



STATE OF THE INTERNET KENYA 2017





Bloggers
Association
of Kenya



The Bloggers Association of Kenya (BAKE) is a community association of Kenyan bloggers and content creators that promotes online content creation & free expression in Kenya. Through iFreedoms Kenya, we promote digital rights and media rights in Kenya through archival of important events, research, public interest litigation, policy intervention, advocacy and training.

BAKE is grateful to the partners and individuals who offered technical, advisory and financial support that made this report possible. This report was produced as part of BAKE's iFreedoms Kenya program.

State of the Internet in Kenya 2017 Report

Published by the Bloggers Association of Kenya (BAKE). February 2018



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INTRODUCTION:

2017 was an eventful year for Kenya. Politically, the Supreme Court in the presidential petitions made two significant rulings, one on the utility and respect of technology in enhancing the rule of law and the second one on Access to Information.

On the freedoms front, the High Court found the clause in the penal code, ‘undermining the authority of a public officer’ as unconstitutional, thereby ensuring restrictions to freedoms are further reduced. It is important to note that there were fewer arrests of bloggers and influencers in 2017, as compared to 2016.

We are proud to be releasing the third consecutive report documenting the digital rights landscape in Kenya. In the last one year, we have made significant footprints in promoting digital rights. For instance, in a partnership with the Media Legal Defense Initiative (MLDI), we trained a pool of lawyers in Mombasa and Nairobi on the law and the internet, a first of its kind in the country.

Apart from documenting various issues that took center stage in the last year, this report is also serves as a learning document

in understanding the legal and policy environment that informs and promotes freedom of association, freedom of the media, freedom of information, freedom of expression and access to information in Kenya.

In making this document possible we are immeasurably grateful to the partners; individuals and institutions that made the activities during the year possible. They include the Media Legal in Defense Initiative (MLDI), the Collaboration on International ICT Policy in East and Southern Africa (CIPESA), Internews, Access Now, Bill & Melinda Gates Foundation, Mugambi Laibuta, Demas Kiprono and Ephraim Kenyanito among others.

This report would not have been possible without the input of BAKE staff, specifically Kennedy Kachwanya (Chairperson), Jane Muthoni (General Manager) and Shitemi Khamadi (Programs Manager). We are also grateful to Renee Kamau, the report’s lead researcher.

James Wamathai,
Nairobi, February 2018



COUNTRY CONTEXT:

Politics dominated 2017, making for an exhilarating yet volatile year. The protracted election timeline put a strain on the country. Over just three months, Kenya witnessed a general election, its subsequent invalidation by the Supreme Court, and a fresh Presidential Election – in which the opposition leader refused to participate. These events were punctuated by a beleaguered election management body, attacks on the credibility of the election process by the opposition, attempts by the government to enact retrogressive electoral amendments, targeting of civil society organizations, not to mention an economic boycott, protests and deaths.

Right from the start of the electioneering period (which was essentially set in motion in January) and throughout the events of the last few months of 2017, the socio-economic environment was under immense stress. In a survey conducted in December, it was found that three quarters of Kenyans felt that 2017 was worse than the previous year, as it was characterized by a deterioration of the political climate, economic conditions, employment prospects, cost of living and internal security¹.

Apropos of access to the Internet, that it remained open may be attributed to many factors according to one pundit². On the one hand, there was concerted advocacy by digital rights groups against a shutdown. This included sustained online campaigns such as #KeepItOn which was employed to create awareness and pressure the government to commit to an open internet³. In addition, training workshops conducted by BAKE on digital security, the Internet and the law around the country contributed to the discourse.

The expert⁴ posited that another reason the Internet could have remained open was because the government was also using the Internet to serve the state's communication interests. The 2017 campaign period saw a spike in media manipulation, over sensationalised stories, negative campaigning, disinformation and fake news. Content such as negative campaigning could easily be traced to the two main political camps⁵.

The review of the legal environment demonstrates the role of the judiciary in advancing the rule of law and protecting fundamental rights and freedoms.

On matters election, the Supreme Court considered the deployment of election technology (admission of eligible voters and biometric identification, electronic transmission of the tabulated results) as well as legal issues regarding computer forensics and hacking of election technology equipment. It held that the irregularities and illegalities observed, specifically the failure to transmit all the results electronically as failure to adhere to the law, affected the result of the elections, and impugned the integrity of the same. The Court subsequently declared the August 8 election “invalid, null and void” in a momentous judgement, earning it high praise as a democratic breakthrough. It also cemented the right of access to information due to its compliance with freedom of information requests.

Similarly, the High Court suspended of the controversial *Election Laws (Amendment) Bill, 2017* pending the determination of the case challenging its legality in 2018. The High Court also delivered progressive judgements for the protection of the right to free speech. The Court found the provisions on criminal

1 <https://www.standardmedia.co.ke/article/2001264363/why-2017-was-a-bad-year-for-kenyans>

2 <https://medium.com/@gracelouisebomu/could-fake-news-have-saved-kenya-from-an-internet-shutdown-e9f6820f2fe6>

3 <https://www.ifree.co.ke/2017/08/bloggers-rationalized-website-domains-can-deleted/> and <https://www.ifree.co.ke/2017/10/internet-shutdowns-take-centre-stage-internetfreedomfrica-forum/>

4 Grace Bomu, an Open Technology Fund Fellow at the Berkman Klein Center (<https://cyber.harvard.edu/events/2017/10/Mutungu>)

5 <https://medium.com/@gracelouisebomu/could-fake-news-have-saved-kenya-from-an-internet-shutdown-e9f6820f2fe6>



defamation and undermining the authority of a public officer to be unconstitutional in *Jacqueline Okuta & Another v AG & 2 others* and *Robert Alai v AG and another* respectively.

A number of legislations and regulations came into force in 2017, and the reception by ICT stakeholders was varied. The much-anticipated Computer and Cybercrimes (2016) law was welcomed by most; the *Draft*

Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks (2017) and the Film Classification Board's "*Statement on Children Television Programmes Promoting Homosexuality in Kenya*" both had mixed reactions; and the reintroduction of the *Information Communication Technology Practitioners Bill (2016)* was vehemently opposed.



ICT INDICATORS

Mobile and internet statistics:

Mobile subscriptions:

The Communications Authority of Kenya (CA) sector statistics report⁶ for the first quarter of the financial year 2017/18 (July – September 2017) revealed that the number of mobile subscriptions stood at 41.0 million up from 40.2 million reported in the preceding quarter, marking a growth of 1.9 per cent over the period. Subsequently mobile penetration rose by 1.7 percentage points to reach 90.4 per cent from 88.7 per cent recorded during the previous quarter.

The 10 most downloaded Apps in Kenya were found⁷ to be Uber, Instagram, Facebook, Branch, Facebook Messenger, Trucaller, Tala, Facebook Lite, Whatsapp and Opera Mini.

Internet statistics:

CA reported⁸ that data/internet subscriptions witnessed a growth of 4.3 per cent to stand at 30.8 million subscriptions from 29.6 million subscriptions reported the previous quarter, with mobile data/internet subscriptions contributing 99.0 percent of the total data/internet subscriptions. Subsequently, the number of estimated data/internet users grew by 12.5 per cent to post 51.1 million

users from 45.4 million users reported last quarter translating to Internet penetration levels of 112.7 per cent during the period under review.

The total international Internet bandwidth available in the country according the Communications Authority grew by 0.1 per cent to post 2,909.512 Gbps during the quarter under review from 2,906.873 Gbps recorded during the last quarter. Used capacity also registered a growth of 0.5 per cent to reach 887.187 Gbps up from 882.573 Gbps recorded during the last quarter.

Akamai's State of the Internet / Connectivity Report⁹ for the first quarter of 2017 ranked Kenya's mobile internet speeds 14th of the 130 countries surveyed.

The categories of most visited websites in Kenya were found to be: internet search engines; sports, gaming and betting websites; sites with adult content; Social Media platforms; and entertainment platforms (TV and video)¹⁰.

At the end of the period under review, the number of registered Dot KE (.KE) domain names was registered at 69,567.

The specific browsing habits and characteristics of Kenyans in 2017 according to the Consumer Barometer¹¹ were as follows:

6 <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q1%20%202017-18.pdf>

7 www.nendo.co.ke

8 <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q1%20%202017-18.pdf>

9 <https://www.akamai.com/us/en/about/our-thinking/state-of-the-internet-report/global-state-of-the-internet-connectivity-reports.jsp>

10 <https://www.youtube.com/watch?v=MZXl8m0kVlI> and <https://www.similarweb.com/top-websites/kenya>

11 <https://www.consumerbarometer.com/en/trending/?countryCode=KE&category=TRN:NOFILTER:ALL>



USER GROUPS	NUMBER OF USERS ¹²
People who access the internet	25,683,800
People who access the internet daily	18,899,400
People who use a smartphone	20,837,800
People who use a computer	10,176,600
People who use a tablet	3,392,200
People who use one screen - a computer, smartphone or tablet	16,476,400
People who use two screens - two of computer, smartphone or tablet	5,815,200
People who use three screens - computer, smartphone and tablet	1,938,400
People who access the internet at least as often via smartphone as computer	31,014,400
Average number of connected devices per person	533,060

Social Media and blogging in 2017:

According to Nendo, a Kenyan digital strategy, research and training agency, the revised number of estimated monthly active users per platform (based on smartphone penetration) as of September 2017 were:

PLATFORM	MONTHLY USERS
WhatsApp	12 million
Facebook	7.1 million
YouTube	8 million
Instagram	4 million
LinkedIn	1 million
Twitter	1 million
Snapchat	0.25 million

Increased internet penetration and mobile subscriptions as detailed above have contributed to the growth of locally generated content and the corresponding proliferation of the blogging and Social Media communities.

Relevant and prominent Twitter hashtags included #KenyaDecides and #ElectionsKE (the dedicated hashtags and emoji assigned by Twitter¹³ on the election); #DigitalGenderGap (which highlighted the low adherence to digital rights for women as regards online safety, access and affordability; #KeepItOn (which was a campaign against internet shutdowns during the election period); and #FreeSSUdan4 (which culminated in the successful release of the Kenyan nationals and their reunion with the families in December 2017)

Kenyan doctors went on strike and downed their tools for 100 days in protest of the government's failure to implement a collective bargaining agreement (CBA) signed in 2013. Medics mounted a social media campaign under the hashtag #LipaKamaTender, as a way to apply pressure on the government to honour the CBA¹⁴. The hashtag (pay like a tender) drew attention to the corruption allegations within the Ministry of Health such as the 'missing' Ksh. 5 billion¹⁵, and the tenders irregularly awarded to the President's relatives, amounting to Ksh. 200 million¹⁶. These reports of graft, juxtaposed against the poor working conditions of the

¹² Based on population of 48.46 million

¹³ <https://twitter.com/TwitterGov/status/889746689485139968>

¹⁴ <http://africanarguments.org/2016/12/23/lipakamatender-how-kenyas-striking-medical-workers-took-control-of-the-narrative/>

¹⁵ <https://www.nation.co.ke/news/Sh5bn-scandal-in-Uhuru-flagship-maternity-project/1056-3431422+9oom8z/>

¹⁶ https://www.the-star.co.ke/news/2016/10/29/uhuru-sister-cousin-were-paid-sh200m-health-cash_c1446057



medical facilities, the low pay and the long hours highlighted by the online campaign, led to the public calling for the government to honour the agreement. Using the hashtag, medical professionals also spoke of their own experiences, revealing details about their individual and institutional realities, and in doing so, also exposed the plight of medical professionals as well as the overall status of health care in Kenya¹⁷. The strike was called off in March of 2017 after a deal, which included a salary increment, was struck between the union on behalf of the medical fraternity and the government.

One hashtag which generated a lot of interest and engagement during the election was Boniface Mwangi's #StareheNiBonnie campaign for the Starehe parliamentary seat on an Ukweli Party ticket¹⁸. This was accompanied by the crowdsourcing effort under #JoinBonnie1MillionChallenge¹⁹ which was a request to his over 1 million followers to donate Ksh. 10 or more in a bid to raise a total of KES 10 million for logistics, campaign materials, media and communication.

