Mapping the ICT policy environment in South Africa

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Executive summary

South Africa largely respects online freedoms, and to this extent the country could be considered to have a free online media environment. Many of the instances of internet censorship apparent in more repressive countries, and outlined by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, are absent in South Africa.[1] Bloggers, for instance, are not criminalised for expressing their views, as they are in much more repressive contexts. The fact that internet service providers (ISPs) are not held liable for internet content – unless they are informed of the existence of illegal content and they fail to take the content down – is a positive feature of the Electronic Communications and Transactions (ECT) Act. There is no evidence of users being disconnected from internet access, even if they violate intellectual property laws. Cyber attacks have become a growing problem in South Africa, but these are largely perpetrated by criminals against businesses.[2] Only recently, in the case of the hacking of the SANRAL website, can the attack be considered "political" and potentially part of public and union resistance to the imposition of e-tolls on Gauteng's freeways. However, this was apparently not a coordinated attack, and therefore should not be taken as a general trend.

However, there are indications that the conditions for internet rights are not optimum, and need to be improved. According to La Rue's report, there are legitimate grounds for restricting certain types of information, such as child pornography, hate speech, defamation, and direct and public incitement to commit genocide. Any limitation must meet a three-part cumulative test, which ensures that limitations are predictable and transparent: they must be legitimate and they must be necessary and proportional to the aim. La Rue noted that many countries are placing undue restrictions on the internet.[3] Three aspects of this trend cited in his report are relevant for South Africa: criminalisation of legitimate expression, arbitrary blocking and filtering of content, and inadequate protection of the right to privacy and data protection. With respect to the first, it is apparent from an analysis of the various amendments to the Films and Publications Act that the scope for criminalisation of "unacceptable" content has been gradually expanded beyond the constitutionally recognised limitations on freedom of expression. With respect to the second, aspects of the self-regulatory system for internet content are also unduly restrictive of freedom of expression. With respect to the third, safeguards to prevent abuses of the government's monitoring and interception of communications capability are inadequate.

La Rue has also argued for governments to prioritise internet access, given that it has become an indispensable tool for realising human rights, and this includes making the internet available, accessible and affordable.[4] Where access is present, La Rue has also called on governments to ensure that usable, meaningful content is provided online. South Africa clearly has some way to go in realising these three dimensions of universality. A key weakness in South Africa's information and communications technology (ICT) landscape has been a confused policy framework that attempts

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[1]La Rue, F. (2012). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, United Nations General Assembly Human Rights Council, 16 May.

[2]Fripp, C. (2011, October 19). Cyber-attacks remain problematic. *IT News Africa.* www.itnewsafrica.com/2011/10/cyber-attacks-remain-problematic

[3]La Rue, F. (2012). Op. cit.

[4]La Rue, F. (2012). Op. cit.

to balance conflicting objectives, but that has ultimately allowed excessive profit taking by parastatal and private network operators at the expense of universal service. In the case of Telkom, the Department of Communications, which is also the custodian of Telkom's shares, has protected the parastatal from competition to enable it to meet universal service targets. However, the company has largely failed to meet these targets because it sought to extend the network on commercial principles, which led to massive churn as users could not afford the rising costs of the service. Mobile phone network operators have been largely unregulated by policy, which has allowed them to entrench their dominance relatively unchallenged.

An added dimension to the problem is that the regulator, ICASA, has been weakened by the Department of Communications through a variety of measures, including underfunding and an erosion of its administrative and institutional independence. Leadership in the regulator has been cited as a key challenge, given that the policy framework guiding its activities is considered by many to be strong. The regulator's weakness has meant that it cannot hold the network operators to account sufficiently, which has exacerbated the problems mentioned above. These weaknesses also point to the ineffectiveness of the universal services agency, USAASA, in promoting universal service and access to ICTs. Like ICASA, USAASA has struggled to assert itself independently of the Department of Communications, and has been plagued by ineffective management.[5]

Recently, the ICT policy cluster has undergone review, resulting in the gazetting of a new national broadband policy called South Africa Connect. Many of the principles from previous policies, such as universal access and a programme based on the constitutional principles of freedom of expression, remain in the policy document. While it has been well received by some in industry – the policy reasserts the need for collaboration between business, government and other stakeholders to make high-speed, affordable access to the internet possible for all – it remains to be seen whether or not it will be effectively implemented.

The following recommendations are made for civil society:

- A coalition of existing organisations around internet rights could be considered. Rather than forming another coalition, exploratory discussions could be held with the Right2Know Campaign and the SOS: Support Public Broadcasting Coalition to establish an internet rights project, which could then become a campaign focus among their members. These coalitions could also be broadened to include organisations that specialise in IT issues and that therefore should have an interest in internet rights. Not only will this coalition lobby to remove the current restrictions on internet content, but it will organise communications users, especially the poor, and campaign for affordable access to communications. These organisations should be provided with the necessary assistance to build the capacity of their members to advocate on questions of internet freedom.

- Audits should be conducted of decisions of the following institutions, to establish whether online freedom is being unduly compromised: decisions of the Film and Publication Board that impact on online freedom; take-down notices from ISPA, the non-profit internet body; interception reports of the designated judge in terms of ROICA, the interceptions bill; and

[5]Lewis, C. (2010). Achieving universal service in South Africa: What next for regulation? Paper presented at the International Telecommunications Society conference Telecommunications: Ubiquity and Equity in a Broadband Environment, Wellington, New Zealand, 26-28 August. link.wits.ac.za/papers/Lewis-2010-USA-RSA-regulation-ITS-paper.pdf

activities of the cyber-inspectors set up in terms of the ECT Act. Where information is not publicly available on their activities, Promotion of Access to Information Act requests should be filed to obtain the information, and if the information is refused, then the right should be enforced through litigation. The findings of these audits should be released publicly to build public awareness of the extent of internet rights.

- Monitoring of the decisions of these institutions should also take place on an ongoing basis. Where internet rights violations take place, these should be publicised and the responsible institution "named and shamed".

- An audit should be conducted of the acceptable use policies of ISPs, and where necessary these ISPs should be approached to change these policies if they are unduly restrictive of online freedom.

- ISPA should be approached to reconsider its take-down notification procedure to ensure that it is procedurally fair. This recommendation and the one above are designed to address La Rue's concern that "corporations also have a responsibility to respect human rights, which means that they should act with due diligence to avoid infringing the rights of individuals."[6]

- The implementation of the new broadband policy, South Africa Connect, should be monitored and assessed on a regular basis by all capable independent stakeholders, from multiple perspectives, such as the extent of stakeholder engagement, technical aspects such as quality and speed, the benefits for disadvantaged communities, the longer-term positive impacts on women and children, and the extent to which increased access to broadband can be said to strengthen democracy in South Africa generally, as well as to secure the constitutional rights of citizens and the universal rights of non-citizens in the country.

The following recommendations are made for parliament and government:

- Parliament should amend ROICA to ensure that people whose communications have been intercepted are informed after the completion of investigations, or if the designated judge refuses to grant an interception direction. ROICA should also be made applicable to foreign signals intelligence.

- The Intelligence Services Oversight Act should also be amended, setting out the required content for reports of the designated judge in ROICA. At the very least, annual reports should include the following information: the number of directions granted; the offences for which orders were granted; a summary of types of interception orders; the average costs per order; the types of surveillance used; and information about the resulting arrests and convictions.

- The Films and Publications Act should be amended to ensure that the Board's jurisdiction does not extend to the internet. Alternatively, if this amendment cannot be achieved, then the Board's jurisdiction should only extend to child pornography, hate speech, propaganda for war and incitement to imminent violence; if internet content has artistic, scientific or public interest merit, then the Board should not have jurisdiction over such content at all. Furthermore, the Board's independence should be enhanced, and it should be made accountable to parliament. This will bring the Board into line with La Rue's recommendation that "any determination on what content should be blocked must be undertaken by a competent judicial authority or a body which is independent of any political, commercial or

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[6]La Rue, F. (2012). Op. cit.

other unwarranted influences."[7] The pros and cons of collapsing the Board into ICASA, given the latter's constitutionally protected independence, and given the inevitable convergence of content classification systems, should also be evaluated.

- The Department of Communications' ICT policy should conduct an honest assessment of the strengths and weaknesses of the communications environment, including an assessment of the profit-taking practices of network operators and its own role in allowing these practices to continue, either through acts of commission or omission. The review should also identify structural conflicts of interest in the communications environment that impede universality, and provide solutions to these problems.

- Through the above review, weaknesses in ICASA's administrative, financial and institutional independence must be identified and improved to ensure that it becomes a more effective regulator, less susceptible to governmental and industry capture. The review also needs to ensure that ICASA regulates the costs of communications much more effectively to ensure affordable access to communications. Such an assessment is currently underway, funded by the Open Society Foundation (the results are due to be published soon.)

- The mandate of USAASA should be reviewed to ensure that it makes a meaningful difference to universality by providing targeted subsidies that improve access to communications. USAASA must be mandated to develop access plans for women and youth especially to address the yawning digital divide for both social groups. Already a Special Investigating Unit probe has been launched on the agency by the Minister of Communications.[8]

1. Background

South Africa has an impressive array of laws, policies and regulatory measures impacting on internet access and content. On paper, the country is clearly committed to universality of communications, including of the internet. In reality, however, weak policy arrangements coupled with ineffective government interventions coupled with high user costs have set the country back when it comes to ensuring universality of the internet. Disparities in access are highly gendered. With respect to internet content, while strong constitutional guarantees exist for freedom of expression, the effectiveness of these guarantees has been gradually reduced by an array of laws that have progressively chipped away at internet freedom. Self-regulatory measures to regulate internet content are well developed.

Civil society and the media have also become increasingly concerned about even more threats to freedom of expression posed by new legislation or threats of legislation. Parliament is considering a Protection of State Information Bill that seeks to protect valuable state information and classify information on national security grounds. This is currently awaiting the president's signature to be passed into law. If passed in its current form, the bill could have a chilling effect on freedom of expression around the activities of the security cluster, if the publication concerned (including an online publication) relies on classified documents, even if there are strong public interest grounds for revealing the classified information. The ANC ruling party has also proposed the reintroduction

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[7]La Rue, F. (2012). Op. cit.

[8]MyBroadband.co.za (2014, March 27). USAASA probe moves ahead.
mybroadband.co.za/news/government/99472-usaasa-probe-moves-ahead.html

of statutory regulation for the press in the form of a Media Appeals Tribunal accountable to parliament, and has proposed that parliament conduct an investigation into the desirability of this. Media organisations have expressed fears that such a move could pave the way for state control of newspaper content, including their online versions.[9]

In 1994, South Africa experienced a largely peaceful transition to democracy after decades of apartheid. A final constitution, drafted by a Constitutional Assembly consisting of the major political parties, was adopted in 1996, and this constitution has set the legal framework for transformation in the country. The new constitutional order also replaced parliamentary sovereignty with constitutional sovereignty, presided over by an independent Constitutional Court. The constitution recognises first, second and third generation rights, although the majority of cases heard by the court have been in relation to first and second generation rights.[10] There is no hierarchy of rights, and each right has to be interpreted on a case-by-case basis, especially when it comes into conflict with other rights. Furthermore, most rights are not absolute, and are subject to a general limitations clause. While freedom of expression has been largely respected, in the past few years, South Africa's media freedom rating has been downgraded by several international media freedom monitoring organisations, such as Reporters Without Borders and Freedom House. Local media and civil society organisations such as the South African National Editors' Forum (Sanef) and the Right2Know Campaign (R2K) have expressed concern about a growing trend towards securitisation of the state and attempts to censor critics.

