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South Africa Digital Rights and Inclusion Report

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SOUTH AFRICA DIGITAL RIGHTS AND INCLUSION 2021 REPORT

A PARADIGM INITIATIVE PUBLICATION

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EXECUTIVE SUMMARY

This report captures the state of digital rights and inclusion in South Africa and notes developments. South Africa made several positive steps in developing policies that promote digital inclusion in 2021. This includes changes to the law to address online dimensions of gender-based violence.

Yet, there are serious barriers in implementing digital rights policies, ongoing challenges with disinformation and hate speech, and many continue to lack meaningful access to ICTs.



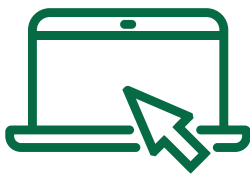


INTRODUCTION

DIGITAL RIGHTS AND INCLUSION IN ANGOLA



South Africa has strong protections for human rights, but the legacy of colonialism and apartheid has left enduring racial and economic inequalities, and the country continues to grapple with high rates of poverty, unemployment, and gender-based violence. This is coupled with significant digital inequality, with about 64% of the population having access to the Internet.¹ Nonetheless, in 2021 there were several developments in law and jurisprudence to adapt existing legal frameworks to advance digital inclusion and extend protections for digital rights.



65%

**POPULATION HAVE
ACCESS TO THE INTERNET**

COMPLIANCE WITH REGIONAL AND INTERNATIONAL FRAMEWORKS

South Africa subscribes to a range of regional and international frameworks that protect and advance various information rights – such as the International Covenant on Civil and Political Rights,² the Universal Declaration of Human Rights,³ the African Charter on Human and Peoples' Rights,⁴ and the African Charter on the Rights and Welfare of the Child (which recognises children's rights to privacy and freedom of expression, among others).⁵

1. Digital 2021: South Africa (2022), <https://datareportal.com/reports/digital-2021-south-africa> (accessed 4 February 2022).

2. International Covenant on Civil and Political Rights, <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 6 March 2022).

3. Universal Declaration of Human Rights, <https://www.un.org/sites/un2.un.org/files/udhr.pdf> (accessed 6 March 2022).

4. African Charter on Human and Peoples' Rights, <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 6 March 2022).

5. Articles VII and X, African Charter on the Rights and Welfare of the Child, https://au.int/sites/default/files/treaties/36804-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf (accessed 4 February 2022).



The African Commission on Human and Peoples' Rights 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa is also applicable.⁶ While there were no major developments in South Africa's compliance with these instruments in the year under review, its human rights record will be examined as part of the UN Human Rights Council's Universal Periodic Review in 2022.⁷ Notably, South Africa is yet to ratify the African Union's Convention on Cybersecurity and Personal Data Protection (the Malabo Convention), which provides various safeguards for privacy and data protection.⁸

IMPACT OF COVID-19 REGULATIONS ON DIGITAL RIGHTS AND INCLUSION

In 2021, South Africa continued to operate under a National State of Disaster, which was declared in March 2020 after the first locally detected cases of COVID-19. As noted in the 2020 Londa report for South Africa, several of the South African government's policy responses to COVID-19 have implications for digital rights.

The Independent Communications Authority of South Africa (ICASA) released an emergency temporary spectrum to mobile operators in April 2020 to help reduce network congestion and help meet the spike in demand due to the COVID-19 pandemic. This temporary allocation of emergency spectrum continued through the end of 2021, allowing operators to pilot 5G networks and increase network capacity in high-demand areas.⁹ Other temporary measures also promoted digital inclusion, such as the zero-rating of certain health and education-related websites.

Unfortunately, and possibly in part due to pre-existing challenges to digital inclusion, recent research suggests that disruptions to schooling resulted in South Africa's children losing up to 1.3 years of learning during the pandemic.¹⁰

However, other measures in the government's COVID-19 response have been less laudable in their impact on digital rights. Notably, the State of Disaster regulations include provisions that criminalise the spreading of disinformation about COVID-19.¹¹ There appear to have been no documented cases of a person being charged or prosecuted for contravening this provision in 2021. However, COVID-19-related disinformation was the biggest source of reported content to Real411.org, a civil society-run platform to document and counter disinformation, which indicates the scale of challenges relating to disinformation in the pandemic.¹²

6. Declaration of Principles on Freedom of Expression and Access to Information in Africa, <https://www.achpr.org/legalinstruments/detail?id=69> (accessed 8 March 2022).