Yet another was the #RegisterToVote, campaign driven by the State House digital team, which runs @UKenyatta, the President's Twitter account. It was accompanied by a sleek video featuring the President 'dabbing'. Many Kenyans on Twitter (#KOT), felt the President's dance was out of touch with current realities in Kenya, including the doctors' and lecturers' strikes, drought and Al-Shabaab attacks, among other crises. Counteracting the #UhuruDabChallenge, the #DabOfShame took form, and scores of Kenyans on Twitter chose to participate in the challenge, but in a negative, sarcastic way. They posted pictures that graphically

depicted a President in high spirits, happily dancing away, while his citizens continued to wallow in misery under the crises bedeviling the country²⁰. In response, the team deleted the #UhuruDabChallenge invitation, but by then, many Kenyans on Twitter had already captured screenshots of the deleted message.

On Facebook, a Mzalendo online baseline survey²¹ of regular users revealed that most were youthful and very interested in politics. In the survey conducted in November of 2016, research findings showed that over 8300 respondents had a good understanding of the current political and electoral system. This dispelled assumptions that youth online were disinterested in politics and governance. However, the same research exposed the fact that of the youth who are highly educated, they were also greatly disillusioned with the current crop of elected leaders²².

As for blogging, 2017 demonstrated that bloggers create a vast majority of the local content; be it in form of videos, blog posts, Social Media sharing and updates, and even journalistic news articles²³. As the community expands, the Bloggers Association of Kenya (BAKE) has continued to organize and empower local content creators. The rising popularity of the BAKE Awards is evidence of this. It began with 13 categories in 2011, and over 400 blogs submitted for nomination. This number has since grown to 10,000 blog submissions for 23 categories in 2017, and the inclusion of a further 3 additional categories in 2018²⁴, demonstrating the growing embrace and recognition of blogging in the country. The previous year's contest received 800,000 votes, with women bloggers being awarded the accolade in 8 categories²⁵.

17 <http://africanarguments.org/2016/12/23/lipakamatender-how-kenyas-striking-medical-workers-took-control-of-the-narrative/>

18 <https://twitter.com/bonifacemwangi/status/893766628198035456>

19 <https://twitter.com/bonifacemwangi/status/871602990704152576>

20 <http://www.nation.co.ke/oped/blogs/dot9/walubengo/2274560-3814268-75ohj7/index.html>

21 http://info.mzalendo.com/media_root/file_archive/UCL_Research_-_Press_Release.pdf

22 http://info.mzalendo.com/media_root/file_archive/UCL_Research_-_Press_Release.pdf

23 <https://www.kachwanyanya.com/2017/05/26/75081/>

24 <http://www.bakeawards.co.ke/2018/01/11/the-bake-awards-2018-submission-phase-is-now-open/>

25 <http://www.bakeawards.co.ke/2018/01/11/the-bake-awards-2018-submission-phase-is-now-open/>



Another indicator is the monetization of blogs. For instance, the blog Niaje received a substantial investment from What's Good Studios (WGS) in late 2016. WGS acquired a stake in Niaje in a reported cash and stock arrangement²⁶. Unfortunately, a similar arrangement unravelled during the same period. After a three-month partnership between Ghafla and Ringier Kenya, the collaboration came to an end in December of 2016, seeing Ghafla revert to its former website and operational structure²⁷.

BAKE has contributed to the sector by increasing the knowledge of bloggers and Social Media users on how to be safe online while creating content. Through its training workshops and fora, BAKE endeavours to make the online space better and safer by rolling out trainings across the country to ensure that online users understand how the internet and digital platforms work²⁸.

These included sessions on digital security, Internet and the Law which were held in Nairobi, Nakuru, Kisumu and Mombasa. They achieved the objective of improving participants' understanding of rights and offenses related to the Internet within the Kenyan legal context. The trainings were organized in light of shrinking rights of Kenya's digital citizens in the face of new restrictive laws and increased arraignment of individuals for expressing online opinions which authorities deem in breach of the law. Experts also advised those in attendance about communications and device protection practices including strong passwords, anti viruses, encryption (email and hard disk) and privacy settings on Social Media accounts²⁹.

BAKE, duly accredited by the Law Society of Kenya, also carried out training workshops for lawyers on Internet and the Law to empower

them with knowledge on concepts such as freedom of expression, digital rights and access to information. The training workshops which were held in Nairobi and Mombasa in late 2017 produced a pool of advocates with the necessary technical knowledge to competently represent and advise bloggers, journalists and Kenyans online on freedom of expression related matters³⁰.

Other notable developments:

As regards *Telegram*, a Kenyan software developer leveraged the 'rise of the bots revolution' and developed a bot that could perform election polls countrywide, addressing expense and time challenges experienced by market research companies³¹.

With regards to voter education, Ongair created a way to enhance discovery of political aspirants through the conversational interface on Telegram. The #UchaguziBot³² allowed voters to ask a 'bot' questions to find out which candidates were running for different positions in their county with a question as simple as, "Who is running for MP in Kajiado?" or even, "Kajiado MPs" and would be provided with a list of MP candidates in Kajiado county and anywhere else. Given that IEBC's gazetted list of candidates on their website was 438 pages long and 119 MB in size, the bot was warmly welcomed as it facilitated easy access to the list of candidates vying³³.

It is worth mentioning that, *podcasting* has arrived in Kenya. A far cry from the early 'Silicon Savannah' days six years ago when podcasts seemed to be an inaccessible medium only available to people with Apple devices, now anyone with an internet connection and smart-enough phone can tune in to be informed and entertained by people they probably know

26 <http://www.techweez.com/2016/12/09/whats-good-studios-niaje/>

27 <http://businesstoday.co.ke/swiss-media-firm-dumps-ghafla/>

28 <https://www.kachwanya.com/2017/05/26/75081/>

29 <https://www.ifree.co.ke/2017/07/training-empowers-young-bloggers-social-media-enthusiasts-internet-law-digital-security/>

30 <https://www.ifree.co.ke/2017/09/internet-the-law-training-workshop-for-kenyan-lawyers/>

31 <http://www.techweez.com/2017/06/30/Kenyan-developer-leveraging-telegram-bots-for-polling/>

32 <https://medium.com/lets-ongair/introducing-uchaguzi2017-bot-7c5907e8ecce>

33 <https://medium.com/lets-ongair/introducing-uchaguzi2017-bot-7c5907e8ecce>



personally, talking about subjects they relate to. A survey³⁴ conducted found that as of January 2017, the total number of listeners for six podcasts was 2,046.

Another significant development is the growth of vlogging in the country. A video blog or video log, usually shortened to vlog, is a form of blog for which the medium is video, and is a form of web television³⁵. Vlogging is an industry that has become popular in recent years as a form of digital storytelling³⁶. Whether undertaken as a hobby or career,

many Kenyans have taken advantage of the video-sharing sites YouTube to create content on themes such as tech, fashion and beauty, health and fitness, food and travel, parenting, lifestyle, and comedy and entertainment. Having a YouTube channel has been shown to be beneficial in that it could earn you exposure as well as an income³⁷. BAKE Awards added a category for the best vlog in 2018, allowing established vloggers to showcase their work and gain recognition by their peers and viewers for it³⁸.



THE DIGITAL RIGHTS LANDSCAPE:

Regional and international protection of online rights:

There exists a normative framework governing digital rights and freedoms at the international and regional levels, a digital bill of rights if you will. For example, on the global scale, the *Charter of Human Rights and Principles for the Internet*³⁹ identifies internet policy principles which are necessary to fulfil human rights in the Internet age. The Charter codifies freedom of expression and information on the internet; right to privacy and digital data protection; right to non-discrimination in internet access, use and governance; right to liberty and security on the internet, among others⁴⁰.

On the continent, the *African Declaration of Internet and Freedoms*⁴¹ (ADIRF) is a Pan-African initiative to elaborate on the principles which are necessary to uphold human and

people's rights on the continent and cultivate an environment that can best meet Africa's social and economic development needs and goals. The ADIRF outlines much the same human rights standards as the Charter. Other regional documents of note include the African Union Convention on Cybersecurity and Personal Data Protection.

These instruments are anchored in the core⁴² international human rights treaties such as the Universal Declaration of Human Rights of 1946, the International Covenant on Civil and Political Rights of 1966, and the International Covenant on Economic, Social and Cultural Rights of 1966⁴³. Other specialized human rights documents include the 2011 report of the UN Special Rapporteur on freedom of expression, Frank La Rue, the 2012 landmark decision by the UN Human Rights Council on human rights and the internet, the 2016 UN General

34 <https://www.iafrikana.com/2017/03/09/the-dawn-of-podcasting-in-kenya/>

35 https://en.wikipedia.org/wiki/Video_blog

36 <https://www.blog.bake.co.ke/2018/01/18/need-know-startvlogging/>

37 <https://hapakenya.com/2017/04/10/20-kenyan-youtubers-that-you-should-be-watching/>

38 <https://www.blog.bake.co.ke/2018/01/18/need-know-startvlogging/>

39 <http://internetrightsandprinciples.org/site/charter/>

40 Both instruments make specific mention of the rights of women and children as groups requiring additional protection.

41 africaninternetrights.org

42 Others include the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child of 1989, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. (Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>)

43 This also includes the Optional Protocols to CEDAW, the ICCPR and the ICESCR, both of 1966.



Assembly Resolution⁴⁴ on the promotion, protection and enjoyment of human rights on the Internet, and the 2017 report of the UN Special Rapporteur on promotion and protection of the right to freedom of opinion and expression, David Kaye⁴⁵.

Article 2 (specifically sub-articles (5) and (6)) of the Constitution state that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Digital rights in Kenya:

Mapping the country's digital rights terrain firstly entails an outline of the institutions, policies, legislations and regulations governing the ICT⁴⁶ sector, and the developments that took place between November 2016 and December 2017. The present mapping exercise also includes an exposition of the legal framework governing and/or affecting online freedom of opinion, assembly and expression, access to information and right to privacy, as well as the corresponding offences.

Kenya ICT Laws

*Draft National ICT Policy*⁴⁷ – The Ministry of Information, Communications and Technology announced that it had embarked on a review of the National ICT Policy of 2006 due to the rapid change and dynamic nature of technology, and in order to streamline it with emerging developments in the ICT sector. In January 2017 it was revealed that the review of the policy was also motivated by

the need to have more ICT companies operate at the county level and for listing in the stock market⁴⁸.

*Draft Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks (2017)*⁴⁹

– the National Cohesion and Integration Commission (NCIC) and the Communications Authority co-authored guidelines on content regulation during the election period. Seeking to quell hate speech, it stated that “all Social Media shall be written using a civilised language that avoids a tone and words that constitute hate speech, ethnic contempt and incitement to violence”. In addition, those publishing content on Social Media were obliged to authenticate the source and truthfulness of their content, to forestall misleading rumours⁵⁰.

Further, “Social Media platform administrators” would be held responsible for moderating and controlling any form of hate speech shared in their groups. It was revealed that the two bodies had sent out warnings to 21 group administrators on the same⁵¹.

A laudable move was the safe harbour offered to publishers of political content on Social Media platforms, allowing them to liaise with NCIC when unsure whether the content they want to publish is inflammatory. NCIC was required to reply to these queries within 24 hours⁵².

However, BAKE took great issue with the incompatibility of the guidelines with

44 Resolution A/HRC/32/L.20 is available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>

45 <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/06/Kaye-Report-March-2017-AHRC3522.pdf>

46 ICTs are often (mistakenly) used synonymously with computers and/or the internet. This research employs UNESCO's much broader definition. ICTs will refer to “forms of technologies that are used to transmit, process, store, create, display, share or exchange information by electronic means. [they include technologies such as] radio, television, video, DVD, telephone (both fixed line and mobile phones), satellite systems, and computer and network hardware and software, as well as the equipment and services associated with these technologies, such as video-conferencing, email and blogs.”

