



Mask or muzzle: The impact of COVID-19 measures on digital rights in Kenya

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INTRODUCTION

When we first heard of COVID-19 and how it was ravaging Europe, we did not think that it would have a great impact on our laws, especially digital rights. The expectation was more on the government imposing limitations on freedom of assembly, to enforce social distancing, and on the right to privacy, since contact tracing involves sharing people's personal information with third parties. Upon the confirmation of the first COVID-19 case in Kenya, the government swung into action by enacting various pieces of legislation and measures. While the measures were well intended, the manner in which existing laws have been interpreted during this COVID-19 period has proved the adage that the road to hell is paved with good intentions.

THE SYSTEMATIC SHRINKING OF THE DIGITAL RIGHTS SPACE

In this article, I will discuss the COVID-19 measures that touch on digital technologies and their impact on digital rights as stated in the African Declaration on Internet Rights and Freedoms.¹ I will then show how existing laws have been implemented during this COVID-19 period in ways that undermine digital rights also contained in the African Declaration. The last part of the article will discuss what Kenya needs to do when implementing COVID-19 measures without unnecessary infringements to people's digital rights.

THE ADVENT

In late February, a Kenya Airways staff member was suspended for filming a China Southern Airlines plane landing with 239 passengers at the Jomo Kenyatta

¹ <https://africaninternetrights.org>

International Airport. The video, which was shared online, led to an uproar by Kenyans. This prompted three court petitions by the Law Society of Kenya, two doctors and a lawyer who quickly secured court orders suspending flights from China for 10 days because of the coronavirus concerns.²

Weeks later, the Ministry of Health confirmed Kenya's first COVID-19 case in Nairobi on 12 March 2020. The case was of a Kenyan citizen who had travelled back to Nairobi from the United States via London, United Kingdom on 5 March 2020.³

THE POLICY MEASURES

As soon as this was announced, the government swung into action by invoking public health measures such as asking companies to allow their staff to work from home, travel restrictions, closing schools, suspending of public gatherings, and a nightly curfew to delay the spread of the disease, while the country ramped up investment in its health care systems.⁴ The law used was the archaic Public Health Act of 1921.⁵

These measures were introduced through subsidiary legislation and presidential orders and they limited the exercise of people's rights and liberties such as the right to privacy and freedom of assembly and movement, among many others. Other measures included encouraging the use of cashless payment systems such as mobile money in transactions.

Cashless payments

In a bid to encourage social distancing, President Uhuru Kenyatta encouraged players in the financial sector to explore ways of deepening mobile money usage to reduce the risk of spreading the virus through physical handling of cash. This directive plus a meeting between Safaricom and the Central Bank of Kenya led to the company announcing that all person-to-person transactions under KES 1,000 (USD 10) would be free for 90 days. The company also allowed small and medium-sized enterprises (SMEs) to increase their daily M-Pesa mobile money transaction limits from KES 70,000 to KES 150,000 (USD 700 to USD 1,500).

These measures had an impact, and the Central Bank of Kenya governor, Patrick Njoroge, stated in a presentation in May that there was a significant increase in transaction volumes and values. The KES 101-500 and KES 501-1000 bands had recorded an increase of 857,341 and 692,385 more transactions, respectively. These statistics confirmed that the waiver of fees for up to KES

2 Wangui, J. (2020, 18 March). Coronavirus: Suspended KQ employee eyes court. *Daily Nation*. <https://www.nation.co.ke/kenya/news/coronavirus-suspended-kq-employee-eyes-court-255684>

3 Ombur, R. (2020, 13 March). Kenya Confirms First COVID-19 Infection. *VOA*. <https://www.voanews.com/science-health/coronavirus-outbreak/kenya-confirms-first-covid-19-infection>

4 World Bank (2020, 29 April). COVID-19 Dampens Kenya's Economic Outlook as Government Scales up Safety Net Measures. <https://www.worldbank.org/en/news/press-release/2020/04/29/covid-19-dampens-kenyas-economic-outlook-as-government-scales-up-safety-net-measures>

5 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20242>

1,000 encouraged more mobile money transactions. The new band of KES 70,001 to KES 150,000 also recorded an increased average of 19,949 transactions per week. The increase in values of bank to e-wallet transfers shows that there is some success in the measure of reducing use of physical cash by Kenyans.⁶

Access to the internet and Google Loon

President Uhuru Kenyatta approved Google Loon services in Kenya to enable universal 4G data coverage in the country. The president said that the approval was in line with the government's measures to respond to the disruptions caused by the COVID-19 pandemic that has seen many people work from home to avoid contracting the respiratory illness.⁷ In this project, Google Loon is partnering with government-owned mobile network operator Telkom to provide internet connectivity to areas that are typically underserved, using high-altitude balloons with solar-powered cellular network gear on board, replacing the need for permanent tower infrastructure in environments where that option is either not practical or unaffordable.⁸

This measure is in line with Principle 2 of the African Declaration on Internet Rights and Freedoms, Internet Access and Affordability, which states that access to the internet plays a vital role in the full realisation of human development. The principle calls on states to facilitate high-speed internet access, such as by establishing necessary infrastructure, while making it as affordable as possible. The Google Loon project gives life to this principle during this time where internet access is needed for people to work from home as they practice social distancing.

