



## The Internet Legislative and Policy Environment in Kenya

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## List of Abbreviations

AFRICOG	Africa Centre for Open Governance
AFRINIC	Africa Network Information Centre
AfTLD	Africa Top Level Domain Organization
APC	Association of Progressive Communications
AU	African Union
AUC	African Union Commission
BFID	Banking Fraud Investigation Department
CBOS	Community-Based Organisations
CCK	Communications Commission of Kenya
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIC	Commission for the Implementation of the Constitution
CLARION	Centre for Law Research International
Cofek	Consumer Federation of Kenya
CREAW	Centre for Rights Awareness Creation
CSOs	Civil Society Organisations
DeG	Directorate of e-Government
DFID	Department for International Development
DRAKE	Domain Registrars Association of Kenya
EAC	East African Community
EACO	East African Communications Organisations
EC	Enhanced Cooperation
GAC	Government Advisory Committee
HURINETS	Human Rights Networks
IAWRT	International Association of Women in Radio and Television

ICANN	Internet Corporation for Assigned Names and Numbers
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
iCSIRT	Industry Computer Security and Incident Response Team
ICTA	Information, Communication and Technology Authority
IETF	Internet Engineering Task Force
IGF	Internet Governance Forum
IP	Internet Protocol
ISD	Division of Information Society
ISOC	Internet Society
ISP	Internet Service Providers
ITU	International Telecommunications Union
KCSE	Kenya Certificate of Secondary Education
KE-CIRT	Kenya Computer Incident Response Team
KECRIT/CC	Kenya National Computer Incident Response Team Coordination Centre
KENET	Kenya Education Network
KENIC	Kenya Network Information Centre
KEPSA	Kenya Private Sector Association
KICA Act	Kenya Information and Communications Act
KICTANET	Kenya ICT Action Network (KICTANet)
KHRC	Kenya Human Rights Commission
KIS	Kenya Information Society
KNCHR	Kenya National Commission on Human Rights



KRA	Kenya Revenue Authority
MICT	Ministry of Information, Communication and Technology
MCK	Media Council of Kenya
NCIC	National Cohesion and Integration Commission
NCS	National Communication Secretariat
NEWS	Network Early Warning Systems
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organisations
NOFBI	National Optical Fibre Backbone Infrastructure
NTA	National Taxpayers' Association
P2P	Peer to Peer
PKI	Public Key Infrastructure
PWDs	People with Disabilities
RIRs	Regional Internet Registries
TESPOK	Telecommunications Association of Kenya
TLD	Top-level Domain
TI-Kenya	Transparency International-Kenya
UDHR	Universal Declaration on Human Rights
VAT	Value Added Tax
W3C	World Wide Web Consortium
WGEC	Working Group on Enhanced Cooperation
WSIS	World Summit on Information Society
ZACR	ZA Central Registry

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## Preface

This report has been produced as part of the Internet Freedom Project, in conjunction with Global Partners Digital (UK). It is aimed at providing policy makers, civil society, scholars and other relevant ICT stakeholders in Kenya and ultimately globally with an overview of the status of the ICT sector as an integral part of the political economy reality of the 21<sup>st</sup> century with attention to the rights and freedoms that exist there in. Indeed there have been questions as to whether the internet is a right or a privilege. Many developing countries are now adopting ICT as a key economic growth driver. In that regard, it is no longer feasible to view ICT, of which the internet is a key component, as a mere luxury.

The fact is the internet is no longer a luxury commodity, but an essential part of daily interactions. However, it does not exist in a vacuum. There are many initiatives and forums all over the world such as the Internet Governance Forum and country-specific initiatives such as policy framework to regulate and explore the opportunities that ICTs present to this generation. But while many developing countries are now looking to ICTs to drive their economic development agenda through a lot of innovation, their voices are not being heard or are not strong enough in these forums. Indeed the ICT policy sectors from government point of view are inward looking and focuses on monitoring and controlling the use of the resource internally but not much attention is given to the whole of the ICT and particularly to global internet environment or to protection of the rights and freedoms that the public should enjoy on the internet.

The report draws on the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue's reports, which among other things, explore key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the internet. It gives an overview of the environment at present, including pending bills and draft laws, with the aim of identifying emerging and/or priority threats to an open and free internet, and also highlights best practices.

We hope that the findings, especially the gaps and opportunities identified, will contribute to putting in place a policy and legislative framework that will not only improve the infrastructure of the ICTs but also promote human rights in ICTs, especially the internet.

## Executive Summary

Information is a key driver of economic, social and human development and as such is a key aspect daily living. Human rights instruments already recognized this and made provisions in their various charters. Indeed access to information and freedom of expression have long been recognized as fundamental human rights. For example the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) in their Article 19 respectively recognize the right. The Constitution of Kenya 2010 (CoK, 2010) provides for freedom of expression in Article 31 and the right to access information in Article 35. Access to information is pivotal to the awareness, promotion and enjoyment of other rights.

As has been aforementioned, this report has been informed by the Global Internet Freedom Project being undertaken in partnership with the Global Partners Digital, UK, with six other media and internet civil society organizations working together on internet freedom in the Global South. It is premised on the idea that access to information is a right and the importance of technology to support the enhancement and enjoyment of the right.

At the end of the 20<sup>th</sup> century, the world witnessed a move from industrial revolution toward an information revolution. Principal to this revolution has been the rapid growth of the new technologies otherwise known as the information and communication technologies (ICTs) which include the internet, email, and mobile telephony among others. Of these, the internet is the most pervasive and ubiquitous in terms of capabilities such as being a repository of information, a channel or medium to send and receive information. Because of its exponential potential, debates are raging around its governance, control and access including interrogating whether or not the internet is a right or a public good.

The Swedish Minister for Foreign Affairs Carl Bildt, said that the internet is a human right.<sup>1</sup> Later, participants at an ICT workshop, drawn from diverse civil society organizations from the human rights, media and ICT policy sectors, in a joint statement, among other things affirmed the importance of the internet as an enabling medium for democratization and the promotion, exercise and enjoyment of human rights. They also recognized that the ability to access and use of the internet has become inextricably linked to the rights to freedom of expression, association and assembly, as enshrined in the African Charter on Human and Peoples' Rights (ACHPR), and the ICCPR.<sup>2</sup>

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<sup>1</sup> Mr. Bildt was speaking at the Second Stockholm Internet Freedom Forum on Internet Freedom for Global Development convened on May 18-19<sup>th</sup>, 2012, in Stockholm Sweden.

<sup>2</sup> The forum was the Pan African Civil Society Workshop on "Who Controls the Internet" held in Nairobi, Kenya, on July 26 and 27, 2012.

Based on these observations and the role that the internet has come to play as a source of information and a medium of transmitting and receiving information, it is therefore difficult to not see the internet as a right. And as a right it is also not presumptuous to consider or classify it as a public good. The Business Dictionary defines a public good as “An item whose consumption is not decided by the individual consumer but by the society as a whole, and which is financed by taxation. A public good (or service) may be consumed without reducing the amount available for others, and cannot be withheld from those who do not pay for it. Public goods (and services) include economic statistics and other information, law enforcement, national defense, parks, and other things for the use and benefit of all. No market exists for such goods, and they are provided to everyone by governments.”<sup>3</sup>

In light of the above, this report considers the internet a right and a public good. It compiles the findings of a mapping survey of the internet environment in Kenya focusing on the current legislative and policy provisions that affect the internet as a right. It draws on the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’s reports<sup>4</sup>, which among other things, explore key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the internet. It gives an overview of the environment at present, including pending bills and draft laws, with the aim of identifying emerging and/or priority threats to an open and free internet, and also highlights best practices.

The methodology used was primarily a review and analysis of existing and proposed legislation in relation to the internet. The review also focused on extra-legal practices that have already taken place, are currently taking place or might take place regarding the ICT sector.

The report examines the question of access to the internet with regard to access to connectivity and quality of access in terms of the issue of the access to information. It also examines matters that have to do with freedom of expression and how this right is promoted, enabled or denied by legislation, policy or practice. These include negative practices such as arbitrary blocking and filtering, cases of criminalising legitimate expression Imposition of intermediary liability Disconnecting users from the internet Surveillance and lawful interception (mainly state instituted) and cybercrime such as cyber attacks

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<sup>3</sup> <http://www.businessdictionary.com/definition/public-good.html>

<sup>4</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement> and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/PDF/G1313303.pdf?OpenElement>

In addition, the report discusses the matter of data protection which falls under the purview of privacy, net neutrality and engagements of various stakeholders and some of the international processes that govern the internet.

**The report has been divided into three sections:**

**Section 1 deals with the status of online freedom of expression in Kenya.** It gives an overview of practices, policies and legislation that affect the ICT sector and by default the internet in Kenya. It examines the status of online freedom of expression in Kenya outlining the key concerns in Kenya and the respective obligations of the Government of Kenya.

Among these concerns are access to the internet, which is taunted to be growing rapidly but there are questions regarding the quality and the network coverage; concerns of freedom of expression with surveillance legislation being put in place to curb security issues, some of which involve criminalization of legitimate expression and also imposes self-censuring and which also brings in the question of intermediary responsibility; and arbitrary blocking or removal of content.

Though the Jubilee Government seems committed to internet freedom, there are pieces of legislation such as the Kenya Information and Communication Act (KICA) 2013 and the Media Council of Kenya Act 2013, both passed in December 2013 that claw back on the freedoms provided for in the constitution. Together they limit freedom of expression and restricting media independence. In addition, they expand certain definitions such definition of a journalist, which will in effect attempt to control or regulate citizen journalism as currently practiced by bloggers. While the government is keen on keeping an eye on the media and by extension the conversations online, it is thin on area of cyber security, with no proper cyber security framework in place, an issue that also limits freedom online.

**Section 2 focuses on internet governance processes and power players in the sector.** This section describes the main structures and actors that must be engaged with to shape the internet policy environment at the national level. It aims to identify the opportunities and barriers for civil society to engage with these structures and actors. It includes a description of the main incentives and approaches for each player. A major concern in this section is that while it has been recognised that internet governance processes have to take the multi-stakeholder approach, a lot of power has been vested in governments and businesses which leaves the people vulnerable to arbitrary adoption of legislation and policies that may infringe if not outrightly violate the rights of the people online.

The report identifies up to nine different government bodies that are concerned with internet governance in Kenya. These include the Ministry of Information, Communication and Technology from where most of the legislation originate; the Communications Commission of

Kenya which is a key directorate and is the regulatory authority and has a lot to do with accessibility where affordability is concerned; the ICT Authority (ICTA)-formerly known as the ICT Board of Kenya- which is charged with managing and delivering ICT-enabled development objectives, and market Kenya as a local and international ICT hub.

Of concern regarding the ICTA are a number of questions around content, language and collaboration with local innovators to develop apps that can be used across the board, and especially on mobile since most Kenyans access the internet via the mobile phone.

Another key government body is the National Steering Committee on Media Monitoring of the Ministry of Information ( now Ministry of ICT), a body that was created during the election campaign period in late 2012 and whose role was primarily to monitor individual communications via mobile phones and online. This body has raised a lot of concern<sup>5</sup> by making blanket warning statements<sup>6</sup> regarding hate speech targeted at internet users, particularly, bloggers. Its role in containing hate speech hinges on invasion of privacy and curtailing genuine expression. For instance it claimed that during the election week alone, it intercepted 300,000 text messages per day containing hate speech. This trend is worrying because it did not disclose what was contained in those messages, while the body charged with monitoring hate speech, the National Cohesion and Integration Commission (NCIC) has not clearly defined what hate speech is. Thus, practices that limit freedom of expression such as these are likely to increase where there are no clear guidelines.

Other power players identified include businesses and donors/development partners. The latter are of great importance as they provide resources and technical support that is urgently needed to not only make the ICT sector vibrant but to engage the public in programmes that increase citizen participation. A lot of discussions take place in forums both in and out of the country and without adequate sponsorship, there's usually very little representation of non-business or government sectors.

**Section 3 focus on the role of the civil society in the internet governance processes.** It aims to give an assessment of the national civil society environment at present, and in particular, identify the opportunities for strengthening and the growing the movement. The internet being

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<sup>5</sup> Response to comments by the National Steering Committee on Media Monitoring <http://bloggers.or.ke/response-to-comments-by-the-national-steering-committee-on-media-monitoring/> accessed on October 5, 2013

<sup>6</sup> Kenyan monitoring committee urges Facebook to expose hate speech [http://sabahionline.com/en\\_GB/articles/hoa/articles/newsbriefs/2013/02/21/newsbrief-05](http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/02/21/newsbrief-05) accessed on October 5, 2013.

a relatively new phenomenon, that initially started off as a luxury commodity for a privileged few, attracted internet-related and non-traditional civil society organizations such as Kenya ICT Action Network (KICTANet), Internet Society (ISOC) Kenya Chapter and the consumer organization Consumer Federation of Kenya (Cofek).

The most outstanding observation about the civil society is that while the civil society in Kenya has been vibrant in shaping policy advocacy and activism that has effected a lot of democratic reforms, the mainline civil society is still largely either excluded out of the internet freedom and rights discourse or is not aware or does not find it necessary to engage as they do not see the internet as their mandate. In this category of CSOs the Kenya Human Rights Commission (KHRC), which is a member of the Freedom of Information (FOI) Network, already recognized the linkage between internet freedom as a right and the basic human rights under civil and political rights. Using FOI as an entry point, the KHRC has been progressively involved in the internet freedom discourse and will continue to work on this area.

However, by the nature of their work, some of other CSOs that have been identified and show interest in this discourse include Article 19 (East Africa) and Transparency International, Kenya. The former has done extensive work on Freedom of Expression while the latter has done significant work in the search for a freedom of information law. In addition, members of the FOI Network, convened by International Commission of Jurists, Kenyan Chapter (ICJ-Kenya) are also CSOs that should join in the campaign for internet freedom.

### **Summary of main findings**

The Government agencies represented by the Ministry of ICT and the CCK, and businesses/private sector are focused on issues of access and infrastructure. The importance of national internet governance ought not to be underestimated. Whereas internet governance technical standards are naturally global and can be achieved in individual countries, it depends on various factors that are country-specific, for example the quality of available national infrastructure and its international connectedness. Therefore, the national communications policies and regulations are vital in determining how infrastructure, access and affordability progress. To support internet growth, the policy makers must take strong leadership in implementing policy.

Policies should not distort the market by favouring operators. Of importance is that reduction in internet costs will attract more subsidies and therefore have more Kenyans connected

During the Kenya IGF, July 26, 2013, a government official said that their role as government is not to provide infrastructure (businesses will do that) but to monitor and control. The same sentiments were raised at during the AfIGF on discussions regarding infrastructure, business,



human rights and the whole controversies within the universal access fund.<sup>7</sup> This scenario is one that clearly allows governments and businesses a lot of control over the internet, while excluding other stakeholders, by controlling the infrastructure and by extension, access to the internet and makes internet rights vulnerable to abuse.

There is a small but vibrant internet civil society interested in ICT and internet governance, a good example being KICTANet, through which the Kenya IGF has provided important fora for multi-stakeholder discourse. These CSOs participate in various discourses both locally and internationally. Unfortunately, they are sometimes viewed with suspicion by some sections of authorities, who have, on some occasions, excluded CSOs from deliberations. This is a notion that arises out of many state actors' view of the civil society as always driving foreign agenda. Further, they have tried to rubbish CSOs as noisemakers with no tangible results.

In terms of Enhanced Cooperation (EC) as an internet governance processes, CSOs must be wary of declaration or statements such as the Tunis Agenda's (later discussed in Section 2 on internet governance processes and power players) to attempt claim that national governments are the exclusive authority where public policy is concerned and, in particular, for a global internet. Internet governance processes need to be fully inclusive of all stakeholders, promoting the democratic and innovative potential of the internet. That way the safe-guards of the rights and freedoms in the internet derived from the Constitution and the international human rights instruments.

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<sup>7</sup> Notes taken during the Kenya IGF, July 26<sup>th</sup> 2013

## Introduction

The growth of the ICT sector worldwide has been exponential especially with the advent of widespread availability of the internet in the 1990s. Countries have realised the potential that ICTs have on accelerating growth and development and therefore, are making every effort to mainstream ICT national policies as part of national development goals. Many developing countries especially in sub-Saharan Africa have adopted various strategies to address developmental challenges in order to improve the quality of life of the citizenry. Evidence from developed and Newly Industrialised Countries (NICs) suggest that ICTs are capable of facilitating poverty reduction and promoting development through creating employment; enhancing economic activities; facilitating reduction of production costs; improving quality of service delivery; and facilitating decentralisation of growth and development.<sup>8</sup>

“Information society” is a term used to describe the most recent stage of social history. In the 20<sup>th</sup> century the most developed countries gradually entered the state of information society and it is expected that within a matter of a few decades the majority of the world’s population will be living and working in a global information society.<sup>9</sup>

The reason for this shift in development, where ICTs are now key factors to growth and development is the important and central role information plays in every aspect of life. The internet, being central to ICTs, has become an important part of daily living experiences in the 21<sup>st</sup> century. Taking cognisance of the important role information plays, it is thus necessary to have policies and legislation in place to ensure the citizens make the most out of it. The United Nations Declaration of Human Rights recognised this and made provisions for it in Article 19 on freedom of expression as fundamental human right. Freedom of information resides within the purview of freedom of expression, as do right to privacy and freedom of speech.

According to Frank La Rue:

Unlike any other medium, the internet enables individuals to seek, receive and impart information and ideas of all kinds instantaneously and inexpensively across all national borders... The internet vastly increases the capacity of individuals to enjoy their right to freedom of opinion and expression, including access to information, which facilitates the exercise of other human rights, such as the right to education and research, the right to freedom of association and

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<sup>8</sup>Eric Aligula and Florence E. Etta, “Making Sense of Information and Communication Technology Investments” in Mainstreaming ICT: Research Perspectives from Kenya, Outa, Etta and Aligula eds, Nairobi, 2006, pg 1.

<sup>9</sup><http://www.msu.ac.zw/elearning/material/1349116439Information-Society-what-is.pdf>

assembly, the right to development and to protect the environment. That internet boosts economic, social and political development, and contributes to the progress of human kind as a whole; but it is especially an instrument that strengthens democracy by facilitating citizen participation and transparency.<sup>10</sup>

A policy is a program of planned activities to achieve a set of objectives. Often policies precede legislation as part although also legislation do precede policies.

The degree of internet freedom can somehow be correlated with the degree that a country enjoys civil liberties and political freedoms. Kenya's freedom rating according to Freedom House scores of 2013 dropped from three to four.