7. United Nations Human Rights Council, Universal Periodic Review - South Africa, <https://www.ohchr.org/en/hrbodies/upr/pages/zaindex.aspx> (accessed 8 March 2022).

8. African Union Convention on Cybersecurity and Personal Data Protection https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf (accessed 4 February 2022).

9. ICASA (2021) 'Three months grace period to allow licensees to wind down their use of temporary radio frequency spectrum', <https://www.icasa.org.za/news/2021/three-months-grace-period-to-allow-licensees-to-wind-down-their-use-of-temporary-radio-frequency-spectrum> (accessed 2 February 2022).

10. 2030 Reading Panel, '2022 Background Report', https://www.readingpanel.co.za/_files/ugd/e4cf67_fc97218559fb49dc9afd7942a81a4f61.pdf (accessed 8 March 2022).

Section 14, Regulations issued in terms of Section 27 (2) of the Disaster Management Act 2002 (GNR 480 of 2020 to GNR.1659 of 2021) (accessed 2 February 2022).

Real411 Trends (n.d.), <https://www.real411.org/trends> (accessed 9 March 2022).

The emergency regulations also provide for extensive collection and retention of personal data of people who undertake the COVID-19 test. While the relevant provisions include commendable safeguards, such as a limitation on how that data can be used, and the establishment of oversight and reporting mechanisms, the whole regime has drawn criticism from human rights advocates, in part due to a lack of ongoing reporting and limited scrutiny from lawmakers and oversight bodies.¹³ Moreover, it is not clear to what extent the data collection provisions or the oversight mechanisms are in operation, if at all, which is cause for concern.

In October 2021, the Department of Health launched a digital coronavirus vaccine certificate, which fully vaccinated users can generate via a web portal.¹⁴ While there are no stipulations currently as to how the vaccine certificate would be used, at the time of its launch it was envisaged that the certificate would be used to grant access to certain venues and events for vaccinated individuals.¹⁵ While this initiative is still in the early stages of implementation, other jurisdictions have seen concerns that digital vaccine certificates create risks of digital exclusion; in the context of South Africa's digital divide, this matter will need to be monitored.

PRIVACY, DIGITAL IDS AND SURVEILLANCE

Data Protection

In July 2021, the provisions of South Africa's data protection law, the Protection of Personal Information Act (POPIA), came into effect following a one-year grace period for all relevant bodies to become compliant.¹⁶ This milestone comes seven years after the Act was first signed into law.

During the period under review, the Information Regulator, South Africa's data protection authority, developed the data protection framework further. It issued guidance notes on the processing of children's personal data,¹⁷ and "*special personal information*".¹⁸ This is a category of sensitive data which is given extra protection under the law and it includes information such as details of a person's race, beliefs, health and sex life, biometric information or union membership.¹⁹ Despite the positive developments, there are still implementation challenges for data protection in 2021. Examples include: a ransomware attack on the Information Regulator's own IT systems in September 2021,²⁰ and a further data breach at Experian, a private credit agency, which had already reported a large data breach the previous year.²¹

13. Hunter (2020) 'Track and trace, trial and error: Assessing South Africa's approaches to privacy in Covid-19 digital contact tracing', https://www.researchgate.net/publication/350896038_Track_and_trace_trial_and_error_Assessing_South_Africa%27s_approaches_to_privacy_in_Covid-19_digital_contact_tracing (accessed 1 February 2022).

14. Electronic Vaccination Data System, <https://www.gov.za/covid-19/vaccine/evds> (accessed 7 March 2022).

15. Address by President Cyril Ramaphosa (2021), <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-30-sep-2021> (accessed 7 March 2022).

16. Information Regulator South Africa (2021) '100 Day Countdown to be POPIA Compliant', <https://www.justice.gov.za/inforeg/docs/ms/ms-20210324-POPIA-Compliance.pdf> (accessed 5 February 2022).

17. Information Regulator South Africa (2021) 'Guidance Note: Processing Personal Information of Children', <https://www.justice.gov.za/inforeg/docs/InfoRegSA-GuidanceNote-Processing-PersonalInformation-Children-20210628.pdf> (accessed 5 February 2022).

18. Information Regulator South Africa (2021) 'Guidance Note: Processing of Special Personal Information', <https://www.justice.gov.za/inforeg/docs/InfoRegSA-GuidanceNote-Processing-SpecialPersonalInformation-20210628.pdf> (accessed 5 February 2022).