The measure also aligns with Principle 7, which provides for the right to development and access to knowledge. Internet access at this time is crucial to enable school-going children to learn from home, as we figure out how life will go on with the COVID-19 pandemic.

IMPACTS ON THE RIGHT TO PRIVACY

Self-quarantine enforcement through mobile surveillance

As soon as it locked its borders, the Kenyan government started using electronic surveillance to monitor individuals who had sworn to self-quarantine after returning from countries ravaged by the novel coronavirus. The surveillance was to ensure that the individuals did not step out of their quarantine locations. Those who swore to self-quarantine were supposed to state where they would do so and were not supposed to switch off their gadgets. Those who breached the movement restrictions were picked up by medical personnel and police and

6 Central Bank of Kenya. (2020). Presentation on the Status and Outlook of Kenya's Banking Sector. www.centralbank.go.ke/uploads/presentations/1483113962_PRESENTATION%20ON%20KENYA'S%20BANKING%20SECTOR%20SITUATION%20AND%20OUTLOOK.pdf

7 Presidency of Kenya. (2020, 23 March). Kenya Approves Roll Out Of Google Loon 4G To Mitigate Coronavirus Work Disruptions. <https://www.president.go.ke/2020/03/23/kenya-approves-roll-out-of-google-loon-4g-to-mitigate-coronavirus-work-disruptions>

8 Jackson, E. (2020, 23 March). Kenya Approves Google's Loon Internet Project. *The Kenyan Wall Street*. www.kenyanwallstreet.com/kenya-approves-googles-loon-internet-project/

taken to government-run quarantine centres.

The Standard newspaper reported about a woman who had come from the UK and promised to self-quarantine for 14 days but went to her workplace. Security agencies tracked her to her office and took her to a government medical facility.⁹ The real-time monitoring of people's movements in Kenya through their mobile phones is only permissible through an investigation warrant.¹⁰ With the COVID-19 pandemic, this targeted surveillance became normal.

The National Transport and Safety Authority (NTSA) contact tracing (passenger manifest) with payment gateway services tender

Despite hailing itself as the Silicon Savannah due to the wide use of mobile devices, Kenya, like many other countries, did not bother with a contact tracing application. This is due to peculiar factors in the mobile economy such as the widespread use of feature phones, which cannot work with such a measure. Many Kenyans, however, use public transport, where they are exposed to other people, some of whom may be infected with COVID-19. In May, the National Transport and Safety Authority (NTSA) published terms of reference for prequalification of service providers who would provide it with contact tracing (passenger manifest) with payment gateway services. This was aimed at achieving compliance with the presidential directive on cashless payments and at the same time providing for deployment of an effective contact tracing application.¹¹

The Authority intends on introducing mandatory use of cashless payment for all public service vehicles as permitted by the law, which authorises them to impose any such conditions on the licence to secure the safety and convenience of the public.¹²

Principle 8 of the African Declaration states that everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. The principle requires targeted surveillance of online communications to be governed by clear and transparent laws.

While the Declaration requires that communications surveillance must be both targeted and based on reasonable suspicion of commission or involvement in the commission of serious crime and judicially authorised, it does not anticipate situations where surveillance may be needed for public health purposes, like now. And it is at this point that the principles of privacy by design, informed consent and the purpose limitation in data protection law are supposed to be alive.

Contact tracing technologies, when deployed, should only collect the most necessary and least intrusive data from the people under surveillance. This intentional purpose limitation will ensure that a public health activity does not

9 Ombati, C. (2020, 24 March). State taps phones of isolated cases. *The Standard*. <https://www.standardmedia.co.ke/nairobi/article/2001365401/state-taps-phones-of-isolated-cases>

10 Section 52, Computer Misuse and Cybercrimes Act. <http://www.kenyalaw.org:8181/exist/kenyalex/act-view.xql?actid=No.%205%20of%202018>

11 www.ntsago.ke/2020/notices/TOR%20Contact%20Tracing.pdf

12 Section 30 (2) of the National Transport and Safety Authority Act. <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2033%20of%202012>

turn into a mass surveillance activity. People need to be adequately informed of the limitations to their right to privacy during this COVID-19 period due to contact tracing and there must be full enactment of the data protection law. A similar approach was recommended by the United States Supreme Court, which held that public health surveillance and reporting are only permissible when they are directly linked to the preservation of health. Access to health information and records systems should still respect a patient's confidentiality and privacy.¹³

