

State of Internet Freedom in Kenya 2016

Charting Patterns in the Strategies African
Governments Use to Stifle Citizens' Digital Rights

December 2016



State of Internet Freedom in Kenya | 2016

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Credits

This research was carried out by the Collaboration on International ICT Policy for East and Southern Africa (CIPESA) as part of the OpenNet Africa initiative (www.opennetafrica.org), which monitors and promotes Internet freedom in Africa.

The report presents the findings of a study on what the government in Kenya is doing to inhibit citizens' access to ICT, for example content blocks, censorship, filtering, infrastructure control, law-making, court cases; using ICT activity and data to monitor citizens; and how government bodies and functionaries are using propaganda, impersonation, threats, cloning, and other tactics to shape online content in their favour. Other country reports for Burundi, Democratic Republic of Congo, Ethiopia, Rwanda, Somalia, Tanzania, Uganda, Zambia and Zimbabwe as well as a regional State of Internet Freedom in Africa 2016 report, are also available.

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State of Internet Freedom in Kenya 2016: Charting Patterns in the Strategies African Governments Use to Stifle Citizens' Digital Rights

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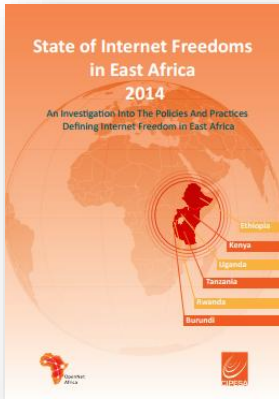
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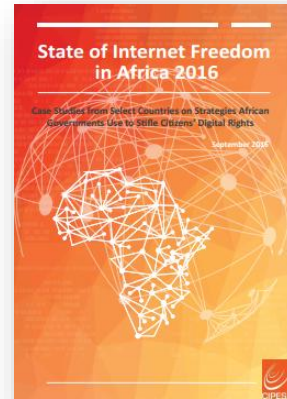
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1. Introduction

Internet access has opened up civic space, expanded business opportunities, facilitated the exchange of knowledge, spurred innovation and enhanced communication across Kenya. The effect of internet access is noticeably visible in various sectors. The media for instance, has had to rethink, restructure, re-organise and change how to produce and disseminate news.¹ There is also an increasing presence of bloggers and other netizens, emerging as alternative news sources online. Also, Small and Medium Enterprises (SMEs) have grown their online presence through websites and social media platforms, which has in turn created employment opportunities as the SMEs work to engage and sustain online clients and customers.

In the political and governance landscape, internet access has enabled the realisation of freedom of expression thereby affording previously unheard voices an audience. The government has also made significant steps to increase its online presence, including through offering key public services and information online towards promoting efficiency and transparency. Services such as immigration services, registration of persons, lands registry, motor vehicle and driver registration, filling of tax returns, voter registration and business names registration are available online. Services within the government institutions are integrated on the e-citizen platform.²

However, greater access to the internet is hampered by affordability and inequality of access, stemming from the unequal distribution of Internet and mobile infrastructure, to illiteracy and cultural factors that affect equal access for men and women. According to the Kenya National Literacy Survey of 2006, over one third (38.5%) of adults and youth in Kenya lack the minimum literacy levels.³ Huge regional disparities in literacy levels also exist with the capital Nairobi having the most literate population (87.1%) and North Eastern region registering the lowest levels at 8%.⁴

Meanwhile, the government remains largely sensitive about online criticism and has taken several regressive steps, including the intimidation of bloggers and introduction of punitive legislation that threatens free speech. In the first two months of 2016, up to 10 social media users in Kenya were arrested or summoned by security authorities over their online communications.⁵

In order to promote internet freedom in the country, there is a need to understand what the state of internet freedom is, what the obstacles are, which stakeholders are most at risk, and what tactics the government and other actors use to curtail internet freedom. This report therefore discusses the factors influencing ICT use in Kenya and how laws and policies affect internet freedom. The report focuses on the controls initiated by the government to inhibit citizens' access to ICT, such as internet shut downs, censorship, law-making, court cases against internet users, and surveillance. Further, the report investigates how government bodies and functionaries are using propaganda and online activism to shape online content in their favour. The report concludes with a series of recommendations to address current challenges to internet freedom.

¹ Nation Media Group Closes TV and Radio Stations <http://www.africanews.com/2016/06/30/kenya-s-nation-media-group-shuts-down-tv-and-radio-stations/>

² eCitizen - Gateway to All Government Services, <https://www.ecitizen.go.ke/>

³ Kenya is Making Slow Progress Towards Attaining Literacy Levels, see: http://www.the-star.co.ke/news/2015/09/17/kenya-is-making-slow-progress-towards-attaining-50-literacy-levels_c1206064

⁴ <http://www.eldis.org/go/home&id=31868&type=Document#.V-WKca1tHuA>

⁵ New Year, Old Habits: Threats to Freedom of Expression Online in Kenya, See: <http://www.cipesa.org/2016/01/new-year-old-habits-threats-to-freedom-of-expression-online-in-kenya/>

The research results presented in this report focus on recent legal and policy developments, as well as on abuses and violations of internet freedom over the 12 month period to November 2016 in Kenya. However, in order to establish trends on strategies of information controls used by the government of Kenya, the study takes an interest in practices over the last five years.

2. Methodology

The research presented in this report was conducted through a mixed methods approach. Researchers based in Kenya interviewed key informants who were purposively selected. The informants were chosen on the basis of the known or presumed knowledge about issues related to or affecting internet freedom in the countries studied. They included activists and human rights defenders that are advancing free expression and association, as well as some of those who had been victims of abuses and violations. Others were internet and telecom service providers, regulators, law enforcement officials, and journalists. In total, 15 key informants were interviewed for this report.

Policy analysis was conducted to generate an understanding of the laws that affect digital rights. The analysis took an interest both in policies and laws that have been used to curtail internet freedom and those that could potentially be employed to curtail freedom of expression and access to digital technologies. Besides the existing laws, an analysis was done of relevant bills currently under consideration by Parliament. Moreover, document review was done, including of open access sources such as media articles and secondary research reports, as well as analysis of records such as court orders and regulatory decisions, some of which are not readily available in the public domain.

3. Country Context

3.1 ICT Access

Internet access in Kenya has continued to record a positive growth. As at June 2016, there were an estimated 37.7 million internet users, translating to an internet penetration level of 87.6%.⁶ The majority of internet users access the internet through mobile, with broadband access steadily growing as more service providers enter the broadband retail market targeting the middle class. However, the high cost of mobile internet and broadband services continues to limit access. Further, the cost of ICT devices has remained high, with the price of the cheapest internet enabled phones ranging from Kenyan shillings 1,000 to 1,200 (US\$ 10 to US\$ 12).