This report has been developed as policy advocacy document to review and make recommendations regarding the ICT environment in Kenya.

The methodology includes a review of existing and proposed legislation and any information that can be gathered about extra-legal practices which might take place in relation to the internet.

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<sup>10</sup> Frank La Rue , UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in Global Information Society Watch 2011: Internet R

# 1. Status of Online Freedom of Expression in Kenya

## Overview of Legislative and Policy Framework

This section seeks to examine the status of online freedom of expression in Kenya. The succeeding sections outline the key concerns in Kenya and the respective obligations of the Government of Kenya.

Kenya does not have specific cyber laws and as such the entry point of any legislative analysis are the existing media, communications and information laws, the international instruments and the Constitution of Kenya.

In reviewing freedom of expression online, the report is guided by the Constitution of Kenya, 2010, which was adopted following a national referendum in August 2010. This Constitution contains elaborate provisions on fundamental human rights and freedoms in Chapter 4 on the Bill of Rights, largely adapted from International Human Rights Instruments.

However, despite such commitments to international treaties and conventions, the state has continued to retain many laws, which, in one way or the other, restrict or threaten internet freedom.

The Constitution sought to rectify this scenario by requiring Parliament to enact legislation to give effect to its provisions and requiring the amendment of non-compliant ones. However, there have been delays by Parliament to enact new legislation or to review existing legislation, and its adoption of diluted or weak legislation where they have been enacted or non-prioritisation of key legislation when needed. Hence, the implementation of policy and legislation under the new Constitution is not as transformative as was envisioned by the drafters of the Constitution.

Kenya has acceded to the main United Nations human rights instruments, including the Universal Declaration on Human Rights (UDHR);<sup>11</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>12</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>13</sup> Convention on the Elimination of All Forms of Discrimination against Women

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<sup>11</sup> Acceded to in July 1990; Provides for among others: right to life, liberty and security of the person (3); right to equality before the law and equal protection of the law (7); freedom from arbitrary arrest (9); presumption of innocence (11); right to privacy (12); freedom of thought, conscience and religion (18); and freedom of opinion and expression (19).

<sup>12</sup> Ratified on May 1, 1972; Provides for among others: right to liberty and security of person (9); equality before the courts (14); right to privacy (17); freedom of thought, conscience and religion (18); freedom of opinion and expression (19); freedom of association (22); and equality before the law (26).

<sup>13</sup> Ratified on May 1, 1972; Provides for among others the: right to work (6); right to education (13); and right of everyone to enjoy the benefits of scientific progress and its applications (15).

(CEDAW);<sup>14</sup> and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);<sup>15</sup> and the African [Banjul] Charter on Human and Peoples' Rights.<sup>16</sup>

The provisions of these instruments are now directly applicable in Kenya as provided by Article 2(5) and (6) of the Kenyan Constitution. The Article provides that the general rules of international law, and any treaty or convention ratified by Kenya forms part of the law of Kenya.<sup>17</sup> And as such, any person whose rights have been violated or is threatened with regard to their activities online, can proceed to the courts to seek redress for the particular breach or the protection of the law relying on the provisions of the various instruments.

Further, the Constitution provides a comprehensive and progressive Bill of Rights in Chapter 4, which provides for several fundamental rights and freedoms. These include the rights to privacy; to access to information; to property; to consumer protection; to fair administrative action; to access to justice and fair hearing; to freedom of conscience, religion and opinion; to freedom of expression; and to freedom of the media. The introduction of these provisions marked a shift from the previous constitutional order whose guarantees were not as extensive.

As per Article 21 of the Constitution, the State and every State organ is required to observe, respect, protect and fulfill the rights and fundamental freedoms in the Bill of Rights. It further requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Article 22 addresses the question of legal standing in court by granting every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The Constitution also provides for the limitation of fundamental rights and freedoms under Article 24, stating that they can only be limited “by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.” Some of the rights that can be limited include freedom of conscience, religion, belief, opinion, freedom of expression and of the media.

However, in late 2013 Parliament passed two government-sponsored two media laws that now put limits to freedom of expression. The Kenya Information and Communication Act (KICA) 2013

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<sup>14</sup> Acceded to on March 9, 1984: Requires among others that state parties: condemn discrimination against women in all its forms (2); and eliminate all forms of discrimination against women.

<sup>15</sup> Acceded to on September 13, 2001; Requires all state parties to undertake to prohibit and eliminate racial discrimination in all its forms (5) and guarantee equality of law regardless of race, colour, national or ethnic origin rights in the enjoyment of rights such as the: right to equal treatment before the tribunals and all other organs administering justice; right to security of person; freedom of thought, conscience and religion; freedom of opinion and expression; and freedom of peaceful assembly and association.

<sup>16</sup> Ratified on January 23, 1992; It provides for among others rights such as: equality before the law and equal protection of the law (3); human dignity (5); liberty and to the security of his person (6); freedom of conscience (8); right to receive information and express and disseminate opinions (10); free association (11); work (15); and education (17).

<sup>17</sup> Article 2, Constitution of Kenya 2010

which repealed the Kenya Information Act of 1998, revised in 2009, and the Media Council of Kenya Act 2013 which repealed the Media Act of 2007. KICA 2013 undermines the freedom and independence of the media by giving the state-controlled Communications Commission of Kenya (now renamed Communication Authority of Kenya) power to regulate and control media, thereby encroaching on the functions and responsibilities of an independent statutory organ, the Media Council of Kenya as provided for in the Constitution. It establishes the Communications and Multimedia Tribunal to hear complaints against journalists or persons accused of violating the Act (with an expanded definition to include bloggers ). This tribunal, which has a heavy composition of government appointees essentially usurps the powers of the Media Council of Kenya, a hitherto independent body that has been the self-regulatory mechanism for the media.

### 1.1. Access to the Internet: Connectivity and Quality of Access

The number of people accessing the internet in Kenya has been on a steady rise. According to the Communications Commission of Kenya (CCK),<sup>18</sup> there were 9.6 million internet subscriptions (that is, people with internet connections) in March 2013 a 49.2% increase from the 6.5 million recorded in March 2012. In addition, the estimated number of internet users (not necessarily subscribers) also increased from 11.8 million in March 2012 by 38.9% to 16.4 million by March 2013.

A total of 99% of the internet subscriptions are through mobile phones and 3G modems. Terrestrial wireless data, Satellite Data, Fixed DSL Data, Fibre Optic and Fixed Cable Modems usage account for less than 1% of total internet subscriptions. The increase of mobile telephony penetration can be attributed to the abolishment of the 16% Value Added Tax (VAT) levied on mobile phones by the Government in 2009, which led to reduction of the cost of mobile phones.<sup>19</sup> However, with the adoption of the Value Added Tax Act in August 2013, reintroducing the tax, mobile phone prices are set to increase.<sup>20</sup> It is important to note that the Government retained the 16% VAT and an additional 10% excise duty on mobile phone airtime. This negatively impacts on access based on affordability and excludes many people from internet access.

Broadband internet is not widely available across the country, but is largely concentrated in urban areas, and even then the fastest speed is available only in up-market neighbourhoods with prohibitive subscription costs. According to the CCK report, broadband subscriptions by March 2013 stood at 1.18 million, up 17.5% from 1.0 million recorded in March 2012.

With regard to quality of access, it is important to note that since internet connectivity for the majority of users is dependent on the existence of mobile network coverage, people in rural and remote areas still face obstacles. Despite service providers' claims of availability of 3G everywhere, in many rural areas the connectivity is 2G with very slow speeds or the absence of

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<sup>18</sup> Communications Commission of Kenya, *Quarterly Sector Statistics Report (Jan-Mar 2013)* [http://cck.go.ke/resc/downloads/Sector\\_Statistics\\_Report\\_for\\_3rd\\_Quarter\\_2012-2013.pdf](http://cck.go.ke/resc/downloads/Sector_Statistics_Report_for_3rd_Quarter_2012-2013.pdf) [Accessed August 12, 2013]

<sup>19</sup>The Big 4, Deloitte: Kenyan Economy Succeeds From Removal of Mobile Tax, See: <http://www.big4.com/deloitte/deloitte-kenyan-economy-succeeds-from-removal-of-mobile-tax/> [Accessed August 19, 2013]

<sup>20</sup>The Star, Cost of mobile phones set to increase by 16%. <http://www.the-star.co.ke/news/article-132589/cost-mobile-phones-set-increase-16> [Accessed August 19, 2013]

network coverage altogether. Absence of connectivity in such areas and the non-availability of technology like Fibre Optic Networks or 3G networks results in slower internet connections. Moreover, services such as Fibre Networks or Satellite data remain costly alternatives to deploy where mobile phone networks are absent. In addition, whenever there is fibre optic cable cuts within the country or undersea, the result has been the disrupted internet connectivity across the country and sometimes across East Africa.<sup>21</sup>

While internet access is yet to be formally recognized as a right, Article 9(1) of the Banjul Charter<sup>22</sup> provides that “every individual shall have the right to receive information” and as such the right to access the internet can be viewed as already embodied within this provision.

The Government has been making several efforts to increase connectivity and bridge the digital divide. In 2004, the Government established the Directorate of e-Government (DeG)<sup>23</sup> as part of the achievement of the Kenya’s Vision 2030 blueprint and the National ICT Policy.<sup>24</sup> The goals and objectives of the e-Government Strategy is to improve the delivery of Government information and services to the citizens, promote productivity among public servants, encourage participation of citizens in government, and empower all Kenyans in line with development priorities outlined in the Economic Recovery Strategy for Wealth and Employment Creation. As part of these efforts, Kenyans can, among others, view and apply for public service jobs;<sup>25</sup> track status of ID and Passports;<sup>26</sup> and submit tax returns.<sup>27</sup>

In 2006, the Government, in partnership with Emirates Telecommunication Establishment (Etisalat), built its own 5,000 Km fibre optic cable linking Mombasa on the coast of Kenya to Fujairah in the United Arab Emirates.<sup>28</sup> The cable which was commissioned in 2009 has increased connectivity speeds and capacity and lowered the cost of internet access.<sup>29</sup>

In addition, the government of Kenya has invested in the National Optical Fibre Backbone Infrastructure (NOFBI), which forms part of its ICT-related projects intended at enhancing service delivery to citizens and reaching to 29<sup>30</sup> counties under the County Connectivity project.

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<sup>21</sup> Business Daily, *Seacom cable cut disrupts internet links*. <http://www.businessdailyafrica.com/Corporate-News/Seacom-cable-cuts-disrupt-telcos-internet-links/-/539550/1727582/-/5m78ckz/-/index.html> [Accessed August 14, 2013]

<sup>22</sup> African (Banjul) Charter On Human And Peoples' Rights, See: [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) [Accessed August 12, 2013]

<sup>23</sup> Its functions, including those of the Kenya ICT Board and the Government Information Technology Services (GITS), will from August be carried by the recently established Kenya ICT Authority. <http://ictafrica.info/FullNews.php?id=10514>

<sup>24</sup> Directorate of E-Government <http://www.e-government.go.ke/> [Accessed August 15, 2013]

<sup>25</sup> PSC Jobs <http://www.psckjobs.go.ke/>

<sup>26</sup> Tracking status of ID & Passport - Kenya e-Government [http://www.e-government.go.ke/index.php?option=com\\_content&view=article&id=61&Itemid=65](http://www.e-government.go.ke/index.php?option=com_content&view=article&id=61&Itemid=65)

<sup>27</sup> KRA Online <https://mapato1.kra.go.ke/itms/>

<sup>28</sup> Reuters, Kenya awards Alcatel-Lucent undersea cable deal <http://uk.reuters.com/article/2007/10/11/idUKL1111608720071011>; The East African Marine System Limited, About TEAMS [http://www.teams.co.ke/index.php?option=com\\_content&view=article&id=59&Itemid=53](http://www.teams.co.ke/index.php?option=com_content&view=article&id=59&Itemid=53) [Accessed August 16, 2013]

<sup>29</sup> State House Kenya, The East African Marine Systems cable officially launched <http://www.statehousekenya.go.ke/news/june09/2009120601.htm> [Accessed August 16, 2013]

<sup>30</sup> “Kenya: Telkom Kenya Gets Three More Years to Manage NOFBI.” JULY 9, 2013

The USD60 million project covering 5,000Km is managed by Telkom Kenya and service providers pay fees to access the network. NOFBI was established to enable government agencies provide services online (e-government), lower costs of entry to business for internet Service Providers and ultimately, offer faster internet access in rural areas not covered by fibre deployment.<sup>31</sup> Further, the project will make possible the implementation of e-government initiatives such as e-health, e-banking, e-farming and e-learning.

In 2010, the Ministry of Information and Communications, with the Kenya ICT Board as the implementation agency, launched an initiative dubbed *Wezesha*, to support the ownership of laptops by university students across Kenya. The objective of *Wezesha*—Swahili for ‘enable’—was to provide a financial incentive through a voucher worth USD120 per registered student as contribution for the purchase price of any laptop, with the student contributing the balance. The first phase was expected to support the purchase of 15,667 laptops.<sup>32</sup>

Another initiative to promote connectivity is implemented by the Kenya Education Network (KENET) and the Kenya ICT Board. KENET promotes ICT use in teaching, learning and research in higher education institutions in Kenya and aims to interconnect all the universities, tertiary and research institutions in the country by setting up a cost effective and sustainable private network with high speed access to the global internet. So far, 64 KENET member institutions have been provided with affordable and efficient bandwidth.<sup>33</sup>

The Kenya ICT Board has been supporting the establishment of 210 electronic centres (e-centres) known as Pasha Centres (or Digital Villages) across the country. These centres in rural areas provide a host of services to the public via computers connected to the internet, or by using and marketing other ICT-enabled applications. The programme provides a loan from the Digital Villages Revolving Fund—repayable in three years—to successful applicants, and training on aspects such as entrepreneurship.<sup>34</sup>

Moreover, the current Jubilee Coalition Government elected into office in March 2013 is putting in place measures to implement its manifesto promise of providing solar powered laptop computers equipped with relevant content for every school-age child in Kenya.<sup>35</sup> The first phase, costing KES 15.3 Billion (Approx. USD174.8 Million), will provide 425,000 pupils in 6,000 primary schools with laptops in January 2014.<sup>36</sup> The funds will also be applied in the

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<http://allafrica.com/stories/201307100130.html>

<sup>31</sup> Schumann, Robert and Michael Kende. 2013. Lifting barriers to internet development in Africa: suggestions for improving connectivity. ISOC. (41)

<sup>32</sup> doIT in Kenya, *Wezesha*,

[http://www.doitinkenya.co.ke/index.php?option=com\\_k2&view=item&id=1564:wezesha&Itemid=568](http://www.doitinkenya.co.ke/index.php?option=com_k2&view=item&id=1564:wezesha&Itemid=568) [Accessed August 17, 2013]

<sup>33</sup> Kenya ICT Board, KENET <http://www.ict.go.ke/index.php/digitalinclusion/kenet> [Accessed August 17, 2013]

<sup>34</sup> Pasha, About Pasha <http://www.pasha.co.ke/node/2> [Accessed August 17, 2013]

<sup>35</sup> Jubilee Coalition, *Transforming Kenya: Securing Kenya's Prosperity 2013-*

*2017*, [http://www.scribd.com/document\\_downloads/123569244?extension=pdf&from=embed&source=embed](http://www.scribd.com/document_downloads/123569244?extension=pdf&from=embed&source=embed) [Accessed August 15, 2013]

<sup>36</sup> The Standard, *Plans underway to roll out Sh15b laptop project despite criticism*,

[https://www.standardmedia.co.ke/?articleID=2000088678&story\\_title=plans-underway-to-roll-out-sh15b-laptop-project-despite-criticism&pageNo=1](https://www.standardmedia.co.ke/?articleID=2000088678&story_title=plans-underway-to-roll-out-sh15b-laptop-project-despite-criticism&pageNo=1) [Accessed August 15, 2013]



development of digital content, building capacity of teachers and the setting up of computer laboratories in schools throughout the country. However, the programme has been criticized as a misplaced priority as the country still faces teacher shortages and lacks sufficient classrooms for school-going children.<sup>37</sup>

The Government recently launched the National Broadband Strategy<sup>38</sup> for the 2013–2017, whose overall objective is to provide quality services to all citizens. The Strategy targets to increase by 2017, the minimum broadband speeds from the current 256 Kbps to 5 Mbps in rural areas and to 40 Mbps in urban areas; broadband penetration in households from the current 6.3% to 35%; and, broadband subscriptions from the current 2% to 25%. Further, it seeks to have reduced broadband cost per Mbps in relation to the average national income from the current 30% to 10%.

With regard to universal access, the Kenya Information and Communications Act in Section 84 (J) establishes the Universal Service Fund administered by the CCK. The purpose of the fund is to support widespread access to, support capacity building and promote innovation in information and communications technology services. The fund, according to CCK, has supported the initiation of several pilot projects including the establishment of 16 school-based ICT centres and four community telecentres; provided ICTs for People with Disabilities (PWDs) in eight institutions; and supported the digitization of the Kenya Certificate of Secondary Education (KCSE) curriculum.<sup>39</sup> Given the disparities of access, the fund is still insufficient to cater for the needs of the people across the country.

Mobile services provider Orange currently implements Facebook Zero (0.facebook.com), which allows its users to access the text-only version of the social media site without being charged for the data cost. However, users pay for data when viewing photos or external links.<sup>40</sup> Further, public internet access points are offered to guests in Kenya's main international airport, with an increasing trend also noted amongst major restaurants and hotels across the country.

## 1.2. Arbitrary Blocking and Filtering

Newspapers, television and radio are the main sources of news and information for most Kenyans. However, many media outlets have increased efforts to extend and make available their content on online platforms. Media houses now post or stream their content on their

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<sup>37</sup> Business Daily, *Computer labs plan to ease cost of laptop project*, <http://www.businessdailyafrica.com/Computer-labs-plan-to-ease-cost-of-laptop-project/-/539546/1882284/-/8kiqpvz/-/index.html> [Accessed August 15, 2013]

<sup>38</sup> Government of Kenya, National Broadband Strategy <http://www.cck.go.ke/resc/publications/Broadband/National-Broadband-Strategy.pdf> [Accessed August 14, 2013]

<sup>39</sup> Communications Commission of Kenya, *Universal Access Projects* [http://www.cck.go.ke/services/universal\\_access/projects/](http://www.cck.go.ke/services/universal_access/projects/) [Accessed August 16, 2013]

<sup>40</sup> Orange, *Facebook Zero on Orange* [http://www.orange-kenya.co.ke/index.php?option=com\\_content&view=article&id=220:facebook-zero-on-orange&catid=56:voice-offers&Itemid=130](http://www.orange-kenya.co.ke/index.php?option=com_content&view=article&id=220:facebook-zero-on-orange&catid=56:voice-offers&Itemid=130) [Accessed August 17, 2013]

websites and repost and rebroadcast on social media for example on Twitter, Facebook and YouTube.

internet usage statistics confirm that many Kenyans access not only local sites, but also global sites with local content. According to Alexa.com,<sup>41</sup> the top local sites include Google.co.ke, Facebook, The Standard, Daily Nation, OLX Kenya, Capital FM 98.4, Kenyan-post.com, Ghafla! Kenya, and Safaricom. Further, key global websites visited include Google, YouTube, Yahoo, Twitter, Blogspot.com, Wikipedia, WordPress.com, and BBC Online. This is indicative that people in the country largely enjoy unrestricted access to the internet.

