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*Collins Odote**

PREVENTING AN INFODEMIC DURING A PANDEMIC: COVID-19 AND MEDIA PERFORMANCE IN KENYA

Collins Odote*

ABSTRACT

In the year 2020, the deadly coronavirus (COVID-19) disease ravaged the entire world and brought countries and their entire operations to a standstill for almost the entire year. With no known cure, the only arsenal that countries had to address this virus was through travel restrictions, social distancing and wearing masks. Against this background media became an important tool in the fight against the pandemic, becoming a critical source of information to citizens and medium of communication by Governments. Kenya recognizes the importance of media in governance. Consequently, Article 33 of the Constitution guarantees to the media freedom and independence to enable them collect and disseminate information without any control or hinderance. This right is particularly important during a pandemic such as COVID-19, where Governments can be tempted to limit such access. However, in enjoying this right, the media is expected to ensure that they play a positive role in the process of addressing the pandemic and not to exacerbate it. The Kenyan media played a catalytic role throughout the year 2020 as the country grappled with the COVID-19 pandemic and its impacts on lives and livelihoods, on security and economy and on politics. Against the above background, the paper seeks to assess how the pandemic affected the realization of media freedom in Kenya and secondly the performance of the media in reporting about the pandemic. Did it exercise its rights and freedoms responsibly? What lessons does the country learn from media's coverage? How facilitative was the regulatory framework? The paper argues that media's role in providing information is essential for addressing disasters as such it requires to be regulated in a such manner that enables it deliver on its fundamental mandate without undue restrictions.

I. THE EMERGENCE AND SPREAD OF COVID-19

When the world ushered in a new year on 1st January 2020, there was the usual pomp and celebrations. Individuals and countries looked forward to progress in various facets of life, from social, economic to political. Pope Francis, the head of the Catholic Church, for example spoke about violence against women, immigration, and peace as critical issues to focus on in 2020.¹ The United

* Associate Professor of Law, University of Nairobi, Faculty of Law.

1 Castelfranco S, 'On New Year, Pope Wishes the Faithful a 2020 of Peace' *Voice of America (VOA News)* (January 1, 2020) <<https://www.voanews.com/europe/new-year-pope-wishes-faithful-2020-peace>> accessed December 3, 2024

Nation's Secretary General, António Guterres in similar fashion also wished members of the international community a happy 2020. His main concerns were insecurity, inequality, and climate change while his hopes were pinned on action by the world's young people.² In Kenya President Uhuru Kenyatta's main concern was lack of unity in the country. He was, however, positive that the "New Year, and the new decade that it begins, present our Nation with tremendous opportunities to foster unity, prosperity, positive social change and the deepening of democratic gains and enhancing the rule of law."³

The world was oblivious at this point in time of the deadly coronavirus (COVID-19) disease that would ravage the entire world and bring countries and their entire operations to a standstill for almost the entire year, 2020. At the start of that year, it was only in China where the virus evolved from, had faced its wrath. Originally reported as a pneumonia virus of unknown etiology in December in Wuhan City, Hubei Province of China,⁴ by 7th January 2020 it was discovered that the cause was a novel coronavirus, provisionally named 2019 novel corona virus (2019-nCoV).⁵ It quickly spread to the rest of the world such that by 11th January, 2020 it had been reported in 218 countries and territories with a total of over 90 million infected people.⁶ With no known cure, the only arsenal that countries had to address this virus was through travel restrictions, social distancing and wearing masks. Against this background media became an important tool in the fight against the pandemic, becoming a critical source of information to citizens and medium of communication by Governments.

Kenya recognizes the importance of media in governance. Consequently, Article 33 of the Constitution guarantees to the media freedom and independence to enable them collect and disseminate information without any control or hinderance. This right is particularly important during a pandemic such as COVID-19, where Governments can be tempted to limit such access. However, in enjoying this right, the media is expected to ensure that they play a positive role in the process of addressing the pandemic and not to exacerbate it. The Kenyan media played a catalytic role throughout the year 2020 as the country grappled with the COVID-19 pandemic and its impacts on lives and livelihoods,

2 United Nations, 'UN Secretary-General's 2020 New Year's Message' (*United Nations Western Europe*, December 31, 2019) <<https://unric.org/en/un-secretary-generals-2020-new-years-message/>> accessed December 3, 2024

3 2020 New Year Message by His Excellency Hon Uhuru Kenyatta, December 31st, 2019, reported in Citizen Digital. Available at <https://www.citizen.digital/news/well-continue-making-kenya-better-says-uhuru-as-he-calls-for-unity-in-2020-310802>> accessed on December 3, 2024.

4 World Health Organization (WHO), 'Pneumonia of Unknown Cause - China' (January 5, 2020) <<https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>> accessed December 3, 2024

5 This naming was done by the World Health Organization. See Shou W and others, 'Effects of Media Reporting on Mitigating Spread of COVID-19 in the Early Phase of the Outbreak' (2020) 17 *Mathematical Biosciences and Engineering* 2693

6 'Countries Where Coronavirus Has Spread' (*Worldometer*) <<https://www.worldometers.info/coronavirus/countries-where-coronavirus-has-spread/>> accessed December 3, 2024

on security and economy and on politics. Against the above background, the paper seeks to assess how the pandemic affected the realization of media freedom in Kenya and secondly the performance of the media in reporting about the pandemic. Did it exercise its rights and freedoms responsibly? What lessons does the country learn from media's coverage? How facilitative was the regulatory framework?

The paper argues that media's role in providing information is essential for addressing disasters as such it requires to be regulated in a such manner that enables it deliver on its fundamental mandate without undue restrictions. At the same time, some regulation is necessary to avoid misinformation, which if left to occur can result to another crisis and exacerbate the pandemic being reported such as the COVID-19 pandemic. To make this case the paper is structured into seven sections. Following this introduction, section two discusses the role of media during a pandemic and points out the need to avoid it causing an infodemic due to misinformation. It argues that a delicate balance is needed between freedom and responsibility of the media to ensure that it informs without distorting information due to the implications of wrong information during the period of a pandemic. Section three based on this theoretical frame, discusses the response by Government to the COVID-19 pandemic, while section four highlights the response by the Kenyan media in 2020, the year that COVID-19 was reported in and fundamentally impacted the Kenyan society. It discusses innovations that the media employed to respond to the pandemic, ranging from changing the nature of live coverage for studio guests to working from home. It also discusses the media's traditional in spotlighting ills in society by analyzing the reporting of corruption cases such as the KEMSA heist. The section demonstrates that the Kenyan media performed exceptionally well, justifying its status as free, objective, and mature media within the continent. In section five challenges and shortcomings in the media's response is discussed, the aim being to demonstrate whether the media were successful in addressing the information needs for the country and preventing the spread of fake news around the epidemic. The section shows that despite its efforts, fake news was a key challenge in the reporting and communication around the COVID-19 pandemic. Section six of the paper assesses the regulatory framework governing media operations to determine the extent to which it is responsive to pandemics such as COVID-19 and demonstrates that the laws and policies are largely silent and out of tune with reporting during a pandemic. The extent to which it deals with such issues is in the context of security operations during terrorist attacks and not health crisis. Section seven concludes the paper.