South Africa still faces significant development challenges, especially in the wake of the 2009 global recession which has made it even more difficult to reverse entrenched structural inequalities inherited from apartheid and to create sustainable jobs. According to the Presidency's development indicators for 2010,[11] most of the country's main economic indicators have declined markedly since the start of the 2009 global recession, with the exception of inflation and interest rates. South Africa's ranking in the Knowledge Economy Index has slipped gradually from 49th place in 1995 to 65th in 2009, which it attributes to low university through-put, slow internet penetration and decreasing funding for research and development.[12]

Unemployment is in long-term decline, although it remains exceedingly high at 25.3% of the economically active population according to the narrow definition of unemployment and 35.9% according to the expanded definition of unemployment (which includes discouraged work seekers). The problem has been exacerbated by the global recession. The largest number of unemployed people falls within the 15-34 age group, and unemployed men outnumber unemployed women.[13] Poverty has been alleviated by the introduction of social grants, but inequality remains extremely high, with 70% of income accruing to the richest 20%, while the poorest 10% earn a mere 0.6% of

[9]Bischoff, J. (2010, August 4). Sanef launches campaign to oppose media tribunal. *journalism.co.za*. www.journalism.co.za/blog/sanef-launches-campaign-to-oppose-media-tribunal

[10]Dugard, J., Socio-Economic Rights Institute of South Africa. (2011). Speech at local government workshop, University of the Witwatersrand, 29 July.

[11]South African Presidency. (2010). Development Indicators 2010, p. 17. www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010.pdf

[12]Ibid., p. 17.
[13]Ibid., p. 22.

income.[14] Modest gains have been made in increasing access to formal housing, and the country is well on the way to ensuring universal access to water, but electricity roll-out has slowed down after a large increase in the number of connections between 1994 and 2010.[15]

In spite of significant inroads into addressing service delivery backlogs, the country is also beset by mass discontent at the pace of delivery. Since 2004, South Africa has experienced an upsurge in protest action on issues relating to service delivery, corruption, lack of accountability and labour issues (including salary demands), with the number of what the Ministry of Police refers to as "crowd management" incidents reaching record levels in 2010-2011. Sociologist Peter Alexander has referred to these as a "rebellion of the poor", which he maintains is unparalleled in any other country.[16] Youth under the age of 35 constitute 70% of the population, and those under 15, 35% of the population.[17] Nearly three million of the 6.7 million youth are disengaged from society's major institutions, and youth discontent has been recognised as a key factor in social unrest. The country's youth have made up a large percentage of those engaged in protest action.[18]

In the face of this rising discontent, there are signs of the government becoming increasingly defensive and intolerant of dissent. In response to what they consider to be growing threats to media freedom, Reporters Without Borders has downrated South Africa's press freedom ranking from 26th place in 2002 to 43rd place in 2012, and Freedom House has also downrated South Africa from "free" to "partly free".[19] Furthermore, public protests are often banned on spurious grounds and police violence against protestors has also become more prevalent since the re-introduction of the military ranking system in the police which existed under apartheid (considered a "re-militarisation of the police").[20] In 2012 and 2013 there were several incidents of violent quashing of protests resulting in the deaths of protesters – most notably in the death of 34 protesting miners at Marikana in August 2012.

The right to freedom of expression guarantees the right to receive or impart information and ideas, but does not extend constitutional protection to propaganda for war, incitement to imminent violence or hate speech, which is defined as advocacy of hatred on the basis of race, gender, ethnicity or religion and speech that constitutes incitement to cause harm.[21] Access to information is also protected as a stand-alone right in the South African Bill of Rights.[22] The act that gives effect to this right, including over the internet, is the Promotion of Access to Information Act. A related

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[14]Ibid., p. 23.

[15]Ibid., p. 30-33.

[16]Alexander, P. (2012, April 13). A massive rebellion of the poor. *Mail and Guardian.* mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor

[17]Statistics South Africa. (2010). Social Profile of South Africa, p. 30. www.statssa.gov.za/publications/Report-03-19-00/Report-03-19-002009.pdf

[18]Gower, P. (2009, July 31). Idle minds, social time bomb. *Mail and Guardian.* mg.co.za/article/2009-07-31-idle-minds-social-time-bomb

[19]Daily News. (2012, May 3). How others are reading us. *Daily News.* www.iol.co.za/dailynews/opinion/how-others-are-reading-us-1.1287993

[20]Leadership. (2011, April 19). Police brutality. *Leadership Online.* www.leadershiponline.co.za/articles/politics/1261

[21]Constitution of the Republic of South Africa No. 108 of 1996, S. 16. www.info.gov.za/documents/constitution/1996/a108-96.pdf

[22]Ibid., S. 32.

piece of legislation is the Protected Disclosures Act, which protects whistleblowers from occupational detriment if they disclose confidential company information on certain protected grounds.

The constitution also makes provision for an independent broadcasting regulator to regulate broadcasting in the public interest, and provides for several independent institutions to assist parliament in its oversight role.[23] Other media regulators include the Film and Publication Board, a statutory body falling under the Ministry of Home Affairs, and the self-regulatory Broadcasting Complaints Commission of South Africa (BCCSA).

Communications services are regulated by ICASA in accordance with the Electronic Communications Act (ECA), which was promulgated in 2005 to facilitate convergence. The ECA incorporates a semi-layered approach to licensing, with three layers having been identified: electronic communications services (ECS), electronic communications network services (ECNS) and broadcasting.[24] Internet service providers (ISPs) are classified as ECSs and therefore require a licence from ICASA; however, the act does not give ICASA jurisdiction over the content of ECSs. ICASA has regulated the cost of asymmetric digital subscriber lines (ADSL) since 2007.[25]

2. Access to the internet

Universality of communications has been a central feature of South African communications policy, law and regulation, and as a result universal service and access obligations have been placed on ECNS licensees in the form of meeting roll-out targets as well as contributing financially to universality. A separate agency was established in terms of the 1996 Telecommunications Act, and subsequently the ECA, to promote universal service and access to ICTs in South Africa, called the Universal Service and Access Agency of South Africa (USAASA). The Agency manages the Universal Service and Access Fund, which is funded from a levy on licensees, and is meant to provide subsidies for needy people to assist them to access ICTs, finance construction of electronic communications networks in underserviced areas, and facilitate access to ICTs for schools and other public centres.[26] The ECA also makes provision for the licensing of underserviced area licensees, to promote access to ICTs in areas with a teledensity of 5% or less.

Internet connectivity is provided on a fixed-line or mobile basis, with fixed-line connectivity (largely through ADSL) provided by the partially privatised fixed-line telephone parastatal Telkom. In 2006, competition to Telkom was introduced in the form of the fixed-line operator Neotel. There are three main mobile networks – Vodacom, MTN and Cell C – and other service providers such as Virgin Mobile and 8ta (a Telkom subsidiary) riding on these networks, and all provide wireless 3G broadband access to the internet.[27] In 2009, a state-owned broadband company called Broadband

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[23]Ibid., S. 192.

[24]Goldstuck, A. (2008, August 29). Oh frabjous day! The telco Jabberwock is dead! *Thought Leader*. www.thoughtleader.co.za/amablogoblogo/2008/08/29/oh-frabjous-day-the-telco-jabberwock-is-dead

[25]Hawthorne, R. (n/d) Local loop unbundling versus encouraging the growth of wireless local loops: lessons for South Africa from other countries.

[26]Universal Service and Access Agency of South Africa, About USAF. www.usaasa.org.za/usaif/index.html

[27]Muller, R. (2011, October 10). Local loop unbundling: What should be achieved? *MyBroadband.co.za*. mybroadband.co.za/news/telecoms/35608-local-loop-unbundling-what-should-be-achieved.html

Infraco was established with the objective of promoting affordable access to electronic communications by providing long-distance backhaul connectivity nationally and regionally. The major players have invested in several undersea cables, which have been landing in South Africa and have greatly increased the bandwidth capacity in the country.[28]

South Africa's internet user base grew 25% from 6.8 million in 2010 to 8.5 million at the end of 2011, which means that penetration is approaching 20% of the population, but access is unevenly spread across the country. A recent report by World Wide Worx estimates that there are 726 ISPs in South Africa.[29] Smartphones are the main drivers of internet access in South Africa. Of the total user base, 7.9 million access the internet on their mobile phones, with the majority accessing the internet both on their mobile phones and through computers, laptops or tablets.[30] By 2011, 81.8% of the population used a mobile phone, with 73.3% of these connecting on a prepaid basis; the fact that mobile phones are nearly ubiquitous happened in spite of, not because of, national policy.[31] Vodacom is the most popular network operator, followed by MTN.[32] According to analysts, moves are underway by ICASA to try to create market entry points for their smaller competitors, Cell C and Telkom Mobile.[33]

A recent survey by MyBroadband.co.za[34] tested the average speeds for mobile and wireless broadband connections. It showed an average download speed of 8.88 Mbps and an average upload speed of 1.97 Mbps. Table 1 summarises the survey results.

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[28]BuddeComm. (n/d). South Africa – Fixed-line Market and Fibre Infrastructure – Overview and Statistics. www.budde.com.au/Research/South-Africa-Fixed-line-Market-and-Infrastructure-Overview-and-Statistics.html

[29]LINK Centre. (2013). The SADC Communications Environment: An Assessment of Communications Policies, Laws and Regulations in SADC Member States. www.wits.ac.za/22485/ World Wide Worx also put the number of internet subscriptions in South Africa at 11,303,000 in 2012; 58% of these were estimated to be broadband connections and 26% mobile connections.

[30]South African Press Association. (2012, May 10). Internet use in SA growing. *News24*. www.news24.com/SciTech/News/Internet-use-in-SA-growing-20120510#

[31]Lewis, C. (2010). Op. cit.

[32]South African Audience Research Foundation, Cell Phone Trends. www.saarf.co.za/amps/cellphone.asp

[33]Informal discussion with Charley Lewis from the LINK Centre.

