Policy Recommendations: Digital and data infrastructure policy recommendations to promote an inclusive digital economy

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1. Background

Digitisation is redefining several aspects of the global economy; transforming how businesses operate and spearheading innovation in the digital and technology space.

Developing countries such as Kenya are not being left behind in the digital economy. Despite only 3.7 per cent of the country's population engaging in e-commerce and 1 in 5 Kenyans having access to the internet (Kenya National Bureau of Statistics (KNBS)) the country has been experiencing a rise in e-payments, e-commerce and e-government.

The government which has a huge stake in cultivating a friendly environment to boost the digital economy has established platforms such as;

> E-citizen - '*an official digital payments platform that enables Kenyan citizens, residents and visitors access and pay for government services online*'; and

> Huduma Namba - '*a unique number generated through the National Integrated Identity Management system (NIIMS), which involves collecting biometric data and will enable Kenyan citizens to access various services*'.

The development of these digital platforms and tools is essential in the digital world we live in. However, they raise new challenges - loss of privacy, cybersecurity threats, and questions of data ownership. This is because the digital tools and platforms developed require our personal data to operate. Therefore, it is crucial for governments to set up data protection policies, laws and regulations in order to regulate the risks associated with engaging in the digital economy.

Kenya enacted the Data Protection Act, 2019 (the Act/DPA) to regulate the collection and processing of data (especially personal data including 'legal persons') in Kenya. The big question is whether the Act supports and promotes an inclusive digital economy in the country and whether Kenyans have the requisite skills to effectively use digital platforms while protecting their data.

2. Approach and Methodology

The inputs to these recommendations were collected through a literature review that subsequently fed into a workshop held on 2nd March 2021 in Nairobi, Kenya on 02 March 2021. The workshop was attended by 11 representatives from Kenyan non-state actors working in the digital space, on digital rights and access to information as well as on issues related to the digital economy. The aim was to explore practical issues from and to provide recommendations on what policy support Kenya would need to promote a vibrant and inclusive digital economy in Kenya. The objectives of the workshop were to:

1. Review what types of policy support are in place or will be needed to promote, create a vibrant and inclusive digital economy in Kenya.
2. Generate practical recommendations on the digital and data infrastructure policies to promote an inclusive digital economy which will be shared with the office of the Data Protection Commissioner.

The goal of this exercise is that citizens, civic organisations and government stakeholders understand and actively exercise the rights, responsibilities and opportunities contained in Kenya's Data Protection Act 2019 for data-driven and rights-based development in regards to the broader data/digital infrastructure blueprints and policies. To do this, the African Declaration on Internet Rights and Freedoms was also reviewed; it is a Pan-African initiative to promote human rights standards and principles of openness in Internet policy formulation and implementation in Africa - in view of social and economic development needs and goals[1]. Similarly, views from the Restore Data Rights Declaration that is also a call for a more transparent, inclusive, and accountable ways to obtain, use and dispose of personal data during and after the COVID-19 pandemic have been adopted[2]. All this is against the backdrop that resources and investments are needed (both technical and legal) to develop regulations that comprehensively protect human rights within the context of robust pursuit of the internet and digital technologies in a digital economy.

3. Recommendations

The Ministry of Information Communications and Technology, Innovation And Youth Affairs should:
1. **Develop policies that will strengthen innovation capacities and infrastructure in the actualization of the digital economy**. The Kenya Digital Economic Blueprint recognizes the need for strengthening innovation capacity and creating an enabling business environment including plans to

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[1] https://africaninternetrights.org/declaration/
[2] https://restoredatarights.africa/the-restoredatarights-declaration/

increase the internet connectivity in the entire country[3]. An example is working closely with public and private developers in the real estate sector to ensure adherence to standards such always-on, high speed, wireless, internet as outlined in the Kenya National ICT Policy 2019[4]. The most important factor is to ensure the promotion of policies that ensure affordable costs on internet connectivity. Some of the key digital principles that are relevant to policy and innovation development include[5]:

    a. Understanding the local digital ecosystem includes aligning with existing technological, legal and regulatory policies (current and in process) as well as people, networks, cultures, politics, infrastructure and markets currently in place.

    b. Designing for scale means making decisions from the start that will enable digital development initiatives to scale later

    c. Sustainability is important for impact and closely linked to scale; without sustainability, it is impossible to scale.

    d. Data driven: rigorous data collection and use lead to improved quality of data and decisions that accrue from this data.

    e. Identification and use of open sources/platforms, open data and interoperability standards: open approaches to digital development increase and foster collaboration and acceleration of results.

    f. Defining both security and privacy concerns: Openness does not mean that sensitive data or personal information should be shared. There is a need for practical regulations that operationalize the Kenya Access to Information Act (ATI 2016) as the Kenya National ICT Policy (2019) (which also recognizes that subsidiary policy was to be developed around the issue of safety and security of personal information) and which guides and communicates on what open means. More than 4 years after the ATI Act was passed, there are still significant challenges on the disclosure of information by public entities and the regulations under the Act are yet to be published.

