

CAN THE CONSTITUTION SERVE AS A BLUEPRINT FOR AI REGULATION IN SOUTH AFRICA?

Category: Technology Law

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In navigating the complexities of AI regulation, South Africa can draw inspiration and guidance from its Constitution. The Constitution embodies the democratic values of human dignity, equality, freedom, and the rule of law. [\[1\]](#)

In an era defined by rapid technological advancements such Artificial Intelligence (“AI”), South Africa, like many other nations must consider the implications, challenges and opportunities of AI adoption.

This includes assessing its impact on various sectors such as healthcare, agriculture, education, and the broader economy and society. Developing a national strategy, frameworks or standards for AI regulation is an important step to ensure responsible and ethical development of AI.

The Department of Communications and Digital Technologies (“**DCDT**”) published a draft National AI Plan (“**AI plan**”) as part of its commitment to address the advancements in AI. The AI plan highlights the crucial role of policymakers and regulators in aligning the use of AI with regulatory goals, such as stability, consumer protection, integrity, and competition.[\[2\]](#) It emphasises the need for policymakers to encourage AI innovation across various sectors while identifying and mitigating emerging risks associated with AI deployment.[\[3\]](#) Furthermore, the AI plan highlights a contextual and proportional approach to regulation, along with enhancing data governance and implementing disclosure requirements for transparency.[\[4\]](#) The overall goal is to establish mechanisms that enhance transparency, accountability, and trust in AI technologies[\[5\]](#). While the AI plan gives direction on what policy makers and regulators should consider in AI regulation, it is important that South Africa’s approach to AI regulation is suited to its unique environmental, social and economic conditions and needs.

Developing and deploying responsible and ethical AI is vital for enabling universal confidence, inclusivity, trusted adoption, ethical advancement and technological prosperity^[6]. The Constitution of the Republic of South Africa, 1996 (“**the Constitution**”) serves as a guiding framework for AI regulation. It embodies the principles of democracy, equality, human dignity and the rule of law. These foundational principles provide a solid foundation for forming a regulatory framework that ensures AI technologies benefit the society while upholding fundamental rights and values.

An issue highlighted in a report by Access Partnership titled ‘AI in Africa: Unlocking Potential, Igniting Progress’ is that AI adoption in Africa has the potential to exacerbate the current social and digital divides.^[7] At the centre of South Africa’s constitutional principles lies a commitment to human dignity and equality and as AI technologies become more prevalent in sectors like healthcare, education, and the military, it is important that these technologies do not reinforce or worsen existing inequalities or discriminate against marginalised communities. The Constitution’s provisions against discrimination on the grounds of race, gender, religion, or other grounds serve as a guide in developing AI regulation that promotes fairness and inclusivity.^[8]

Furthermore, the right to privacy as enshrined in section 14 of the Constitution underlines the importance of safeguarding individuals’ personal information; in an era where AI technologies rely on vast amounts of personal information, protecting individuals’ personal information is paramount.

Data protection laws such as the *Protection of Personal Information Act 4 of 2013* (“**POPIA**”) can ensure that AI technologies respect and promote individuals’ privacy rights.

The principle of accountability^[9] is another constitutional value that is crucial in AI regulation, especially considering the potential for automated decision-making processes in AI-driven environments which can mask responsibility and exacerbate biases. Highlighting accountability and transparency is crucial in AI regulation. Holding developers, deployers and users of AI systems accountable for their actions can mitigate risks and promote trust in AI technologies.

The Constitution provides the right of access to courts^[10] and emphasises the importance of ensuring justice and establishing mechanisms for resolving disputes before a court or other forums.

Users of AI systems may suffer harm caused by malfunctions, for example an autonomous vehicle (self-driving vehicle) may fail to detect a pedestrian crossing the road, resulting in an accident. As such, incorporating such a provision that establishes mechanisms for resolving disputes related to AI issues can enable individuals who have suffered harm to seek redress for AI-related issues in accordance with constitutional principles of justice and fairness.

As South Africa navigates the complexities of AI regulation, it can draw inspiration and guidance from its Constitution. By aligning regulatory efforts with the constitutional values of democracy, equality, human dignity, and the rule of law, South Africa can ensure the adoption and deployment of responsible and ethical AI that benefits society while upholding individuals’ fundamental rights and freedoms. Incorporating such values and rights in AI regulation can promote accountability, inclusiveness, transparency and reliability.

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[1] Section 1 and 7, *Constitution of the Republic of South Africa, 1996*

[2] South Africa’s Artificial Intelligence (AI) Planning: Adoption of AI by government 2023, page 19

[3] South Africa’s Artificial Intelligence (AI) Planning: Adoption of AI by government 2023, page 19

[4] South Africa's Artificial Intelligence (AI) Planning: Adoption of AI by government 2023, page 19-20

[5] South Africa's Artificial Intelligence (AI) Planning: Adoption of AI by government 2023, page 20

[6] South Africa's Artificial Intelligence (AI) Planning: Adoption of AI by government 2023 page 39

[7] Access Partnership 'AI in Africa: Unlocking Potential, Igniting Progress A working paper' 2023 available at

<https://cdn.accesspartnership.com/wp-content/uploads/2023/09/Access-Partnership-AI-in-Africa-A-working-paper-Single.pdf?hsCtaTracking=6a792288-3a7d-4f03-899e-0ccb862ee288%7C50405a06-2969-4236-911d-435379a83ac2>

[8] Section 9, *Constitution of the Republic of South Africa, 1996*

[9] Section 1(d), *Constitution of the Republic of South Africa, 1996*

[10] Section 34, *Constitution of the Republic of South Africa, 1996*