Impact of cyber security & cybercrime laws enacted by SADC governments on freedom of expression and digital rights

Presenters: Dianne Hubbard and Frederico Links

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THE QUESTION: Are cybercrime laws being applied to silence or inhibit speech in the SADC region?

- DIFFICULT AREA TO RESEARCH:
  - single cybercrime law
  - multiple overlapping cybercrime laws
  - cybercrime chapters in Penal Codes
  - scattered cybercrime provisions in multiple laws.
- Became clear that cybercrime provisions have to be considered CONTEXTUALLY alongside other legal tools & frameworks.

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METHODOLOGY

1. **Desk research**

   supplemented by input from some virtual interviews

2. **Focus on primary sources of law**

   inaccuracies often found in secondary sources

3. **Language shortcomings**

   laws available only in French or Portuguese examined via online translation tools

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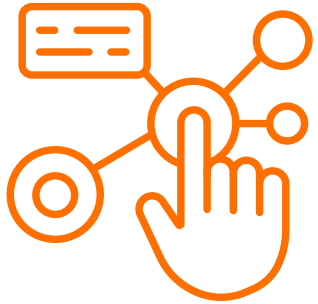
KEY INTERNATIONAL SOURCES



1. **Convention on Cybercrime (Budapest Convention), 2001**

Additional Protocol on criminalization of acts of a racist and xenophobic nature committed through computer systems, 2003

2. **African Union Convention on Cyber Security and Data Protection (Malabo Convention), 2014**
3. **SADC Computer Crime and Cybercrime Model Law, 2012 (under revision)**

- recommended criminalization of "insults" on basis of race, color, descent, national or ethnic origin or religion = possibly too broad & subjective as approach to hate speech.
- absence of sufficient public interest defenses & other safeguards for journalists, whistleblowers, etc.

AREAS OF EXAMINATION

1. **Context for media activities**
   - registration requirements & fees for print / broadcast / online media
   - powers of regulatory bodies to influence content
   - potential for closing down publications/broadcasters
2. **Case studies: What laws are being used in practice against journalists or being used to stifle expression?**
3. **Constitution: What protection for freedom of expression and media laws and how applied in practice?**

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4. Cybercrime provisions

- **Technical offences:**

  - crimes where computer or information system is the **object** of the crime, such as hacking or spread of malware.

  - crimes where a computer is used as a **tool** to facilitate the crime, such as online fraud or identity theft.

- **Content-related offences:** such as use of computers to spread child pornography, intimate images without consent, hate speech, racism and xenophobia or “fake news”.

5. State surveillance

- SIM card registration / registration of internet subscribers.
- legal authority for interception & retention of communications content or metadata (which can be equally invasive of privacy).
- legal authority for confiscation of communications devices.

6. Control of internet

- State power to shut down internet totally or selectively.
- State power to throttle at key political moments.

7. **Take-down provisions: mechanisms for quick removal of online content, often without the involvement of any State decision-maker**

- push online platforms to be overly cautious, pre-emptively removing content that is not actually illegal.
- force persons who posted online content to prove that it does not infringe any rights, with no right to notice or appeal in some instances.
- leads to use of algorithms that may result in removal of legal communications.

8. **Election laws concerning media & communications**

- ONLY for countries with elections in 2023-24.

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KEY FINDINGS

- **Content-based criminal offences** are the ones most often employed to inhibit speech, and these are most often contained in laws other than cybercrime law, such as Penal Codes.
- Cybercrime laws often have provisions **prohibiting access to or use of materials** originally obtained via illegal access to computer systems.
- **Take-down procedures** which do not involve judicial decision-makers are of concern, although these do not seem to have inspired much discussion or debate in the region to date.
- Prior restraints on speech tended to take the form of **discretionary mechanisms** for suspending media activity or revoking media licenses.

