

# GLOBAL INFORMATION SOCIETY WATCH 2021-2022

*Digital futures for a post-pandemic world*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)  
AND SWEDISH INTERNATIONAL DEVELOPMENT COOPERATION AGENCY (SIDA)

## Global Information Society Watch 2021-2022

Digital futures for a post-pandemic world

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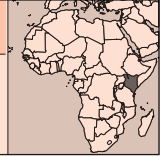
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# KENYA

## THE IMPACT OF THE COVID-19 PANDEMIC ON THE FUTURE OF ONLINE FREEDOM OF EXPRESSION IN KENYA



### ARTICLE 19 Eastern Africa

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### Introduction

Article 33 of the Constitution of Kenya guarantees every person the right to freedom of expression regardless of the medium. Despite this, in 2021, ARTICLE 19 ranked Kenya as “less restricted”, with a global expression score of 61 out of 100, through a global metric that measures free expression across the world.<sup>1</sup> While “less restricted” may seem positive, it actually means the country still bears some challenges that inhibit the exercise of free expression both online and offline. These challenges are often either legal or administrative, i.e. they are associated with the legal or policy framework for free speech, or the implementation of these.

This report highlights the legal and administrative concerns related to the exercise of online free speech in Kenya and how the pandemic further impacted free expression online. It shows how existing and new legislation has been utilised to restrict free expression online during the pandemic and further analyses the impact of these changes on the future of free expression in the country. It ends with recommended actions to be implemented by different stakeholders to safeguard online freedom of expression in the country.

### Background

Before the pandemic, activists in Kenya had some wins with respect to free expression, such as the declaration of the offence of criminal defamation, specifically relating to libel under section 194 of the Penal Code, as unconstitutional in 2017.<sup>2</sup> The High Court found that criminal sanctions ought to be reserved for the most serious offences, such as hate speech or incitement to violence, as stipulated

under article 33 of the Constitution.<sup>3</sup> This decision was a win for online expression, ensuring that internet users would not be prosecuted for defamation.

Unfortunately, in 2018, Kenya enacted the Computer Misuse and Cybercrime Act, a law that introduced the offence of criminal defamation and 25 other provisions that have a chilling effect on online free expression.<sup>4</sup> In response to the act, the Bloggers Association of Kenya (BAKE),<sup>5</sup> supported by ARTICLE 19 Eastern Africa, filed a petition challenging the constitutionality of 26 provisions of this act.<sup>6</sup> However, in a judgement delivered in February 2020, the High Court held these provisions were constitutional and the provisions were still in effect and applied during the pandemic.<sup>7</sup>

Other concerns related to online free expression prior to the pandemic included the attempt by parliament in 2019 to pass a law to license bloggers and regulate the conduct of social media users.<sup>8</sup> The Kenya Film and Classification Board also made decisions before and during the pandemic that violated free expression and restricted access to certain films, particularly those with LGBTIQ content.<sup>9</sup>

Ahead of Kenya’s third Universal Periodic Review (UPR) in 2020, ARTICLE 19 sent a detailed memorandum to the UN Human Rights Committee highlighting problematic provisions in Kenya’s legal framework that entrench broad surveillance practices, and content-based restrictions to online free expression. These include legislation like the Prevention of Terrorism Act 2012 and the National

<sup>3</sup> Ibid.

<sup>4</sup> ARTICLE 19. (2018, 18 May). Kenya: Passage of flawed Computer and Cybercrimes Act threatens free expression. <https://www.article19.org/resources/kenya-passage-of-flawed-computer-and-cybercrimes-act-threatens-free-expression>

<sup>5</sup> <https://bake.co.ke>

<sup>6</sup> ARTICLE 19. (2018, 5 June). Kenya: Suspension of Cybercrimes Act provisions a welcome step to protect free expression. <https://www.article19.org/resources/kenya-suspension-of-cybercrimes-act-provisions-a-welcome-step-to-protect-free-expression>

<sup>7</sup> ARTICLE 19. (2021). Kenya: Briefing on attacks against journalists March 2020-July 2021. [https://www.article19.org/wp-content/uploads/2021/11/Covid-Response-Africa\\_Kenya.pdf](https://www.article19.org/wp-content/uploads/2021/11/Covid-Response-Africa_Kenya.pdf)

