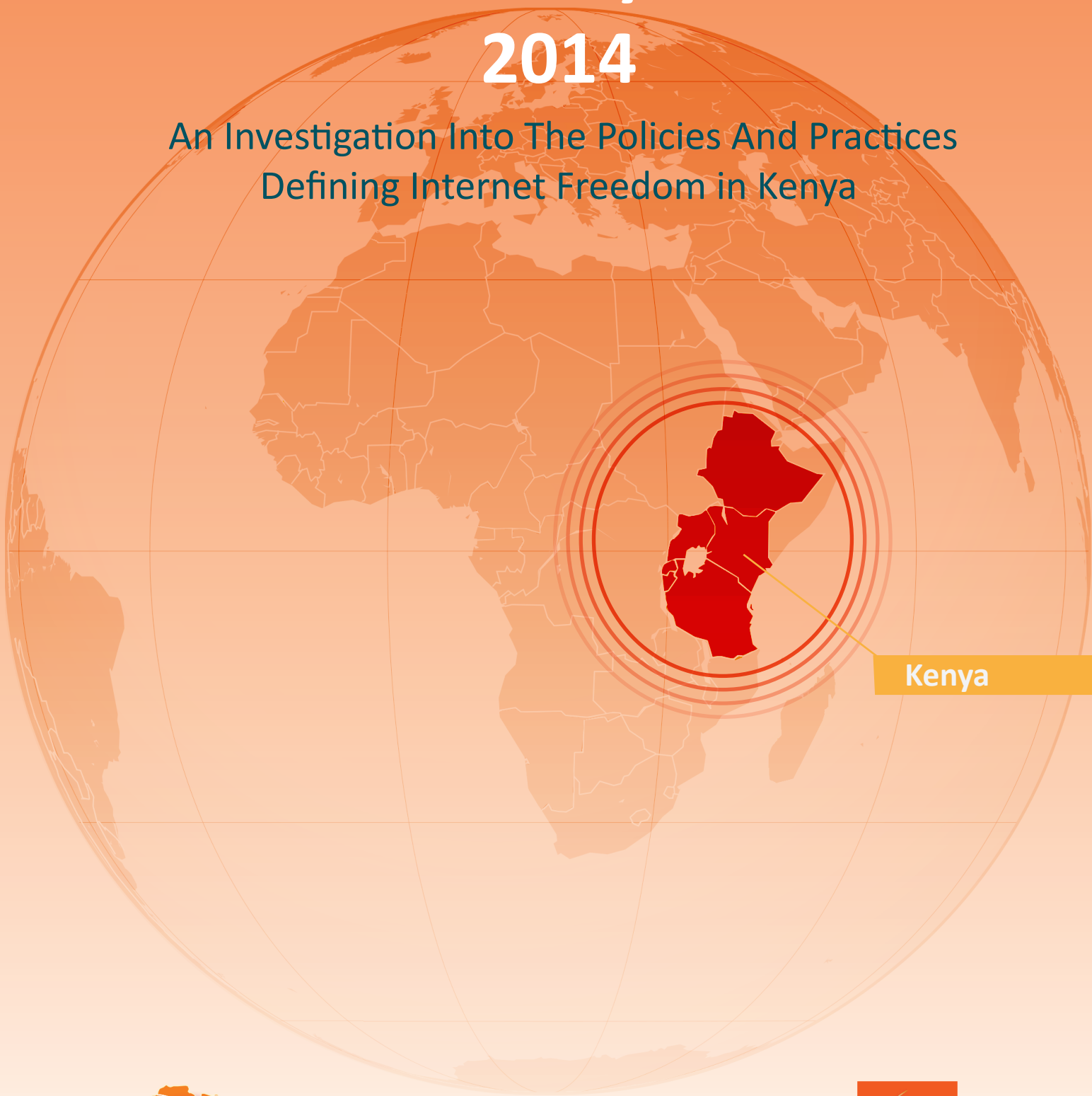
State of Internet Freedoms in Kenya 2014

An Investigation Into The Policies And Practices Defining Internet Freedom in Kenya



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Credits

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This report was produced as part of CIPESA's internet freedoms monitoring initiative, OpenNet Africa. Other country reports have been written for Burundi, Ethiopia, Rwanda, Tanzania, South Africa and Uganda. The country reports, as well as a regional 'State of Internet Freedoms in East Africa' report, are available at www.opennetafrica.org.