47 <http://icta.go.ke/pdf/NationalICTPolicy20June2016.pdf>

48 <http://www.ict.go.ke/governmentreviewing-ict-policy/>

49 https://www.researchictafrica.net/countries/kenya/CCK_Guidelines_for_prevention_of_transmission_of_undesirable_bulk_political_messages_content_via_cellular_mobile_networks_-_2012.pdf

50 <https://www.businessdailyafrica.com/economy/Social-media-hate-mongers-face-Sh1m-fine-in-NCIC-plan/3946234-3990070-10rqto9/index.html>

51 <http://www.techweez.com/2017/07/25/kenya-government-social-media-hate-speech-regulation/>

52 <http://blog.cipit.org/2017/07/18/a-review-of-the-communications-authority-guidelines-for-dissemination-of-political-text-messages-and-social-media-content/>



the *2016 Geoffrey Andare*⁵³ case which determined that an authority cannot impose sanctions on entities it does not license. Secondly, the limitations did not conform with those envisaged by the Constitution, noting that the terms “civilised language”, “intimidating” are not known in law, and have no objective and ordinary meaning. A further objection by BAKE concerned the requirement for correct identification when publishing political messages, which it termed as an affront to the right to privacy and the right to freedom of expression⁵⁴.

*Kenya (Information and Communications) Registration of SIM cards Regulations (2015)*⁵⁵ – the stated object of the regulations was to provide a process for the registration of existing and new subscribers of telecommunication services provided by telco licensees. The move was ostensibly introduced to combat fraud, money laundering and terrorism. However, some are of the view that anonymity is compromised by mandatory SIM card registration requirements. In 2017, Safaricom is reported to have begun visually documenting anyone registering for or renewing a SIM card⁵⁶. The threat to anonymity is further exacerbated by the fact that the communications regulator is granted⁵⁷ with access to service providers’ offices and records without a court order, raising concerns over the lack of judicial oversight⁵⁸.

The original regulation was reinforced by a public notice⁵⁹ issued in January 2017.

The Communications Authority listed seven precautions to be followed by SIM card owners, failure to which one would suffer a penalty of six-month imprisonment, a fine of Ksh. 100,000 or both. Later in June, the Authority announced it was considering plans⁶⁰ allowing for the sale and use of foreign SIM cards ‘to tame the misuse of foreign SIM cards in the country and will serve as a means of ensuring that all SIM cards are registered’⁶¹.

*The Kenya Computer and Cybercrimes Bill (2016)*⁶² – it sought to provide for offences relating to computer systems; and to enable timely and effective collection of forensic material for use as evidence. The bill borrows heavily from the Council of Europe Convention on Cybercrime CETS (Budapest Convention) with the aim of aligning it with international standards and streamlining international cooperation efforts. The law highlights a number of offences, some of which are already housed under the KICA. It addresses access-related offences, and also looks to incorporate more content-related offences such as cyberstalking and cyberbullying, not previously covered in existing laws⁶³. In addition, it assigns fines and jail terms for the listed offences. The bill received Cabinet approval⁶⁴ in April, and it was gazetted in June vide Gazette Vol. CXIX—No. 78⁶⁵, dated 16th June 2017. The Bill went through First Reading on October 10th 2017 and was referred to the relevant departmental committee⁶⁶.

53 *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR [Available at <http://kenyalaw.org/caselaw/cases/view/121033/>]

54 <https://www.ifree.co.ke/2017/07/statement-by-bake-on-cas-guidelines-for-prevention-of-dissemination-of-undesirable-bulk-political-sms-and-social-media-content-via-electronic-communications-networks/>

55 http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/163-Kenya_Information_and_Communications_Act__Registration_of_Sim-Cards_Regulations__2015.pdf

56 Interview with Safaricom agents, cited in Freedom of the Net report, 2017 (Freedom House) Available at <https://freedomhouse.org/report/freedom-net/2017/kenya>

57 Vide section 13, KICA, Available at http://www.ca.go.ke/images/downloads/sector_legislation/Kenya%20Information%20Communications%20Act.pdf

58 Freedom of the Net report, 2017 (Freedom House) Available at <https://freedomhouse.org/report/freedom-net/2017/kenya>

59 <http://www.techweez.com/2017/01/06/sim-card-registration-kenya-2/>

60 <http://www.ca.go.ke/index.php/component/content/category/97-statutes-regulations>

61 <https://citizenv.co.ke/business/ca-drafts-rules-allowing-use-of-foreign-sim-cards-168141/>

62 http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/ComputerandCybercrimesBill_2017.pdf

63 Mapping the Cyber Policy Landscape: Kenya Available at <https://www.gp-digital.org/publication/mapping-the-cyber-landscape-kenya/>

64 <http://www.ict.go.ke/cabinet-approves-cyber-security-bill/>

65 http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXIX-No._78_.pdf

66 http://www.parliament.go.ke/the-national-assembly/house-business/votes-and-proceedings/item/download/4049_14b580f348e9e5ea1192fdd3cdaf3d01



*The Information Communication Technology Practitioners Bill (2016)*⁶⁷ – the object of the bill was to provide for the training, licensing, registration, practice and standards for ICT practitioners. The ICT Cabinet Minister had initially opposed the Bill on the grounds that “if enacted, [it] will cause duplication in regulation and frustrate individual talents from realizing their potential.” However, the Minister, speaking in December 2017 changed his tune, stating that that the recently concluded elections shed light on several issues that needed to be addressed, “especially the unsubstantiated reports of alleged IEBC hacking by the NASA team which was sent to over 200 countries and embarrassed the country because the claims were unfounded.” He added that “it would not have been so if the government had credentials of such individuals”⁶⁸.

Other laws include the *Kenya Information and Communications Act (CAP 411A)*⁶⁹. Relevant documents are *the Ministry of Information, Communications and Technology’s Strategic Plan (2013-2017)*⁷⁰ and the Kenya National ICT Master Plan (2013/14-2017/18)⁷¹. *The Draft Kenya Information and Communications Act (Cybersecurity) Regulations 2016* and *Draft Kenya Information and Communications Act (Electronic Transactions) Regulations 2016* would create a number of Internet-specific offences and substantive regulatory obligations for Internet intermediaries and telecommunications providers⁷².

The relevant institutions/agencies are: The Ministry of Information, the Communications and Technology; the Communications Authority of Kenya; the Kenya ICT Authority; the National Communications Secretariat. These are in addition to the Computer Incident Response Team (KE-CIRT) and the Cybersecurity Committee (NKCC).

Kenya laws affecting freedom of expression, opinion and the media; and the right to access to information and privacy

The Bill of Rights – Chapter Four of the Constitution of Kenya enshrines the right to privacy, freedom of opinion, freedom of expression, freedom of the media, access to information, and freedom of association under Articles 31 – 36 respectively.

Kenya Access to Information Act (No. 31 of 2016) – it is an Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. This progressive law also provides for the protection of persons who disclose information of public interest in good faith. In addition, it provides a framework public entities and private bodies to i) proactively disclose information that they hold and to provide information on request; ii) facilitate access to information held by private bodies.

Although the law took effect on September 21, 2016, the Ministry has yet to gazette regulations on cost, time and designation of bodies as either public or private. Its implementation has been painfully sluggish. So much so that the Ombudsman is reported⁷³ to have warned private companies that they face a Ksh. 0.5 million fine and an embargo from transacting business with the national or county governments if they fail to disclose information as required, leading to companies scrambling to comply with the law. Entities obliged to make information public on request include those which receive taxpayer funds, companies which provide public services such as telcos and banks, and those exploiting natural resources such as oil and mineral wealth.

67 http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/InformationCommunicationTechnologyPractitioners_Bill_2016.pdf

68 <http://www.techweez.com/2017/12/04/ke-ict-practitioners-bill-2016/>

69 http://www.ca.go.ke/images/downloads/sector_legislation/Kenya%20Information%20Communications%20Act.pdf

70 <http://www.ict.go.ke/downloads-2/>

71 <http://www.ict.go.ke/downloads-2/>

72 <https://www.article19.org/data/files/medialibrary/38413/Kenya-Cyber-Security-and-Electronic-Transactions-Legal-Analysis-21-April-2016.pdf>

73 <https://www.businessdailyafrica.com/economy/Kenyan-firms-slow-in-enforcing-Access-to-Information-Act/3946234-3955564-126nyqy/>



As mentioned, the institution charged with the responsibility of oversight and enforcement of the right to access to information is the Commission on Administrative Justice/Office of the Ombudsman. The Commission has developed a reporting framework which is meant to guide the implementation of resolution of public complaints indicator and compliance with access to information obligations by public institutions⁷⁴.

*The Data Protection Bill (2013)*⁷⁵ – the bill is meant to give effect to Article 31 (c) and (d) of the Constitution of Kenya, and regulate the collection, retrieval, processing, storage, use and disclosure of personal data. The need for a standalone legislation governing privacy and data protection cannot be understated; yet four years down the line no progress has been made towards its enactment. Currently, there are various pieces of legislation that house provisions of privacy, such as the Consumer Protection Act (2012), and others.

There is an urgent need for its enactment owing to the changes introduced by the General Data Protection Regulation (Regulation (EU) 2016/679) which takes effect on the 25th of May 2018. Albeit a European Union (EU) regulation, the GDPR will have implications for countries like Kenya, as it will operate extra-territorially so as to apply to EU data subjects engaging with businesses domiciled within the EU, irrespective of their location. Not only do the regulations apply outside of the EU borders, they also carry very hefty fines for non-compliance. It is therefore imperative that Kenya develops comprehensive data protection legal and regulatory frameworks to ensure that cross-border transactions with the EU are not affected⁷⁶.

*The Media Council (Amendment) Act (2013)*⁷⁷ Act applies to media enterprises, journalists, media practitioners, accredited foreign journalists as well as the consumers of media services.

It should be recalled that the High Court in *Nation Media Group Limited & 6 others v Attorney General & 9 others [2016]* declared specific provisions of the Media Council Act and the Kenya Information and Communications (Amendment) Act unconstitutional. It found that section 3(2) (a) of the Media Council Act was “an unjustifiable limitation of the right to freedom of expression” and that the language in section 6(2) (c) was “couched in a manner that [was] vague and broad and that [was] likely to limit the freedom of expression”⁷⁸.

The institutions associated with the media include the Media Council and the Complaints Commission which are established by the Act, as well as the Communication and Multimedia Appeals Tribunal which was fully constituted in 2017^{79/80}.

The Media Council (Amendment) Act, 2013 states that “a person aggrieved by any publication or conduct of a journalist or media enterprise” may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered, and the remedy sought. Bloggers who fall within the definition of journalists as publishers, as well as those who fall within the category of media enterprises owing to the fact that they write news and have employees, will be subject to the law. The Act imposes a fine of not more than Ksh. 20 million on any media enterprise and a fine of not more than Ksh. 500, 000 on any journalist adjudged

74 <http://www.ombudsman.go.ke/wp-content/uploads/2017/07/7th-Edition-PC-Guidelines-3.pdf>

75 <http://icta.go.ke/data-protection-bill-2012/>

76 http://www.e-comlaw.com/data-protection-law-and-policy/article_template.asp?from=dplp&ID=1655&Search=Yes&txtsearch=issues

77 <http://www.mediacouncil.or.ke/en/mck/index.php/publications/media-laws/viewdownload/9-media-laws/30-the-kenya-information-and-communications-amendment-act-2013>

78 <http://kenyalaw.org/caselaw/cases/view/122358/>

79 <https://www.ifree.co.ke/2017/03/communication-and-multimedia-appeals-tribunal-takes-shape/>

80 In 2014, the ICT Cabinet Secretary had been estopped from appointing a chairman and members to the Appeals Tribunal and the Complaints Commission by the High Court (<https://www.nation.co.ke/news/Courtblocks-media-council-jobs/1056-2168430-vnuq1cz/index.html>)



to have violated the Act.⁸¹ The Tribunal is also mandated to hear matters brought by a journalist or media enterprise where it is alleged that actions limit or interfere with the constitutional freedom of expression of such journalist or media enterprise⁸².

The multiplicity of regulatory mechanisms is worth mentioning - two regulatory bodies are established under the different Acts; the Complaints Commission under the MCA, and the Communications and Multimedia Appeals Tribunal under the KICA. The two bodies both regulate broadcasting standards, monitor compliance and penalty directed at journalists for any opinion, views, or content of any broadcast or publication. This identical and concurrent jurisdiction may lead to administrative inefficiency and even potentially violate bloggers' and others' right against double jeopardy⁸³.