There is no reported incidence of State use of technologies that aid in the arbitrary blocking and filtering of specific websites, internet protocol (IP) addresses and domain name extensions or the taking down of websites whether during key events or otherwise. However, during the 2007/08 Post Election violence, the government banned live TV broadcast reporting of the events as they unfolded, and this indirectly applied to such broadcasts online on the same.<sup>42</sup>

More recently, during the on-going discussions on a proposed Amendment Bill to the Kenya Information and Communication Act, a controversial proposal having such an effect was floated. The new section 102B to the principal Act was to be introduced purportedly to codify the State's obligations under the Tampere Convention.<sup>43</sup>

The radical proposal, which has since been withdrawn from a more recent version of the Bill,<sup>44</sup> sought to grant the Authority (CCK) power, during a declaration of a state of emergency under Article 58<sup>45</sup> of the Constitution, to give direction to any communications service provider that their entitlement to provide communication services has for the duration of the state of emergency either been suspended, either generally or in relation to specific services, networks or facilities or restricted or modified with respect to the provisions given in the direction.

Further, that such restriction or modification included "provisions for the taking, removal, addition, construction, control or the usage for purposes of mitigating public emergencies or disasters of, all or any such communication system, equipment or services under this Act; and provisions for the stopping, delaying and censoring of messages and broadcasts, and the carrying out of any other purposes which the Authority thinks necessary to facilitate the direction given".

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<sup>41</sup> Alexa, *Top Sites in Kenya* <http://www.alexa.com/topsites/countries/KE> [Accessed August 17, 2013]

<sup>42</sup> Article 19, *How far to go? Kenya's media caught in the turmoil of a failed election*, <http://www.article19.org/data/files/pdfs/publications/kenya-how-far-to-go.pdf> [Accessed August 14, 2013]

<sup>43</sup> See: <http://www.kictanet.or.ke/?p=17028>; Explanatory Guide For Proposed Amendments To The Kenya Information And Communications Act, [http://cck.go.ke/regulations/downloads/Explanatory\\_guide\\_.pdf](http://cck.go.ke/regulations/downloads/Explanatory_guide_.pdf) [Accessed August 17, 2013]

<sup>44</sup> The Kenya Information and Communication Amendment Bill 2013 [http://www.cickenya.org/index.php/component/k2/item/download/292\\_e498e12870cb2acb143f5a470b7f5278](http://www.cickenya.org/index.php/component/k2/item/download/292_e498e12870cb2acb143f5a470b7f5278) [Accessed August 18, 2013]

<sup>45</sup> Under this Article, a state of emergency may be declared only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to meet the circumstances for which the emergency is declared.

Blocking and filtering is implemented by some private institutions. Some of the institutions use filtering technologies to exclude pages containing keywords such as sex and porn, or specific adult content from being viewed on their networks. Such actions also extend in some cases to social media platforms such as Facebook, YouTube and Twitter, and private email services such as Gmail or Yahoo! Mail where such restrictions bar access to the websites in their entirety, or limit their access during office hours.

### 1.3. Criminalising Legitimate Expression

Article 19 of the International Covenant on Civil and Political Rights provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph two of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order or of public health or morals.

It should be noted that sexual orientation is also a form of expression and the protected grounds offline also apply online.

The Bill of Rights in the Constitution of Kenya, 2010 guarantees the right to freedom of opinion, expression and of the media. Article 32 grants all persons, the right to freedom of conscience, religion, thought, belief and opinion. Article 33 guarantees the right to freedom of expression, which however does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27 (4).

The prosecution for hate speech following the 2007-08 post-election violence is of concern as it is slowly leading to self-censorship of what would be legitimate expression.

Since the Constitution does not define hate speech, Section 13 of the National Cohesion and Integration Act does, and while well intentioned, it essentially amounts to a claw-back of the freedom of expression. Moreover, the law has been narrowly and emotionally applied to limit otherwise legitimate expression to the extent that expressing an unfavourable opinion about a person from a different ethnic group is almost synonymous with hate speech.

According to Section 13 of the Act, a person who uses threatening, abusive or insulting words or behaviour, or displays any written material; publishes or distributes written material; presents or directs the public performance of a play; distributes, shows or plays a recording of visual images; or provides, produces or directs a programme which 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 offence is punishable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both.

However, the High Court in recent decisions<sup>46</sup> on hate speech brought under this law has, in line with Article 20 (3), adopted interpretations that have favoured the enforcement of the right to freedom of expression.

Moreover, the Kenya Information and Communications Act still provides for avenues through which legitimate expression is criminalised. Under its section 29, a 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 commits an offence. The offence is punishable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

The existing media legislative framework does not adhere to international and regional standards of media freedom.

The Books and Newspapers Act<sup>47</sup> regulates the registration, deposit, printing of books and newspapers and requires publishers to deposit bonds with the Registrar of Books and Newspapers and provides stiff penalties for non-compliance of its provisions and grants any police officer power to seize any book or newspaper suspected to be printed or published in contravention of the Act.<sup>48</sup> Currently, online book and publications may not be under its purview, given the limited definitions of book and newspapers that did not factor in electronic publications.

The Prevention of Public Security Act, whose section still permits the arrest and detention of journalists for compromising public safety, public order, morality or international defence is still in force.

The Prevention of Terrorism Act, (section 35(3) (c)) allows the limitation of the freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under the Act. Offences under the Act include incitement, hoaxes, or intimidation—offences can be carried out online.

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<sup>46</sup>RanduNzaiRuwa & 2 Others V Internal Security Minister & Another [2012] eKLR; Chirau Ali MwakwereVs Robert M. Mabera And 4 Others (2012) eKLR; UhuruMuigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR

<sup>47</sup>Cap 211

<sup>48</sup>S. 19

Kenya's Penal Code still contains provisions on criminal defamation, which are still applicable to online content and are yet to be decriminalised. Section 67 of the Act makes it an offence to publish anything that is intended to degrade, revile or expose to hatred or contempt a foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb peace and friendship between Kenya and the country to which such persons belong.

Further, Section 194 states that a person will be guilty of the misdemeanour termed libel if by print, writing, painting or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that person. The general punishment for misdemeanours as provided under Section 36 of the Code is imprisonment for a term not exceeding two years or a fine, or both. This fine has been specified by the Kenya Information and Communications Act 2013 and pegged at KES 20million (USD 228,982) for an offending media house and KES 500,000.00 (USD 5725) for a journalist.

Section 2 of the Media Act 2007 provided a limited definition of a journalist, restricting it to a person who among others holds a diploma or a degree in mass communication from a recognised institution of higher learning and is recognised as such by the Council, and requires all journalists and media enterprises to register with the Council. The Media Council of Kenya (MCK) Act 2013 is not specific and leaves it for the MCK to set the definition. However, implicit in KICA 2013 on this definition is inclusion of offenders on all media platforms including social media those whose works is practiced online such as bloggers exposing them to the same punitive measures.

The Communication and Multimedia Appeals Tribunal, which falls under the state controlled Communication Authority, will have power to impose these hefty fines on media houses and journalists, recommend de-registration of journalists and make any order on freedom of expression. These massive fines would kill most media houses and definitely those that the average Kenyan journalist can only imagine. Being a being multimedia in nature, it is feared that this extends powers to hear complaints against persons posting material online which are journalistic in nature and thus exposes bloggers to these stiff penalties, in effect, limiting freedom of expression for fear of reprisal.

The MCK Act 2013 repealed the Media Act 2007 and establishes the Media Council of Kenya; to regulate the conduct and discipline of journalists and the media; and enable self-regulation of the media. The MCK Act 2013, while providing for a more elaborate appointment procedure for the Council, still leaves the same and its funding under the control of the state.

Section 35 requires the media to observe the code of conduct and to be free and independent in style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases.

Recent events in the country indicate that the government is increasingly becoming more intolerant to criticism of its affairs and sensitive over political discourse hence it is keen to deal with persons publishing articles, blogs or tweets online that are not viewed favourably.

Legislation that was ideally established to stem crime is in practice, being used to unlawfully censor content that is considered offending, shocking or disturbing to government or its officials.

In August 2012, outspoken and controversial blogger and social commentator, Robert Alai narrated an incident where after an altercation with the then Government Spokesman Alfred Mutua, he was arrested, detained and charged under section 29 of the Kenya Information and Communication Act , 2009, for sending abusive and annoying messages.<sup>49</sup>

In March 2013, the blogger was summoned and questioned by detectives after a series of tweets regarding Francis Kimemia, the then head of Civil Service and current Secretary to the Cabinet and later charged in court for causing annoyance to Mr. Kimemia.<sup>50</sup> In May 2013, the same blogger was charged under the National Cohesion and Integration Act with hate speech intended to stir ethnic tensions between members of the Kalenjin and Luo based on one of his posts on the popular social networking site Facebook.<sup>51</sup>

In May 2013, in yet another incident involving the same blogger, he was charged under Section 29 of the Kenya Information and Communication Act for posting annoying tweets about William Oduol, a local politician.<sup>52</sup> The blogger is currently out on bail, pending the determination of these matters by the Courts.

In July 2013, Betty Waitherero, a blogger,<sup>53</sup> upon posting an article<sup>54</sup> on her blog about the Jubilee Government, the then Government Spokesman Mr. Muthui Kariuki who was also mentioned in the article is alleged to have called the blogger's father (a former workmate) and threatened to have the blogger arrested if she did not pull down the article and refrain from writing such pieces in the future. While the threats cannot be ascertained, the blog post was subsequently taken down by the author.

In August 2013, another blogger, WanjikũRevolution Kenya's Facebook profile<sup>55</sup> was blocked for seven days and a post mentioning the Jubilee Government on her Facebook timeline was taken

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<sup>49</sup> Tech Mtaa, *Part One: Why Was @RobertAlai Summoned By The CID Then Locked-Up?* <http://www.techmtaa.com/2012/08/23/part-one-why-was-robertalai-summoned-by-the-cid-then-locked-up/>; TechMtaa, *Part Two: The Court Appearance And How My Communications Were Monitored* <http://www.techmtaa.com/2012/08/24/part-two-the-court-appearance-and-how-my-communications-were-monitored/> [Accessed August 15, 2013]

<sup>50</sup> Nairobi Wire, *Tweets That Made Robert Alai Get Summoned By CID*, <http://www.nairobiwire.com/2013/03/tweets-that-made-robert-alai-get.html> [Accessed August 16, 2013]

<sup>51</sup> The Star, *Blogger Alai charged with hate speech*, <http://www.the-star.co.ke/news/article-122494/blogger-alai-charged-hate-speech> [Accessed August 15, 2013]

<sup>52</sup> The Kenyan Daily Post, *Photo of Robert Alai's charge sheet after he was arrested*, <http://www.kenyan-post.com/2013/05/photo-of-robert-alais-charge-sheet.html> [Accessed August 16, 2013]

<sup>53</sup> Incredible Kenya, <http://bettywaitherero.blogspot.com/> [Accessed August 16, 2013]

<sup>54</sup> <http://www.jamiiforums.com/kenyan-politics/496301-enough-of-this-propaganda-jubilee.html>

<sup>55</sup> The Wanjiku Revolution Kenya <https://www.facebook.com/wanjikurevolutionpage> [Accessed August 16, 2013]

down by Facebook.<sup>56</sup> She blamed Kenya Government operatives for the act stating that they were responsible for reporting her profile as violating Facebook community standards.

#### 1.4. Imposition of Intermediary Liability

Kenya has more than 72 licenced intermediaries, dominated by mobile telecommunication companies. The sector is regulated by the CCK of Kenya and the Ministry of Information and Communication.

So far, Kenya does not have legislation which explicitly exempts intermediaries from liability or directly holds them accountable for the acts or omissions of their users. Further, while there is no law specifically requiring them to monitor, filter, remove or block content generated by users which is deemed illegal, that liability is likely to arise under some legislation which has prompted intermediaries to put in place preventative measures to eliminate such occurrences.

In essence there is no policy or law that provides a framework to shield intermediaries from liability by providing among others, a 'notice and take down' regime adopted in the EU Data Protection Directive<sup>57</sup> or 'safe harbour' provisions under the US Digital Millennium Act.<sup>58</sup>

Therefore, as will be outlined below, intermediaries in Kenya remain open to liability under several legislations. It is important to note that most of these legislations are old and have not been updated to conform to recent developments in various jurisdictions especially with regard to the internet. Hence, while their provisions did not contemplate the existence or nature of the internet, their continued existence and enforcement remains to affect how business is conducted online given the liability risk that they pose, if applied to the internet.

Under section 62 of the National Cohesion and Integration Act,<sup>59</sup> any newspaper, radio station or media enterprise which publishes any utterance which amounts to the offence of ethnic or racial contempt<sup>60</sup> is liable on conviction to a fine not exceeding one million shillings.

The Copyright Act<sup>61</sup> in section 35 provides that any person who violates any copyrights, by, among others, distributing, broadcasting and the availing to the public protected works without the licence or consent of the copyright owner commits a crime. Further, under section 38, it creates offences related to copyright infringement and penalties for acts such as the sale, hire,

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<sup>56</sup>Wanjikū Revolution Kenya, *Welcome to the Era of Digital Censorship in Kenya, but the REVOLUTION is still coming!* <http://wanjikurevolutionkenya.wordpress.com/2013/08/05/welcome-to-the-era-of-digital-censorship-in-kenya-but-the-revolution-is-still-coming/> [Accessed August 16, 2013]

<sup>57</sup> OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data <http://www.oecd.org/internet/interneteconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm>

<sup>58</sup>Digital Millennium Copyright Act <http://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf>

<sup>59</sup> Act No. 12 of 2008 <http://www.cohesion.or.ke/images/downloads/national%20cohesion%20and%20integration%20act%202008.pdf>

<sup>60</sup> This is the utterance of 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.

<sup>61</sup> No. 12 of 2001. [http://www.copyright.go.ke/rough/copyright\\_act.pdf](http://www.copyright.go.ke/rough/copyright_act.pdf)

distribution, possession, importation of copyrighted works. Hence, an intermediary through whose facility the copyrighted works is distributed could be liable under this legislation.

Section 30 of the Kenya Information and Communication Act<sup>62</sup> makes it an offence for persons running telecommunications systems while out of the course of duty, to intentionally modify or interfere with the contents of messages sent through their systems. Further, section 31 makes it an offence for a licensed telecommunication operator to intercept, or disclose the contents of messages sent through their telecommunication systems outside the course of their business. Both offences are punishable by a fine not exceeding three hundred thousand shillings or, to imprisonment for a term not exceeding three years, or to both. Section 84D of the Act makes it an offence to publish or transmit or cause to be published in electronic form obscene information. The offence is punishable by a fine not exceeding two hundred thousand shillings or, to imprisonment for a term not exceeding two years, or to both.

Under section 194 of the Penal Code, a person commits the offence of libel if they publish or convey defamatory material. Further, in section 117 of the Penal Code, a person who does anything to obstruct, prevent, pervert or defeat the course of justice or in any way interferes or prevents the execution of any legal process whether civil or criminal is guilty of an offence and is liable on conviction to imprisonment for five years. This provision may be abused by law enforcement agencies to intimidate and get compliance especially where the victim is not conversant with the law.

Under common law, intermediaries can still be held liable for actions such as breach of contract, defamation, copyright infringement, negligence, nuisance, invasion of privacy, breach of confidence, infliction of emotional distress, pain and suffering, vicarious liability and so on.

In order to protect themselves from liability and legitimise their actions, internet Service Providers (ISPs) rely on their user agreements to enforce compliance of their users with the law. For example, the Terms and Conditions of the Safaricom Domain Name Registration and Web Hosting Service<sup>63</sup> constrict freedom of expression, opinion and belief as users are disallowed from using the service for among others, storing, reproducing, transmitting, communicating or receiving any offending material; or to cause annoyance, inconvenience or needless anxiety to any person. The agreements also give the service provider sole discretion to terminate the agreement(s).

Further, the challenge with such agreements is that while they provide for Arbitration as the method of resolving disputes, this is hardly implemented. As a result, determinations are then made as administrative decisions. The difficulty with this is that any determination arising out of the administrative action taken by intermediaries are, in the absence of checks and balances, likely to be unjust, opaque, discriminatory, biased, politically motivated, lacking clear and effective mechanisms for seeking recourse and open to abuse by either intermediary or State and non-state actors.

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<sup>62</sup>Cap 411A (Rev. 2011);

[http://www.law.co.ke/klr/fileadmin/pdffdownloads/Acts/KenyaInformationCommunicationsAct\(Cap411A\).pdf](http://www.law.co.ke/klr/fileadmin/pdffdownloads/Acts/KenyaInformationCommunicationsAct(Cap411A).pdf)

<sup>63</sup><http://domains.safaricom.co.ke/terms.pdf>



While Kenyan ISPs and web platforms are not required to conduct surveillance on their users, the reports that the CCK demanded their co-operation in the installation of internet traffic monitoring equipment namely the Network Early Warning Systems (NEWS)<sup>64</sup> in March 2012 raises doubt as to whether their opposition to the move prevailed over the Commission's demand. Given that intermediaries fear suffering the consequences such as losses for failing to comply with the directives from the Commission, it is likely that such systems have already been installed and are functional within the ISP networks.

So far, no local intermediary is producing any transparency and accountability reports to the public, hence it is difficult to ascertain the number of cases or requests for information that they have to deal with and the reasons behind the decisions they have taken as a result. Further, none is reported to be engaged in any initiative that demonstrates their commitment to ensuring the advancement of user rights such as freedom of expression and privacy, such as Global Network Initiative.<sup>65</sup>

### 1.5. Disconnecting Users from the internet

Kenya has not had, so far, any reported incidence of the state taking measures to cut off access to the internet entirely. internet Service Providers are regulated by the CCK, which is a semi-autonomous body established by Statute. However, in a proposed amendment legislation to the Principal Act, The Kenya Information and Communication Amendment Bill 2013 seeks to grant the regulator independence from the Executive.

