

# Digital Policy Digest



#### IN THIS EDITION

Halting Targeted Mass And Unlawful Communication Surveillance!

An Analysis of Kenya's Data Protection Act in the Age of Artificial Intelligence An Analysis of the African Union Development Agency - New Partnership for Africa's Development (AUDA-NEPAD) Artificial Intelligence Continental Roadmap for Africa.



## Digital Policy Digest

No. 1 of 2024

This Digital Policy Digest (DPD) documents digital rights policies and laws and presents guidance on areas needing reform. This edition features a tribute to the recently adopted Resolution 573 by the African Commission on Human and Peoples' Rights on unlawful targeted communications surveillance, an analysis of Kenya's Data Protection Act in the Age of Artificial Intelligence and an analysis of the African Union Development Agency - New Partnership for Africa's Development's (AUDA-NEPAD) Artificial Intelligence Continental Roadmap for Africa.

## Halting Targeted Mass And Unlawful Communication Surveillance!

PAGES 4 - 7

### An Analysis of Kenya's Data Protection Act in the Age of Artificial Intelligence

**PAGES 8 - 16** 

An Analysis of the African Union Development Agency - New Partnership for Africa's Development (AUDA-NEPAD) Artificial Intelligence Continental Roadmap for Africa.

PAGES 17 - 25

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Halting Targeted Mass and Unlawful Communication Surveillance!

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### Introduction

In a welcome development, the African Commission on Human and Peoples' Rights (ACHPR) passed a Resolution on the deployment of mass and unlawful targeted communication surveillance and its impact on human rights in Africa - Resolution 573 at the 77th Ordinary Session held from 20 October to 09 November 2023. The resolution addresses the mischief of African States leveraging communications surveillance technologies to violate the right to privacy, freedom of expression and other rights. Among others, the Resolution highlights the prevalence of 'mass surveillance and unlawful targeted communication surveillance that does not conform with international human rights law and standards, and the disproportionate targeting of journalists, human rights defenders, civil society organisations, whistleblowers and opposition political activists, without appropriate safeguards for privacy rights.' The identified target victims that fall prey to the deployment of surveillance measures in Africa are critical actors in society, contributing to protecting human rights and advancing access to information. Yet, State action has been a constant source of stifling their mandate to deliver on their critical roles.

Among others, the Resolution highlights the prevalence of 'mass surveillance and unlawful targeted communication surveillance that does not conform with international human rights law and standards

1. https://achpr.au.int/en/adopted-resolutions/573-resolution-deploy-ment-mass-and-unlawful-targeted-communication

# Background

Government policies and practices in Africa have pointed to the heightened interest in amassing communication surveillance technologies without clarity on the reasons for procuring the same or where procurement is made. Countries like Zambia, Nigeria, Morocco, Botswana, and Kenya are examples of countries that have been cited in the past as hotspots for unlawful spyware deployment using technologies from companies like Circles.<sup>2</sup> This failure of transparency, a key component of exhibiting democratic values, is a travesty of due process and a shortfall in a drive towards realising democratic values. Laws and policies have been put in place which suggest a deep interest in monitoring communications in Africa. In Tanzania, the Tanzanian Communication Regulatory Authority (TCRA) released a statement on 13 October 2023, calling for all individuals and companies relying on Virtual Private Networks (VPN) for their operations to declare their VPN usage and provide all relevant information, including their Internet Protocol (IP) addresses, an invasive call sanctioning the use of VPNs.

The issue is the ability of such a collection of data to imperil users' privacy leading to self-censorship. Additionally, it enables surveillance posing a real risk to human rights defenders, the media and other actors relying on VPNs in Tanzania. The measure by the TCRA threatens users' ability to access the Internet, occasioned by section 16(2) of the Electronic and Postal Communications (Online Content) Regulations, 2020, a concern given Tanzania's history of shutting down the Internet. The TCRA directive in essence, was a direct threat made on anonymity, calling for disclosure of IP addresses, among other things, especially in the absence of a legitimate purpose to do so. The passing of Resolution 573 came timely after the TCRA directive, and States with similar directives or laws in place must be guided accordingly to cease any interest in violating privacy.