The country is served by undersea cables including the top providers SEACOM and The East African Marine System (TEAMS) which provide up to 820,000 and 702,000Mbps of broadband respectively.⁷ The increased usage of the internet for e-services and Over The Top (OTT) services has been attributed to the increased bandwidth provided by undersea fibre cables connecting the country. As regards mobile telephony services, the Kenyan market is very competitive with three active mobile service providers who play a major role in enhancing access to internet services. Currently, mobile penetration stands at 90%.

⁶ Communications Authority of Kenya, Quarterly Sector Statistics Report: Q4 2015/2016 (April-June 2016), <http://www.ca.go.ke/images/downloads/STATISTICS/SECTOR%20STATISTICS%20REPORT%20Q4%202015-2016.pdf>

⁷ Communications Authority of Kenya, <http://ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q3%202015-16.pdf>

Safaricom has a 65.6% share of the mobile service market, followed by Airtel (17.5%) and Telkom Kenya (Orange) (12.5%).

Uptake of the .ke country level domain has increased to 58,259 domains as at March 2016, up from 46,411 in September 2015.⁸ The majority of subscribers of the county level domains are private companies and not-for-profit organizations which account for 93% and 3% of domain registrations respectively.

Kenya has a very vibrant social media community. Blogging in Kenya became popular around 2003 and has since grown to host diverse content that include among others: politics, lifestyle, finance and arts. In June 2015, the number of Kenyan blogs was reported at 15,000.⁹ Politics, governance, and comedy are some of the most popular topics on Twitter and Facebook. The president, deputy president and opposition leaders often trend when they hold or attend political events. On the other hand, the numbers of business pages and organised communities like Kilimani mum's marketplace¹⁰ are also gaining more following on Facebook, Twitter and WhatsApp.

The Communications Authority¹¹ is an independent regulatory body established and mandated to regulate the communications sector. Its role includes managing infrastructure through licensing services and systems, facilitating access to communications, regulating tariffs, approving the type of communications equipment used and protecting the consumers.

However, the authority's independence has come into question on the issue of Safaricom's dominance.¹² The result was the adoption of a highly criticised¹³ Statute Law (Amendment) Bill 2014¹⁴ which was passed into law. The law strips the Communications Authority of its power to regulate market dominance in the telecommunications sector. This responsibility was then given to the Competition Authority of Kenya. This situation reflects the relationship that the private sector has with the government and its possible effect on internet freedom as Safaricom's market dominance continues to impact directly on affordable access, consumer choice, innovation and the levels of competition as it extends to the online economy.¹⁵

The Ministry of Information and Communications Technology on the other hand is responsible for the formulation, administration, and implementation of communications, information and broadcast policy. Under this Ministry, previous directorates that existed independently such as the Department of E-

⁸ Communications Authority of Kenya,

<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20%20Statistics%20Report%20Q1%202015-16.pdf>

⁹ State of Blogging and Social Media in Kenya 2015 report <http://www.monitor.co.ke/wp-content/uploads/2015/06/The-State-of-Blogging-and-Social-Media-in-Kenya-2015-report.pdf>

¹⁰ Kilimani mums marketplace, see: <https://www.facebook.com/groups/259179404180927/>

¹¹ Communications Authority, www.ca.go.ke

¹² <http://www.cio.co.ke/news/main-stories/safaricom-gets-back-up-from-ag-on-market-dominance-tussle>

¹³ Abuse of the Statute Law Miscellaneous Amendments, <http://www.nation.co.ke/oped/Opinion/Abuse-of-the-Statute-Law-Miscellaneous-Amendments/440808-2937410-279h3p/index.html>

¹⁴ Statutes Law Miscellaneous Amendment Bill, 2014,

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/StatutesLawMiscellaneous\(Amendments\)Bill2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/StatutesLawMiscellaneous(Amendments)Bill2014.pdf)

¹⁵ Market dominance and ethics: the case of Safaricom, <https://www.linkedin.com/pulse/market-dominance-ethics-case-safaricom-peter-wanyonyi>; Safaricom gets crucial support in battle with CA, <http://www.businessdailyafrica.com/Corporate-News/Safaricom-gets-crucial-support-in-battle-with-CA/539550-2698158-5epa4q/index.html>

government, Government Information Technology Services (GITS) and the ICT Board were merged¹⁶ to form the ICT Authority¹⁷ - mandated with the task of streamlining and rationalising the Government ICT functions. Further, the Ministry also houses the National Communications Secretariat (NCS), which is the government policy adviser on information and communications responsible for preparing legislation, policy papers and country position papers on the matter. These two government bodies have also been active in engaging on global ICT policy development and implementation processes such as ICANN,¹⁸ the Internet Governance Forum,¹⁹ and the International Telecommunications Union (ITU)²⁰ among others.²¹

3.2 Laws and Policies Affecting Internet Freedom

Freedom of Expression

The Constitution of Kenya, 2010 under Article 33 provides for the freedom to receive, seek and impart information. However, the country has several laws which govern surveillance, including the National Police Service Act (2011), the Prevention of Terrorism Act (2012), the National Intelligence Service Act (2012), the Official Secrets Act (1970), the Penal Code (2008), the Criminal Procedure Code (2010) and the Kenya Information and Communications Act (1998).

Section 29 of the Kenya Information and Communications Act (KICA) 2013, penalises the use of ICT to disseminate messages deemed to be “grossly offensive” or that cause “annoyance, inconvenience or needless anxiety to another person” with a fine of up to Kenya Shillings 50,000 (about US\$ 495), three years in prison, or both.²² The KICA does not clearly define what constitutes content that causes “annoyance, inconvenience or needless anxiety to others,” while the Penal Code has no clear definition of a “rumour” or “report which is likely to cause fear and alarm to the public or to disturb the public peace.”²³

On the other hand, the Security Laws (Amendment) Act 2014, allows admissibility in court of electronic messages and digital material regardless of whether it is not in its original form. Part V of that law regarding “special operations” raises particular concerns, as it expands the surveillance capabilities of the Kenyan intelligence and law enforcement agencies without sufficient procedural safeguards.²⁴ This law, passed amidst government’s frantic efforts to fight terrorist attacks inside the country by the Somali militant group Al Shabaab, gives broad powers to the Director General of the National Intelligence Service to authorise any officer of the Service to monitor communications, “obtain any information, material,

¹⁶ Kenya ICT Board, eGovernment and GITS to Join Under Kenya ICT Authority, <http://cio.co.ke/news/main-stories/kenya-ict-board,-egovernment-and-gits-to-join-under-kenya-ict-authority>

¹⁷ ICT Authority Kenya, www.icta.go.ke/

¹⁸ ICANN launches African Engagement Office in Nairobi, see: <https://www.icann.org/news/blog/icann-launches-african-engagement-office-in-nairobi>

¹⁹ The 2011 IGF was held in Nairobi, See: <http://www.intgovforum.org/multilingual/content/igf-2011>

²⁰ Kenya recently hosted the ITU Global ICT Capacity Building Symposium (CBS-2016), see:

<http://www.itu.int/en/ITU-D/Capacity-Building/Pages/CBS-2016.aspx>

²¹ Africa Telecommunication Union, event calendar, See: <http://atu-uat.org/2432-2/>

²² The Kenya Information and Communications Act, chapter 411A, 2009

²³ New Year, Old Habits: Threats to Freedom of Expression Online in Kenya, <http://cipesa.org/2016/01/new-year-old-habits-threats-to-freedom-of-expression-online-in-kenya/>

²⁴ Kenya High Court Ruling on Security Amendment Act a Victory for Free Speech, <https://www.article19.org/resources.php/resource/37866/en/kenya:-high-court-ruling-on-security-amendment-act-a-victory-for-free-speech>

record, document or thing” and “to take all necessary action, within the law, to preserve national security.”