International connectivity to Kenya is achieved through different methods. However, majority of ISPs now rely on the under-sea fibre optic cables—Seacom, Teams, Eassy—given its capacity, with little reliance on satellite connectivity. While there is no centralised switch to access internet, any interference with the under-sea cables, which most ISPs rely on, can have deleterious effects including the loss of connectivity.

Section 84U of the Kenya Information and Communication Act is categorical that no license under the Act can deny access or service to a customer, except for delinquency of payment of dues or for any other just cause. However, it does not define the instances which would be termed as just causes.

There is also no legislation that embodies the concept of “graduated response”. However, service providers often reduce and limit internet speeds for users downloading a large volume of content, especially through peer-to-peer (P2P) services based on their fair use terms or principles and policies.<sup>66</sup>

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<sup>64</sup> Business Daily, *CCK sparks row with fresh bid to spy on internet users*, See: <http://www.businessdailyafrica.com/Corporate-News/CCK-sparks-row-with-fresh-bid-to-spy-on-internet-users-/-/539550/1370218/-/x6adjmz/-/index.html>

[Accessed

<sup>65</sup> Global Network Initiative <http://www.globalnetworkinitiative.org/>

<sup>66</sup>Zuku, Fair Usage Policy, See: <http://www.zuku.co.ke/triple-play/fair-usage-policy.html> [Accessed August 20, 2013]

## 1.6. Cyber Attacks

While cases of cyber-attacks have been on the increase, the Government has largely been the victim, rather than the proponent of the attacks. In January 2012, more than 100 Kenya Government websites were attacked and defaced by an Indonesian hacker.<sup>67</sup> In August 2013, the website of the Department of Immigration and Registration of Persons suffered a similar fate.

In the private sector, financial institutions have been adversely affected by white-collar crimes. According to the Banking Fraud Investigations Department (BFID), a conservative figure of KES 1.49 billion (USD17.52 million) was stolen from customers' accounts between April 2012 and April 2013, with only a paltry KES 530 million (USD6.2 million) being recovered.<sup>68</sup> The BFID report cites identity theft, electronic funds transfer, bad cheques, credit card fraud, loan fraud, forgery of documents and online fraud as the key methods used to defraud these institutions.

Further, many computers in Kenya are regularly compromised and taken over by hackers to mount distributed denial of service (DDoS) attacks.<sup>69</sup> Most of these incidents are launched by foreign hackers. While it is possible, there is yet to be reports of attacks of such scales from within Kenya. The top attacking countries of Kenyan networks and sources of malware have been identified as China, United States, Korea, Brazil and South Africa.<sup>70</sup> But in December 2013, the Centre for Law and Research International (CLARION) complained of its website being hacked with high suspicions of Kenyan sources.

The CCK has since established the Kenya National Computer Incident Response Team Coordination Centre (KE-CIRT/CC) as the national trusted focal point for advising and coordinating responses to cyber-security incidents in the country. However, this measure is still insufficient to deal with increasing cybercrime. More importantly, the absence of a proper cyber-security policy and legal framework in addition to the capacity gaps among law enforcement agencies to prevent, detect, investigate and prosecute cybercrime is a testimony of the exposure of internet users to such crimes.

Further, there is little effort in place to educate users on how to ensure their security efforts online. Nonetheless, the Telecommunications Service Providers Association of Kenya (TESPOK) recently launched the Cyber Usalama Initiative and its Industry Computer Security and Incident Response Team (iCSIRT).<sup>71</sup> The initiative's main objective is to educate and empower Kenyan internet and computer users on internet safety and security. The role of the iCSIRT is to, among

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<sup>67</sup> Daily Nation, *Massive cyber attack hits 100 State websites*

<http://www.nation.co.ke/business/Tech/Massive+cyber+attack+hits+100+State+websites+/-/1017288/1309316/-/13shwd7z/-/index.html> [Accessed August 18, 2013]

<sup>68</sup> Jambo News Pot, *How fraudsters stole Ksh1.5 billion from Kenya's banks in one year* <http://ht.ly/lbQQ08> [Accessed August 18, 2013]

<sup>69</sup> Daily Nation, *How safe is the Kenyan cyberspace?*

<http://www.nation.co.ke/oped/blogs/Kenyan+cyberspace+is+not+safe/-/634/1945962/-/view/asBlogPost/-/1g2sx1/-/index.html> [Accessed August 18, 2013]

<sup>70</sup> Tespok Kenya iCSIRT, *Cyber Threat Trends Report Q2 2013*, [http://usalama.co.ke/reports/Q2-2013/Cyber%20Threat%20Trends%20Report\\_Q2-2013.pdf](http://usalama.co.ke/reports/Q2-2013/Cyber%20Threat%20Trends%20Report_Q2-2013.pdf) [Accessed August 18, 2013]

<sup>71</sup> Usalama Cyber, Tespok iCSIRT <http://usalama.co.ke/icsirt.html> [Accessed August 18, 2013]

others, detect, report and investigate incidents that pose a threat to the security of our members' information systems including other forms of network abuse such as spam and copyright infringement.

### **1.7. Surveillance and Lawful Intercept**

Globally, surveillance is a growing problem. Digital communications have enabled state surveillance to reach unprecedented levels.

In Kenya, the right to privacy is well established in the Constitution. Article 31 provides that “Every person has the right to privacy, which includes the right not to have their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.” However, the right to privacy is not an absolute right and may be limited by statute as provided under Article 24 of the Constitution.

Under the statutory framework, the infringement of the privacy of communication and hacking are prohibited.

Section 31 of the Kenya Information and Communication Act 2009, prohibits the interception of messages and the disclosure of the contents of messages sent through a licenced telecommunication system, other than in the course of business by telecommunication operators. Further, per section 30 of the same law, the modification of such a message so sent is also an offence. This provision is still weak in protection privacy because it is open to abuse, especially where there is non-disclosure of the information shared.

Moreover, the Act under section 83U prohibits the unauthorized access to computer data except where the act was done by a person who has a right to control the operation or use of the computer system and exercises such right in good faith; having express or implied consent of the person empowered to authorize him to have such an access; with reasonable grounds to believe that he had such consent; or acting in reliance of any statutory power for the purpose of obtaining information, or taking possession of any document or other property.

The Government has, in the recent past, introduced legislation that grants government agencies greater powers to monitor and collect information about individuals' private communications and activities including those conducted on the internet.

For example, according to section 36 of the National Intelligence Service Act, 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. However, the Service must, prior to taking any action under this section, obtain a warrant. Hence, the last proviso grants the police for example, the authority to hack into any system in line with their statutory mandate.

In addition, section 35 of the Prevention of Anti-terrorism Act allows the limitation of the right and fundamental freedoms of persons or entities for purposes of ensuring: the investigations of a terrorist act; the detection and prevention of a terrorist act; or that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others. Hence it provides for, among others, the limitation of the right to privacy to that extent that it allows a person, home or property to be searched; possessions to be seized; or the privacy of a person's communication to be investigated, intercepted or otherwise interfered with.

Section 36 of the Act allows the Police, with consent in writing of the Inspector-General of Police or the Director of Public Prosecutions, to apply for an ex parte order from the High Court for an Interception and Communications Order for obtaining evidence of the commission of an offence under the Act. The High Court, before issuing such an order, must be satisfied that the application relates to the commission of an offence under the Act or to the whereabouts of the person suspected by the police officer to have committed the offence. Then it can make an order: requiring a communications service provider to intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted or authorizing the police officer to enter any premises and to install any device for the interception and retention of a specified communication and to remove and retain such a device.

While the move by CCK demanding the co-operation of telecommunication service providers in the installation of NEWS in March 2012—as a measure to detect and respond to cyber threats—was opposed as a violation of the Constitution, it is not clear whether the same has been implemented though it is very likely.

## 1.8. Data Protection

As already pointed out, the right to privacy is protected under Article 31 of the Constitution and is subject to statutory limitations. Currently, Kenya does not have clear or extensive legislation on data protection that stipulates who can access personal data, what it can be used for, how it should be stored, or for how long. Hence, there is little or no protection available to users that would secure their information held by third parties.

There is however, a proposed Data Protection Bill 2012, which seeks to give effect to Article 31(c) and (d) of the Constitution and thus regulate the collection, retrieval, processing, storing, use and disclosure of personal data. However, the bill is yet to be tabled before Parliament for debate, more than a year after it was initially drafted. This delay is indicative of either the non-prioritisation or perceived unwillingness of the government to adopt data protection legislation.

Clause 5 of the bill reinforces the right of every person to privacy with respect to their personal data relating to their private and family life. However, clause 6 provides that the right may be

limited in order to safeguard overriding legitimate interests, and it requires that such limitation be carried out using the method that is least intrusive to the data subject.

The Bill has proposals that would require detailed and advance notices to individuals that information about them is being collected by any agency. Clause 7 requires any agency,<sup>72</sup> before collecting information directly from an individual, to take reasonable steps to ensure such an individual is aware of several matters.

These include the fact of the collection; the purpose; the intended recipients of the information; the name and address of the agency that is collecting and the agency that will hold the information and whether or not any other agency will receive the information; whether the collection of the information is authorised or required by or under law (including the particular law by or under which the collection of the information is so authorised or required, protocols to comply with the law; whether or not the supply of the information by that data subject is voluntary or mandatory); the consequences if any, for that data subject if all or any part of the requested information is not provided; and the rights of access to, and correction of, personal information provided under this Act.

Under clause 10, users are granted the right, where their personal data is destined for automated or manual processing, to information on the person processing data concerning him or her; place of origin of the data; use of the data collected; any other person to whom the data is transmitted; and rectification of incorrect data and the right to erasure of illegally processed data.

With regard to the security of the information collected, agencies holding personal information are required under clause 11 to ensure that the information is protected, by such security safeguards as are reasonable in the circumstances, against loss, damage and destruction or the access and use by an unauthorised person, modification, or negligent disclosure or use.

The Bill further requires that information be held in ways that can be easily retrieved, that users have the right to obtain access to personal information held by agencies and the right to correction of such information. It further requires under clauses 14, 15 and 16, that any information obtained be used for the intended purpose, not misused—including use for commercial purposes—without express consent of the subject or authorised under written law respectively. Lastly, it provides that a person who interferes with the right to privacy is liable to imprisonment for a two year term or to a fine of KES. 100,000, or both.

The challenge with the proposed legislation is that it does not specifically mention data that is stored in the cloud, including those that may be stored in off-country sites. Hence, the question of jurisdiction will be material in assessing compliance of agencies and in the prosecution of individual rights. However, the bill seeks to go around this by restricting its application to the data and the rights of the data subjects.

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<sup>72</sup>Public entity or private body

The Media Bill 2013 makes provision for the privacy of individuals. In the Code of Conduct for Journalists it states that the public's right to know shall be weighed against the privacy rights of people in the news.<sup>73</sup> Further, that intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest shall itself be legitimate and not merely prurient or morbid curiosity. Moreover, it requires that things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

While Kenya does not implement a real-name identification system, the Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations 2012 require subscribers of telecommunication services to be registered by service providers. The details required include official name, telephone number, date of birth, physical address, postal address, identity card number, and certificates of registration or incorporation in the case of legal persons. Moreover, paragraph 13 prohibits any proxy registration.

Telecommunication service providers are required to maintain secure and confidential records of such registrations. However, under paragraph nine, a licensee may disclose the registration particulars for the purpose of facilitating the performance of any statutory functions of the CCK; in connection with the investigation of any criminal offence; or for any criminal proceedings; or for any civil proceedings.

It is important to note that there is no duty to inform a subscriber of any request for their personal information; requirement for a court sanctioned order to release such information; stipulation on who can access such records; or the procedure to be followed before such access is granted.

The National Cohesion and Integration Commission has indicated that it was monitoring material posted on social media including Facebook and Twitter,<sup>74</sup> and that it had written to Facebook asking for among others, cooperation in shutting down some accounts. The monitoring is being done by the Commission, working with the Police, Criminal Investigations Department's Cyber Crime Unit, the CCK, and other stakeholders.

Under the Penal Code, offences related to obstruction remain available to law enforcement officers, and they may be misapplied, in the absence of court sanctioned orders, to pressurize or oblige private actors to hand over user information during the course of investigations. Such offences include—as provided in section 117—conspiracy to do anything to obstruct, prevent, pervert the course of justice, and are punishable by imprisonment for five years. Section 253 makes it an offence to assault, resist or wilfully obstruct any police officer in the due execution of his duty or any person acting in the aid of that officer—an offence that also carries a five year imprisonment penalty.

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<sup>73</sup>Para 15, Code of Conduct

<sup>74</sup>The Standard, NCIC warns over hate on social media. See:

<http://www.standardmedia.co.ke/?id=2000048339&cid=4&articleID=2000048339> [Accessed August 20, 2013]

### **1.9. Net Neutrality**

In Kenya, evidence of legal provisions on net neutrality can be found in the Kenya Information and Communication Act. Section 84U of the Act prohibits licensees from denying access or service to customers except for delinquency of payment of dues or for any other just cause.

More importantly, section 84V requires licensees to provide equal opportunity for access to the same type and quality of service to all customers in a given area at substantially the same tariff limiting variations to available or appropriate technologies required to serve specific customers.

The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations 2010 also contain provisions regulating the conduct of service providers (licensees) in the telecommunications sector.

Rule 9 provides for the interconnection obligations of telecommunications service providers which include to meet all reasonable requests for access to its public telecommunications network, in particular access at any technically feasible point on its telecommunications network; adhere to the principle of non-discrimination to interconnection offered to other interconnecting licensees; and provide access to the technical standards and specifications of its telecommunications network with which another interconnecting licensee shall be interconnected.

Further, Rule 9 requires all licensees to provide uniform, non-preferential service on a first-come-first-served basis to all persons within a covered geographical area or a given class who request for such service. However, a licensee is not deemed to violate the principle of equal access and non-preferential treatment if it considers the ability of a person to pay for a service when deciding whether to provide a service to the person; or, makes other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

Whereas these provisions hold true, internet Service providers continue to among others intentionally slow down P2P communications.

### **1.10. Government engagement at the International level**

How the country acts on internet issues on the global stage – including whether this is consistent or inconsistent with national level laws and policies. International spaces to look at include: internet Corporation for Assigned Names and Numbers (ICANN), ITU, Freedom Online Coalition, Human Rights Council, OECD, World Summit on Information Society (WSIS) review process, international trade negotiations. Section Two deals, with government engagement at international level, and focuses on areas with evidence of government participation.

## 2. Internet Governance Processes and Power Players

This section aims to describe the main structures and actors that must be engaged with to shape the internet policy environment at the national level. It aims to identify the **opportunities and barriers** for civil society to engage with these structures and actors. It includes a description of the main incentives and approaches for each player.

### Overview

The internet has transformed communications in the world like never before. To a lot of people, the internet is equal to their daily communication. With this development and dependence of citizens on the internet, several issues have cropped up and have made it necessary to consider such issues as rights and protection of users, and the need for laws of internet usage (as seen in section 1 above). Of concern has been such issues as freedom of expression online, data protection, control of the internet by governments, access and affordability of internet and so on just to name a few.

Many of these issues fall under technical and policy aspects of the internet and have to be dealt with by governments and citizens of a country, and therefore call for concerted efforts. As such many of them have and continue to get attention locally and globally through the internet governance structures.

Internet governance derives its mandate from the WSIS Tunis agenda<sup>75</sup> and is defined as<sup>76</sup> *the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of the internet.*

The definition takes into consideration the governance and technical aspects of internet. It can be interpreted that in crafting the Tunis Agenda, it had been envisaged that different actors would be required to participate in shaping the internet policy environment as articulated in article 35<sup>77</sup> which states:

[T]he management of the internet encompasses both technical and public policy issues and should involve all stakeholders and relevant inter-governmental and international organizations.

The Tunis agenda recognized that diverse stakeholder groups such as governments, businesses, civil society, academia and the technical community would be required to participate in

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<sup>75</sup> The Tunis Agenda for the Information Society was a consensus statement of the WSIS adopted on November 18, 2005 in Tunis, Tunisia. It established guidelines for policy-oriented discussion of internet governance, and identified two mechanisms required for the development of internet governance – the Internet Governance Forum; and the Enhanced Cooperation on international public policy issues pertaining to the internet.

<sup>76</sup> Tunis Agenda: <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html> para 34.

<sup>77</sup> Ibid para 35



internet policy decision making process. However, in its definition of the “roles” of different stakeholder groups in the internet governance processes, it vests governments with the sole right to make internet policy<sup>78</sup> “authority for internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international internet-related public policy issues”. This authority and participation of governments is an issue that has continued to be a main concern in internet policy discourses with arguments that the term “Governance”<sup>79</sup> embraces shared rules, procedures, and programs that give rise to expectations and practices, assign roles to participants, and shape their interactions. This exclusive authority to governments to control denies public/citizen participation in decision-making processes, which the Kenyan constitution recognizes.

## 2.1. Relevant Ministries

The internet has linkages to different sectors of the economy, has a cross cutting role and with a diverse range of stakeholders.

The following stakeholders have a direct or indirect role in internet policy matters.

### 2.1.1. Ministry of ICT<sup>80</sup>

Kenya’s Ministry of ICT is in charge of all matters communication. The Ministry together with the CCK are the bodies that participate in internet policy negotiations. They are the formulators and implementers of government policies that have to do with communications including the internet. Further, the Ministry is charged with the formulation and implementation of ICT policy with some priorities being to:<sup>81</sup>

- ensure a knowledge-based society;
- develop an enabling framework that will foster ICTs’ contribution to the fulfilment of Vision 2030;
- establish a culture of cyber security, including consumer protection; and
- strengthen the country’s capacity to meet technological challenges.

Notably, these priorities are reliant on the internet, making it important to the government for the following reasons:<sup>82</sup>

- i. It has wide-ranging political importance within national social and economic development.
- ii. It has specific sectorial significance, concerned with the management of the ICT sector itself.

<sup>78</sup> Tunis Agenda article 35 (a) <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

<sup>79</sup> Drake, J. William. Framing ‘Internet Governance’ Policy Discourse: Fifteen Baseline Propositions <http://www.itu.int/osg/spu/forum/intgov04/contributions/drake-presentation.pdf> [Accessed August 20, 2013]

<sup>80</sup> <http://www.information.go.ke/>

<sup>81</sup> National ICT Master Plan 2017 <http://www.ict.go.ke/docs/MasterPlan2017.pdf>

<sup>82</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society* <http://www.internetociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> pg 38 [Accessed August 22, 2013]

- iii. It has implications for national security.
- iv. It has wide-ranging significance for the delivery of government services, particularly through e-government, in the education sector and in areas such as trade facilitation.

