

Introduction

1. Digital rights including the right to privacy and the right to freedom of opinion and expression online are important issues in Kenya, and must be reflected in the recommendations made during the third cycle of the UPR in January 2020.
2. In the second cycle of the UPR, Kenya received 253 recommendations from 91 countries. Kenya supported eleven of 19 recommendations that were categorised as relating to Freedom of Opinion and Expression and/or Freedom of the Press. Four of these recommendations explicitly mentioned the online sphere or an internet-focused item of legislation, although all of the recommendations in these thematic areas were implicitly relevant.
3. With Kenya's online population continuing to grow at a rapid rate, it becomes increasingly important for UPR recommendations to explicitly address the need for the rights to freedom of opinion and expression and privacy to be protected online as well as offline, in line with the state's obligations under Articles 17 and 19 of the International Covenant on Civil and Political Rights (ICCPR).

Updates since the previous UPR Review

4. Since the previous review, the number of online citizens in Kenya has continued to grow. At the time of the second UPR review in 2015, only 37.9 in every 100 inhabitants had a mobile broadband subscription, but in 2019, the Kenyan Communications Authority reports that the figure has increased to 46.7 in every 100 inhabitants.¹
5. President Uhuru Kenyatta's administration has made relatively limited progress on the implementation of recommendations received during the second UPR cycle review. Amendments that were requested to the 2013 Information and Communication Act were not voluntarily implemented, although the High Court in April 2016 nullified a provision criminalising "misuse of a licensed communication system".²
6. With regard to previously supported recommendations, the Kenyan government has also failed to respond to requests for information from the Special Rapporteur on Freedom of Opinion and Expression, and has additionally failed to address a series of fundamental legislative issues that undermine freedom of opinion and expression and privacy online.
7. As noted above, in April 2016 the Kenyan High Court declared Section 29 of the Kenya Information and Communications Act unconstitutional. Section 29 outlawed "misuse of a licensed communication system", but the court found that the provision was ambiguous, and therefore prone to be abused in the prosecution of legitimate speech.

¹ Communications Authority (2015) 2nd Quarter sector statistics p.19 <https://ca.go.ke/document/sector-statistics-report-q2-2014-15/>

² Geoffrey Andare v Attorney General & 2 others (2016) <http://kenyalaw.org/caselaw/cases/view/121033/>

8. In similar petitions, the offences of “undermining the authority of a public officer” (Section 132 of the Penal Code) and criminal defamation (Section 67 of the Penal Code) were also found to be unconstitutional.³
9. The Computer Misuse and Cybercrimes Act was enacted after the 2017 elections. The Act criminalises offences committed using digital means, including unauthorised access and interference. The law was debated against the backdrop of an election that had leveraged digital technologies to spread misinformation.⁴ Parliamentarians added to the bill a number of content-related offences including: false publication, publication of false information, pornography, identity theft and impersonation, cybersquatting, phishing, interception of electronic messages, willfull misdirection of messages, cyberterrorism, inducement to deliver electronic messages, intentionally delivering messages sent erroneously, unlawful destruction of electronic messages, fraudulent use of electronic media, issuance of false e-instructions, the reporting of cyber threats, and employee liability to relinquish access codes.
10. With regard to the Computer Misuse and Cybercrimes Act, digital rights and freedom of expression advocates raised concerns over the criminalisation of certain types of online content. The Bloggers Association of Kenya (BAKE) filed a petition that resulted in the temporary suspension of 26 sections of the Act pending the hearing and determination of the lawsuit. In the petition, BAKE explained that the impugned sections threaten freedom of opinion, freedom of expression, freedom of the media, freedom and security of the person, right to privacy, right to property and the right to a fair hearing.⁵
11. The 2016 Access to Information Act provides for the right to information, and establishes a procedure for applying to access information. The Commission on Administrative Justice (Ombudsman) has an access to Information (ATI) Centre, and has published an access to information implementation plan on their website.⁶ Further information about implementation is provided under Paragraph 21 below.

