

LONDA



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Togo Digital Rights and Inclusion Report

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TOGO DIGITAL RIGHTS AND INCLUSION 2021 REPORT

A PARADIGM INITIATIVE PUBLICATION

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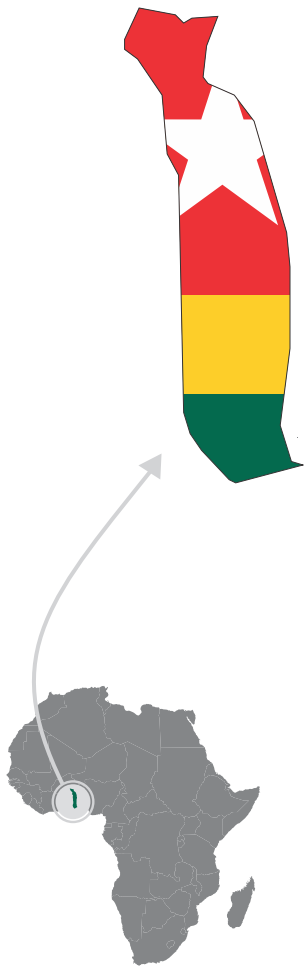
EXECUTIVE SUMMARY

“This closed space, cut up, monitored at all points, where individuals are inserted in a fixed place, where the slightest movements are controlled, where all events are recorded, where an uninterrupted work of writing connects the center and the periphery, where power is exercised without sharing, according to a continuous hierarchical figure, where each individual is constantly located, examined and distributed between the living, the sick and the dead.” This impressionistic picture of the plague painted by Michel Foucault in 1975, in his essay *“Surveiller et punir”*, has never been more acute than in the era of the health crisis in Togo.

Since the beginning of the pandemic, the fundamental principles of the law on the protection of personal data have been violated. These include the principles of the right to information, the right to access, the right to object, the right to rectification, deletion, and erasure, the right to update personal data after death and the transfer of data.

The report highlights violations of digital rights in Togo, from internet blackouts to cyber espionage and the introduction of new technologies creating exclusion of a segment of the population. In addition, the report reveals that there has been little communication about the massive collection of data related to the pandemic to allow citizens to take a stand. Only terse statistics related to the evolution of contact cases and deaths are regularly published by the government.





INTRODUCTION

DIGITAL RIGHTS AND INCLUSION IN TOGO

Togo, a coastal country in West Africa, shares borders with Ghana, Benin and Burkina Faso¹ and is home to just over 8 million people in 2022.² Although the poverty rate declined from 61.7% to 53.5% between 2006 and 2021, poverty and inequality remain very high, especially in rural areas where 69 per cent of households live below the poverty line.³

Togo's Human Capital Index (HCI) remains low at 0.41. This means that a child born today in Togo will reach only 41% of his or her potential as an adult in terms of health, education and nutrition. The government would like to increase the human development index to 0.554 by the end of 2022, as well as reduce the unemployment rate to 2.6% and the underemployment rate to 19.4%.⁴

0.41%

HUMAN CAPITAL INDEX (HCI)

Despite an unfavourable international environment, marked by crystallisation of trade tensions and the persistence of the security threat, the Togolese economy has maintained its good performance in recent years with growth driven by the confirmed recovery of public investment, the expansion of activity in the construction sector, and improved agricultural productivity.⁵ The COVID-19 pandemic could limit the economic momentum of recent years.