The government also collects data and information, stores and uses it for analysis mainly for planning purposes. Of importance is that no social process is exempt from the influence of the internet—from education to health and governance.

### 2.1.2. The Communications Commission of Kenya (CCK)<sup>83</sup>

The Communications Commission of Kenya (CCK)<sup>84</sup> is the regulatory authority for communications, and is charged with the responsibility of technical areas of the internet such as in the deployment of the infrastructure necessary for the internet, broadband, regulation of internet service providers, mobile termination rates, regulating competition in the telecoms market, and protection of consumer rights. It is tasked with the regulation that pertains to the national success of the internet. This role is embedded in the Kenya Communications (Amendment) Act of 2009 and based on the recognition of the rapid changes and developments in technology that have blurred the traditional distinctions between telecommunications, Information Technology (IT) and broadcasting. This statute therefore enhanced the regulatory scope and jurisdiction of CCK, and effectively transformed it to a converged regulator.

The regulator is responsible for facilitating the development of the information and communications sectors through several ways including protecting consumer rights within the communications environment, licensing all systems and services in the communications industry, managing the country's frequency spectrum and numbering, managing the Universal Access Fund, managing competition in the sector to ensure a level playing ground for all players resources, among others. ***This last role is important as access to the internet and its affordability is key and is a universal access requirement. Access to the internet as a right is protected by the right to information, freedom of expression, freedom of assembly, media freedom and freedom of association, all of which are guaranteed in the CoK 2010, as well as the UDHR, ICCPR and the ACPHR.***

CCK has the mandate to administer the Universal Service Fund (USF) whose purpose is “to support widespread access to ICT services, promote capacity building and innovations in ICT services in the country”<sup>85</sup>. Further, the fund is supposed to “finance national projects that have significant impact on the availability and accessibility of ICTs in rural, remote and poor urban areas.” There are controversies surrounding the UAF because the service providers have been demanding to sit on its advisory board as their contribution to the fund is significant (0.5 percent of their revenue). They would like to ensure proper utilization of their contribution but

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<sup>83</sup> <http://cck.go.ke/>

<sup>84</sup> [www.cck.go.ke](http://www.cck.go.ke)

<sup>85</sup> [http://www.cck.go.ke/services/universal\\_access/purpose.html](http://www.cck.go.ke/services/universal_access/purpose.html)

this was not taken into consideration when members of the board were appointed in early 2013.<sup>86</sup> It is anticipated that the fund will be fully operational by end of 2013.<sup>87</sup>

Other roles are facilitating the development of e-commerce, type approving/accepting communications equipment meant for use in the country, and regulating retail and wholesale tariffs for communications services. This means that CCK directs decisions on investment, including investment in rural areas, and to make services more affordable by regulating interconnection rates and/or retail tariffs.

The Ministry as well as the CCK, have embraced multi-stakeholder approach in policy-making processes and have had stakeholder consultation in coming up with various guidelines, sector regulation and legislation, such as the national broadband strategy and universal service policy, just to mention a few. However, stakeholder input has not always been taken on board, making stakeholders question the usefulness of the consultations.

Notably, the two structures work closely with various stakeholders, including the private sector and civil society. However, many find that the telecoms wield immense power and are usually given priority in consultations. A case in point is in 2011 when CCK announced its intention to increase the mobile interconnection charges. The Office of the President overruled the CCK in favour of Safaricom Ltd, which has market dominance over other telecoms companies.<sup>88</sup>

Additionally, the Ministry of ICT and CCK participate in international internet policy negotiations on behalf of the government, for example they are the main points of interaction for Kenya with the International Telecommunications Union (ITU) and its activities. In addition, CCK represents Kenya at the Internet Governance Forum (IGF), and the Government's advisory committee (GAC) of ICANN just to mention a few. In other words, the most relevant governmental authority resides with CCK, which has powers to influence the direction of policy.

In view of the March 2013 general elections and change in government, the CCK is set to change

### **2.1.3. The Kenya ICT Authority (ICTA)<sup>89</sup>**

The Kenya ICT Authority (ICTA) was recently constituted and has taken over the roles and resources previously held by the Kenya ICT Board, the e-Government Directorate and the Government Information and Technology Services (GITS). This is in line with the Executive Order No.2 of 2013 on the Reorganization of Government. ICTA will now manage and deliver

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<sup>86</sup> <http://www.telecompaper.com/news/kenya-appoints-universal-service-fund-board-members--926906>

<sup>87</sup> <http://www.humanipo.com/news/33822/kenyan-universal-service-fund-to-be-operational-by-year-end/>

<sup>88</sup> *Kenya: Kibaki Stops Further Drop in Mobile Call Charges*. June 2011. <http://www.balancingact-africa.com/news/en/issue-no-558/telecoms/kenya-kibaki-stops-f/en> [Accessed August 23, 2013]

<sup>89</sup> [http://www.e-government.go.ke/index.php?option=com\\_content&view=article&id=106:creation-of-the-kenya-ict-authority&catid=1:latest-news&Itemid=18](http://www.e-government.go.ke/index.php?option=com_content&view=article&id=106:creation-of-the-kenya-ict-authority&catid=1:latest-news&Itemid=18)

ICT-enabled development objectives, and market Kenya as a local and international ICT hub. Moreover, it will rationalize and streamline the management of all Government of Kenya ICT institutions, and advise the Government on sectorial development and ICT project implementation and investment. **Of interest is how ICTA will continue expanding the Kenya Open data<sup>90</sup> launched in 2011 and which promotes transparency of government. Will it, for example, collaborate with local innovators to developed apps that will be available and can be used say on mobile phones? Will the content be availed in local languages? As it is, more Kenyans need to be encouraged to make use of the portal in particular in matters of development for counties. Nevertheless, since this merger is a new development, not much can be said about its performance and interaction with stakeholders. However, there is no doubt it will be a major player in the local internet policy environment.**

#### **2.1.4. The National Communications Secretariat (NCS)<sup>91</sup>**

The National Communication Secretariat (NCS was established through the Kenya Communications Act of 1998 to advise the Government on info-communications policies. Its mandate includes advising on policies, carrying out specialized research and conducting continuous review of development under the info-communications Sector.

#### **2.1.5. Kenya Computer Incident Response Team (KE-CIRT)**

The Kenya Computer Response Team (KE-CIRT derives its mandate from the Kenya Information and Communications Act CAP 411A which directed the CCK to develop a national cyber security management framework through the establishment of a national Computer Incident Response Team (CIRT).<sup>92</sup> KE-CIRT brings together government agencies, the Central Bank and internet expertise drawn from Kenya Network Information Centre (KENIC), TESPOK and KENET to address cyber-attacks as and when they occur. KE-CIRT is housed and derives financial support from CCK and the ITU for capacity-building.

Cyber-security has been acknowledged as a rising concern in Kenya, and measures are being taken to address its challenges and risks. Consequently KE-CIRT is tasked with coordinating response and managing cyber security incidents nationally and to collaborate with relevant actors locally, regionally and internationally. An important function is that of gathering and disseminating technical information on computer security incidents, vulnerabilities, security fixes and other security information, as well as issuing alerts and warnings. It also has a duty to conduct research and analysis on computer security, related technologies and advise on new trends.

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<sup>90</sup> <https://opendata.go.ke/>

<sup>91</sup> Under Ministry of ICT

<sup>92</sup> [http://www.cck.go.ke/industry/information\\_security/ke-cirt-cc/functions.html](http://www.cck.go.ke/industry/information_security/ke-cirt-cc/functions.html)

The public is listed as one of the constituents of this team.<sup>93</sup> However, it is not clear what role the public is meant to play or how it should be serviced by KE-CIRT. It is important for citizens to find out what exactly this role should be and the mechanism of reporting to the said public by KE-CIRT, and within which frequency.

#### **2.1.6. The Ministry of Education<sup>94</sup>**

The Ministry of Education is spearheading the government's pre-election promise to equip every student starting their primary school education with a laptop. The project as discussed in section 1 continues to draw many views from different quarters such as parents, teachers, the technology community and the larger public. The views by and large have been skeptical, of the undertaking. Criticism has focused on whether laptops are a priority and especially in schools that are under-resourced and lack electricity, in particular those in marginalized areas. Further, that there is lack of capacity of trained teachers on computers and in technical skills. As such, concerns are raised around who will troubleshoot if the computers breakdown. However, it should be noted that this project has been tried in such countries as Rwanda<sup>95</sup>

The project needs support from all stakeholders as it will ultimately result in many more children getting connected to technology, but there is need for putting out a clear strategy outlining how the program will be rolled out including some of the threats to the programme. Further, it should endeavour to get the marginalized children connected. Stakeholders will therefore need to be vigilant to ensure that the project is not captured by selfish interest, that there is equity in distribution of laptops and the marginalized are not forgotten. Additionally, the Ministry of Education must be accountable to Kenyans and must be compelled to make information available on the progress of the project.

#### **2.1.7. Kenya Education Network (KENET)<sup>96</sup>**

Kenya Education Network (KENET is a National Research and Education Network that promotes the use of ICT in teaching, learning and research in higher education institutions in Kenya. It connects universities and research institutions using high capacity bandwidth to enhance national research and educational capacity for developmental purposes. KENET also aids electronic communication amongst students and faculties in member institutions, share learning and teaching resources by collaboration in research and development of educational content. KENET is a potential driver of developmental content in the educational field, including collaborative work around open educational resources (OER).

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<sup>93</sup> [http://www.cck.go.ke/industry/information\\_security/ke-cirt-cc/constituents.html](http://www.cck.go.ke/industry/information_security/ke-cirt-cc/constituents.html)

<sup>94</sup> <http://www.education.go.ke/News.aspx?department=1&id=>

<sup>95</sup> <http://www.idgconnect.com/blog-abstract/2490/kenya-laptops-children-initiative>

<sup>96</sup> <http://www.kenet.or.ke/>

### 2.1.8 Kenya Revenue Authority (KRA)<sup>97</sup>

The Kenya Revenue Authority (KRA) is tasked with the responsibility of collecting taxes, customs and duties on behalf of the Government of Kenya. KRA was one of the government departments to embrace online services, for example, the application of personal Identity number (PIN) is only possible online. This means that even those who are not internet savvy and need a PIN have no alternative but to go to an internet café to get assistance for this service. As a matter of fact, many cyber cafes have a service for assisting people with KRA PIN application. This online process is meant to shorten the time it takes to apply and get the KRA PIN.

Further, from November 2013, users will be required to acquire electronic signatures before they are allowed to transact.<sup>98</sup> Consequently, the e-government will be handling a lot of sensitive data, which calls for security of people's records. In line with this, each citizen will be issued with a Public Key Infrastructure (PKI) with a unique online identity (digital certificate) which will be required whenever they take part in online transactions. "Individuals will apply for a digital certificate using their name and ID number and later called in for a face-to-face authentication process by the Accredited Certificate Authority."<sup>99</sup> Subsequent to the verification process, the applicants will be consented to download the digital signatures unique to the Personal Computers or USB. These signatures will not be transferrable. The certificate will facilitate access to government online services. ***The assumption is made here that all applicants should have some form of gadget to perform or download the said signature yet this is not the case. This is a point of action to interrogate the inclusiveness of this process to ensure that the process is right from the outset.***

In addition, KRA offers online services such as submission of tax returns and payments,<sup>100</sup> and tax related information to citizens and businesses.<sup>101</sup> For KRA, the internet is of considerable importance to deployment of a national single window for trade facilitation, and integration of customs, port and transit processes, ultimately reducing costs for government and trading enterprises.<sup>102</sup>

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<sup>97</sup> <http://www.revenue.go.ke/>

<sup>98</sup> Okutta, Mark. "Kenya to introduce digital signatures for online services". March 21, 2013

<http://www.businessdailyafrica.com/Corporate+News/Kenya+to+introduce+digital+signatures+for+online+services/-/539550/1726570/-/otqaua/-/index.html>

<sup>99</sup> Okutta, Mark. "Kenya to introduce digital signatures for online services". March 21, 2013

<http://www.businessdailyafrica.com/Corporate+News/Kenya+to+introduce+digital+signatures+for+online+services/-/539550/1726570/-/otqaua/-/index.html>

<sup>100</sup> <https://mapato1.kra.go.ke/itms/>

<sup>101</sup> <http://www.revenue.go.ke/index.php/e-tax-registers--printers/taxpayer-requirement>

<sup>102</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society* <http://www.internetociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> Ibid. pg 41 [Accessed August 20, 2013]

### 2.1.9. Kenya Network Information Centre (KENIC)<sup>103</sup>

Kenya Network Information Centre (KENIC) is the national domain name registry. It was borne through a broad based consultative process of the "Local internet Community."<sup>104</sup> The aim was to institutionalize a local non-profit organization to manage and operate the .ke county code Top Level Domain (.ke ccTLD), making KENIC the most prominent internet-specific technical entity in Kenya charged with managing this registry.

Its board comprises representatives from CCK, the Kenya Information Society (KIS), KENET, the TESPOK, Domain Registrars Association of Kenya (DRAKE), Kenya Private Sector Association (KEPSA), the National Task Force on Electronic Commerce and the Directorate of Government IT Services. KENIC's management is key to getting Kenyans to use the national domain as a way of promoting what is Kenyan and demonstrating patriotism.<sup>105</sup> Government departments and some businesses use this national domain.

Lately, KENIC's management has been a concern to stakeholders, for instance it has experienced a high staff turnover and overstaying of some board members. Additionally, there have been unconfirmed reports about the CCK's intention to wind up KENIC. This would be controversial as it would require all stakeholder involvement and one stakeholder cannot go it alone. Further .ke is not subordinate to CCK. CCK's response to the matter is that if indeed this decision is arrived at, then all stakeholders will be involved.<sup>106</sup>

The registration of .ke must be affordable, and the fact that .africa may be operational any time may lead to greater competition for the .ke brand.

## 2.2. Key State Commissions

Several State Commissions though not directly involved are relevant in shaping the internet policy.

### 2.2.1. Kenya National Commission on Human Rights (KNCHR)<sup>107</sup>

The Kenya National Commission on Human Rights (KNCHR) is an autonomous national human rights institution established under Article 59 of the Constitution of Kenya 2010 and the Kenya National Commission on Human Rights Act, 2011 with the core mandate of furthering the promotion and protection of human rights in Kenya. It is a successor to the body of the same name established by an earlier Act of Parliament in 2002, that later became operational in July 2003.

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<sup>103</sup> <http://www.kenic.or.ke/>

<sup>104</sup> <http://www.kenic.or.ke/index.php/about-kenic>

<sup>105</sup> <http://www.kenic.or.ke/>

<sup>106</sup> Communications from the Director of Communications to the KICTANET list. [www.kictanet.or.ke](http://www.kictanet.or.ke)

<sup>107</sup> <http://www.knchr.org/>

The KNCHR is a watchdog and an advisory body. It monitors government institutions, conducts investigations on alleged human rights violations, and in appropriate cases provides redress to those whose rights have been violated. The Commission gives advice to the Kenyan Government on how to enhance the promotion and protection of human rights. It also monitors the enactment of legislation in Kenya and recommends existing legislation for review to ensure they comply with human rights standards.

### **2.2.2. The Commission for the Implementation of the Constitution (CIC)<sup>108</sup>,**

The Commission for the Implementation of the Constitution (CIC) is a key organ in ensuring the effective implementation of the Constitution. Its objectives are to ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent and in accord with the letter and spirit of the Constitution. Consequently, the Commission has been inviting stakeholders to engage with it on all proposed bills. These stakeholder consultations are important as there is an opportunity to make suggestions and influence the direction of policy in areas under discussion.

### **2.2.3. The National Gender and Equality Commission (NGEC)<sup>109</sup>**

The National Gender and Equality Commission (NGEC) was established by an Act of Parliament in August 2011, following the promulgation of Kenya's new Constitution, 2010. The NGEC is mandated to promote gender equality and freedom from discrimination. One of the key issues it addresses is that of sexual and gender-based violence, and ensuring that survivors receive the health services they are entitled to, under the Constitution. Further technology-based violence against women is an emerging area that the Commission may be required to start giving attention.

### **2.2.4. The National Cohesion Integration Commission (NCIC)<sup>110</sup>**

The National Cohesion Integration Commission (NCIC) was established in 2008 as an independent body to spearhead national reconciliation, cohesion and integration and to eliminate discrimination especially ethnic, racial or religious discrimination after Kenya went into post-election violence.

The NCIC has various areas of focus but two become important in particular as they are relevant and could be applied to freedom of expression online. The Commission promotes research and monitoring of the status and trends of national peace and stability in order to

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<sup>108</sup> <http://www.cickenya.org/>

<sup>109</sup> The commission has no available site but more information can be found on <http://www.giz.de/Themen/en/dokumente/giz2013-en-fact-sheet-Kenya-NGEC.pdf>

<sup>110</sup> <http://www.cohesion.or.ke/>



advise the relevant state agencies. It also focuses on facilitating operationalization of laws, policies, and practices that counter ethnic, racial and religious tensions.

## 2.3. Regional Bodies

Regional Intergovernmental organizations are increasingly becoming important as they serve a number of basic functions that enhance the possibility of cooperation. They are put up by states to facilitate cooperation and provide a forum that can be used to discuss, negotiate or enhance critical issues of importance to a region, and create linkages. Immediate examples are the Africa Union (AU) and the East Africa Community (EAC).

### 2.3.1 East Africa Community (EAC)<sup>111</sup>

The East African Community (EAC) is the regional intergovernmental organisation that brings together Kenya, Uganda, Tanzania, Rwanda and Burundi. As part of its institutional framework, the Sectorial Council on Transport, Communications and Meteorology is constituted as an organ of the Community. It derives its mandate from Article 14(3) (i) of the EAC Treaty:<sup>112</sup>

Establish from among its members, Sectorial Councils to deal with such matters that arise under this Treaty as the Council may delegate or assign to them and the decisions of such Sectorial Councils shall be deemed to be decisions of the Council.

Among those responsible are the Ministers of Communications/ICT/Information, with heads of Communications Regulatory Authorities as subsidiaries. The roles and functions of this organ are not defined. However the regulatory authorities of the region have come together under the East African Communications Organisation (EACO),<sup>113</sup> whose aim is to strengthen and promote cooperation in the development and provision of postal, telecommunications and broadcasting services.