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Content

Introduction

The use of Information and Communication Technologies (ICTs) continues to grow in Kenya, aided by a liberal regulatory regime, growth in the country's economy, rising affordability, and innovations such as mobile money transfer that are attracting millions of users. Kenya has 31.3 million mobile subscriptions, representing a mobile penetration of 77%. Internet access stands at 52% of the population and there are 26 million subscribers to the mobile money service.[1] There are four mobile service providers: Safaricom, Airtel, Essar Telecom, and Telkom (Orange). Safaricom enjoys 65% share of the voice market and 75.6% of the data/internet market.

The mobile phone is the preferred method of internet access, while social media sites are among the most accessed websites. For instance, as of March 2014, the top websites accessed by Kenya's internet users were Google, followed by Facebook, Youtube and Twitter. Wikipedia and Blogspot were also among the top 10.[2] According to the communications regulator, broadband access is rapidly growing (currently standing at just over 40%),[3] aided partly by marine fibre optic cable that landed at the Kenyan coast in 2009. The government and various private companies are also laying fibre optic cable around the country. Innovations such as the crowd-mapping platform Ushahidi and the mobile money application M-Pesa are boosting ICT use in the country.

Kenya's democratic credentials have also been improving, with a peaceful presidential election in March 2013, supported by the country steadily implementing wide-ranging governance reforms mandated by the 2010 constitution. Such reforms include devolution of government, a cut to powers of the presidency, and greater transparency in public operations.

Despite these progressive reforms, Kenya lacks an access to information law although a bill was published in 2007. In 2013, Kenya amended two of her communications acts – the Kenya Communications and Information (Amendment) Act 2013 and the Media Council Act 2013 - inserting retrogressive provisions that restrict media freedom and general freedom of expression. Furthermore, there were attempts to amend the Public Benefits Organisations Act, which would greatly limit freedoms of association. The amendment bill was later discarded after much criticism from the general public. The proposed law prohibits NGOs (to be renamed Public Benefit Organisations, or PBOs) from receiving more than 15% of their funding from external donors and also prohibits them from receiving their funding directly from donors. Instead, the funds would be channelled through a new PBO Federation.[4]

1 *Communications Commission of Kenya (CCK), Quarterly Sector Statistics report: Second Quarter of the Financial year 2013/14, http://www.cck.go.ke/resc/downloads/Sector_Statistics_Report_Q2_201314.pdf*
2 *http://www.alexa.com/topsites/countries/KE*
3 *Communications Commission of Kenya (CCK), Quarterly Sector Statistics report: Second Quarter of the Financial year 2013/14, http://www.cck.go.ke/resc/downloads/Sector_Statistics_Report_Q2_201314.pdf*
4 *FIDH, Parliament decides to withdraw controversial amendments targeting Public Benefit Organisations (PBO) , December 5, 2013; http://www.fidh.org/en/africa/kenya/14469-kenya-parliament-decides-to-withdraw-controversial-amendments-targeting*

Relevant Agencies

The Communications Authority of Kenya was created by the Kenya Information and Communications (Amendment) Act 2013 as "independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions." The Agency, which replaced the Kenya Communications Commission, departs from the old way of choosing the regulatory body's board members. A selection panel comprised of representatives of the Media Council, Private Sector Alliance, Law Society, Institute of Engineers, Public Relations Society, National Union of Teachers, Consumers Federation, and the ministry in charge of the media is charged with selecting the board members.

The Media Council is a statutory body governed by the Media Council Act, No. 20 of 2013 with the mandate to regulate the media and the conduct and discipline of journalists. The Council started as a self-regulating body in 2004 to regulate the media industry in Kenya but through the Media Act 2007, it adopted a co-regulation approach, where it started receiving government funds for some of its activities but remained independent in its operations.[5] The Council strongly criticised the Media Council Act of 2013, which it believes infringes on media freedom and freedom of expression.

The National Cohesion and Integration Commission was created by The National Cohesion and Integration Act of 2008, in the aftermath of the 2007-2008 post-election violence. Its mission is "to facilitate and promote a Kenyan society whose values are harmonious and non-discriminatory for peaceful co-existence and integration."[6] Its chairperson is appointed by the president from among nine commissioners nominated by parliament. The Commission has since its creation been centrally involved in fighting hate speech, including in the online sphere as can be seen below in the sub-sections on the Commission's founding law and the one on incidents related to internet freedoms violations.

