

Building trust between the state and citizens

A Policy Brief on Internet shutdowns and elections
in Kenya 2017



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Executive Summary

In 2016, 11 African governments shut down the Internet fully or partially during elections and other politically agitated moments such as protests. Internet shutdowns abrogate human rights such as freedom of expression and assembly, access to information and political rights. They also cause harmful economic losses. For instance, a conservative estimate found that Uganda lost at least \$2.2 million US dollars during an Internet shutdown around its election in 2016. The shutdown consisted of a blackout of popular social media sites and messaging apps Whatsapp, Twitter and Facebook. It also involved suspension of mobile money services which was implemented by mobile network operators (MNOs).

Kenya's economy is bigger than Uganda with close to double the number of mobile subscribers. According to quarterly statistics provided by the Communications Authority of Kenya (CA), over 12 billion Kenya Shillings are transacted over mobile money on average daily. During a June 2017 seven-hour outage of popular MNO Safaricom, it is estimated that the company lost about 2.6 billion Kenya shillings.

The impact of the Internet on life, society and the economy is so great that decisions affecting it ought to be made within the framework of collective decision making. In addition, a policy affecting fundamental and human rights is subject to the international law standard of legality, proportionality and necessity. This test is captured in Article 24 of the Constitution of Kenya.

This brief examines Kenyan law and concludes that there is no legal basis for an Internet shutdown. It therefore calls upon state agencies to promote an open Internet during the elections and after. It also calls for more public debate on the issue of digital rights and for institutions such as the Kenya National Commission on Human Rights to spearhead more

understanding among actors on the human rights aspects of the Internet in Kenya. In addition, MNOs are called upon to proactively disclose to their customers and discuss with the public, their views and preparedness for network disruptions.

As Internet shutdowns have occurred around periods surrounding elections, the brief aims to raise awareness among election observers on the nexus between an open Internet and free and fair elections. It recommends that observers include openness of the Internet as a parameter in election observation.

Although Kenya has a history of post-election violence, it notably has one of the most progressive Constitutions in Africa. While there is fear that there may be some form of an Internet shutdown, political actors can allay these fears by publicly committing to keep the Internet open. They would also affirm Kenya's commitment to the rule of law and provide a good practice for other African states to adopt.

Introduction

Internet shutdowns were experienced in over half of the 18 African countries that conducted presidential elections in 2016. These shutdowns affected the most popular messaging applications, prior to, during or after the elections. The reasons given by governments range from upholding public order to preventing spread of propaganda.

As Kenya heads to elections in August 2017, two broad concerns about the Internet have surfaced. One is the use of the Internet to spread hate speech online and the other is use of the Internet to manipulate media thereby mobilizing voters in some areas while suppressing them in others.

State agencies have responded by increasing surveillance on online activities as well as issuing warnings that the Internet may be shutdown should things become unmanageable. The country has experienced some disruptions of the Internet in the recent past. And while some were as a result of technical failure of operators' systems, no explanation has been given for a December 2016 jamming of communication networks around Parliament buildings in Nairobi ⁱⁱ.

Internet penetration levels in Africa, in particular via mobile phone, are on the rise. Kenya for instance has about 38.9 million Internet subscriptions ⁱⁱⁱ. Further, there are increasingly many aspects of life that depend on the Internet.

Shutdowns have the effect of chilling the economic environment, as investors from small business owners to development agencies to multinational corporations, are not sure of the stability of the Internet. Above all, Internet shutdowns adversely affect human rights ^{iv}. The debate on control of the Internet during elections ought therefore to be grounded on constitutional principles and international human rights standards.

This brief considers the issue of Internet shutdowns in Kenya. The first section presents a broad introduction, while the second discusses policy concerns from economic and political points of view. Section three reflects on human rights and Internet shutdowns, while section four maps some of the actors. The brief concludes that ordering an Internet shutdown is a major decision requiring participation of all stakeholders. Above all, it is a policy that limits human rights and therefore a subject to the conditions set out in Article 24 of the Constitution of Kenya.

| Statute | Article/ Section | Provision |
|---------------------------------------|--------------------|---|
| Constitution | 2 (5) | Enjoins international law such as the Universal Declaration on Human Rights (UDHR) as part of the laws of Kenya. |
| | 2(6) | Provides that treaties and conventions ratified by Kenya are considered part of the law of Kenya. |
| | 10, 232(1) and 119 | Includes public participation as part of Kenya's national values and principles and makes it mandatory to consult the public when making decisions that affect them |
| | 24 | Provides conditions for limiting rights and fundamental freedoms. |
| | 31 | Right to privacy. |
| | 32- 39 | Civil and political freedoms including, freedom of conscience, religion, belief and opinion; expression; media; access to information; association; assembly, demonstration, picketing and petition; and political rights. |
| | 58 | Defines the conditions and procedure for declaring a state of emergency. The provision also provides mechanisms for redress on declaration of state of emergency. |
| | 59 | Establishes the Kenya National Commission on Human Rights that is charged with among others: promoting the protection and observance of human rights in public and private institutions; monitoring human rights; ensuring observance of international treaties and investigating complaints. |
| | 238 | Defines and outlines the principles for national security. |
| National Cohesion and Integration Act | 15, 26, 43, 52 | Establishes the National Cohesion and Integration Commission whose mandate includes: advising the government; education and training against hate speech; dispute resolution; investigation of hate speech; and receiving complaints from the public. |
| | 13 and 26 | Outlaws hate speech and ethnic incitement. |
| Police Service Act | 57 and 58 | Provide for search and seizure powers and arrest without a warrant. |
| Prevention of Terrorism Act | 35(3) (c) | Allows the limitation of the freedom of expression of the media and of conscience, religion, belief and opinion to prevent an act of terrorism. |
| National Intelligence Service Act | 36 | Limits the right to privacy in the Constitution where there is suspicion of an act of terrorism. |
| Elections Act | 109 | Provides for development of a code of conduct that political actors must adhere to. The Code requires candidates to refrain from violence and promote peace. |
| Preservation of Public Security Act | 3 | Empowers the President to make regulations necessary for the provision of public security. |

Table 1: Key Kenyan legal provisions related to Internet shutdown issues

Internet Shutdowns

An Internet shutdown may be defined as an “intentional disruption of Internet or electronic communications, rendering them inaccessible or effectively unusable to a specific population or within a location, often to exert control over the flow of information.”^v Some African civil society organisations give a four-pronged test for network disruptions- they must be **intentional, state sanctioned** and **result** in a shutdown, disruption, or other limitation to a **medium of communication**.^{vi} This would put the action of the Ugandan government in this definition of an Internet shutdown, considering its action of shutting down mobile money services in April 2016.

