni.²

UTANGULIZI

HAKI ZA DIJITALI NA UJUMUISHAJI YA NCHI YA AFRIKA KUSINI

Hasa, Afrika Kusini inaendelea kuwa na sifa nzuri kwa heshima ya haki za mtandao na uhuru, ikipewa nafasi kama nchi inayofanya vizuri zaidi katika ubora wa kutoa Faharasi ya Mtandao Jumuishi kwa mwaka 2020.³ Katika miaka ya hivi karibuni, kumekuwa na juhudi zilizoongezeka za kuelekea katika mazingira ya kidigitali. Walakini, Afrika Kusini bado inakabiliwa na vizingiti vingi katika kuendeleza haki za kidijitali, na tofauti nyingi zilizopo, viziuzi vya ufikiaji, na miundo ya ubaguzi imekuzwa na janga la ulimwengu.⁴



Katika mazingira ya kidigitali

Kuonyesha baadhi ya maendeleo muhimu mnamo 2020, ripoti hii inategemea sana utafiti wa eneo-kazi pamoja na ufahamu kutoka kwa uzoefu wa vitendo vya kufanya kazi kwa haki za kidijitali nchini Afrika Kusini. Ripoti hii inazingatia maendeleo muhimu mnamo 2020 inayohusiana na utatu wa haki za habari.⁵ Kwanza, ripoti inaonyesha athari ya COVID-19 kwa maendeleo ya haki za kidijitali. Pili,

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.

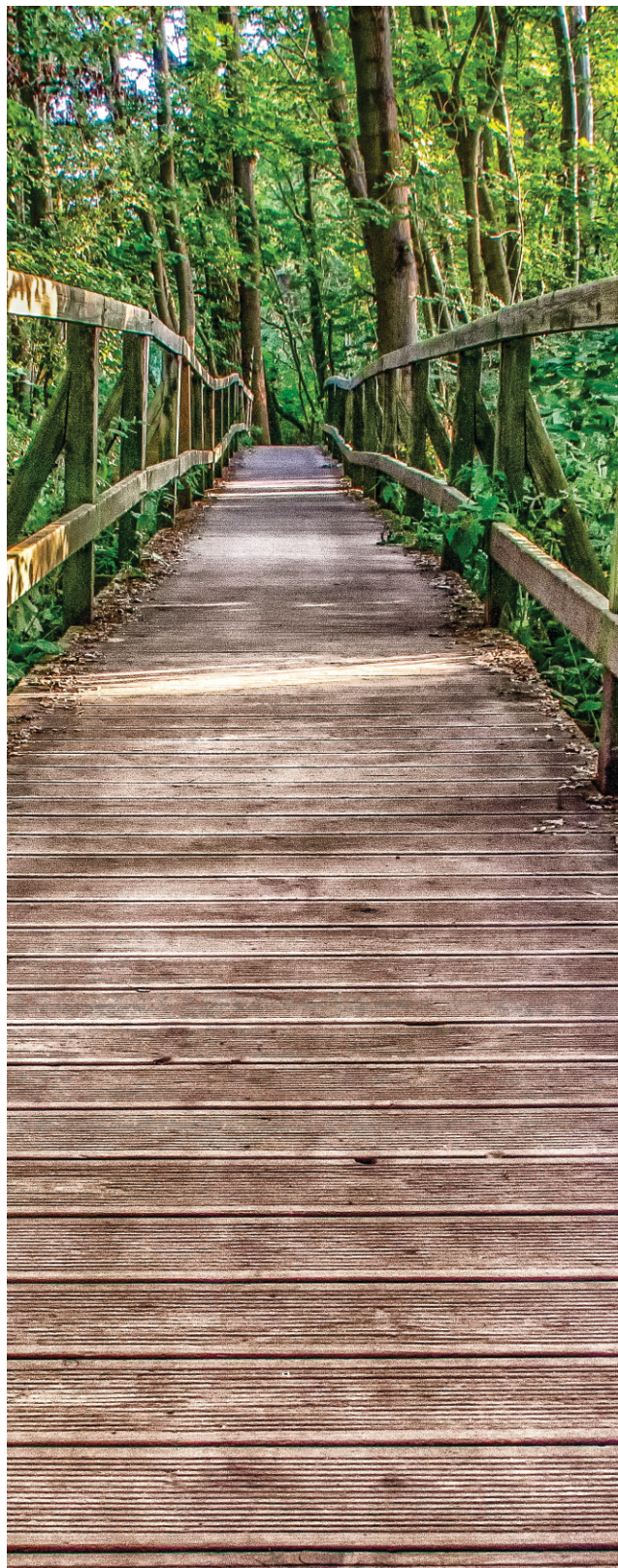
inazungumzia maendeleo ya hivi karibuni kuhusiana na uhuru wa kujieleza. Tatu, ripoti hiyo inagusa mazingira ya faragha ya Afrika Kusini. Nne, changamoto zinazohusu upatikanaji wa mtandao na kutengwa kwa kidijitali zinaonyeshwa. Ripoti hiyo inahitimisha na seti ya mapendekezo mafupi ambayo yanatafuta njia ya Afrika Kusini kuelekea moja ya ufikiaji, ujumuishaji, na heshima ya haki za kimsingi.