2. https://citizenlab.ca/2020/12/running-in-circles-uncovering-the-clients-of-cyberespionage-firm-circles/

## **ACHPR Resolution 573**

The purpose of Resolution 573 is to direct States to comply with Article Charter on Human and Peoples' Rights (African Charter), including Article 9 on freedom of expression and access to information, among other rights. In addition, Resolution 573 reaffirms the ACHPR's Declaration of Principles on Freedom of Expression and Access to Information in Africa (the ACHPR Declaration)<sup>3</sup>, which provides in Principle 5 that the same rights that people have offline should be protected online, in accordance with international human rights law and standards recognising in Principle 40(1) the right to privacy, including the confidentiality of communications and the protection of personal information. African States are reminded that the spirit of the Declaration lives on, and States must adhere to the African Charter, to which their signatories. Principle 43(4) states that in accordance with Article 62 of the African Charter, States shall, in each Periodic Report submitted to the African Commission (ACHPR), provide detailed information on the measures taken to facilitate compliance with the provisions of the Declaration. While the Declaration is soft law, the performance of States regarding compliance with Article 9 of the African Charter is measured against the Declaration so States cannot

Resolution 573 reaffirms the ACHPR's Declaration of Principles on Freedom of Expression and Access to Information in Africa, which provides in Principle 5 that the same rights that people have offline should be protected online.

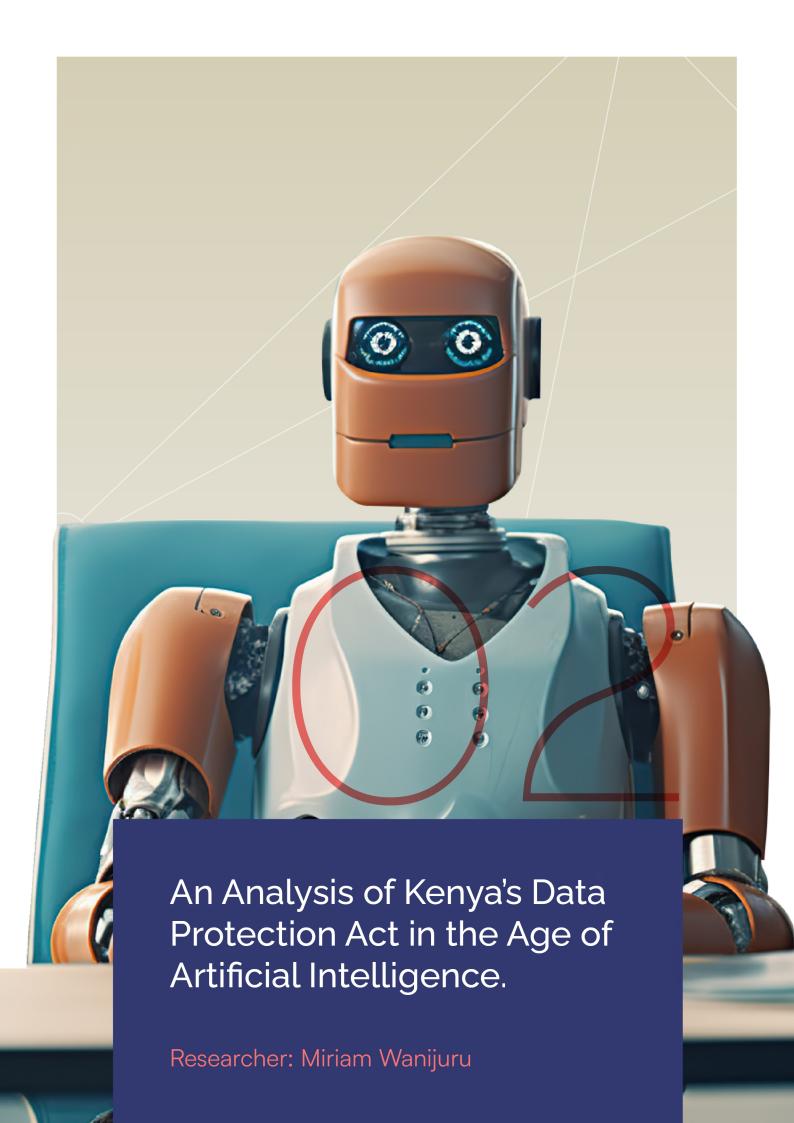
3. https://achpr.au.int/en/node/902#:~:text=The%20Declaration%20 establishes%20or%20affirms,to%20express%20and%20disseminate%20information.