[5] *The Media Council of Kenya, http://www.mediacouncil.or.ke/en/mck/index.php/about-us/who-we-are*
[6] *The National Cohesion and Integration Commission, http://www.cohesion.or.ke/*

Policy and Regulatory Environment

Some of the laws related to online rights and freedom of expression in Kenya evolved in part from the post-election violence of 2007-2008, during which ICT, particularly short message services (SMS), were used to fan ethnic and political conflict that resulted in the death of more than 1,200 people. This created the need to deter and to punish perpetrators of hate speech. Others laws, such as the one that caters for the interception of communications, came as part of regulatory efforts to strengthen the role of intelligence services in surveillance. More recent laws, such as the Kenya Information and Communications (Amendment) Act 2013, and the proposed Access to Information law, arise from a need to implement the country's liberal 2010 constitution. Unfortunately, these recent laws have failed to live up to the progressive standards set by the constitution.

The Constitution

Article 31 of Kenya's constitution grants all citizens the right to privacy, including in the sphere of communications. Meanwhile, Article 33 (1) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. Crucially, however, Article 33 (2), 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." Furthermore, in Article 33 (3), the constitution stipulates that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 35 grants every citizen 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." Furthermore, it provides that every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The National Cohesion and Integration Act of 2008

Section 13 of this Act outlaws hate speech. It 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." This law has been used to charge online journalists and bloggers, although some lawyers have suggested that this was in contravention of individuals' privacy.[7]

Section 62 of this Act relates to the offence of ethnic or racial contempt. It states that "a newspaper, radio station or media enterprise that publishes" 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, is liable on conviction to a fine not exceeding KShs1 million (US$ 11,521). The law does not specifically make mention of digital platforms such as mobile phones or the internet. Nonetheless, it has been used against content published online, as is explained in the subsection 'Internet freedoms violations' below.

[7] *Judie Kaberia and Nzau Masau, Kenyan Authorities in the Dock Over Hate Speech, May 3, 2013. http://iwpr.net/report-news/kenyan-authorities-dock-over-hate-speech*

The Kenya Information and Communications (Amendment) Act 2013 [8]

Enacted in December 2013, this law created the Communications Authority of Kenya. Under Section 27, this law makes it mandatory for telecom service providers to register the particulars of telephone subscribers, namely the person's full name, identity card number, date of birth, gender, physical and postal address. Under Section 27A (2) subsection c, telecom providers are required to keep subscribers' details in a secure and confidential manner, and not to disclose them without the written consent of the subscriber. Exceptions are for purposes of facilitating statutory functions of the Authority, in connection with the investigation of a criminal offense or for purposes of criminal or civil proceedings. Offending operators may be sentenced to a fine of up to KShs 5 million (US$ 57,605).

The Act states that freedom of the media and freedom of expression may be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." Specifically, the right to freedom of expression does not extend to the spread of propaganda for war; incitement to violence; the spread of hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of other persons or community or incitement to cause harm; or is based on any ground of discrimination.

The Communications Amendment Act 2009

This Act gave the Communications Commission of Kenya (CCK) regulatory powers over broadcasting and telecommunications services. Under section 27, it provides that the minister, in consultation with CCK, will make regulations for telecoms services, and these shall include regulations on the privacy of telecommunications. The law creates the offense of improper use of telecom services. Section 29 penalises any person who by means of a licensed telecommunication system "sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character"; or sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person." A convicted person is liable to a fine not exceeding KShs 50,000 (US$576), or a jail term not exceeding three months, or both.

Meanwhile, Section 31 relates to the interception and disclosure of subscribers' communications by a telecoms operator. An operator who intercepts a message, or discloses the contents of an intercepted message to a third party, is liable on conviction to a fine not exceeding KShs300,000 (US$3,462) or a maximum prison sentence of three years, or both. The law also stipulates a KShs200,000 (US$ 2,304) penalty or imprisonment of not more than two years, or both, for unauthorised use of computers (Section 83U). Meanwhile, Section 83W states that a person who "intercepts or causes to be intercepted, directly or indirectly, any function of, or any data within a computer system" is liable to a fine not exceeding KShs 500,000 (US$ 5,760) or imprisonment for a term not exceeding three years or both.

Sexual content is regulated under Article 84D. The article states that a person who "publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons" can be sentenced to a maximum of two years and fined up to KShs200, 000 (US$ 2,304).