ATHARI ZA COVID -19 KWA HAKI ZA KIDIJITALI NA JUMUISHI

Majibu kadhaa ya serikali ya Afrika Kusini kwa COVID-19 imehusishwa, kwa viwango tofauti, utatu wa haki za habari. Kwa kupongezwa, kupitia kupitishwa kwa kanuni, Mamlaka Huru ya Mawasiliano ya Afrika Kusini (ICASA) kwa muda ilitoa wigo mkubwa wa mahitaji kusaidia kupunguza msongamano wa mtandao, kuhakikisha huduma bora za njia pana, na kuwezesha kupungua kwa gharama kwa watumiaji wa mtandao.⁶

Kwa kuongezea, kanuni zilichapishwa kwenye tovuti zenye viwango vya afya na elimu.⁷ Waendeshaji wa mtandao wa rununu MTN na Vodacom zaidi walitoa ufikiaji uliokadiriwa sifuri kwa wavuti zinazotoa rasilimali za afya na elimu.⁸ Hizi zilikuwa hatua muhimu kwa ujumuishaji wa kidijitali, na ilionyesha uwezekano wa juhudi za maana zaidi za kuendeleza upatikanaji wa wavuti kwa wote.

Hata hivyo, cha kutia wasiwasi, ni kanuni ambazo zinahusu haki ya uhuru wa kujieleza. Usambazaji wa habari kuhusu mazingira ya janga hilo ulibainika kama jambo kuu, na kusababisha uchapishaji wa kanuni ambazo ni kosa kutangaza habari yoyote, kupitia chombo chochote, pamoja na mitandao ya kijamii kuhusu COVID- 19.⁹ Maagizo zaidi yalihatiji huduma za mawasiliano za kielektroniki, leseni, watoa huduma wa juu na watoa huduma za mtandao kuondoa habari bandia



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

zinazohusiana na COVID-19 kutoka kwenye majukwaa yao.¹⁰ Mwisho, jibu lililoadiliwa sana linahusu njia za kutafuta mawasiliano zilizopitishwa na serikali. Majibu katika suala hili yamepitwa mara kadhaa, lakini mwishowe ilisababisha kanuni ambazo zilijumuisha vizuizi kadhaa muhimu vya faragha, pamoja na arifu ya mtumiaji na kifungu wazi kwamba kizuizi cha yaliyomo kwenye mawasiliano hayaruhusiwi. Hasa, jaji aliteuliwa kutekeleza wa kufuatilia mawasiliano.¹¹ Maendeleo ya hivi karibuni katika suala hili ni programu ya COVID Alert SA, inayotumia ufuatiliaji wa mawasiliano ya Bluetooth, ambayo inasemekana inategemea teknolojia.¹² ya kulinda faragha. Baadhi ya hatua hizi zimeibua wasiwasi miongoni mwa wanaharakati wa faragha.¹³