Copyright (Amendment) Bill (2017)⁸⁴ – the bill represents a conscious effort to protect the rights of copyright owners by seeking to amend the Copyright Act. In the age of the BitTorrent network, indexing sites and streaming sites, copyright owners the world over struggle to protect their copyright on digital and online platforms. Enacting laws which recognize and protect the economic and moral rights of authors, is only half the battle; enforcement is the other. For this reason, countries are looking to Internet Service Providers to uphold copyright protection given the key role they play in availability of content, Kenya included.⁸⁵ According to the memorandum of objects and

reasons, one proposed amendment to the law (Clause 19) would be the introduction of new sections 35A, 35B and 35C to provide for the protection of ISP through provisions dealing with ISP liability, safe harbour, takedown and the resultant offences.

Other relevant laws

Other legislations have ICT and/or digital rights related provisions such as *Defamation Act (CAP 36)*⁸⁶, section 4 (2) (d) of the *Preservation of Public Security Act (CAP 57)*⁸⁷, and sections 13 & 62, *National Cohesion and Integration Act (No 12 of 2008)*⁸⁸. The limitation of rights under these sections as public safety measures, which are usually invoked under extraordinary circumstances, are nevertheless used to arrest and detain journalists for work which criticizes authorities' actions or publishes unfavourable political opinions⁸⁹. One can make this deduction after closer examination of the incidents where these laws have been invoked. The evidence suggests that often, the primary interest of authorities lies much closer to stifling legitimate expression⁹⁰ than maintaining public order and safety. Another law is the *Sexual Offences Act of 2006*⁹¹ which prohibits⁹² child pornography, including its promotion and distribution.

Regarding the laws mentioned, the concerned authorities include the National Cohesion and Integration Commission, the National Intelligence Service, the Kenya Police Service, and the Office of the Director of Public Prosecutions.

81 This means that only when the bloggers are legally defined, expressed or proven to be media enterprises will the law apply. (<https://www.ifree.co.ke/2017/03/communication-and-multimedia-appeals-tribunal-takes-shape/>)

82 <https://www.ifree.co.ke/2017/03/communication-and-multimedia-appeals-tribunal-takes-shape/>

83 <https://su-plus.strathmore.edu/bitstream/handle/11071/5247/Limitations%20on%20media%20freedom%20-%20Are%20the%20current%20media%20laws%20in%20compliance%20with%20the%20constitution%20of%20Kenya.pdf?sequence=1>

84 <http://bcckenya.org/assets/documents/The%20Copyright%20Bill%202017.pdf>

85 <http://blog.cipit.org/2017/11/06/internet-service-providers-to-be-enlisted-in-fight-against-piracy-in-kenya/>

86 <http://kenyalaw.org/lex/rest//db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/D/Defamation%20Act%20Cap.%2036%20-%20No.%2010%20of%201970/docs/DefamationAct10of1970.pdf>

87 <http://kenyalaw.org/lex/sublegview.xql?subleg=CAP.%2057>

88 <http://kenyalaw.org/lex//actview.xql?actid=No.%2012%20of%202008>

89 The Internet Legislative and Policy Environment in Kenya, Kenya Human Rights Commission, 2014 Available at <http://www.khrc.or.ke/mobile-publications/civil-political-rights/34-the-internet-legislative-and-policy-environment-in-kenya/file.html>.

90 State of Internet Freedom in East Africa, 2014 (CIPESA) Available at https://www.cipesa.org/?wpfb_dl=76

91 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%203%20of%202006>

92 Section 12 of the Act, Available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%203%20of%202006>



HUMAN RIGHTS AND THE INTERNET

The regional and international instruments outlined above constitute a framework anchored in international human rights for exercising, enforcing and advancing human rights for the online environment. Internet or digital rights allow and facilitate individuals to access, use, create, and publish digital media or to access and use electronic devices, or communications networks⁹³. In addition to rights, there also exist a set of internet policy principles or implementation principles that describe features of the system which are required to support human rights⁹⁴.

The most common rights and freedoms associated with the internet are the freedom of opinion, expression, assembly and association, the media, the right to information, data protection and privacy. Internet principles govern openness, access and affordability and even security, stability and resilience of the internet. One feature of human rights is that they are interrelated, interdependent and indivisible. Therefore, when they interact, and are subsequently translated to the internet, we extrapolate provisions such as freedom from surveillance, content controls and takedowns, censorship, shutdowns, blocking and/or filtering, and user information requests.

Rights and freedoms come with corresponding responsibilities and duties. One such responsibility is that the enjoyment of one's rights must not prejudice those of another; in which case States may enact laws which limit certain rights where it is reasonable and justifiable to do so, or in the public interest⁹⁵. The need to combat terrorism, hate speech and incitement to cause violence, alarming or obscene material and fake news have oft been cited as justifications for State limitations of digital access and content.

The below analysis of the status of the internet and digital rights in the country will include a review of the exercise and enforcement of rights by users, as well as the measures, tactics and limits imposed by the government which infringe on the enjoyment of the said rights. On balance, Kenya's internet was described as "relatively free"⁹⁶ in Freedom House's most recent Freedom of the Internet report.

Freedom of Opinion and Expression Online in Kenya in 2017

Frank La Rue, former Special Rapporteur on the promotion of and protection of the right to freedom of opinion and expression provided guidance on the use of "new information and communication technologies, including the internet and mobile technologies, for the exercise of the right to freedom of opinion and expression, including the right to seek, receive and impart information and the relevance of a wide diversity of sources, as well as access to the information society for all".

The Special Rapporteur explained that any limitation to the right to freedom of expression must pass the following three-part, cumulative test:

- (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency);
- (b) It must pursue one of the purposes set out in the ICCPR, namely to protect the rights or reputations of others, or to protect national security or of public order, or of public health or morals (principle of legitimacy); and
- (c) It must be proven as necessary and the least restrictive means required to achieve

93 https://en.wikipedia.org/wiki/Digital_rights

94 IRPC Charter of Human Rights and Principles for the Internet Available at <http://internetrightsandprinciples.org/site/charter/>

95 Article 24, Constitution of Kenya, 2010

96 Kenya scored 29 out of 100 (0 being most free, 100 being least free) Available at <https://freedomhouse.org/report/freedom-net/2017/kenya>



the purported aim (principles of necessity and proportionality).

Further, any law seeking to restrict the right to freedom of expression must be applied by a body which is ‘independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application’.

Legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

In Kenya, the Constitution, at **Article 33** provides that every person has the right to freedom of expression, which includes—(a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research.

The Constitution also states that the right to freedom of expression does not extend to—propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4). In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 32 (1) on the other hand states that every person has the right to freedom of conscience, religion, thought, belief and opinion.

With the legal and human rights underpinnings in mind, below is an exposition of the exercise of the rights of freedom of expression and opinion, and government response to the same in 2017.

Hate speech:

Article 33 (2) (c) and (d) limits the right to freedom of expression where it amounts to hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination⁹⁷.

Section 13 of the National Cohesion and Integration Act (No. 12 of 2008) creates the offence of hate speech. It is defined as the use of words or behaviour that is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour, if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up. It specifies that the words and behaviour include programmes, images or plays. It further goes on to prescribe the penalty for contravention as a fine not exceeding Ksh. 1 million or imprisonment for a term not exceeding three years, or both.

Section 62 of the Act outlines the offence of ethnic or racial contempt thus: “any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race”. Should one be convicted, they face a fine not exceeding Ksh. 1 million, or to imprisonment for a term not exceeding five years, or both.

Even amidst regulatory interventions by governments and internet companies, it has become apparent that some cunning netizens have ingeniously identified loopholes to exploit and gone on to propagate inflammatory messages. Take Facebook for instance. With over 2,000 languages and dialects in use on Facebook, and even though it utilizes content moderators for its pages, it has proved impossible to flag all hateful content on the

97 Constitution of Kenya, 2010



site. Secondly, the sheer number of users on the platform versus those who report illegal content is disproportionate, leaving many posts unflagged. Lastly, it is common knowledge that some users register fake accounts and hide behind anonymous profiles to post threats and unsavoury comments which further makes it difficult to prosecute⁹⁸.

Beyond Facebook, other challenges in enforcement cited include low competence, minimal to no political will, and lack of the appropriate technology to rein in online hate speech. Further, the comprehension of enforcement officers on what precisely constitutes hate speech and its delineation with free speech is inadequate⁹⁹.

Over the reporting period, several investigations, arrests and detentions were made by the authorities over propagation of hate speech. For instance, and pursuant to the Communications Authority directive on curbing hatespeech, Paul Odhiambo, aka Amemba, a Facebook commentator, was arrested for allegedly publishing inflammatory messages on the platform. It was reported that his phones were confiscated to aid investigations over some posts aimed at propagating animosity between some communities in Busia¹⁰⁰. Similarly, Meshack Kipchirchir Korir was charged with ethnic contempt for publishing, on Facebook, a post which the police said, “was calculated to stir up ethnic hatred between Kalenjin community and the Kikuyu community”¹⁰¹.

The next month, in August, a Malindi Court allowed the police to detain a WhatsApp administrator, a Mr. Japheth Mulewa. He was accused of sharing hate messages and threatening violence against members of

a particular community in the area. His messages apparently had the potential to cause panic and threaten national security. Mr. Mulewa was detained for a period of five days to complete investigations¹⁰². Elsewhere, in Kajiado, Longton Jamil was also held in police custody on suspicion of spreading hate messages. He was the WhatsApp administrator of a group ‘Kajiado Unity of Purpose’ which the police allege he shared hate messages in it. The police said they were investigating Jamil over a post on the WhatsApp group detailing how several people were killed in the country after the announcement of presidential results. He insisted that the post was based on information provided by the Kenya Human Rights Commission on national TV stations without any alteration¹⁰³. Within the same month, Robert Alai was arrested over ‘incitement to violence’ allegations. His arrest was however, widely believed to be in connection to an article he published concerning the death of a member of the first family, accompanied with images¹⁰⁴.

Facebook user Oliviah Nyabwazi Moraira aka Kabz Nyar Kisii was in October arrested over hate speech allegations. She allegedly posted ethnically inciting words on Facebook knowing that they would promote hate between different tribes¹⁰⁵. Blogger Dennis Owino, popularly known as @KinyanBoy¹⁰⁶ was arrested and held for six hours without being told the reason for his arrest, and later released without charge¹⁰⁷.

Misinformation and content manipulation:

During the 2017 elections season, Social Media enabled opinion influences to proliferate, unfortunately leading to online manipulation

98 <https://www.businessdailyafrica.com/corporate/companies/Gap-Kenyan-law-stokes-hate-speech-social-media/4003102-4012060-9gsi41/index.html>

99 State of Internet Freedom in Kenya, 2017 (CIPESA) Available at https://cipesa.org/?wpfb_dl=254

100 <https://www.ifree.co.ke/2017/07/paul-odhiambo-arrested-publishing-inflammatory-messages-facebook/>

101 <https://www.ifree.co.ke/2017/07/meshack-kipchirchir-korir-charged-for-content-published-on-facebook/>

102 <https://www.ifree.co.ke/2017/08/whatsapp-group-admin-malindi-detained-sharing-hate-messages/>

103 <https://www.ifree.co.ke/2017/08/longton-jamil-held-kajiado-suspicion-spreading-hate-messages-whatsapp/>

104 <https://www.ifree.co.ke/2017/08/robert-alai-held-incitement-violence/>

105 <https://www.ifree.co.ke/2017/09/oliviah-nyabwazi-moraira-held-hate-speech/>

106 <https://twitter.com/KinyanBoy>

107 <http://www.monitor.co.ke/2016/10/18/dennis-owino-held-police-six-hours-without-reason/>



and, at times, overt disinformation¹⁰⁸, as Social Media is the dominant source of fake news stories. OdipoDev research revealed that Whatsapp played a major role in mass distribution of these stories, as compared to other social networking platforms¹⁰⁹. Kennedy Kachwanya, the BAKE Chairperson, attributes this to the fact that WhatsApp has a larger user base than other platforms. He also links this to both the use of bots as well as individuals whose inclination is towards sharing of posts that are relatable. Besides being more pervasive than any social network in Kenya, Whatsapp is also fast, simple, and much more intimate, compared to say Facebook or Twitter. These factors rapidly increase a fake news story's influential power¹¹⁰.