Internet shutdowns are among the most blunt and extreme forms of information controls namely technical, legal, political, and social tools through which governments regulate the flow of information^{vii}. In the past, in Kenya, information controls involved criminalisation of speech, surveillance, and control media houses^{viii}. These controls have been removed legally through the expanded Bill of Rights in the 2010 Constitution.

With the advent of the Internet, information exchange has increased exponentially. Governments appear threatened by the robust access to information that is enabled by the Internet, and seeks to control the flow of such information for several reasons, among them public order, protection of state leaders and institutions, and protection of state processes and national security.

Ways in which shutdowns can be implemented

The Internet is comprised of a network of devices such as computers whose data can move over a wide range of channels including telephone wires, fibre-optic cables, satellites and wireless connections. Shutdowns can be implemented at various layers of the Internet architecture. For instance, in the recent Internet shutdowns in Africa, some of the methods employed include:

1. Internet Protocol (IP) address blocking where an Internet Service Provider (ISP) denies access to servers that host specific addresses when users try to communicate with those sites. This has been implemented in social media blackouts where traffic to and from sites

such as Whatsapp, Twitter and Facebook is blocked. This was seen in Uganda in 2016^{ix}.

2. Deep Packet Inspection (DPI) where equipment reads data passing through a network and hijacks it through equipment known as a “middlebox”. Such data never reaches the intended recipient and therefore a user trying to access a site in an ISP that is hijacking certain sites will never reach it. This method has been reported in Ethiopia^x where there the state-owned ISP has been noted to read packets of data and hijack some of them.
3. Border Gateway Patrol (BGP) attacks where the addresses of certain websites or routes to entire networks are taken over illegitimately, thereby corrupting the routes through which data to those addresses would have been resolved. This was the case in Gambia in December 2016^{xi} and Egypt in 2011^{xii}.
4. Hypertext Transfer Protocol (HTTP) throttling which is the intentional slowing of bandwidth by a service provider. This makes access to throttled sites extremely sluggish, to the point of the sending network dropping those requests, which translates to the user not accessing the sites in question. This was reported in Gabon in September 2016^{xiii}.

Why do governments shut down the Internet?

Governments give various justifications for shutdowns among them the need to protect state institutions and leaders, managing election crises, controlling the spread of propaganda, and mitigating dissent and national security^{xiv}. However, some Internet blackouts go unexplained. Their purport can only be inferred from major events that coincide with the blackouts. Table 2 analyses Internet shutdowns in Africa in 2016 against political moments that coincided with the disruptions.

| Month | Country | Rationale | Political Moment |
|----------|----------|---|--------------------------|
| February | Uganda | To “stop spreading of lies” | General Elections |
| February | Chad | | Presidential Elections |
| March | Ethiopia | | Oromo Protests |
| April | Burundi | Maintenance of peace | Protests |
| April | Gambia | | Anti-government protests |
| May | Uganda | Maintenance of peace | Inauguration |
| June | Algeria | High school examinations | None |
| July | Ethiopia | Avoid cheating at national examinations | Oromo protests |
| July | Libya | | Protests |
| July | Zimbabwe | | Protests |

| | | | |
|--------------|----------|-----------------------|---|
| August | Ethiopia | National Examinations | Protests |
| August | Gabon | | Election protests |
| August | Mali | | Protests |
| August | Zambia | | Geo-located outages in opposition strongholds |
| September | Egypt | | Localised blackout in Sinai region |
| October | Ethiopia | | Oromo Protests |
| November | Gambia | | National Elections |
| December | DRC | National security | Expiration of presidential term |
| January 2017 | Cameroon | National security | Protests in Anglophone regions |

Table 2: Analysis of shutdowns in Africa in 2016

Conversely, there have been instances where the government kept the Internet open such as:

Lesotho: the Communications Minister ordered for a shutdown of facebook and twitter as he felt users were abusing and spreading lies about the government, and this was likely to cause alarm^{xv}. However, the Regulator reported that such an order would need to be implemented under the confines of the law. Needless to say that the order was later withdrawn.

Organisations such as BloggingGhana, an association of Ghanaian bloggers, Ghana Decides, Ghana Votes, Ghana CDD, PenPlusBytes, et cetera. had popularised the use of social media by educating the online community about using social media sites such as Twitter, Facebook and YouTube.

The Ghanaian police and security services actively used social media^{xvi} to share public safety information during the election period. The Electoral Commission of Ghana similarly used Twitter to share updates on the voting and electoral processes, as well as responses to allegations or challenges (like the attempted hack of the Electoral Commission’s website) that could potentially undermine the electoral process.

1. Ghana’s society groups were also very active throughout the election. Ghana’s Coalition of Local Observers (CODEO), which monitored conduct at the polls, also ensured regular engagement with citizens through Twitter and called for calm when both dominant political parties claimed victory — before the official conclusion of vote counting. Social media served as a source of public information regarding the activities and messages of the candidates and the processes of the election itself. Most Ghanaian users of the platform were able to follow the election proceedings through Whatsapp and Facebook, through their mobile phones.

2. Activists and organisations took to online spaces to discuss party manifestos and campaign promises and to share ideas with policymakers and fellow citizens. Online citizens were able to stay informed and up-to-date by following the hashtag #GhanaDecides, and through updates shared via channels like @BloggingGhana, @OccupyGhana and @GhanaElections.

If Kenya was to have a shutdown, several factors would influence the method chosen:

1. Kenyan elections are normally highly contested and there has often been post-election violence linked to hate speech and incitement^{xvii}. A shutdown would therefore be effected to curb hate speech online, thereby preventing offline violence.^{xviii}
2. Close to 90% of Kenyans online access the Internet from their mobile phones or broadband from their places of work for those who are in office employment^{xix}. The percentage of those with access to broadband Internet at home is negligible. A mobile Internet shutdown would therefore have the effect of depriving a significant population access to the Internet.
3. The most widespread mobile network in terms of geographical coverage and subscriber base is operated by Safaricom Ltd, with about 71.2% of subscriptions. Together with other Mobile Network Operators (MNOs), Safaricom would have a role to play in implementing a shutdown as well as in communicating to its customers the nature, extent, effects and mitigation for disruption of the Internet.
4. Apart from the Internet, shutdowns in countries like Uganda also involved suspending of mobile money services. Kenyans transact close to 15 billion Kenya shillings per day^{xx} and interruption of mobile money would not only lead to loss but also have ripple effects on enterprises dependant on mobile money as well as flow of money within the country.^{xxi}
5. Kenya is geographically and culturally diverse, with political party bases spread out across the country. Disruption of communication services in the regions may be interpreted as politically motivated.