evade it. National laws, policies and practices must adhere to this yardstick if human rights are to be fully realised.

To this end, the ACHPR calls on African States to do the following<sup>4</sup>:

- Ensure that all restrictions on the rights to privacy and other fundamental freedoms, such as freedom of expression, freedom of association and freedom of assembly, are necessary and proportionate, and in line with the provisions of international human rights law and standards;
- 2. Align approaches on the regulation of communication surveillance with relevant international human rights law and standards, considering safeguards such as the requirement for prior authorization by an independent and impartial judicial authority and the need for effective monitoring and regular review by independent oversight mechanisms;
- 3. Only engage in targeted communication surveillance that is authorized by law, that conforms with international human rights law and standards, and premised on reasonable suspicion that a serious crime has been or is being carried out;
- 4. Promote and encourage the use of privacy-enhancing technologies and desist from adopting laws or other measures prohibiting or weakening encryption, including backdoors, key escrows and data localization requirements, unless such measures are justifiable and compatible with international human rights law and standards;
- Ensure that victims of violations arising from arbitrary surveillance measures have access to effective remedies and take specific measures to investigate and prosecute cases of illegal and indiscriminate surveillance.

4. https://achpr.au.int/en/adopted-resolutions/573-resolution-deployment-mass-and-unlawful-targeted-communication



## Introduction

Kenya's Data Protection Act (2019) (DPA) provides a crucial framework for protecting personal data, yet it faces challenges in addressing the complexities of artificial intelligence (AI) disruption. While the Act establishes essential principles, such as consent and accountability, it does not fully account for the nuances of AI technologies, including algorithmic accountability and other ethical considerations. A recent town hall meeting convened by Paradigm Initiative highlighted the need for legislative reforms, regional collaboration, and awareness campaigns to address the gaps in the current policy landscape. Additionally, in the wake of Al, Kenya should draw upon international guidelines, such as those outlined by UNESCO, to inform the development of a comprehensive Al policy that goes beyond data protection and encompasses broader considerations such as intellectual property, transparency, and societal impact. Lastly, establishing an independent office for AI regulation and prioritising youth empowerment and skilling in AI is the way to go if Kenya is to realise the promises of AI in the digital age.

A recent town hall meeting convened by Paradigm Initiative highlighted the need for legislative reforms, regional collaboration, and awareness campaigns to address the gaps in the current policy landscape.

### A Background of Kenya's Data Protection Act 2019

In November 2019, Kenya's new DPA came into effect, establishing new standards for digital technologies such as Artificial Intelligence (AI)<sup>5</sup>. The DPA gives life to Articles 31(c) and (d) of the Kenyan 2010 Constitution, which spell out the need for data privacy<sup>6</sup>. It further imposes obligations on data controllers and processors to ensure the protection of personal data and outlines penalties for non-compliance. Since its enactment, the Data Protection Act (2019) has had some commendable achievements. These include, but are not limited to:

- The Office of the Data Protection Commissioner is up and running and has created important supporting frameworks as spelled out in the act.
- Establishment of three additional regional offices and additional centres in various locations across the country.<sup>7</sup>
- Creation of the Data Protection (General) Regulations 2021.8
- As of 2023, more than 2,000 data controllers and processors have been registered.
- The commission works very closely with civil society organisations and continues to engage in awareness-creation sessions focusing on educating businesses about their data protection obligations.