Freedom of Expression and Opinion

12. Article 33 of the Constitution of Kenya 2010 guarantees freedom of expression. It states 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. The right to freedom of expression [is limited and] does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

³ Jacqueline Okuta & another v Attorney General & 2 others [2017] <http://kenyalaw.org/caselaw/cases/view/130781/>

⁴ Computer Misuse and Cybercrimes Act 2018, <http://bit.ly/2JLBSI8>

⁵ Victoria Wangui, “BAKE is successful after court suspends 26 sections of the Computer Misuse and Cybercrimes Act”, iFree, <http://bit.ly/2JC3t5Z>

⁶ Kenyan Ombudsman Access to Information Centre, <http://bit.ly/2JSZG2W>

13. On 1 May 1972, Kenya acceded to the International Covenant on Civil and Political Rights (ICCPR). It submitted its most recent implementation report in December 2018. Article 17 of the ICCPR ensures the right to privacy and Article 19 of the ICCPR guarantees the right to freedom of expression and freedom of opinion.
14. International human rights bodies have affirmed that these rights extend online. The UN Human Rights Council has affirmed on four occasions since 2012 that “the same human rights that people have offline must be protected online”.
15. Media and content related laws are typically introduced around election periods. This may be attributed to the 2007 post-election violence that resulted in deaths of more than 1,200 people and the displacement of over 500,000 people. The National Cohesion and Integration Commission (NCIC) was set up under the 2008 National Cohesion and Integration Act to, among other objectives, foster national cohesion and curb hate speech. Section 13 and 62 of the NCIC Act⁷ criminalise hate speech and “ethnic and racial contempt”.
16. As noted in Paragraphs 9 and 10 above, the 2018 Computer Misuse and Cybercrimes Act was enacted in the aftermath of the 2017 elections, and introduced new restrictions on the creation and propagation of certain types of online content. This legislation was heavily criticised by the Bloggers Association of Kenya (BAKE), who filed a petition that resulted in the temporary suspension of 26 sections of the Act pending the hearing and determination of the lawsuit on the basis that the Act violated a range of fundamental human rights including freedom of opinion and expression, and the right to privacy.
17. Legacy laws that predate the new Constitution contain provisions that limit the right to expression. Examples of these laws include: the Preservation of Public Security Act which permits the arrest and detention of journalists for compromising public safety, public order, morality or international defence.⁸ Under the Act, the President may make regulations for confiscation of broadcasting and other communication equipment in the interest of preservation of public security.
18. From May 2017 – April 2018, Article 19 recorded 94 incidents of violations against individual journalists and media workers, including bloggers, in Kenya.⁹ Journalists who covered the 2017 general elections worked in an exceptionally challenging environment. Attacks against them showed a marked rise in severity and in numbers during the prolonged elections period that saw journalists face physical attacks, arrest, being denied access to areas, and receiving various forms of threats, even more so after the August elections and in the run up to the October repeat presidential poll. Article 19 recorded a total of 41 cases of violations against journalists during this two month period alone.
19. Article 19 also recorded 30 cases of human rights violations in January 2018, at the height of elections petitions in various courts across the country. This constitutes 38 per cent of the total

⁷ National Cohesion and Integration Act 2008, <http://bit.ly/2LWkhpO>

⁸ Preservation of Public Security Act 1960, <http://bit.ly/2XTUDnT>

⁹ Article 19, “Violations of Media Freedom 2017-18”, (2018), <http://bit.ly/2LqXDq8>

violations during the monitoring period. A total of 43 journalists were physically assaulted during the monitoring period, and one received death threats, while cases of attacks on freedom of expression were documented in 15 of the country's 47 counties. Supporters of various political factions were the main culprits followed by police, private individuals and unknown assailants.¹⁰

Freedom of information and censorship of content

20. The right to access information held by the state is protected under Article 35 of the Kenyan Constitution and every Kenyan citizen has the right to the correction or deletion of untrue or misleading information affecting them.¹¹
21. As noted in Paragraph 11 above, the [Access to Information Act of 2016](#) provides for the right to information and develops a procedure for citizens to apply to access information. The Ombudsman directed all public offices at national and county government level to disclose information proactively within 30 days, and also published the contacts of all county information officers to ease filing of information requests.¹²
22. The Kenya Film Classification Board (KFCB) is established by the Films and Stage Plays Act. The law was enacted during the colonial period and it sought to vet content for public dissemination. In 2009, the law was amended to shift from a censorship model to a classification model. KFCB is also charged with the administration of the Programming Code under the Kenya Information and Communications Act.
23. The current Chief Executive Officer of the KFCB Ezekiel Mutua was appointed in 2016. He has frequently restricted content on moral grounds, including videos, advertisements and other events publicised on social media. In 2016, the Board wrote to Google, demanding the removal of a video depicting same-sex love. The video was eventually labeled as “potentially racy”. Similarly, in September 2018, the Board banned the film *Rafiki* for “[glorifying] homosexuality”,¹³ prompting its producer to seek redress from the High Court to allow the film to air locally.¹⁴