Of course, access to accurate information is a critical facet of a modern democracy, in that it enables one to make informed choices; where this is absent or otherwise not guaranteed, it may lead to undue influence over elections and potentially skew results. This potential impact, along with the rise of Social Media as source of news, prompted the government to attempt to regulate the spread of falsehoods.

Privacy International, a human rights NGO, published its report "Texas media company hired by Trump created Kenyan president's viral 'anonymous' attack campaign against rival"¹¹¹. The investigative report revealed the role of an American data-based digital advertising company in the highly divisive online re-election campaign of Kenyan president Uhuru Kenyatta. In the run-up to Kenya's presidential election in August 2017, paid advertisements for two mysterious sites dominated Google searches for election-related terms and flooded Kenyans' Social Media feeds. They linked back to either 'The Real Raila', a virulent attack campaign alleging that

a government headed by opposition leader Raila Odinga would 'remove whole tribes', or to 'Uhuru for Us', a softer site showcasing the President's accomplishments. The two 'grassroots' campaigns were created by Harris Media LLC, an American far right digital media company, for President Kenyatta's campaign, as revealed by the new Privacy International investigation¹¹².

Separate research¹¹³ indicated the opposite - that more outrageously false stories seemed to be released for opposition-leaning groups in Kenya. This is in line with existing theories of fake news consumption which state that opposition groups are more likely to consume fake news than government-leaning groups. However, this only speaks to the source of such articles, and does not mean that the articles were consumed solely by opposition-leaning audiences, but by government supporters as well¹¹⁴. It is known that diversity of political ideologies is critical in a functioning democracy. It is also true that echo chambers cause people to seek and consume information that is close to their own beliefs.

Global news outlets BBC and CNN were forced to issue clarifications after becoming victims of fake news about the Kenyan election. BBC, whose programme 'Focus on Africa' was mimicked to provide a fake story about the Jubilee Party being ahead by a considerable margin in an opinion poll, distanced itself from the clip that has been circulating online. CNN also came out to distance itself from a clip also showing President Uhuru Kenyatta's popularity surging ahead, "despite his lack of participation in the recent presidential debate." The video, which was actually a cut from a CNN Philippines broadcast with the logo of the broadcaster superimposed on the rest of the footage, showed that 59.8 per

108 Freedom of the Net 2017 (Freedom House) Available at <https://freedomhouse.org/report/freedom-net/freedom-net-2017>

109 <https://medium.com/@OdipoDev/3-things-we-discovered-from-3-months-of-investigating-fake-news-in-kenya-dfaa6f4e1857>

110 <https://medium.com/@OdipoDev/3-things-we-discovered-from-3-months-of-investigating-fake-news-in-kenya-dfaa6f4e1857>

111 The investigative report is available at <https://privacyinternational.org/node/954>

112 <https://www.ifree.co.ke/2017/12/investigation-reveals-the-role-of-a-texan-company-in-the-re-election-of-president-kenyatta/>

113 <https://medium.com/@OdipoDev/3-things-we-discovered-from-3-months-of-investigating-fake-news-in-kenya-dfaa6f4e1857>

114 <https://medium.com/@OdipoDev/3-things-we-discovered-from-3-months-of-investigating-fake-news-in-kenya-dfaa6f4e1857>



cent of Kenyans prefer President Kenyatta compared to his challenger Raila Odinga¹¹⁵.

The Law attempts to stem this situation. This can be seen in the Computer and Cyber Crimes draft law which created the offence of “intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence”. It was also a major focus of the Communications Authority’s *Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks (2017)*.

Other interventions included the educational tool rolled out by Facebook before the election, to assist its users spot and limit the spread of fake news stories on its platform. The company, together with its WhatsApp platform, placed adverts in some of the country’s national newspapers and radio stations giving consumers tips on how to spot false stories¹¹⁶.

Fake news can be described as “false or misleading information published as authentic news, generally understood to be deliberate, however possibly accidental”¹¹⁷.

Defamation:

The Constitution at Article 33 confers the right to freedom of expression, but qualifies that in the exercise of the right, “every person shall respect the rights and reputation of others”. The protection of reputation, that is, the esteem in which one is held by society, is of significant social utility.

Defamation laws, while aiming to redress harms to reputation resulting from speech – whether spoken aloud, distributed in print, broadcast, or otherwise publicly communicated – will necessarily interfere with the right to freedom of expression. In some

instances, this interference can be justified; while in others, defamation laws can be used to silence legitimate speech¹¹⁸. Court rulings in Kenya previously created unfavourable precedents for access to information and free speech, resulting in Nairobi once being described as the ‘libel capital’ of Africa. Punitive suits against journalists and bloggers for defamation, libel and contempt of court have been prevalent, especially where the content featured exposés on corruption and land related scandals.

However, the year 2017 represented a break from the practise of abusing the justice system to suppress freedom of expression. The courts interpreted criminal defamation and the offence of ‘undermining the authority of a public officer’ to be incompatible with the Constitution’s provisions.

Criminal defamation:

The *Jacqueline Okuta*¹¹⁹ case brought into sharp focus the constitutionality or otherwise of the offence of criminal defamation created under the provisions of section 194 of the Penal Code. Section 194 of the Penal Code provided that “any person who, by print, writing, painting or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the misdemeanour termed libel.”

The Court, in determining whether the provision unjustly violated the freedom of expression by imposing sanctions on the civil wrong of defamation, considered the following questions:

- i) whether criminal defamation was a ground on which a constitutional limitation on the rights of freedom of the expression could be legally imposed; and

115 <https://www.standardmedia.co.ke/business/article/2001249755/cnn-bbc-fall-into-fake-news-trap>

116 <https://qz.com/1044573/facebook-and-whatsapp-introduce-fake-news-tool-ahead-of-kenya-elections/>

117 Portland, GeoPoll: The reality of fake news in Kenya, 2017 Available at <https://portland-communications.com/publications/reality-fake-news-kenya/>

118 Revised Defining Defamation Principles: Background Paper (Article 19, 2016) Available at <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>

119 *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/130781/>



- ii) whether defamation law infringes the right of freedom of expression guaranteed under the constitution or whether it constituted a reasonable and justifiable limitation justifiable in an open democratic society.

On the issue of criminal sanctions for a tortuous act, Justice John Mativo clarified that defamation of an individual by another individual is a civil wrong for which the common law remedy is an action for damages. He elucidated that fundamental rights are conferred in the public interest and defamation of any person by another person is unconnected with the fundamental right conferred in the public interest and, therefore, Section 194 ought to be construed outside the scope of Articles 33 and 24.

The learned judge pronounced that the offence of criminal defamation indubitably operated to encumber and restrict the freedom of expression enshrined in Article 33 of the Constitution. He therefore considered whether criminal defamation constituted a “permissible derogation” from that right - concluding that this turned on “whether or not it was a limitation that is reasonably justifiable in a democratic society”.

A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. After weighing the chilling effect of criminalizing defamation, the stifling effect of regulating information flow in the public domain against the intended objective of protecting the reputations, rights and freedoms of other persons, Mativo J. reckoned that the offence of criminal defamation constitutes a disproportionate instrument for achieving that aim. Thus, he was satisfied that criminal defamation is not reasonably justifiable in a democratic society within the contemplation of Article 24 of the Constitution, and

inconsistent with the freedom of expression guaranteed by 33 of that Constitution¹²⁰.

This landmark decision delivered in early 2017 declared criminal defamation charges to be unconstitutional, as, it would follow, would be its continued enforcement. Pursuant to this, the DPP, in February, directed the Director of Criminal Investigations to withdraw all pending criminal defamation cases with immediate effect. The DPP further directed that there should be no charges preferred against any person under the criminal defamation law “until and unless the said judgment has been reversed or set aside by an Appellate Court”¹²¹. However, a few months later, in July, the High Court was forced to order the DPP to stop prosecuting journalist Kurgat Marindany under section 194¹²².

Another development since the *Jacqueline Okuta* judgment is the suit instituted against BAKE’s Programs Manager and iFreedoms Kenya editor Shitemi Khamadi over coverage of court cases. Lawyer Cecil Miller in November brought a case against Shitemi and Njeru (who was the 2nd petitioner) for contempt of court. Mr. Miller alleged that the two were in contempt of a directive by the court gagging media from publishing the case, pending hearing and determining of the case. It should be noted that the story written by Mr. Khamadi was published after the court made a ruling on a previous contempt of court case against Mr. Njeru. Moreover, the gagging orders forbade Njeru and his associates or agents from publishing the story. Mr. Khamadi was not and has never been part of the cases¹²³.

Undermining the authority of a public officer

In the *Robert Alai*¹²⁴ case, the spotlight was turned on the constitutionality of Section 132 of the Penal Code. The impugned provision states that “any person who, without lawful excuse, the burden of proof

120 <http://kenyalaw.org/caselaw/cases/view/130781/>

121 <https://www.ifree.co.ke/2017/02/dpp-instructs-the-cid-to-withdraw-all-criminal-defamation-cases/>

122 <https://www.ifree.co.ke/2017/07/court-orders-dpp-to-stop-prosecuting-journalist-kurgat-marindany-under-criminal-defamation/>

123 <https://www.ifree.co.ke/2017/11/lawyer-cecil-millersues-ifreedomskenya-editor-over-coverage-of-court-case/>

124 *Robert Alai v The Hon Attorney General & another* [2017] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/135467/>



whereof shall lie upon him, utters, prints, publishes any words, or does any act or thing, calculated to bring into contempt, or to excite defiance of or disobedience to, the lawful authority of a public officer or any class of public officers is guilty of an offence and is liable to imprisonment for a term not exceeding three years”¹²⁵.

The petition was triggered by the arraignment of Robert Alai for posting “*Insulting Raila is what Uhuru can do. He hasn’t realized the value of the Presidency. Adolescent President. This seat needs Maturity*” on Twitter. The publication of this statement was allegedly calculated to bring into contempt the lawful authority of the President of the Republic of Kenya, thereby committing the offence of undermining the authority of a public officer.

Justice Chacha Mwita stated that, where the constitutionality of a statute or provision is questioned, a court is under obligation to make use of the constitutional mirror laying the impugned legislation or provision alongside the article(s) of the constitution and determine whether it meets the constitutional test. The court is also to analyse both the purpose and effect of the Section or the Act, and thereafter ascertain whether any of the two could lead to the provision being declared unconstitutional.

In applying the purpose and effect test, the Judge turned his attention to the history and circumstances under which the impugned provision or legislation was enacted. In doing so, he surmised that the previous aims (enacted at the height of Emergency), “cannot be the object of section 132 in the current constitutional dispensation when people enjoy a robust Bill of Rights that has opened the democratic space in the country”. He went on to pronounce that the criminalization of any utterance that would appear to displease those in public office could not possibly be what Kenya’s transformative constitution stands for.

“Kenya is a democratic state with a democratically elected leadership. The people of Kenya have a democratic right to discuss affairs of their government and leadership because of their right to freedom of expression guaranteed by Article 33 of the constitution. They cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers”, according to Mwita J.

He also observed that the very phrase “undermining authority of a public officer” was too general, vague and wide - to the extent of being unclear which circumstances would lead to undermining of a public officer’s authority. The framing of the wrongdoing also neglected to demonstrate how the act the subject of section 132 could possibly hinder a public officer from performing his obligations under that office. Citing *Geoffrey Andare Vs Attorney General (2015)*, he emphasized that it is imperative that any and all limitations of fundamental rights must be clear and precise enough to enable individuals to conform their conduct to its dictate.

After analysis of the legal issues, Justice Mwita accordingly declared the impugned section 132 to be inconsistent with Articles 33, 50 (2) (a), (i), (l) and 25 (c) of the Constitution, in so far as it suppresses freedom of expression, shifts burden to an accused, denies an accused the right to remain silent and derogates the right to fair hearing.

Censorship and network disruption

Today’s governments’ censorship techniques – including technical, legal, political, and social tools – and are increasingly effective and widespread and are used by dictatorships and democracies alike¹²⁶. Here, this report will employ the terminology ‘internet shutdown’ to describe the censorship techniques and internet control mechanisms utilized by states.