Kenya’s National Intelligence Service Act, 2012 gives security agencies the powers to monitor communications as well as to “search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing.” Additionally, the Media Council Act, 2013 contains “broad” speech offences, which could be further reinforced by the Cybercrime and Computer Related Crimes Bill, 2014 when it comes into force.²⁵ Early this year the Kenya government indicated that it was preparing a bill to regulate social media use ahead of the 2017 elections.²⁶ The debate around this was to tame hate-speech and prevent violence during the elections.

Section 13 and 62 of the National Cohesion and Integration Act (2008)²⁷ criminalises offences of hate speech, ethnic and racial contempt. The Act states that a person who uses speech (including words, programs, images or plays) that is “threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence 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.” The National Cohesion and Integration Commission (NCIC) was set up pursuant to the 2008 Act to, among others, foster national cohesion and tame hate speech through political rallies, vernacular radio stations, leaflets and mobile phone texting service. The NCIC has a department which monitors hate speech online and works with the police and service providers to investigate hate speech incidences.²⁸ Most of the cases the NCIC has investigated under this act have involved public figures in political rallies or high profile individuals.²⁹ Nonetheless, offensive speech continues on social media as the content shared does not meet the threshold of hate speech as outlined in the Act. According to Dennis Itumbi, who works in the office of the President, “the authorities lack the competence, the will, the technology and the agility to tame online hate speech.”³⁰ Another challenge is that there is still little understanding among the public and also some law enforcement officials on what constitutes hate speech and its delineation with free speech, said Itumbi.

²⁵ Ibid

²⁶ Kaka Mwalimu, Government prepares bill to regulate social media usage, <http://www.hivisasa.com/national/news/145899>

²⁷ National Cohesion and Integration Act (2008) http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalCohesionandIntegrationAct_No12of2008.pdf

²⁸ NCIC monitoring SMS, web chatter for hate speech, see: <http://www.nation.co.ke/news/politics/-/1064/1156904/-/g4m2s7/-/index.html>

²⁹ See: Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR, see: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=61912382192936484779212; CHIRAU ALIMWAKWERE V ROBERT M. MABERA & 4 OTHERS [2012] eKLR, see: <http://kenyalaw.org/caselaw/cases/view/81744/>; George Aladwa Omwera v Republic [2016] eKLR, see: <http://kenyalaw.org/caselaw/cases/view/119457/>; Moses Kuria Charged with Hate Speech, see: <http://mobile.nation.co.ke/news/Moses-Kuria-charged-with-hate-speech/1950946-2362234-format-xhtml-6f574kz/index.html>; CORD, Jubilee legislators charged in court over hate speech, See: <http://www.standardmedia.co.ke/article/2000205607/cord-jubilee-legislators-charged-in-court-over-hate-speech>; Mutahi Ngunyi grilled by NCIC over hate tweet <http://ksnmedia.com/2015/09/now-mutahi-ngunyi-grilled-by-ncic-over-hate-tweet/>;

³⁰ Kenyan Authorities in the Dock Over Hate Speech, <http://www.capitalfm.co.ke/news/2013/05/kenyan-authorities-in-the-dock-over-hate-speech-2/>

Public Participation

The current constitution provides a strong basis for the involvement of the public in governance, a concept embodied in the principle of public participation articulated in its Article 10. Further, Article 232(1) (d) commits public servants to include public participation in policy development. This process has also been termed as public consultation as its objective is to ensure government seeks, obtains and considers the views of stakeholders. Moreover, Article 119(1) provides the right to petition parliament by the citizens. It is a requirement for Bills tabled in Parliament to go through a public participation process before being signed into law. Counties have also initiated the development of public participation bills at local government level. These include Nairobi, Nyeri, Uasin Gishu, Murang'a, Kisumu, Busia and Laikipia counties among others.

A demonstration of this process in the ICT sector can be seen in two ongoing processes. In the first instance, an Information Communication Technology Practitioners Bill, 2016³¹ which was introduced in Parliament in June 2016. The Bill seeks to regulate the ICT sector in the country, by requiring under clause 16, that persons register as ICT practitioners and that under clause 20, they obtain licenses to practice. These proposals in the bill to regulate ICT Practitioners who include bloggers, have the potential of adversely affecting online freedom.

Most of the stakeholders, including the Cabinet Secretary for the Ministry of ICT³² were opposed to the Bill, arguing that it will isolate Kenya from the global stage and stifle ICT innovation in the country. During the public debate on the Bill, stakeholders presented their concerns regarding the bill to Parliament, pointing out that there was little consultation during the process of drafting the bill. The Parliamentary Committee on Energy, Information and Communication requested for more time to review the submissions and give feedback given the uproar the Bill generated.³³

In the second instance, the Ministry of ICT introduced a draft Computer and Cyber Crimes Bill (2016) for public consultation.³⁴ The Bill proposes to address a number of cyber offences including child online pornography, cyber bullying, and also provides for investigation procedures. The Bill proposes to give the police and authorised persons the power to seek warrants through court orders to access, search and seize data and equipment, where they have reasonable grounds to believe that the content of a specifically identified electronic communication is required for the purpose of a specific investigation in respect of a serious offence. Warrants issued for the interception of communication under the provision would be valid for up to nine months.

Unlike the ICT Practitioners Bill, the draft Computer and Cyber Crimes Bill 2016 was disseminated widely and made available online. This provided an opportunity for many stakeholders to present their views on the bill. These two instances illustrate the challenge of realising public participation in Kenya. The lack of

³¹ [Information Communication Technologies Practitioners Bill, 2016,
http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/InformationCommunicationTechnologyPractitioners_Bill_2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/InformationCommunicationTechnologyPractitioners_Bill_2016.pdf)

³² [Government of Kenya rejects ICT Bill,
http://www.cio.co.ke/news/main-stories/government-of-kenya-rejects-ict-practitioners-bill](http://www.cio.co.ke/news/main-stories/government-of-kenya-rejects-ict-practitioners-bill)

³³ Status of the ICT Practitioners Bill Review, see: <http://www.blog.bake.co.ke/2016/08/17/the-status-of-the-ict-practitioners-bill-review/>

³⁴ Draft of the Computer and Cybercrime Bill, <http://www.mygov.go.ke/wp-content/uploads/2016/07/MOICT-PUBLICATION-READY-COMPUTER-AND-CYBERCRIMES-BILL-2016-1-1.pdf>

a proper framework for participation and consultation means that depending on the institution, the quality of participation may be affected.