[8] *The Kenya Information and Communications Amendment Act 2013, http://www.cck.go.ke/regulations/downloads/KenyaInformationandCommunications_Amendment_Act2013_.pdf*

The National Intelligence Service Act, 2012

This law 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." It describes the term 'monitor' as the "means to intercept, listen to, record or copy using any device." Under Article 45, a member of the intelligence service needs to obtain a warrant for authorisation to do monitoring. The law does not state in detail what kinds of communications may be monitored and does not use the term 'interception'. Kenya does not have a stand-alone law on interception of communications. There are no publicly recorded instances when Kenya used the National Intelligence Service Act 2012 to intercept communications.

The Access to Information Bill 2013

Kenya published a draft access to information bill in January 2007 but there has been little progress on passing it into law. The new government in 2013 promised to fast-track the enactment of the law, one of whose objectives is to give effect to the right to access to information by citizens as provided for under Article 35 of the Constitution. The law's other objectives, as outlined in Article 3, are to:

- provide a framework for the proactive disclosure by public entities and private bodies of information that they hold and the provision of information on request in line with the constitutional principles;
- provide a framework to facilitate access to information held by public entities and private bodies in order to ensure the protection of any right conferred by the Constitution and any other law;
- promote routine and systematic disclosure of information by public entities and private bodies based on the constitutional principles relating to accountability, transparency, public participation and access to information;
- provide for the protection of persons who disclose information in the interest of public and in good faith; and
- provide a framework to facilitate public education on the right to access to information under this Act.

Internet Freedoms Violations

Infringements have been held in the context of a number of laws and regulations. In recent years, some of the actions against supposedly offensive digital communications have been justified by The National Cohesion and Integration Act of 2008, which is concerned with any newspaper, radio station or media enterprise that publishes any utterance that amounts to the offence of ethnic or racial contempt. There are provisions in the penal code – particularly Section 194 - that make a person liable for defamation if they publish or convey defamatory material, and Section 117 that criminalises any act, which in any way interferes or prevents the execution of any legal process. According to researchers, while this provision can be invoked to remove or block content including online content, "it has also been useful in promoting proactive action by service providers and other state agencies in monitoring and stemming the spread of hate speech."[9] In the run up to the March 2013 elections, authorities used these penal code provisions to fight hate speech via SMS and on the internet.

There was much activity around online freedoms (some regressive, some positive) related to the presidential elections. According to a project that monitored hate speech online in the run up to the elections, bloggers and other social media users were the main perpetrators of hate speech. The Umati project monitored online content from September 2012 until the elections, and recorded incidences of hate and dangerous speech.[10]

It was observed that while the 2013 elections were largely peaceful, much of the "violence" shifted to the online space, especially to Facebook and Twitter.[11] Others claimed that although the language used in campaigns by politicians, political parties and aspirants were scrutinised through various new laws and initiatives, hate speech did not disappear from public rhetoric. Instead, the method of disseminating such messages seems to have shifted: "Hate speech appears to have largely left SMS and found a new home on the web, in social media".[12]

During March of 2013, 405 incidents of offensive speech were recorded, as were 358 incidents of moderately dangerous speech, and 321 incidents of extremely dangerous speech including calls to kill, while the call to discriminate, whether via insults or stereotypes, remained rampant.[13]

Regulatory measures to curb hate speech post the 2007 elections included the National Cohesion and Integration Act of 2008, but closer to the 2013 elections there were even more spirited measures directed at hate speech. In March of 2011, the National Integration Cohesion Commission (NCIC) announced it would monitor hate speech on the internet in the lead-up to the polls. Dr. Mzalendo Kibunja, the head of the Commission, stated: "Facebook, Twitter and such networks will be our main focus and I can tell you most of the hate speech comes from Diaspora not internally."[14]

9 *Githaiga, Munyua and Kapiyo, Kenya Report on Intermediary Liability, August 2012. KICTANET & APC, http://www.apc.org/en/pubs/intermediary-liability-kenya*

10 *iHub Research, Monitoring Online Dangerous Speech, http://opennetafrica.org/wp-content/uploads/researchandpubs/Monitoring%20Dangerous%20Online%20Speech%20in%20Kenya.pdf*

11 *How technology is shaping the decisive Kenyan elections, The Daily Dot, http://www.dailydot.com/politics/kenyan-election-2013-technology-umati/*

12 *Institute for Human Rights and Business, Corporate responses to Hate Speech in the 2013 Kenya Presidential Elections: Case Study Safaricom. November 2013*

13 *iHub Research, Monitoring Online Dangerous Speech, http://opennetafrica.org/wp-content/uploads/researchandpubs/Monitoring%20Dangerous%20Online%20Speech%20in%20Kenya.pdf*