19. Information Regulator South Africa (2021) 'Guidance Note: Processing of Special Personal Information', <https://www.justice.gov.za/inforeg/docs/InfoRegSA-GuidanceNote-Processing-SpecialPersonalInformation-20210628.pdf> (accessed 5 February 2022).

20. Information Regulator South Africa (2021) 'Information Regulator's IT systems affected by a ransomware attack', <https://www.justice.gov.za/inforeg/docs/ms/ms-20210913-ITsystems.pdf> (accessed 5 February 2022).

21. ITWeb (2021) 'Experian struggles to quell breach as data leaked again', <https://www.itweb.co.za/content/o1Jr5qx9OpbvKdWL> (accessed 7 March 2022).



Surveillance

In February 2021, the Constitutional Court ruled that key provisions of South Africa's interceptions law, the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA), were unconstitutional.²² The Court found that RICA failed to provide adequate safeguards against abuse, which created a chilling effect on the right to privacy, freedom of expression, and other rights. The matter was brought by the amaBhungane Centre for Investigative Journalism after evidence emerged that state intelligence operatives had spied on one of their journalists. The court ordered RICA to be amended to boost transparency, oversight and safeguards in state surveillance operations.

Unfortunately, despite this resounding judgment in favour of greater privacy protections, in particular for journalists, 2021 saw evidence of continued state harassment and spying of journalists. For example, in March the media company News24 lodged a complaint with the surveillance oversight judge, after receiving evidence that an investigative journalist who had reported on corruption within the police was being monitored.²³ While the outcome of this complaint has yet to be made public, it has underscored concerns that there will

be patchy compliance with both the letter and spirit of the Constitutional Court's judgment.

In July 2021, South Africa was embroiled in global media exposés surrounding the controversial Pegasus spyware, which has been used by governments across the world to spy on dissidents, journalists, human rights actors and public servants.²⁴ Leaked documents suggested that South African President Cyril Ramaphosa was one of 14 heads of state apparently targeted by client agencies of the spyware. While the responsible party is unknown, and there is no evidence that South Africa itself was a Pegasus client, this incident underscored the dire need for better domestic and international protections against the trafficking and use of surveillance tools.

Digital ID

In early 2021, the Department of Home Affairs received public comments on a draft Official Identity Management Policy, which seeks to create an updated framework for the government's maintenance of data about the identities of its population.²⁵ Among other things, the draft policy was criticised for its state-security-centric approach, and for a proposal to collect biometric data of all infants registered in South Africa.²⁶

22. AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others (CCT 278/19; CCT 279/19) [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC) (4 February 2021) (accessed 8 March 2022)

23. News24 (2021) 'Rogue Crime Intelligence cops 'bug' News24 investigative journalist', <https://www.news24.com/news24/SouthAfrica/Investigations/breaking-rogue-crime-intelligence-cops-bug-news24-investigative-journalist-20210308> (accessed 2 February 2022).

24. News24 (2021) 'Ramaphosa one of 14 world leaders targeted in Pegasus spyware case - report', <https://www.news24.com/news24/southafrica/news/ramaphosa-one-of-14-world-leaders-targeted-in-pegasus-spyware-case-report-20210721> (accessed 2 February 2022).

25. Home Affairs (2020) Draft Official Identity Management Policy, https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf (accessed 4 February 2022).

26. Reuters (2021) 'Government's plan to record all babies' biometrics raises privacy fears', <https://www.iol.co.za/news/politics/governments-plan-to-record-all-babies-biometrics-raises-privacy-fears-e9a7c8cc-547d-5e0a-924c-d56c23cef5c4> (accessed 2 February 2022).

ACCESS TO INFORMATION

There were developments in legislation and jurisprudence that advanced access to information and transparency. In January 2021, the legal provisions requiring political parties to disclose all major donors and financial records finally came into force.²⁷ However, it should be noted that only a few political parties made financial disclosures to South Africa's electoral commission.²⁸ Further, in December 2021, the High Court found that public officials should also be required by law to disclose any donations they receive in internal party elections.²⁹

In November 2021, the High Court also found in favour of media houses seeking access to tax-compliance records of former President Jacob Zuma, in short finding that a person's right to confidentiality about their tax affairs should in narrow circumstances be balanced with the public's right to know (for example, in this case a powerful politician who is believed not to have been fully tax compliant).³⁰

These developments show strong policy moves towards greater access to information in the realm of politics and influence, which could promote greater accountability. However, as ever, these policies rely on better compliance and

African civil society organisations have drafted proposed amendments to South Africa's access to information law to emphasise the requirement for proactive disclosure of information and seek to align the law with regional frameworks and best practice.³¹

Another area where overall improvements to access to information and public participation should be noted is in the digitisation of the court system, after the judiciary fast-tracked a transition to virtual hearings and digital filing in 2020.³² The Department of Justice and Constitutional Development augmented these changes by developing draft rules for virtual court hearings in April 2021.³³ This promising use of technology to enhance access to justice is welcome, though it underscores the urgent need for policies and programmes to address South Africans' unequal access to ICTs.