Infrastructure

The Kenya Information and Communication Act (Cap 411A)³⁵ requires telecom service providers to collect the personal information of SIM card subscribers including their names, ID numbers, and dates of birth. Proxy registration is permissible for minors whose SIM cards are registered under the parent's/guardian's identification documents. It is a requirement for telecommunication services operators to provide the registration details of subscribers to authorities upon request for purposes of investigation of crimes. To combat the sale and use of counterfeit mobile phone handsets, the Communication Authority acting on its mandate, directed that all mobile phones sold and used in the country have an International Mobile Equipment Identity (IMEI) numbers. Around 1.89 million handsets without IMEI numbers were disconnected in October 2012 following an order issued by the Authority.³⁶

The 47 County governments introduced in 2013 have come up with regulations on way leaves.³⁷ Since most counties have prioritised electricity as an economic enabler, in most counties laying electricity infrastructure is not as regulated as other utilities e.g. fibre cables. ICT seems to be of less priority since infrastructure service providers have had to incur further costs and additional compliance requirements under regulations adopted by the different county governments as they expand their reach into those counties by laying fibre optic cables. Way leave regulations have been noted as one of the barriers to ICT access especially in the rural areas as the fees charged and compliance requirements vary across the different counties. For example, to lay a fibre cable from Nairobi county extending to the neighbouring Machakos County, an ISP is required to seek authorisation from both counties and pay separate fees in each county. Telecom service providers have raised concerns to the central government over double regulations.³⁸ Moreover, there are no regulations or meaningful partnerships among the private sector companies with the government to reduce costs through infrastructure sharing. In a bid to help citizens get access to the internet in rural areas, some counties have partnered with service providers in local initiatives to provide free WiFi services.³⁹

4. Results

4.1 Using and Abusing Courts of Law to Stifle Internet Freedom

³⁵ Regulation of Sim card Act (2015), http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/163-Kenya_Information_and_Communications_Act_Registration_of_Sim-Cards_Regulations_2015.pdf

³⁶ 1.89 million 'Fake phones' shut, <http://allafrica.com/stories/201210020512.html>

³⁷ A way leave is basically a right of way granted by a landowner, generally in exchange for payment and typically for purposes such as the erection of telephone wires or electricity cables or laying of pipes underground.

³⁸ Min 1.51 YouTube video from the ICT Wishlist Kictanet Event, <https://www.youtube.com/watch?v=aVvBD0wQYN8>

³⁹ Liquid Telecom connects Nakuru County to free and fast high capacity WIFI <https://www.liquidtelecom.com/news-events/news/275-liquid-telecom-connects-nakuru-county-to-free-and-fast-high-capacity-wifi>

There has been an increase in the number of documented cases of social media users charged in court in Kenya during 2016. On January 25, 10 bloggers were summoned by the Directorate of Criminal Investigations (DCI) for questioning over alleged misuse of a licensed telecommunications system under Section 29 of the Information and Communication Act.⁴⁰ The 10 included Robert Alai, Cyprian Nyakundi, Patrick Msafari, Seth Odongo, Charles Dienya, Anthony Mburu, Eddy Illah, Phelix G-Cord, George Nyongesa and Yassin Juma. The arrests were condemned by the Bloggers Association of Kenya (BAKE) as attempts by the government to intimidate Kenyans online and were tantamount to “criminalisation of civil matters” with users being arrested on charges that ultimately infringe upon freedom of expression.⁴¹

In December 2014, blogger Robert Alai was arrested and charged with undermining the authority of a public officer by referring to President Kenyatta as an “adolescent president” in a blog contrary to Section 132 of the Penal Code, Act.⁴² He was again arrested in February 2015 for offending a businessman online by linking him to a land saga that involved the illegal acquisition of the Langata Primary School playground.⁴³ Meanwhile, Allan Wadi – a student – was also arrested over “hate speech” and jailed in January 2015 for posting negative comments about the president on Facebook.⁴⁴ In the same month, journalist Abraham Mutai was arrested following tweets he posted over alleged corruption in the Isiolo County Government.⁴⁵ He was charged with the “misuse of a licensed communication platform to cause anxiety” but was later released. Nancy Mbindalah, an intern with the department of finance at the Embu County Government, was also charged on similar grounds over social media posts dating as far back as 2013, in which she is alleged to have insulted County Governor Martin Wambora.⁴⁶ Earlier in 2013, Kenyan authorities were looking for 14 bloggers accused of posting hate messages on the internet. Six of them had already been identified, and one had been charged with posting “annoying” statements on Twitter and Facebook, under Article 29(b) of the 2009 Kenya Information and Communications Act that proscribed the transmission of a message that is known “to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person.”⁴⁷

4.2 Online Surveillance

⁴⁰ 10 Bloggers to be grilled over Internet posts, <http://www.standardmedia.co.ke/article/2000189434/10-bloggers-to-be-grilled-over-internet-posts>

⁴¹ James Wamathai, BAKE condemns the arrest and intimidation of Kenyans online, <http://www.blog.bake.co.ke/2016/01/24/bake-condemns-the-arrest-and-intimidation-of-kenyans-online/>

⁴² Blogger Robert Alai Charged With Undermining President Uhuru Kenyatta, <http://www.opennetafrica.org/blogger-robert-alai-charged-with-undermining-president-uhuru-kenyatta/>

⁴³ Blogger Robert Alai arrested over Lang'ata land grabbing saga, <http://businesstoday.co.ke/news/media/1423150493/blogger-robert-alai-arrested-over-langata-land-grabbing-saga>

⁴⁴ Insulting Kenya's president on Facebook lands blogger in prison, <http://stream.aljazeera.com/story/201501022145-0024464>

⁴⁵ Genesis and Synopsis of How Isiolo County Government Degenerated, <http://www.mareeg.com/genesis-and-synopsis-of-how-isiolo-county-government-degenerated/>

⁴⁶ Please Excuse this Misuse of Licensed Telecommunications Equipment, <http://www.brainstorm.co.ke/2015/02/03/please-excuse-this-misuse-of-licensed-telecommunication-equipment/>

⁴⁷ Kenya: 14 bloggers linked to hate messages, <http://www.nation.co.ke/News/14-bloggers-linked-to-hate-messages/-/1056/1732288/-/cut5kvz/-/index.html>

Section 36 of the National Intelligence Service (NIS) Act provides that the "the right to privacy set out in Article 31 of the Constitution, may be limited in respect of a person suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communications may be investigated, monitored or otherwise interfered with" and Section 45 of the same act provides that "...an officer of the Police Service [has] the power to obtain any information, material, record, document or thing and for that purpose – (a) to enter any place, or obtain access to anything; (b) to search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing; (c) to monitor communication; or (d) install, maintain or remove anything."

