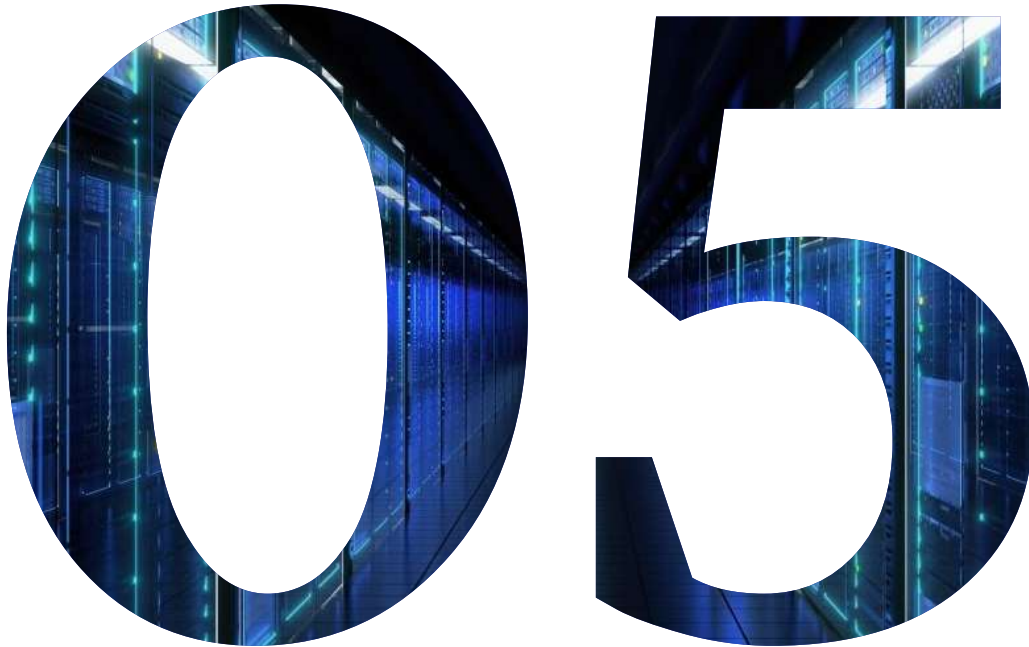


A R T I C L E



**THE LAW SOCIETY OF KENYA'S  
"SOCIAL MEDIA REGULATIONS"  
2020: CONTEXTUAL  
REVIEW WITHIN THE PROFESSION -**

**JAMES GITAU**



## Introduction

Change, the only constant phenomena on earth, attempted to make headway in the legal profession in Kenya in 2020, in the context of Advocates' conduct online. This was after the Law Society of Kenya's Ethics Committee shared the Draft Advocates Social Media Code for public participation. The reception of the regulations by members of the society was quite telling of the "how-not-to-go-about" social media regulation. In the paragraphs below, this feature shall attempt to dissect the issues, from a broad sense.

On the 17th of December, 2010, Mohammed Bouaziz, a young Tunisian, doused himself in petrol and set himself alight.<sup>i</sup> This was in protest to extortion from police, in a country where president Zine El Abidine Ben Ali had ruled for two decades. This incident went viral on social media, leading to huge protests. A month later, Ben Ali was ousted from power leading the country to democracy, ostensibly as a result of the actions of Bouaziz.

In 2016, there was a perpetuation of genocide against the Rohingya Muslims of Myanmar. The United Nations commissioned an independent Fact-Finding Mission (FFM) whose report noted that social media, especially Facebook, was used by the government of Myanmar to incite violence against the Rohingya Muslims,<sup>ii</sup> bringing to mind memories of the Rwandan genocide in the 1990s, where radio was used similarly.

The two scenarios above demonstrate just how much of an impact social media can have in our lives, both positive and negative. It is then the responsibility of any reasonable body to ensure that the use of social media is regulated to avoid the negative impacts and better facilitate the positive outcomes. Such regulations do exist, with the first line of defence being the various social media platforms' policies.

# Challenges in self-regulation

Due to the dynamic and ever-changing nature of social media or blogosphere, numerous regulatory challenges have emerged. Several gaps have consistently been identified, leading to proposals for self-regulation, as remedial action for the said gaps.

Self-regulation has worked to a large extent, albeit only for a short while, and not any longer. For instance, the use of Facebook to perpetuate hate speech in Myanmar along with Facebook's slow response to curbing this hate speech, is a glaring gap, as noted by Facebook's then Chief Operations Officer, Sheryl Sandberg. She was briefing a Senate Intelligence Committee in September 2018.<sup>iii</sup> This was not an isolated incident of manipulation of the Facebook platform for malicious intent.