Accordingly, the objectives of EACO are to harmonize and regularize regulatory frameworks, promote development of postal and telecommunications/ICT services, broadcasting, and regulatory matters. Further, it is to achieve ways and means to achieve “fast, reliable, secure, affordable and efficient communications services within the community.”<sup>114</sup> Areas of focus relevant for this report include:

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<sup>111</sup> <http://www.eac.int/>

<sup>112</sup> EAC Treaty: [http://www.eac.int/treaty/index.php?option=com\\_content&view=article&id=80:article-14--functions-of-the-council&catid=41:chapter-5&Itemid=199](http://www.eac.int/treaty/index.php?option=com_content&view=article&id=80:article-14--functions-of-the-council&catid=41:chapter-5&Itemid=199)

<sup>113</sup> <http://www.eaco.int/>

<sup>114</sup> [http://www.eaco.int/index.php?option=com\\_content&view=article&id=47&Itemid=34&lang=en](http://www.eaco.int/index.php?option=com_content&view=article&id=47&Itemid=34&lang=en)

- promoting the development of application of ICT;
- promotion of the development of local content from the Region;
- network development and regional inter-connectivity;
- policy advice on matters unfolding in the communications sector;
- security of ICT networks;
- research and technological developments;
- exchange of information; and
- ensuring the provision of universal service in the region.

Uganda and Rwanda are reliant for connectivity on infrastructure in Kenya and are an interested party in Kenya's communications infrastructure and internet environment. In light of this, EACO is a significant body to be lobbied since it guides the Ministries of ICTs on policy direction and in particular on harmonization of communication regional policies that may affect the internet such as those of access and affordability of the internet for the citizens of the Community.

### **2.3.2 Africa Union (AU)<sup>115</sup>**

The Africa Union (AU) was established to support the process of integration in the continent. It was also to enable the Union to actively participate in the global economy, and in the same breadth tackle the multifaceted social, economic and political hitches which had been complicated by certain negative aspects of globalisation. Among its objects are promotion of unity and solidarity among African States; coordination and stepping-up of cooperation for development; upholding the sovereignty and territorial integrity of Member States, and advancement of international cooperation within the framework of the United Nations.

The specialized technical committees form one part of the AU organs. Under this is placed the Transport, Communications and Tourism committee of the AU, which, in practical terms, has been translated as the Division of Information Society (ISD) African Union Commission.<sup>116</sup> The mandate of ISD covers all aspects of coordinating Communications and Information Technology areas notably telecommunication/ICT, postal and broadcasting. Further, the division is in charge of all continental activities related to the development, harmonization, coordination and the implementation of policies, regulations, strategic frameworks and infrastructure development for the Communications and Information Technologies sector. The vision for ISD is "building information-based society that drives the establishment of a peaceful, integrated and prosperous Africa." Its mission is to provide the opportunity of affordable, reliable and sustainable access to ICT services and applications by government, business, and all citizen of Africa.

<sup>115</sup> <http://www.au.int/en/about/nutshell>

<sup>116</sup> <http://pages.au.int/infosoc>

The African Union Commission (AUC) has been entrusted by its member states to carry out the process of applying to the internet Corporation for Assigned Names and Numbers (ICANN) for the dotAfrica gTLD in terms of the New Generic Top Level Domain (gTLD) programme.<sup>117</sup> dotAfrica is set to be a distinctive pan-African identification for regional online operations when it is opened up for registration. The African Union Commission selected Uniform SA/ZA Central Registry (ZACR) through a bid process as the official operator of the dotAfrica registry, tasked with the duty to administer and operate dotAfrica gTLD on behalf of the African community.<sup>118</sup>

In July 2013 the .africa TLD application was given a go ahead by ICANN when it ruled that the 'initial evaluation' had approved the (ZACR) bid for dotAfrica.<sup>119</sup> Accordingly, the delegation of the new gTLDs is planned to happen during the third quarter of 2013, and subsequently the .africa TLD will be available for launch, and registration.<sup>120</sup> It is anticipated that the dotAfrica gTLD will bring the continent together as an internet community under one umbrella allowing e-commerce, technology and infrastructure to flourish.

Africa Union (AU) has continental ICT policy objectives and set priorities as seen in its spearheading the .africa initiative. This is one body that stakeholders must work with in terms of realizing continental ICT objectives.

### **2.3.3. Africa Top Level Domain Organization (AfTLD)<sup>121</sup>**

Africa Top Level Domain Organization (AfTLD) is the representative of country code Top Level Domain (ccTLD) managers from Africa. It represents collective views of the managements of Africa's country code Top Level Domain (ccTLDs). It is an active participant in such foras as ICANN and the internet Governance Forums where it has continued to run workshops. AfTLD works in collaboration and partnerships with other Regional Top Level Domain Organizations (RTLDOs), and serves as an observer to the European ccTLD association (CENTR). In addition, it regularly works in partnership with other common interest organizations such as internet Society (ISOC) and ICANN. AfTLD is recognized by many African governments demonstrated by the kind of support it receives from them when it organizes its events.

AfTLD's mission is aimed at achieving excellence among African ccTLDs through training and sharing knowledge to ensure outstanding policy, operational, administrative and business standards by partnering with among others Africans and national stakeholders.

### **2.3.4. Regional Internet Registries (RIRs)**

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<sup>117</sup> <http://au.int/en/dotAfrica%20gTLD>

<sup>118</sup> <http://au.int/en/sites/default/files/AUC-dotAfrica-Communique-.pdf>

<sup>119</sup> Africa on track to having its own .africa gTLD <http://www.biztechafrika.com/article/africa-track-having-its-own-africa-gtld/6446/> [Accessed August 27, 2013]

<sup>120</sup> <http://africanonespace.org/content.php?tag=5&title=What+is+dotAfrica%3F>

<sup>121</sup> <http://www.aftld.org/#&panel1-1>

Regional internet Registries (RIRs) are organizations that manage the allocation and registration of internet number resources within a particular region of the world. internet number resources include internet Protocol addresses and autonomous system (AS) numbers.

Africa Network Information Centre (AFRINIC)<sup>122</sup> is the internet number registry for Africa. It was accredited by ICANN in 2005 as the fifth Regional Registry.<sup>123</sup> Its vision is to spearhead internet technology and policy development in Africa, and aims to “serve the African community by providing professional and efficient management of internet number resources, supporting internet technology usage and development, and promoting a participative and multi stakeholder approach to internet self-governance”.

AfriNIC, in its responsibility for the allocation and registration of internet number resources on the continent, acts as the regional tier between ICANN at global level and national (ccTLDs). Similar to ICANN, AfriNIC is a multi-stakeholder organisation.

## 2.4. Other Relevant Processes and Spaces

Due to its nature of transcending boundaries and allowing individuals and organisations to bypass established national laws, the internet is seen as naturally global rather than national in character. Its governance circumvents local governance structures and allows different groups to participate in critical internet discourses globally. Further, decisions that shape the development of the internet take place in global processes and fora focused with either coordination or standardization. Examples of such fora include the ITU, internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), and the ICANN, just to mention a few.

ICANN, IETF and W3C make decisions on technical matters of the internet with ICANN and IETF embracing multi-stakeholder approach. For Kenya, the ITU and the ICANN are important as the Kenya government is part of those consulted in decision making. Policy debates get attention in such foras as the IGF, the UN sponsored World Summit on Information Society (WSIS), and Enhanced Cooperation. It is therefore important to consider these spaces as relevant and the processes important as they make huge decisions on the direction of internet policy.

### 2.4.1. The International Telecommunications Union (ITU)<sup>124</sup>

The International Telecommunication Union (ITU) is the United Nations specialized agency for ICTs. It draws its membership from 193 Members states, and private/public members drawn

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<sup>122</sup> <http://www.afrinic.net/>

<sup>123</sup> <http://www.afrinic.net/en/about-us/origins>

<sup>124</sup> <http://www.itu.int/en/about/Pages/default.aspx>

from ICT regulators, leading academic institutions and over 700 private companies. There has been some agitation to have ITU include CSOs in its membership.

The ITU allocates global radio spectrum and satellite orbits, develops the technical standards that ensure networks and technologies flawlessly interconnect. ICTs underpin everything the ITU does.<sup>125</sup> This is informed by the enabling role that ICTs continue to play in areas such as health care, education, government services, financial markets, and environmental management.

Additionally, standards are critical to the smooth running of ICTs and whether voice, video or data messages, standards enable global communications by ensuring that countries' ICT networks and devices are speaking the same language. In light of this, the ITU defines elements in the global infrastructure of ICTs. It also maintains the WSIS Stocktaking Database as a publicly accessible system and makes available information on ICT-related initiatives and projects that reference the WSIS Action Lines.<sup>126</sup>

The ITU is important in internet debates as this is where significant technical and policy outcomes and decisions concerning the relationship between the internet and its underlying communications infrastructure, including spectrum management are made.

#### **2.4.2. Internet Corporation for Assigned Names and Numbers (ICANN)<sup>127</sup>**

The internet Corporation for Assigned Names and Numbers (ICANN is a non-profit private organization that is responsible for the coordination of the global internet's systems of unique identifiers and ensures it is stable and secure operation.<sup>128</sup> Its work includes coordination of the internet Protocol (IP) address spaces namely internet Protocol version 4 (IPv4) and version 6 (IPv6) and assignment of address blocks to regional internet registries<sup>129</sup> for maintaining registries of internet protocol identifiers, and for the management of the top level domain name space.<sup>130</sup>

ICANN's primary principles of operation are described as facilitating the operational stability of the internet; "to promote competition; to achieve broad representation of the global internet

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<sup>125</sup> <http://www.itu.int/en/about/Pages/overview.aspx>

<sup>126</sup> <http://www.itu.int/wsis/stocktaking/index.html>

<sup>127</sup> <http://www.icann.org/>

<sup>128</sup> Article 1 <http://www.icann.org/en/about/governance/bylaws/bylaws-18mar11-en.htm>

<sup>129</sup> A regional internet registry (RIR) is an organization that manages the allocation and registration of internet number resources within a particular region of the world.

[http://en.wikipedia.org/wiki/Regional\\_internet\\_registry](http://en.wikipedia.org/wiki/Regional_internet_registry)

<sup>130</sup> [en.wikipedia.org/wiki/Top-level\\_domain\\_name](http://en.wikipedia.org/wiki/Top-level_domain_name)

community; and to develop policies appropriate to its mission through multi-stakeholder consensus-based processes.”<sup>131</sup>

At ICANN Governments channel their input through the Governmental Advisory Committee (GAC).<sup>132</sup> The GAC's critical function is to offer suggestion to ICANN on matters of public policy, in particular “where there may be an interaction between ICANN's activities or policies and national laws or international agreements.” It meets three times a year under the auspices of ICANN meetings. It is here that it discusses issues with the ICANN Board and other ICANN Supporting Organisations, Advisory Committees and other groups. The GAC may also discuss issues with the Board either through face-to-face meetings or by teleconference.

There have been times when a power struggle has been witnessed between ICANN's board and GAC,<sup>133</sup> for example governments, including many Western ones, sometimes have been unhappy with ICANN, complaining that it is not sufficiently transparent or accountable.

The government of Kenya sits in this committee and is represented by the CCK, and another representative designated by the Principle Secretary, Ministry of ICT.

ICANN does provide for civil society engagement with the Generic Name Supporting Organisation (GNSO)<sup>134</sup> being a main platform. Through one of the GNSO's constituency namely the Non Commercial Stakeholder Group (NCSG).<sup>135</sup> The NCSG pays attention to the interests and concerns of non-commercial registrants and internet users of the generic Top-level Domains (gTLDs) such as .com, .org, and .net. This is the structure that gives a voice and representation to non profit organisations which serve non-commercial interests such as consumer protection, education, public interest policy advocacy, children's welfare, human rights, religion etcetera. In other words, NCSG humanizes the technical aspects and users' rights. However, there is need for strengthening of CSO involvement such as funding NCSG's activities and participation in ICANN meetings.

### **2.4.3. The World Summit on the Information Society (WSIS)**

The World Summit on the Information Society (WSIS) was held in two phases; the first one in 2003 and the second one in 2005.<sup>136</sup> It focused on discussing information society opportunities and challenges, and aimed at bridging the digital divide that separates rich countries from poor countries by increasing access to the internet in the developing world. A dispute over control of

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<sup>131</sup> Memorandum Of Understanding between the U.S. Department of Commerce and internet Corporation for Assigned Names And Numbers <http://www.icann.org/en/about/agreements/mou-jpa/icann-mou-25nov98-en.htm> [Accessed August 27, 2013]

<sup>132</sup> <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

<sup>133</sup> <http://www.economist.com/node/21530955>

<sup>134</sup> <http://gns0.icann.org/en/about/stakeholders-constituencies>

<sup>135</sup> <http://gns0.icann.org/en/about/stakeholders-constituencies/ncsg>

<sup>136</sup> <http://www.itu.int/wsis/index.html>

the internet threatened to derail the conference but this was averted when it was agreed to set up an international internet Governance Forum (IGF) and Enhanced Cooperation (EC), which would play a consultative role.<sup>137</sup>

The UN, while recommending representation from governments at the highest level, invited participation of all relevant UN bodies and other international organizations, non-governmental organizations, private sector, civil society, and media to establish a truly multi-stakeholder process.<sup>138</sup>

Follow up to WSIS is happening, and aims to provide the progress made and to register activities undertaken by governments, international organizations, civil society, the business sector, and other entities since the last event in 2005. “The goals of the WSIS Stocktaking Platform are to provide opportunity for stakeholders to extend network, create partnerships and provide more visibility, thereby adding value to the projects at the global level.”<sup>139</sup> Further, the follow-up works towards achieving the targets set out in the Geneva Plan of Action.<sup>140</sup>

An overall review of the implementation of WSIS outcomes will take place in 2015. In 2013, UNESCO hosted the first WSIS+10 Review meeting "Towards inclusive Knowledge Societies for Peace and Sustainable Development"<sup>141</sup> where main challenges in building Knowledge Societies for sustainable development were addressed. This first multi-stakeholder review event looked at the WSIS Action Lines' achievements, and analysed fresh developments in addition to forecasts. Recommendations were made to the post 2015 process.

CSOs must be part of this discussion and express their views as it is only through participating that their voices will be heard. Additionally, Kenya's ICT Master Plan<sup>142</sup> anchors one of the strategic goals on WSIS connectivity goals for citizens, communities and public facilities at broadband speeds. This states that “Every citizen, resident, home and institution will be connected through countrywide robust, accessible and affordable ICT infrastructure.”<sup>143</sup>

#### **2.4.4. The Internet Governance Forum (IGF)<sup>144</sup>**

The internet Governance Forum (IGF) is a multi-stakeholder forum for policy dialogue on issues of internet Governance. It brings together, on an equal basis and through an open and inclusive process, all stakeholders in the internet governance deliberations, usually drawn from governments, the private sector, civil society, and the technical and academic community. The IGF supports the UN Secretary-General to carry out the mandate from the WSIS Tunis Agenda

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<sup>137</sup> [http://en.wikipedia.org/wiki/World\\_Summit\\_on\\_the\\_Information\\_Society](http://en.wikipedia.org/wiki/World_Summit_on_the_Information_Society)

<sup>138</sup> <http://www.itu.int/wsis/basic/about.html>

<sup>139</sup> <http://www.itu.int/wsis/stocktaking/index.html>

<sup>140</sup> <http://www.itu.int/wsis/docs/geneva/official/dop.html>

<sup>141</sup> <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/unesco-and-wsis/homepage/>

<sup>142</sup> National ICT Master Plan 2017 <http://www.ict.go.ke/docs/MasterPlan2017.pdf>

<sup>143</sup> National ICT Master Plan 2017 <http://www.ict.go.ke/docs/MasterPlan2017.pdf> (8)

<sup>144</sup> <http://www.intgovforum.org/cms/aboutigf>

article 67<sup>145</sup> in regard to convening “a new forum for multi-stakeholder policy dialogue” namely the IGF. The first IGF was held in 2006, with the event becoming an annual occurrence. Kenya has been very active in local, regional and global IGFs. It also convened the 2011 global IGF.

The Kenya IGF is structured so that stakeholders mutually agree on the respective year’s key internet governance issues which have been different every year. Further, and before the national IGF physically happens, stakeholders debate the topics agreed on, on Kenya ICT Action Network (KICTANet) listserve.<sup>146</sup> The results of the online debates are then shared in a one day face-to-face meeting. The recommendations of the Kenya IGF are then taken onto the East African Internet Governance Forum (EAIGF) and ultimately to the Global IGF.

The IGF provides a global discussion space where issues of internet governance are explored without actual decisions resulting from them. This allows for setting agenda in relevant areas that governments should focus in terms of governance of internet.

#### 2.4.5. Enhanced Cooperation (EC)<sup>147</sup>

The call for enhanced cooperation in the area of internet governance has its origins in the outcome of the second phase of the WSIS, Tunis in 2005. It derives its mandate from Article 69 of the Tunis Agenda<sup>148</sup> which recognised *“the need for enhanced cooperation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the internet, **BUT NOT** in the day-to-day technical and operational matters, that do not impact on international public policy issues.”*

The Tunis Agenda recognized the need for development of such policy by Governments in consultation with all stakeholders.

In article 71,<sup>149</sup> the UN Secretary General is requested to initiate a continuous process of enhanced cooperation by engaging the relevant stakeholders, including governments, the private sector, civil society, academia and practitioners.

Criticism has been leveled on the Tunis Agenda by some CSOs, saying that it contains a vague promise that some unspecified activities in the future will enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the internet. Further article 35 (a) states that: “Policy authority for internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international internet-related public policy issues.”

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<sup>145</sup><http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

<sup>146</sup> [www.kictanet.or.ke](http://www.kictanet.or.ke)

<sup>147</sup> <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=61>

<sup>148</sup> <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

<sup>149</sup> <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>



Articles 69 and 35 (a) are clear that governments, and not any other stakeholder group, would develop public policy principles. The private sector is relegated to “technical and economic fields”<sup>150</sup> and civil society is in a subtle way dismissed as having a role only in vague “internet matters”<sup>151</sup> at the “community level.” The agenda affirms a classical, pre-internet view of policy making which reserved this right of policy making to sovereign states. The Tunis Agenda subordinates multi-stakeholder governance to a mere right to be consulted by states as they formulate policy. However, EC should be seen as a process to facilitate and contribute to multi-stakeholder dialogue, through formal or informal cooperative arrangements. Forms of cooperation that have emerged range from information and experience-sharing to consensus-building and fund-raising and the transfer of technical knowledge and capacity-building.