<sup>8</sup> Muya, C. (2019). *Policy analysis on the Kenya Information and Communication (Amendment) Bill*. The Lawyers Hub Kenya. [https://lawyershub.org/media/Policy\\_Analysis\\_on\\_Kenya\\_Information\\_and\\_Communication\\_Amendment\\_Act\\_1\\_UXKIfMV.pdf](https://lawyershub.org/media/Policy_Analysis_on_Kenya_Information_and_Communication_Amendment_Act_1_UXKIfMV.pdf)

<sup>9</sup> ARTICLE 19. (2018, 17 May). Kenya: Censorship by film classification board limiting free expression. <https://www.article19.org/resources/kenya-censorship-by-film-classification-board-limiting-free-expression>

<sup>1</sup> ARTICLE 19. (2021). *The Global Expression Report 2021: The state of freedom of expression around the world*. <https://www.article19.org/wp-content/uploads/2021/07/A19-GxR-2021-FINAL.pdf>

<sup>2</sup> *Jacqueline Okuta & another v Attorney General & 2 others*. <http://kenyalaw.org/caselaw/cases/view/130781>

Intelligence Service Act.<sup>10</sup> Although Kenya accepted all 26 recommendations on free expression from the UPR, ARTICLE 19 continues to document arrests and harassment of journalists among other restrictions to free expression.<sup>11</sup>

## Impact of the COVID-19 pandemic on online free expression

Kenya instituted measures to curb the pandemic that impacted the exercise of online free expression. To begin with, at the onset of the pandemic, existing laws were used to regulate COVID-19 related misinformation and disinformation online, including section 22 and 23 of the Computer Misuse and Cybercrimes Act. The former deals with publishing false data with the intention that it be relied on as authentic, while the latter relates to publishing false information to cause chaos, panic or violence among citizens. In March 2020, the government announced that this law would be used to arrest and prosecute those publishing false information about the coronavirus.<sup>12</sup>

By September 2020, ARTICLE 19 Eastern Africa had documented 10 cases where internet users, including journalists and online communicators, were either arrested or threatened with prosecution for violating section 23 of the Computer Misuse and Cybercrimes Act.<sup>13</sup> Additionally, ARTICLE 19 Eastern Africa also documented the arbitrary use of the provisions in the two sections by the Directorate of Criminal Investigations (DCI) to compel detainees to take down or edit allegedly offending posts and websites.<sup>14</sup>

In November 2021, the National Computer and Cybercrimes Coordination Committee (NC4) was set up under section 4 of the Computer Misuse and Cybercrimes Act to aid in the implementation of the act. During the appointment of members of this committee, the authorities stated that the focus of the government and the committee would

be to deal with purveyors of false information over social media.<sup>15</sup>

In addition to the use of existing laws, Kenya also enacted or attempted to enact laws to curb the pandemic that had a chilling effect on online free expression. In 2020, a senate ad hoc committee set up to deal with the COVID-19 situation in Kenya developed the Pandemic Response and Management Bill, which set out measures to curb the pandemic.<sup>16</sup> Part VII of the bill gave powers to the cabinet secretary to limit rights without subjecting these powers to effective judicial oversight.<sup>17</sup> Article 36 (b) also prohibited the circulation of false alarm or false warning on the pandemic, but in vague terms that failed to comply with international standards on limitations of free expression.<sup>18</sup>

The authorities in Kenya further adopted measures that impacted access to information and privacy. ARTICLE 19 believes the rights to free expression, access to information and privacy are complementary and mutually reinforcing. This has led to the development of principles relating to communication surveillance, mandatory data retention, anonymity and mandatory user registration, data disclosure by companies and search and seizure.<sup>19</sup> Unfortunately, during the first year of the pandemic, Kenya relied on health legislation to expand surveillance and in totality limit the right to data protection, which impacted online free expression.<sup>20</sup>

Through our project “Unseen Eyes, Unheard Stories”, ARTICLE 19 found that the government relied on the Public Health (Prevention, Control and Suppression of Covid-19) Rules 2020 to expand the search and seizure powers of health officials; extend existing public CCTV systems to conduct mass surveillance on public spaces and enforce social distancing restrictions; use telecommunication data such as geolocation data to track and trace individuals and enforce quarantine; as well as to deploy a contact tracing app, “Jitenge MoH”, which failed to comply with principles of data protection by design

10 ARTICLE 19. (2020). *Submission to the United Nations Human Rights Committee, List of Issues of Kenya, 128th Session*. UN Human Rights Treaty Bodies. [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FICO%2FKEN%2F40935&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FICO%2FKEN%2F40935&Lang=en)