UHURU WA KUJIELEZA

Kwa jumla haki ya uhuru wa kujieleza iliyolindwa kikatiba inaheshimiwa sana nchini Afrika Kusini.¹⁴ Mnamo mwaka wa 2020, Mahakama ya Kikatiba ilithibitisha kwamba “si kutia chumvi kuashiria haki ya uhuru wa kujieleza kama uhai wa demokrasia halisi ya kikatiba ambayo inaifanya iwe hai, thabiti na yenye amani. Muhimu zaidi, kujieleza huru ni jambo la lazima muhimu katika kubadilishana maoni maoni na uwajibikaji.”¹⁵ Licha ya hayo, kuna maendeleo kadhaa yanayohusiana na uhuru wa kujieleza ndani na nje ya mtandao ambayo inahimiza ufuatiliaji zaidi.

■ KUFURAHIA UHURU WA KUJIELEZA MTANDAONI MNAMO 2020

Matumizi na ufurahiaji wa uhuru wa kujieleza mtandaoni yanazidi kuwa maarufu nchini Afrika Kusini.¹⁶ haswa watumiaji wengi wanapojiunga na mitandao ya kijamii kupata na kusambaza habari. Inakadiriwa kuwa kuna watumiaji milioni 22 wa mitandao ya kijamii nchini Afrika Kusini. Nafasi za mtandaoni huunda fursa mpya na za kufurahisha za ukuzaji wa uhuru wa kujieleza. Walakini, changamoto zingine zimetokea wakati wa kuvinjari nafasi hizi za kisasa. Yaliyoangaziwa hapa chini ni baadhi ya maendeleo ya kupendeza yanayohusiana na uhuru wa kujieleza mtandaoni.

Ya kwanza inahusiana na kesi kuhusu Tweet ya kudhalilisha.¹⁷ Mnamo Novemba 2020, Mahakama Kuu ya Rufaa iliamua kuwa taarifa hiyo iliyochapishwa kwenye Twitter ilikuwa ya kukashifu na isiyo halali, ilikubali kwamba “kuongezeka kwa mitandao ya kijamii kutaendelea kuzingatia eneo hili la sheria”, ikigundua ufikiaji wa maudhui yaliyotangazwa na wanachama wa kawaida wa jamii.¹⁸ Mahakama ilirejelea wasiwasi juu ya upotovu na upotoshaji habari kwenye mitandao ya kijamii.¹⁹ Hii inaashiria hatua muhimu kuelekea maendeleo ya uelewa wa kisheria wa kashfa katika muktadha wa mitandao ya kijamii huko Afrika Kusini.²⁰

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.

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.



Matumizi na ufurahiaji wa uhuru wa kujieleza mtandaoni yanazidi kuwa maarufu nchini Afrika Kusini, haswa watumiaji wengi wanapojiunga na mitandao ya kijamii kupata na kusambaza habari.

Maendeleo ya pili yanahusu hali ambayo kampuni zinatumia vibaya michakato ya mahakama kumaliza uhuru wa kujieleza, kukandamiza na kuzuia kusema, na kuwatisha wale wanaowakosa.²¹ Mnamo Aprili 2020, katikati ya kufungwa kwa Afrika Kusini na COVID-19, shirika la migodi linayofanya kazi nchini Afrika Kusini bila mafanikio lilitafuta kuzuia wanaharakati wa jamii kutumia mitandao ya kijamii ili kuzua wasiwasi na ukosoaji dhidi ya mgodi. Maombi ikiwa yangefanikiwa yangeweka mfano hatari ambao ungekuwa na athari mbaya kwenye hotuba ya bure kote na nje ya mtandao. Kwa bahati nzuri, ombi liliondolewa, na wanaharakati wa jamii wanaweza kuendelea kushiriki habari na kutoa maoni.

