Compatibility of African regional treaties & Conventions with international best practice on Internet Governance

- Area: ROADMAP FOR THE FURTHER EVOLUTION OF THE INTERNET GOVERNANCE ECOSYSTEM
- Entitled by: Arthur Gwagwa
- Region: Zimbabwe
- Organization: Zimbabwe Human Rights Forum
- Sector: Civil Society
- Keywords: African region, Conventions and treaties, right to privacy, digital rights, international best practice

Abstract

The African charter on Human and People's Rights does not protect the right to privacy, either online or offline, and neither does it protect wider digital-based rights. Despite the incorporation of such right in some African national constitutions, and pronouncements by courts such as South African Supreme Court, the African supra-natural bodies are significantly lagging behind developments in other regions. Attempts to plug this gap through the draft African Convention on Cybercrime have stalled due to lack of consensus. Further, the draft convention will not be a panacea to the presenting problems, mainly because it contains a number of flaws and did not benefit from multi-stakeholders' consultation. The above scenario calls for global effort in supporting African efforts to be an equal party in the global Internet governance ecosystem.

Document

The African Charter on Human and Peoples' Rights is comprehensive in its coverage and protection of human rights, in particular civil liberties relating to the rights to receive information, express and disseminate opinions within the law. However the expressly guaranteed right to “privacy”, however, is notably absent. The situation is made worse by the ineffective of remedies caused by the Commission’s failure to effectively implement

decisions or recommendations in cases in which a state has been found to have violated a guaranteed human right.

The South African Constitutional Court and the South African Human Rights Commission (SAHRC)'s advanced best practice in securing the right to privacy online demonstrate that, with global support, the African Commission's lack of power to ensure redress or punishment for human rights violations does not present an insurmountable obstacle.

In view of the absence of the right to privacy in the African Charter, **in** 2009, the Extra-Ordinary Conference of African Union Ministers in charge of Communication and Information Technologies resulted in the adoption of the Oliver Tambo Declaration, directing the African Union Commission to develop a convention on cybercrime, jointly with the United Nations Economic Commission for Africa.

This Convention seeks to establish an integrated regional legal framework for cyber security, which simultaneously protects the fundamental rights and freedoms of persons affected.

This convention was to take into consideration the African context and adhere to the legal and regulatory requirements on electronic transactions, cyber security, and personal data protection. The Declaration recommended that the Convention be adopted by 2012.

Following this request, a process was undertaken to draft a cybercrime law. Following first drafts in 2011 and 2012, a final draft of the AU Convention on Confidence and Security in Cyberspace (aka AU Convention on Cyber Security, “the AUCS”) was put forward by the African Union in 2013 and scheduled for signing in January 2014 at the next Africa Union Summit. The signing was postponed.

Despite setting the protection of the rights of persons as its second objective, dedicating a section to the *"right of the person whose personal data are to be processed"*, some provisions of the draft challenge and/or limit those rights, liberties and protections directly, such as;

- Disclosure of identity, which is a threat to anonymity

- Reliance on national legislation which in itself is often unreliable

- Incorporation of vague notions of public interest and state security

- Unlimited state power to issue search and seizure

- A further problem with the Convention is the general lack of consultation with non-governmental actors in the drafting process, which has attracted considerable criticism.

NetMundial Forum therefore offers an opportunity to ensure that African regulatory framework which is currently shambolic benefits from international best practice and comparative experiences that exhibit such best practice thus brining it into line with other regional arrangements such as the European Convention on Human Rights and the Inter-American Convention on Human Rights.

Having researched on this issue and presented papers at the Human Rights Council, RightsCon and having introduced the subject of digital technology and privacy, the Zimbabwe Human Rights Forum is equipped in assisting the process of aligning African regional practice with international best practice.