National Security and Public Order

A number of African countries give national security and public order as the justification for Internet shutdowns. National security is defined in the Article 238 as “the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.” The Constitution further provides principles of national security to include: conformity to the Constitution and Parliament; compliance to the highest standards of human rights and respect for diversity of cultures. In addition, national security organs are refrained from furthering or prejudicing political interests.

An Internet shutdown in Kenya with the justification of national security would therefore be subject to standards set out in the Constitution. Among these are the three-part test of legality, proportionality and necessity when limiting human rights such as those enjoyed on the Internet.

National security has been effected through the laws establishing the defence force, intelligence services and the police. These laws have clear provisions on how rights such as privacy and freedom of expression may be limited in prevention and investigation of crime and terrorism.

xxii

This provision may be difficult to implement for several reasons with one of them being that the law was made before independence in a different constitutional dispensation. Article 24(2) envisaged rights limiting laws made before 2010. The provision requires specificity in the intention and the right to be limited in the rights limiting law. It also requires that the limitation be narrow so as not to derogate from the core or essential content of the right being limited.

The case of *Okuta v R* which considered a similar rights-limiting law made before 2010 applied the proportionality test in determining whether the old law was justifiable in the new dispensation. In this case the availability of alternatives to the right to the limiting law was found to be sufficient to serve the purpose. Similarly, availability of laws such as the National Cohesion and Integration Act as well as provisions on national security are alternatives to the provisions of the Preservation of Public Security Act.

POLICY CONCERNS

Issues arising out of an Internet shutdown in Kenya can be classified into four broad areas. The first area is economic where the absence of the Internet affects trade and money-making activities. The second is political and revolves around power structures and how the state maintains security while upholding human rights, online and offline. The third is technical concerns on the practicability of carrying out a shutdown. Another is human rights where an absence of the Internet is considered as limiting of human rights.

Economic Issues

The Kenya ICT Policy (2006) envisions improving livelihoods through provision of ICT services. It addresses seven areas namely IT; broadcasting; telecommunications; postal services; radio frequency spectrum; universal access and institutional frameworks. There was a policy revision process in 2016^{xxiii} resulting in the ICT draft policy 2016.

Kenya's economic blueprint Vision 2030 identifies Information and Communication Technologies (ICTs) as a supporting pillar to achievement of the vision. Hence the government has been leveraging on ICTs to deliver services. For example, services such as motor vehicle registration, passport application, tax returns and visa applications are now done

online through the e-citizen platform. The government has also rolled out a digital literacy programme aimed at giving primary school children computing skills to prepare them for the next industrial revolution. It also has a digital employment programme, *Ajira* where young people work online through a government portal.^{xxiv}

Internet shutdowns would be contrary to the aspirations in economic policies, as they would occasion losses. In monetary terms, The Brookings Institute conservatively estimated that in 2015, Internet shutdowns had led to a loss of US\$2.4 billion from reduced economic activity. Four sub-Saharan African nations that suffered the largest impact that year are presented in Table 3.

| Country | Loss (Million US \$) |
|------------------------------------|----------------------|
| Democratic Republic of Congo (DRC) | 74.5 |
| Chad | 3.7 |
| Ethiopia | 8.5 |
| Uganda | 2.2 |

Table 3: Estimate of Internet shutdown related economic losses among sub Saharan nations in 2015

Source: Copley, 2016^{xxv}

In 2016, Safaricom reported data revenue of 24 billion Kenya Shillings.^{xxvi} Further, over 12 billion Kenya Shillings is transacted on average over mobile money. In the 2016 Budget Policy Statement, the government acknowledged the important role played by mobile money, raising concern that disruption of these services would occasion loss of tax revenue.^{xxvii} During a seven-hour outage of popular MNO Safaricom, it is estimated that the company lost about 2.6 billion Kenya shillings.

Other than direct economic losses^{xxviii}, a study by Deloitte found that more losses are occasioned by ripple effects of shutdowns. These include reduced productivity and dampening of investor confidence.^{xxix} In the case of Cameroon that experienced a three-month long Internet shutdown in January 2017, “Silicon Mountain”, an innovation hub in the affected regions experienced a massive migration of skilled workers to big cities^{xxx}.

In Kenya, 96.4% of the Internet subscribers are on pre-paid plans and they purchase data bundles prior to using them. The bundles are time sensitive and they expire after a given period. From a consumer protection perspective, a shutdown would affect their ability to use the pre-purchased services.

As shutdowns result in losses for the telecommunications companies, a question that arises is how these losses are borne. These companies have relationships with their customers based on contracts and risk legal disputes from the customers where they do not provide these services. In April 2016 when Mobile Network Operator (MNO) Safaricom had a technical blackout, the company compensated its subscribers by offering free money transfer services^{xxxi}. This is similar to free services offered by Orange in Cote D'Ivoire in 2011^{xxxii}. While companies like Safaricom normally compensate subscribers with complimentary minutes for dropped

calls, it is not clear who would compensate subscribers or the companies in the case of a government ordered shutdown. In Egypt, companies sued the government for losses in the 2011 shutdown^{xxxiii}.

The Internet therefore affects many aspects of life in Kenya and decisions about it affect every Kenyan. Decisions about the Internet must therefore be made in the spirit of public participation as envisaged in the Constitution.

Political Issues

Kenyan society participates in political discourse ranging from issues of governance, corruption, national debt, elections and sharing of national resources. Social media platforms such as Facebook, Twitter and Whatsapp also provide space for political engagement during the electioneering period. The Internet supports sharing of divergent views, an important role in achieving political rights in a plural society^{xxxiv}. As noted from Table 2, shutdowns in Africa in 2016 were linked to political processes. Shutdowns therefore manifest the level of openness and diversity in a society.