Ya tatu ni kuchapishwa kwa Rasimu ya Kanuni za Marekebisho ya Filamu na Machapisho na Wizara ya Mawasiliano na Teknolojia ya Dijitali.²² Kanuni ziliwekwa ili kutoa uwazi zaidi na mwelekeo juu ya jinsi maudhui ambayo husambazwa mtandao kwa faida ya kibiashara yameainishwa.²³ Walakini, kanuni hizo zilisababisha ghasia, na wasiwasi kwamba kanuni hizo zilikuwa za kibabe na jaribio la kudhibiti mtandao.²⁴ Asasi ya kiraia Shirika la Ufuatiliaji wa Vyombo vya Habari Afrika (MMA) liliwasilisha maoni juu ya Kanuni za Rasimu ikigundua kuwa kuna “athari kubwa kwa utekelezaji wa haki mkondoni, haswa haki ya uhuru wa kujieleza”.²⁵

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>

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

kwamba Rasimu ya Kanuni zinaunda mfumo ambao hauwezi kutekelezeka na hauwezi kutekelezeka, ambayo ni mbali na maoni bora ikizingatiwa kuwa “mfumo wa sasa wa udhibiti na sera kuhusu TEHAMA na maudhui mtandaoni nchini Afrika Kusini unachanganya, hauna uhakika na isiyoratibiwa, ambayo inaweza kuzidishwa na wigo mpana wa Rasimu ya Kanuni”²⁶ Kuna uwezekano wa kuwa na harakati zaidi juu ya Rasimu ya Kanuni mnamo 2021, iwe kwa njia ya marekebisho zaidi, au kwa njia ya kuchapishwa.

■ MATAMSHI YA CHUKI NA UCHOCHEZI

Kwa upande wa kujieleza bila kinga, ni muhimu kwamba uelewa wa pekee wa matamshi ya chuki nchini Afrika Kusini unazingatiwa. Hii inafuatia uchunguzi wa Mahakama Kuu ya Rufaa mnamo 2019 ambao uligundua vifungu vya matamshi ya chuki ya Sheria ya Kukuza Usawa na Kuzuia Ubaguzi wa Haki (Sheria ya Usawa) ni kinyume cha katiba.²⁷ Mahakama ya Kikatiba kwa sasa imebanwa na maswala mawili ya matamshi ya chuki ambayo yanaweza kuwa na athari kubwa kwa ufafanuzi wa kisheria wa Afrika Kusini kwa matamshi ya chuki ambayo yataathiri jinsi matamshi ya chuki yanavyojaribiwa kila wakati na nje ya mtandao.²⁸ Kwa bahati mbaya, na katikati ya kutokuwa na uhakika wa kisheria, kumekuwa pia na kuongezeka kwa usambazaji wa maudhui ya kuumiza na kudhuru katika majukwaa ya mitandao ya kijamii, na

udhahirisho mtandaoni wa chuki dhidi ya wageni,²⁹ ubaguzi wa kijinsia na unyanyasaji,³⁰ na mivutano ya ubaguzi wa rangi.³¹