IMPACTS ON FREEDOM OF EXPRESSION

"Fake" and or "misleading" COVID-19-related information

Blogger Cyprian Nyakundi was arrested for allegedly posting on Twitter that a top tax authority official travelled abroad and failed to self-quarantine on his return. He is not the only blogger who has been arrested for COVID-19-related posts. Blogger Robert Alai was also arraigned before a court of law for allegedly publishing false information about the novel coronavirus on his social media platform. A civilian who goes by the name Elijah Muthui Kitonyo was arrested in Mwingi town for allegedly publishing false information that could result in panic on social media.¹⁴

In what can be said to be favouritism, a member of parliament (MP), John Kiarie of Dagoretti South, wrote a Twitter thread claiming that 7,000 people were quarantined by the government in various facilities. Health Cabinet Secretary Mutahi Kagwe refuted his claims, saying the figure was grossly exaggerated. The MP was summoned by the police and he presented himself to Kabete Police Station. After being questioned, he agreed to clarify and apologise for his post. The MP was not charged like other persons arrested for posting similar things online.¹⁵

The Computer Misuse and Cybercrimes Act contains a provision that makes it an offence to publish information that is false over a computer system, so as to cause panic, chaos or violence among citizens of the republic. The provision also makes it illegal to discredit the reputation of a person. Those found guilty of committing this offence shall on conviction be liable to a fine not exceeding KES 5,000,000 (USD 50,000) or to imprisonment for a term not exceeding 10 years, or to both.¹⁶

The Bloggers Association of Kenya had gone to court to challenge 26 sections of the Computer Misuse and Cybercrimes Act which contravened rights enshrined in the constitution, such as freedom of expression, opinion and the media. They managed to get these 26 sections suspended.¹⁷ However, in

13 *Planned Parenthood of Central Missouri v Danforth*. <https://www.law.cornell.edu/supremecourt/text/428/52>

14 Onger, L. (2020, 30 May). COVID-19: Freedom of expression, power and rule of law. *iFreedoms Kenya*. <https://www.ifree.co.ke/2020/05/covid-19-freedom-of-expression-power-and-rule-of-law>

15 *Ibid*.

16 Section 23, Computer Misuse and Cybercrimes Act. <http://www.kenyalaw.org:8181/exist/kenyalex/act-view.xml?actid=No.%205%20of%202018>

17 Wangui, V. (2018, 30 May). BAKE is successful after court suspends 26 sections of the

February 2020, Justice Makau dismissed the whole case as he found the law valid and constitutional.¹⁸ The Bloggers Association of Kenya has since then appealed the judgement at the Court of Appeal.

False advertising

Dr. Pranav Pancholi and Sylvia Ndinda, both of Avane Dermatology Cosmetic Clinic and Medical Spa, were arraigned at the Milimani Law Courts following their arrest by Directorate of Criminal Investigations officers and the Kenya Medical Practitioners and Dentists Board for publishing a false advertisement on social media regarding COVID-19 rapid self-test kits. The two had published an advert selling self-test kits for early diagnosis that offered results in 15 minutes. The advert also alleged that the test required no special facility or equipment, required no special training to use, and combined an antibody test for COVID-19.

False advertising is a crime and is prohibited in the Consumer Protection Act, 2012, which shields consumers from unprofessional practices by businesses. The two suspects pleaded not guilty and were released on bail.¹⁹

Cyberbullying

Kenya's first COVID-19 recovery patient, Brenda Ivy Cherotich, who was also patient zero, was heavily bullied by Kenyans online after she came forward to speak to Kenyans on her recovery journey. A section of Kenyans online took to social media to discredit and question the truth in her story. Some went to the extent of sharing her personal conversations and nude images, which led to her being heavily trolled and bullied online.²⁰

This angered Health Cabinet Secretary Mutahi Kagwe, who expressed his disappointment that the efforts of the health authorities and the two recoveries were viewed as public relations gimmicks. He even called on the police to arrest social media abusers. TV personality Yvonne Okwara called the actions on social media shameful and this also put a target on her back, with Kenyans on Twitter harassing her as well. The Computer Misuse and Cybercrimes Act contains a provision on cyber harassment but no one is on record for being arrested and charged for cyber harassment during this COVID-19 pandemic period.²¹

Principle 3 of the African Declaration is on freedom of expression. This right includes freedom to seek, receive and impart information and ideas of all kinds through the internet and digital technologies and regardless of frontiers.