The increase in election time shutdowns in Africa is worrying. In October 2016, the African Union Commission concerned about this trend of “interrupting or limiting access to telecommunication services such as the Internet, social media and messaging services increasingly during elections” called upon state parties to take legislative and other measures for protection of human rights online^{xxxv}. When shutdowns occur during election periods, a question that arises is the effect of the disruptions on how free and fair the elections in question are. Election observation missions ought therefore to include openness of the Internet and communication tools as a parameter for observation.

In countries that rank high on freedom indices such as Ghana^{xxxvi}, although the police had threatened a shutdown during the 2016 elections, this was averted through public consultation^{xxxvii}. After the experience of post-election violence in 2007, the Waki Commission^{xxxviii} in Kenya recommended limitation of freedom of expression to curb incitement to violence witnessed in the media prior to the election. The National Cohesion and Integration Act therefore outlaws hate speech, ethnic and racial contempt.

The impact of shutdowns is disproportionate to the justification given. In many cases, instead of increasing security as purported, shutdowns create an environment for speculation and conspiracy theories. During Kenya’s post-election violence in 2008, a ban on live broadcast and restriction on phone message services left a vacuum for those seeking information. Kenyans took to social media to share stories that contributed to peace building efforts.^{xxxix} This goes to show that citizens also understand and are actively performing their civic responsibilities.

The maturing role of citizens can also be seen in their increasingly sophisticated response to hate speech online. Since the 2013 elections, the public has been quick to call out social media users and even leaders who propagate hate speech. ^{xl}However, these cases were not successfully prosecuted, pointing to inefficiencies among agencies in the anti-hate speech space.^{xli}

In the modern world, the overall effect of disrupting communications in a country such as Kenya is therefore akin to a state of emergency as it denies the public essential services and family ties.

Technical Concerns

From a technical perspective, it is difficult to implement a shutdown that selectively disrupts the Internet for a group of people or disrupts part of the Internet from all. This is due to the decentralised nature of the Internet where access to networks and content may occur from multiple points. Several issues arise when considering an Internet shutdown in Kenya:

1. Kenya has multiple points for connecting the country to the Internet to and from outside the country. These include four marine fibre optic cables, LION2 (Lower Indian Ocean Network), SEACOM, TEAMS and EASSy and several other connections. An Internet shutdown would require disrupting some of these connections. The connections serve not only Kenya but also inland and land locked countries within the region.
2. A partial shutdown would require Internet Service Providers to monitor network traffic and select which traffic to allow and which to disallow. This would raise concerns about network neutrality- the principle that all traffic on the Internet should be treated equally.
3. Overall, while technical tools to disrupt the Internet exist, there is concern about the circumstances in which they should be employed. This is because the tools require resources to run. In addition, without agreed principles on how these tools may be deployed, there is risk that they could be abused.

Internet Shutdowns & Human Rights

The nexus between human rights and the Internet can be seen at many levels:

1. The Internet is a critical enabler of social and economic change. It has created new opportunities for social interaction, enabled new business models and contributed to economic growth and social development in all other sectors. It is a key enabler for all human rights and particularly the rights to freedom of expression, information, and assembly.^{xliii} The Internet has effectively empowered individuals with redistribution of control of information and a completely new approach to how society operates. Hence communities such as Kenyans on Twitter have grown into spaces not only for sharing information but also for creating and influencing of discourse in Kenyan media.^{xliiii}
2. The Internet is increasingly securing the right to development by providing opportunities for economic advancement. Access to education, health, finance, and government services is facilitated by Internet access. Mobile platforms such as the mobile money service Mpesa has provided banking services to individuals marginalised by the financial sector in Kenya. Facebook has provided young people with an opportunity to market their business and sell their products and services. Where the right to development is a collective right, Internet shutdowns to a group of people may abrogate their collective right. The case of Anglophone Cameroon, where the Internet was shut down in two English speaking regions for close to a hundred days, is one such example. It resulted the chipping away of an Internet economic community.

The Constitution of Kenya has several provisions on human rights that apply to the Internet. These include the following:

1. Article 2 (5) enjoins international law such as the Universal Declaration on Human Rights (UDHR) as part of the laws of Kenya. Regarding limiting of the human rights to freedom of expression, international law requires application of the three-part test of legality, necessity, and proportionality.
2. Article 2 (6) provides that treaties and conventions ratified by Kenya are part of the law of Kenya. Among treaties Kenya is signatory to is the African Charter on Human and People's Rights (ACHPR) which in addition to individual human rights provides for collective rights such as the right to development.^{xliiv}

3. Article 10 lists public participation as a national value and principle. This is from the basis of supremacy of the people in Article 1 where it is envisaged that state power will be used constitutionally and for the benefit of the people. The people may therefore participate in decision making and this may be through the Internet.
4. Articles 32 to 39 define civil and political liberties namely freedoms of conscience, expression, access to information, association, assembly, political rights and movement. These rights are increasingly achieved over the Internet. For instance, many candidates for the August 2017 elections have a social media presence from where they mobilise and engage with their supporters and public. It is worth noting however that freedom of expression is limited, as it does not extend to hate speech, propaganda for war, incitement to violence, or advocacy of hatred that will incite others. This limitation Act.
5. Apart from freedoms directly related to expression and association on the Internet, the permeation of the Internet to many aspects of life means that it affects other rights such as labour (Article 41) economic and social rights (Article 43), language and culture (Article 44) and family (Article 45). This is because information relating to these rights is readily available online and the Internet as a medium can be used to provide services such as communication, thereby keeping family ties.
6. Article 24 provides for how rights may be limited. This is in line with the international law principle of legality, proportionality and necessity for limitation of human rights.
7. The Constitution creates actors who are charged with various roles that apply to the Internet. These include the judiciary, Parliament, Ministry, Regulator, the national human rights institutions as well as the public.
8. While states such as Ethiopia declared a state of emergency that included an Internet shutdown, Kenya's Constitution has prescribed measures for a state of emergency. Article 58 requires the input of Parliament and mandates the Supreme Court to decide the validity of emergency measures.

Principles for Limiting Human Rights on the Internet

Curbing hate speech online is a policy balancing act as it limits not only the freedom of expression but also other liberties enjoyed on the Internet including freedom of assembly, access to information and political rights. In the Kenyan perspective, two principles are important- public participation and principles of limiting human rights as provided for in Article 24.