[34]Staff writer. (2014, January 20). Fastest wireless broadband connections in SA. *MyBroadband.co.za*. mybroadband.co.za/news/broadband/93747-fastest-wireless-broadband-connections-in-sa.html

Table 1: Average download and upload speeds

Rank	ISP	Service	Download speed	Upload speed
1	MTN	MTN LTE	33.89 Mbps	8.48 Mbps
2	Vodacom	Vodacom 3G	15.01 Mbps	1.62 Mbps
3	MTN	MTN 3G	14.64 Mbps	1.48 Mbps
4	Vodacom	Vodacom LTE	11.51 Mbps	6.29 Mbps
5	8ta	8ta LTE	11.12 Mbps	2.59 Mbps
6	Cell C	Cell C LTE	4.24 Mbps	0.92 Mbps
7	8ta	8ta 3G	3.01 Mbps	1.12 Mbps
8	Cell C	Cell C 3G	2.67 Mbps	0.94 Mbps
9	Neotel CDMA	Neotel CDMA	0.8 Mbps	0.32 Mbps
10	iBurst Wireless	iBurst Wireless	0.48 Mbps	0.17 Mbps

Source: MyBroadband.co.za

According to Research ICT Africa, by 2007/2008, more women than men owned mobile phones, although for every one woman that accessed the internet, two men accessed it. While monthly mobile expenditure constituted 29.3% of monthly disposable income on average, women spent more of their disposable income than men.[35] More recently, and drawing on MyBroadband.co.za statistics, the Internet Society of South Africa has stated that 69% of internet users are male and 31% female. Most users access the internet at work, and the country's economic hub, Gauteng, boasts the largest proportion of internet connections of any of the provinces. Most internet users fall within the 35-54 age group, which is out of synch with the preponderance of youth in South Africa.[36]

Fixed-line connectivity through ADSL is constrained by the lack of growth of the fixed-line network after an initial period of growth after the 1994 transition to democracy.[37] By 2011, South Africa's fixed broadband penetration rate was a mere 1.5%, significantly lower than the Organisation for Economic Co-operation and Development (OECD)'s average broadband penetration rate for OECD

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[35]Gilwald, A., Milek, A., & Stork, C. (2010). *Gender Assessment of ICT Access and Usage in Africa*, Volume 1 2010. Research ICT Africa.
www.ictworks.org/sites/default/files/uploaded_pics/2009/Gender_Paper_Sept_2010.pdf

[36]Internet Society South Africa (2011). South African Internet Users. www.isoc.org.za

[37]Horwitz, R., & and Currie, W. (2010). Politics, privatisation and perversity in South Africa's telecommunications reform programme. In D. Moyo and W. Chuma (Eds.), *Media Policy in a Changing Southern Africa: Critical reflections on media reforms in the global age*. Pretoria: Unisa Press, p. 11-38.

countries.[38] This distortion in connectivity makes it more difficult for South African internet users to optimise their usage of the internet for the purposes of accessing information, given that mobile connectivity is generally slower and more limited than fixed-line connectivity. South African ADSL subscribers also have to contend with restrictive caps, with some plans only offering 1 GB of data per month, although some service providers have begun to offer uncapped ADSL.

South Africa's ability to connect to both voice and data networks has been marred by high user costs, and the lack of transparency around pricing has allowed operators to continue these practices relatively unchallenged. According to Research ICT Africa, South Africa ranked a dismal 30th out of 46 African countries for prepaid mobile telephone affordability. Poor subscribers are the worst affected by the excessively high prices of prepaid or pay-as-you-go rates, including out-of-bundle costs, as the poor are more likely to access the internet on an out-of-bundle basis. Data bundle prices have also been the source of considerable controversy in South Africa, although Blackberry has been particularly successful as it offers data at a relatively affordable flat rate.[39]

Recognising the fact that the low broadband penetration rate was going to impact negatively on South Africa, the Department of Communications developed a National Broadband Policy, which was gazetted in 2010. It defined broadband as an always available, multimedia capable connection with a download speed of at least 256 kbps, and aimed to ensure universal access to broadband by 2019, with household penetration standing at 15% by the same year.[40] The department also gazetted a Local and Digital Content Development Strategy, which proposed the establishment of a digital content fund and content generation hubs to stimulate the development of local content, and the prioritisation of the following content areas: animation, wildlife, documentaries, games and ringtones.[41] While the development of the policies was broadly welcomed, concerns were raised about the weakness of the Broadband Policy and its relatively low target in terms of download speed,[42] as well as its lack of an implementation plan.[43] Furthermore, the elite nature of media discourses surrounding the policy, which tended to adopt a techno-centric rather than development-centric approach that could have made the issues more accessible, contributed to the lack of proper public scrutiny of the policy.[44] More decisive targets were, however, set in the ICT Industry Competitiveness and Job Creation Compact, approved in July 2011, which commits to 100% broadband penetration by 2020.[45]

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[38]Muller, R. (2011, August 2). SA broadband penetration rates: how do we compare? *MyBroadband.co.za*. mybroadband.co.za/news/broadband/29586-sa-boadband-penetration-rates-how-do-we-compare.html

[39]Gedye, L. (2012, January 6). Broadband price drop expected. *Mail and Guardian.* mg.co.za/article/2012-01-06-broadband-price-drop-expected

[40]Department of Communications. (2010). Broadband Policy for South Africa. Government Gazette No. 33377, 13 July 2010.

[41]Department of Communications. (2009). Local and Digital Content Development Strategy for South Africa. Government Gazette No. 32553, 4 September 2009.

[42]Association for Progressive Communications. (2010). Analysis of the broadband policy of South Africa. www.apc.org/es/pubs/briefs/analysis-broadband-policy-south-africa

[43]Lewis, C. (2010). Op. cit.

[44]Chigona, W., Vergeer, J., & Metfula, A. (2012). The South African Broadband policy: in the eyes of the media. *Info*, 14(4), 65-77.

[45]Staff writer. (2011, July 31). 100 percent broadband penetration in SA by 2020: DoC. *MyBroadband.co.za*. mybroadband.co.za/news/broadband/30550-100-broadband-penetration-in-sa-by-2020-doc.html

At the end of 2013, a new broadband policy, called South Africa Connect, was gazetted.[46] The policy states that the network roll-out will be based on a wholesale open access network, which has long been campaigned for by advocates. A broadband council will also be appointed. Its intention is to make sure that South Africans can access the network at 2.5% or less of the average monthly income. According to the policy, half of the population will have 100 Mbps access by 2020. Table 2, outlining the targets set by the new policy, was developed by Research ICT Africa, which was instrumental in its formulation.

Table 2: South Africa Connect broadband targets

Target	Penetration measure	Baseline (2013)	By 2016	By 2020	By 2030
Broadband access in Mbps user experience	% of population	33.7% internet access*	50% at 5 Mbps	90% at 5 Mbps; 50% at 100 Mbps	100% at 10 Mbps; 80% at 100 Mbps
Schools	% of schools	25% connected	50% at 10 Mbps	100% at 10 Mbps; 80% at 100 Mbps	100% at 1 Gbps
Health facilities	% of health services	13% connected	50% at 10 Mbps	100% at 10 Mbps; 80% at 100 Mbps	100% at 1 Gbps
Government facilities	% of government offices	N/A	50% at 5 Mbps	100% at 10 Mbps	100% at 100 Mbps

Source: Research ICT Africa, 2012 ICT Access and Use Survey

NGOs have long advocated for increased access to broadband for the population of South Africa, and private groups, such as MyBroadband.co.za (now also an ISP), have pushed for lower costing and criticised the work of ICASA. In this regard, it can be said that private players, in particular ISPs, have collectively engaged in business-focused advocacy, both in their attempts to drive down costs and improve their own business models, and also with the vision of ubiquitous and high-speed access for the majority of South Africans, something viewed as being not only in the interest of businesses, but also in the national interest for the development of the country. While "access" itself – given the uptake of mobile technology – currently appears to be less of an advocacy preoccupation compared to the past for NGOs working in South Africa, advocacy for better, more affordable access in South Africa can be seen to come from multiple quarters: the non-profit sector, private sector, media and academia. Although these advocacy initiatives are not necessarily coordinated, they suggest widespread agreement and a community of vision amongst diverse stakeholders when it comes to access.

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[46]Staff writer. (2013, December 8). South Africa Connect: the new broadband policy. *MyBroadband.co.za*. mybroadband.co.za/news/government/93243-south-africa-connect-the-new-broadband-policy.html

2.1 Arbitrary blocking and filtering

Self-regulation is the preferred method of regulating the internet in South Africa. While self-regulatory mechanisms are less susceptible to state capture, they are susceptible to industry capture and as a result can lead to an overly cautious approach towards controversial speech.[47] The Internet Service Providers' Association (ISPA) is South Africa's non-profit industry body. ISPA's take-down notification procedure does not make any provision for representations to be made by the alleged infringer before the take-down occurs, and there is no in-built right of appeal. This makes the procedure vulnerable to accusations of procedural unfairness and has led intellectual property lawyer Reinhardt Buys to argue that the take-down procedures are unconstitutional.[48] These lacunae are significant in view of the propensity recognised in other jurisdictions for take-down notices to be based on contestable grounds.[49] Under the terms of the Electronic Communications and Transactions (ECT) Act, a service provider is not liable for wrongful take-down; this acts as a disincentive to scrutinise requests for take-downs carefully, since liability rests with the lodger of the notice. However, if ISPs do not implement take-down notices, they could be liable for hosting illegal content, which incentivises them to err on the side of caution and "take down now and ask questions later", irrespective of the legitimacy of the complaint.[50] The problems with these arrangements were highlighted in 2008, when the Recording Industry of South Africa (RISA) Anti-Piracy Unit issued take-down notices to ISPA, which then issued the hosting ISP with a take-down notice, and Buys challenged the constitutionality of the take-down procedure.

Another area of self-regulation that requires further examination is the acceptable use policies of South African ISPs and the extent to which they pass constitutional muster. An overview of the policies of some of the largest ISPs in South Africa suggests a tendency to identify prohibited content that would otherwise be protected speech under South Africa's constitution.

For instance, MWEB's acceptable use policy states that it prohibits use of the IP services in a way that is "harmful, obscene, discriminatory, (…) constitutes abuse, a security risk or a violation of privacy, (…) indecent, hateful, malicious, racist, (…) treasonous, excessively violent or promoting the use of violence or otherwise harmful to others."[51] Most of the quoted grounds are vague and would cover speech that would ordinarily receive constitutional protection, which implies that MWEB has adopted an inappropriately censorious approach towards controversial speech. iBurst's policy is even more restrictive in that it forbids publication of illegal material which it defines as including material that is obscene and discriminatory. However, it also forbids material that "could be deemed objectionable, offensive, indecent, pornographic, harassing, threatening, embarrassing,

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[47]La Rue, F. (2012). Op. cit., p. 12.

[48]Muller, R. (2008, November 12). Local websites in danger. *MyBroadband.co.za*. mybroadband.co.za/news/internet/5948-local-websites-in-danger.html

[49]Urban, J., & Quilter, L. (2006). *Efficient process or "chilling effects"? Takedown notices under section 512 of the Digital Millenium Copyright Act*. lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf; Moore, T., & Clayton, R. (2008). The Impact of Incentives on Notice and Take-down. Paper presented at the Seventh Workshop on the Economics of Information Security (WEIS 2008), Hanover, NH, USA, 25-28 June. www.cl.cam.ac.uk/~rnc1/takedown.pdf

[50]Muller, R. (2008, November 12). Op. cit.