In the context of AI, most AI systems often rely on vast amounts of data,

- https://www.data4sdgs.org/resources/artificial-intelligence-practitioners-guide-kenya
- http://www.parliament.go.ke/sites/default/files/2017-05/The\_Constitution\_of\_Kenya\_2010.pdf
- 7. https://www.odpc.go.ke/ps-eng-john-tanui-mbs-launches-the-odpcs-second-regional-office-in-nakuru/#:~:text=The%20 ODPC%20has%20established%20its,Nyeri%2C%20Garis-sa%2C%20and%20Eldoret.
- 8. https://www.dataguidance.com/sites/default/files/the\_data\_protection\_regulations\_2021fin.\_1.pdf

including sensitive personal information, so as to operate effectively, thereby making the DPA a key foundation in how Al systems are developed and deployed.<sup>9</sup>

# Emergence of Artificial Intelligence: Challenges, Opportunities and Supporting Laws

Artificial intelligence technologies, including machine learning and deep learning algorithms, have the potential to revolutionise various sectors, including healthcare, finance, transportation, and governance. However, the deployment of Al raises concerns regarding data privacy, security, transparency, and accountability. Additionally, some Al algorithms perpetuate biases and discriminate against certain groups when the training data is not diverse or representative. Given the impacts posed by Al, many scholars and policy experts have argued that it is necessary to regulate Al. Unfortunately, in Kenya, as is the case in many African countries, an Al-specific policy is absent. There has also been no codification of imperatives for the ethical use of Al in Kenya.

Given this situation, other supporting laws and strategies are used as a point of reference as they are still essential foundations for Al governance. Some of the existing supporting laws on Al in Kenya include the following:

- 1. The Data Protection Act (2019)
- 2. The Computer Misuse and Cybercrimes Act of 2018, which provides
- 9. https://www.techpolicy.press/kenya-must-update-its-regulatory-frameworks-to-keep-pace-with-ai/

- a framework to deal with offences related to digital platforms.
- 3. The Kenya National Digital Master Plan 2022 2032, which identifies Emerging Technologies as one of the foundational and cross-cutting themes for the ICT ecosystem growth and development
- 4. A report by the Distributed Ledgers Technology and Artificial Intelligence Taskforce which provided recommendations on how the Government can leverage new technologies in Kenya.
- 5. The proposed 2023 Robotics and Al Society Bill which is aimed at governing the burgeoning sectors of artificial intelligence (Al) and robotics in Kenya. The bill is yet to be adopted as it is faced with strong opposition from industry insiders.
- 6. Article 10 of the Constitution of Kenya which provides national values and principles that can be adapted for the governance of Al in Kenya. These include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development.

Artificial intelligence technologies, including machine learning and deep learning algorithms, have the potential to revolutionise various sectors, including healthcare, finance, transportation, and governance. However, the deployment of Al raises concerns regarding data privacy, security, transparency, and accountability.

# Is Kenya's Data Protection Act Ready for Al Disruption? Thoughts from PIN's Digital Policy Café

While Kenya's Data Protection Act (2019) establishes essential principles and obligations for data protection, its effectiveness in addressing the challenges posed by Al disruption is subject to scrutiny. On the 30th of January 2024, Paradigm Initiative convened a town hall meeting in Nairobi, Kenya, composed of key actors in Kenya's tech policy space to dissect challenges, implications, and potential solutions in navigating the relationship between Al and data protection in Kenya. The town hall, dubbed Digital Policy Café, is part of a broader initiative by PIN aimed at drawing attention to essential voices in the development and formulation of policies on the African continent.

Overall, participants agreed that the DPA does not sufficiently address the complexities associated with AI systems, such as automated decision-making and algorithmic accountability. In light of this, they agreed that indeed, Kenya requires an AI-Specific policy as a matter of urgency. The community recommendations that emerged from the town hall meeting include:

- That the government re-evaluates and reforms legislative frameworks to address nuanced challenges posed by AI technologies.
- That regional collaboration and harmonisation of AI regulations is important in creating a unified front against tech companies attempting to bypass regulations.
- That the Kenyan government should focus on public education and awareness to shift the narrative around AI, while emphasising both risks and benefits.
- That the government should ensure the anticipated Al National Policy goes beyond the current copyright acts and adequately addresses situations where Al generates content.
- That the government should condense complex information into ac-

cessible formats, and using platforms like TikTok for short videos or comic strips to communicate key points, and leveraging artists to disseminate information on Al.