In 2016, it was widely reported that Facebook was used to interfere with the presidential elections of the United States of America (USA) through numerous disinformation campaigns. This was not unique to the USA as the world came to learn, much to everyone's chagrin, through

an exposé on Cambridge Analytica, in early 2018.<sup>iv</sup> The company obtained information from Facebook and in turn used it to influence the political views of millions of Facebook users around the world.

Early 2020, parents of children who use Tik Tok, were up in arms over increased incidents of predators contacting their children via the platform.<sup>v</sup> In the United Kingdom, there has been a surge in the drug trade on social media, with some of these drugs getting to the hands of children.<sup>vi</sup>

In Kenya, a shocking story hit news headlines in late 2020, when forty-four (44) underage girls were found partying in a house in mountain view, Nairobi, indulging in a cocktail of drugs including bhang. Reports indicated that the underage girls communicated and planned with their hosts through WhatsApp.<sup>vii</sup>

The list of these shortcomings in self-regulation is endless. The same can be

said of the reasons, given, most social media platforms are not constrained to geographical boundaries further compounding the problem of regulation. Secondly owing to the novelty of some of the issues that come with the use of social media sites, there are no established customs of usage in international law, as there have been in other areas such as commerce. This then leads to a gap in the regulation of a lot of social media sites.

## State Regulation

From the foregoing, it is reasonable for one to conclude that at one point or the other, there will be some misuse in the use of social media not envisioned in law, which brings us to the need for regulation. Much as there are gaps it is not to say that the use of social media is largely unregulated. Several laws are regulating the use of social media.

In Kenya for example, the Communications Authority of Kenya Act establishes the Communication Authority of Kenya, a body



tasked with the mandate of regulating the use of communication mediums in Kenya, including social media. The Computer Misuse and Cyber Crimes Act and the Kenya Information and Communications (Amendment) Act also serve to regulate the use of communication devices and platforms.

## Regulation within the profession

Within the legal profession, the Advocates Act and several other subsidiary legislation regulate the conduct of Advocates. In addition to these, the Law Society of Kenya recently developed the Draft Advocates Social Media Code to regulate the use of social media by advocates. Against the background of how ineffective self-regulation has been by social media sites, perhaps one would understand why LSK is inclined to regulate the use of social media among its members.

The code prescribes how members are to use social media in a manner that ensures professionalism and proper use of social media. The scope of application of the code extends to both public and private interactions of the members and can be used in the event of disciplinary proceedings.viii The code clarifies that members are to uphold the highest professional standards in their day-to-day dealings.

For the most part, the code creates restrictions on the members based on professional standards already set. The code attempts filling a void in the law e.g., when it comes to marketing by members on social media sites.

The overriding objective is to ensure that the dignity of the profession is maintained. However, the code raises one main point of concern. This is;

To what extent does the law allow the limitation of the freedom of expression especially by professionals e.g. advocates?

In Kenya, rights under the Bill of Rights can be limited with exception of the absolute rights under Article 25.ix The criteria for limitation of rights as provided for under Article 24(5). The standard set for limitation of rights under the bill of rights is; such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.x

Based on the progressive nature of the Constitution of Kenya 2010, it would therefore be difficult to make an argument that there can be justification for limiting this right for any reason other than that envisaged in Article 24 e.g., where the right is being exercised in furtherance of illegality such as incitement to violence or defamation. It then follows that even within the profession, we have to limit the right only to the extent that we are preserving the integrity of the profession. Indeed, Advocates like other members of society have the right to freely express their views on all matters affecting the society in which they exist.

The use of social media for example was instrumental in the #Endsars protest in Nigeria, with Modupe Odele, a legal practitioner, offering legal assistance to protesters through the use of social media.xi In this instance, it was a force for good. Today, social media has taken the place of what radio was in the 1990s, Kenya, being used as a tool to critique, disseminate information and bring people together by creating personal relationships.

Given that we cannot isolate the individual from the profession there is a potential for future problems. Social

media, though public in nature, is a personal space where one is free to interact with friends and family alongside members of the public. Such interactions as a matter of fact should be considered part of private life. The regulations, in their application, envisage a situation where such private interactions are legislated upon. Any attempt to legislate on this will invariably invite some harsh criticism to put it mildly.


The drafters are then called to ensure that they bear this in mind as they bring their regulations to life.

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## About Writer



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