Public participation requires that public bodies consult the people when making decisions that affect them. In the case of an Internet shutdown, the consequences of the decision are so dire that public participation is required at multiple layers- with political players from where hate speech online emanates and can be curbed; with the technical community who can advise on the consequences of disrupting the Internet for the stability of the Internet architecture; ISPs and MNOs who owe a duty to their customers to provide quality communication services; civil society organisations who fight for public interest; the general public who depend on the Internet for numerous functions other than political discourse.

Article 24 of the Constitution reiterates the principles of international law on limiting of human rights. Any limitation to a fundamental right is required to be legal, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Factors that must be considered before a right is limited include the nature of the right, importance of the limitation, balance of the enjoyment of rights by one individual versus the rights of others; proportionality and whether there are less restrictive means to achieve the purpose of the limitation.

In explaining Article 24, the case of *Okuta v AG*^{xiv} starts from the premise that “the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense” on one hand, while on the other hand that “the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions”. This calls for a balance between the individual right to express oneself and the rights of others.

The limitation to freedom of speech is captured in Article 33 of the Constitution. This has been effected in the National Cohesion and Integration Act which outlaws hate speech (s.13) and incitement (s. 62). In addition, the National Cohesion and Integration Commission (NCIC) has several mechanisms to proactively deal with hate speech both online and offline.

They include:

1. The advisory role where the Commission may advise the government on how to promote ethnic harmony.
2. Education and training to foster ethnic harmony.
3. Alternative dispute resolution methods such as conciliation, mediation, and arbitration among warring parties to promote ethnic harmony.
4. Investigation of complaints of incidences including hate speech online forwarded to the Commission by the Attorney General, Human rights Institutions and take remedial measures.
5. Investigation on its own motion or after complaints by the public.
6. Identify factors leading to ethnic disharmony in the country.

Other laws that limit freedom of expression online include the Election Code of Conduct under the Elections Act that refrains parties and candidates from acts of violence or intimidation and requires them to “condemn, avoid and take steps to prevent violence and intimidation. Therefore, there exists mechanisms for dealing with hate speech online that do not require the disproportionate measure that would be an Internet shutdown.

In previous frameworks, there were laws limiting freedom of expression online but these have been repealed. For example, section 88 of the Kenya Information and Communication Act gave the Minister power to take temporary possession of the premises of a licensee. Two provisions that criminalised speech have also been declared unconstitutional by the High Court. These are section 29 of KICA^{xvi} and section 194 of the Penal Code in ^{xvii} .

With these trends towards a society that is more cognizant of human rights, efforts by government to maintain order on the Internet must be based in the law.

ACTORS

There are a variety of actors that engage in access, use, policy and regulation of the Internet. A pertinent question in examining shutdowns that occur during political seasons relates to relationships and sense of trust among the various actors, as well as the independence of the decision makers.

Trust refers to the expectation of other people behaving virtuously towards others. It is often considered within interactions of individual elements within a shared or collaborative context (Sztompka, 1999; DiMaggio, 2005). The various actors are illustrated in Figure 1 and discussed below.

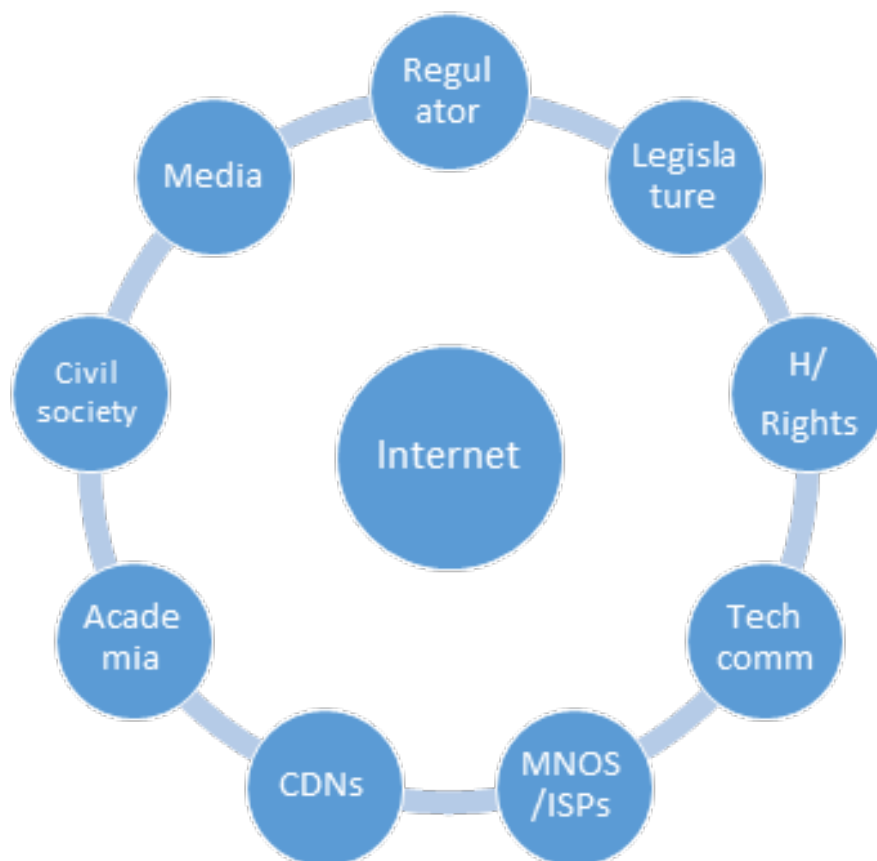


Figure 1: The various actors involved in accessing, using, and regulating the internet.

Anti-Hate Speech Agencies

There are several agencies mandated to deal with hate speech online. These include the National Cohesion and Integration Commission, the police, Office of the Director of Public Prosecutions as well as the Judiciary. As earlier discussed, the public has increasingly played a role in identifying harmful speech online and petitioning these agencies to take action. There is a need for more coordinated effort among these agencies not only in prosecuting hate speech online but also in educating the public on eliminating such speech.

The Regulator

Internet shutdowns orders in Africa were often/all issued by the regulators at the request of the Executive. In Kenya, the government has stated that it is concerned with misuse of social media^{xlviii} while the Authority has been on record stating that Kenya may experience a shutdown of the Internet should there be violence.^{xlix}

A pertinent question in examining shutdowns that occur during political moments is the relationship(s) among the various actors and the independence of the decision makers.

The Communications Authority is established as an independent body that should ideally not maintain any functional or financial interests with the executive or commercial interests. This objective is achieved through independent appointment of the Board as well as financial autonomy as the Regulator is funded by licence fees that it collects from licensees or directly from the national budget^l. However, Section 5C of KICA grants the Cabinet Secretary an avenue to issue policy guidelines to the Authority.