Finding that a person's right to confidentiality about their tax affairs should in narrow circumstances be balanced with the public's right to know.

27. ALT Advisory (2021) 'President signs proclamation on the commencement of the Political Party Funding Act', <https://altadvisory.africa/2021/01/27/president-signs-proclamation-on-the-commencement-of-the-political-party-funding-act/> (accessed 4 February 2022).

28. Independent Electoral Commission (2022), 'Electoral Commission issues Third Quarter Disclosure Report in terms of the Political Party Funding Act and Regulations', <https://www.elections.org.za/pw/News-And-Media/News-List/News/News-Article/Electoral-Commission-issues-Third-Quarter-Disclosure-Report-in-terms-of-the-Political-Party-Funding-Act-and-Regulations?a=AISDGvpz75ps1usOFX7oiq3Rh9rH6i1aeCRCnFVG1Bl=> (accessed 9 March 2022). The IEC's most recent quarterly report noted that 11 parties had made funding disclosures, an increase from 3 and 6 parties in previous quarters.

29. AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa (55578/19) [2021] ZAGPPHC 813 (2 December 2021) www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2021/813.html (accessed 1 February 2022). This case stems from a legal battle between South African President Cyril Ramaphosa and the Public Protector surrounding donations he received in the internal party election to become president of the African National Congress (ANC). The media outlet amaBhungane successfully argued in an amicus intervention that, irrespective of the outcome of the dispute, there should be a legal requirement for such donations to be disclosed.

30. AmaBhungane (2021) 'Zuma tax case: five reasons why the panic over confidentiality is wrong', <https://amabhungane.org/advocacy/211122-zuma-tax-case-five-reasons-why-the-panic-over-confidentiality-is-wrong/> (accessed 4 February 2022).

31. Media Monitoring Africa and others (2021) 'Making South Africa's Promotion of Access to Information Act fit for purpose in the digital age', <https://mediamonitoringafrica.org/democracy-governance/paia-reform/> (accessed 10 March 2022).

32. The South African Judiciary (n.d.) About Courts Online, <https://www.judiciary.org.za/index.php/court-online/about-court-online> (accessed 15 March 2022).

33. E-rules: Draft Amended Uniform Rules (2021), https://www.justice.gov.za/rules_board/invite/20210309-E-Rules-AnnexureA.pdf (accessed 15 March 2022).

HATE SPEECH, MISINFORMATION AND CRIMINAL DEFAMATION LAWS

In July 2021, the Constitutional Court made a ruling which further developed jurisprudence on hate speech, in *Qwelane v South African Human Rights Commission*.³⁴ The Court affirmed that hate speech “*is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy*”.³⁵ However, its ruling noted that a healthy democracy requires a degree of tolerance towards expression or speech that shocks or offends. The Court ordered revisions to the Equality Act which had the effect of narrowing the definition of hate speech to exclude speech that is intended to be ‘*hurtful*’ but not harmful or inciting of harm.

The courts have also been called to examine other questions of online harm. For example, in 2021 the Equality Court started hearings on a harassment complaint brought by the South African Human Rights Commission against Mr. Anthony Matumba, a politician who is accused of posing as a white woman on social media and publishing a series of racist and derogatory posts about black women.³⁶ After various delays the case has continued into 2022, during which time Mr. Matumba was sworn in as a member of Parliament.³⁷

Perhaps most significantly, in July a period of violent civil unrest in parts of South Africa raised questions about the role of disinformation and incitement in sharpening political tensions and socio-economic frustrations in the country.³⁸ The unrest, which resulted in devastating violence, loss of life, and economic damage in parts of KwaZulu-Natal and Gauteng provinces, ostensibly resulted from popular outrage at a decision of the Constitutional Court to jail former President Jacob Zuma for contempt of court, following his refusal to appear before a judicial inquiry on corruption.