The Kenya Information and Communications Act (KICA) prohibits the interception and disclosure of communications by licensed telecommunication operators (Section 31) and by any person (Section 83). The KICA Regulations also prohibit the monitoring and disclosure of content transmitted "through the licensed systems by listening, tapping, storage, or other kinds of interception or surveillance of communications and related data" (Section 15(1)).

In a 2015 landmark case, **Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another**⁴⁸ security law amendments on surveillance for security purposes was contested in court. Parties in the case challenged the proposed amendment to Section 36A of the Prevention of Terrorism Act allowing "National Security Organs to intercept communication for the purposes of detecting, deterring and disrupting terrorism". They argued that the clause granted excessively broad surveillance powers to security officials without setting out what these powers are and how they are to be exercised, and leaving it to the Cabinet Secretary to prescribe. The clause was also problematic because it did not identify the security organs and was outside any kind of parliamentary scrutiny therefore breaching international standards on the right to privacy. However, the courts decided, that there were sufficient safeguards and the clause did not threaten the right to privacy and it was maintained in the law.

In **Bernard Murage versus Fineserve & 3 others [2014]**,⁴⁹ the petitioner challenged the use of thin sim technology which was alleged to be able to intercept communications from the primary sim data. It was held that these matters were for the Communications Authority and the Central Bank to determine as there did not appear to be any abuse of the petitioner's rights and further that as the petitioner was not a consumer, that he was not a party to the proceedings.

Under the proposed Computer and Cyber Crimes Bill 2016, which is currently under development, it is expected that greater elaboration will be provided for collaboration of persons with surveillance and interception. The current draft of the bill, yet to be formally published by Government, provides for investigation procedures for law enforcement purposes and international cooperation. This would include: search and seizure, preservation of data, interception of content data, disclosure of traffic data, limitation of intermediary liability, mutual legal assistance and so on.

Kenya does not have a data protection law although a Data Protection Bill⁵⁰ developed in 2011 has never been officially published. The draft Bill set out principles of personal information protection, conferred oversight and enforcement powers to the Commission on Administration of Justice (the Ombudsman) and

⁴⁸ See Judgement: <http://kenyalaw.org/caselaw/cases/view/106083/>

⁴⁹ See Judgement: <http://kenyalaw.org/caselaw/cases/view/109772/>

⁵⁰ See text: <http://cickenya.org/sites/default/files/bills/Data%20Protection%20Bill%20Final.pdf>

prescribed offences and recourses for redress. The draft bill will need to be updated to bring it into conformity with recent developments and international best practice and standards on privacy rights.⁵¹

Further, the Ministry of ICT is in the process of developing a Computer and Cyber Crimes Bill⁵² which prescribes various offences including accessing, interfering with or intercepting data without authorisation (Clauses 4 - 7). It also provides for the recording of and seizure of data (Clause 23) and the collection of traffic data and the interception of content data for law enforcement purposes (Clauses 26 and 27 respectively). Sub-clause 28 (2) provides penalties for misusing the powers granted under Part III relating to investigation procedures and Clause 29 provides for redress with the High Court or Court of Appeal. The debate around the Computer and Cyber Crimes Bill has sought severally to govern limitations to the freedom of expression online. Initial drafts of the Bill, for example, prescribed much higher penalties for hate speech online than is currently provided for offline.

For example, Section 17 of the 2014 version of the Bill which has since been struck out, provided:

17 (1) A person who—

- (a) uses threatening, abusive or insulting words or behaviour,
- (b) displays any written or electronic material;
- (c) publishes or distributes written or electronic material; or
- (d) distributes, shows or plays, a recording of visual images; through a computer system which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour whether publicly or anonymously, commits an offence if that person intends to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

(2) It is immaterial where the offence referred to in subsection (1) is conducted privately or publicly.

(3) A person who commits an offence under this section shall be liable upon conviction to a fine not exceeding one million shillings or to an imprisonment term for a term not exceeding five years or to both. In this section, “ethnic hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

The Nairobiian (a local daily), reported an incident in their June 10-16, 2016 issue,⁵³ of public CCTV camera personnel being paid to monitor a woman’s travel movements for personal reasons and that she was subsequently blackmailed on the basis of knowledge of her travel movements. The lack of regulations to govern the operation of CCTV cameras deployed by government across major cities across the country, presents a potential challenge to the enjoyment of the rights to privacy.

Currently, all telecommunications providers collect personal financial information of their users in the course of providing mobile financial services such as MPesa. As part of its vetting process, the National

⁵¹ Kenya: Draft Data Protection Bill Critically Limited,

<https://www.article19.org/resources.php/resource/2825/en/kenya:-draft-data-protection-bill-critically-limited>

⁵² Computer and Cyber Crimes Bill, <http://www.mygov.go.ke/?p=11234>

⁵³ Are police CCTV cameras used to spy on innocent citizens?,

<http://www.sde.co.ke/thenairobiian/article/2000204830/are-police-cctv-cameras-used-to-spy-on-innocent-citizens>

Police Service Commission requires police officers to provide their bank as well as MPesa statements.⁵⁴ Banks and mobile banking services providers have been required to provide these statements to the commission although it is not clear whether warrants are sought before this information is produced as some individuals have obtained injunctions against the provision of this information citing the need for specificity of dates and details as opposed to all banking information.⁵⁵

Meanwhile, the Directorate of Immigration and Registration of Persons has increasingly been using biometrics to document refugees,⁵⁶ to address the issue of ghost workers in civil service,⁵⁷ and for voter registration.⁵⁸ The absence of a data protection framework once again presents a challenge in securing the collected information.

Allegations of surveillance of activists has limited their ability to document and report on sensitive issues such as extra-judicial killings of terrorist suspects. Organisations working on these issues such as Haki Africa, MUHURI and the Kenya Human Rights Commission have reported increased surveillance including being threatened with deregistration,⁵⁹ having their accounts frozen or showing cause for their accounts not to be frozen respectively in 2015 shortly before the release of controversial reports.

The government departments responsible for monitoring communications are the National Intelligence Service (NIS) and the Directorate of Criminal Investigations, including its units such as the Cyber Crime Unit, Anti-Banking Fraud Unit and the Anti-Terrorism Police Unit. These were established under the National Intelligence Service Act and the National Police Service Act and have various powers to investigate criminal offences, part of which includes legitimate authority to seek orders to intercept communications.

4.3 Control and Blockages

Last year, the Open Rights group, Article 19 the Kenya ICT Action Network (KICTANet) developed a tool⁶⁰ to investigate evidence of content blocks. The results of the study indicate that the only websites which were inaccessible appeared to be inoperative due to technical errors. In addition, ongoing research by the Tor Project on internet censorship shows that Kenya has not experienced any intentional website blocking by the government or any other institutions.⁶¹ The only anomalies detected in July 2016 by the OONI explorer tool came from Domain Name System (DNS) inconsistency. The DNS translates a web address into an IP number closest to the users geographically for faster website access. Inconsistency occurs where the resolved IP address is different from the website address directing the user to another site or a failed connection to websites.