The Working Group on Enhanced Cooperation (WGEC) in May proposed that a questionnaire be used as the primary means to collect stakeholder views on various aspects of enhanced cooperation, and, in the same breadth, emphasize that outcomes of the Group be more tangible and concrete. The process is on-going and CSOs should take the opportunity to influence the process by filling out the questionnaire<sup>152</sup> available on the UN Commission on Science and Technology website.

Moreover, CSOs should be worried as they seem to be excluded from directly participating in the formulation of transnational internet public policy and EC might curtail the future evolution of internet Governance.

#### **2.4.6. Web 2.0 Resources**

Web 2.0 resources or tools (the advancement in the web technology that allows users to be not only readers of content but also be content creators) are important as there they provide publishing opportunities to ordinary citizen’s majority of them ignorant of laws that govern freedom of expression online. Moreover, a lot of organizations have come up with a social media strategy since most of them have now embraced social media, and taken to communicating to their audiences on these platforms.

It is important to note that a lot of what happens on the internet is determined by users, “or by the relationship between the supply and demand sides of the internet—between telecommunications businesses and ISPs, platform and content providers such as Google and Facebook, and individual citizens and consumers.”<sup>153</sup> Users, and not governments or regulatory authorities, have contributed to the phenomenal the cell phone use in Kenya, which is

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<sup>150</sup> Ibid. 35 (b)

<sup>151</sup> Ibid. 35 (c)

<sup>152</sup> [http://unctad.org/meetings/en/SessionalDocuments/2013\\_WGEC\\_Questionnaire.pdf](http://unctad.org/meetings/en/SessionalDocuments/2013_WGEC_Questionnaire.pdf)

<sup>153</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society* <http://www.internetociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 60

contributing to the uptake of the internet. Citizens have massively embraced social networking and in particular on twitter where sometimes heated debates or ‘battles’ happen led by Kenyans on Twitter “KOT.”<sup>154</sup> Internet usage among users is an indicator of the impact of internet meaning that increased adoption is as a result of costs of internet and the quality of the experience.<sup>155</sup> Kenya is still considered to have the lowest costs for internet access in the region<sup>156</sup> and the therefore a higher penetration of users.

## 2.5. Powerful players

The internet is recognized as a crucial driver of the economy by many governments. However, in a broader internet governance context, “still a large part of the world’s population feels excluded from international internet policy making venues.”<sup>157</sup> The problem worsens when bad internet policies are imposed upon the world by a handful of powerful governments influenced by powerful players.

In Kenya, the government has set the pace in promoting ICT and internet development in Africa. This has seen high internet usage which has been possible through initiatives and principled decision making by well-informed policy makers along with multi-stakeholder participation in the policy making process. However, it has not been lost to stakeholders that there are some powerful stakeholders who influence and shape the direction of policy.

### 2.5.1 Politicians

In communication and internet policy matters, the Parliamentary Departmental Committee on Communication is one that matters. Usually Parliamentary committees are concerned with examining the work of government departments. This committee deals with communication, information, broadcasting and ICT development and management.<sup>158</sup> It is this team that deals with ICT and internet matters at committee level before debate and passing on of legislation in parliament. It provides for political input from the ICT sector, and has significant influence in public policy debate on internet issues.

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<sup>154</sup> Kenyans on twitter )Kot)<https://twitter.com/search?q=%23KOT&src=hash>

<sup>155</sup> Schumann, Robert and Michael Kende. 2013. Lifting barriers to internet development in Africa: suggestions for improving connectivity. ISOC. (16)

<sup>156</sup> Schumann, Robert and Michael Kende. 2013. Lifting barriers to internet development in Africa: suggestions for improving connectivity. ISOC. (23)

<sup>157</sup> Bowe, Rebecca. 2012. *Widespread Participation Is Key in internet Governance*.  
<https://www.eff.org/deeplinks/2012/06/widespread-participation-key-internet-governance>

<sup>158</sup> <http://www.parliament.go.ke/plone/national-assembly/committees/committees/energy-communication-and-information-committee>

### 2.5.2. Donors and Development Partners

Donors and development partners, both multilateral and bilateral, are another powerful group. Many have invested in internet infrastructure, capacity building of organizations in internet, delivery of public services and have financed government agencies such as the ICT board on the digital villages' project. In other words, many have provided budgetary and technical support in this area, notably the Department for International development (DFID)<sup>159</sup> and the International Development Research Centre (IDRC)<sup>160</sup> have supported national internet governance debates including providing financial and logistical support to facilitate debates and support civil society participation<sup>161</sup> in the said debates. These partners also offer policy guidance and utilize the internet in tracking down the development objectives.

### 2.5.3. Businesses

The business/private sector has diverse stakeholders that include telecom operators and ISPs with some of these companies integrated into global multinationals. The sector is a force in leading internet initiatives as seen by Safaricom Ltd, ZUKU and Access Kenya that continue to provide different platforms of access, including providing internet in residential areas. In other words, these businesses have invested in infrastructure that supply telecommunications and internet access to users. In terms of internet governance, more focus has been on those that supply the internet and some of them have participated in internet governance debates for example Safaricom<sup>162</sup> and Airtel.<sup>163</sup> It is also known that they make quite substantial tax contributions through their various products and therefore stand a chance of being given attention by the government if they do not necessarily agree with certain proposed measures. Technical decisions made by telecommunications companies are significant and provide ways in which the internet becomes available to users. This includes decisions such as how much bandwidth will be availed in different locations, and the quality of access. These are critical in determining infrastructure results.

In summary, provision of infrastructure, network quality and reliability, spectrum availability and management and bandwidth availability are determined by businesses.

The technical community (still part of business/private sector) comprises IT specialists in telecommunications businesses and ISPs, software engineers, computer scientists, and those who manage important internet resources such as internet Exchange Points and the domain

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<sup>159</sup> <https://www.gov.uk/government/organisations/departement-for-international-development>

<sup>160</sup> <http://www.idrc.ca/EN/Pages/default.aspx>

<sup>161</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society* <http://www.internetociety.org/sites/default/files/ISOC%20study%20oP%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 39[Accessed August 20, 2013]

<sup>162</sup> <http://www.safaricom.co.ke/>

<sup>163</sup> <http://www.africa.airtel.com/wps/wcm/connect/africaairtel/Kenya>

name system. These are concerned with the technical working of the internet and mainly hired by ICT businesses and companies that make widespread use of ICTs. These, together with the academia, “share a high level of knowledge of the internet and are more likely to be engaged in technical areas of its governance—either as individuals or through their professional employment. They are also important participants in areas such as cyber-security where the interface between technical and public policy dimensions of governance is crucial.”<sup>164</sup> The academia also contributes to continuous research and on workable models of internet governance in a country.

#### **2.5.4. The Telecommunications Association of Kenya (TESPOK)<sup>165</sup>**

The Telecommunications Association of Kenya (TESPOK) brings together telecommunications service providers and represents the interests of its members through highlighting its activities and concerns in the media and to the general public, as well as producing several concrete outcomes. It also provides policy and direction within the industry and the Government. Additionally, telecommunications Stakeholders formed TESPOK as a channel through which they would engage government on sector policy and regulatory issues.<sup>166</sup>

TESPOK runs the internet Exchange Point (IXP) which enables ISPs to locally exchange national traffic, route it from and to destinations in Kenya rather than over international telecommunications networks. This in country exchanging of traffic brings down the cost for international transit, a point consistent with an ISOC Report, *Lifting barriers to internet development in Africa: suggestions for improving connectivity*,<sup>167</sup> which avers that IXPs have become important for local exchange of traffic in many African countries. Further, that there have been heavy investments in infrastructure on connectivity and fibre networks. The report nevertheless notes that this has unfortunately not translated into a corresponding internet access services by users and the costs still remain high.

#### **2.5.5. The Kenya Private Sector Alliance (KEPSA)<sup>168</sup>**

The Kenya Private Sector Alliance (KEPSA) seeks to provide a collective voice for the private sector in the country. It draws its membership from more than 60 business membership

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<sup>164</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the Internet Society* <http://www.internetsociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf>. Page 47 [Accessed August 20, 2013]

<sup>165</sup> <http://www.tespok.co.ke/>

<sup>166</sup> <http://www.tespok.co.ke/index.php/aboutus/history.html>

<sup>167</sup> Schumann, Robert and Michael Kende. 2013. *Lifting barriers to internet development in Africa: suggestions for improving connectivity*. ISOC. [Accessed August 20, 2013] <http://www.internetsociety.org/sites/default/files/Barriers%20to%20internet%20in%20Africa%20internet%20Society.pdf>

<sup>168</sup> <http://www.kepsa.or.ke/>

organisations (including TESPOK) and individual companies. It has great influence and conducts private sector development through advocacy, projects and partnerships both local and international. It aims to influence public policy through policy formulation and implementation.<sup>169</sup>

### **2.5.6. The Media**

The media is a powerful tool in Kenya. It continues to convey information to and from the people and even in the advent of the internet, there are citizens who are reliant on it due to challenges of internet access.

The media has embraced online platforms and provides a forum where audiences can interact and make comments on articles or footage available online. Further, they also stream their content, which is archived on YouTube. The media are local content providers, and this has seen a lot of advertising moving to these online platforms.

The Media has continued to stimulate civic debate, and even mobilize and sustain civil society networks. It is still recognized as an important tool for social change and offers powerful communication platforms for different actors to advance their views. Even in the advent of internet, it still sets the agenda in Kenya in many ways. Further, it plays the curation role and helps citizens make informed decisions on authentic topics reported online.

## **2.6. Civil Society**

While the civil Society, and in particular NGOs and Community-Based Organisations (CBOs), have been on the periphery of the internet governance and freedom discourse, there has an increasing role in internet policy and, in particular, on matters related to human rights, infringement of moral behaviour through mass media, corporate social responsibility, social change and access to information.

Several civil society groupings exist to provide a framework for collaborative thinking and consensus-building in internet policy. The most active ones are Kenya ICT Action Network (KICTANet) and ISOC, Kenya Chapter.

The Consumer Federation of Kenya (COFEK) has also been active in raising consumer issues that are internet related and has been successful after courts agreed with them on certain concerns for example on digital migration where it sued the CCK.<sup>170</sup>

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<sup>169</sup> <http://www.kepsa.or.ke/index.php/about-us/who-we-are>

<sup>170</sup> <http://www.humanipo.com/news/29598/cck-writes-to-cofek-over-intended-digital-migration-suit/>

### **2.6.1. The Kenya ICT Action Network (KICTANet)<sup>171</sup>**

The Kenya ICT Action Network (KICTANet) is a multi-stakeholder forum of over 700 members drawn from the private sector, academia, civil society, media, development partners and individuals interested in ICT policy and regulation. “The network aims to act as a catalyst for reform in the ICT sector in support of the government mission to enable Kenyans to gain maximum benefit from the opportunity offered by ICTs.”<sup>172</sup> It conducts online critical debates that affect citizens.

KICTANet is an inclusive platform that allows for equality in participation. It has on many occasions set the agenda for debate on various issues. This has further been amplified when the Media has picked topical issues from its listserve, and produced television features, news, or print articles that have been carried in the main daily newspapers. Further, some of these topics have been expanded onto Facebook, where “netizens” continue to debate the same issues carried on the list.

KICTANet has played a major advocacy role in liberalization of voice of internet, and such other processes as the ICT policy of 2006, Freedom of Information Bills, the Independent Communications Commission of Kenya Bill, the Media Council Bill, just to name a few. Additionally, it has been the convener of the Kenya IGF and the EAIGF. KICTANet took the responsibility of organising the Kenya IGF and the EAIGF from 2008 to 2012 when it passed on this responsibility to ISOC Kenya and suggested that EACO takes over EAIGF. It was also one of the organizers of the global IGF in 2011.<sup>173</sup>

KICTANet’s Informal discussions are often just as important as formal institutions in the evolution and use of the internet.

### **2.6.2. The Internet Society (ISOC) Kenya Chapter<sup>174</sup>**

Internet Society (ISOC) Kenya Chapter aims to promote the open development, evolution, and use of the internet for the benefit of all people. It plays a role in the coordination of Kenya’s internet professional community and took over from KICTANet the role of organizing the Kenya IGF. It successfully convened the 2013 Kenya IGF.

### **2.6.3. Consumers Federation of Kenya (COFEK)<sup>175</sup>**

Consumers Federation of Kenya (COFEK is multi-sectorial, non-political and non-profit federation committed to consumer protection, education, research, consultancy, litigation,

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<sup>171</sup> [www.kictanet.or.ke](http://www.kictanet.or.ke)

<sup>172</sup> Ibid.

<sup>173</sup> <http://igf.or.ke/>

<sup>174</sup> [http://isoc-ke.org/?page\\_id=211](http://isoc-ke.org/?page_id=211)

<sup>175</sup> <http://www.cofek.co.ke/>

anti-counterfeits campaign and business assessment, and rating on consumerism and customer-care issues. Cofek works towards a fair, just and safe marketplace for all Kenyan and regional consumers, and is currently hosting the secretariat for 10-country member Eastern Africa Region Alliance of National Consumer Organizations (Earanco).

It worked with the Kenya Law Reform Commission and other stakeholders in finalizing the Consumer Protection Bill, 2010. This was informed by Cofek's belief that the right to information and protection culminated in the ability to make informed decisions and choices.

ICT is among the sectors that Cofek focuses on. On this one, it sued the former Minister of Information Hon. Samuel Poghiso when he re-appointed, for a second term, the former CCK Director General, against the recommendation of the CCK board.<sup>176</sup> Cofek is also in court with the CCK over the date of digital migration.<sup>177</sup> Cofek argued that digital migration was expensive<sup>178</sup> and most Kenyans could not afford to buy set-up boxes that would enable them to switch from analogue to digital frequency. Cofek was arguing for more time against the December 31, 2012 date set by CCK. Cofek is an important stakeholder to push for consumer understanding and peoples policies in internet debates.

Cofek, which addresses consumer issues across the board, and the ICT Consumers Association of Kenya, which focuses on the ICT and internet sector are meant to represent the demand side of the internet in the same way that business associations represent the private sector.

#### 2.6.4. iHub<sup>179</sup>

The iHub, a centre of innovation, offers a networking venue for the technical and professional community.<sup>180</sup> It provides a community workspace, incubator and meeting place, with high-speed internet connection, for technologists, programmers, web designers and other internet entrepreneurs. It is co-located with a number of other IT ventures, including Frontline SMS and Ushahidi.

iHub conducts research on technology innovation<sup>181</sup> and shares stories about the vibrant East African technology community. It would be interesting to see if iHub can be replicated in the

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<sup>176</sup> Judy Ogotu. Court quashes appointment of CCK boss. May 17, 2012.

[http://www.standardmedia.co.ke/?articleID=2000058339&story\\_title=](http://www.standardmedia.co.ke/?articleID=2000058339&story_title=)[Accessed August 28, 2013]

<sup>177</sup> JILLO KADIDA AND WINFRED KAGWE. Court suspends Nairobi's digital TV migration plan. December 21, 2012. <http://www.the-star.co.ke/news/article-100277/court-suspends-nairobis-digital-tv-migration-plan>[Accessed 207 August 2013]

<sup>178</sup> Lucianne Limo. January 11, 2013 CCK, Cofek ordered to set new digital migration date

[http://www.standardmedia.co.ke/?articleID=2000074794&story\\_title=Kenya-CCK,-Cofek-ordered-to-set-new-digital-migration-date](http://www.standardmedia.co.ke/?articleID=2000074794&story_title=Kenya-CCK,-Cofek-ordered-to-set-new-digital-migration-date)[Accessed August 27, 2013]

<sup>179</sup> <http://www.ihub.co.ke/>

<sup>180</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society*

<http://www.internetociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 49[Accessed August 20, 2013]

<sup>181</sup> <http://www.ihub.co.ke/research/about>

informal settlements or even in other counties in Kenya's devolved government and how that would evolve.

## 2.7. Multi-stakeholder Governance

Kenya has been recognized as having a genuine multi-stakeholder model in matters of internet governance. Internet governance debates and processes in Kenya have been characterised by the participation of diverse stakeholder groups drawn from civil society, business industry, academia, government and the telecom sector. The civil society representation here however does not include the broader civil society but a small group of internet and technologically-oriented groups. These take discussions to the ICT sector levels but leaves out the traditional human rights organizations that are able to drive the debates within the wider international human rights agenda. This national multi-stakeholder collaboration saw the formulation of Kenya's ICT Policy of 2006. Since then, the model has continued to inform the domestic internet policy agenda and for example there are stakeholder consultations in matters policy and regulation. Debate among participants from diverse stakeholder groups takes place on such platforms as on KICTANet and ISOC Ke listserves. Further, these diverse groups drawn from the government, business and civil society take part in national, regional and international internet governance meetings.

This multi-stakeholder model is now supported by Kenya's 2010 Constitution,<sup>182</sup> which places ordinary people at the heart of policy making processes. Article 10 provides for the participation of citizens as one of the national values and principles of governance. It provides inter alia that:

1. The national values and principles of governance in this Article binds all State organs, State officers, public officers and all persons whenever any of them:
  - a) applies or interprets this Constitution;
  - b) enacts, applies or interprets any law; or
  - c) makes or implements public policy decisions.
2. The national values and principles of governance include, patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

The challenge remains on how to ensure that after stakeholder consultations, the views collected are considered and taken on board on government positions that might be taken to International negotiations. This calls for a framework that operationalizes this article.

While most of the mainstream human rights and governance CSOs have not engaged with the internet governance processes, KICTANet has played an important role as a discussion forum

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<sup>182</sup> Article 10 (1) of Kenya's 2010 Constitution  
<http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>



and a change agent in the Kenyan internet governance milieu over the past decade. It has been described by ISOC as “a multi-stakeholder initiative, which has been highly influential in the Kenyan ICT and internet governance environment during the past decade and has been very successful in raising interest and involvement in ICT and internet governance and in including diverse stakeholder groups in discussions and decisions.”<sup>183</sup> As a result, it has been promoted as a model for multi-stakeholder engagement.

It is anticipated that even with a new government, Kenya will endeavour to balance the needs of the business environment, human rights and multi-stakeholder policy decision-making in matters of internet governance. The leadership in the previous government supported a progressive policy agenda and regulatory environment. While the Jubilee Coalition campaigned on a premise of ushering in the era of digital governance, barely eight months in its existence, there have been rapid changes in the legislative landscape of the country in practically all spheres. The passing of the KICA Act 2013 perceived to be draconian has sent warning signs of attempts to limit freedom of expression in the media both online and offline. This is in addition to attempts to introduce stiff government control of the civil society through an introduction of an amendment to the Public Benefits Organisations Act 2013 that would have totally crippled the civil society had it passed. These kinds of legislation that limit the civic and democratic space are a matter of concern over the government’s commitment to multi-stakeholder processes.