II. ROLE OF MEDIA IN A PANDEMIC

The media plays a particularly important role in a society and in the democratic process, with some scholars arguing that it is the most powerful means of shaping public policy.⁷ In a democratic society, therefore, the role of the media assumes seminal importance.⁸ This led to it being categorized as the Fourth Estate early in the 17th century. Since then, its role as an avenue for public discourse is world-recognized. Consequently, despite the many ills that the media gets accused of, its role in a democracy and “as a watchdog, as a guardian of the public interest, and as a conduit between governors and the governed remains deeply ingrained.”⁹ They thus help to buttress and deepen democracy. In their role of being the link between citizens and their leaders, media becomes a useful avenue for public participation. In representative democracies, the involvement of the citizens in the governance process is quintessential. The media helps people engaged in the business of governance by informing, educating, and mobilizing the public.¹⁰ By performing the informative function,¹¹ the media enables people to thus build a civic culture of debate and engagement. This enables governing to be based on the consent of the citizenry. Media and media freedom is therefore a critical condition for sustaining representative democracy.¹²

One of the roles of the media, according to democratic theory is to serve as a watchdog and critic of the Government.¹³ This is based on the argument that deliberation within a polity is improved if a variety of heterogeneous viewpoints are aired and that contrasting opinions lead to more sound decisions.¹⁴ According to Nyabuga,¹⁵ media serves the truth and public interest by acting as both watchdogs against official excesses and spaces for construction, dissemination and sharing of important information.¹⁶ As the fourth estate, the media thus has the role of checking the exercise of political power through providing an avenue for debate and critique of state actions. This accords with the categorization of the media as the public sphere.¹⁷

7 Singh, L. ‘Role of Media in Making and Execution of Public Policy in India’ (2013) *The Indian Journal of Political Science*, 74(2), 309–312, 309

8 Ibid 310.

9 Coronel, S. ‘The role of the media in deepening democracy’ (2003) *NGO Media Outreach*, 1-23.)

10 Ibid, Nyabuga, G. ‘Devolved Power: A critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya’ (2017) *Africa Development*, 42(4), 104-119, 109

11 Blake D. Morant, ‘Democracy, Choice, and the Importance of Voice in Contemporary Media’ (2004) 53 *DePaul L Rev* 943, 946.

12 Takirambudde, P. N. ‘Media freedom and the transition to democracy in Africa’ (1995) *Afr. J. Int’l & Comp. L.*, 7, 18, 20.

Paterson M, ‘The Media and Access to Government—Held Information in a Democracy’ (2008) 8 *Oxford University Commonwealth Law Journal* 3, 3-24

13 Moehler D C and Singh N, ‘Whose News Do You Trust? Explaining Trust in Private versus Public Media in Africa’ (2009) 64 *Political Research Quarterly* 276, 281

14 Ibid.

15 Nyabuga, G. ‘Devolved Power: A critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya’ (2017) *Africa Development*, 42(4), 104-119

16 Ibid 106.

17 Habermas, J. ‘Theory and Practice’ (1974) *London: Heinemann*; Habermas, J. ‘The structural transformation of the public sphere: An inquiry into a category of bourgeois society’ (1989) MIT press.

With the evolution in the governance space and increased innovations in the digital space, the role and type of media has changed. Increasingly social media is becoming a key tool for public policy making and change. The unprecedented proliferation of social media engendered by the internet boom has provided a novel platform for virtual connection that permits civic engagements in social, economic, and political life.¹⁸ The African continent traditionally lagging in adoption of technology, has seen increased utilization of mobile technology and use of social media.¹⁹ It has become a useful tool for public policy discourse even preferred by world leaders. President Donald Trump made the use of Twitter his preferred communication channel, while the Arab Spring revolution was undertaken using social media too. The Arab Spring demonstrates the power of social media as an enabler of social change.²⁰ The concept of the Arab Spring refers to events that led to revolutions in North Africa and middle east, starting from December, 2010 when Mohammad Bouazizi set himself on fire in the streets of Tunisia sparking widespread street protests that culminated in the overthrow of the authoritarian regime in that country.²¹ The uprising was largely undertaken on Facebook, Twitter, Instagram, YouTube and the like, making social media a powerful tool in social mobilization in the Arab Spring. This spread from Tunisia to Jordan, Oman, and Yemen, Lebanon, Mauritania, Saudi Arabia, and Sudan and finally to Egypt.²² Social media was useful during the Arab Spring by “making citizens believe that they had a say in public affairs”,²³ “allowed people to connect, mobilize and organize on a large scale against their regimes”²⁴, and “allowed activists across Arab nations to share ideas and strategies with each other but broadcast the protests world-wide.”²⁵

Media plays an important role in the governance process of a society and affects both positive and negative events in society. For example, Amartya Sen wrote about the role that media can play in preventing a disaster, arguing that “There has never been a famine in a functioning multiparty democracy. A free press and the practice of democracy contribute greatly to bringing out information that can have an enormous impact on policies for famine prevention... a free press and an active political opposition constitute the best early-warning system

18 Oginni, S. O., & Moitui, J. N. ‘Social media and public policy process in Africa: Enhanced policy process in digital age’ (2015) *Consilience*, (14), 158-172, 172

19 Ibid 159

20 Smidi A and Shahin S, ‘Social Media and Social Mobilisation in the Middle East: A Survey of Research on the Arab Spring’ (2017) 73 *India Quarterly: A Journal of International Affairs* 196, 198

21 Ibid 196-7.

22 Howard, P. N., & Hussain, M. M. ‘Digital Media and the Arab Spring’ <https://ora.ox.ac.uk/objects/uuid:05e13455-3e16-478b-b0b3-f75b58ef489c/download_file?file_format=pdf&safe_filename=Digital%2BMedia%2Band%2Bthe%2BArab%2BSpring%2Bfinal%2Baccepted%2Bversion.pdf&type_of_work=Journal+article> accessed 3 December 2024

23 Smidi and Shahin (n 20) 204

24 Ibid.

25 Ibid.

a country threatened by famine could have.”²⁶ While the statement may be slightly exaggerated especially since famines occur even in democracies, the reality is that media is an important tool in preventing and responding to a famine situation.

The COVID-19 pandemic demonstrated the important role that media plays during a pandemic. Despite this importance, there is little literature on the interrelationship between media coverage and epidemics.²⁷ Since the World Health Organization (WHO) declared the novel Coronavirus (COVID-19) a pandemic, more and more journalists around the world were pulled in to report from the frontlines of the global crisis.²⁸ This is demonstrative of the role of the media in supplying information about the pandemic. Mass media became the major source of information about the novel coronavirus.²⁹ Just like in previous pandemics, such as SARS in 2003, H1N1 in 2009, and MERS in 2012, the media contributed significantly to providing information about the COVID-19 pandemic, but it led to an infodemic. In assessing the role of the media during the COVID-19 pandemic, a six-point typology has been developed by some scholars for that assessment.³⁰ These include the role of media in public health communication by providing information about the pandemic; health education; communicating strategies for social distancing, reduction of stigma, discrimination, and prejudice; supporting telemedicine; and managing infodemics. The essence is to assess the effectiveness to which the media delivers on risk communication.

Risk communication in the context of pandemics is about “real-time exchange of information, advice and opinions between health experts or officials and people who face a threat (hazard) to their survival, health or economic or social well-being. Its goal is that everyone at risk can take informed decisions to mitigate the effects a disease outbreak and take protective and preventive action.”³¹ Effective risk communication plays an important role in response measures to a pandemic. It “not only saves lives and reduces illness (by informing people on how to protect their health), but it also enables countries and communities to preserve

26 Sen M, ‘Development and Freedom,’ (1999) *New York: Anchor Books*.

27 Yu M and others, ‘Communication Related Health Crisis on Social Media: A Case of COVID-19 Outbreak’ (2020) 24 *Current Issues in Tourism* 2699, 1

28 ‘Ethical Considerations for Reporting on COVID-19’ (*International Center for Journalists*) <<https://www.icfj.org/news/ethical-considerations-reporting-covid-19>> accessed 3 December 2024

29 Anwar A and others ‘Role of Mass Media and Public Health Communications in the COVID-19 Pandemic’ [2020] *Cureus* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7557800/pdf/cureus-0012-00000010453.pdf>> accessed 3 December 2024

30 Ibid.

31 World Health Organization ‘Managing Epidemics: Key Facts about Major Deadly Diseases’ (January 1, 2018) <<https://apps.who.int/iris/handle/10665/272442>> accessed December 3, 2024, 43

their social, economic and political stability in the face of emergencies.”³² WHO guides that risk communication during an outbreak requires three fundamental and interrelated matters to be dealt with. First, concerned authorities should rapidly employ ways to relay necessary and concerning information to the public as soon as possible through the media.³³ Secondly, authorities should address fears, concerns, perceptions, and anxiety of people and devise ways to answer each query of everyone.³⁴ Media provides a useful avenue for dealing with this. Controlling rumours and disinformation is necessary.³⁵ social media is especially a culprit for this.³⁶ Adhering to the above will ensure effective health risk communication. Such communication will instruct, inform, and motivate appropriate self-protective behaviour; update risk information; build trust in officials and dispel rumours.³⁷ Of the stated issues the most critical factor is trust building so that recipients of the information can be able to trust its authenticity and rely on it since during a pandemic and other disasters, there is a high risk level and thus propensity to panic and mistrust.