[51]MWEB Acceptable Use Policy. www.mweb.co.za/legalpolicies/GeneralPage/AcceptableUsePolicy.aspx

distressing, vulgar, hateful, racially or ethnically offensive, or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful." There can be little doubt that this provision is unconstitutional, given its over-breadth, which covers offensive and not just harmful material, whereas the constitution requires a harms test to be applied before the right to freedom of expression can be limited on justifiable grounds.[52] In contrast, Internet Solutions' policy restricts prohibited content to "copying or dealing in intellectual property without authorisation, child pornography and/or any unlawful hate-speech materials."[53] The Codes of Conduct of the Wireless Application Service Providers' Association (WASPA) and the Digital Media and Marketing Association (DMMA) are also unduly restrictive of freedom of expression and use highly subjective measurements of unacceptable material, covering material, for instance, that merely causes grave and widespread offence.

Most of the take-down notices have related to copyright infringements rather than arbitrary blocking and infringements that impact directly on constitutional rights to freedom of expression and speech.

A recent transparency report by Google,[54] listing the top 10 sites in South Africa with respect to the number of URL take-down requests, was summarised by MyBroadband.co.za in Table 3.

Table 3: Top 10 websites in terms of take-down requests

.co.za domain	URLs removed	URLs for which no action was taken
bidorbuy.co.za	275	376
iza.co.za	501	20
janobarnard.co.za	148	49
macspares.co.za	74	0
afribaba.co.za	63	3
torrentbox.co.za	56	0
kiclassifieds.co.za	48	2
wozaonline.co.za	29	5
el-roi.co.za	2	29
gumtree.co.za	2	27

Source: MyBroadband.co.za

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[52]iBurst Acceptable Use Policy. www.iburst.co.za/documents%5Clegal%5Cdocument_2.pdf

[53]Internet Solutions Acceptable Use Policy. www.is.co.za/legal/Pages/default.aspx

[54]Staff writer. (2013, December 20). Copyright violation complaints against SA sites. *MyBroadband.co.za*. mybroadband.co.za/news/internet/94073-copyright-violation-complaints-against-sa-sites.html

Moreover, towards the end of 2013, several video rips of on-air blunders from the newly launched African satellite news channel, Africa News Network 7 (ANN7), were taken down after they were uploaded by members of the public onto online video platforms.[55] Although the reason for the take-down was copyright infringement, there is a political undertone to the original postings of the blunders, given that ANN7 is controlled by the powerful Gupta family from India, whose business dealings in South Africa and proximity to President Jacob Zuma have come under intense public criticism.

2.2 Criminalising legitimate expression

Although there are no cases of constitutionally legitimate online expression being criminalised, political pressure has been exerted in at least one case in an attempt to effect the same. In a notable incident, the ANC placed political pressure on websites – in particular the *City Press* newspaper – to take down the online versions of a provocative painting of President Zuma, with his genitals exposed, by artist Brett Murray. The painting had caused significant social protest by ANC supporters and others, and was defaced by two visitors to the gallery where it was exhibited in 2012.[56] During the fracas, the Film and Publication Board ruled that the portrait could not be accessed by anyone under 16 years of age. After an appeal, this classification was overturned by the Board. Significantly, following political pressure, the *City Press* removed the online version of the painting, its editor Ferial Haffajee saying this was "in the spirit of peacemaking… and from fear too."[57]

Internet content falls within the regulatory framework of the Film and Publication Board, which was set up in 1996 to replace the apartheid-era Publications Control Board. The Board is a portfolio organisation of the Ministry of Home Affairs. The essential difference between the old board and the new one is that while the old board acted as a censorship board, particularly of political content that challenged the legitimacy of the apartheid regime, the new board is meant to confine its role to content classification, with a very narrow range of content being restricted or even prohibited: hence the Film and Publication Board's motto, "We inform, you choose."[58]

The 1996 Films and Publications Act has been amended several times, and each amendment has broadened the scope for classification and prohibition of material and the type of material covered by the Act, while reducing the independence of the Board and the transparency of its appointment process.

In terms of the 2009 amendments, a publication constitutes a "refused publication" if it contains child pornography, propaganda for war or incitement to imminent violence, or the advocacy of hatred based on any identifiable group characteristic which constitutes incitement to cause harm –

[55] Muller, R. (2013, August 26). ANN7 videos disappearing explained. *MyBroadband.co.za*. mybroadband.co.za/news/broadcasting/85229-ann7-videos-disappearing-explained.html

[56] For further commentary see Naidoo, M. (2012, May 30). Brett Murray's painting "The Spear". *Muthal Naidoo*. www.muthalnaidoo.co.za/democracy-othermenu-121/326-brett-murrays-painting-qthe-spearq

[57] Murray, B. (2012, May 28). Jacob Zuma painting The Spear removed by South African paper. *Brett Murray*. www.brettmurray.co.za/the-spear-press/28-may-2012-bbccouk-spear-image-removed-from-city-press

[58] Film and Publication Board website. www.fpb.gov.za

unless the publication is a bona fide documentary, has scientific, literary or artistic merit, or is on a matter of public interest. "Refused publication" is not defined in the Act, but presumably refers to publications that are banned for possession and distribution. If the publication contains any of the offending material mentioned above, it will be classified XX (prohibited for distribution), unless it has artistic, scientific or public interest merit, in which case it will be classified as X18 to protect children from "harmful or age-inappropriate materials". X18 publications can only be distributed by licensed owners of adult premises. The 1996 Act, in contrast, allowed publications to escape classification requirements entirely if they had artistic or scientific merit (with the exception of child pornography).

These 2009 amendments continue to be controversial, and were the subject of constitutional litigation by the South African National Editors' Forum (Sanef) and Print Media South Africa (PMSA). The Constitutional Court heard the case in March 2012. The section of the Act that dealt with sexual content was struck down as being unconstitutional on the basis that prior restraint violated the right to freedom of expression. Presumably, the Court was not asked to deal with the other grounds for pre-publication classification as they do not receive constitutional protection. However, the main focus of the challenge was to ensure that both newspapers and magazines did not have to submit to the pre-classification regime of the Act. As a result, the overbroad clause on hate speech was not challenged and therefore remains in effect for all publications other than magazines and newspapers.

While the Board (whose governance structure was renamed the Film and Publication Council) can issue directives of general application, such as classification guidelines, it can do so only in consultation with the minister, which is seen to undermine its independence.[59]

There are other statutory or common law provisions impacting on online rights. The Promotion of Equality and Prevention of Unfair Discrimination Act, otherwise known as the "Equality Act", was promulgated in 2000 and prohibits unfair discrimination and harassment. It prohibits hate speech, which is defined as "speech that is or could be reasonably construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred."[60] Concerns have been expressed about the constitutionality of this provision as it adopts a broader definition of hate speech than what the constitution allows for, which is likely to open the Act up to constitutional challenge.[61]

The common law of defamation can also impact on online content. Defamation in South Africa is defined as the wrongful and intentional publication of a statement which has the effect of injuring a person's reputation.[62] Apartheid-era defamation law gave maximum protection to the plaintiff, and imposed strict liability on the defendant; since then defamation law has been revised in the light of

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[59]Films and Publications Amendment Act, No. 3, 2009, S. 4(a)(1).

[60]Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, S. 10.

[61]De Vos, P. (2011, September 12). Malema judgment: A re-think on hate speech needed. *Constitutionally Speaking*. constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed; Grootes, S. (2011, May 8) Julius Malema: A freedom-of-speech revolutionary? *Daily Maverick*. www.dailymaverick.co.za/article/2011-09-08-julius-malema-a-freedom-of-speech-revolutionary#.U2bSs1fLJOw; Bronstein, V. (n/d) What you can and can't say in South Africa. Paper commissioned by the Democratic Alliance. www.da.org.za/docs/548/Censorship_document.pdf

the constitutional guarantee of freedom of expression, and holds that in the case of media defendants, a publication cannot be considered unlawful even if it is incorrect, providing there were reasonable grounds for publication.[63]

2.3 Imposition of intermediary liability

Self-regulation is widely used in relation to online content. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications in terms of the ECT Act. This means that ISPA members have the right to self-regulate, in accordance with a code of conduct adopted in 2008.[64] In order to qualify for immunity from liability under the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifications of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their users' communications.[65] However, internet users can send a take-down notice to ISPA, requesting the removal of material they consider unlawful. If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down.[66]

The Wireless Application Service Providers' Association (WASPA) is the industry body for mobile-based value-added service providers. It too has a code of conduct which provides a framework for adult content, and sets in place procedures to protect children from harmful content.[67] The Digital Media and Marketing Association (DMMA) is the industry body for digital publishers, and also has a code of conduct that sets out the expected standards of professional practice of its members.[68] Newspapers operate a self-regulatory system in the form of the Press Council of South Africa, which incorporates a Press Ombudsman and Press Appeals Panel. There has been some uncertainty about whether the system applies to online newspapers, and in 2011 as part of a review of its own processes, the Council recommended that its code should cover the online publications of its members.[69]

Electronic transactions are regulated according to a separate Act, the Electronic Transactions Act of 2002. Importantly for ISPs, the Act provides for the limitation of liability for service providers, providing they are members of an industry representative body recognised by the Department of Communications.[70] The Act also criminalises a range of online crimes (such as hacking, spamming

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[62]Moorcroft, J. (2011, March 22). Defamation on the internet. *South African Advocates*. www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-internet

[63]Bronstein, V. (n/d). Op. cit.

[64]Internet Service Providers' Association, About ISPA. ispa.org.za/about-ispa

[65]Internet Service Providers' Association, Code of Conduct. ispa.org.z[a/code-of-conduct

[66]Internet Service Providers' Association, How to request a take-down notice. ispa.org.za/code-of-conduct/take-down-guide

[67]Wireless Application Service Providers' Association, Code of Conduct. www.waspa.org.za/code/waspa_coc_11.6.pdf

[68]Digital Media and Marketing Association, Code of Conduct. www.dmma.co.za/about-us/code-of-conduct

[69]Press Council of South Africa. (2011). *Review*, p. 7. www.presscouncil.org.za/Reports/View/press-councils-review--4

[70]Electronic Communications and Transactions Act Act 25 of 2002, Chapter XI. www.info.gov.za/view/DownloadFileAction?id=68060

and email bombing) and creates cyber policing in the form of cyber inspectors, employed by the Department of Communications, who are given wide-ranging powers to monitor and inspect any website or information system and search premises for evidence of cyber crime on reasonable cause shown, provided they are in possession of a warrant. Their powers have been criticised as overly broad, creating the potential for infringements of the right to privacy, and the system remains open to abuse particularly because South Africa lacks a dedicated law on privacy.[71]

2.4 Disconnecting users from the internet

There have been no reported incidents of users being disconnected from the internet for political reasons in South Africa.