KEY FINDINGS

- There is a need for attention to the **independence of regulatory bodies** – particularly where they have significant degrees of discretion (such as the discretion to suspend or cancel media licenses).
- Where there is political will to inhibit speech, legal **tools will be found**.
- One area that could be further explored is the power of the government to **close down internet access**, either partially or completely.
- Cybercrime and related media laws are **rapidly evolving** across the region, with many new developments.
- While most SADC member states have since the early 2010s, and even earlier, introduced and implemented
- Cyberspace, cybersecurity and/or cybercrime related laws: some – such as Namibia and Lesotho – are still in the process of finalizing substantive frameworks.

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KEY FINDINGS

- All SADC member states already had or have a **range of problematic laws and regulatory frameworks** on their statute books that can be or have been used for repressive purposes.
- Over the years, the **primary tools** used to clampdown on the media, as well as civil society and political opposition in countries across the region, have been **criminal defamation or insult provisions**, as well as decency, national security or public order provisions, among others, in **criminal procedure laws or penal codes**.
- Concerningly, in many instances where **repressive state practices** have been recorded and reported, such practices have occurred as a result of law enforcement and/or state security actors having acted extrajudicially.

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KEY FINDINGS

- Similarly, media freedom and free expression violations have occurred where **law enforcement and/or state security overreach** have been enabled by poorly developed or underdeveloped law or regulatory provisions.
- At the same time, across the region human rights and public **oversight safeguards or guardrails**, and transparency and accountability mechanisms, where such exist, are generally also **poorly developed or underdeveloped** in law and regulation.
- The **enabling of state surveillance abuse and/or overreach has become a primary concern**, particularly for media freedom advocates, in the context of cybersecurity and/or cybercrime law and regulatory crafting and drafting in the SADC region.

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FOR JOURNALISTS & MEDIA

- Journalists and the media are encouraged to continuously and persistently focus the glare of public scrutiny on law and regulatory crafting and implementation that threaten freedom of expression and media freedom.
- Specifically, journalists and the media in general are encouraged to **proactively engage with law, policy and regulatory crafting and drafting processes** that could impact media freedom and freedom of expression generally.
- Journalists and the media are encouraged to continuously and persistently contribute to **raising public awareness and knowledge of the content and potential impacts of state-driven actions** in the realm of cyberspace law and regulation.
- Regionally, journalists and media organizations are encouraged to form effective **information and advocacy sharing networks** that engage at the highest levels with regional governments and international stakeholders on media freedom issues in the digital age.

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FOR CIVIL SOCIETY

- **Donor programming and advocacy efforts** should focus on bringing laws regulating freedom of expression and media freedom, and practice thereof, in line with best practice guidance and standards, making them compliant with international and continental instruments that speak to protecting and enhancing such freedoms.
- Domestic and regional civil society actors are encouraged to form **alliances and collaborations with local and regional media actors** to raise local and regional public awareness and knowledge of the content and potential impacts of state-driven actions in the realm of cyberspace law and regulation.
- Similarly, human rights and civil society actors, both domestically and regionally, are encouraged to continuously and persistently focus the glare of public interest advocacy on law and regulatory crafting and implementation that threaten freedom of expression and media freedom.

FOR SADC GOVERNMENTS

- Laws regulating freedom of expression and media freedom should be brought in line **with best practice guidance and standards** and reflective of compliance with international and continental instruments.
- SADC member states are encouraged to look to **international and continental best practice guidance** and examples, such as the Malabo Convention, in the context of domestically legislating for cyber security and cybercrime – while also being cognizant of some of its shortcomings and considering additional safeguards.
- In this regard, states are also encouraged to look to the **Declaration of Principles on Freedom of Expression and Access to Information in Africa** as guidance in law, policy and regulatory crafting and drafting.

FOR SADC GOVERNMENTS

- States are explicitly encouraged to build out, where necessary in cyber security and cybercrime laws and regulatory frameworks, meaningful and **effective public and judicial oversight** and transparency mechanisms as necessary guardrails.
- Similarly, in the context of elections, states are encouraged to give life to the Guidelines on Access to Information and Elections in Africa, both legislatively and practically.
- SADC member states are encouraged **to revisit and review criminal defamation and insult provisions** (which are often remnants of colonial laws), that generally adversely impact media freedom, in their criminal procedure and penal codes with a view to bringing such measures in line with best practice.