1. <https://www.gallimard.fr/Catalogue/GALLIMARD/Bibliotheque-des-Histoires/Surveiller-et-punir>

2. <https://fr.countryeconomy.com/pays/togo#:~:text=Le%20Togo%2C%20avec%20une%20population,146%20personnes%20par%20km2>

3. [https://www.banquemondiale.org/fr/country/togo/overview#:~:text=Pays%20c%3B4tier%20d'Afrique%20de,urbain%20\(26%2C5%25\)](https://www.banquemondiale.org/fr/country/togo/overview#:~:text=Pays%20c%3B4tier%20d'Afrique%20de,urbain%20(26%2C5%25))

4. <https://www.tg.undp.org/content/togo/fr/home/presscenter/pressreleases/2019/lancement-rapport-2019-sur-le-developpement-humain.html#:~:text=Quant%20au%20Togo%2C%20la%20valeur,%C3%A8me%20rang%20sur%20189%20pays>

5. <https://www.togofirst.com/fr/economie/1504-7671-togo-le-taux-de-croissance-economique-2020-en-hausse-par-rapport-aux-previsions>

Being the only country in West Africa that has never experienced a peaceful and democratic political changeover since its independence in 1960, Togo began a slow and difficult process of democratization in 1990. Today, the political system can be characterized as a republic in transition to democracy.

The ruling party, the Union for the Republic (UNIR), has dominated the Togolese political scene since 2013. It holds 59 of 91 seats in the National Assembly following the 2018 legislative elections. President since 2005, Faure Gnassingbé remains one of the oldest heads of state in the West African sub-region in terms of longevity in power.⁶

2012-2022, A DECADE OF LAWS AND VIOLATIONS

The Togolese Constitution of October 14, 1992 lays the foundations of confidentiality and guarantees each citizen *“respect for his private life, his honour, his dignity and his image”*. In addition, Article 29 states that *“the State guarantees the secrecy of correspondence and telecommunications. Every citizen has the right to the secrecy of his correspondence and his communications and telecommunications”*.⁷

Drafted in 1992 and then amended by the revision of May 8, 2019, this Constitution came into being at a time when human rights were beginning to assert themselves and when the democratic conditionality of development aid was still a palpable reality to which the French-speaking African states were trying to adapt.

However, it is worth noting that these provisions of the fundamental law, while remaining a general statement of faith in the principle of privacy, are nonetheless explicit enough to be interpreted to the benefit of the citizen who is the victim of an online violation. But, in spite of this, the judges up

to now interpret this fundamental law in a primary sense, not taking into account the digital era and the Internet revolution. This fundamental interpretation remains very attached to the generalities of the inviolability of private correspondence.

The secrecy of communications and telecommunications in the strict sense was mainly attached to telephone and radio communications. They can allow the judge to establish a link with respect to the private life of individuals online, even if an update of this article is indeed desirable. However, the recent constitutional revision in 2019 did not take this into account.



The State guarantees the secrecy of correspondence and telecommunications. Every citizen has the right to the secrecy of his correspondence and his communications and telecommunications.



6. https://www.lemonde.fr/afrique/article/2020/05/03/au-togo-faure-gnassingbe-investi-president-l-opposition-continue-a-contester-l-election_6038504_3212.html

7.

[https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/38025/110367/F-1481961433/TGO-38025%20\(VERSION%20CONSOLIDEE\).pdf](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/38025/110367/F-1481961433/TGO-38025%20(VERSION%20CONSOLIDEE).pdf)

It should be noted, however, that a legal framework has been built on the issue of digital law in Togo since 2012. First of all, there are texts that regulate the information society and the electronic communications sector in general, but most recently texts that are now interested in digital rights have been adopted.

Law No. 2019-014 of October 29, 2019 on the protection of personal data regulates the collection, processing, transmission, storage and use of personal data.⁸ It applies to individuals, the State, local authorities, legal entities under public or private law, as well as to automated or non-automated data processing carried out on the territory of Togo or in any jurisdiction where Togolese law applies.

According to this law, the rights of the persons concerned are access to information, the right of opposition, the right to rectification and deletion of personal data and the right to erasure.

However, in Togo, digital rights are still a new reality and this notion was not necessarily assimilated into human rights at the beginning. There is a great deficiency related to the knowledge of their rights by citizens, even if in recent years, we are witnessing a strong interest of the legislator and the government in the digital issue, not for the sake of protecting the citizen, but rather for the sake of adopting the policies of the State to the digital policies and also to comply with the regional trend of fighting for digital freedoms in African countries.