125 Penal Code, CAP 63 Available at <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063>

126 Introduction to Internet Censorship and Control, Murdoch and Roberts available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268587



An Internet shutdown may be defined as an “intentional disruption of Internet or electronic communications, rendering them inaccessible or effectively unusable to a specific population or within a location, often to exert control over the flow of information”¹²⁷. A four-pronged test for network disruptions is that they must be: intentional, state sanctioned and result in a shutdown, disruption, or other limitation to a medium of communication. Actions range from interfering with internet traffic directly (shutdowns, restrictions, throttling) to pressuring hosts to remove offending content (takedowns). Examples of ways this can be (and have been) implemented include Internet Protocol (IP) address blocking¹²⁸, use of Deep Packet Inspection (DPI) equipment¹²⁹, Border Gateway Patrol (BGP) attacks¹³⁰, and Hypertext Transfer Protocol (HTTP) throttling^{131 / 132}.

Such measures may well constitute infringements of a range of universal human rights. Besides freedom of expression and access to information, these courses of action may impact upon other rights such as the freedom to make political choices and participate in governance and decision-making processes; and economic and social rights such as to work and education. They also occasion direct and ripple economic losses¹³³.

Blocking and filtering:

The blocking, filtering or prevention of access to internet content are generally technical measures intended to restrict access to information or resources typically hosted in

another jurisdiction. Such action is normally taken by the internet access provider through hardware or software products that block specific targeted content from being received or displayed on the devices of customers of the internet access provider.¹³⁴

According to an Article 19 policy brief¹³⁵, acts of blocking and filtering are notoriously ineffective, as they involve risks of both over-blocking and under-blocking content and as such amount to a violation of the right to freedom of expression.

Even so, Internet shutdowns and network disruptions have been experienced the world over, prompting the development and dissemination of handy guides¹³⁶ detailing what measures one could take to stay connected, should Internet or Social Media be switched off in one’s country.

Indeed, disruptions were experienced in over half of the 18 African countries that conducted presidential elections in 2016 alone – accounting for a third of the continent’s 54 nations. Governments give various justifications for shutdowns – from protection of state institutions and leaders, managing election crises, controlling the spread of propaganda, and mitigating dissent and national security¹³⁷ to prevention of cheating during examinations. Others go wholly unexplained. However, one can detect more sinister motivations behind disruptions such as: to quash opposition political parties and their supporters’ voice, or to muddle the organization of protests and silence those who wish to demonstrate¹³⁸.

127 Deji Bryce Olukotun, “Internet Shutdowns – an Explainer.” Available at <http://www.dw.com/en/internet-shutdowns-an-explainer/a-36731481>

128 This is where an Internet Service Provider (ISP) denies access to servers that host specific addresses when users try to communicate with those sites.

129 This refers to an instance where equipment reads data passing through a network and hijacks it through equipment known as a “middlebox”. Such data never reaches the intended recipient and therefore a user trying to access a site in an ISP that is hijacking certain sites will never reach it.

130 Here, the addresses of certain websites or routes to entire networks are taken over illegitimately, thereby corrupting the routes through which data to those addresses would have been resolved.

131 This is the intentional slowing of bandwidth by a service provider. This makes access to throttled sites extremely sluggish, to the point of the sending network dropping those requests, which translates to the user not accessing the sites in question.

132 Building trust between the state and citizens: A policy brief on Internet shutdowns and elections in Kenya 2017, (KICTAnet) Available at https://www.kictanet.or.ke/?sdm_downloads=kenya-policy-brief-on-internet-shutdowns

133 CIPESA estimated that over a period of 236 days, internet disruptions in 10 African countries led to loss of US\$237 million.

134 Blocking, Filtering and Take-Down of Illegal Internet Content, 2016 Available at <https://rm.coe.int/168068511c>

135 Freedom of Expression Unfiltered: How blocking and filtering affect free speech, December 2016 (Article 19) Available at https://www.article19.org/data/files/medialibrary/38586/Blocking_and_filtering_final.pdf

136 <https://qz.com/878823/a-guide-to-staying-online-if-the-internet-or-social-media-has-been-blocked-in-your-country/>

137 Building trust between the state and citizens: A policy brief on Internet shutdowns and elections in Kenya 2017, (KICTAnet) Available at https://www.kictanet.or.ke/?sdm_downloads=kenya-policy-brief-on-internet-shutdowns

138 Don’t hit the switch: making the case against network disruptions in Africa, 2017.



In Kenya, the reporting period covered preparation for, and the conduct of both a general election and a fresh presidential election. In the run up to August 2017, the two main themes around Internet prior to and during an election re-surfaced. First being the use of the Internet to spread hate speech online and the other the use of the Internet to manipulate media thereby mobilizing voters in some areas while suppressing them in others¹³⁹. A combination of these factors, it was feared, would contribute to poll violence.

The Communications Authority of Kenya Director General Francis Wangusi nevertheless assured Kenyans that the Authority was “unlikely” to orchestrate an internet shutdown – whether complete or partial. He did confirm that CA was “monitoring the activities of Social Media so as to pull down sites that were created with the intent to misinform and incite members of the public”, while urging members of the public to be responsible Social Media users¹⁴⁰.

Indeed, in 2016 the Centre for Intellectual Property and Information Technology Law (CIPIT) in partnership with Open Observatory of Network Interference (OONI) ran tests in Kenya almost every day to examine whether internet censorship events were occurring in the country. Hundreds of thousands of network measurements were collected and analyzed. 1,357 URLs were tested for censorship, including both international websites and sites that are more relevant to Kenya (such as local news outlets). Yet, after five months of intensive testing from four local vantage points in Kenya, the team found almost no signs of internet censorship in the country¹⁴¹.

The results of these tests would have subdued the anxieties of many, if not for the fact that CIPIT did continue conducting

network measurements on Kenyan Internet Service Providers (ISPs) using assorted techniques even after the OONI report was launched. Between the dates of 6th – 10th February 2017, the data indicated the presence of a middle-box on the cellular network of one provider, Safaricom Limited (AS33771) that had not previously presented any signs of traffic manipulation¹⁴². The brief¹⁴³ explained that traffic manipulation (usually an indicator of middle-box presence) persisted through end of February to early March 2017.

Shortly after reaching out to the company for further information on these observations, a technical team from the company denied the presence of a middle-box in their data. Stephen Chege, the Safaricom Director of Corporate Affairs, responded by assuring that the company strictly adheres to the correct HTTP format as per agreed global standards (RFC 2616: Section 2.2). He stated that “any crafted or altered packets that violate the accepted correct HTTP formats generate an error. So by [CIPIT] sending a packet that has its HTTP parameters detuned/altered, they would receive an error [as observed]”. Mr. Chege described a trend whereby similar packet crafting methods (such as the Ooniprobe used by CIPIT) have in the past been utilized to defraud Safaricom by tunnelling traffic through zero-rated sites, thereby by-passing billing. He explained that the ISP takes measures to protect and optimize quality of user experience, which does not constitute evidence of a middle-box.

Within a few days, there was negative activity for a middle-box observed. The apparent absence of tampering signs implied two possibilities: the probable middle-box was reconfigured to avoid triggering errors from the invalid http requests, or that the network dropped the probable middle-box in the network.

139 Building trust between the state and citizens: A policy brief on Internet shutdowns and elections in Kenya 2017, (KICTAnet) Available at https://www.kictanet.or.ke/?sdm_downloads=kenya-policy-brief-on-internet-shutdowns

140 <https://businesstoday.co.ke/govt-to-shut-down-websites-ahead-of-elections/>

141 <https://ooni.torproject.org/post/kenya-study/>

142 <http://blog.cipit.org/2017/03/23/cipit-research-reveals-evidence-of-internet-traffic-tampering-in-kenya-the-case-of-safaricom-network/>

143 <http://blog.cipit.org/wp-content/uploads/2017/03/Final-March-Brief-pages.pdf>



Additionally, in the month of October, there were concerns about throttling during demonstrations particularly in Nairobi’s Central Business District, as well as unconfirmed reports of throttling targeting individuals’ devices. CIPIT’s preliminary figures¹⁴⁴ pointed towards throttling on the network. The Centre did qualify this, stating that the results could also have been influenced by network congestion and other infrastructure-related factors. More research is needed determine the nature of throttling practices currently being conducted by ISPs and thereby to differentiate those that are business-driven from those that are censorship-driven¹⁴⁵.

Takedown and removal of content:

Typically, these measures are aimed at: preventing users from accessing certain types of content to protect them (e.g. child sex abuse images) or a third party (e.g. privacy violation); or preventing users from downloading illegal material (e.g. ‘pirate’ websites) and potentially committing an offence (e.g. accessing child sex abuse images). In this sense, it can be framed as measures to combat and reduce criminality. Before such measures are adopted or implemented, however, the key question that must be answered is whether such steps are necessary and proportionate to tackle the problems they are purported to address¹⁴⁶.

The Kenya Film Classification Board (KFCB) banned 6 children’s television programmes for “glorifying homosexual¹⁴⁷ behaviour in Kenya”. In its June 2017

“Statement on Children Television Programmes Promoting Homosexuality in Kenya”¹⁴⁸, KFCB stated that access to certain content aired by MultiChoice, a South African pay TV network, was prohibited on the grounds that “homosexuality goes against our Kenya’s moral values and culture”. Again, in November, the KFCB CEO banned yet another popular show after it introduced a gay storyline¹⁴⁹.

Takedowns may also be brought about under section 62 of the National Cohesion and Integration Act, which holds liable any media enterprise for publishing any utterance, which amounts to hate speech. This provision could be invoked to remove or block content including online content¹⁵⁰.

In addition, some reports indicate that the authorities may force users to remove certain content from their Social Media profiles. In one example, blogger Robert Alai removed content from his Facebook page in August 2017¹⁵¹. This was after he was arbitrarily arrested¹⁵² for the post.

The Kenya government did not request Google to remove any content during the period of July - December 2016, and January – June 2017, according to its Transparency Reports¹⁵³. Similarly, no requests were made to Twitter¹⁵⁴ or Yahoo¹⁵⁵ during the reporting period.

Cyberbullying

While the Internet is a powerful tool for connecting like-minded people and

144 <http://blog.cipit.org/2017/10/29/internet-speed-throttling-surrounding-repeat-election/>

145 <http://blog.cipit.org/2017/10/29/internet-speed-throttling-surrounding-repeat-election/>

146 Freedom of Expression Unfiltered: How blocking and filtering affect free speech, December 2016 (Article 19) Available at https://www.article19.org/data/files/medialibrary/38586/Blocking_and_filtering_final.pdf

147 The Kenyan penal code (sections 162, 163 and 165) criminalizes same sex relationships [Available at <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063>]

148 <http://kfcb.co.ke/wp-content/uploads/2017/06/STATEMENT-ON-CHILDREN-TELEVISION-PROGRAMMES-PROMOTING-HOMOSEXUALITY-IN-KENYA-ISSUED-ON-15TH-JUNE-2017.pdf>

149 <https://www.sde.co.ke/article/2001259002/kenya-film-classification-board-bans-comedy-show-promoting-gay-content>

150 Intermediary Liability in Kenya (Munyua, Githaiga and Kapiyo) Available at https://www.apc.org/sites/default/files/Intermediary_Liability_in_Kenya.pdf

151 Freedom of the Net, Kenya 2017 (FreedomHouse) Available at <https://freedomhouse.org/report/freedom-net/2017/kenya>

152 <https://www.ifree.co.ke/2017/08/robert-alai-held-incitement-violence/>

153 https://transparencyreport.google.com/government-removals/by/country/KE?hl=en&country_request_amount=group_by:totals;period:1498780800000;authority:KE&lu=country_item_amount&country_item_amount=group_by:totals;period:1498780800000;authority:KE

154 <https://transparency.twitter.com/en/countries/ke.html>

155 <https://transparency.oath.com/government-removal-requests.html>



communities, it can also be used negatively, with devastating effects. Cyberbullying is one of the negative impacts which stem from the unfettered liberty to communicate - ranging from defamation, harassment and abuse to threats of physical harm. The term 'cyberbullying' is often treated as a distinct phenomenon, but it is an extension of bullying, which is an age-old problem. Bullying taps into societal undertones of prejudice and discrimination and often impacts people with protected characteristics of race, religion, sexuality, gender identity and disability the most¹⁵⁶.