Maendeleo mengine mashuhuri yanahusiana na uamuzi wa hivi karibuni wa Mahakama ya Katiba kuhusu uchochezi.³² Mahakama ya Kikatiba ilitangaza kifungu kinachohusiana na kuchochea katika Sheria ya Makusanyiko ya Machafuko ambayo haiendani na haki ya uhuru wa kujiele.³³ Jambo hili lilihusu taarifa ambazo zinadaiwa ziliwahimiza watu kuchukua ardhi, na kusababisha mashtaka ya jinai kwa kuchochea watu kuingia ndani. Wengi wa Mahakama ya Kikatiba walitoa matamko mashuhuri kuhusu uingizaji wa haki ya uhuru wa kujieleza. Wakati suala hili halikuwa juu ya uchochezi mtandaoni ni muhimu kutambua kwamba Muswada wa Sheria ya Makosa ya Mtandao, ambao ulipitishwa na Bunge zote mbili ya tarehe 2 Desemba 2020 na sasa upo mbele ya Rais unasubiriwa kutiwa saina, unashughulikia uchochezi katika Sura ya 2.³⁴ Hukumu hii inaweza kuwa na athari kwa jinsi mawasiliano mabaya yanavyo angaziwa katika Muswada, ambayo inaweza kuathiri jinsi uchochezi mtandaoni unaeleweka na kushughulikiwa.

Udhahirisho mtandaoni wa chuki dhidi ya wageni, ubaguzi wa kijinsia na unyanyasaji, na mivutano ya ubaguzi wa rangi.



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/>



■ HABARI POTOFU NA HABARI MBAYA

Zaidi ya hayo hapo juu, wasiwasi juu ya uhalifu wa upotofu na upotoshaji wa habari unaongezeka kufuatia majibu ya kupuuza habari kwa polisi wa Afrika Kusini (SAPS). Kwa mara mbili tofauti SAPS imetoa maonyo kuhusu usambazaji wa habari zinazoenezwa kwenye mitandao ya kijamii. Onyo la kwanza lilipendekeza kuwa uchapishaji, usambazaji, utangazaji, au uenezaji wa habari za uwongo au habari bandia ni kosa.³⁵ Katika onyo la pili SAPS iliwasihi wanachama wa umma wasisambaze habari za potovu.³⁶ Mbali na kanuni za COVID-19 upotoshaji sio kosa la jinai nchini Afrika Kusini. Kabla ya hii, Afrika Kusini ilikuwa imeashiria uchaguzi wake kutoharamisha habari potofu. Hii inaonyeshwa wazi katika tofauti iliyo wazi kati ya Usaliti wa Mtandaoni na Muswada wa Usalama wa Mtandaoni na Muswada³⁷ wa hivi karibuni wa Makosa ya Mtandaoni.³⁸ Muswada wa awali aliharamisha usambazaji wa ujumbe wa data za uwongo. Hii imeondolewa kwenye toleo la hivi

karibuni la Muswada wa Mtandao ambao haujumuishi vifungu ambavyo vitaifanya iwe kosa kutangaza ujumbe wa asili wa data. Kwa hivyo, matamshi ya SAPS yanahusu na yanaonekana kuoana na mienendo ya eneo yenye utata na taarifa potofu.³⁹

HAKI ZA FARAGHA

Mazingira ya faragha ya Afrika Kusini yameshuhudia maendeleo muhimu ya ulindaji wa data na uwezekano wa maendeleo kuhusu vitambulisho vya dijitali kwa upande mmoja, na ukosefu wa ulindaji wa kutosha kuhusiana na hatua kadhaa ya ufuatiliaji kwa upande mwingine. Wakati haki ya faragha inalindwa kikatiba nchini Afrika Kusini,⁴⁰ matumizi yake katika mazingira ya dijitali ni wazo linaloibuka kwa watu wengi ambao wanaanza kupambana na uelewa unaobadilika wa kwanini faragha ni muhimu, nini maana ya habari ya kibinafsi, na athari za njia tofauti ambamo watendaji wa serikali na wasio wa serikali wanaweza kupoteza haki za faragha.