2.5 Cyber attacks

Cyber attacks have only recently become a growing reality in South Africa, although they currently remain a relatively insignificant feature of the South African internet landscape. Most notably there was a recent attack on the South African National Road Agency Limited (SANRAL) website following the controversial roll-out of an e-tolling road fee system in Gauteng. In the attack, a security flaw was exposed that could give hackers access to the personal details of registered road users. According to SANRAL, its website has been disabled to international access due to these attacks.[72] In August 2013, a suspected "hacker" – it was later suggested that the case against the "hacker" was not strong – exposed a security flaw on the website for the City of Johannesburg's online e-statement system.[73] Also in 2013, MTN was subject to a DDoS attack which pulled down its servers, affecting its clients for a day.[74]

2.6 Surveillance and lawful interception

Another law that impacts on internet freedom is the Regulation of Interception of Communications and Provision of Communication-Related Information Act (ROICA) of 2002. The Act regulates the interception of certain communications, including internet traffic, and makes it illegal for communications to be intercepted except according to the framework set out in the Act, which makes provision for a designated judge to issue interception directions requested by law enforcement officers (in the defence force, the intelligence services or the police) on crime-related or national security grounds. Interception directions will be undertaken by the Office of Interception Centres (OIC).

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[71]Gereda, S. (2006). The Electronic Communications and Transactions Act. In L. Thornton et al. (Eds.), *Telecommunications Law in South Africa*. www.wits.ac.za/academic/clm/link/publications/22988/telecommunications_law_in_south_africa.html; also see Furber, P. (2007, September 1). At the coalface of cyber crime. *ITWeb*. www.brainstormmag.co.za/index.php?option=com_content&view=article&id=481:at-the-coalface-of-cyber-crime

[72]Vermeulen, J. (2014, January 14). Sanral E-toll website unavailable overseas due to cyber-attacks. *MyBroadband.co.za*. mybroadband.co.za/news/government/94765-sanral-e-toll-website-unavailable-overseas-due-to-cyber-attacks.html

[73]Staff writer. (2013, December 23). City of Joburg website "hacking" case update. *MyBroadband.co.za*. mybroadband.co.za/news/security/93533-city-of-joburg-website-hacking-case-update.html

[74]Vermeulen, J. (2013, August 29). Cyber-attack behind Afrihost, MTN Internet problems. *MyBroadband.co.za*. mybroadband.co.za/news/broadcasting/85637-cyber-attack-behind-afrihost-mtn-internet-problems.html

ROICA makes it illegal to establish communications networks that are not capable of surveillance. It places obligations on communications service providers, including ISPs, to assist the state in the interception of communications. Telecommunications operators and ISPs are required by the law to facilitate interception and monitoring of communications and to store communications-related information at their own expense for not less than three years and not more than five years.[75] Furthermore, all mobile phone users are required to register their SIM cards, and provide proof of residential address and identity numbers. ROICA was part of a basket of laws passed in the early 2000s to assist in the global "war against terror". All these acts were controversial at the deliberation stage in parliament, on the grounds that they threatened the rights to privacy and freedom of expression. While many controversial clauses were amended, they were not completely cured of deficiencies and as a result still continue to evoke controversy.

In 2001, the international non-governmental organisation Privacy International warned during parliamentary hearings on the bill that that it lacked basic safeguards. In finalising the law, parliament responded to criticisms by introducing judicial, legislative and executive oversight measures to prevent abuses. As a result, the Act ensures that interception centres that carry out the directions report to the Minister of State Security and the Parliamentary Joint Standing Committee on Intelligence. The designated judge also provides the Committee with an annual report, which becomes publicly available when the Committee's report is released. Furthermore, intelligence activities are certified as being legally compliant by the Inspector General, who is selected by, and reports directly to, parliament. The Act also disallows communications to be intercepted without a direction being granted by the judge on the grounds specified in the Act, and it requires the judge to be satisfied that less intrusive methods of police or intelligence investigation are not likely to yield the required information.

But Privacy International persisted with their warnings, noting that the US federal wiretapping law contains what they maintained is a higher standard for issuing of interception orders than South Africa's, namely that the application must demonstrate "probable cause" to believe that an individual is committing, has committed, or is about to commit a serious crime. In the South African system, the judge merely has to be satisfied that there are reasonable grounds that a crime has been, or is likely to be, committed. Furthermore, directions may also be issued in relation to serious offences that may be committed in future, which may not be constitutional as it allows law enforcement officers to speculate on future acts that have not yet occurred.[76] As a result of their reservations, in a 2006 report on the leading surveillance societies in the world, Privacy International listed South Africa as being among the countries that showed a systematic failure to uphold safeguards.[77]

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[75]Regulation of Interception of Communications and Provision of Communication-Related Information Act of 2002, S. 30(2)(a).

[76]Bawa, N. (2006). The Regulation of Interception of Communications and Provision of Communications-Related Information Act. In L. Thornton et al. (Eds.), *Telecommunications Law in South Africa*. www.wits.ac.za/academic/clm/link/publications/22988/telecommunications_law_in_south_africa.html

[77]Zetter, K. (2007, December 31). World's top surveillance societies. *WIRED*. www.wired.com/threatlevel/2007/12/worlds-top-surv

A key flaw in South Africa's law is lack of public oversight, as the public is provided with too little information to be able to monitor whether the Act is achieving its intended results, namely to fight crime and to ward off genuine threats to national security.[78] While the designated judge's reports are made available as part of the Joint Standing Committee's reports to the National Assembly, they contain little information, and the legislation governing the oversight of the intelligence services, the Intelligence Services Oversight Act, is ambiguous about the content of these reports. As a result, between 2006 and 2008, the designated judge's report merely contained bald statistics on the number of interception orders granted. The designated judge for 2009/2010 issued a more detailed report for that period, but it still falls far short of the reporting obligations needed for effective public oversight. In contrast, in the US federal system, the publicly available annual reports on "wiretaps" in relation to criminal matters include information on the number of interception orders, the major offences for which orders were granted, a summary of different types of interception orders, the average costs per order, the types of surveillance used, and information about the number of arrests and convictions resulting from intercepts. Furthermore, in South Africa there is no provision for people whose communications have been intercepted to be informed once the investigation is completed, or if the judge turns down the application for an interception direction.[79]

Another source of controversy in relation to ROICA is that the time period for retention of data by telecommunications companies and ISPs is far longer than in comparable jurisdictions, and other jurisdictions merely require targeted data preservation rather than wholesale data retention as required by ROICA. These requirements add considerably to the cost of implementing ROICA, and given that most of the costs of implementation are borne by the service providers, the requirement may prove to be too onerous for small companies, especially ISPs. While provision has been made in ROICA for an Internet Service Providers' Assistance Fund, the fund covers a limited array of the total costs of implementing the Act.[80]

Interception statistics in terms of ROICA have been available since 2008. According to the reports of the various designated judges to the Joint Standing Committee on Intelligence, there were 826 interception directions granted between 2006 and 2010. Between 2008/2009 and 2009/2010, there was a 120% increase in interception orders (from 189 directions to 416 directions); no information is available to explain this large increase.[81] While there is no information about the reasons for interception directions in 2008/2009, in 2009/2010 directions were granted to assist the investigation of drug dealing and drug trafficking, vehicle theft and car hijacks, armed robberies, corruption and fraud, and assassinations, murder and terrorism.[82] Most directions are granted to the

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[78]Duncan, J. (2011, January 30). Another View: Time to oversee the officials who spy on us. *Sunday Times.* www.timeslive.co.za/opinion/commentary/2011/10/30/another-view-time-to-oversee-the-officials-who-spy-on-us

[79]Bawa, N. (2006). Op. cit.

[80]Ibid.

[81]Reports of the designated judges in terms of ROICA, 2006-2010, contained in reports to the National Assembly by the Joint Standing Committee on Intelligence.

[82]Khumalo, J. A. M. (2010). Statistical briefing by designated judge for the period 1 April 2009 to 31 March 2010. Report to the National Assembly of the Joint Standing Committee on Intelligence.

Crime Intelligence Division of the South African Police Service, followed by the National Intelligence Agency (NIA, now known as the State Security Agency). By 2009/2010, the designated judge was receiving an average of 35 applications for interception directions a month, and he approved the applications in 94% of cases involving the police and 87.3% of cases involving the NIA.[83]

The system has proved itself capable of subversion. The *Sunday Times* newspaper has reported that in 2010, intelligence officers duped the designated judge into signing an order to tap the phones of then police commissioner General Bheki Cele, as well as two of the paper's journalists who were reporting on a controversial lease deal the General was implicated in. According to court papers, the intelligence officers lied about who the mobile phone numbers contained in the application belonged to. This incident has fuelled fears that other applications to tap the communications of journalists and public figures may have been granted under false pretences.[84]

Significantly, ROICA does not cover foreign signals intelligence, or intelligence derived from any communication that emanates from outside South Africa, or passes through or ends in the country. The state agency that intercepts these signals is the National Communications Centre (NCC), which falls under the Ministry of State Security, and not the OIC. This means that these signals can be intercepted without a warrant – a major lacuna in the law that has been criticised for creating space for violations of the right to privacy on national security grounds. According to the *Mail and Guardian* newspaper, "This means that you can be bugged completely outside of the law, and without a judge's direction, if your communication involves a party in another country."[85] As a great deal of internet traffic originates outside the country, the interception of this information can take place without judicial oversight, which is wide open to abuse.

In 2008 a Ministerial Review Commission appointed by the then minister of intelligence found the unregulated interception of foreign signals intelligence to be unconstitutional, and recommended that the activities of the NCC should be covered by ROICA.[86] This argument was reiterated by several civil society organisations and academics in public hearings in March 2012 on the General Intelligence Laws Amendment Bill, which was introduced to amalgamate the various intelligence services into the State Security Agency (SSA). At the time of writing, this bill is still being considered, but in response to a submissions on this point by the Right2Know Campaign, the chair of the ad-hoc Committee on the Bill, Cecil Burgess, argued that the international nature of criminal syndicates required law enforcement officials to be proactive and the ROICA warrant procedure took some time, therefore there were circumstances where the intelligence services would need to intercept signals before a warrant could be obtained.[87] This point implied that the Committee may well be open to leaving foreign signals intelligence unregulated.

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[83]Ibid.

[84]Rose, R., Hofstatter, S., & Wa Afrika, M. (2013, March 20). Bugging: How cops lied. *Sunday Times*. www.timeslive.co.za/specialreports/stinvestigations/2013/03/20/bugging-how-cops-lied

[85]Swart, H. (2011, October 14). Secret state: How the government spies on you. *Mail and Guardian.* mg.co.za/article/2011-10-14-secret-state

[86]Ministerial Review Commission in Intelligence. (2008). Intelligence in a Constitutional Democracy. Final report to the Minister for Intelligence Services, the Honourable Mr. Ronnie Kasrils MP.