Having seen the nexus between a potential Internet shutdown and politics in Kenya, it is important that the regulator maintains its independence in making decisions about the Internet. This can be achieved through transparency in decision making, that is, explaining in explicit terms the legal basis, nature and extent of controls to the Internet and communication technologies.

Media

The term 'media' has been used to refer to communication forms and channels aimed at mass audiences, such as newspapers, magazines, radio, and television. Other characterizations have included sound recording, gaming, virtual reality, mobile phone and web-related industries. The term as used here refers to print, broadcast, and social media forms, all targeted at a mass audience.

The media, in this regard, are important stakeholders in the sharing of information on the Internet. Traditional print and broadcast forms have established an online presence in which they can exercise various legal rights, including the freedom of expression and of association. The social media space has both traditional media and individual contributors, and has raised the greater concern over the possibilities of the spread of hate speech, particularly on channels such as WhatsApp.

Legislature

Parliament's role includes legislature that ideally enhances rights on the Internet rather than diminishes them. It also has a role in oversight of Executive decisions such as interference with the Internet.

The 11th Parliament passed the Security Laws Amendment Act that limited some rights in order to give security agencies more teeth in the fight against terrorismⁱⁱ. While the trend towards legislations that claw back on human rights on the Internet is on the rise, the United Nations Human Rights Council passed a resolution in July 2016 condemning measures to prevent or disrupt the Internet and called upon all States to refrain from and cease such measures. In a complementary statement, UN experts and rapporteurs declared kill switches unjustifiable even during conflict and found that blocking access to the Internet was an extreme measure^{lii}. The African Commission on Human and People's Rights called for Ethiopia to unblock Internet in the country in 2016. The Freedom Online Coalition, which counts Kenya among its 30 state members, issued a statement in April 2016^{liii} "expressing deep concern" over Internet shutdowns and calling for "an open and interoperable Internet."^{liv}

A good practice is observed in Nigeria where a Digital Rights and Freedoms Bill, which forbids Internet shutdowns and throttling is under consideration.

Human Rights Institutions

The interconnectedness of the Internet with many aspects of life comes with many human rights issues. With many human rights being achieved on the Internet, the Kenya National Commission on Human Rights (KNCHR) should include digital rights in its agenda. The African Declaration on Internet Rights and Freedoms, an initiative adopted by actors in the digital rights movement, calls for involvement of national human rights institutions in promoting and protecting human rights online.^{lv} The declaration describes how the various rights such as freedom of expression, assembly, access to information and privacy can be applied to the Internet. While it has been endorsed by local organisations, there remains a gap in building capacity among local actors which KNCHR can fill.

The Commission already works with human rights civil society organisations and it could assist them to integrate digital rights in their work.

Technical Community

The Internet has developed and expanded globally due to the contribution and collaboration of various actors. The underlying infrastructure of the Internet is continuously improved by the technical community through research and development of products and standards.

In Kenya, the community is comprised of various bodies such as the local representatives of regional Internet registries, the Kenya Network Information Centre (KENIC) that administers the .ke namespace and Kenyan representatives to various international Internet standard setting and technical bodies. The Africa technical community recently discussed an anti-shutdown proposal at the annual Africa Internet Summit. The proposal recommended that governments who shut down the Internet should be denied resources such as Internet names

and addresses. While it did not pass, it provided an opportunity to conceptualise the role of the community in Internet governance^{lvi}.

Mobile Network Operators/Internet Service Providers

Mobile Network Operators (MNOs) and Internet Service Providers (ISPs) have become important players in delivery of human rights such as freedoms of expression and assembly as well as privacy online. MNOs also effect shutdown orders. In the shutdowns that occurred in Africa in 2016, MNOs cited conditions on their licences as the reason for obeying government directives.^{lvii}

With Kenya's new dispensation, private actors have a greater role in upholding human rights. For instance, Article 46 provides for consumer rights which require providers to deliver services of reasonable quality; provide information necessary for the full enjoyment of services; protect the health, safety, social and economic interests of consumers and compensate consumers for loss or injury arising from defects in services.

The UN Guiding Principles on Business and Human Rights provide the – respect, protect and remedy- framework for cases where operators are faced with state directives that may result in violations of human rights. In his recent report, Kaye (2017) applies this framework to telecommunication companies. He calls for companies such as MNOs to have clear human rights respecting policies. He recommends that the companies carry out due diligence through human rights impact assessments to identify gaps thereby preventing and mitigating human rights abuses^{lviii}. In the same vein, Article 19 recommends that operators could achieve more for human rights by being more transparent about issues that affect human rights^{lix}.

In the case of a Kenya, transparency could be achieved through informing subscribers of the possibility of a shutdown and involving them, where possible, in discussions with other stakeholders on averting the shutdown. In the case of a shutdown order, MNOs could disclose to the nature and extent of the shutdown and have dialogue with affected users on the effect of the shutdown.

Disclosures are important as they give consumers information with which they can distinguish between normal Internet glitches and government sanctioned disruptions^{lxii}. There have been shutdown orders that implicitly or explicitly do not allow companies to disclose information on the order. In some of the shutdowns in Africa in 2016, public pressure resulted in companies and the government disclosing the rationale for the disruptions. While Kenya has an access to information framework, companies would retain better relations with the public by proactively disclosing the basis of a disruption as opposed to concealing it.

AccessNow proposes a ten-point plan for operators in executing the Guiding Principles^{lxiii}. It includes procedural aspects such as proactive and responsive mechanisms for addressing grievances from customers. Substantive aspects such as policies and timely investigation of grievances are also covered. An important feature of the plan is compensation for those affected by actions of the company. As earlier stated, companies like Safaricom do compensate subscribers for unavailability of services. It is not clear however whether in the case of a government ordered disruption of services there would be compensation. This remains among the questions that could be resolved through a consultative process with all affected

parties.

For the shutdowns in Africa, none of the MNOs sought judicial interpretation of the shutdown directives. This may be due to their relationship with the regulator and the fear of putting their licences in jeopardy.

This problem requires a further study on the dispute resolution mechanisms for regulatory action and the checks and balances for the regulator as an independent constitutional body. It also calls for more transparency in the licensing process, to ensure the public's interest is protected and that operators are not required to take actions potentially violating human rights.