■ ULINDAJI WA DATA NA VITAMBULISHO VYA KIDIJITALI

Wakati wa 2020, Rais alileta vifungu muhimu vya sheria ya ulindaji wa data ya Afrika Kusini - Sheria ya Ulindaji wa Habari za Kibinafsi (POPIA)⁴¹ kutumika, na kipindi cha neema cha mwaka mmoja cha kufuata. Haya yalikuwa maendeleo ya kukaribishwa kwa ulindaji wa data, zote mbili ili kuhakikisha kufuata sheria zinazohitajika, lakini pia kuhakikisha kuwa haki ya faragha zinatekelezwa katika kizazi cha kidijitali.⁴² POPIA itaanza

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>

kutekelezwa tarehe 1 Julai 2021⁴³ Mnamo Desemba 2020, Sera Rasmi ya Usimamizi wa Vitambulisho ilichapishwa ili kutoa maoni.⁴⁴ Sera hiyo ni sehemu ya juhudi za Afrika Kusini za kuongeza usimamizi wa kitambulisho na ukuzaji wa vitambulisho vya dijitali. Sera hiyo, bado iko katika hatua changa, ina uwezekano mkubwa wa kuwa na athari kubwa juu ya mfumo wa usimamizi wa vitambulisho Afrika Kusini ambao umewekwa kuwezesha daftari jumuishi la watu kidigitali litakavyokuwa ni salama, sahihi na la siri.

■ UFUATILIAJI

Kutoka kwa mtazamo wa ufuatiliaji, kumekuwa na maendeleo mawili ya kufurahisha ya sheria. Changamoto ya kikatiba kwa vifungu anuwai vya Udhhibiti wa Kuingilia kwa Mawasiliano na Utoaji wa Sheria ya Habari inayohusiana na Mawasiliano (RICA),⁴⁵ ambayo inaruhusu ufuatiliaji wa serikali, iko mbele ya Mahakama ya Katiba.⁴⁶ Imesemekana kuwa RICA ni kinyume na katiba kwa kukosa kutoa kinga za kutosha, na kwa kuunda athari mbaya kwa haki ya faragha na haki za kikatiba zinazohusiana, pamoja na, uhuru wa kujieleza, uhuru wa vyombo vya habari, na ufikiaji wa Mahakama. Tukio lingine linahusiana na kuendeleza sheria katika kujibu maombi ya kutolewa kwa mitandao ya ufuatiliaji wa video za CCTV katika jiji la Johannesburg.⁴⁷ Wanaharakati wa faragha wana wasiwasi kuwa hii inafanywa kwa kukosekana kwa mfumo wezeshi unaowezesha ambao ni kinyume na haki ya faragha

iliyolindwa kikatiba.⁴⁸ Inatumainiwa kuwa kinga madhubuti na inayofaa itatekelezwa hivi karibuni kwani utumiaji wa teknolojia mpya zinaweza kutishia kufurahiya haki za faragha.

UFIKIAJI WA MTANDAO

■ GHARAMA KUBWA YA DATA

Gharama kubwa za data za Afrika Kusini bado ni kikwazo cha msingi cha upatikanaji na uunganisho, na kwa hivyo kizingiti cha msingi kwa utekelezaji wa haki za dijitali.⁴⁹ Takwimu za hivi karibuni zinaonyesha kwamba takriban 63% ya watu nchini Afrika Kusini ni sehemu ya idadi ya dijitali kama watumiaji wa mtandao; Walakini, inaonekana ni 10.4% tu ya kaya za Afrika Kusini zinaweza kupata mtandao nyumbani, kwa watu wanaoishi vijijini takwimu hii inakuwa 1.7%.⁵⁰ Pengo kati ya vijijini/mijini linabaki kuwa la wasiwasi. Kwa bahati nzuri, kumekuwa na viashiria kadhaa ambavyo watendaji wa serikali na wasio wa serikali wanatafuta kuwezesha ufikiaji wa mazingira ya kidijitali. Kufuatia mapendekezo ya 2019 ya Tume ya Ushindani kwamba bei za data nchini Afrika Kusini zilikuwa juu sana na kwamba miundo ya bei ni "isiyokidhi matarajio ya masikini",⁵¹ mitandao ya mawasiliano ya simu ya rununu imeanza kupunguza bei zao. Hii inaweza kuchangia vyema kuendeleza upatikanaji wa mtandao nchini Afrika Kusini.⁵² Kwa kuongezea, ICASA imeanza mchakato wa maombi ya ugawaji wa wigo wa mahitaji