11 ARTICLE 19. (2020, 28 September). HRC45: Kenya accepts UPR recommendations on free expression. <https://www.article19.org/resources/hrc45-kenya-accepts-upr-recommendations-on-free-expression>

12 Mutinda, T. (2020, 19 March). COVID-19: Arrest purveyors of fake news – Uhuru. *The Star*. <https://www.the-star.co.ke/news/2020-03-19-covid-19-arrest-purveyors-of-fake-news-uhuru>

13 ARTICLE 19. (2020, 30 September). Kenya: Journalists attacked and silenced during the COVID-19 Pandemic. <https://www.article19.org/resources/kenya-journalists-attacked>

14 ARTICLE 19 Eastern Africa. (2021). *Freedom of Expression and the Digital Environment in Eastern Africa: Monitoring Report January 2020-December 2020*. <https://www.article19.org/wp-content/uploads/2021/02/Freedom-of-Expression-and-the-Digital-Environment-in-Eastern-Africa.pdf>

15 Onyando, W. (2021, 4 November). Matiang'i warns fake news spreaders. *Nairobi News*. <https://nairobi.news.nation.co.ke/matiangi-warns-fake-news-spreaders>

16 Bowmans. (2020). *COVID 19: Tracking Government Response in Kenya*. <https://www.bowmanslaw.com/wp-content/uploads/2020/12/Bowmans-Kenya-Government-Response-Tracker.pdf>

17 ARTICLE 19. (2021, 19 January). Kenya: Measures to tackle Covid-19 pandemic must not violate human rights. <https://www.article19.org/resources/kenya-measures-covid-19-must-not-violate-human-rights>

18 Ibid.

19 ARTICLE 19. (2017). *The Global Principles on Protection of Freedom of Expression and Privacy*. <https://www.article19.org/data/files/medialibrary/38657/Expression-and-Privacy-Principles-1.pdf>

20 ARTICLE 19 Eastern Africa, Pollicy, & KICTANet. (2021). *Unseen Eyes, Unheard Stories: Surveillance, data protection and freedom of expression in Kenya and Uganda during COVID 19*. <https://www.article19.org/wp-content/uploads/2021/04/ADRF-Surveillance-Report-1.pdf>

and default, while also collecting more information than was necessary.<sup>21</sup>

In addition to measures adopted by the authorities in response to the pandemic, the social impact of the pandemic itself had consequences for online free expression. The pandemic increased reliance on digital technologies as a means of association, expression, education and work, meaning more people spent time online. However, online harassment increased, disproportionately affecting women and children. In May 2020, the Directorate of Criminal Investigations (DCI) raised the alarm over an increase in online violence against children through forms such as child online grooming, cyberbullying and access to pornographic and sexual content, and advised parents to report these cases to their local DCI offices.<sup>22</sup> In the same period, ARTICLE 19 documented an increase in online violence against women in public spaces such as journalists<sup>23</sup> and women in politics,<sup>24</sup> as well as against sexual and gender minorities.<sup>25</sup> Structurally silenced women such as sex workers who switched to online tools to carry out their work also faced online harassment through non-consensual image distribution. Their customers disclosed intimate images or videos online without their consent, which had serious offline repercussions, as well as causing these women to avoid digital spaces.<sup>26</sup>

Challenges with digital inclusion, specifically the availability and affordability of the internet, also affected online expression. The GSM Association (GSMA) reports that women in Kenya were disproportionately affected by the pandemic, with some having to sell their mobile handsets to sustain themselves financially. Specifically, the report states, “Kenya was the only survey country where the gender gap in mobile internet use has widened, from 34

per cent in 2019 to 42 per cent in 2020.”<sup>27</sup> Persons with disabilities also faced challenges accessing information during the pandemic, as there was no regular sign language interpretation for national COVID-19 briefings, or messages in Braille or other accessible formats.<sup>28</sup>

Unfortunately, social media platforms that were important spaces for online free expression were also used to perpetuate misinformation and disinformation on emerging political events that happened during the pandemic. These include attempts to amend Kenya’s constitution through the Building Bridges Initiative (BBI) or reduce the impact of credible news like the Pandora Papers.<sup>29</sup> The BBI is a state-led initiative to amend the constitution in a manner devoid of public participation and, as ruled by courts, in a manner inconsistent with the Kenyan constitution.<sup>30</sup> Research also shows the use of paid influencers to target specific individuals who challenged the BBI process of amending the constitution and spread false information attacking their credibility, as well as the use of verified accounts and platform algorithms on Twitter to amplify these false narratives.<sup>31</sup>