Content Delivery Networks

Content delivery networks (CDNs) are networks of servers strategically placed in several geographic locations to efficiently deliver Internet content. These include social media platforms and search engines. In the recent US elections, concern was raised about the role of CDNs in shaping opinions through the content they prioritise. This is not a new problem as there are examples of these intermediaries cooperating with governments to censor content.

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To address the issue of hate speech online during political periods, CDNs should engage their users and raise awareness on how to use their platforms responsibly. In a case like Kenya, they should develop mechanisms that are cognisant of local contexts and responsive to community norms and local laws. In addition, CDNs should enhance their transparency by publishing government requests to users as well as communicating their decision-making processes to users.

Academia

Academia has always been at the forefront in providing research to guide the larger community on emerging issues and the potential gains and harms of different paths. The current responses by government on the Internet include a commitment to increase access as well as increased monitoring and surveillance. The academic community needs to contribute to conversations on how the Internet should affect the society.

Civil Society

Civil society actors have capitalised on social media to influence citizen participation and where necessary incite and maintain civil disobedience. Aware of the risk Internet shutdowns pose to their advocacy efforts, civil society organisations launched the #KeepItOn Coalition to raise awareness about shutdowns and engage with governments and the private sector. Many are also taking to the Courts to file legal and constitutional challenges against the governments issuing shutdown orders, and the companies executing them.

Election Observers

There are many local and international bodies observing and monitoring the Kenyan elections.

In the past, they have included media monitoring as a parameter for understanding the conditions under which the polls were undertaken. With increased use of the Internet in different aspects of elections, observation missions should report on and analyse various information controls and their effect on human rights. Such reports would be useful in holding the state accountable on its obligations to protection and promotion of human rights in the digital space.

Conclusion

In summary, this brief makes the following points:

1. The Internet is interconnected with many aspects of life in Kenya. It enables civil and political rights directly and other rights such as economic, social, cultural and development rights.
2. A recent trend with African states is to shut down the Internet during political moments such as elections and protests. Indeed, the justification for an Internet shutdown in Kenya is to curb hate speech online and prevent it from becoming violence offline. Kenya has had experience with post-election violence which led to regulation of hate speech online. The National Cohesion and Integration Act is therefore the correct framework to address hate speech online.
3. The brief analyses the Constitution of Kenya and laws affecting freedom of expression and related rights online. It found that the Internet as an enabler of fundamental rights may not be limited except as outlined in Article 24.
4. The Internet governance space has many actors. Decisions such as disruption of the Internet affect its stability and openness as well as the economy and human rights. Such decisions must therefore be taken collectively and regard to the Constitution.

Recommendations

State actors must act within the spirit of the Constitution which calls for an expansion rather than limiting of rights. In this vein, state agencies ought to promote an open Internet as a space for divergent views. In particular:

1. Stakeholders that can effect an Internet shutdown should allay the public's fears by committing to keep the Internet open. A commitment by the Executive, the Regulator as well as MNOs not to interfere with the Internet and communication systems would demonstrate adherence to the Constitution and help to reduce tension around the highly contested elections.
2. Agencies should refrain from unilaterally threatening to switch off the Internet during elections as this causes unnecessary worry and contributes to over emphasis on elections as the only use of the Internet.
3. Providers should communicate with their customers and the public their outlook about the election period and communications. They should also disclose information such as emergency services available in case of any technical failures and involve the public in creating solutions in case of disruptions.
4. Agencies such as the NCIC and CA that have expended public funds in monitoring of social media and the Internet at large should share with the public reports on the objectives, extent and results of the monitoring.
5. Human rights institutions need to be more involved in conversations on digital rights, with appropriate access to telecommunications regulatory bodies, relevant contracts, tenders, and licenses, and expert officials.
6. There is need for building of capacity among actors on the Internet and emerging policy concerns. This would be a great aid in helping society to meaningfully participate in shaping the future of the Internet for the benefit of all.
7. In terms of checks and balances: licensed service providers tend to implement government directives out of soft coercion as they fear that noncompliance with directives of the regulator could result in difficulty in operating or cancellation of the licenses. There is need for dispute resolution mechanisms that licensees can approach without fear of losing their licenses.

8. Election observer groups should include openness of the Internet as a parameter when analyzing and reporting on the freedom and fairness of elections.
9. Internet shutdowns are a complex issue involving limitation of human rights. Any Internet shutdown order should be issued with legal backing such as a court order, and made publicly available, given their wide impact on society and its institutions.
10. There are multiple players involved in the access, use and regulation of the Internet. Beyond regulatory and legal constraints and guideline, there is need for greater levels of mutual trust and expectation among the institutional and individual actors, with each fulfilling their role without the need for a shutdown.
11. Issues for further study:
 - a. Dispute resolution mechanisms in regulation of the Internet in Kenya.
 - b. The nexus between hate speech online and violence offline.
 - c. The relationship between an open Internet and free and fair elections.
 - d. Other aspects of the Internet in political season for instance media manipulation by political actors to mobilise voters in some areas and suppress voters in others.
 - e. Compensation mechanisms to consumers for disruption of services due to government ordered Internet shutdowns.

ⁱ Writer, "Kenya's Communication Authority May 'Block Internet' During Elections."

ⁱⁱ Mutai, "Internet, Phones Blocked as House Debates Election Laws."

ⁱⁱⁱ Communications Authority of Kenya, "Sector Statistics Report Q2 FY 2016-17."

^{iv} Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the right to Freedom of Opinion and Expression."

^v Deji Bryce Olukotun, "Internet Shutdowns – an Explainer."

^{vi} Media Rights Agenda, Media Foundation West Africa and Kenya ICT Action Network, "Don't Hit the Switch: Making the Case Against Network Disruptions in Africa."

^{vii} Hal Roberts and Steve Murdoch, "Internet Censorship and Control."

^{viii} Odhiambo, "The Media Environment in Kenya Since 1990."

^{ix} "OONI - How Uganda Blocked Social Media, Again."

^x "OONI - Ethiopia: Evidence of Social Media Blocking and Internet Censorship."

^{xi} "OONI - The Gambia: Internet Shutdown during 2016 Presidential Election."

^{xii} Dyn Guest Blogs, "Egypt Leaves the Internet."

^{xiii} "After 4 Days, Gabon Is Getting Back on the Internet (Updated)."

^{xiv} Hussain, "The Dictators' Digital Dilemma."