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>



makubwa.⁵³ ICASA pia inafanya kazi na wadau anuwai kuelewa vizuri, pamoja na mambo mengine, hali ya soko la rejareja la rununu.⁵⁴ Matokeo ya mwisho ya mchakato huu yatakuwa na athari nzuri katika ufikiaji na unganisho nchini Afrika Kusini. Hatua hizi za ICASA zimewekwa ili kuleta maboresho makubwa katika kufikia mazingira ya kidijitali. Maendeleo zaidi yaliyowekwa kuboresha ufikiaji yalionekana katika makubaliano ya utendaji yaliyosainiwa na Rais Ramaphosa na Waziri wa Mawasiliano na Teknolojia ya Digitali Stella Ndabeni-Abrahams.⁵⁵ Makubaliano hayo yanathibitisha kwamba Waziri lazima ahakikishe kwamba asilimia 80 ya idadi ya watu wanapata mtandao kufikia 2024 na gharama ya sasa ya data ya rununu inapaswa kupunguzwa kwa 50%.

■ MIUNDOMBINU YA KIDIJITALI

Zaidi ya juhudi zilizo hapo juu, kumekuwa na viashiria vya kuahidi vinavyoonyesha maendeleo ya miundombinu ya dijitali ya Afrika Kusini. 5G imekuwa maendeleo mashuhuri zaidi ya miundombinu ya dijitali ya 2020. Mitandao mikubwa ya rununu inatoa au inafanya kazi kwa kutoa ufikiaji wa 5G kwa wateja wao.⁵⁶ Rasimu ya Sera ya upelekaji wa haraka wa mitandao ya mawasiliano ya kielektroniki ilichapishwa mnamo 2020.⁵⁷ Rasimu ya Sera imekusudiwa “kutoa ufafanuzi juu ya upelekaji wa mitandao na vifaa vya mawasiliano vya kielektroniki”.⁵⁸ Kuchapishwa kwa Ripoti ya Tume ya Rais juu ya Mapinduzi ya 4 ya Viwanda ilikuwa wakati muhimu kwa mazingira ya dijitali ya Afrika Kusini.⁵⁹ Ripoti hiyo inaonyesha kuwa ujuzi wa kidijitali na ukuzaji wa miundombinu ya 4IR kutapewa kipaumbele. Kwa kuongezea, Ripoti hiyo inapendekeza kwamba Afrika Kusini itengeneze satellite ya

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%20200Mbps%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/>

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>

mawasiliano ya geostation, ambayo itatoa unganisho bora kwa jamii zilizotengwa katika ukanda wa SADC.

■ KUTENGWA KWA KIDIJITALI

Kwa bahati mbaya, juhudi za kufikia na miundombinu inaweza kubaki bila maana bila kuwepo na hatua zinazofaa kupunguza pengo la kidijitali na kukuza kwa ustadi ujuzi wa kidijitali.⁶⁰ Bila ujuzi unaohitajika, ushiriki wa maana na wenye bidii na huduma za mtandaoni hauwezekani.⁶¹ Nchini Afrika Kusini, pengo la kidijitali linapenyeza kwenye ukandamizaji wa kihistoria na unazidishwa katika muktadha wa ufikiaji wa ujuzi wa kidijitali.⁶² Ripoti ya hivi majuzi iligundua “kuwa ubaguzi wa ufikiaji wa mtandao unadhoofisha zaidi haki ya usawa na ubaguzi, iliyohakikishwa na Katiba na chini ya sheria ya kimataifa ya haki za binadamu.”⁶³ Katika muktadha wa huduma ya afya, haswa linapokuja suala la kupata habari zinazohusiana na afya wakati wa janga, kutengwa kwa kidijitali kunaweza kuwa na athari kubwa kwa haki za habari, ambazo zinaweza kuhusisha safu ya haki zingine.⁶⁴