Right to Equal Access and Opportunity

24. The right to equality and freedom from discrimination is provided for under Article 27 of the Constitution of Kenya. Equality is said to include the full and equal enjoyment of all rights and fundamental freedoms. Prohibited grounds of discrimination include race, sex, pregnancy,

¹⁰Article 19 (2018) Violations of Media Freedom 2017-18 <https://www.article19.org/resources/kenya-violations-media-freedom/>

¹¹ Kenya Law, “Famy Care Limited v Public Procurement Administrative Review Board”, (2012), http://kenyalaw.org/Downloads_FreeCases/432012.pdf

¹² Access to Information Act 2016, <http://bit.ly/2Gh1vpF>

¹³ KFCB, “Press Release: The Ban of ‘Rafiki’ Film”, (2018), <http://bit.ly/30zdHti>

¹⁴ The East African, “‘Rafiki’ producer takes KFCB to court over ban”, 15/9/2018, <http://bit.ly/2xVuRoI>

marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. It is deducible that the Constitution advocates for removal of barriers to internet access, since many economic and social rights are fully enjoyed only when citizens are granted access to online spaces.

25. Kenya has established a Universal Service Fund (USF) that is administered by a council under the Communications Authority. As of 2017, the fund had in excess of Ksh. 7.1 billion (68.9 million USD). Priority projects for the fund include education, the expansion of school broadband connectivity, and expanding access in sub-regions with the lowest current penetration rates.¹⁵
26. The rapid transition of some government services online in the face of limited internet access and affordability is disproportionately affecting marginalised citizens. Many people also lack the requisite digital literacy to comfortably access government services online. Without further investment in measures to bridge the digital divide, the government is at risk of leaving large numbers of citizens isolated from access to key public services.

Right to data protection and privacy on the Internet

27. Article 31(c) & (d) of the Constitution state that every person has the right to privacy, which includes the right not to have personal information unnecessarily requested or publicly revealed, nor private communications interfered with.
28. There have been several attempts to introduce a rigorous data protection framework. The two most recent efforts have resulted in the formulation of two bills – one introduced in 2018 in the Senate,¹⁶ and another in July 2019 in the National Assembly. Only the latter is backed by the government, and was initially drafted by the Ministry of ICT.
29. The 2019 bill is more comprehensive in that it establishes a data protection oversight authority, and delineates the obligations of data processors and controllers. Nonetheless, both bills envisage potential limitations on privacy on the basis of national security. It is expected that the two bills will eventually be merged under parliamentary procedures, before being subjected to a vote.
30. In 2017, Privacy International reported that law enforcement had access to subscriber phone data which was used to track individuals, and to facilitate extra-judicial killings.¹⁷ Other reports such as that of Citizen Lab list Kenya among the countries that purchases surveillance hardware and software.¹⁸

¹⁵ KICTANet, “Online discussion on State of Broadband in Kenya”, 24/4/2019, <https://www.kictanet.or.ke/?p=40002>

¹⁶ Draft Data Protection Bill 2018 (Senate), <http://bit.ly/2GiIxic>

¹⁷ Privacy International, “Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya”, (2017), https://privacyinternational.org/sites/default/files/2017-10/track_capture_final.pdf

¹⁸ Tactical Tech, “Kenya: Data and Digital Election Campaigning”, (2018), <https://ourdataourselves.tacticaltech.org/posts/overview-kenya>

31. In 2018, the High Court found that the Device Management System (DMS) acquired by the Communications Authority an affront to the right to privacy¹⁹. The Authority had planned to install the system at mobile operator premises to monitor phones and other communication gadgets ostensibly to rid the market of counterfeit devices.

Proposed Recommendations

32. In light of Kenya's existing record on freedom of opinion and expression, freedom of the press, and the right to privacy online, the submitting organisations call on states to offer the following recommendations to Kenya:

- a.** Kenya should urgently address issues of access to the internet for the unconnected as well as digital literacy, particularly in light of the fact that many government services can only be accessed online.
- b.** The Kenya Information and Communications Act (Registration of Subscribers of Telecommunication Services) Regulations (2013), Regulation 13, should be amended to remove direct access to telecommunication networks by the government.
- c.** The Kenya Information and Communications Act should be amended to minimise data required when registering for a SIM card, in order to place limits on state capacities for targeting, profiling and surveillance.
- d.** Kenya should enact a comprehensive data protection framework to give effect to the right to privacy. The data protection law should not prioritise national security capabilities over the protection and promotion of fundamental rights, including the right to privacy.

¹⁹ Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others
<http://kenyalaw.org/caselaw/cases/view/151117/>