2. **Develop a consumer awareness campaign strategy with key stakeholders in the digital economy.** Closely linked to 1(a) above, this will improve public participation as well as that can potentially increase the number of people participating in the digital economy.

3. Introduction of sustainable ICTs at scale involves huge capital investments. The private sector not only brings capital investments but can improve efficiency and boost profitability of new technology ventures[6].

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[3] Only 3.7 per cent of the country's population engaging in e-commerce and 1 in 5 Kenyans having access to the internet (Kenya National Bureau of Statistics (KNBS))

[4] https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf

[5] All the 9 principles are available here: Principles |Principles for Digital Development (digitalprinciples.org)

[6] Ghosh, A. 2011. Development of ICT Infrastructure through Public Private Partnership February 2011.
https://www.researchgate.net/publication/340490683_Development_of_ICT_Infrastructure_through_Public_Private_Partnership

a. Whereas the liberalization of the communication sector in Kenya has had positive impacts on deployment of ICTs, universal access remains elusive as licensed commercial operators and service providers have tended to concentrate operations in areas where a return on investment is guaranteed (National ICT Access gap study in 2016)[7]. The Universal Service Fund (USF) Framework should continue to be strengthened through adequate resourcing as well as support from other government agencies such as the National Police service (in securing infrastructure in remote parts of the country).

b. In line with the National ICT Policy 2019, actualize removal of barriers to local content creation by the government as well as on distribution such as exorbitant classification fees and broadcasting fees;

The Office of the Data Protection Commissioner (ODPC) should do the following:

1. **Work with County assemblies to draft policies** on digital rights at the county level.

2. In line with the Kenya National ICT Policy 2019, it is important to establish regulations to embed digital literacy in sensitization and education, for example in the school curriculums - that considers data protection principles such as:

    a. Sensitise the public on security concerns and safety around personal information and the adverse impacts of using the internet as well.

    b. The Government of Kenya (in the National ICT Policy 2019) commits to actively promote the right of the use of social media as an extension of the protection of freedom of expression guaranteed under Article 33 and 34 of the Constitution of Kenya 2010. However, the right to use social media does not extend to propaganda or war-like purposes; incitement to violence; hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination or that promulgates falsehoods. The pursuit of the legitimate objectives should not be used as a pretext to curtail criticism of the government.

3. Push for discussions with key stakeholders, including the Ministry of ICT to **gazette regulations on Artificial Intelligence (AI) and Machine Learning (ML)**. AI affects our freedom of choice and information, these systems (as will be deployed both in the public and private spheres) can be biased in decision support. This also includes identifying and mapping out the agreements the government has made on AI.

4. **Form working groups/ committees on AI and digital rights** with both international and local organizations; data rights, data governance and data processing non-state actors (both CSOs and private sector organizations), research institutions and academia, the Ministry of ICT, the Commission on Administrative Justice (CAJ), ODPC, Communications Authority of Kenya (CAK), to work closely on practical use cases that guides growth of regulations that do neither stifle growth of digital innovations nor water down digital rights.

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[7] Communications Authority. Universal Access Overview.
https://ca.go.ke/industry/universal-access/universal-access-overview/

5. **Proactive audits on e-government systems**. There is a rise in the offer of e-government services, which translates to the citizens' data being put at risk of data breaches, therefore it is crucial that these systems are not easy to breach. This can be borrowed from countries like Estonia which has established a National Cyber Security Index[8] to establish the cyber security health of various public service offers.

6. **Actions affecting data controllers and processors as per the Data Protection Act (2019):**
   a. **Identify and map out representative clusters of data controllers and processors** in the country and publish this information.
   b. **Establish regulations for data controllers and processors**. These regulations should commit data controllers and processors to being open with users on:
      i. What data is being used for (both direct and indirect)
      ii. Who has access and how is the access provided (directly and indirectly).
      iii. What records are processed, risks there-in as well as teh rights of the data subjects.
      iv. In what formats data is processed
      v. Whether they can opt out.
      vi. Procedures on how to be registered
      vii. Advisories to some of the sectors (for example journalists) with broad principles on how they can self-regulate.
   c. **Ensure that data controllers and processors simplify the terms and conditions** for their products and services offered to consumers - outlining the rights of either parties.

7. **Form intra-government linkages** so that different avenues of feedback can be shared for example; if feedback is provided to the Commission on Administrative Justice (CAJ), it will eventually be received by the ODPC or other government agencies and acted upon seamlessly.

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[8] https://ega.ee/project/national-cyber-security-index/