[87]Parliamentary Monitoring Group. (2012). General Intelligence Laws Amendment Bill: Public hearings. www.pmg.org.za/report/20120328-general-intelligence-laws-amendment-bill-b25-2011-public-hearings

2.7 Data protection

The Protection of Personal Information Act (POPI) was signed into law in November 2013. Before the signing of the law, South Africa did not have sufficient safeguards for privacy, data protection and online security. The right to privacy is protected in the constitution, but there was no law in place to give effect to this right. A commencement date for the new legislation, which includes prison terms and fines of up to ZAR 10 million for contravening the law, has yet to be set.[88]

2.8 Net neutrality

Net neutrality is envisaged as fundamental to broadband roll-out in South Africa. While there has been little campaigning on the issue in recent years, and while some industry analysts argue that it is a non-issue at the moment,[89] the recently gazetted broadband policy states the following guiding principles:

- **Openness:** At the infrastructure level, open access for multiple service providers who are enabled to compete on shared platforms; at the level of government and its regulatory agencies, commitment to open governance and open data; openness in policy formulation through consultation and public participation.

- **Service and technological neutrality**: No preference is given to any particular type of service or technology, while ensuring the use of common standards and protocols that enable interoperability.

- **Universality:** Universal access to broadband services through more even provisioning of services, including a focus on services in underserved and underserviced areas and communities.

- **Equality:** Address the digital divides between those with the resources and capabilities to access and optimally use the full range of broadband services and those who are marginalised from services.

- **Efficiency:** Within a competitive market, enable the sharing of infrastructure to avoid unnecessary duplication.

- **Coordination:** By the state, across all tiers of government and across relevant sectors.

- **Transparency and accountability:** By sector institutions and operators, policy and regulatory certainty to enable public and private investment.

- **Innovation:** Create conditions for innovation throughout the ICT ecosystem from policy and regulation to services and applications, and from networks to users and skills and capacity building.

- **Complementarity:** Leverage top-down coordination and bottom-up initiatives, public and private resources, fixed and wireless technologies, and different tiers of government.

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[88]Pierce, L. (2013, December 2). Protection of Personal Information Act: Are you compliant? *Mail and Guardian*. mg.co.za/article/2013-12-02-protection-of-personal-information-act-are-you-compliant

[89]Vandermeulen, J. (2013, September 6). SA Internet traffic shaping not a net neutrality issue: Cerf. *MyBroadband.co.za*. mybroadband.co.za/news/broadband/86353-sa-internet-traffic-shaping-not-a-net-neutrality-issue-cerf.html

- **Future-proof:** Ensure that policy choices are flexible enough to accommodate technological progress, neutral enough to withstand technology and market shifts, and resilient to value dilution.

2.9 Government engagement at the international level

Traditionally, the most important internet policy issues in the international arena for South Africa have been reform of internet governance, African and regional cooperation, South-South cooperation, bridging the digital divide through equitable access to ICTs, and harnessing ICTs for development. Internal developmental issues form part of the country's engagement in debates on global internet governance. At the WSIS Tunis Summit in 2005, then president Thabo Mbeki stressed the importance of ICTs in helping "extricate the poor of Africa and the world from their condition of underdevelopment, marginalisation and social exclusion," and that the mobilising power of ICTs was reflected "both in our national initiatives and the priority programmes of NEPAD, the New Partnership for Africa's Development."[90] South Africa's position in international internet governance debates reflects these developmental concerns, but it also reflects the country's broader foreign policy strategy, which is based on strong regional and South-South links. Alongside Brazil and India, South Africa has been one of the stronger critics of the current model of internet governance and has actively participated in efforts to reform it. In line with the traditional South African foreign policy objective of reforming the UN system and global governance institutions, the government has supported reform of the system in order to develop "multilateral and multi-stakeholder institutions and systems rooted within the UN system to ensure inclusive and equitable access to ICTs within the context of an Internet Governance system that is legitimate, transparent and accountable."[91]

At the first Summit of the India-Brazil-South Africa Dialogue Forum (IBSA) in September 2006, the IBSA heads of state emphasised the "importance of working together towards a people-centered, inclusive and development-oriented Information Society." They also "emphasized the need to promote and enhance close trilateral cooperation and capacity building between the three countries in the areas of digital inclusion, ICTs for development, as well as E-government and governance as a means of reducing the digital divide in their societies."[92]

Although some believe that the much discussed UN Committee on Internet-Related Policies (CIRP) proposal came out of the IBSA meeting in Rio in 2011, the proposal is now seen as having been largely driven by the Ministry of External Affairs of India. South Africa had a limited role in the CIRP proposal. What is notable however is South Africa's lack of measures to distance itself from the CIRP proposal, with even the Indian government backing away from the proposal in response to the strong civil society and media outrage in October 2012.

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[90]Address of the President of South Africa, Thabo Mbeki, at the World Summit on the Information Society, Tunis, Tunisia, 16 November 2005. www.dfa.gov.za/docs/speeches/2005/mbek1116.htm

[91]Ibid.

[92]Joint Declaration of First IBSA Summit Meeting, 14 September 2006. pib.nic.in/newsite/erelease.aspx?relid=20686

This may be explained by South Africa's desire for South-South solidarity in its internet policy or politeness arising from its hosting of IBSA and BRICS summits in 2011 and 2013. Interestingly, IBSA did not form any significant bloc at the World Conference on International Telecommunications (WCIT) held in December 2012, and South Africa sided more strongly with African positions at the conference. India did not sign the final agreement, whereas South Africa did. There are conflicting reports that Brazil either signed, or could not sign, due to non-payment of fees or other technicalities.

BRICS (the group of emerging economies made up by Brazil, Russia, India, China and South Africa) has had less substantive influence on South African internet policy. South Africa joined BRICS in 2010 and took part in the third and fourth BRICS summits. Issues of technical cooperation regarding broadband infrastructure have come up at BRICS. In January 2013, BRICS security representatives discussed international terrorism, piracy and cyber security in New Delhi. This was the first stand-alone BRICS security meeting (security meetings previously accompanied general summits). According to a Russian newspaper, "Representatives underlined the necessity to coordinate BRICS security initiatives not just between the five members, but also with other international platforms and organisations (particularly with the UN): for example, leaders of the BRICS countries recognised the need to create mechanisms to work toward preventing terrorist activity and other crimes being propagated on the Internet at an international level."[93] Best practices in cyber security and the possibility of emergency response teams were discussed.

In March 2013 the fifth BRICS summit reaffirmed the need for cooperation in infrastructure development, and stated: "We recognize the critical positive role the Internet plays globally in promoting economic, social and cultural development. We believe it's important to contribute to and participate in a peaceful, secure, and open cyberspace and we emphasise that security in the use of Information and Communication Technologies (ICTs) through universally accepted norms, standards and practices is of paramount importance."[94]

While South Africa is generally pro-human rights, it is also pro-shifting geopolitical balances/imbalances. It will at times support China, for example, but is also quite ambitious in its own right.

The government participates "fairly" actively in ICANN's Governmental Advisory Committee (GAC). The representatives are usually from the Department of Communications (DoC), but apparently they do not say very much. Their position on ICANN is extremely critical and they advocate for it to be internationalised or brought under the oversight of the ITU or a new body (e.g. CIRP, which they supported to some extent). South Africa has more capacity for human rights and participates much more actively in the Human Rights Council (HRC) than in any internet governance spaces. The government always has a large delegation and human rights specialists from both the Department of International Relations and Cooperation (DIRCO) and the Department of Justice attend HRC

[93]Soboleva, I. (2013, January 16). BRICS address world security challenges. *Russia Beyond the Headlines*. rbth.com/articles/2013/01/16/brics_address_word_security_challenges_21935.html

[94]Fifth BRICS Summit Declaration and Action Plan, 27 March 2013. www.brics5.co.za/fifth-brics-summit-declaration-and-action-plan

meetings. South Africa is a leader on LBGT rights in the HRC and could potentially be a leader on internet rights, but not without quite a lot of change happening in the current chaotic communications and information policy scene. From 2009 to 2012 the DoC was working on a National Cyber Security Policy Framework. A draft came out in 2010, and another in 2011, but in 2012, the Ministry of State Security was put in charge of developing the cyber security strategy. This was approved by the cabinet in 2012, which means that cyber security unfortunately no longer remains the responsibility of a civilian ministry.

Tshihumbudzo Ravhandalala (Zane), who has led the South African delegation at the ITU in Geneva (not the WCIT), as well as the CSTD and WIPO, has either gone back to the capital or will soon. There is likely to be an inevitable change in conduct of business, but not necessarily a change in position. At times, staff from the DoC and the Ministry of Science and Technology attend these meetings. But in the last few years, since CSTD has had a mandate to review WSIS implementation, it is usually the DIRCO staff that negotiate CSTD resolutions to ECOSOC. These policies are developed based on a South African general foreign policy stance which has been mostly aligned with a pro-ITU and "non-aligned movement" approach fairly hostile to North American and European positions on internet governance. They have consistently supported increased governmental oversight of internet governance and enhanced cooperation as defined by Brazil and India, among others. They also support multi-stakeholderism, but do not consistently put it into practice. However, South Africa's membership in the CSTD has not been renewed and this will remove an important platform for IBSA to work as a unit in a UN policy forum.

The DoC and DIRCO are the most important bodies in terms of decision making on international internet policy issues in South Africa. The primary actor is the DoC, which traditionally deals with WSIS and ITU processes. DIRCO (previously the Department of Foreign Affairs) is involved with regional organisations that have ICT initiatives, such as the African Union and NEPAD. Since 2005, as IBSA and BRICS frameworks emerged as an important factor in South African outward-looking internet policy, DIRCO has become more important. The lack of linkage between South Africa's WCIT position and the IBSA proposals could indicate a lack of consolidated strategy between these two ministries. There are working groups and meetings between them, but these are fairly ad hoc. At times they work well, at other times less so. Usually the DIRCO staff in the Geneva Mission would represent South Africa at the ITU and at IGF meetings (when they attend). They do not usually participate in IGF open consultations and only sometimes attend the IGF. However, as an extension of their ITU representation, they have followed the CSTD very actively and the South African government has been one of the most influential in the CSTD.

2.10 Summary of main findings

With respect to the universality of the internet, the widespread penetration of mobile phones has expanded access to the internet. But because of the inherent technical limitations of mobile phones, they cannot be used as easily as fixed-line connections via ADSL for accessing large amounts of information. This problem could fail to narrow and in fact even sharpen the divide between the information haves and information have-nots. The cost of connectivity is possibly the

single largest barrier to popular access to and usage of the internet. This impacts negatively on both freedom of expression and access to information, as poor users, women and youth are affected disproportionately, making them even more vulnerable to economic and social marginalisation and therefore also impacting negatively on their right to equality. It is hoped that the new broadband policy, South Africa Connect, will address both the cost and access issues; however, its implementation needs to be closely monitored.

Linguistic diversity is sadly lacking on South African-orientated sites, which impacts negatively on the right to cultural and linguistic identity of those who do not consider English their home language or mother tongue. To this extent, language acts as a significant barrier to online usage for many South Africans.