HATE SPEECH IS THE ANTITHESIS OF THE VALUES ENVISIONED BY THE RIGHT TO FREE SPEECH



34. ALT Advisory (2021) 'Constitutional Court rules on the constitutionality of the hate speech provision in the Equality Act', <https://altadvisory.africa/2021/08/02/constitutional-court-rules-on-the-constitutionality-of-the-hate-speech-provision-in-the-equality-act/> (accessed 1 February 2022).

35. *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021) (accessed 10 March 2022).

36. SAHRC (2021), 'Media Alert: SAHRC v "TRACY ZILLE" commences in the Louis Trichardt's Equality Court, Limpopo', <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2825-media-alert-sahrc-v-tracy-zille-commences-in-the-louis-trichardt-s-equality-court-limpopo> (accessed 1 February 2022).

37. News24, (2022) 'EFF councillor accused of using fake 'Tracy Zille' account sworn in as MP', <https://www.news24.com/news24/southafrica/news/just-in-eff-councillor-accused-of-using-fake-tracy-zille-account-sworn-in-as-mp-20220126> (accessed 1 February 2022).

38. Report of the Expert Panel into the July 2021 Civil Unrest (2022), <https://www.thepresidency.gov.za/content/report-expert-panel-july-2021-civil-unrest> (accessed 15 February 2022).

However, in hearings held by the South African Human Rights Commission investigating the causes of the unrest, a range of witnesses argued that the unrest was at least in part orchestrated by individuals and political factions supportive of Zuma, and fuelled by a pattern of disinformation and inciting messages on social media. In addition, several people were charged for incitement relating to messages allegedly posted to Twitter, Facebook, or WhatsApp.³⁹

These events raise searching questions about the effectiveness of law enforcement in identifying and acting on legitimately harmful speech, the ability of digital platform companies and public bodies to coordinate, and the effectiveness (and local-appropriateness) of disinformation and content moderation tools adopted by the digital platforms. These events will likely spur policy proposals to more aggressively police speech online, which could erode freedom of expression.

DIGITAL EXCLUSION IN SOUTH AFRICA AND ITS IMPACT ON HUMAN RIGHTS

Several major developments in South Africa highlighted concerns about digital exclusion and the role of multinational corporations in internet governance and inclusion.

After WhatsApp drew global criticism for privacy policy changes affecting its non-EU customers, South Africa's data protection authority, the Information Regulator, said it was considering litigation.⁴⁰ WhatsApp's parent company, Meta, faced further criticism after it withdrew from a roundtable with South African members of Parliament to discuss content moderation, as well as the company's disinformation responses and privacy policies. This would have been the company's first appearance before an African legislature.⁴¹

The Competition Commission launched an inquiry into competition in the digital economy, with a focus on '*online intermediation platforms*' such as eCommerce services, online classifieds, food delivery services and accommodation aggregators.⁴² Among other things, the Commission expressed interest in the extent to which dominant platforms, particularly those with a global reach, may affect small businesses' ability to participate in the economy. The Commission also expressed disappointment in the decision of certain global platforms not to participate.⁴³

A consortium of news publishers also approached the Competition Commission to make submissions on competition issues related to major digital platform companies such as Google and Meta,

39. See News24 (2021) '#UnrestSA: Twitter's 'Sphithiphithi Evaluator' in court for allegedly inciting public violence', <https://www.news24.com/news24/southafrica/news/unrestsa-twitters-sphithiphithi-evaluator-in-court-for-allegedly-inciting-public-violence-20210830> and Mail & Guardian (2021) 'Six 'instigators' arrested as 'insurrection' investigation in KZN and Gauteng gains momentum', <https://mg.co.za/news/2021-07-20-six-instigators-arrested-as-insurrection-investigation-in-kwazulu-natal-and-gauteng-gains-momentum/> (accessed 4 February 2022).

40. Reuters (2021) 'South African regulator seeking legal advice on WhatsApp's new privacy policy', 13 May 2021, <https://www.reuters.com/world/africa/south-african-regulator-seeking-legal-advice-whatsapps-new-privacy-policy-2021-05-13/> (accessed 1 February 2022).

41. News24 (2021) 'Facebook refuses to appear before SA Parliament on its own', <https://www.news24.com/fin24/companies/ict/facebook-refuses-to-appear-before-sa-parliament-on-its-own-20210525> (accessed 1 February 2022).