While the media is useful during a pandemic as the COVID-19 experience globally demonstrated, there are challenges that it faces. These include restrictions of access to information by governments. There are governments that use the excuse of a pandemic to clamp down on the media and restrict its operating environment. This compounds the situation since without accurate and comprehensive information, containing the health pandemic becomes even more difficult. Secondly, just like in other sectors, the pandemic affects the operations and profitability of the media thus forcing it to take measures to stay afloat including downsizing staff and sometimes even closure either temporarily or permanently. Thirdly, there lacks global guidance on how to use media during large-scale pandemics to avoid issues like breach of personal privacy and address leakages. Some media platforms widely used during such pandemics, including COVID-19, like *zoom* suffered several hacks.³⁸ Fourth and more critically, is the dangers of misinformation, fake news and rumours thus leading to an infodemic during a period of a pandemic.

The occurrence of infodemic was a great challenge at the onset of the COVID-19 pandemic. The term infodemic has been used to refer to circumstances when

³² Ibid.

³³ Ibid, Anwar and others (n 29), 10

³⁴ Ibid.

³⁵ Ibid

³⁶ Ibid.

³⁷ Frohlich, K. L., & Potvin, L. 'The inequality paradox: the population approach and vulnerable populations' (2008). *American Journal of Public Health*, 98(8), 216–221.

Vaughan E and Tinker T, 'Effective Health Risk Communication About Pandemic Influenza for Vulnerable Populations' (2009) 99 *American Journal of Public Health* S324, 324.

³⁸ Bao H and others, 'Digital Media's Role in the COVID-19 Pandemic' (2020) 8 *JMIR mHealth and uHealth* e20156.

there is rapid spread of misinformation or fake news through social media platforms and other outlets.³⁹ This may result to people acting inappropriately jeopardizing the efforts of Government and health authorities to manage COVID-19.⁴⁰ WHO Director-General Tedros Adhanom Ghebreyesus in a speech at a Munich Security Conference used the term infodemics to describe the levels of misinformation around the virus, arguing that “we’re not just fighting an epidemic; we’re fighting an infodemic.”⁴¹ He stated that this was as a result of the fact that “Fake news spreads faster and more easily than this virus, and is just as dangerous.”⁴² As a consequence, The World Health Organization (WHO) and health authorities worldwide started to work closely with social media platforms including Facebook, Google, Twitter and YouTube to provide evidence-based information to the general public trying to actively counter the misinformation that is circulating.⁴³

Preventing an infodemic is just as important as addressing the challenges of the COVID-19 pandemic and any other pandemic. It is especially critical in this information era where information spreads extremely fast with the proliferation of social media. This was captured by the World health Organization as follows:

“We know that every outbreak will be accompanied by a kind of tsunami of information, but also within this information you always have misinformation, rumours, etc. We know that even in the Middle Ages there was this phenomenon. But the difference now with social media is that this phenomenon is amplified, it goes faster and further, like the viruses that travel with people and go faster and further. So, it is a new challenge, and the challenge is the [timing] because you need to be faster if you want to fill the void...What is at stake during an outbreak is making sure people will do the right thing to control the disease or to mitigate its impact. So, it is not only information to make sure people are informed; it is also making sure people are informed to act appropriately.”⁴⁴

The extent to which Kenya’s media was regulated and facilitated to address the infodemics during the COVID-19 pandemic is the focus of the rest of this article. This discussion takes place against the framework of freedom of the media and access to information. It recognizes that while the COVID-19 pandemic and its

39 Yuen Yu Chong, et al, “Guest Editorial, ” 108 *International Journal of Nursing Studies*, 1-2. Available at <https://www.sciencedirect.com/science/article/pii/S0020748920301280?via%3Dihub>.<accessed on December3, 2024>.

40 Ibid.

41 Director General, WHO (15 February 2020) ‘Munich Security Conference’ <<https://www.who.int/director-general/speeches/detail/munich-security-conference>> accessed December 3, 2024

42 Ibid.

43 Ibid, Zarocostas J, ‘How to Fight an Infodemic’ (2020) 395 *The Lancet* 676

44 Sylvie Brand, Director of Infectious Hazards Management at WHO’s Health Emergencies Programme, speaking to LANCET. Zarocostas J, ‘How to Fight an Infodemic’ (2020) 395 *The Lancet* 676

responses resulted to limitations to, and violations of human rights,⁴⁵ human rights protection is foundational to public health⁴⁶ with the director General of the World Health Organization, in the early days of the COVID-19 pandemic stating that “all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights”⁴⁷ Consequently, recognizing and protecting the human rights obligations during the COVID-19 pandemic was agreed upon as critical to effective public health law response and the promotion of democratic governance.

The international community has an elaborate framework of human rights since the adoption of the Universal Declaration of Human Rights in 1948. We now have an expansive international human rights regime, consisting of civil and political rights and social, economic and cultural rights buttressed by a regional human rights system. Together they provide a framework for obligations and responsibilities that duty-bearers must uphold, and rights holders are to enjoy. During a pandemic, the right to health is at the forefront. Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Delivering on this right was the guiding beacon in actions during the COVID-19 pandemic.

In the quest to address the challenges that the COVID-19 pandemic brought to societies; several human rights were threatened. Some of the rights that were threatened globally during this period, include, the rights to equality and non-discrimination; the right to health and life; the right to economic, social and cultural rights; participation, accountability and transparency.⁴⁸ One of the critical human rights violations sources during this period, is the emergency response measures taken by states in efforts to respond to pandemics and protect human health and lives. In Kenya for example, the imposition of curfews and burial orders in response to the pandemic led to violations of the constitution and threats to constitutionalism.⁴⁹

This article assesses the intersection between the right to health and the right to information during a pandemic by assessing how the media delivers on its role to provide accurate and timely information and the state’s role in regulating

45 Bueno de Mesquita J, Kapilashrami A and Meier BM, ‘Strengthening Human Rights in Global Health Law: Lessons from the COVID-19 Response’ [2021] SSRN Electronic Journal. Background Paper 11. Human Rights Center. The University of Sussex

46 Ibid

47 Adhanom, T. WHO Director General’s Opening Remarks at Mission Briefing on COVID-19- 12 March 2020. Available at <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19---12-march-2020>> accessed on December, 2024.

48 Bueno and others (n 45)

49 Kabira N and Kibugi R, ‘Saving the Soul of an African Constitution: Learning from Kenya’s Experience with Constitutionalism during COVID-19’ (2021) 20 African Human Rights Law Journal 1, 447

the delivery of that obligation in a manner that is facilitative and responsible. The assessments is made within the framework provided by the Economic and Social and Cultural Rights Committee in its statement issued in 2020 on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights⁵⁰ which urges that states must in responding to the pandemic do so within a human rights respecting context, or else “there exists a clear risk that the measures taken might violate economic, social and cultural rights and increase the suffering of the most marginalized groups.”⁵¹

One of the balancing areas that the Committee spoke to, and which is the focus of this article is information. In the view of the Committee:

“Accurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus and to protect the population against dangerous disinformation. Accurate and accessible information is also crucial in reducing the risk of stigmatizing, harmful conduct against vulnerable groups, including those infected by COVID-19. Such information should be provided on a regular basis, in an accessible format and in all local and indigenous languages.”⁵²

The states become an important duty bearer to ensure that this right is delivered while the media and citizens are right holders. Media is in addition under an obligation to ensure that as it delivers on the right of access to information and enjoys its rights to media freedom, it is responsible and does not threaten the right to health either through disinformation or misinformation.