The current lack of affordable internet access limits the potential of the internet to be put to a range of beneficial uses, such as improving service delivery and encouraging political participation, and therefore impacts on a range of rights. One of the most significant impacts is on the right to education. While the government made proposals as far back as 2001 for a special e-rate to apply to schools to facilitate access to the internet, and ICASA held public hearings on the matter in 2010, the rate has still not been implemented.[95] These problems make it difficult to ensure widespread connectivity to the internet in schools, which in turn reduces the ability of learners to develop the skills needed to participate meaningfully in the information society. Teachers and learners in unconnected schools are also deprived of rich online educational resources.[96]

Lack of affordable access also impacts negatively on e-health deployment. The Presidential National Commission on the Information Society and Development viewed ICTs as vehicles to bridge the gap between rural and urban healthcare, by linking medical practitioners who are separated geographically. However, lack of access to an internet connection has been cited as one of the most significant barriers to the realisation of the potential of e-health in rural clinics.[97] Political participation is also adversely affected by lack of internet access, as it makes it difficult for citizens to participate in political activities and to interact with government online, including accessing government services online.

Unduly restrictive internet content regulation also impacts negatively on a range of rights. In the past ten years, South African lawmakers have demonstrated a tendency to prioritise national security over civil liberties, resulting in insufficient privacy safeguards, and the fact that South Africa still lacks privacy legislation exacerbates the problem. The overly broad powers of the cyber inspectors provided for in the ECA potentially threaten the right to privacy. Furthermore, the lack of basic safeguards to protect the right to privacy when communications are intercepted in terms of ROICA also creates space for abuses of this right, and indeed evidence has emerged of abuse. However, as with the application of the ECA, too little information is available to establish whether

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[95]Muller, R. (2010, February 18). E-rate battle stage set. *MyBroadband.co.za*. mybroadband.co.za/news/telecoms/11537-e-rate-battle-stage-set.html

[96]Nonyane, J., & Mlitwa, N. (n/d) ICT access and use in rural schools in South Africa: A case study in Mpumalanga Province. Unpublished paper, Cape Peninsula University of Technology.

[97]Ruxwana, N., Herselman, M., & Conradie, P. (2010). ICT applications as e-health solutions in rural healthcare in the Eastern Cape Province of South Africa. *Health Information Management Journal*, 39(1), 17-26.

abuses are occurring on a widespread basis. The inability of civil society to hold the government to account in this regard is in itself a concern that needs to be addressed.

The lack of safeguards may well lead to users self-censoring out of fear of their communications being intercepted. In the run-up to the ANC's previous elective conference in 2007, evidence emerged of the communications of some of then president Thabo Mbeki's political opponents being intercepted. Politicians and trade unionists have continued to express fears of interception of communication.[98] Nevertheless, the most recent BRICS summit reaffirmed the need for an internet infrastructure that that is both "secure" and "open", and in line with international norms.

With respect to freedom of expression, the fact that internet content was brought under the jurisdiction of a government agency with limited independence, the Film and Publication Board, with hardly any public debate about its implications, is deeply concerning. Both the Films and Publications Act and the Equality Act have stretched definitions of hate speech beyond what is constitutionally permissible. In the process, the robust exchange of opinions on a range of issues could be discouraged on the basis that they constitute hate speech, especially if these opinions cause widespread shock or offence.

The self-regulatory system for internet content is also not without its flaws. As argued above, in order to escape liability when they are informed, it is very possible that ISPs are adopting an overly cautious approach to complaints they receive on allegedly illegal material. Furthermore, the fact that major ISPs have largely adopted acceptable use policies that restrict legitimate speech, and not just speech that does not receive constitutional protection, is of concern. The fact that ISPA's take-down procedure does not allow the alleged infringer the right to make representations or to appeal a decision is an additional factor that risks tilting the self-regulatory regime towards censorship.

3. Internet governance process and power players

3.1 Relevant ministries

Department of Communications (DoC)

The Department of Communications (DoC) creates the policy framework with which the national regulator, ICASA, has to work. The DoC and the Department of International Relations and Cooperation (DIRCO) are the most important bodies in terms of decision making on international internet policy issues in South Africa. Over the past years, leadership of the DoC has been in flux. The current minister of communications is Yunus Carrim, appointed in 2013. In 2010, in a cabinet reshuffle, Roy Padayachie replaced the previous minister of communications, Gen. Ret. Siphiwe Nyanda, amidst allegations of corruption. In 2011, Padayachie was replaced by Dina Pule in another cabinet reshuffle. Padayachie was moved along with his deputy minister to the Ministry of Public Service and Administration. President Zuma said at the time that he was moving one of his

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[98]Chauke, N. (2012, May 11) Mdluli admits writing a letter to Zuma. *SABC News.com*. www.sabc.co.za/news/a/414815804b35447fa7d4efe756e8533f/Mdluli-admits-writing-a-letter-to-Zuma-20121105

"strongest executives" to his "biggest problem areas" and that "Padayachie has been promoted." Dina Pule, who had been deputy minister under Nyanda, then became minister, while ANC MP Stella Tembisa Ndabeni became the new deputy communications minister. In February 2013, amidst allegations of nepotism and corruption, it was rumoured that she would be fired and replaced possibly by Lindiwe Zulu, President Zuma's advisor on international relations. In addition, Director General Rosey Sekese was replaced in January 2012 by Gift Buthelezi, after allegations that Sekese had misled the National Assembly's Communications Committee on her performance contract.

In 2013 the DoC gazetted a new broadband policy for South Africa, called South Africa Connect (see above sections).

3.2 Other relevant processes and spaces

Independent Communications Authority of South Africa (ICASA)

Communications services are regulated by the Independent Communications Authority of South Africa (ICASA) in accordance with the Electronic Communications Act (ECA), which was adopted in 2005 to facilitate convergence. ICASA lacks autonomy from the DoC and has been criticised for lacking the resource capacity and leadership needed to achieve its goals.

Presidential Infrastructure Coordinating Commission (PICC)

The Presidential Infrastructure Coordinating Commission (PICC) was established in 2011. In December 2012, the PICC launched Strategic Integrated Project (SIP) 15: Expanding Access to Communication Technology, which aims "to ensure universal service and access to reliable, affordable and secure broadband services by all South Africans, prioritising rural and under-serviced areas and stimulating economic growth."[99] SIP 15 includes the prioritisation of migration from analogue to digital terrestrial television and expansion of access to ICTs through broadband roll-out.

The Universal Service and Access Agency of South Africa (USAASA)

The Universal Service and Access Agency of South Africa (USAASA) was established by the 1996 Telecommunications Act, and subsequently the Electronic Communications Act, to promote universal service and access to ICTs in South Africa. Its mandate is to ensure that "every man, woman and child whether living in the remote areas of the Kalahari or in urban areas of Gauteng can be able to connect, speak, explore and study using ICTs."[100] USAASA repeatedly fails to meet its targets and has yet to develop a clearly defined universal access strategy.

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[99]Presidential Infrastructure Coordinating Commission (PICC). (2012). A Summary of the South African National Infrastructure Plan. www.economic.gov.za/communications/presidential-infrastructure-coordinating-commission/202-picc-summary-of-sa-national-infrastructure-plan/download

[100]www.usaasa.org.za

Infraco

Established in 2009, Broadband Infraco is the state-owned broadband company that owns the fibre optic networks of the parastatal railway network.[101] Due to a lack of coordination between the Department of Public Enterprises and the DoC, Infraco was unable to maintain its clients, the mobile operators. Consequently, MTN, Neotel and Vodacom built an alternative national infrastructure network. Its objective is to promote affordable access to electronic communications by providing long-distance backhaul connectivity nationally and regionally. Investment in several undersea cables has greatly increased bandwidth capacity in the country.

Film and Publication Board

The Film and Publication Board is a statutory body falling under the Ministry of Home Affairs. By law, internet cafés are supposed to register with the Film and Publication Board and pay an annual fee for that privilege.

Internet Service Providers' Association (ISPA)

The Internet Service Providers' Association (ISPA) represents over 150 ISPs with a range of purposes. On 20 May 2009, the Minister of Communications "formally recognised ISPA as an Industry Representative Body in terms of section 71 of the Electronic Communications and Transactions Act, 2002."[102] ISPA has been responsible for shaping ICT policy in South Africa since its inception in 1996. It is vital for ISPA to keep a close eye on new legislation and jump in with comment/input as needed. The majority of ISPA's members are small and are often marginalised, their voices unheard by the government. It is also difficult for small entities to have a say in ISPA's positions due to lack of time and resources.[103] Consequently, ISPA is faced with the challenge of determining the positions of these small entities.

National domain name registry

The internet's global reach means that international bodies such as ICANN have an indirect impact. The launch of new top-level domains has created both threats for the local (.za) domain name industry as well as opportunities of creating unique domain names that are culturally and geographically specific (.africa, .capetown, .joburg, .durban).[104] At the end of 2013, ICANN announced that 1,900 top-level domains (gTLDs) would be launched.[105]

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[101]Gillwald, A., Moyo, M., & Stork, C. (2012). *Understanding What is Happening in ICT in South Africa*. Cape Town: Research ICT Africa.
www.researchictafrica.net/publications/Evidence_for_ICT_Policy_Action/Policy_Paper_7_-_Understanding_what_is_happening_in_ICT_in_South_Africa.pdf

[102]ispa.org.za/about-ispa

[103]Interview with Ant Brooks.

[104]Ibid.

[105]Staff writer. (2013, December 4). New domains launched. *MyBroadband.co.za*.
mybroadband.co.za/news/internet/92997-new-domains-launched.html

3.3 Powerful players

Politicians

Yunus Carrim, minister of the Department of Communications (DoC). Carrim has been the minister of communications since 2013. He has reacted swiftly to findings, such as a public protector investigation into the chief operations officer at the SABC, and has welcomed other moves towards transparency, such as an investigation of the universal services agency, USAASA.

Businesses

The voice of business is influential at the level of national and international policy. South African internet businesses are very active in ICANN and are leading the bid for Africa that is being supported by the African Union and by the South African government. They do consult on national issues occasionally (e.g. during the national IGF). In national policy, the government tends to listen to business more than civil society regarding broadband, although this can be skewed in favour of Telkom, the fixed-line operator; Neotel, the new fixed-line second national operator (SNO); and Vodacom, in which the government had indirect shareholdings through parastatals. The government also listens to think tanks (Research ICT Africa), as well as research work done by the Association for Progressive Communications (APC).

Telkom is South Africa's "largest integrated communications company", holding the "dominant backbone".[106] Telkom provides internet connectivity on a fixed-line or mobile basis primarily by ADSL. Other mobile operators are deemed powerful players when considering access because of the nature of Telkom's inability to deliver reasonable prices on fixed lines.[107] Some argue that this is the fault of the government for preserving Telkom's monopoly for so long instead of enabling competition. The Telecommunications Act is responsible for this.