Pengo la kidijitali-jinsia, ingawa halijaenea nchini Afrika Kusini kama sehemu zingine za eneo hilo, bado lipo na ufikiaji wa mtandao wa 60% kwa wanaume na 52% kwa wanawake.⁶⁵ Walakini, wasiwasi muhimu katika muktadha wa usawa na ujumuishaji unahusiana na unyanyasaji wa kijinsia mtandaoni.⁶⁶ Ni muhimu kutambua kwamba wakati wa kufungwa nchini Afrika Kusini, Wanawake wa Umoja wa Mataifa walitoa taarifa wakitaka kukomeshwa kwa unyanyasaji wa mtandao dhidi ya wanawake na wasichana nchini Afrika Kusini, wakati hakuna takwimu zilizorejelewa, taarifa hiyo na yenyewe inaashiria changamoto kubwa.⁶⁷ Ilibainika, kikundi cha wadau wengi kimetaka njia inayowajibika kudhibiti vurugu za nyumbani zinazoweza na teknolojia.⁶⁸ Hii inafuatia mchakato wa marekebisho ya sheria ambayo Bunge la Afrika Kusini linarekebisha sheria anuwai ili kukabiliana na janga la unyanyasaji wa kijinsia nchini. Inatarajiwa kwamba kupitia mchakato huu kutakuwa na utambuzi mkubwa kwamba sheria za Afrika Kusini zinahitaji kujibu changamoto za kisasa na zinazoendelea.

**kuwa ubaguzi wa ufikiaji wa mtandao
unadhoofisha zaidi haki ya usawa na ubaguzi,
iliyohakikishwa na Katiba na chini ya sheria
ya kimataifa ya haki za binadamu.**



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%93-2020-Joint-Submissions-by-RIA-APC-ALT-FWA.pdf>

MAPENDEKEZO NA HITIMISHO

Njia ya kuendeleza haki za kidijitali nchini Afrika Kusini imekuwa na maendeleo kadhaa ya matumaini; Walakini, vizuizi vya ufikiaji, mapungufu yaliyopo katika mifumo ya kisheria na maendeleo kadhaa ya sheria yameibua wasiwasi.

Mapendekezo matatu muhimu yanaibuka.

- Kwanza, juhudi za kukuza kwa ufanisi upatikanaji wa maana kwa kidijitali zinahitaji kupewa kipaumbele, na ufikiaji wa maana kwa watu wote nchini Afrika Kusini ndio lengo.
- Pili, maendeleo ya sheria na michakato ya marekebisho ya sheria inahitaji kujibu changamoto za kisasa, na inahitaji kuhakikisha kuwa ulinzi wa kutosha na mzuri unapewa wale wote wanaohitaji.
- Mwishowe, maamuzi yote, katika ngazi ya kutunga sheria, sera au taasisi, lazima yajulishwe na Katiba na ahadi za Afrika Kusini kwa sheria ya kimataifa ya haki za binadamu.

Afrika Kusini imesimama katika makutano muhimu: njia moja inaelekea kwenye mazingira mabaya ya kidijitali ambayo hayazingatii masharti ya haki za binadamu, wakati nyingine inahimiza uundaji wa ulimwengu salama mtandaoni, kupatikana na kujumuisha mtandaoni. Matumaini ni kwamba tunapoingia 2021, Afrika Kusini inachagua ya mwisho.



LONDA

AFRIKA KUSINI HAKI ZA DIGITALI NA UJUMUISHAJI 2020 RIPOTI

UCHAPISHAJI WA PARADIGM INITIATIVE



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