14 *Moreen Majiwa, NCIC Monitoring Social Media for Hate Speech, March 26, 2011; http://www.mzalendo.com/blog/2011/03/26/ncic-monitoring-social-media-for-hate-speech/*

In 2013, well known bloggers such as Dennis Itumbi and Robert Alai were investigated by the NCIC following accusations of promoting hate speech online. It was alleged that Itumbi posted threatening messages" on a Facebook account, which the NCIC alleges were "intended to cause ethnic hatred among various communities". Itumbi denied the allegations.[15]

While other suspects were also arrested on charges similar to those against Itumbi, Brice Rambaud, programme director the media consultancy Internews, noted that the NCIC seemed to be targeting well-known bloggers and social media activists, yet "most of the dangerous speech witnessed on social media came from ordinary citizens."[16]

Kenya also instituted regulations on the distribution of political bulk SMS. The regulations required service providers to vet content before rejecting or sending it. However, this seemed to be at odds with claims that service providers collecting evidence of hate speech would be in violation of user privacy.[17] Over the 2013 elections period, Safaricom, which enjoyed a 65% share of the voice market and 75% of the internet market, rejected at least 18 bulk message transmission requests for reasons such as failing to submit a copy of ID, or specifying who was signing off the message. These requests were sent back to the client for amendment and five of them were never returned to Safaricom.[18]

Researchers said it was unclear as to whether intermediaries faced pressure from government or powerful interest groups to police online behaviour, but the influence of government agencies or their power could not be underestimated or overlooked.[19] According to these researchers, there are no laws that impose penalties on service providers for failing to block or remove content. Similarly, there are no stated take-down laws, policies or procedures, which left court-sanctioned orders as the best remedy.

Recorded internet freedoms incidents in Kenya include:

- In September 2012, the Communications Commission of Kenya issued guidelines for bulk transmission of political messages via SMS, which required service providers to vet content before rejecting or sending it. "Political messages" are defined as "the transmission of political content by political parties and other individuals to the general public by SMS or MMS or any other similar medium that is capable of transmitting bulk."[20] A sender of a political SMS was required to make a request to the mobile operator at least 48 hours before sending the message. The application required the inclusion of verbatim content of the message, a signed authorisation letter from the political party or individual sponsoring the message; and ID of the sender.[21]

15 *Judie Kaberia and Nzau Masau, Kenyan Authorities in the Dock Over Hate Speech, May 3, 2013. http://iwpr.net/report-news/kenyan-authorities-dock-over-hate-speech; Bernard Koech, Tackling Online Hate Speech in Kenya, February 26 2013; http://iwpr.net/report-news/tackling-online-hate-speech-kenya*

16 *Jude Kaberia, Kenya: Too Little Action on Hate Speech?, July 11, 2013; http://iwpr.net/report-news/kenya-too-little-action-hate-speech*

17 *Alice Munyua, Grace Githaiga, Victor Kapiyo, Kenya report on intermediary liability, August 2012.APC & KICTANET*

18 *Institute for Human Rights and Business, Corporate responses to Hate Speech in the 2013 Kenya Presidential Elections: Case Study Safaricom. November 2013*

19 *Alice Munyua, Grace Githaiga, Victor Kapiyo, Kenya report on intermediary liability, August 2012.APC & KICTANET*

20 *The guidelines outlaw transmission of offensive, threatening, abusive, obscene or profane language. They further outlaw the transmission of messages bearing inciting, threatening or discriminatory language that is intended to expose individuals or groups of individuals to violence, hatred, hostility, discrimination or ridicule on the basis of gender, ethnicity, race, colour. It limits the language of political messages to either Kiswahili or English.*

21 *CCK, Guidelines for the prevention of transmission of undesirable bulk political content/ messages electronic communications networks, September 2012. http://www.cck.go.ke/regulations/downloads/Guidelines_for_the_prevention_of_transmission_of_undesirable_bulk_political_content_via_sms.pdf*

- Around election time in March 2013, Kenya's communications and information ministry reportedly warned internet service providers not to allow inflammatory and divisive messages to be transmitted through their networks. Provider firms would be held accountable for any such messages communicated via their systems.[22] But legal experts warned that tracking web traffic could be an invasion of privacy since Article 31 of Kenya's constitution granted all citizens the right to privacy, including in the sphere of online communications.[23]

- In March 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 proscribes the transmission of a message that is known "to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person.[24]