42. Competition Commission South Africa (2021), 'Online Intermediation Platforms Market Inquiry: Terms of Reference', https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf (accessed 1 February 2022).

43. Competition Commission South Africa (2021), 'Public Hearings for the Online Platforms Market Inquiry', <https://www.compcom.co.za/wp-content/uploads/2021/10/PUBLIC-HEARINGS-FOR-THE-ONLINE-PLATFORMS-MARKET-INQUIRY-1.pdf> (accessed 1 February 2022).

which brings a local dimension to a growing global question for the digital ecosystem.⁴⁴

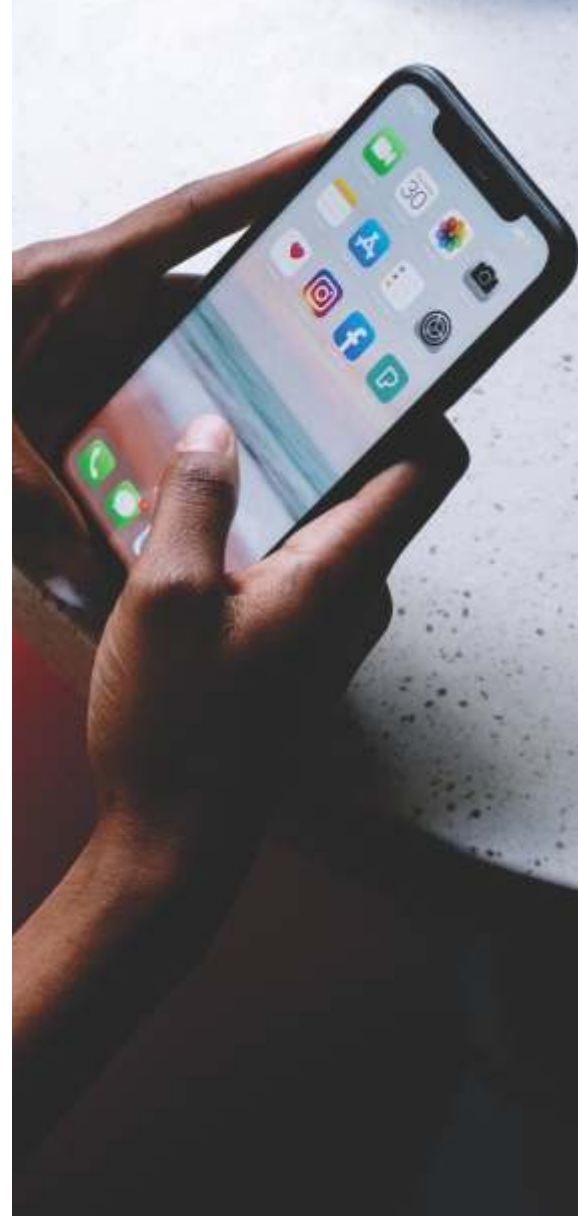
While these matters are expected to further play out in 2022, it is clear that addressing digital exclusion is likely to involve greater accountability and possibly regulation of dominant global platforms. It remains to be seen whether this will be achievable by South African policymakers.

DIGITAL INFRASTRUCTURE AND PRIORITISATION OF ICT

South Africa faces an enduring digital divide, with severely unequal access to ICTs and digital infrastructure which follow the contours of South Africa's other underlying inequalities, along the boundaries of race, class, gender, and geography.

Recognising the considerable shortfall between ambitions and delivery, in 2021 the Department of Public Works and Infrastructure released a draft National Infrastructure Plan 2050 for comment, with an ambitious vision for digital transformation in the coming 30 years. Its goals include universal access to high-speed internet, full digitisation of government services, and an ICT-skilled society.⁴⁵ In a separate process, the Ministry of Communications and Digital Technologies published a draft National Data and Cloud Computing policy for public comment.⁴⁶ While the proactive development of policies to advance ICT infrastructure is to be welcomed, the framing in the draft policy of data as property or infrastructure, and less in terms of the implications for personal data, emerged as a noted concern in public responses.⁴⁷

The high cost of internet and airtime continues to be a feature of the digital divide in South Africa, although these costs have declined following an inquiry by South Africa's Competition Commission in 2019, and South Africa's main network operators all announcing price cuts in 2021.⁴⁸



44. TechCentral (2021), 'SA publishers to drag Google, Facebook to the Competition Commission', <https://techcentral.co.za/sa-publishers-to-drag-google-facebook-to-the-competition-commission/205495/>

45. Draft National Infrastructure Plan 2050 (10 August 2021), <https://altadvisory.africa/wp-content/uploads/2021/08/National-Infrastructure-Plan-2050-released-for-comment.pdf> (accessed 1 February 2022).