INTERNET BLACKOUTS

On June 25, 2020, the Community Court of Justice of the West African regional bloc, ECOWAS (Economic Community of West African States), ruled that internet blackouts in Togo during anti-

government protests in September 2017 were illegal and violated freedom of expression.⁹ The court also called on the Togolese authorities to take all necessary measures, including the adoption of laws and policies that are consistent with human rights to prevent a recurrence. A few months before this conviction, Togo had passed a law on the protection of personal data.

Although this law sets out the legal and institutional framework for personal data protection, it is clear that the state's extensive prerogatives lead it to make decisions on data protection that are not well received. Since this data is kept on a large scale, the risks and effects of its misuse are also vast. The dark side of the digital spectrum not only threatens privacy and security, but also jeopardizes free and fair elections and jeopardizes freedom of expression, information, thought and belief, and hides the truth under false information.

INCREASING ATTACKS ON HUMAN RIGHTS DEFENDERS

The news in this area continues to be occupied by blatant violations of the online privacy of citizens. Between 2019 and 2021, several reports and investigations referred to state-led cyber espionage activities targeting political leaders, journalists, and Catholic clergy.¹⁰

In August 2020, an investigation by Le Monde, The Guardian and Citizen Lab revealed that two Togolese Catholic clergymen, Benoît Alowonou and Father Pierre Chanel Affognon, had been targeted through a WhatsApp vulnerability exploited by NSO Group through its highly sophisticated spyware called Pegasus. These voices that criticised the power of President Faure Gnassingbé unknowingly suffered interruptions of

8. https://jo.gouv.tg/sites/default/files/JO/JOS_29_10_2019-64E%20ANNEE-N%C2%B026%20TER.pdf#page=1

9. <https://www.amnesty.org/fr/latest/news/2020/06/togo-envoie-un-message-clair-que-les-coupures-volontaires-internet-violent-la-liberte/>

10. https://www.lemonde.fr/afrique/article/2020/08/03/au-togo-un-espion-dans-les-smartphones_6048023_3212.html

their smartphones during 2019.

Pegasus is a digital weapon developed and sold to states by the Israeli company NSO Group Technologies, officially to fight terrorism and serious crime. In Togo, it has been used against Catholic clerics, civil society activists and opposition politicians.

Another investigation by Amnesty International and several media outlets in the Forbidden Stories network reported later in 2021 that more than 300 Togolese numbers appear on the list of potential targets of the Israeli spyware, Pegasus. These numbers include political leaders, associations and journalists.¹¹

In the last quarter of 2021, yet another Amnesty International investigation revealed that the notorious group of hackers Donot Team also used fake Android applications and spyware-infected emails to attack a well-known Togolese human rights defender, with the aim of illegally placing him under surveillance.¹²

According to the investigation report, this is the first time Donot Team spyware has been identified in attacks outside of South Asia. The investigation also uncovered links between the spyware and the infrastructure used in these attacks, and Innefu Labs, an India-based cyber-security firm.

Innefu Labs does not have a human rights policy and does not appear to implement human rights due diligence - despite the enormous risks its products pose to civil society.



11. <https://www.dw.com/fr/togo-journalistes-espionnage-pegasus/a-59338602>

12. <https://www.amnesty.org/en/latest/news/2021/10/togo-activist-targeted-with-spyware-by-notorious-hacker-group/>

RESTRICTING THE SPACE FOR ONLINE JOURNALISTS TO OPERATE IN 2021

In late 2021, two journalists, Ferdinand Ayité and Joël Egah, were arrested and jailed in Lomé prison for their online opinions.¹³ They are accused of comments made in “*The other newspaper*”, a very popular news and debate program broadcast on YouTube by the web TV of the newspaper “*The Alternative*”. In the course of the discussion, two ministers, who were not named, were linked to embezzlement. In Togo, the Press Code has not provided for a custodial sentence since 2004, but since the events took place on a “*social media network*,” the prosecution considered that the facts fell under common law.