III. COVID-19 DEVELOPMENTS AND GOVERNMENT RESPONSE MEASURES IN KENYA

The first case of COVID-19 was confirmed by the Government of Kenya on 12th March, 2020⁵³ and announced on 13th March, 2020 to the public by the Cabinet Secretary for Health Honourable Mutahi Kagwe.⁵⁴ The case was of a 27-year old Kenyan woman who had travelled back to Kenya from the United States

50 Social and Cultural Rights UN. Committee on Economic, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights: Statement / by the Committee on Economic, Social and Cultural Rights* (UN Committee on Economic, Social and Cultural Rights 2020) <<https://digitallibrary.un.org/record/3856957?ln=en&v=pdf>> accessed 3 December 2024

51 Ibid.

52 Ibid.

53 Merab E, ‘Kenya Confirms First Coronavirus Case – VIDEO’ *Nation* (March 24, 2020) <<https://nation.africa/kenya/news/kenya-confirms-first-coronavirus-case-video-277924>> accessed December 3, 2024

54 Ombuor R, ‘Kenya Confirms First COVID-19 Infection’ *Voice of America (VOA News)* (March 13, 2020) <<https://www.voanews.com/science-health/coronavirus-outbreak/kenya-confirms-first-covid-19-infection>> accessed December 3, 2024

of America (USA) via London on the March.⁵⁵ The Government confirmed that it had traced all those who had come into contact with this patient⁵⁶ as part of its response and containment measures. As the virus had no known cure at that time, the Government announced several preventive measures at the time of communicating this first case. These included: regular and thorough hand washing or sanitizing of hands; maintaining social distance of at least one metre from the next person; those coughing to either stay at home or maintain social distance; covering the mouth and nose while coughing and sneezing with a handkerchief, tissue, or into flexed elbow; staying at home when feeling unwell or with symptoms like fever, cough, and difficulty in breathing; suspension of public gatherings, meetings, religious crusades, games and events etc., suspension of inter – school events, but keeping schools open, and travel restrictions outside the country unless necessary and no travel to disease Epicenter countries.⁵⁷

The Government at the same time recognized the importance of information in fighting the pandemic and thus made two interrelated directives at the time of providing the above guidelines on how to handle the pandemic. First, it committed to “dissemination of information on daily basis.”⁵⁸ Secondly it warned of the dangers of an infodemic in the process of spreading information about the pandemic, pointing out that “Kenyans must not abuse social media platforms or indulge in spreading misinformation that can cause fear and panic.”⁵⁹ This was in recognition of the dangers of an infodemic at the time that the country was dealing with a pandemic with no known cure and with very little known information, therefore the risk of panic were real and imminent.

In recognition of the importance of information and the media in addressing the pandemic, the Ministry of Health issued daily press briefings giving a status of the number of cases, deaths and recoveries in the countries and the measures that the Government was putting in place to respond to the health, social, economic and political challenges that the COVID-19 pandemic posed to the country.⁶⁰ The President also periodically addressed the nation when the measures to be put in place were grave, with the first such briefing being on 15th March, 2021.

The Government’s first action when it became evident that COVID-19 would be a crisis in the country, was to establish a National Emergency Response Committee on Coronavirus, through an executive order issued by President

55 (n 53).

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

60 For some of the press briefings, see the website of the Ministry of Health at <<https://www.health.go.ke/>> accessed 3 December 2024

Uhuru Kenyatta on 28th February 2021.⁶¹ The committee was to upscale and coordinate Kenya's preparedness and response to COVID-19 and be chaired by the Cabinet Secretary for Health. While it originally only had persons from Government, the committee with time co-opted members from other sectors to ensure success of its initiatives.

The Government took several actions to respond to the pandemic. The first comprehensive set of actions were contained in the press briefing by the President on 15th March 2020. These included restricting international travel, closure of schools and institutions of higher learning, working from home, cashless transactions and banning of congressional meetings.⁶² In addition Government set up a toll-free number, 719 for reporting suspected corona virus cases.

Since then, the Government took several other measures to respond to the virus. Two of the most outstanding ones were economic and security responses. The economic measures were communicated in the President's address on 25th March, 2020⁶³ and involved cushioning Kenyans against the effects of the pandemic.⁶⁴ These included reduction of Value Added Tax to 14%, Pay As You Earn to 25% and turnover tax rate to 1%.⁶⁵ In addition, the Government also was to release 30 billion to all those owed for pending bills, 10 billion to vulnerable members of society and use of one billion from Universal Health Coverage to employ new health workers to respond to COVID-19,⁶⁶ amongst other economic measures.

The second set of measures were those relating to curfew. Worldwide travel restrictions have been adopted as an important tool for controlling the spread of COVID-19. In addition to restricting international travel, Governments also issued cease movement orders of varied scale at the domestic level, ranging from curfew orders to no movement at all except for essential supplies like food. The Kenya Government adopted curfew orders with the first such measure being put on place through a directive by the President on 25th March 2020 and implemented by the Cabinet Secretary for interior who has the legal powers. The President's directive provided that "effective Friday, 27th March 2020; a Daily Curfew from 7 p.m. to 5 a.m. shall be in effect in the territory of the Republic of Kenya, with all movement by persons not authorized to do so or not being Medical Professionals, Health Workers, Critical and Essential Services

61 Executive Office of the President, National Emergency Response Committee on Coronavirus, Executive Order Number 2 of 2020 < <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/119769/Executive-Order-No-2-of-2020.pdf> > accessed 3 December 2024

62 The Elephant, < <https://www.theelephant.info/documents/pres-uhuru-kenyatta-presidential-address-of-25th-march-2020-on-covid-19/> > accessed on December, 3, 2020

63 Ibid

64 Ibid.

65 Ibid.

66 Ibid.

Providers, being prohibited between those hours.”⁶⁷ Following a plea by Media Owners Association, the list of essential service providers included “licensed broadcasters and media houses.”⁶⁸ The critical question though is what service did the media provide to qualify them as essential service providers and how did they perform in the discharge of those functions?

IV. INNOVATIONS AND POSITIVE ROLE OF MEDIA

In an opinion in the Daily Nation on 24th April, 2020, Njoki Chege argued that the COVID-19 pandemic gave the media an opportunity to reclaim its past glory in the public sphere, pointing out that it was “the news story of the year.”⁶⁹ She also argued that there would be a plethora of academic articles by media scholars analyzing “how media covered the pandemic applying a slew of theories from framing to priming and the much-misunderstood ‘agenda-setting theory’.”⁷⁰ Her arguments provide a useful lens for assessing the role of the media during the pandemic. Framing, priming, and agenda-setting provide useful theoretical frameworks for discussions the contributions that Kenyan media played during the pandemic.

In assessing the contribution of the media, one should recollect the primary role it plays in society, which is to provide information, thus enabling citizens to make daily decisions affecting their lives. As part of providing the information, the media can follow what is topical or it can set the tone and priority of debate. This latter is what is known as the agenda setting theory. Traceable to the writings of Lippmann⁷¹ and later McCombs and Shaw,⁷² the theory sees the media’s role as going beyond being just a conveyor of information but to determining what the public eventually perceives as important and thus focusses on. As one writer has stated, “conceptually, agenda setting involves the social learning of the relative importance through the coverage that the issues receive in the news media.”⁷³ The media, under this theory, therefore affects society’s perception of what the important topics of the day are.⁷⁴ The theory has been applied to show the importance of the media to the coverage of COVID-19 pandemic and of

⁶⁷ Ibid.

⁶⁸ Njagih M, ‘Media among 13 groups exempted from curfew.’ (The Standard, 2020) < Media among 13 groups exempted from curfew - The Standard > accessed on 3 December 2024

⁶⁹ Chege N, ‘Kenya: COVID-19 Gives Kenyan Media Chance to Reclaim Lost Glory.’ (Daily Nation, 24 April 2020) < <https://allafrica.com/stories/202004280769.html> > accessed on 3 December 2024

⁷⁰ Ibid.

⁷¹ Lippmann, W., ‘Public Opinion.’ (1992) New York: *McMillan*.

⁷² McCombs ME and Shaw DL, ‘The Evolution of Agenda-Setting Research: Twenty-Five Years in the Marketplace of Ideas’ (1993) 43 *Journal of Communication* 58, 67

⁷³ Wanta, W. ‘The Public and the National Agenda: How People Learn About Important Issues’ (1997) Mahwah, New Jersey: Lawrence Erlbaum Associates, Publishers 5.