### 2.7.1. Challenges

The number of the stakeholders that are significantly engaged in national internet governance is somewhat small.<sup>184</sup> Majority of those significantly involved in these debates are based in Nairobi, and yet Kenya has now moved into devolved system of government. The County governments, either due to lack of understanding or awareness, are not prioritizing internet issues. However, it may still be early to judge how the 47 Counties will go about the issue of access and use of internet within their jurisdictions and if they will seek to exploit them for local development. Nevertheless, the current situation is that most rural communities have poor access to the internet due to poor infrastructure ranging from lack of electricity to inadequate or the absence of network coverage.

Further, ordinary users and consumers are only concerned with end user product namely access to internet and do not bother on the governance aspect of it or are not aware. There is also a tendency to view internet governance as a technical area. As such the discourses of internet policy attract mostly the professionals in this field of specialization.

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<sup>183</sup> Souter, David and Monica Kerretts-Makau. 2012. *Internet Governance in Kenya- An Assessment for the Internet Society* <http://www.internetsociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 50 and 51. [Accessed August 20, 2013]

<sup>184</sup> Souter, David and Monica Kerretts-Makau. 2012. *Internet Governance in Kenya- An Assessment for the Internet Society* <http://www.internetsociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 37 [Accessed August 20, 2013]

Businesses are hesitant to join the internet governance community and therefore unlikely to participate or not know of government initiatives that are internet related.<sup>185</sup> This might be attributed to the fact that businesses might not see what is in it for them in these processes. There is only a small number of internet entrepreneurs and IT professionals, in particular those working in the private sector or in government, that is actively engaged in internet governance discourses. Majority are busy with work, making use of the internet, and either ignorant or not interested in engaging in internet governance issues. The challenge is to create awareness on the fact that everyone who uses the internet is a stakeholder in internet governance.

Understanding what public opinion in this area is another challenge. User priority is not uniform, for instance, some users may suggest that cyber-security is important for them while others may talk of hate speech online, mostly discussed on social media or the mainstream media.

The media occasionally report on internet policy debates but rarely participate in its advocacy on end users' concerns. Most mainstream NGOs have not been active in internet governance debates, except for the KHRC that has recently begun active participation. This is widely attributed to the fact that there is generally a serious lack of awareness among these NGOs of the nexus of the internet and human rights. Some do not consider the internet their mandate and therefore have paid little attention to the discourse which sometimes tend to be extremely technical.

A bridging of the internet CSOs, the technological community and the media can help demystify the internet discourse among CSOs with advocacy expertise.

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<sup>185</sup> Ibid. page 38

### 3. Civil Society

This section aims to give an assessment of the current national civil society environment, and in particular, identify the opportunities for strengthening and the growing the movement.

There exists a vibrant internet civil society interested in ICT and internet governance, a good example being KICTANet, through which the Kenya IGF has provided important fora for multi-stakeholder discourse. CSOs participate in various discourses both locally and internationally. However, the role of the civil society in the internet freedom and governance processes still largely remains in the periphery or obscure. An ISOC<sup>186</sup> report reveals that it is not easy to define civil society, stating that the easiest definition for civil society is as ‘none of the above’—meaning everything but government agencies, private sector businesses and the internet technical and professional community. The report nonetheless notes that many in the technical and professional community regard themselves as members of civil society as well as internet specialists. Wikipedia<sup>187</sup> notes that the term **civil society** is contested. It is sometimes deemed to include the family and the private sphere, and referred to as the "third sector" of society, distinct from government and business. However, in the UN internet governance meetings, civil society is embodied by organisations: development and rights agencies, environmental and consumer organisations, trades unions, faith and women’s groups and the like. But civil society in internet governance should comprise almost everyone that uses the internet, or the public—comprising tax payers who finance operations of Government—whose lives are affected by it.

With regard to internet governance, the ISOC report proposes a three tiered arrangement of civil society as follows:

- the wide community of citizens and consumers, in their different categories;
- organisations that represent specific interest groups within the population, including specific consumer groups; and
- organisations and individuals that are active in internet governance processes and fora.

It is important for CSOs to lobby the Ministry of ICT and other related authorities so that they can understand and support key concerns that require adoption. Further, CSOs will need to continue producing researched evidence-based policy briefs and popular versions of topical issues, and share them with the same authorities and stakeholders with the aim of getting the majority to speak with one voice, and also for the input to be considered as governments finalize on any policy process. In the same breadth, the Ministry must be encouraged to maintain an open door policy to allow for consultations, engagements and simple appraisals with different stakeholders.

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<sup>186</sup> Souter, David and Monica Kerretts-Makau. 2012. *internet Governance in Kenya- An Assessment for the internet Society* <http://www.internetsociety.org/sites/default/files/ISOC%20study%20of%20IG%20in%20Kenya%20-%20D%20Souter%20%26%20M%20Kerretts-Makau%20-%20final.pdf> page 51

<sup>187</sup> [http://en.wikipedia.org/wiki/Civil\\_society](http://en.wikipedia.org/wiki/Civil_society) (accessed August 20, 2013)

Civil society plays a key role in monitoring and agitating for positive changes in Kenya. As such, it will have to remain vigilant to ensure that gains already made in ICTs are not eroded. Additionally, it falls upon the civil society to be bold and forward looking and put precise proposals on the table that can then be taken forward by state actors. To protect the internet as a global commons, the civil society should take responsibility and participate in the governance of the internet so that it can become a vehicle for greater prosperity, equity and social justice for all.

This watchdog role of the civil society has often been treated with suspicion by state actors who have, on some occasions, excluded CSOs from deliberations. Further, they have tried to rubbish CSOs as noise makers with no tangible results. This attitude also influences business players who are more interested in profit making with little regard to human rights.

A case in point is the shock that was the discovery by the Kenyan delegation to the World Conference on International Telecommunications (WCIT) in Dubai, United Arab Emirates, from 3-14 December 2012, that CSOs submissions had been ignored by the government. This landmark conference reviewed the International Telecommunication Regulations (ITRs), which serve as the binding global treaty designed to facilitate international interconnection and interoperability of information and communication services, as well as ensuring their efficiency and widespread public usefulness and availability. The government, through CCK which is mandated to negotiate a position for Kenya, was working within the ATU to come up with an African position. What was intriguing was that the Ministry of Information had convened a multi-stakeholder forum, in line with the Constitutional Article 10 provision for the participation of citizens as one of the national values and principles of governance, to come up with a Kenyan position on the matter. Unfortunately when the multi-stakeholder team arrived at the WCIT, the team realized that the Kenyan position (developed by CCK) had been aligned to the African position and had excluded the submissions of the CSOs made at the pre-conference multi-stakeholder forum. At this juncture however, the final position made by the then Permanent Secretary, Dr. Bitange Ndemo, brought back the CSOs submission and in the end Kenya did not sign the treaty with considerations to balance the needs of the business environment, human rights and policy making in matters that affect the current status of governance of the internet.

At present, the civil society concern worldwide is for there to be an institutional mechanism for civil society participation at the ITU because of its powerful decision making position.

### **3.1 Civil society active on internet issues**

Several Civil societies are active. The main ones and which have been dealt with in another section of this report are KICTANet, ISOC Kenya Chapter and the consumer organization Cofek. These are multi-stakeholder in their nature and outlook.

Others, whose mandates are not exactly internet policy but have engaged on certain internet matters include:

### 3.1.1. Article 19 East Africa<sup>188</sup>

Article 19 is a human rights-based organization whose focus is on the defence and promotion of freedom of expression and freedom of information. The organization derives its name from the Universal Declaration on Human Rights (UHDR)<sup>189</sup> article 19 which states:

Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Article 19 East Africa works to ensure that people everywhere can express themselves freely, access information and enjoy freedom of the press. Their programmes is designed to promote laws and policies that protect free expression, hold abusers and governments to account, and advocate for legal reforms. In addition, Article 19 actively demands transparency and accountability by testing governments' transparency practices and access to information provisions, and by campaigning for the disclosure of information of public interest.

Article 19 has also been involved in the Open Governance Partnership, a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.

### 3.1.2. Kenya Human Rights Commission (KHRC)<sup>190</sup>

The Kenya Human Rights Commission (KHRC) campaigns for the entrenchment of a human rights and democratic culture in Kenya. Further, it works with grassroots human rights networks (HURINETS)<sup>191</sup> across Kenya and links community, national and international human rights concerns. KHRC is engaged in securing the pledges made under Kenya's 2010 Constitution through advocacy initiatives aimed at ensuring the comprehensive observance and its implementation, and for meaningful participation of the citizenry in governance and policy creation.

KHRC's objectives relevant to this report are:

- to influence the formulation, review and/or enactment of policies and legislation, and
- to ensure public access to basic personal national documents.

The KHRC has since 2011 been engaged in ICT projects that involve capacity building for the civil society at the local and regional level and campaigns for internet freedom. KHRC, as a member of the FOI Network has began to introduce the internet freedom to the network to link the network with the internet governance processes.

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<sup>188</sup> <http://www.article19.org/pages/en/mission.html>

<sup>189</sup>The Universal Declaration on Human Rights: <http://www.un.org/en/documents/udhr/>

<sup>190</sup> <http://www.khrc.or.ke/>

<sup>191</sup> <http://www.khrc.or.ke/kenya-human-rights-commission/context.html>

### **3.1.3. The International Association of Women in Radio & Television (IAWRT)**

The International Association of Women in Radio & Television (IAWRT)<sup>192</sup> brings together women working in electronic and allied media, with a mission to strengthen initiatives towards ensuring women’s views and values are an integral part of programming. Further, it advances the impact of women in media. IAWRT collaborates with media organizations on projects that highlight women concerns.

In conjunction with KICTANet and the Association of Progressive Communications (APC)<sup>193</sup> IAWRT is engaged on “Take back the Tech Campaign”<sup>194</sup> aimed at providing evidence for the development of cyber security/crime policy and regulatory framework that acknowledges and considers cyberspace violence against women. Additionally, the project aims to create awareness on cybercrime against women amongst various stakeholders, and is collecting cases on technology based violence against women to be mapped on Ushahidi map through frontline SMS.

### **3.1.4 Transparency International-Kenya**

Transparency International–Kenya (TI-Kenya) is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global Transparency International movement that are all bound by a common vision of a corruption-free world.

TI-Kenya has of late played active role in using ICTs in human rights, to the point of organizing a hack-a-thon which brings developers together to through a weekend marathon of developing apps that can be used in human rights work.

### **3.2 Civil society that can contribute more**

This sector involves the identification of civil society groups that are most influential on the national stage—religious groups, sports groups etc. and the analysis of whether engaging them on the internet is possible and/or desirable.

There are civil society organizations that who, by virtue of their strengths and experience could be encouraged to get into the area of internet policy. These are:

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<sup>192</sup> <http://www.iawrt.org/>

<sup>193</sup> <http://www.apc.org/>

<sup>194</sup> Take back the tech ushahidi map. <https://www.takebackthetech.net/>

### 3.2.1. The Africa Centre for Open Governance (AfriCOG)<sup>195</sup>

The Africa Centre for Open Governance (AfriCOG) focuses on governance and corruption and its effects on Kenya. However, one of its strategic objectives is to influence legislation, regulation, public policy and practice through strategic, pre-emptive, governance and anti-corruption interventions and activities including dissemination of information. AFRICOG could easily be brought on board to engage in internet policy matters.

### 3.2.2. Freedom House<sup>196</sup>

Freedom House has, recently, established a Kenyan office. This is an independent watchdog organization dedicated to the expansion of freedom around the world. It acts as a catalyst for freedom through a combination of analysis, advocacy, and action.

Freedom House believes that freedom is possible only in democratic political environments where governments are accountable to their own people; the rule of law prevails; and freedoms of expression, association, and belief, as well as respect for the rights of minorities and women, are guaranteed. Consequently, it analyses the challenges to freedom; advocates for greater political and civil liberties; and supports frontline activists to defend human rights and promote democratic change. One of the annual projects that Freedom House is involved with is the *Freedom of the Net*,<sup>197</sup> which provides an assessment of global internet freedom.

### 3.2.3. Human Rights Watch<sup>198</sup>

Human Rights Watch is an independent organization devoted to defending and protecting human rights. It focuses international attention where human rights are violated, offers voice to the oppressed, and holds oppressors accountable for their crimes.

Human Rights Watch has in the recent past established an office in Kenya and has works on free speech<sup>199</sup> as one of its programmatic areas.

### 3.1.2. International Commission of Jurists (ICJ) -Kenya<sup>200</sup>

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan and non-profit membership organization. It consists mainly of

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<sup>195</sup> <http://www.africog.org/>

<sup>196</sup> <http://www.freedomhouse.org/country/kenya>

<sup>197</sup> <http://www.freedomhouse.org/content/kelly-sanja>

<sup>198</sup> <http://www.hrw.org/africa/kenya>

<sup>199</sup> <http://www.hrw.org/topic/free-speech>

<sup>200</sup> [www.icj-kenya.org](http://www.icj-kenya.org)

legal practitioners whose focus is the protection of human rights. ICJ Kenya has vast expertise in drafting of legislation and policy advocacy.

Like Article 19, the ICJ-Kenya would be important partners in the internet policy work, as they not only run freedom of information and human rights programs, but they also have a rich resource of legal personnel. ICJ Kenya also convenes the FOI Network in Kenya.

### 3.3. Others

The National Taxpayers Association (NTA) and the Centre for Rights Education Awareness (CREAW) have deployed significant ICT platforms to advance human rights and are CSOs that could contribute to the internet freedom discourse. Also important is The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008, and is a locally registered trust.

It would be necessary to engage certain groups to start discussing the internet in really ordinary lingo and metaphor. Such groups would include the religious organizations (both Christian and Muslim) and other groupings such as such Bunge la Wananchi/Wanjiku Revolution. This group is active and vibrant online and mostly concerned with bread-and-butter issues. The group would be relevant to highlight end-user concerns. However, it seems to be an informal grouping and would probably require capacity support.

The religious/faith-based groups have tenacity to stay on issues of concern to them when advocating, and are trusted by their followers. Some of these have expressed dissatisfaction on explicit content available online.

In terms of issues to pay attention, political/equity is important in internet policy debates as the internet affects a diverse stakeholder group.<sup>201</sup> Some areas are therefore important and require concerted advocacy. Such issues are:

- transparency: the need for available information on decision making procedures;
- accountability: governance should be independently responsible to concerned stakeholders and wider publics;
- effective participation: decision making should be as inclusive as possible; and
- a structure of governance that promotes a fair balance of benefits among stakeholders.

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<sup>201</sup> Drake, William. Framing 'internet Governance' Policy Discourse: Fifteen Baseline Propositions. <http://www.itu.int/osg/spu/forum/intgov04/contributions/drake-presentation.pdf>



## Recommendations

1. There is need to stop further delay and operationalize the Universal Access Fund (USF) which was established by the Kenya Information and Communication Act in 2009.
2. The Ministry as well as the CCK, have embraced multi-stakeholder approach in policy-making processes and have had stakeholder consultation in coming up with various guidelines, sector regulation and legislation. However, stakeholder input has not always been taken on board. There is need to have a clear framework of incorporating stakeholder input into policy positions.
3. The Kenya ICT Authority in expanding open data, it will need to collaborate with locals to developed apps that could be availed and used on mobile phones, avail content in local languages, and encourage Kenyans to make use of the open data portal in particular in matters of development for counties.
4. In terms of the Kenya Computer Incident Response Team (KE-CIRT), the public should be clear on what role it is meant to play and services it expects from KE-CIRT. Further, the mechanism of reporting to the public by KE-CIRT, and the frequency within which the reporting will be done.
5. Stakeholders will need to be vigilant to ensure that the laptop for schools project is not captured by selfish interest, that there is equity in distribution of laptops and the marginalized are not forgotten. Additionally, the Ministry of Education must be accountable to Kenyans and must be compelled to make information available on the progress of the project.
6. The registration of .ke must be affordable to allow more Kenyans to embrace the domain name.
7. The East African Communications Organisation (EACO) is a significant body to be lobbied since it guides the Ministries of ICTs on policy direction and in particular on harmonization of communication regional policies that may affect the internet such as those of access and affordability of the internet for the citizens of the Community.
8. Africa Union (AU) has continental ICT policy objectives and set priorities as seen in its spearheading the .africa initiative. This is one body that stakeholders must work with in terms of realizing continental ICT objectives.

9. An overall review of the implementation of the World Summit on the Information Society (WSIS) outcomes will take place in 2015. CSOs must be part of this outcomes discussion(s) and express their views. It is only through participating that their voices will be heard. It is noted that Kenya's ICT Master Plan anchors one of the strategic goals on WSIS connectivity goals for citizens, communities and public facilities at broadband speeds.
10. CSOs should be on guard not to be excluded from directly participating in the formulation of transnational Internet Public Policy. Further, that Enhanced Cooperation (EC) does not curtail the future evolution of internet Governance.

### **Legal**

1. Pending bills such as the Access to Information Bill, Data Protection Bill and Media Bill should be tabled in Parliament and passed to seal the legal lacuna that currently exists.
2. Parliament and other relevant bodies such as the Commission for the Implementation of the Constitution (CIC) and the Kenya Law Reform Commission (KLRC) should fast-track the review and revision of existing legislation which fail to comply with the Constitution.
3. It is imperative that new legislation is developed on cyber-security to provide a proper legislative underpinning through which cyber-crime can be dealt with.
4. Law enforcement agencies should be trained on cybercrime legislation, new approaches in fighting cybercrime and provided with sufficient resources to enable them detect, investigate and prosecute such crimes or threats.
5. Law enforcement agencies should be re-trained on the constitutional standards and more specifically on the Bill of Rights under the Constitution of Kenya, 2010 to enable them to respect them and apply them in their work.
6. Members of the public and more specifically, bloggers and users of social media need to be sensitized of their rights online and the limits thereof, to enable them freely express themselves within the law. Other areas include on self-protection mechanisms, types of cybercrimes and the reporting frameworks whenever issues are detected.
7. There is need for policy and legislation including a variety of approaches to guide the management of online content to provide for among others procedures and processes for the taking down of online content, where necessary, and means of redress where such content is illegally or irregularly taken down; the liability of internet intermediaries; and, rules of engagement for collaboration between the intermediaries and law enforcement agencies.
8. Internet intermediaries should be encouraged to provide transparency and accountability reports to enable the public ascertain the number of cases or requests for information they receive, how they deal with them including the reasons for the decisions of their subsequent actions.
9. There is greater need for collaboration between the public, law enforcement agencies and private sector including internet intermediaries.