46. Department of Communications and Digital Technologies (2021) Proposed Data and Cloud Policy, https://legalbrief.co.za/media/filestore/2021/04/44411_01-04_TeleCommunication.pdf (accessed 31 January 2022).

47. Research ICT Africa (2021), 'Submission on Proposed National Data and Cloud Policy', https://researchictafrica.net/wp/wp-content/uploads/2021/06/RIA_Submission_DATA_and_Cloud_Policy.pdf (accessed 8 March 2022).

48. ITWeb (2021) 'SA's big telcos take #DataMustFall trend further', <https://www.itweb.co.za/content/LPp6V7rDkdmqDKQz> (accessed 26 January 2022).

However, one of the most significant measures to address ICT costs and access in South Africa – a plan by South Africa’s communications regulator to auction off ‘high demand’ spectrum to network operators⁴⁹ – continued to face delays in 2021, due to protracted litigation by various network operators challenging procedural aspects of the process.⁵⁰ The delay is seen as a major obstacle to reducing prices and expanding high-speed networks.

By early 2022, the regulator indicated that it would proceed with the auctioning of high demand spectrum.⁵¹ In the event of further delays, it is likely that users will continue to bear the brunt of continued high costs and reduced access to ICTs.

In a positive policy development for digital inclusion for people with disabilities, South Africa’s communication regulator published a Code for Persons with Disabilities, which mandates certain accessibility standards for broadcast media, telephony and internet service providers.⁵²

GENDER AND ICT

South Africa continues to grapple with severe challenges regarding gender equality, including deplorably high levels of gender-based violence, and a gender disparity in access to ICTs. There has been growing concern at levels of online gender-based violence in South Africa – for example, the 2021 World Press Freedom Index noted the online harassment of women journalists as a challenge to press freedom in South Africa.⁵³

However, in 2021 South Africa adopted several policy developments that bolster efforts to combat online gender-based violence.

In July, the President signed into law the Cybercrimes Act, and the first key provisions of the Act came into effect in December 2021. The Act creates several new criminal offences relating to online harms and provides for new forms of recourse for online- and technology-based crimes. For example, the Act explicitly criminalises the publishing or sharing of intimate images of a person without their consent and provides for a person who has been subject to malicious communication to seek a protection order.⁵⁴ The remaining provisions of the Act, which provide for the establishment of institutions and mechanisms to enforce the Act, and investigate and prosecute cybercrimes, have yet to come into effect.⁵⁵

Parliament also passed amendments to South Africa’s Domestic Violence Act which makes provision, among other things, for survivors of domestic violence to apply online for a protection order, which – if implemented effectively – could reduce the administrative hurdles for survivors to get access to the recourse that is envisaged in law.⁵⁶ In addition, the amendments to this Act have expanded the definition of harassment to include various harms committed via electronic means; this signals a notable effort by South African lawmakers to create protections for vulnerable groups against online harms.

49. ICASA (2021) 'ICASA issues an invitation to apply for high demand radio frequency spectrum,' <https://www.icasa.org.za/news/2021/icasa-issues-an-invitation-to-apply-for-high-demand-radio-frequency-spectrum> (accessed 26 January 2022).

50. ITWeb (2022) 'Cell C, Vodacom join the fray as spectrum row escalates', <https://www.itweb.co.za/content/LPp6VMrD8kGvDKQz> (accessed 26 January 2022).

51. ICASA (2022) 'Brief on the process for the imminent auction of high-demand radio frequency spectrum', <https://www.icasa.org.za/news/2022/brief-on-the-process-for-the-imminent-auction-of-high-demand-radio-frequency-spectrum> (accessed 8 March 2022).

52. ICASA (2021) 'Code for Persons with Disabilities', <https://www.icasa.org.za/uploads/files/Code-for-Persons-with-Disabilities-Regulations-2021.pdf> (accessed 8 March 2022).

53. Reporters Without Borders (2021) 'South Africa', <https://rsf.org/en/south-africa>, (accessed 4 February 2022).

54. The Cybercrimes Act (2020), s16 and s20.

55. ALT Advisory (2021) 'President signs the Cybercrimes Bill', <https://altadvisory.africa/2021/06/01/president-signs-the-cybercrimes-act/> (accessed 4 February 2022).