⁷⁴ Weaver, D.H. and others. ‘Media agenda-setting in a presidential election year – issues, images and interest’ (1981) NY: Praeger 4.

health issues, it being categorized as “critical”⁷⁵ in “shaping the public response to this crisis.”⁷⁶ The importance of the theory is its demonstration that the media educates the public about how much importance it should place on one issue versus another.⁷⁷

Related to the agenda setting theory are those of framing and priming. Framing is about how the information is packaged and presented. The theory “suggests that how something is presented to the audience (called “the frame”) influences the choices people make about how to process that information.”⁷⁸ Priming on its part is “the impact that agenda-setting can have on the way individuals evaluate public officials by influencing the thematic areas or issues that individuals use to form these evaluations.”⁷⁹

In debating whether COVID was the focus of agenda setting by the media, it is important to recognize that the issue was already high up on the recognition and attention of public discourse as soon as it was discovered in the country. However, the media contributed to its continuing to occupy prominence in public discourse by how it framed the issue. From health issues, to security, economic and even social issues, the media covered all aspects of the pandemic and to that extent, the media can be argued to have set the agenda by how it framed and primed the COVID-19 pandemic coverage.

Provision of information is important in dealing with pandemic for enabling people have accurate and up to date state of developments so that they can be appraised and enabled to take appropriate preventive and responsive action. Almost every media house in Kenya took the initiative to run public health campaigns⁸⁰ and bring information and analysis around COVID-19 pandemic and its various impacts. By covering the issue consistently, the media played a catalytic role in improving health by fighting the pandemic. As one newspaper report asserted:

“The rate at which Covid-19 appears in media demonstrates the role of media as a catalyst in promoting health at all levels. Ranging from washing hands to maintaining social distance, radio stations and televisions provided opportunity

75 Krupenkin M and others, ‘If a Tree Falls in the Forest: COVID-19, Media Choices, and Presidential Agenda Setting’ [2020] SSRN Electronic Journal. *Media Choices, and Presidential Agenda Setting*.

76 Ibid.

77 Kamau, M. M. ‘Agenda setting via gate-keeping theory in the press coverage of presidential candidates in Kenya’ (2016) *Journal of Media and Communication Studies*, 8(9), 90-102, 91

78 Arowoloi O. ‘Understanding Framing Theory’ Working Papers, 2017. Available at <https://www.researchgate.net/publication/317841096_UNDERSTANDING_FRAMING_THEORY> Accessed 3 December 2024 .

79 Scheufele DA, ‘Agenda-Setting, Priming, and Framing Revisited: Another Look at Cognitive Effects of Political Communication’ (2000) 3 *Mass Communication and Society* 297, 297

80 The Media Observer, ‘What Role Has Kenyan Media Played during Covid-19 Outbreak? – Media Observer Newsletter’ (April 14, 2020) <<https://mediaobserver.co.ke/index.php/2020/04/14/media-monitoring-what-role-has-kenyan-media-played-during-covid-19-outbreak/>> accessed December 3, 2024

to health experts and victims who had recovered to increase the level of awareness on the dangers of the virus.”⁸¹

The sustained coverage by the media also ensures that citizens have reliable and up to date information on the virus and related issues. This is important in helping to ensure that citizens enjoy their constitutional rights of access to information.⁸² The Kenya National Commission on Human Rights recognized this essential role played by the media stressing that “accurate and timely information was key to addressing the pandemic”⁸³ since it kept “citizens well informed on the progress in a bid to avert unnecessary panic through misinformation.” As a result of media focus on COVID-19 pandemic and the fact that most Kenyans worked from home in 2020, 55 percent of respondents on a survey undertaken by the Media Council of Kenya confirmed that their media usage had increased during the COVID-19 pandemic.⁸⁴

The importance of the media was evident by the Government’s focus on using it to communicate important developments. The daily press briefings are an acknowledgment of the agenda setting and information dissemination role. While the appointment happened just few days before coronavirus initial case was recorded in Kenya, the choice of Senator Mutahi Kagwe as the Cabinet Secretary for Health and his performance thus far is demonstrative of the importance of Media. His performance was largely celebrated and attributed to his media savviness and background⁸⁵ although not without accusations in other quarters, for example, allegations that he was involved in corruption linked to procurement through the Kenya Medical Supplies Agency.⁸⁶

Media is an important watchdog in society. In a democracy media helps to keep those with power accountable. By informing citizens about the problems and occurrences in society, the media makes those who wield power answerable to the public.⁸⁷ As a watchdog, the media becomes an important tool for enhancing

81 Ibid.

82 Article 35, Constitution of Kenya 2010.

83 Nzemi N, ‘Press Statement: Advisory on the COVID-19 Disease Response in Kenya’ (Kenya National Commission on Human Rights 17 March 2020) <<https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1092/Press-Statement-Advisory-On-The-COVID-19-Disease-Response-In-Kenya>> accessed 3 December 2024

84 ‘State of the Media Report 2020’ (*Media Council of Kenya*, November 2020) <<https://mediacouncil.or.ke/node/387>> accessed December 3, 2024

85 Okolla D, ‘The Corona Cold War: The Battle of Media Narratives - The Elephant’ (*The Elephant - African analysis, opinion and investigation*, April 11, 2020) <<https://www.theelephant.info/features/2020/04/11/the-corona-cold-war-the-battle-of-media-narratives/>> accessed December 3, 2024.

Odote C, ‘Let’s Pool Together in War on Coronavirus’ *Business Daily* (March 29, 2020) <<https://www.businessdailyafrica.com/analysis/columnists/Let-s-pool-together-in-war-on-coronavirus/4259356-5508298-c561sw/index.html>> accessed December 3, 2024

86 Muraya J, ‘It’s a Big Lie, Kagwe Says of KEMSA CEO’s Claim on Tenders Manipulation » Capital News’ (*Capital News*, September 2, 2020) <<https://www.capitalfm.co.ke/news/2020/09/its-a-big-lie-kagwe-says-of-kemsa-ceos-claim-on-tenders-manipulation/>> accessed December 3, 2024

87 See Singh L (n 7) 310

transparency and accountability since it will shine the spotlight on actions of public officials thus empowering citizens to question public policy decisions and their implementation. During the COVID-19 pandemic in Kenya, this role of the media as a watchdog was even more critical. As some writer has argued, the media's role during the pandemic ballooned globally with it framing, explaining, and analyzing events around the crisis.⁸⁸ During times of crisis, the power-grab by the executive branch is greatest. In the Kenyan case, the institutional weakening of other watchdog institutions starting with Parliament, civil society and constitutional commissions meant that the media was the main actor in ensuring accountability during the COVID-19 pandemic.

Through its work, the media was able to push for accountability of Government in its actions and thus ensure that the traditional emergency excuses did not act as a shield for sleaze or abuse of human rights in the guise of fighting COVID-19 pandemic. What became known in media cycles as the KEMSA COVID-19 Heist⁸⁹ demonstrated this catalytic role of the media.

In terms of innovations, like everybody else, the media's operating approach and landscape changed due to COVID-19 pandemic in Kenya. Newspapers that had been used to selling hardcopies found their sales dwindling since Kenyans were not buying paper for fear of spreading the virus. In return, subscriptions to digital copies, that had long existed but not exploited to the full, became a source of revenue for media outlets as these kept readers abreast with information both about the pandemic and other topical developments in the society. In addition, technology application was enhanced in the operations of media, from prerecording interviews to having studio guests operating from the comfort of their homes to even having journalists themselves run their programmes from home; the media innovated to ensure that they continued performing their role in society.

V. CHALLENGES AND SHORTCOMINGS

While media played a critical role during the COVID-19 pandemic, it also had its share of both challenges and shortcomings. The first challenge was an economic one. Worldwide COVID-19 was projected to have a negative effect on the global economy, including resulting into a recession. From the early period, it was

88 Sommer U and Rappel-Kroyzer O 'Reconceptualizing the Watchdog: Comparing Media Coverage of COVID-19 Response in Democracy' (23 September 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698310> accessed 3 December 2024.