^{xv} Minister wants Facebook shut down

<http://www.thepost.co.ls/local-news/minister-wants-facebook-shut-down/>

^{xvi} Ghana Police. <https://mobile.twitter.com/GhPoliceService>

^{xvii} Waki Commission, "Report of the Commission of Inquiry into the Post Election Violence (CIPEV)."

- ^{xviii} Writer, "Kenya's Communication Authority May 'Block Internet' During Elections."
- ^{xix} Communications Authority of Kenya, "Sector Statistics Report Q2 FY 2016-17."
- ^{xx} Ibid.
- ^{xxi} Sunday, "Safaricom's Outage and Its Crippling Effect."
- ^{xxii} For instance, Section 36 of the National Intelligence Service Act limits the right to privacy where there is suspicion of an act of terrorism; section 35(3) (c) of the Prevention of Terrorism Act allows the limitation of the freedom of expression the media and of conscience, religion, belief and opinion to prevent an act of terrorism; and Sections 57 and 58 of the Police Service Act provide for search and seizure powers and arrest without a warrant.
- ^{xxiii} Ministry of Information and Communications, "Draft Kenya ICT Policy."
- ^{xxiv} See <https://www.delivery.go.ke/flagship/ajira>
- ^{xxv} Copley, "Figure of the Week."
- ^{xxvi} Safaricom Ltd, "Safaricom 2016 Annual Report."
- ^{xxviii} Kiarie Njoroge, "Treasury Report Reveals Fears over M-Pesa's Critical Role in Economy."
- ^{xxviii} Bin Morshed et al., "When the Internet Goes Down in Bangladesh."
- ^{xxix} Deloitte, "The Economic Impact of Disruptions to Internet Connectivity."
- ^{xxx} Abdi Latif Dahir, "How Do You Build Africa's Newest Tech Ecosystem When the Government Shuts the Internet Down?"
- ^{xxxi} "[VIDEO] Safaricom Offers Free M-Pesa Services as Apology for Monday Outage."
- ^{xxxii} Ethan Zuckerman, "Orange Côte d'Ivoire Sets a Great Example."
- ^{xxxiii} The Free Library, "Telecoms Cutoff Case Adjourned until Nov. 21."
- ^{xxxiv} William Gumede, "Rise in Censorship of the Internet and Social Media in Africa, , 8(3), pp.413-421 (PDF Download Available)."
- ^{xxxv} Para 68-71, Inter-session Activity Report May- Oct 2016 of Tlakula, P , Special Rapporteur on Freedom of Expression and Access to Information in Africa African Union Commission http://www.achpr.org/files/sessions/59th/inter-act-reps/269/59os_inter_session_chair_srfe_comm_tlakula_eng.pdf accessed 29 Jan 2017.
- ^{xxxvi} See for example Freedom House Report 2016 available at <https://freedomhouse.org/report/freedom-world/freedom-world-2016>.
- ^{xxxvii} Deji Bryce Olukotun, "President of Ghana Says No to Internet Shutdowns during Coming Elections."
- ^{xxxviii} Waki Commission, "Report of the Commission of Inquiry into the Post Election Violence (CIPEV)."
- ^{xxxix} Mäkinen Maarit and Mary Wangu Kuira, "Social Media and Postelection Crisis in Kenya."
- ^{xl} Examples of cases taken up due to public pressure include Kamande wa Kioi (musician), Mutahi Ngunyi (political analyst), and politicians Wilfred Machage and the infamous Pangani Six. See <http://www.nation.co.ke/news/Court-detains-Cord-Jubilee-politicians-in-hate-speech-probe/1056-3249748-v5h34tz/index.html>.
- ^{xli} Moses Chelanga, "Challenges of Prosecuting Hate Speech Offences."
- ^{xlii} Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue."
- ^{xliii} Ndemo Bitange and Weiss Tim (Eds.), Digital Kenya - An Entrepreneurial Revolution in the Making.
- ^{xliv} Collective rights provided for include equality of all peoples (Art.19), self-determination (Art.20), collective property (Art. 221), sovereignty (Art.23) and the environment (Art. 24).
- ^{xlv} R versus Okuta.
- ^{xlvi} Republic of Kenya, Geoffrey Andare v Attorney General & 2 others.
- ^{xlvii} R versus Okuta.
- ^{xlviii} Lilian Mutegi, "New Policies on Use of Social Media to Be Introduced in Kenya."
- ^{xlix} Writer, "Kenya's Communication Authority May 'Block Internet' During Elections."

ⁱSection 5A provides that the Authority shall be independent from political or commercial interests and directs the Authority to be guided by national values and principles in Articles 10 and 231 of the Constitution.

ⁱⁱRepublic of Kenya, *CORD versus AG and others*.

ⁱⁱⁱ"Joint Declaration on Freedom of Expression and Responses to Conflict Situations."

ⁱⁱⁱⁱ"Press Statement of the African Commission on Human and Peoples' Rights on the Human Rights Situation in the Federal Democratic Republic of Ethiopia / Press Releases / ACHPR."

^{liv}<https://www.freedomonlinecoalition.com/news/foc-issues-joint-statement-and-accompanying-good-practices-for-government-on-state-sponsored-network-disruptions/>

^{lv}"The African Declaration on Internet Rights and Freedoms."

^{lvi} Andrew Alston, Ben Roberts and Fiona Asonga, "African Anti-Shutdown Policy."

^{lvii} @mtnug, "MTN Uganda."

^{lviii} Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression."

^{lix} Article 19, *Getting Connected: Freedom of Expression, Telcos and ISPs*.

^{lx} Bin Morshed et al., "When the Internet Goes Down in Bangladesh."

^{lxi} "Global Network Initiative and Telecommunications Industry Dialogue Joint Statement on Network and Service Shutdowns | Global Network Initiative."

^{lxii} For instance, Ugandan President responded to media questions about the shutdown order in February 2016. See <http://www.bbc.com/news/world-africa-35601220>

^{lxiii} Peter Micek and Jeff Landale, "Forgotten Pillar: The Telco Remedy Plan."

^{lxiv} China has attained notoriety for its crackdown on the internet. This has been made possible by private companies who not only comply with shut down orders but also engage in self-censorship to tailor their products for the Chinese market. In 2002, Yahoo refused access to websites that disseminate harmful information to protect the Internet users of China from the adverse influences of the information. Microsoft in 2005 manipulated its search algorithm for MSN Spaces to block words that the government deemed 'inappropriate'.



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