For clarity, although the spread of misinformation and disinformation is wrong and of strong concern, it should be dealt with through civil and not criminal remedies, which are likely to have a disproportionate and chilling effect on freedom of expression. In line with international standards, individuals should be given an opportunity to prove the truth of their statements and the government should respond to them through full, honest and evolving communication with the public and careful and public correction of the misinformation and disinformation.<sup>32</sup>

21 Ibid.

22 Directorate of Criminal Investigations. (2020, 4 May). Cyber safety of children. @DCI\_Kenya (Twitter). [https://twitter.com/dci\\_kenya/status/1257327420388098051?lang=en](https://twitter.com/dci_kenya/status/1257327420388098051?lang=en)

23 Muya, C. (2021). *The Law Should Work For Us: Addressing Gaps in Kenya’s Regulatory Framework to Build a Safer Internet for Women and Girls*. Open Internet Democracy Initiative. <https://openinternet.global/sites/default/files/2021-09/The%20Law%20Should%20Work%20for%20Us.pdf>

24 Gichanga, M., & Orembo, L. (2020). *Trends of Online Violence against Women in Politics During the COVID-19 Pandemic in Kenya*. KICTANet. <https://www.kictanet.or.ke/mdocs-posts/trends-of-online-violence-against-women-in-politics-during-the-covid19-pandemic-in-kenya>

25 ARTICLE 19. (2020, 6 October). Kenya: Free expression on sexual orientation and gender identity is a human right. <https://www.article19.org/resources/kenya-free-expression-on-sexual-orientation-and-gender-identity>

26 Bhalla, N., & Matishe, F. S. (2021, 27 September). African sex workers face digital sex abuse as pandemic pushes them online. *Reuters*. <https://www.reuters.com/legal/transactional/african-sex-workers-face-digital-abuse-pandemic-pushes-them-online-2021-09-27>

27 GSMA. (2021). *The Mobile Gender Gap Report 2021*. <https://www.gsma.com/r/wp-content/uploads/2021/06/The-Mobile-Gender-Gap-Report-2021.pdf>

28 Kimumwe, P. (2020, 13 April). Why Access to Information on Covid19 is Crucial to Persons with Disabilities in Africa. *CIPESA*. <https://cipesa.org/2020/04/why-access-to-information-on-covid-19-is-crucial-to-persons-with-disabilities-in-africa>

29 The Pandora Papers refers to over 11 million confidential records made public by the International Consortium of Investigative Journalists, revealing a parallel economy that benefits the wealthy. Madung, O., & Obilo, B. (2021, 3 November). New Research: In Kenya, Disinformation Campaigns Seek to Discredit Pandora Papers. *Mozilla*. <https://foundation.mozilla.org/en/blog/new-research-in-kenya-disinformation-campaigns-seek-to-discredit-pandora-papers>

30 Kaburu, T. K. (2021, 4 September). The Kenyan Court of Appeal’s BBI Judgement-IV: The Place of Public Participation in Constitutional Amendments. *Oxford Human Rights Hub*. <https://ohrh.law.ox.ac.uk/the-kenyan-court-of-appeals-bbi-judgment-iv-the-place-of-public-participation-in-constitutional-amendments>

31 Madung, O., & Obilo, B. (2021, 2 September). Fellow Research: Inside the Shadowy World of Disinformation-for-hire in Kenya. *Mozilla*. <https://foundation.mozilla.org/en/blog/fellow-research-inside-the-shadowy-world-of-disinformation-for-hire-in-kenya>

32 Rikhter, A. (2021). *International law and policy on disinformation in the context of freedom of the media*. Office of the OSCE Representative on Freedom of the Media. <https://www.osce.org/files/f/documents/8/a/485606.pdf>



ARTICLE 19 has also observed proposed amendments to Kenya's Copyright Act and National Cohesion and Peace Building Act that will impact how internet service providers deal with copyright-related content and hate speech. On the former, the amendments seek to water down provisions on notice and takedown procedures and interfere with the intermediary liability of internet service providers, pushing them to prefer to take down any allegedly infringing content and to police content online.<sup>33</sup> On the latter, the amendments seek to criminalise speech that is unpleasant even though this is not sufficient to be considered unlawful.<sup>34</sup>