89 KTN News, 'Who Is behind the Ksh.2.3 billion KEMSA Heist?' *KTN News* (October 4, 2020) <<https://www.standardmedia.co.ke/ktnnews/video/2000197149/who-is-behind-the-ksh-2-3-billion-kemsa-heist-inside-politics-with-jesse-rogers>> accessed December 3, 2024; Owino S, 'Death Threats in Kemsas Billions Heist Revealed' *Business Daily* (December 2, 2020) <<https://www.businessdailyafrica.com/bd/corporate/companies/death-threats-in-kemsa-billions-heist-revealed-3215794>> accessed December 3, 2024.

projected that the pandemic had the potential of impacting the economy in three ways; affecting production, disrupting supply chain and financial impacts on businesses.⁹⁰ Same projections were made in Kenya, where the UN projected similar negative impacts on the Kenyan economy.⁹¹ The negative impacts were eventually felt, forcing the Government to take measures to respond, including tax breaks and other social safety measures, especially for the most vulnerable members of the society.⁹²

These effects affected all sectors of the economy including the media. As a result, the media effected pay cuts and even lay-offs due to the impact of the pandemic on their revenues.⁹³ While these impacts led to the media calling for their sector to be considered in the Government's economic stimulus packages to cushion them from the effects of COVID-19 pandemic,⁹⁴ the same did not materialize. The challenge led to calls to look at the long-term sustainability of the media industry in Kenya including putting in place measures to cushion it from such shocks.⁹⁵

The second challenge related to harassment of journalists. One of the responses by the Government of Kenya was to declare a dawn to dusk curfew to contain the pandemic.⁹⁶ The curfew imposed under the Public Order Act⁹⁷ by the Cabinet Secretary for Interior and Coordination of National Government, initially set for a period of thirty days, was to prevent movement between seven o'clock in the evening and five⁹⁸ in the morning to curb the spread of the virus. Its rationale was that by doing so, socialization activities would be curtailed. The curfew was extended, and timings varied but the rationale continued in the country for close to a year from the original date of 27th March 2020.

90 Maital, S., & Barzani, E. 'The global economic impact of COVID-19: A summary of research' (2020) *Samuel Neaman Institute for National Policy Research*, 1-12.

91 UNHCR, 'Articulating the Pathways of the Socio-Economic Impact of the Coronavirus (COVID-19) Pandemic on the Kenyan Economy' (UNHCR Operational Data Portal (ODP), April 1, 2020) <<https://data.unhcr.org/en/documents/details/78194>> accessed December 3, 2024

92 See, 'Presidential Address on the State of Interventions to Cushion Kenyans Against Economic Effects of COVID-19 Pandemic' (25 March 2020) A <<https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/>> accessed 3 December 2024; '7th Presidential Address on COVID-19, 23 May, 2020' (*Kenya e-Repository*, May 23, 2020) <<https://academia-ke.org/library/download/7th-presidential-address-on-covid-19-23-may-2020/>> accessed December 3, 2024 ; and The National Treasury and Planning, 'Budget Statement FY 2020-2021' (*Parliament of Kenya*, June 16, 2020) <<http://libraryir.parliament.go.ke/handle/123456789/3385>> accessed December 3, 2024).

93 International Federation of Journalists, 'Covid-19 Ravages Kenya's Media Industry' (*IFJ*, April 15, 2020) <<https://www.ifj.org/media-centre/news/detail/category/covid-19-report-safely/article/covid-19-ravages-kenyas-media-industry.html>> accessed December 3, 2024

94 Ibid.

95 Chelagat J, 'How COVID-19 Complicated Kenya's Media Sustainability Problems - Information Saves Lives' (*Information Saves Lives | Internews*, September 18, 2020) <<https://internews.org/story/how-covid-19-complicated-kenyas-media-sustainability-problems>> accessed December 3, 2024

96 The Public Order (State Curfew Order), 2020. Legal Notice Number 36 of 2020.

97 Chapter 56, Laws of Kenya.

98 Supra, n 88.

Despite contestation over the constitutionality of the curfew orders by the Law Society of Kenya, the Judiciary held that the order was constitutional⁹⁹ and was thus proper exercise of authority: “the government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle.”¹⁰⁰ In making the determination on the constitutionality of the curfew, the court disagreed with the argument by the Law Society of Kenya that the Public Order Act was intended to fight crime and therefore, a curfew under it could not be used to fight a disease, with the court pointing out that the “principal aim of the Curfew Order is to minimize and mitigate the spread of the virus and thus protect human lives which is a legitimate constitutional responsibility of the Government of Kenya and in line with the provisions of the POA. Further, that the engagement of the POA in the fight against Covid-19 pandemic is meant to complement the provisions of the PHA.”¹⁰¹ The court further buttressed its arguments as follows:

“In view of the stated provision, it cannot be said that the POA is not applicable to health emergencies like the one posed by the Covid-19 pandemic. It is possible that the provisions of the PHA may need to be supplemented by those of the POA. *Panic and fear can sometimes lead to disorder and a curfew may be needed to reinforce the provisions of the PHA.* I therefore decline to agree with the Petitioner that a curfew order cannot be used to address a public health emergency.”¹⁰² (Emphasis added).

Despite the above finding, the bigger challenge that the curfew raised was its implementation. It was the constitutional responsibility of the police to ensure adherence to the curfew as part of maintenance of law and order in the country. The police in Kenya have historically not had a positive reputation in the maintenance of law and order. Part of this concern is what led to the institution of a large-scale police reforms program, described in certain quarters as the “the largest in Africa, after that of South Africa, in terms of both scope and commitment of donor funding.”¹⁰³ The reforms were undertaken under the aegis of a National Task Force on Police Reforms whose report is famously known as the Ransley Task Force on Police reforms after its chair, retired Judge Phillip Ransley.¹⁰⁴

The output of the taskforce found its way to the 2010 Constitution and focused on democratizing policing hence the change of name from a force to a service, the inclusion of civilian oversight and enhancing accountability of police actions.

99 Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) 2020 eKLR

100 Kabira N & Kibugi R (n 49) 447

101 Supra, n 91.

102 Ibid.

103 Hope Sr, Kempe R. (2015) ‘In pursuit of democratic policing: An analytical review and assessment of police reforms in Kenya’ (2015) *International Journal of Police Science & Management*, 17(2), 91-97, 91

104 Republic of Kenya. Report of the National Task Force on police reforms (The Ransley Report). (2009)

Despite these efforts, complaints about police excesses are still abound in the country. Police conduct in enforcement of the curfew came under heavy scrutiny and condemnation, including by the Kenya National Commission on Human Rights.¹⁰⁵ Part of the group that bore the brunt of police brutality were journalists.

Police brutality against journalists has been a complaint for years. While it is more propounded during political seasons, like election campaigns of deaths, physical assaults, threats, intimidation, online and phone surveillance on journalists between 2013-2017 with the intensity increasing around election time.¹⁰⁶ Other measures adopted by Government have included asking for the sacking of specific journalists, demanding apology or toning down of content and withholding of advertisement revenue.¹⁰⁷ The normal defense by Government in this instance is interests of national security.¹⁰⁸

During the pandemic, the police were accused of using inordinate force to impose the curfew that had been put in place by the Government as a strategy for preventing the spread of the virus in the country. On the first day of the curfew, media reported incidents of police brutality across the country.¹⁰⁹ A survey conducted by Human Rights Watch confirmed that this brutality extended beyond the first day, claiming the lives of at least six people during the first ten days of the curfew.¹¹⁰ The brutality by the police was loudly condemned by citizens and led to President Uhuru Kenyatta apologizing to the nation, stating that, "I apologise to all Kenyans for excesses that happened during implementation of the curfew. I assure you, if we work together and understand that this problem needs all of us, we will overcome."¹¹¹

The harassment extended to journalists. While there were several reports of harassment of journalists during the pandemic, the one that stood out and depicted the challenges that the media faced in reporting about the pandemic

105 Kenya National Commission on Human Rights 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' (30 June 2020) <<https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic>> accessed 3 December 2024

106 Human Rights Watch, 'Not Worth the Risk: Threats to Free Expression Ahead of Kenya's 2017 Elections' <<https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections>> accessed 3 December 2024

107 Ibid.

108 Ibid.

109 Bearak M and Ombuor R, 'Kenya's Coronavirus Curfew Begins with Wave of Police Crackdowns' *The Washington Post* (March 28, 2020) <https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51_story.html> accessed December 3, 2024

110 Human Rights Watch 'Kenya: Police Brutality During Curfew' (*Human Rights Watch*, April 22, 2020) <<https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew>> accessed December 3, 2024

111 Kimuyu H, 'Curfew: Uhuru Offers Rare Apology over Police Brutality - VIDEO' *Nairobi News* (April 1, 2020) <<https://nairobi.news.nation.co.ke/editors-picks/curfew-uhuru-offers-rare-apology-over-police-brutality>> accessed December 3, 2024

happened on the first day of the implementation of the dawn to dusk curfew.¹¹² NTV Journalist, Peter Wainaina was clobbered by a police officer as he covered running battles between the police and residents at the coast region, events that took place before the curfew period began.¹¹³ This event not only demonstrates the default approach by the police in law and orders matters but also a threat to the constitutional guarantees of press freedom. This action led to condemnation from the Nation Media Group, who pointed out that:

“This level of violence meted out on Kenyans trying to get back home before the 7pm curfew, in some cases because of circumstances beyond their control, is unreasonable, against the law and defeats the purpose of uniting the country against the Covid-19 pandemic. It is outrageous and indefensible, as happened in the case of the NMG journalist Peter Wainaina, for police to start assaulting the public two hours before the curfew. In attacking Mr. Wainaina, the police not only violated the constitutional protections of the media but also acted in contravention of the government’s own decision to recognize journalists as providing an essential service and therefore allowed out during the curfew.”¹¹⁴

The other critical challenge during the COVID-19 period relating to media and its role relates to accuracy of information. The importance of the media is predicated on the reliability of the information it provides to the public. This is particularly important during a pandemic when citizens are prone to panic and require quick, up to date and credible information to enable them take quick action, some of which are life and death decisions. Two problems exist and pose challenges in the discharge of the media role; these are information overload and providing the wrong information. The main problem is the latter, although the former is a huge contributor to wrong information. During a health crisis such as COVID-19 there is normally an information upsurge, hence the need to take “extra care in order to minimize the effects of the crisis.”¹¹⁵ How the media handles their reporting obligation affects the extent to which they help slow or fan the spread of the virus. This is not about self-censorship but more about responsibility: “Therefore, the language of communicating the virus is essential for escalating or dowsing the tension caused by the pandemic.”¹¹⁶ If they use

112 Abdi N, ‘Protect Kenya’s Journalists Reporting on Covid-19’ (Human Rights Watch, May 4, 2020) <<https://www.hrw.org/news/2020/05/04/protect-kenyas-journalists-reporting-covid-19>> accessed December 3, 2024

113 Simiyu JP, ‘Police Beat Up NTV Journalist in the Line of Duty [VIDEO]’ (*Kenyans.co.ke*, March 27, 2020) <<https://www.kenyans.co.ke/news/51345-police-clobber-ntv-journalist-line-duty-video>> accessed December 3, 2024

114 ‘Nation Media Group (NMG) Statement Condemning the Police Brutality on Kenyans and Journalists during the Ongoing Coronavirus Curfew on March 27, 2020 – The Nation Media Group’ <<https://www.nationmedia.com/news/nation-media-group-nmg-statement-condemning-police-brutality-kenyans-journalists-ongoing-coronavirus-curfew-march-27-2020-2/>> accessed December 3, 2024

115 Ogbodo JN and others, ‘Communicating Health Crisis: A Content Analysis of Global Media Framing of COVID-19’ (2020) 10 *Health Promotion Perspectives* 257, 257

116 Ibid

words that accentuates fear or despondency they will be exacerbating and not trying to pacify the situation.

Addressing misinformation is critical in the fight against any pandemic. Globally the misinformation and disinformation threat were a worrying issue throughout 2020 and continued into 2021. While accurate information is necessary to help fight pandemics, misinformation about COVID-19 proliferated, including on social media.¹¹⁷ social media has become famous with fake news in the recent past making its reliability to be tenuous. The effect of this varies but ranges from overreacting, underreacting, and taking the wrong remedy. The danger of wrong information is evident from countries that initially claimed that the virus was a western conspiracy or that they had survived its effects solely through the power of prayers, yet the disease was manifest within their borders. Tanzania was one such country, leading at some point to diplomatic tiffs with Kenya over the handling of the crisis.

While misinformation is a challenge for all media, it is more acute in social media largely because of the context of social media operations, with arguments being advanced that by its nature, in social media communication, accuracy concerns are much lower than in mainstream media.¹¹⁸ Addressing these challenges while benefitting from the advantages of social media, including its wide reach is important in responding to COVID-19 and other health pandemics. This calls for accountability on the part of the media to ensure that “journalists ... provide objective, accurate, fair news reports, especially when the world is in the grips of public health crises and other disastrous events.”¹¹⁹

Misinformation, referring to the false circulation of false information and disinformation which differs from the former due to its deliberate nature were prevalent during the emergence of the COVID-19 pandemic and led to the term infodemic by the Director General of the World Health Organization. The pandemic provided a fertile ecosystem for the spread of information globally and this was evident in such aspects as the origin of the virus, “fake cures, fake testing kits, imitation drugs and rising reports of COVID-related fraudulent actions, from scams and price inflations to bogus companies and accusations of fraud along transnational chains of medical suppliers and subcontractors.”¹²⁰

117 Frenkel S, Alba D and Zhong R, ‘Surge of Virus Misinformation Stumps Facebook and Twitter’ *The New York Times* (March 8, 2020) <<https://www.nytimes.com/2020/03/08/technology/coronavirus-misinformation-social-media.html>> accessed December 3, 2024 ; Russonello G, ‘Afraid of Coronavirus? That Might Say Something About Your Politics’ *The New York Times* (March 13, 2020) <<https://www.nytimes.com/2020/03/13/us/politics/coronavirus-trump-polling.html>> accessed December 3, 2024

118 Pennycook G and others, ‘Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-Nudge Intervention’ (2020) 31 *Psychological Science* 770

119 Zheng Y, Goh E and Wen J, ‘The Effects of Misleading Media Reports about COVID-19 on Chinese Tourists’ Mental Health: A Perspective Article’ (2020) 31 *Anatolia* 337

120 Smith C and Wiegatz J ‘Making Sense of #FakeNews and #CovidBillionaires - The Elephant’ (The Elephant - *African analysis, opinion and investigation*, November 14, 2020) <<https://www.theelephant.info/features/2020/11/14/making-sense-of-fakenews-and-covidbillionaires/>> accessed December 3, 2024

Fake and false news was a challenge not just globally but also in Kenya. Addressing it requires a multiplicity of actions. In Kenya these ranged from training,¹²¹ production of fact sheets popularly known as covid-19 *memes* during the pandemic,¹²² regular briefings by the Government, involving both the Ministry of Health and the President, to arresting and charging those spreading the false information.

VI. PREVENTING AN INFODEMIC INTO THE FUTURE: BALANCING RIGHTS WITH RESPONSIBILITIES

Law provides one of the tools for dealing with false news. As a result, looking at the content of approaches to legal regulation to govern false information around the pandemic is an important analytical task as it helps ensure that the rules do not lead to unintended consequences, either by failure to regulate disinformation or resulting in censorship of the media. A free and independent media is a core component of every democratic society. It is even more important during an epidemic or pandemic. For it serves several purposes geared towards educating, informing, and entertaining the citizenry. The Constitution of Kenya guarantees freedom and independence of the media¹²³ as an important fundamental right to ensure that Kenya continues to operate as an open and democratic society. The state is prevented from controlling or interfering with the media or penalizing people for holding or disseminating their opinion.¹²⁴ This links with the guarantee of access to information to every person.¹²⁵ The media is central to the enjoyment of the rights to information by citizens. In 2020 and moving to 2021, it was at the forefront of ensuring that citizens had access to information regarding various aspects of the COVID-19 pandemic.

However, as part of the global community, Kenya too suffered with her set of fake news around the pandemic. While several counties put in place “countermeasures via decrees and emergency legislation”¹²⁶ Kenya largely relied on its existing legal framework. The main legal framework used during the pandemic was the Public Health Act.¹²⁷ The Act, whose main purpose is

121 UNESCO, ‘Kenyan Youth leaders Trained to counter COVID-19 Disinformation’ <<https://en.unesco.org/news/kenyan-youth-leaders-trained-counter-covid-19-disinformation>> accessed 1 December 2024)

122 UNDP Kenya, ‘Tackling Coronavirus misinformation in the digital age - #SpreadInfoNotPanic’ (8 April 2020) <<https://www.ke.undp.org/content/kenya/en/home/blog/2020/Tackling-Coronavirus-misinformation-in-the-digital-age.html>> accessed 1 December 2024); Verenardo Meeme, ‘Kenya Doctor Dispelling Covid-19 Myths through Journalism’ (Alliance for Science 8 September 2020) <<https://allianceforscience.cornell.edu/blog/2020/09/kenyan-doctor-dispelling-covid-19-myths-through-journalism/>> (Accessed 1 December 2024).