56. ALT Advisory (2022) South Africa: President signs trio of GBV laws, <https://altadvisory.africa/2022/02/07/south-africa-president-signs-trio-of-gbv-laws/> (accessed 5 February 2022).



Notably, the Domestic Violence Amendment Act also strengthens protections for other vulnerable groups, for example by explicitly extending its definition of domestic violence (both on- and offline) to include abuse of elders, children, and economically vulnerable members of a household.⁵⁷

NATIONAL ARTIFICIAL INTELLIGENCE STRATEGY

Though the Presidential Commission on the Fourth Industrial Revolution called in 2020 for a prioritisation of policy and skills development on Artificial Intelligence (including establishment of an AI institute focused on training and ensuring use of AI for positive social impact),⁵⁸ progress has been slow. Flagship interventions include the establishment of South Africa's Centre for the Fourth Industrial Revolution, affiliated to the World Economic Forum,⁵⁹ and a pilot AI training programme funded by the German government.⁶⁰

Some legal protections do exist against misuse of Artificial Intelligence; for example, South Africa's

data protection law, POPIA, includes limitations on automated decision-making based on the processing of personal information.⁶¹

However, there continues to be a lack of comprehensive policy to promote ethical use of AI and ensure human rights protections. This was underscored in early 2021 in the findings of an inquiry into racial discrimination in medical schemes: the inquiry found that, while it did not see evidence that the algorithms used by medical schemes contributed to trends of racial discrimination observed in their decisions on claims, there was an alarming lack of transparency in the working of those algorithms.⁶² Indeed, two of three companies before the inquiry did not have the capacity to assess the workings of their own algorithms. In the context of South Africa's severe social and economic discrimination, the lack of clear legal standards to ensure transparency and accountability in Artificial Intelligence is a major concern.

57. Domestic Violence Amendment Act (2021), s1

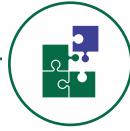
58. Report of the Presidential Commission on the 4th Industrial Revolution (2020), p 50, <https://www.gov.za/documents/report-presidential-commission-4th-industrial-revolution-23-oct-2020-0000> (accessed 15 March 2022).

59. CSIR (n.d.), Centre for Fourth Industrial Revolution South Africa, <https://www.csir.co.za/centre-fourth-industrial-revolution-south-africa> (accessed 15 March 2022).

60. Smart Africa (n.d.), South Africa: Artificial Intelligence, <https://smartafrica.org/sas-project/artificial-intelligence/> (accessed 15 March 2022).

61. Protection of Personal Information Act of 2013, s 71.

62. Council of Medical Schemes, Interim Report of Section 59 Investigation (2021), <https://cmsinvestigation.org.za/index.php/interim-report/> (accessed 15 March 2022).



CONCLUSION

Despite the significant challenges noted, there were hopeful developments for digital rights in South Africa in 2021. However, the hurdles of implementation, and continued lack of access for many ordinary South Africans, remain a concern. While the continued advancements in policy, law and jurisprudence are to be welcomed, South Africa's digital rights record tends to be strong on paper and weaker in execution.

The following recommendations therefore emerge:

- Policymakers, regulators and network providers must continue steps towards universal, affordable and secure access to ICTs for everyone in South Africa.
- Government and Parliament, in consultation with civil society, should review all emergency regulations relating to the Covid-19 pandemic, especially those pertaining to digital rights, and where necessary to repeal or revise these for the current state of the pandemic.
- Government and civil society should prioritise capacitating institutions, including the court system, the Information Regulator, the South African Human Rights Commission, and Parliament, to respond effectively to emerging digital rights questions and to ensure meaningful protections for the digital rights of more vulnerable and marginalised people.
- Policymakers should work to establish clear legal standards to ensure the ethical and accountable use of Artificial Intelligence, with wide public consultation and participation from academia and civil society.
- All relevant stakeholders should work to ensure further development of overall legislation, policy and jurisprudence that enhance digital rights and protections, and which advance the vision set out in South Africa's Constitution for a truly vibrant, responsive democracy in which all people participate meaningfully.

Londa 2021 expands on last year's report with findings from 22 countries, examining themes of privacy, freedom of expression, access to information, segmentation and exclusion, digital transformation, affordability, gender and others within existing legislative frameworks, and against the backdrop of a widening digital divide. This edition captures the gaps and proffers recommendations to achieve a digitally inclusive and rights - respecting Africa.




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