In Kenya, the phenomenon is on the rise¹⁵⁷. Cyber bullying occurs through information exchange without physical contact between a person and the victim. However, this does not eliminate physical harm altogether¹⁵⁸. In May 2017, cyberbullying of a 29-year-old woman on Facebook was linked her eventual suicide. It was alleged that members of the Facebook group, Buyer Beware, aggravated the suicide of 29-year-old Brenda Akinyi Maone Waru. It was reported that she was taunted for 'lack of morals' for yielding to a police officer's demand for sex when seeking assistance on a case relating to the defilement of her three-year-old daughter. The ridicule is said to have triggered the taking of her own life.¹⁵⁹

In a bid to address cybercrime including cyber-bullying, Kenya enacted the Computer and Cybercrimes Bill in 2017. Section 14 (1) reads:

A person who, individually or with other persons, wilfully and repeatedly communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct is likely to cause those persons apprehension or

fear of violence to them or damage or loss on that persons' property; or detrimentally affects that person.

Section 14, curiously, conflates and combines the crimes of cyberstalking and cyberbullying, leaving the scope unclear. This offends legal principles which state that some non-negotiable features of criminal offences are specificity and foreseeability. On this basis, one can argue that section 14 fails this test.

Other cybercrimes:

Unfortunately, that of Brenda Waru was not the only reported suicide as an offline consequence of online activity in 2017. Again, in May of 2017, online incitement to commit suicide led to the death of a 16-year-old boy in Kamukunji, Nairobi, after playing an online game that encourages one to take his or her life. Jamie Njenga, a Form Two student at JG Kiereini Secondary School in Kiambu County had played the online game Blue Whale Challenge. It entailed carrying out 50 challenges, and the player is considered the winner when he or she goes through the last challenge, which requires the person to commit suicide.¹⁶⁰

In December 2016, a United States International University - Africa (USIU-Africa) student was kidnapped after falling victim to fraudsters who described themselves as businessmen on Facebook. According to reports, the student identified as Christine Chepkurui Rono was duped into believing that the presumed businessmen would help boost her start-up business and was kidnapped thereafter. The police traced the suspected criminals who had demanded Ksh. 10 million for her release¹⁶¹.

156 The United Nations Chronicle Available at <https://unchronicle.un.org/article/cyberbullying-and-its-implications-human-rights>

157 <https://www.kenyans.co.ke/news/19287-6-kenyan-media-personalities-who-were-victims-cyber-bullying>

158 https://www.the-star.co.ke/news/2017/05/30/kenyan-activist-takes-on-cyber-bullying-as-threat-grows_c1566520

159 <https://www.ifree.co.ke/2017/05/facebook-group-buyer-beware-distances-itself-from-cyber-bullying-that-contributed-to-womans-suicide/>

160 <https://www.standardmedia.co.ke/article/2001238930/kamukunji-teenager-kills-himself-after-online-game>

161 <https://www.kenyans.co.ke/news/how-usiu-student-was-kidnapped-fraudsters-facebook>



Right to Privacy and Access to Information Online

The right to privacy online includes freedom from surveillance, the right to use encryption, and the right to online anonymity. Everyone also has the right to data protection, including control over personal data collection, retention, processing, disposal and disclosure. Additionally, freedom from surveillance grants every person the right to communicate without arbitrary surveillance or interception (including behavioural tracking, profiling, and cyber-stalking), or the threat of surveillance or interception. Third, everyone has the right to seek, receive and impart information and ideas through the Internet¹⁶².

These principles feature broadly in the Kenyan Constitution at Article 31, which reads as follows: Every person has the right to privacy, which includes the right not to have their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.

Article 35 provides for the right of access to information. It states: Every citizen has the right of access to— information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Every person has the right to the correction or deletion of untrue or misleading information that affects the person. The State shall publish and publicise any important information affecting the nation.

Having outlined the legal and human rights foundations, below is an analysis of the exercise of the rights of access to information and privacy, and government reaction to the enforcement in 2017.

Access to information requests:

Election Petitions:

In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*¹⁶³, the Supreme Court of Kenya (SCOK)¹⁶⁴ clarified that the petitioner had “set out the parameters of the intended scrutiny in the petition namely, all rejected votes and spoilt votes, the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C, and the KIEMS Kit, the server(s) and website/portal”. The SCOK ordered read only access to a host of systems and documents. The Court also ordered that the Registrar (assisted by a number of judicial officers and staff) supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd Respondents¹⁶⁵.

Similarly, in *Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others*¹⁶⁶, Justice Gitari ordered the 1st respondent to allow read only access of the data in the KIEMS kits with regard to the Gubernatorial Elections of Kirinyaga County. The judge further ordered the 1st respondent to supply the Petitioner certified photocopies of Forms 37A, and 37B as prayed in prayer No. 4 and the petitioner access to original Forms 37A and 37B. This was also the case in *Farah Maalim v Independent Electoral & Boundaries Commission & 3 others* where the Court granted the petitioner read only access to the data extracted from the KIEMS kits in respect to the polling stations requested¹⁶⁷.

Other requests:

Katiba Institute (KI) regularly makes use of Article 35 on Freedom of Information (FOI) to give effect to the constitutional principles of transparency, accountability and freedom

162 IRPC Charter of Human Rights and Principles for the Internet Available at <http://internetrightsandprinciples.org/site/charter/>

163 <http://kenyalaw.org/caselaw/cases/view/140420/>

164 Sitting as Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Njoki and Lenaola, SCJJ (<http://kenyalaw.org/caselaw/cases/view/140420/>)

165 <http://kenyalaw.org/caselaw/cases/view/140420/>

166 <http://kenyalaw.org/caselaw/cases/view/142374/>

167 <http://kenyalaw.org/caselaw/cases/view/142924/>



of expression. Some Notable FOI Requests¹⁶⁸ made by KI concerned i) the Judicial Service Commission recruitment of Chief Justice, Deputy CJ and Judge of the Supreme Court¹⁶⁹; ii) the OKOA Kenya Referendum¹⁷⁰; iii) EACC Report on Mileage Claims by MPs¹⁷¹; and appointment of Members of Boards of State Corporations and Agencies¹⁷².

In *Katiba Institute v Presidents Delivery Unit & 3 Others*¹⁷³, the High Court considered the constitutional petition regarding published advertisements in the media, through billboards and in business messaging or tags #GoKDelivers and #JubileeDelivers. Katiba Institute (KI), the petitioner, wrote to the Presidents Delivery Unit (PDU), the 1st respondent on 17th August 2017 in pursuit of its right of to access information. KI was seeking information on how many advertisements had been published, through what media, schedules and dates when it was done, copies of the documents advertised, total cost incurred and the relevant government accounting office(r) and the individual or government agency that met the cost. The information sought was to cover the period 25th May to 16th August 2017.

KI relied on section 14 (2) of the Elections Offences Act which prohibits government from advertising in print or electronic media or by way of banners or hoardings in public places its achievements during election period. The petitioner avered that the respondents refused and or failed to supply the information sought under Article 35(1)

and in doing so failed to observe Article 10 of the Constitution.

Justice Chacha Mwita stated that it was his “evaluation and analysis of the facts and evidence and the law [that he came] to the inescapable conclusion that the respondents violated the petitioner’s right of access to information and that no effort was made to justify this violation”. He consequently issued a declaration that the failure to disclose and publicize the requested information infringed the right of access to information, Article 10 constitutional values and Chapter Six obligations on leadership and integrity. Mwita J. issued an order of mandamus compelling the 1st and 2nd respondents to provide, at the respondents cost, information sought by the petitioner in their August letter.

Government requests for user information:

There may be legitimate reasons for a State to require that an information and communications technology company communications and technology company to provide user data; however, a company should only supply data or user information to a State in response to a request where it is in keeping with standards regarding the right to privacy under international law, or it risks being complicit in or otherwise involved with human rights abuses¹⁷⁴.

There is a positive trend of private companies promoting transparency and accountability, through periodically publishing reports detailing information on government requests for user data,

168 <http://www.katibainstitute.org/what-we-do/freedom-of-information/>

169 KI wrote to the Judicial Service Commission on July 14 2016 seeking information on the criteria that was used to shortlist applicants who applied for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court. These positions fell vacant following the retirement of the former Chief Justice Dr. Willy Mutunga, Deputy Chief Justice Kalpana Rawal and Justice Philip Tunoi

170 KI made an FOI request in February 2016 to the Independent Electoral and Boundaries Commission asking to be furnished with information on what were the issues raised in the General Suggestion by promoters of the OKOA Constitutional Amendment Initiative when it asked people to sign on in support of the popular initiative. KI is concerned that promoters of OKOA initiative may have developed a Constitutional Amendment Bill that includes proposals for constitutional amendments that go beyond what the promoters of the initiative proposed in the General Suggestion.

171 KI is working with the National Civil Society Congress to compel the Ethics and Anti-Corruption Commission (EACC) to disclose a Report which resulted from an investigation of the Mileage Claims made by Members of Parliament.

172 KI and Article 19 filed an FOI request with the Public Service Commission (PSC) asking to be provided with information whether the principles and values of Public Service under Article 232 of the Constitution which requires, among others, that public offices be filled through a competitive process was followed when the national executive, including the President, appointed persons to sit on Boards of various State Corporations and Agencies in April and October 2015.

173 <http://kenyalaw.org/caselaw/cases/view/144012/>

174 UN Report on The Right to Privacy in the Digital Age (A/HRC/27/37) Available at <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx>



content removals, and compliance with those requests, including internet companies (Google, Twitter, Facebook and Yahoo) and telecommunications companies (Vodafone, Orange and Millicom)¹⁷⁵.

The Kenya government made one request for user/account data, ostensibly relating to a criminal process during the period of July – December 2016¹⁷⁶. Facebook did not comply.

For the period of January – June 2017, according to its Transparency Reports, the government made 7 requests to Facebook to preserve account records in connection with official criminal investigations for 90 days pending our receipt of formal legal process¹⁷⁷. It did not make any data requests, however.

Communication surveillance and interception and the collection of personal data:

State agencies in most countries have always had the capacity to collect and monitor communications – from telegraph information to telephone calls, and Kenya is no exception. In the digital age, this has expanded. The Kenya government has a long history of surveillance of journalists, political rivals, and civil society organizations and actors. But with the proliferation of smartphones and the rise of in-app (closed) communications has forced a new scramble by intelligence agencies to catch up and by-pass the encryption used in some of the apps¹⁷⁸. This has led countries to adapt and utilize high-tech methods of shadowing and spying on telecommunication systems and interception of data and content.

Surveillance has been propelled by advancements in technology, vagueness of laws and the role of intermediaries. Leaps

in technology coupled with rising insecurity, periodic clashes/poll violence and terrorism has meant that an entire billion-dollar industry has sprung up to cater to the needs of governments to monitor activity of netizens and ICT users with the aid of sophisticated technology.

The practice of surveillance, in and of itself, is not the focus of the present review. Instead, the analysis examines whether the practice of monitoring and intercepting communication is both lawful and legal¹⁷⁹. In fact, numerous laws in Kenya provide for surveillance and interception of communications, namely the Kenya Information and Communications Act, the Prevention of Terrorism Act, the National Police Service Act, the National Intelligence Service Act, the Official Secrets Act, among others. The principle of presumption of legality applies, even though the state's track record viz observation of legal and international human rights standards is abysmal. For example, it is an open secret that the National Intelligence Service, which apparently has direct access to communication networks across Kenya, regularly shares information with police agencies, some of whom have been engaged in gross human rights abuses¹⁸⁰. Such actions are considered extra-legal and go unchecked. The government's unlawful and disproportionate surveillance capabilities became increasingly evident in the past year, particularly as the country prepared for national elections in August 2017¹⁸¹.