⁵⁴ MPESA accounts to be probed in vetting <http://www.nation.co.ke/news/MPesa-accounts-to-be-probed-in-vetting/1056-2953228-7n9abi/index.html>

⁵⁵ Specify Period of Interest to Get Access, Kidero Tells EACC on Accounts, http://www.the-star.co.ke/news/2016/03/20/specify-period-of-interest-to-get-access-kidero-tells-eacc-on-accounts_c1316696

⁵⁶ Catalyst – Kenta Biometric Identification Systems, <https://kanere.org/2014/08/16/catalyst-kenya-biometric-identification-systems/>

⁵⁷ Ghost Works: Kenya Biometric Register Launched, <http://www.bbc.com/news/world-africa-29011628>

⁵⁸ Kenya Introduces Biometrics for Voter Registration, <http://www.voanews.com/content/kenya-introduces-biometrics-for-voter-registration/1543269.html>

⁵⁹ NGOs in Kenya protest threatened deregistration of 959 organisations, <http://www.irinnews.org/report/102174/ngos-kenya-protest-threatened-deregistration-959-organisations>

⁶⁰ Jieleze, <https://kenya.censorship.exposed/en/home/>

⁶¹ OONI Explorer, Kenya, <https://explorer.ooni.torproject.org/country/KE>

In 2015, the government of Kenya allegedly reached out to the Hacking Team to bring down a social blog (Kahawa Tungu)⁶² raising issues on government accountability.⁶³ The Hacking Team turned down the requests citing that it was against the company policy and international regulations to deal directly with law enforcement. Furthermore, PacketShaper equipment that is used for filtering, censorship and surveillance was detected to be in use in networks in Kenya in 2012.⁶⁴

Kenya, which has seen a rise in anti-gay rhetoric⁶⁵ led by various political leaders, with attempts to introduce an anti-homosexuality law, in February 2016 had the Kenya Film Classification Board (KFCB) order Google to pull down a video the agency deemed inappropriate for promoting gay relationships. The KFCB also expressed its interest to rate and therefore censor content from Netflix⁶⁶ and potentially ban it for national security reasons.⁶⁷

Role of Intermediaries

According to Google's Transparency Report,⁶⁸ there has been only one content takedown request from Kenya in the period of June 2014 and June 2015. The request was in form of a court order on behalf of Kenya Internet Solution to delist an item from its search engine alleged to be defamatory. The company responded with 100% compliance. Further, during the same period Kenya has been one of the two African countries that have sent removal requests to Twitter; both of which got 0% compliance.⁶⁹ Kenya did not request for user information in the second half of 2015.⁷⁰ However, it made five requests in the first half of 2015 and the intermediary released data from one account, indicating 20% compliance.

The two transparency reports released by Vodafone⁷¹ (whose Kenyan operator is Safaricom) have failed to disclose data requests or content control by the government, stating that the laws on whether to release such data are unclear. Vodafone owns 40% of Safaricom shares,⁷² and currently holds the largest market share of the country's mobile telephone and data services. Airtel Kenya, has never released any data on government requests.

⁶² Kahawa Tungu, see: <http://www.kahawatungu.com/>

⁶³ Italians Reject Bid to Close Kahawa Tungu, www.nation.co.ke/news/politics/Italians-reject-bid-to-close-Kahawa-Tungu/1064-2786990-72vi9ez/index.html

⁶⁴ Planet Blue Coat Mapping: Global Censorship and Surveillance Tools, <https://citizenlab.org/2013/01/planet-blue-coat-mapping-global-censorship-and-surveillance-tools/>

⁶⁵ Homophobic Rhetoric Detrimental to Health of Key Populations in Kenya, <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/364-homophobic-rhetoric-detrimental-to-health-of-key-populations-in-kenya.htm>

⁶⁶ Margaret Wahito, Netflix content must be classified afresh, says KFCB, <http://www.capitalfm.co.ke/business/2016/01/netflix-content-must-be-classified-afresh-says-kfcb/>

⁶⁷ Kenya Film Board Protests Decision not to Regulate Netflix, http://www.standardmedia.co.ke/business/article/2000188791/kenya-film-board-protests-decision-not-to-regulate-netflix?articleID=2000188791&story_title=kenya-film-board-protests-decision-not-to-regulate-netflix&pageNo=1

⁶⁸ Google transparency report, <https://www.google.com/transparencyreport/removals/government/KE/?hl=en>

⁶⁹ Twitter transparency report, <https://transparency.twitter.com/removal-requests/2015/jul-dec>

⁷⁰ Facebook transparency report, <https://govtrequests.facebook.com/country/Kenya/2015-H1/#>

⁷¹ Vodafone transparency report 2015, http://www.vodafone.com/content/dam/vodafone-images/sustainability/downloads/vodafone_law_enforcement_disclosure_report_2015-4.pdf

⁷² Safaricom Sustainability Report https://www.safaricom.co.ke/sustainabilityreport_2015/stakeholder-engagement/shareholder/

Infrastructure control

In 2015, the Communications Authority indicated that they were in the process of developing cyber regulations in response to recent cyber security incidents.⁷³ The new regulations, first mooted in 2012,⁷⁴ would obligate users on public WIFI networks to register their mobile phone numbers. The identification process would then be linked to the SIM-card registration system through mobile service providers. Cyber cafes would also be required to install CCTV (Closed Circuit Television cameras) for face identification. However, there are no clear indications as to when these proposed regulations will come into effect. These proposed regulations were met with criticism with critics stating that they would violate the right to privacy guaranteed under the Constitution and the regulator is yet to announce the next steps.⁷⁵

4.4 Activism and propaganda

Ministries and government institutions and agencies are increasing their online presence. Most of them manage websites and social media pages to disseminate information to the public. In March 2016, in a bid to re-organise its communication strategy, the government re-established the Office of the National Government Spokesman, which had been shut down in 2013 to coordinate government communication.⁷⁶ Prior to the re-establishment of this office, Kenyans heavily depended on the Presidential Strategic Communications Unit (PSCU) Twitter⁷⁷ and Facebook accounts for up to date information and engagement on presidential and government matters. During the undertaking of this research the PSCU website was taken down during the re-organisation process.⁷⁸ This could be a possible indication that citizens rely more on social media than on website content for government updates.

It is important to note that a former senior police officer was appointed to the post of national government spokesperson, and that the office is now domiciled within the Ministry of Interior which is responsible for internal security, as opposed to the Ministry of ICT, where the office was previously. This is a continuing trend by the government of appointing former military or police officials to key positions.