The main mobile networks are Cell C, Telkom Mobile, Vodacom and MTN. They provide wireless 3G broadband access to the internet. The two smaller mobile operators, Telkom Mobile and Cell C, have finally been able to put pressure on Vodacom and MTN, bringing prices down.[108]

Neotel, the second fixed-line operator, was established in 2006 as the main competitor to Telkom. In 2007, Dark Fibre Africa emerged and installed open access ducting infrastructure, meaning anyone with a licence can run a fibre optic network.[109] First-tier ISPs in South Africa include Internet Solutions, MTN Business Solutions, MWEB and Telkom.

Civil society

Generally speaking, civil society has not been very influential in ICT policy over the last two decades. There is occasionally opportunity for civil society to contribute in ICT policy review; however, it is quite limited and it is questionable whether it has an impact on the final results. This

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[106]Gillwald, A., Moyo, M., & Stork, C. (2012). Op. cit.
[107]Interview with Ant Brooks.
[108]Gillwald, A., Moyo, M., & Stork, C. (2012). Op. cit.

[109]Ibid.

is partly because civil society organisations lack the resources to engage with the vast number of different entities and processes they would need to in order to make a meaningful contribution.

ISPA used to include issues raised by civil society in its submissions to parliament, but made the decision to stop trying to raise these sorts of issues and focus solely on industry issues that affect its members.[110]

The Right2Know Campaign has been actively involved in advocacy around the Protection of State Information Bill – commonly referred to as the "State Secrecy Bill" – since 2010, but its campaign has broadened to include other issues related to freedom of information as well.[111]

3.4 Multi-stakeholder governance

In South Africa, there is little room for civil society to participate in national-level decision making on global internet governance. During WCIT, there was no civil society consultation. Civil society was left in the dark as to what would happen there, reliant mainly on the international media and social media coverage of the events. As one local commentator noted, "The DoC is not well known for its ability to work with stakeholders, nor to take their opinions to heart." He said he feared Minister Pule would endorse the Russian and Chinese proposals "for no reason other than 'fraternal friendship' and without any understanding whatsoever of the consequences."[112]

Substantive engagement with the government is likely to be more fruitful at the level of national internet policy. There, multi-stakeholder practices are at least formally stronger – with departmental broadband colloquiums and broadband strategy consultations. In this light, broadband is likely to be the biggest policy hook for the government and for civil society. The government understands it and makes good policies, although implementation is poor and inconsistent. In 2008, the government even had to be taken to court in order to implement broadband policies under the Electronic Communications Act, allowing value-added service. If South African civil society had the resources to initiate consultation and put pressure on the government to consult with them, they probably would support the idea of multi-stakeholder participation. But it would be hard work, and it is unlikely that the government would commit to changing its stance based on these consultations. Civil society has generally challenged government when it comes to any suggestions to control content on the internet (e.g. as in the saga related to the painting of President Zuma's genitalia). But, when it comes to stances against global capital and large internet companies, progressive civil society would support the government. South African organised civil society tends to be both critical of the government and of multinational corporations.

3.5 Summary of main findings

The current communications minister is seen to be proactive, and there is some hope that he will manage to steer the ICT sector in the right direction. He has supported at least two independent

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[110]Interview with Ant Brooks.
[111]www.r2k.org.za/about/what-we-do
[112]Patel, K. (2012, December 5). Internet governing rights: World powers butt heads. *Daily Maverick*. www.dailymaverick.co.za/article/2012-12-05-internet-governing-rights-world-powers-butt-heads/#.U1-IPq1dWzU

probes, affecting the SABC and the activities of the universal access agency, USAASA. However, a secure space for multi-stakeholder engagement remains to be built. Businesses are seen to be influential in the local and international policy spaces. However, while ISPA offers a voice for small businesses, there are still concerns over the marginalisation of some of its smaller members. ICASA remains weakened in its regulation of business, especially in the mobile sector, due to both capacity and leadership constraints. While it is felt that there is little room for civil society organisations to participate in multi-stakeholder governance processes, civil society has been effective in forming advocacy coalitions, allowing for broad-based participation in lobbying against negative policy directions, such as the State Secrecy Bill.

4. Civil society

4.1 Civil society active on internet issues

South Africa does not have an organisation dedicated to internet rights. However, the country has a lively civil society sector that acts as an important check against unrestrained use of state and private power. An important positive development has been the recent formation of civil society coalitions around specific issues. The two most prominent coalitions are:

- SOS: Support Public Broadcasting Coalition, a civil society coalition which was formed in 2008 and which focuses on addressing the multiple crises at South Africa's public broadcaster, the South African Broadcasting Corporation (SABC). It also lobbies for citizen-friendly policies, laws and practices for public and community broadcasting, and advocates for an effective and independent communications regulator.[113] The Coalition has made South Africa's digital migration process part of its core work, and is one of the few civil society organisations actively involved in the lobbying around the process.[114] SOS has also made a submission on the draft Local and Digital Content Development Strategy.

- Right2Know (R2K) Campaign, another civil society coalition, established in 2010 to campaign for a Protection of State Information Bill that meets what it refers to as its "seven-point freedom test". The campaign has been successful in raising public consciousness about the bill and mobilising opposition to it. It has also managed to ensure significant legislative amendments to the bill. More recently, R2K has also begun to conduct advocacy on broader issues relating to the transparency and accountability of the security cluster. In the context of this advocacy, R2K has argued for greater oversight of monitoring and interception of communications, especially foreign intelligence signals.[115] R2K does not have any dedicated activities, however, on internet rights.

Other South African-based organisations taking up issues that touch on internet rights are as follows (not an exhaustive list):

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[113]www.supportpublicbroadcasting.co.za/about

[114]SOS: Support Public Broadcasting. (2011). Policy submission on the digital dividend. www.supportpublicbroadcasting.co.za/library/entry/sos_-_policy_suggestions_on_the_digital_dividend

[115]Right2Know Campaign. (2012). Submission to the Ad-hoc Committee of the National Assembly on the General Intelligence Laws Amendment Bill. www.r2k.org.za/2012/03/16/r2k-submission-on-the-general-intelligence-laws-amendment-bill

- Media Monitoring Africa, which promotes quality media in Africa from a rights-based perspective through acting as a watchdog of media ethics and freedom. It undertakes advocacy on these issues as well, and includes online media rights in its work.[116]

- The Freedom of Expression Institute (FXI), which was formed in 1994 and whose mandate is to fight for and defend freedom of expression, oppose censorship and fight for access to information and media diversity. The FXI has on occasion taken up cases of online censorship.[117]

- Section 16, which advocates for law reform in relation to freedom of expression and access to information, including online.[118]

- Gender Links, which focuses on promoting gender equality, especially through the media, in the SADC region and comments on and publicises issues around gender equality and media and ICTs.[119]

- The South African National Editors' Forum (Sanef), an association of editors and journalism educators. It engages in advocacy on media freedom issues, which may also extend to online media.[120]

- While less public than Sanef, ISPA and WASPA also undertake advocacy on behalf of their members on issues affecting internet freedom, and were active in making representations on amendments to the Films and Publications Act that they felt threatened the rights of their members.

- The Open Democracy Advice Centre (ODAC), which conducts litigation and advocacy around the Promotion of Access to Information Act and the Protected Disclosures Act. ODAC has also been instrumental in organising civil society participation in the Open Governance Partnership, and in that context has raised the need for the South African government to embrace open data principles.[121]

- The Alternative Information Development Centre (AIDC), which was formed in 1996 to promote social justice in South Africa's then newly established democracy. It ensures the dissemination of progressive alternative perspectives through participatory peoples' media including social media, and has also undertaken advocacy on issues affecting internet rights.[122]

- The Southern African NGO Network (SANGONeT), which provides non-governmental organisations with a range of tools and services, but is not really involved in advocacy on South African internet rights. SANGONeT publishes an online newsletter focussing on the NGO sector called NGO Pulse.[123]

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[116]www.mediamonitoringafrica.org/index.php/about

[117]fxi.org.za/home

[118]www.sectionsixteen.org/newsletters/index.cfm?
y=category_home&company=1&subsection=9&newsletter=0

[119]www.genderlinks.org.za/page/about-us

[120]www.sanef.org.za/about

[121]opengovpartners.org/za

[122]www.aidc.org.za/index.php?option=com_content&view=article&id=47&Itemid=76

[123]www.ngopulse.org/about

- The LINK Centre is based at the University of the Witwatersrand, conducts research and training on ICT-related issues, and offers post-graduate courses. It also undertakes advocacy in the form of submissions to various fora.[124]
- The South African chapter of Creative Commons popularises the use of creative commons licences, aimed at protecting copyright in a way that acknowledges the need for access to information in the digital era.[125]
- CIVICUS: World Alliance for Citizen Participation, headquartered in Johannesburg, South Africa, deals with a range of rights issues, from creating an enabling environment, to participatory government, to legitimacy, transparency and accountability. Part of this advocacy outreach involves consideration of the role of ICTs in these processes.
- Research ICT Africa conducts research, training and capacity building on ICT-related issues in 20 African countries, including South Africa, and undertakes advocacy on the ICT policy environment in South Africa.[126]

There are several online sites devoted to digital media issues, and others that touch on digital media-related issues, such as MyBroadband.co.za, ITWeb, The Media magazine, Free African Media, Hellkom and the Daily Maverick. These online sites are important repositories of information and analysis on issues affecting the internet, and keep their readers informed and engaged in issues that affect their rights. For the most part, these sites have not become engaged in direct advocacy in support of internet rights, but have the potential to do so.

4.2 Civil society who could be activated

Given the broad-ranging yet specific concerns of many of the civil society stakeholders, it is recommended that a coalition be formed over the issue of internet rights. This should at least include Media Monitoring Africa, FXI, SANGONeT, ISPA, WASPA and MyBroadband.co.za. Research-based initiatives such as the LINK Centre and Research ICT Africa could offer policy input into the deliberations of this coalition. However, rather than form a separate coalition, activists should seek to group their concerns under already-existing advocacy groups, such as the Right2Know Campaign, which is already showing strong interest in internet rights issues.

4.3 Summary of main findings

This brief overview shows that civil society and the media space are rich with activity on internet-related issues. However, the fact that serious incursions have been made into internet freedom suggests that civil society advocacy on internet rights has not been sufficiently robust, and that the advocacy that has taken place has been piecemeal, relatively uncoordinated and of limited impact on key issues. In spite of the proliferation of IT-related sites, reflecting the complexity and breadth of the ICT sector, there has been little public education work on the impact of these creeping erosions of internet freedom. This is in contrast to legacy media freedom issues, where threats to this freedom have been met with strong reactions from civil society, and hence concessions by the

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[124] link.wits.ac.za

[125] www.creativecommonsza.org

[126] www.researchictafrica.net/about.php

government and parliament. No ongoing monitoring is taking place of decisions being made by the Film and Publication Board or the Equality Courts or ISPs, for instance, to assess their impact on online freedom. As a result, it is impossible to assess the true import of the problems outlined in the earlier sections. It has been shown that coalitions work well in South Africa when it comes to advocacy in rights-related issues, especially if they have a mass base, and what should be considered is the possibility of a coalition-based approach to advocacy on internet rights in South Africa.