## Conclusion

From the above, it is clear that new and existing legislation was used to restrict free speech and expand surveillance. In addition, online free expression was negatively impacted by digital exclusion, misinformation and disinformation, and online harassment. Kenya will hold its general election in August 2022, which means that these challenges are also likely to be replicated or intensified in the near future. Already Kenya has reported an increase in incidents of alleged hate speech by politicians that if not dealt with may fuel offline conflict.<sup>35</sup>

A survey by the Reuters Institute revealed that 75% of news consumers in Kenya failed to differentiate between real and fake content.<sup>36</sup> This is concerning given the history of the use of political disinformation and foreign influence through projects such as Cambridge Analytica in the 2017 elections.<sup>37</sup> Although there are organisations engaged in fact checking, the reach of their work is limited and there is a need to increase the visibility of their efforts. Furthermore, there is a need to intensify media literacy among Kenyan citizens to increase knowledge on the potential harms and benefits of digital technologies in relation to free expression. Campaigns to intensify fact checking

of certain information, so that already fact-checked information is made more available to citizens, and so that more citizens participate in fact checking, are also necessary.

Digital rights advocacy is also concentrated at the national and international level, with very limited participation from county or community-based organisations. These organisations, however, express an interest to learn and engage with digital rights issues.<sup>38</sup> There is a need to have community-based organisations advocating for legislation and policies that support digital inclusion and online free expression, including at the subnational level in the counties.

While Kenya is making efforts to promote digital inclusion, like creating a legal framework on community networks, knowledge on related regulations and how to use them to support digital connectivity in underserved areas is limited. There is a need to invest in the dissemination of this knowledge at the grassroots level. Overall, there is a need to address other factors deepening digital exclusion, such as the affordability of broadband and devices and taxation.

In the long run, unless the factors identified above are dealt with, they will continue to negatively impact the exercise of online free expression in Kenya.

## Action steps

To address the above, the following action steps are recommended:

- Kenya needs to actualise the recommendations it received during its UPR and harmonise national legislation with international standards to ensure the law provides a good environment for the exercise of free expression.<sup>39</sup>
- Civil society should increase knowledge of digital rights and encourage digital rights advocacy at the grassroots level.
- Civil society should increase the number of programmes on media literacy and fact checking.
- Donors should increase funding to support digital rights advocacy and research for organisations at both national and grassroots level that will enable them to amplify their work to ensure that free expression online is realised.

33 ARTICLE 19. (2022, 12 January). Kenya: Copyright law must respect international standards of free speech. <https://www.article19.org/resources/kenya-proposed-copyright-amendment-bill-must-respect-free-speech>

34 ARTICLE 19 Written Memorandum on the National Cohesion and Peace Building Bill 2021.

35 Makong, B. (2021, 2 November). DPP vows action against hate mongers abusing free speech. *Capital News*. <https://www.capitalfm.co.ke/news/2021/11/dpp-vows-action-against-hate-mongers-abusing-free-speech>

36 Tangen, O. Jr. (2021, 31 December). Kenya: Troll trackers and the fight against the disinformation industry. *DW Akademie*. <https://www.dw.com/en/kenya-troll-trackers-and-the-fight-against-the-disinformation-industry/a-60325620>

37 Warah, R. (2019, 9 August). Cambridge Analytica and the 2017 elections: Why has the Kenyan media remained silent? *The Elephant*. <https://www.theelephant.info/features/2019/08/09/cambridge-analytica-and-the-2017-elections-why-has-the-kenyan-media-remained-silent>

38 Consultation among human rights defenders in Kenya with the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in Nairobi organised by ARTICLE 19 on 31 January 2022, held at Ufungamano House.

39 ARTICLE 19. (2021, 28 May). Kenya: Harmonise legal framework on free expression with ICCPR recommendations. <https://www.article19.org/resources/kenya-harmonise-free-expression-with-iccpr-recommendations>

## **DIGITAL FUTURES FOR A POST-PANDEMIC WORLD**

Through the lens of the COVID-19 pandemic, this edition of Global Information Society Watch (GISWatch) highlights the different and complex ways in which democracy and human rights are at risk across the globe, and illustrates how fundamental meaningful internet access is to sustainable development.

It includes a series of thematic reports, dealing with, among others, emerging issues in advocacy for access, platformisation, tech colonisation and the dominance of the private sector, internet regulation and governance, privacy and data, new trends in funding internet advocacy, and building a post-pandemic feminist agenda. Alongside these, 36 country and regional reports, the majority from the global South, all offer some indication of how we can begin mapping a shifted terrain.

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2021-2022 Report  
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