Kenya has been ranked in a research study to be the fourth most active country in Africa on Twitter with 125 million tweets in 2015.⁷⁹ The other countries were Egypt (500 million), Nigeria (360 million), South Africa (325 million) and Ghana (70 million). Activists have used the platform to coordinate with other activists and it has even been suggested to be effective means of keeping Kenyan and International

⁷³ Ratio Magazine 'CA press release on measures to regulate Cybercrime', <http://www.ratio-magazine.com/201507034420/Corporate-Press-Releases/-Kenya-Press-Releases-Communications-Authority-Statement-on-Measures-to-Manage-Cybercrime.html>

⁷⁴ Police Target Cybercafes in War on Cyber Crime <http://www.businessdailyafrica.com/Corporate-News/Police-target-Internet-cafes-in-war-on-cybercrime/539550-1383882-item-0-owp0yu/index.html>

⁷⁵ Authority, Ministry engage stakeholders on sector regulations, See: <http://www.ca.go.ke/index.php/component/content/article/94-news/383-authority-ministry-engage-stakeholders-on-sector-regulations>

⁷⁶ Eric Kiraithe Named Government Spokesman, <http://www.nation.co.ke/news/Eric-Kiraithe-named-govt-spokesman/1056-3119152-15t4d6nz/index.html>

⁷⁷ Presidential Strategic Communications Unit twitter handle https://twitter.com/pscu_digital?lang=en

⁷⁸ PSC website, www.presidency.go.ke

⁷⁹ How Africa Tweets, Portland Communications, http://www.portland-communications.com/wp-content/uploads/2013/05/Twitter_in_Africa_PPT.pdf

corporations accountable, crowd funding and highlighting women's rights issues.⁸⁰ Notable campaigns include:

- a) *#SomeoneTellCNN* - used to urge CNN to report factually and accurate news on Kenya
- b) *#MyDressMyChoice* - used to urge all Kenyans to respect the choice of ladies to dress how they like
- c) *#IsUhuruInKenya* - used to keep the government accountable on travel expenditure by the President's Office
- d) *#DeadBeatKenya* - used to keep fathers accountable for their responsibilities to families
- e) *#1MillionforJadudi* – used to raise funds for treatment of a cancer victim, and in a record 24 hours 6 million Kenya shillings was raised.

Perhaps as a result of this, Twitter has been the most affected social media platform on government use of propaganda to achieve its aim. It has previously been alleged that the State House digital director in the Presidential Strategic Communications Unit, Dennis Itumbi, had been using bots and fake accounts in order to create an impression on social media that a government official or a government programme is being well received online.⁸¹ It has also been previously reported that the Kenyan Government had begun recruiting a "cyber army" with a mandate of hacking accounts of activists, bloggers, journalists and dissidents.⁸² This revelation can however not be confirmed.

What has been more evident is the government use of bots to create trending hashtags in response to criticism and calls for more government accountability.⁸³ For example in a security operation, where the government had rounded up and detained more than 1,000 people of Somali origin at the Safaricom Kasarani Sports Stadium, Kenyans on Twitter created the hashtag, *#Kasaraniconcentrationcamp* to highlight their displeasure with these actions. The government responded by using various hashtags to explain the security operation⁸⁴ with the hashtag *#OperationLindaNchi* being the most prominent.

There have been calls for government transparency on the use of Twitter bots to create strategic narratives and the government has denied its use of bots. Larry Madowo, an influential local journalist on social media noticed⁸⁵ the use of government bots to troll news stations during prime-time news and questioned government officials about the same through Twitter.⁸⁶ According to this blog, "The fake accounts network became clear during the Press Pass TV when dozens of accounts started relaying identical messages that were either praising the Government or castigating the opposition."⁸⁷

⁸⁰ Standing up for the Right Thing: The role of Twitter Hashtags in African Social Media Activism, <https://cipitblog.wordpress.com/2015/01/03/standing-up-for-the-right-thing-the-role-of-twitter-hashtags-in-african-social-media-activism/>

⁸¹ Digital vs Analogue: The Sad Tale of Uhuru's Presidency, <http://nairobinews.nation.co.ke/news/digital-vs-analogue-the-sad-tale-of-uhurutos-presidency/>

⁸² Kenyan Government Now Recruits Cyber Army to Hack Accounts of Activists and Critics, <http://www.kahawatungu.com/2015/01/13/kenyan-government-now-recruits-cyber-army-hack-accounts-activists-critics/>

⁸³ Tweeting Against Corruption: Fighting Police Bribery Through Online Collective Action, www.diva-portal.org/smash/get/diva2:747107/fulltext01.pdf

⁸⁴ Digital Speak: Kenya's War on Terror Explained Using Hashtags, <http://www.sde.co.ke/article/2000164157/digitalspeak-kenya-s-war-on-terror-explained-using-hashtags>

⁸⁵ Kenya: Can a Tweet Be Worth Sh50m? in Kenya, Yes!, <http://allafrica.com/stories/201508180158.html>

⁸⁶ Twitter, @LarryMadowo, <https://twitter.com/larrymadowo/status/560854762036674560>

⁸⁷ See, <https://catfishingandbots.wordpress.com/>

In June 2016, there were reports that the PSCU was being reconstituted following news of the sacking of its director and other officials, which was celebrated⁸⁸ by Kenyans online.⁸⁹ However the team, known for its aggressive defence of government against any form of criticism was reconstituted in the first week of July, which according to reports was done after the intervention of the President.⁹⁰

Online discussions on social and political issues normally take place on Facebook and Twitter; on blogs and in the comment sections of online newspapers. Government Facebook pages are considered one way communication channels more for broadcasting public information than for engaging with citizen concerns. Public officers have sought to quell the robustness of online discussions by arresting online users who have voiced concerns about corruption issues on Facebook,⁹¹ Twitter⁹² and even WhatsApp.⁹³

The most common charges proffered against online users included misuse of a telecommunications system under KICA until it was repealed by a High Court decision in May 2016, undermining the authority of a public officer under Section 132 of the Penal Code and hate speech under Sections 13 and 62 of the NCI Act. These cases often do not result in convictions demonstrating that criminal prosecutions are being used to intimidate the freedom of expression online.

The Push-Back

Kenyans have created⁹⁴ counter hashtags to beat the troll bots accounts.⁹⁵ For instance in 2015, the purported government Twitter bots took to the platform with the hashtag #NorwaySupportsTerror over allegations that the government of Norway was funding terror by backing Haki Africa, a Mombasa NGO that had been working to hold government accountable over its counter-terrorism operations. Kenyans on Twitter realized that this was a distraction to steer conversation away from the fact that there had been recent incident where Al Shabaab claimed to have killed 20 police officers in Yumbis, a village north of Garissa.⁹⁶

Kenyans on social media have in the past raised complaints about parody⁹⁷ accounts e.g. of the police, which logged in complaints online on behalf of the police. Further, the police have been known to use

⁸⁸ Nowhere to Hide for Sacked Itumbi as Twitter Trolls Pop Champagne,

<http://nairobinews.nation.co.ke/news/nowhere-hide-sacked-itumbi-twitter-trolls-pop-champagne/>

⁸⁹ Now That Itumbi Is Sacked Here Are Seven Things That Dennis Itumbi Can Get To Do For Relevancy...He Really Should Consider 4 and 6 and 7 <http://www.ghafla.co.ke/blogs/music/11522-now-that-itumbi-is-sacked-here-are-seven-things-that-dennis-itumbi-can-get-to-do-for-relevancy-he-really-should-consider-4-and-6-and-7>