The DPA does not sufficiently address the complexities associated with AI systems, such as automated decision-making and algorithmic accountability. In light of this, Kenya requires an AI-Specific policy as a matter of urgency.

# Does Kenya's Data Protection Act Meet UNESCO's Recommendations on Al Ethics?

UNESCO's Recommendations on the Ethics of AI encompass two essential parts. Part III focuses on foundational principles, including proportionality, safety, fairness, sustainability, privacy, human oversight, transparency, responsibility, awareness, and multi-stakeholder collaboration. Part IV delves into specific areas for ethical consideration, including impact assessment, governance, data policy development, environmental impact, gender and cultural considerations, education and research, communication, economic implications, and health and social well-being.<sup>10</sup>

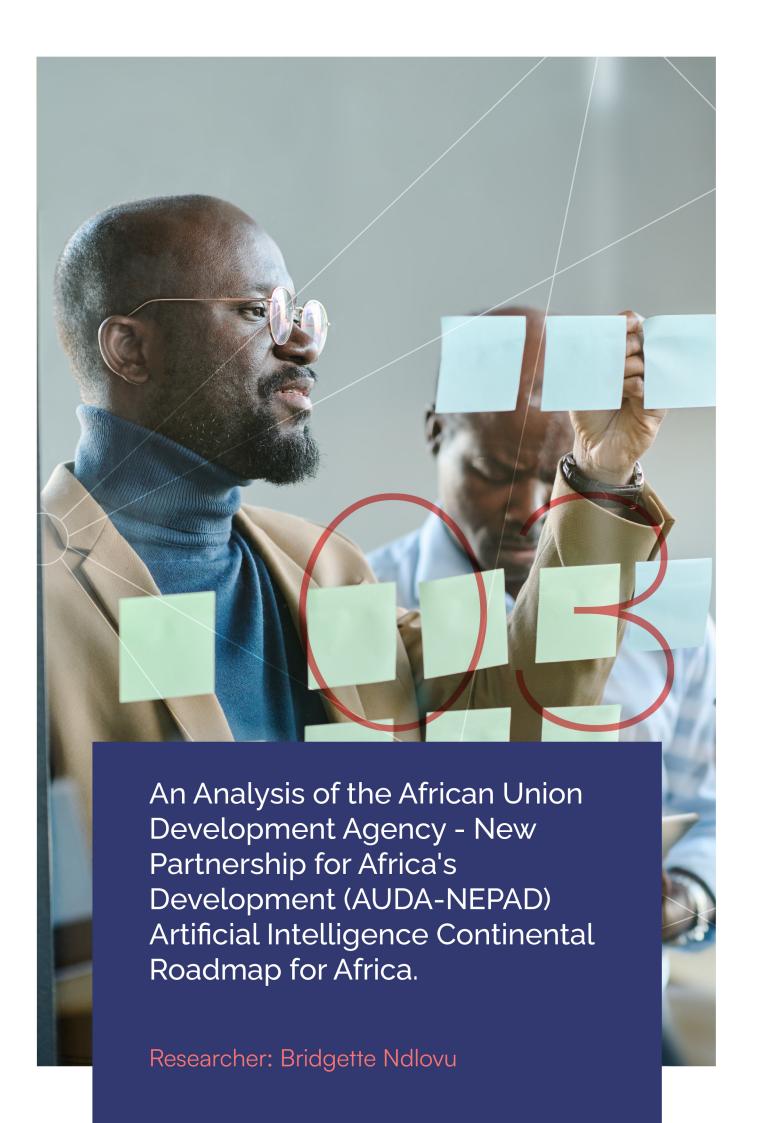
As pointed out in the town hall meeting, Kenya's DPA (2019) provides a foundational framework for safeguarding personal data which aligns with UNESCO's Recommendations on AI Ethics in some aspects but falls short in others. For one, the Act has provisions for fair processing of personal data and prohibits discrimination, addressing some aspects of fairness and non-discrimination. However, it does not sufficiently address potential biases in AI algorithms that could lead to discriminatory outcomes. Moreover, the Act emphasises transparency regarding data processing activities but it does not specifically address the transparency and explainability of AI algorithms, which are crucial for building trust and accountability in AI systems. Similarly, while the Act promotes awareness of data protection rights and obligations, contributing to data literacy, it does not specifically address awareness and literacy regarding AI technologies and their ethical implications.