Computer Misuse and Cybercrimes Act. *iFreedoms Kenya*. <https://www.ifree.co.ke/2018/05/bake-is-successful-after-court-suspends-26-sections-of-the-computer-misuse-and-cybercrimes-act>

18 Bloggers Association of Kenya (BAKE) v Attorney General & 5 others [2018] eKLR.

19 Onger, L. (2020, 18 March). Two accused of allegedly advertising fake Covid-19 test kits on social media. *iFreedoms Kenya*. <https://www.ifree.co.ke/2020/03/two-accused-of-allegedly-advertising-fake-covid-19-test-kits-on-social-media>

20 Onger, L. (2020, 3 April). Brenda Ivy Cherotich and Yvonne Okwara victims of cyberbullying in recent times. *iFreedoms Kenya*. <https://www.ifree.co.ke/2020/04/brenda-ivy-cherotich-and-yvonne-okwara-victims-of-cyberbullying-in-recent-times>

21 Section 27, Computer Misuse and Cybercrimes Act. <http://www.kenyalaw.org:8181/exist/kenyalex/act-view.xql?actid=No.%205%20of%202018>

The exercise of this right should only be limited by law, such as in the Kenyan situation, where the Constitution of Kenya is clear on limitations to the right to freedom of expression. The principle mentions the limitations listed under international human rights law (namely the rights or reputations of others, the protection of national security, or of public order, public health or morals), and adds that limitations must be necessary and proportionate in pursuance of a legitimate aim. The Kenyan Computer Misuse and Cybercrimes Act has a provision that reintroduces criminal defamation, and that is the provision that has been used to charge bloggers in Kenya.

RECOMMENDATIONS

Due to the emerging violations of online rights, privacy and freedom of expression, national policy-making bodies that are making law in response to COVID-19 should consider the following recommendations.

LEAD THE NARRATIVE

Threats to online rights in Kenya are from the application of existing laws. Section 23 of the Computer Misuse and Cybercrimes Act has had many social media users arrested and charged. The provision was one of the 26 provisions in the Act that had been suspended by the high court when the Bloggers Association of Kenya filed a case in court challenging their constitutionality. In the final judgement that was issued in early 2020, the case was dismissed, thus bringing the provision back to life. While it is in the state's best interest that there is accurate information out there, due to the prevalence of disinformation in this age, a proactive approach wins over policing speech.

The state should be the first to share all necessary information with its people and encourage healthy debate on issues. Being ahead of the narrative wins public trust and removes the vacuum in which misinformation thrives.

FOLLOW THE LAW

The Constitution of Kenya has a very balanced approach to human rights. It is a social contract between the Kenyan people and the Kenyan government, thus any measure that limits people's rights due to the COVID-19 pandemic should be constitutional. The measures that work force the government to take seriously its socioeconomic obligations of access to health care and water. Curbing COVID-19 also entails limiting various rights such as the right to privacy and freedom of movement, expression and assembly. These limitations should be provided for by law and should pursue a legitimate aim as expressly listed under international human rights law, as stated in Principle 3 of the African Declaration.

PUBLIC PARTICIPATION

The 2010 constitution requires public participation in key decision-making processes. However, progress towards this goal has been slow. Participation is costly and difficult to manage, especially in a country that is large and ethnically diverse. In the wake of COVID-19, people can no longer convene. However, legislative government bodies are innovating ways of collecting public views. Many counties in Kenya are forming ward-level WhatsApp groups to enable the collection of public views from people for the public participation process.

Such brilliant ideas on how technology can be used for the public participation process should be included in the Public Participation Bill, which is still in parliament. Technology should be used to ensure that policy making is an inclusive process by giving people access to channels where they can voice their opinions on the various draft laws that will affect them upon enactment.

CONCLUSION

In this article, I have highlighted several measures that have impacted the exercise of civil rights and liberties in the digital sphere. Some of the measures have been positive, such as the promotion of cashless payments and mobile money in order to reduce contact with paper cash while encouraging social distancing. The other positive development has been the boost to internet access through the Google Loon project. Some measures have shown the government's surveillance capabilities and intentions, such as self-quarantine enforcement through mobile surveillance and the NTSA contact tracing and payment gateway services tender.

Incidents that affected digital rights are arrests due to the spread of "fake" and/or "misleading" COVID-19-related information. This came in the wake of a clampdown on disinformation by state agencies. Other unfortunate incidents were cases of cyber bullying against recovered COVID-19 patients.

All these affected the following principles in the African Declaration on Internet Rights and Freedoms:

- Principle 2. Internet Access and Affordability
- Principle 3. Freedom of Expression
- Principle 4. Right to Information
- Principle 7. Right to Development and Access to Knowledge
- Principle 8. Privacy and Personal Data Protection

To ensure a proper balance is maintained while legislating on COVID-19, national policy-making bodies should proactively lead the narrative on all communications, follow the law, and engage members of the public when legislating. This will ensure that the government gets full support from the citizens in its fight against COVID-19.