⁹⁰ Dennis Itumbi Was Not Sacked, Nobody from PSCU Lost Their Job! See what's happening, <http://www.waza.co.ke/dennis-itumbi-was-not-sacked-nobody-from-pscu-lost-their-job-see-whats-happening/>

⁹¹ A 24 year old woman in custody for abusing Embu governor on Facebook, <http://mobile.nation.co.ke/counties/woman-in-custody-for-abusing-Wambora-on-Facebook/-/1950480/2584890/-/format/xhtml/-/bbb3w0z/-/index.html>

⁹² How A Retweet Got KBC Journalist Judith Akolo In Trouble with The Police, <https://tuko.co.ke/83161-retweet-got-kbc-journalist-judith-akolo-trouble-police.html>

⁹³ Man Charged for Sharing Killed Soldiers Photos on Whatsapp, <http://citizentv.co.ke/news/man-charged-for-sharing-killed-soldiers-photos-on-whatsapp-112194/>

⁹⁴ It costs a few coins to pay Cyprian Nyakundi to fight your "enemies" online, <https://tuko.co.ke/123013-eish-how-cyprian-nyakundi-has-gone-rogue-on-social-media.html>

⁹⁵ #JubileeSupportsTerror takes on Kenyan government after Al-Shabab attacks, <http://stream.aljazeera.com/story/201505261502-0024786>

⁹⁶ Ibid

⁹⁷ Twitter- @KenyaPolice, <https://twitter.com/kenyapolice/status/348131382020681728>

social media with anonymous or fake accounts to monitor users. For instance, citizens have noticed police officers in closed Facebook groups created to inform drivers on the roads to use to avoid alcohol level tests.⁹⁸

5. Discussion

From the foregoing, it is worth noting that more Kenyans are getting active online. This is attributed to the increasing access to the internet and related services in both rural and urban areas, and affordability that has improved with connectivity to broadband internet as well as the entry into the market of new small scale internet service providers.

With a vibrant and forward-looking constitution, which places rights at its epicentre, civic space has expanded in the country as awareness levels of constitutional rights have increased. From a very restricted state in the 1990s, the public have become more aware of their rights buttressed by the 2010 Constitution and are keen to express themselves on key national issues online and offline. The challenge has been, that some of the views expressed online have bothered the government of the day. The current Jubilee government is more sensitive to criticism as compared to the previous Kibaki administration. As a result, security agencies have been keener on responding to bloggers and other critics of the government through arrest or intimidation. A famous cartoonist, Gado, who had drawn for the Daily Nation newspaper for decades, was fired after several of his sketches rubbed the current administration the wrong way.

Further, sensitivity around cases at the International Criminal Court, where the President and his Deputy had been charged has contributed to governments' sensitivity. Besides, terrorism incidents in the country over the past three years, coupled with the use of online channels for promoting violent extremism, and hate speech, attracted the attention of security agencies to the online space. The result has been responses by government in attempts to regulate online speech which have had chilling effects on free speech. This is noted in the 2015 Freedom House Report, which ranked Kenya as partially free.

Other than the introduction of retrogressive legislation aimed at capping free speech, the government has also introduced other measures some of which have been highlighted in this report. These include: the recruitment of, and sponsoring of influential bloggers to advance government propaganda; surveillance and intimidation of bloggers and NGO activists; public service announcements threatening action against online speech; shifting government advertising to the online space which threatens income streams of media organizations; establishment of monitoring instruments such as CCTV; swift and speedy prosecution and trial of bloggers among others. This demonstrates that the government has embraced the online space and is keen to increase its surveillance potential and control narratives online.

⁹⁸ Police Targeting Facebook Pages Assisting Drunk Drivers Escape, <http://nairobewire.com/2014/01/police-targetting-facebook-pages-assisting-drunk-drivers-escape-law.html>

6. Recommendations

6.1 Government

The cost of laying down internet infrastructure can be reduced through infrastructure sharing and public private partnerships. This will then contribute to reduction in access costs and give a stronger front for collaborative efforts on infrastructure regulations.

As discussed above, in the absence of a streamlined infrastructure sharing plan, telecommunications companies are faced with various regulations at national and county levels thus adversely affecting the spread and cost of Internet network especially in the rural areas. County governments should be encouraged to harmonize infrastructure regulations affecting internet connectivity.

The government is encouraged to respect human rights online and to ensure that all measures, whether legal, policy or administrative, comply with the constitution and generally accepted human rights standards. The laws providing for surveillance and interception of communication for the purpose of investigation such as the Security Laws (Amendment) Act 2014 should be amended to ensure transparency in the procedures of applying for authorisation and implementation. Again, the circumstances under which interception is warranted should be narrowed to only those which pose justifiable threat to the national security or peace.

6.2 Civil society

The Civil Society should continue to strongly advocate for internet freedoms in law and in practice in order to ensure the protection of free speech online, accessible and affordable internet, data protection and privacy. They should also increase their monitoring, reporting and responses to cases of violation of rights online.

The importance of upholding internet freedoms continues to increase with the changing political environment. This has been evidenced through for example, the proposed Social media bill that was expected to control online expression ahead of Kenya's 2017 general election and the ICT practitioners bill that is detrimental to innovation and expression. Advocating for these freedoms requires a robust, vigilant and brave civil society. Further, civil society groups that have traditionally promoted human rights offline are encouraged to embrace the online space and start voicing out concerns regarding violation of human rights online. Over and above this, youth are encouraged to establish new organizations that can advance internet freedom, considering that traditional civil society organizations had not focused on this important area.

6.3 Academia

There is need for more research into Internet access and online freedoms. The academia, as a relatively neutral stakeholder, can be useful in the generation of new information, recommendations and strategies that can be beneficial for the online sphere, including in policy and law making. With the current situation, the civil society organizations and other stakeholders face challenges advocating for Internet freedoms without enough backing from research to engage in policy development. Local institutions should aggressively seek support to conduct empirical research in the region, and generate evidence and knowledge, including of comparative approaches of initiatives in other countries to enable benchmarking in this dynamic sector.

6.4 Media

The online environment has affected the media industry as they have had to re-organise their operations and embrace the internet. Today, it is hard for media houses to survive without a strong internet presence. However, the industry should embrace and actively advocate for internet freedom as opposed to being a reluctant participant. In addition, the media can play a critical role of creating awareness and educating the public on public policy engagement processes. This should include highlighting key issues of public concern. Further, the media should reduce coverage of political events and also provide coverage for key activities or issues that are in the public interest. This they can do by providing not only coverage of events but also platforms e.g. through newspaper columns, TV and radio shows, for the academia and civil society to showcase their work and advance their advocacy, especially where the media is conflicted or lacks the capacity. Where costs are an issue, charges to these groups should be reduced since they work in the public interest.

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