Additionally, the Act recognises various stakeholders, including data controllers, processors, and regulatory authorities, but it does not explicitly promote multi-stakeholder collaboration in the development and governance of Al technologies. Lastly, the Act does not mandate specific ethical impact assessments for Al technologies, nor does it directly consider environmental concerns related to Al technologies, such as their energy consumption or ecological footprint.

<sup>10.</sup> https://www.dataguidance.com/opinion/international-unesco-recommendation-ethics

### Conclusion

As explained in this article, AI extends beyond the scope of data protection and individual data privacy rights, involving issues such as intellectual property, transparency and ethics. While Kenya's DPA provides a crucial foundation for data protection, it falls short of fully addressing the complexities and ethical considerations associated with AI technologies. Therefore, Kenya needs to supplement its existing legislation with specific policies and frameworks on AI that go beyond individual data privacy rights. These frameworks need to be comprehensive enough to not only address the regulatory aspects of AI but also focus on empowering and skilling youth in AI and emerging technologies. Lastly, the establishment of an independent office - separate from the Office of the Data Protection Commissioner (ODPC), dedicated to AI the regulation of AI testing and deployment is the way to go.



# Background

The African Union Development Agency (AUDA NEPAD) high-level panel of emerging technologies (APET) unveiled the Al Continental Roadmap for Africa on Wednesday, 28 February 2024, to spotlight the role of Albased technologies in potentially addressing challenges that negatively impact Africa's socioeconomic development and growth. The Roadmap proposes measures African countries can adopt to facilitate inclusive and sustainable Al-enabled socio-economic transformation. The strategy considers that once such measures are adopted, they are likely to contribute to improved efficiency, increased productivity, increased opportunities for employment, and improved economic outputs, among other potential benefits. The roadmap envisages that African countries can better participate in Al technology, broaden economic opportunities, and address constraints that prevent Africa from enjoying Al-enabled development.

The roadmap highlights the need for African member states to formulate legislation and laws to facilitate the adoption of Al. This ensures that countries without developed Al strategies or regulatory frameworks can establish the necessary structures to govern Al. The strategy highlights the need to showcase ongoing Al activities to demonstrate the potential impacts and outputs of the Al economy in Africa. This is to help countries understand the value of Al investments. This presents an opportunity for countries taking progressive steps towards comprehensive Al strategies to take the lead in demonstrating how their efforts contribute to the country's economic growth and other facets.

# Strategic Pillar 1: Developing Human Capital for Al

As part of pillar one, which focuses on developing human capital for AI, the roadmap proposes the need for African member states to strengthen human skills capital by capturing challenges and opportunities for the youth, including exemplary case studies of AI in human capacity building and considering the plethora of African languages, including establishing open-source platforms in the languages. The strategy also highlights the need to establish AI networks to identify and nurture talent in the field. These networks can provide a forum for sharing ideas, collaborating on projects, and mentoring young AI talent.

### Recommendations

The roadmap should explicitly include persons with disabilities in this pillar. Globally, there are one billion people with disabilities, 80 % of whom are from Africa. Therefore, the inclusion of persons with disabilities in this part is also crucial because Al algorithms are limited by a lack of large-scale data sets. Data on the specific needs of persons with disabilities in Africa is scarce, and often, there is an over-reliance on algorithms produced outside Africa.