Kenya's Communications Authority cited the risk of a repeat of the post-election violence of the 2007 election period to justify a Ksh. 2 billion investment in monitoring Kenyans' communications and communications

175 CIPESA Policy Brief: The Growing Trend of African Governments' Requests for User Information and Content Removal From Internet and Telecom Companies (July 2017) Available at https://cipesa.org/?wpfb_dl=248

176 <https://transparency.facebook.com/country/Kenya/2016-H2/>

177 <https://transparency.facebook.com/country/Kenya/2017-H1/>

178 <https://www.standardmedia.co.ke/business/article/2001229876/is-someone-listening-in-on-your-calls-here-s-why-you-should-be-worried>

179 The terms lawful and legal differ in that the former contemplates the substance of law, whereas the latter alludes to the form of law. A lawful act is authorized, sanctioned, or not forbidden by law. A legal act is performed in accordance with the forms and usages of law, or in a technical manner. (<http://legal-dictionary.thefreedictionary.com/lawful>)

180 Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya (Privacy International, 2017) Available at <https://privacyinternational.org/node/43>

181 Freedom of the Net Report 2017 (Freedom House) Available at <https://freedomhouse.org/report/freedom-net/2017/kenya>



devices. The Authority in January 2017 announced that three projects – one each to monitor radio frequencies, monitor Social Media platforms, and ‘manage devices’ would address this¹⁸².

The Communications Authority’s best laid plans, as it were, for executing the Device Management System were thwarted by Justice Mativo. The Milimani High Court judge barred CA from installing the controversial communication monitoring system. In the case filed by Okiya Omtata, the activist argued that CA’s arbitrary decision to spy on Kenyans violates both the law and the Constitution. According to the court documents, the Government of Kenya sought permission to listen to calls, read text messages and review mobile money transactions involving the public, in violation of the right to privacy¹⁸³.

On the social media monitoring front, unconfirmed reports from sources within the Communications Authority disclosed that in late 2016, the Authority finalized a contract with Israeli ‘web intelligence’ firm webintPro¹⁸⁴. The firm’s HIWIRE technology allows for the capture and analysis of open-source traffic and is particularly adapted to analyzing Social Media. Some of the features of the system include the ability to map links between Social Media users, ‘real time’ surveillance of target objects, presumably individual users¹⁸⁵.

Privacy International reported that there is a link between interception of communications content and data and the perpetration of gross human rights abuses. Authorities spy on, profile, locate, track – and ultimately

arrest, torture, kill or disappear suspects, as per its report¹⁸⁶. This has contributed to the normalization of extrajudicial killings over the last few years. The Kenya Human Rights Commission (KHRC) documented that 141 persons were killed by the police in 2015 while 204 were killed in 2016 and a further 80 persons as at 28 June 2017¹⁸⁷. The Kenya National Commission on Human Rights (KNCHR) documented 35 deaths resulting from post poll violence covering the period 1st September to October 2017 most at the hands of security agents. This was in addition to their previous records which put the death toll at 57, meaning therefore that by December, a total of 92 Kenyans had lost their lives in elections related violence¹⁸⁸.

A deeply disturbing online phenomenon has emerged as a result of the trend of surveillance and the normalization of extrajudicial killings, as described below.

Digitization of Extrajudicial Killings and Executions:

In 2017, extrajudicial executions took on a new (digital) dimension, as reported by the Kenya Human Rights Commission¹⁸⁹. In April 2017, there emerged a number of Facebook accounts and pages that believed to be run by police officers. Most of these Facebook pages concern low-income areas in Nairobi. Said pages were characterized by posts warning specific suspected criminal gang members in the areas, complete with their photos, names and areas of operation to change their ways and surrender to the police, failure to which they will be killed. Hours or days later, the “killer police” would post bloody pictures of

182 Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya (Privacy International, 2017) Available at <https://privacyinternational.org/node/43>

183 <http://www.kbcenglish.co.ke/index.php/milimani-high-court-barres-installation-of-communication-monitoring-device-management-system/>

184 Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya (Privacy International, 2017) Available at <https://privacyinternational.org/node/43>

185 webintPro Web Intelligence Systems, 2017, Available at: <http://www.webintpro.com>

186 Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya (Privacy International, 2017) Available at <https://privacyinternational.org/node/43>

187 Kenya’s scorecard on security and justice : Broken promises and unfinished business 2017 (KHRC) Available at <http://www.khrc.or.ke/publications/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>

188 <http://knchr.org/Portals/0/PressStatements/PRESS%20STATEMENT%20-%20STILL%20A%20MIRAGE%20-%20REPORT.pdf?ver=2017-12-20-104740-223>

189 Kenya’s scorecard on security and justice : Broken promises and unfinished business 2017 (KHRC) Available at <http://www.khrc.or.ke/publications/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>



the suspects gunned to death, sometimes with another eerie warning to fellow suspected gang members. These public announcements of people that they intend to kill indicate that some of the executions are planned and premeditated.

The digitization of these executions is not only on Facebook. On 31 March and 1 April 2017, video footage of an alleged plain clothes police officer showed him openly shooting, at close range, and killing two unarmed suspected criminals in Eastleigh, Nairobi on suspicion of being members of the Super Power Gang, an outlawed criminal gang¹⁹⁰.

Surveillance of journalists:

Human Rights Watch and ARTICLE 19 research¹⁹¹ found that the Kenya government has attempted to obstruct critical journalists with legal, administrative, and informal measures, including threats, intimidation, harassment, online and phone surveillance, and in some cases, physical assaults. Police have been implicated in online surveillance and, at times, in directly threatening and physically attacking journalists. In some cases, police have arbitrarily arrested, intimidated, or harassed journalists, according to the report.

Circulation of sexually explicit photos without consent:

Photographs of strip-searched high school student taken by police:

The High Court in December 2017 awarded Ksh. 4 million to a school girl who was strip-searched by police in August 2015, for being in possession of bhang. Justice John Mativo in his judgment ruled that the teenager's rights and dignity were violated. The eighteen-year-

old girl from Kanyama Secondary School in Karatina was allegedly stripped naked and photographed for hiding bhang in her undergarments. She had sought compensation in a law suit filed jointly by herself and CRADLE Children's Foundation, claiming that the semi-nude photos which were circulated on Social Media had caused her embarrassment¹⁹².

Revenge porn:

The Crown Prosecution Service in the United Kingdom defines¹⁹³ "Revenge Porn" as "the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress. The images are sometimes accompanied by personal information about the subject, including their full name, address and links to their social media profiles"¹⁹⁴. This was the case where a Twitter user by the name @Kimindiri sought to disgrace a former partner by sharing nude images of her, including her name, face and telephone number¹⁹⁵. His account has since been permanently suspended.

The *Roshanara Ebrahim case*¹⁹⁶ is also instructive here. The High Court considered a petition filed by Ebrahim who was crowned Miss World Kenya 2015 and thereafter dethroned in reaction to the leaking to the Miss World Kenya organisers of alleged nude photographs of her by the petitioner's boyfriend. We will confine ourselves to the matter of revenge porn and the right to privacy strictly, and not the other legal matters.

In the case, Muriithi J. stated that Article 31 (c) of the Constitution provides for the right to informational privacy which includes privacy of private photographs of a person. He opined that the in taking of 'selfie' nude pictures using a mobile phone or other

190 Kenya's scorecard on security and justice : Broken promises and unfinished business 2017 (KHRC) Available at <http://www.khrc.or.ke/publications/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>

191 "Not Worth the Risk": Threats to Free Expression Ahead of Kenya's 2017 Elections (Article 19, Human Rights Watch, 2017) Available at <https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections>

192 <https://www.standardmedia.co.ke/article/2001263488/court-awards-sh4-million-to-teenager-who-was-strip-searched-by-police>

193 https://www.cps.gov.uk/news/latest_news/crown_prosecution_service_offers_clear_guidance_for_prosecutors_on_revenge_pornography/

194 <http://blog.cipit.org/2016/12/19/high-court-intervenes-in-revenge-porn-case-of-miss-world-kenya-against-pageant-organisers-and-ex-boyfriend/>

195 <http://nairobi.news.nation.co.ke/news/kot-baby-mamas-nudes/>

196 *Roshanara Ebrahim v Ashleys Kenya Limited & 3 others* [2016] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/129450/>



communication gadget, a person does not thereby waive their right to privacy, The judge added that It was clear that she did not publish them or given consent for their publication.

He held that the 3rd Respondent had by his close relationship as a boy-friend of the petitioner accessed the petitioner's photographs, and may indeed have taken some of them, but he had no authority to publish the private photographs. In forwarding the private photographs of the petitioner to the 2nd respondent, the 3rd petitioner had violated the petitioner's right to privacy

of information under Article 31 (c) of the Constitution, and that the petitioner is entitled to compensation in damages.

In regard to capacity there is need to invest heavily in cybercrime units in the police force and generally have operations digitized so that police forces are equipped to deal with the new frontier for crime. One of the main challenges in tackling the offense are finding the main perpetrators, in instances of mass cyber bullying where stories go viral in various channels, it may be impossible to even know the person who originally posted¹⁹⁷.



POLICY AREAS IN FOCUS FOR 2018:

Review and repeal of antiquated legal provisions:

The offence of 'defamation of foreign princes' is one such example which should be repealed for contravening the Constitution's provisions on the exceptions to free speech. Section 67 of the Penal Code creates the misdemeanour offence, the particulars being: "any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to degrade, revile or expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb peace and friendship between Kenya and the country to which such prince, potentate, ambassador or dignitary belongs is guilty of a misdemeanour".

Enactment of laws and policies:

In 2018, priority should be given to the review of the *Draft National ICT Policy*¹⁹⁸; the enactment of the *Computer and Cybercrimes Bill*¹⁹⁹ and public consultation on the *Information Communication Technology Practitioners Bill*²⁰⁰.

Blockchain and cryptocurrency:

An enabling environment should be fostered for the adoption of Blockchain technology. This calls for formulation of broad based policy principles applied among trusted peers and to avoid using regulation for specific technologies. In addition, awareness raising, and demystification of the technology should be a priority for the coming year²⁰¹. Similarly, with cryptocurrency. The Central Bank previously warned²⁰² Kenyans against transacting in the digital currency. In addition, there have been arrests of Bitcoin traders reported²⁰³.

197 <http://kigf.or.ke/cyber-bullying-highlights-of-kigf-2017-online-discussions/>

198 <http://icta.go.ke/pdf/NationalICTPolicy-20June2016.pdf>

199 http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/ComputerandCybercrimesBill_2017.pdf

200 http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/InformationCommunicationTechnologyPractitioners_Bill_2016.pdf

201 KICTANet Blockchain Policy Brief 2017 Available at https://www.kictanet.or.ke/?smd_process_download=1&download_id=28935.

202 https://www.centralbank.go.ke/images/docs/media/Public_Notice_on_virtual_currencies_such_as_Bitcoin.pdf

203 <https://cointelgraph.com/news/kenyan-police-arrest-bitcoin-traders-due-to-alleged-banking-fraud>



Biometric technology and digital identity: Adoption of biometric identification is being adopted by a number of sectors including banking, refugee registration, elections, and transport and immigration (ePassport). As adoption spreads, it would be useful to direct our attention to its regulation, including privacy considerations.

Data protection and retention:

The enactment of the Data Protection Bill must be fast tracked. In addition, Kenyans must prepare and ensure they are in compliance with *General Data Protection Regulation (Regulation (EU) 2016/679)* which will take effect in May 2018 and will operate extraterritorially.

In addition, the #UhuruDabChallenge debacle and the subsequent deletion of the post showcased the need for a data retention policy for government Social Media and other digital records. It demonstrated the need for clarity regarding official communication from government offices via digital platforms, as to the approach taken when deleting and archiving public data, balancing against the public interest of preserving official communication – whether correct, in error, popular or otherwise²⁰⁴.

Privacy and fintech:

The quarterly Fintech Report by Privacy International launched in November 2017 demonstrated the ways in which the financial sector disrupts human rights, privacy and identity laws. In the majority of cases, fintech applications require access to sensitive data and information, at times even one's Social Media accounts, in order to determine one's credit score. In 2018, there needs to be a deliberate attempt to create a framework for ethical use of personal data²⁰⁵.

204 <https://www.nation.co.ke/oped/blogs/dot9/walubengo/2274560-3814268-75ohj7/index.html>

205 <https://privacyinternational.org/sites/default/files/2017-12/Fintech%20report.pdf>



Bloggers
Association
of Kenya



This report was produced as part of
BAKE's iFreedom Kenya program.
State of the Internet in Kenya 2018