123 Article 33, Constitution of Kenya, 2010.

124 Article 33(2), Constitution of Kenya, 2010.

125 Article 35, Constitution of Kenya, 2010.

126 Radu R, ‘Fighting the ‘Infodemic’: Legal Responses to COVID-19 Disinformation’ (2020) 6 social media + Society, 2.2.

127 Chapter 242, Laws of Kenya.

to secure and maintain health¹²⁸ was enacted in 1921 and did not have specific provisions on COVID-19. The debate, therefore, was whether to develop a new law or use its provisions to support emergency measures that were required to deal with the arising issues. As this happened, the provisions of the Act did not address itself to fake news and thus could not help to respond to the emerging pandemic. The second law that was used during the pandemic period was the Public Order Act,¹²⁹ under which provisions, the different curfews were issued.¹³⁰ The regulations restricting movement and related measures¹³¹ did not focus on the infodemic.

There were several legislative proposals on a comprehensive legislation to respond to the COVID-19 pandemic and other future pandemics. A multi-disciplinary team from the University of Nairobi for example developed a comprehensive legislation, *The COVID-19 Response and Management Bill, 2020*. One of the issues that the Bill sought to address was to “ensure protection of data and personal information obtained by any person during the pandemic.”¹³² On 17th April 2020 Senate, through an ad hoc Committee it had put in place on response measures to the COVID-19 Pandemic, published the Pandemic Response and Management Bull, 2020.¹³³

The Senate Bill proposed express provisions to address fake news. It made it an offence to spread false information about the pandemic, indicating that:

“A person who knowingly –

- (a) makes a claim which the person knows or has reason to believe to be false, for the purpose of obtaining any relief, assistance, repair, reconstruction, or other benefit from a public office; or
- (b) makes or circulates a false alarm knowingly or warning as to a pandemic or its severity or magnitude leading to panic commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year, or to both.”¹³⁴

In essence, once enacted the provision would help to address the question of false information and thus provide a basis for addressing the infodemic during

128 Ibid.

129 Chapter 56, Laws of Kenya

130 Kenya Law, ‘Public Legal Information on Kenya’s Response to COVID-19.’ <<http://kenyalaw.org/kenyalawblog/kenyas-response-to-covid-19/>> (7 April 2020) accessed 2 December 2024.

131 The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020, Legal Notice Number 50 of 2020.

132 The COVID-19 Response and Management Bill, 2020, Section 3(2)(g).

133 Kenya Gazette Supplement Number 44(Senate Bills Number 6) 2020. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/PandemicResponseandManagementBill_2020.pdf> accessed 2 December 2024

134 Ibid Section 36.

a pandemic such as the COVID-19 situation. In its absence, resort must be had to the existing legal framework. While there are laws that govern both access to information¹³⁵ and media operations in the country¹³⁶ the issue of specific focus on fake news during an epidemic or pandemic is one that the law does not expressly address itself to. The closest the country came to dealing with a related issue was during the Security Laws amendments process in 2014 in relation to the increased incidences of terrorist attacks in the country.¹³⁷ Sections of the amendments were, however contested in court for violating freedom of expression and the media by attempting to prevent the media from publishing certain information defined as being offensive, threatening or insulting.¹³⁸ The court in striking out those sections frowned about attempts to criminalize the media in instances where civil remedies would be adequate, urging instead for an approach that focusses on self-regulation and engagements between the media and Government to find a balance, stating that:

“However, we believe that rather than enacting legislation that goes against the letter and spirit of the Constitution and erodes the fundamental rights to freedom of expression and of the media, an approach that brings together the State and the media in finding a way to cover terrorism without compromising national security should be explored.”¹³⁹

Even as it made the above observations, the court was alive to the challenge of finding the right balance, thus alive to the reality that it would continue to be an issue for modern democracy to grapple with. In the words of the Court:

“We need say no more, we believe, on this issue, save to observe that even with an ethical and properly self-regulated media, the challenge, with the widespread and the largely uncontrolled use of the internet and social media, of enforcing legislation that seeks to control what is published and broadcast to the public, will be daunting.”¹⁴⁰

The same year that COVID-19 attacked Kenya and the rest of the world, is the same year that a legal framework that provides some respite for fake news also came into force. The Computer Misuse and Cybercrimes Act¹⁴¹ while dealing with cybercrimes mainly has two important provisions that address the question of fake news. First is section 22, titled false publications which provides that:

¹³⁵ Access to Information Act, Act Number 31 of 2016.

¹³⁶ Media Council of Kenya Act, Act Number 46 of 2013

¹³⁷ Republic of Kenya, The Security Laws Amendments Bill, 2014. <<http://www.knchr.org/Portals/0/Bills/THE%20SECURITY%20LAWS%20AMENDMENT%20BILL%202014.pdf>>accessed 2 December 2024

¹³⁸ Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Act Number 5 of 2018.

“A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.”¹⁴² In addition, section 23 dealing with publication of false information provides that:

“A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.”¹⁴³

These provisions seek to address the issue of fake news and have been cited by the Government as fake news about COVID-19 pandemic arose, warning citizens that those found culpable would be charged with spreading fake news under the Act.¹⁴⁴ However, even as it did this, the provisions on fake news have their challenges with concerns that they may restrict the constitutional freedom of media. The question was raised in the court case of *The Bloggers Association of Kenya Versus the Attorney General and 3 others; Article 19 East Africa & Others (interested Parties)*.¹⁴⁵ However, the court argued that addressing fake news through its criminalization, was an important aspect of ensuring that freedom of expression and of the media is realized within the context of truth and avoiding defamation.

VII. CONCLUSION

With the advent of the COVID-19 pandemic, the media played an important role in ensuring that the public had access to information about the virus and its causes to enable them take preventive action, Government too had a platform for engagement. In a publication on media's role during the pandemic, it was pointed out that digital media served three purposes of response, advocacy, and mobilization.¹⁴⁶ The media helped to present information on the trends of the virus and thus kept people informed, enabling them to take real time action.

¹⁴² Ibid Section 22(1).

¹⁴³ Ibid Section 23.

¹⁴⁴ Sugow A, Mungai B and Wanyama J, 'The Regulation of Fake News in Kenya under the Coronavirus Threat - Centre for Intellectual Property and Information Technology Law' (*Centre for Intellectual Property and Information Technology law - Centre for Intellectual Property and Information Technology law*, April 4, 2020) <<https://cipit.strathmore.edu/the-regulation-of-fake-news-in-kenya-under-the-coronavirus-threat/>> accessed 3 December 2024

¹⁴⁵ 2020 eKLR

¹⁴⁶ Bao H and others (n 38).

However, it also had its fair share of challenges with one of the critical ones being disinformation and misinformation.

While several countries took the approach of criminalizing fake news, the reality is that dealing with infodemic during an epidemic requires more than just criminal sanctions. It is important that focus be on providing accurate information since the bigger task must be to ensure that citizens can access such information and therefore, be prepared for and be able to cope with the impacts of a pandemic. The regular update by the Ministry of Health were an important part of addressing the infodemic. What is required much more is to deepen the collaboration between media and Government and ensure capacity building for media, including social media players to enhance accurate and timely information from the media which is an important factor in the fight against epidemics such as COVID-19 pandemic. Criminal sanctions should therefore not be the primary and sole tool for responding to infodemics.

In the end states have to recognize that they have a duty to “balance rights to health and life against the many rights detrimentally affected by their pandemic response measures, including almost all economic, social, cultural, civil and political rights.”¹⁴⁷ Ultimately, the lesson that arises in the process of responding to the COVID-19 pandemic is that derogations from human rights is not an effective tool for dealing with the pandemic. As one scholar correctly quipped, “while the covid-19 pandemic is arguably the worst global crisis since World War II, it is not clear that the possibility of derogation from human rights obligations adds much, if anything, to the arsenal of States in taking measures to combat the virus.”¹⁴⁸

147 Sarah Joseph, ‘International Human Rights Law and the Response to the COVID-19 Pandemic’ (2020) 11 J Int'l Human Legal Stud 249, 258

148 Ibid 259.

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School of Law, University of Nairobi
P. O. Box 30197-00100, Nairobi, Kenya

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