11. The World Bank. Challenges Facing Persons with Disabilities in Sub-Saharan Africa — in 5 charts. https://www.worldbank.org/en/top-ic/poverty/brief/challenges-facing-people-with-disabilities-in-sub-saharan-africa-in-5-charts (accessed on 08 March 2024)

# Strategic Pillar 2: Using infrastructure and data as foundations for strengthening AI Systems

Pillar 2 is centred on the use of infrastructure, and data to strengthen sustainable AI solutions that contribute to national and continental economic growth in Africa. The strategy proposes that African countries should implement financial data and computing infrastructure to enhance access to financial data due to underdeveloped financial systems in many African countries.

### Recommendations

African member states should be made aware of the need to protect financial data and computing infrastructure from cyber threats and risks and be encouraged to take steps toward confronting harm, including espionage, critical infrastructure sabotage, and organised cybercrime. The strategy should encourage member states to develop threat assessments to establish the scope and scale of cyber threats.

In Pillar 2 (c), the roadmap highlights the need for governments to ensure that the prices of digital devices and equipment are affordable and available to citizens. To ensure equity in the access of devices, the strategy should further emphasise the need for governments to provide digital devices for persons with disabilities who lack basic devices to be able to pursue education, communicate with others and benefit from digital technologies.

The roadmap should emphasize the interrelation between data protection legislation and artificial intelligence, citing how governments should ensure that country-specific data regulations provide oversight of Al systems to ensure accountability. Emphasis on this correlation will also enhance personal data protection throughout the lifecycle of Al systems.

The roadmap should emphasise the need to prioritise digital accessibility as a foundational pillar for digital infrastructure to strengthen Al systems and safeguard the human rights of often excluded people.

# Strategic Pillar 3: Creating an enabling environment for Al development and Deployment

The roadmap outlines the need for supportive policies, regulations and legal frameworks that define ethics and intellectual property rights and proposes several strategies for creating an enabling environment for Al development and deployment.

### Recommendations

The roadmap should safeguard against the use of high-risk AI and encourage the undertaking of human rights impact assessments on products deemed to be high-risk Al. The strategy should also create a matrix for High-risk AI to define and categorise what products may be deemed high-risk Al. Developers of high-risk Al will need to comply with transparency requirements to prevent harm to human rights. In line with the above, the roadmap should encourage member states to design regulatory sandboxes for Al businesses and startups that develop and train Al models to get reviews and recommendations before public adoption. Often, Al models used in Africa do not reflect or represent local contexts and are usually likely to reinforce biases. To counter the biases and promote responsible AI development and deployment, the roadmap should encourage member states to develop mechanisms to hold foreign Al actors accountable. The roadmap should emphasise the need for human rights-compliant AI systems development and deployment across the African continent and adopt a human rights-based approach to the implementation of AI in Africa.

# Strategic Pillar 4: Establishing A Conducive Economic Climate For Al

Strategic Pillar 4 outlines how African countries can strengthen their economies by creating specialised AI clusters and focusing resources on healthcare, agriculture, finance, or transportation. This is expected to foster industry, academia, and government collaboration in developing solutions for Africa's challenges. The strategy also outlines the importance of incentivising startups by offering targeted support through funding, mentorship, and regulatory flexibility.

### Recommendations

This pillar does not address infrastructure gaps and should highlight the need for reliable and affordable access to high-speed internet and computing power as a crucial aspect of Al development and deployment. This pillar should be improved by outlining plans to address existing infrastructure gaps that could hinder Al adoption. This pillar does not explicitly mention the promotion of gender equality and inclusion within the Al sector. The pillar should highlight initiatives encouraging women's participation in Al education, leadership roles and entrepreneurship. In addition, beyond grant funding, the pillar should also highlight long-term strategies for ensuring the sustainability of the Al ecosystem by promoting private-public partnerships. PIN's Policy Brief titled Locked out of the Al Revolution: Africa's Absence in Emerging Technologies<sup>12</sup> highlights the importance of collaboration between governments and local and international private sector entities in accelerating innovation. Therefore, the strategy should emphasise the importance of public-private partnerships (PPPs), which are an alternative funding model and have the potential to offer long-term sustainability of the Al ecosystem.