- Ahead of the 2013 elections, the Communications Commission had blocked access to the web portal Mashada, accusing it of failing to moderate hate speech.[25]

- In 2012, blogger Robert Alai was arrested over a tweet that allegedly suggested government spokesperson Alfred Mutua had ordered the murder of two human rights activists. He was held for two days then released on bond. His arrest was effected in terms of section 29 of the Information and Communication Act.[26]

- In April 2012, blogger Dennis Itumbi sued a fellow blogger Robert Alai for defamation via malicious tweets. He sought compensation, and a retraction of the offensive allegations. He argued that bloggers "have to be responsible for what we say on social media."[27]

- Alai was arrested again in April 2013 over an "offensive tweet" and charged under Article 29(b) of the 2009 Kenya Information and Communications Act that proscribes the transmission of a message that is known "to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person."[28] He was acquitted.[29]

- In the first half of 2013, Kenya made a request to Google to remove content from Blogger, arising out of a court order in a defamation case. The request was rejected.[30]

22 *Eugene Okumu, Hate speech on social media declining, The Star, February 4, 2013, http://www.the-star.co.ke/news/article-105780/hate-speech-social-media-declining*
23 *http://iwpr.net/report-news/tackling-online-hate-speech-kenya*
24 *Kenya: 14 bloggers linked to hate messages http://www.nation.co.ke/News/14-bloggers-linked-to-hate-messages/-/1056/1732288/-/cut5kvz/-/index.html*
25 *See 'Was The Government Justified In Shutting Down Mashada.com?' http://jameni.com/was-the-government-justified-in-shutting-down-mashada-com/; accessed April 12, 2013; and Kenya's popular forum Mashada.com shut down in hate speech Crackdown,*
26 *Gareth van Zyl, Blogger's arrest shines light on Kenya's internets freedom, IT Web, 23 August 2012. http://www.itwebafrica.com/ict-and-governance/256-kenya/229859-bloggers-arrest-poses-questions-about-kenyas-internet-freedom*
27 *Dennis Itumbi, "Why I am moving to court against a blogger," DennisItumbi.com (blog), March 18, 2012, http://www.dennisitumbi.com/?p=297.*
28 *Jambonewspot.com, Robert Alai arrested for alleged "libelous" twitter post, May 15, 2013; http://www.jambonewspot.com/robert-alai-arrested-for-alleged-libelous-twitter-post/*
29 *According to the charge sheet, the tweet read: "William Oduol's wife is crying for justice, fears for her life. The wife of William Oduol (Siaya Gubernatorial race candidate) is going through a lot. Her name is Nancy. She is now jobless after she exhausted all her sick leave with her employer. She has been assaulted by the husband (and) it seems she cannot get justice from anywhere else"*
30 *CIPESA, Online Freedoms Under Siege as African Countries Seek Social Media Users' Information, September 2013, http://www.cipesa.org/2013/09/online-freedoms-under-siege-as-african-countries-seek-social-media-users-information/#more-1623*

Recommendations

- Kenya should expedite the enactment of the Access to Information law and the Data Protection law. Civil society should be given opportunity to provide meaningful inputs into these laws.
- The circumstances and laws under which individuals are charged over their online activities need to be clarified. The National Cohesion and Integration Act has improperly been applied to take action agains individuals accused of propagating hate speech.
- There should be clear definitions of what constitutes hate speech and 'causing annoyance' as grounds for taking legal action against individuals.
- Conversations on what constitutes free speech and the distinction between blind control and respect for freedom of expression online should be fostered and should draw in civil society, the media, religious organisations and government departments.
- Create awareness among the media and human rights defenders on internet freedoms and encourage development of a network of advocates and educators on online freedoms.
- The NCIC, police and other security organs should make public all results of their surveillance of citizens' communications, as well as investigations and prosecutions of hate speech and other offences and crimes committed via digital technologies.
- The law should clearly specify the responsibilities of intermediaries and other parties in relation to filtering, removing and blocking content, the steps that need to be followed in these processes as well as appeal processes where there is an attempt to filter, remove or block a site or content.

This report was produced by the Collaboration on International ICT Policy in East and Southern Africa (CIPESA) under the Open Net Africa initiative (www.opennetafrica.org) which monitors and promotes internet freedoms in a number of African countries including Ethiopia, Kenya, Rwanda, Burundi, Tanzania, Uganda and South Africa. As part of the project, we are documenting internet rights violations, reviewing cyber security policies and how they affect internet freedoms, promoting information availability and conducting awareness-raising.

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