12. Paradigm Initiative. Africa's Absence in Emerging Technologies) https://paradigmhq.org/wp-content/uploads/2023/10/Policy-Brief-Africas-Absence-in-Emerging-Technologies-1.pdf (accessed on 25 March 2024)

# Strategic Pillar 5: Building Sustainable Partnerships

The strategy proposes the need for collaboration and cooperation among various stakeholders, including governments, innovators, academia, the private sector and civil society organisations. This approach is commendable but needs to include some actors. The roadmap outlines the need to leverage existing partnerships and forge new ones with international organisations, development agencies and technology companies. This is progressive as technology companies are at the center of the development and deployment of AI technology. Their involvement will ensure that the AI technology that is developed and used is compliant with international and regional human rights instruments.

### Recommendations

The strategy should also specify the involvement of state and non-state-owned Internet service providers whose services can enhance or impede the use of AI technology. They are essential critical stakeholders due to their ability to ensure high-speed connectivity and control access to the Internet. Reliable and fast internet access is vital for data transfer, cloud computing, and real-time AI applications. Assuming that they fall within the bracket of the private sector will not aptly include them.

The strategy underplays the role of the media in shaping the rhetoric by not mentioning the need to create sustainable partnerships with media entities. Many of the technology companies whose products are consumed by billions of people around the world use Al. At the national level, media entities are at the forefront of using Al to revolutionise content creation, news consumption and shape rhetoric. The roadmap should include the media as a critical stakeholder in the White paper and the Roadmap.

# Strategic Pillar 6: Fostering Capacity For Monitoring And Evaluation Of Al

Pillar 6 is crucial as it highlights the importance of monitoring and evaluating Al strategies. African countries often develop relatively sound policies but fail to implement them. Integrating monitoring and evaluation is a great step in assessing progress and identifying emerging challenges.

### Recommendations

The strategy should be supported by clear implementation guidelines and timelines for reviewing and evaluating progress to guarantee its implementation. The plan should outline the stages of implementation and set targets and milestones for realising the identified actions. The AU should provide a mechanism highlighting how it will support member states in implementing, monitoring and evaluating the strategy at the national level for policy coherence.

## Conclusion

The framework provides a foundation for countries that have no existing Al policies, charters, or regulations and serves as a guiding framework for countries that intend to develop their strategies. Despite the lack of adequate infrastructure and poor internet access to enable the development and smooth deployment of Al systems in Africa, the framework is a welcome development as it aligns with the Agenda 2063, which locates technology as an enabler for vibrant digital economies. The development of the framework is commendable as it encourages African states to develop regulatory frameworks that protect citizens from Al-driven tech harms that can potentially exacerbate inequalities. The framework is a good step in safeguarding human rights in a digital world.

## More About PIN

Paradigm Initiative has worked in communities across Nigeria since 2007 and across Africa since 2017, building experience, community trust, and an organisational culture that positions us as a leading non-governmental organisation in ICT for Development and Digital Rights on the continent. Across our regional offices in Kenya, Nigeria, Senegal, Zambia, Zimbabwe, Cameroon, the Democratic Republic of Congo (DRC), and beyond, we have impacted youth with improved livelihoods through our digital inclusion and digital rights programs. The organisation's programs include Life Skills. ICTs. Financial Readiness. Entrepreneurship (LIFE) Training Program, a digital readiness workshop for girls, and Life@School Club Program. PIN has also built online platforms that educate and serve as safe spaces for reporting digital rights violations. These mediums, in the form of reports, short films, and educational online platforms, include Ayeta, Londa, and Ripoti. The organisation is also the convener of the annual Digital Rights and Inclusion Forum (DRIF), a pan-African platform where conversations on digital policy in Africa are shaped, policy directions debated, and partnerships forged for action. The forum has been held since 2013.