Although the two journalists were released on New Year’s Eve, they are now under strict judicial supervision. The directors of the newspaper L’Alternative and Fraternité have been deprived of their passports, ordered not to leave the country, forced to visit the judge once a week, and not to publish or broadcast apologies to the two ministers targeted by their remarks. These measures were deemed “*despicable*” by their lawyer, Mr. Elom Kpade.

COVID-19, THE STATE OF HEALTH EMERGENCY AND VACCINATION DATA

In order to contain the pandemic that is devastating the world, the Togolese government, with the support of the legislator, adopted particularly derogatory measures.

The purpose of these measures was to suspend the ordinary rules in order to apply other “*obviously less liberal rules, which lead to a greater concentration of power and restrictions on fundamental rights*”.

The Togolese legislator, relying on the theory of

“*extraordinary circumstances*” enshrined in article 94 of the constitution of the Fourth Republic, hastily adopted a law on which the entire derogatory regime will have its basis, notably the state of health emergency.

Therefore, the government is allowed to take “*any measure*” in order to prevent and limit the consequences of possible threats to the health of the population. The use of this phrase, which is particularly extensible and even unpredictable, deserves attention. It would seem that the Togolese government has been given a blank check.

In the name of the right of exception, many freedoms have been alienated by the accumulation of new regulations adopted in a panic, to the detriment of an overall reflection, in an unprecedented global context. Thus, the freedom to come and go on the national territory was restricted by the requirement of confinement of the population in certain cities considered close to the opposition, notably Tsévié, Sokodé and Aného.

Privacy, which includes the protection of personal data, was and continues to be abused despite the mandatory introduction of the vaccine among the Togolese population.

In fact, in order to control the spread of the virus, two prejudicial measures, such as quarantine and tracking of patients, were endorsed by the law requiring patients, travellers and citizens wishing to be tested to register on the government’s online platforms, for which no law governs the management of personal data and the responsibilities of the holders of such data.

The launch of the TogoSafe tracking application for travellers was widely discussed as being an invasion of privacy.¹⁴

13. <https://www.ifj.org/media-centre/news/detail/article/togo-deux-journalistes-arretes-et-detenus-pour-avoir-critique-des-ministres.html>

14. <https://numerique.gouv.tg/lancement-de-togo-safe-une-application-mobile-pour-lutter-contre-la-propagation-de-la-covid-19-au-togo/>



This data-gathering intensive application uses the Bluetooth function of its user's phone to alert them when they have been in contact with someone who has tested positive for the Coronavirus. To do this, the application relies on the Bluetooth connection data of the user's Coronavirus-positive phone to identify the various people with whom the user has been in contact. The recommendations provided by the experts for transparency in the collection and management of data by the application are still unheeded by the government.

For example, it is necessary to ensure that the downloading and use of a tracking application is truly voluntary and that no citizen refusing to use it can suffer any disadvantage (for example, being denied access to a good or service). Also, other recommendations had proposed that the source code of this application be published beforehand, in order to give a reasonable time to experts to check its functioning. Two years after its launch, there are no reports on the impact or effectiveness of the TOGOSAFE application.

The same is true for the <https://voyage.gouv.tg> platform launched to dematerialise the management of travellers at the Lomé Airport.¹⁵ The personal data collected by the platform is transferred to other government entities, notably the immigration services, without the user being informed beforehand. Filiation information, notably the name of the traveller's parents, is also collected without any use, whereas before the pandemic, travellers could only travel with the information recorded in their biometric passports and travel documents and an immigration form whose information was strictly related to the trip.

However, in a state governed by the rule of law, these infringements of fundamental freedoms cannot be carried out without any framework. The legislator requires that the adoption of these derogatory measures be motivated, "*proportionate to the risks incurred and appropriate to the circumstances of time and place*" in order to limit the consequences of possible threats to the health of the population.

15. <https://numerique.gouv.tg/ouverture-des-frontieres-aeriennes-voyage-gouv-tg-lance-pour-digitaliser-la-gestion-des-voyageurs-a-laeroport-de-lome/>

In Togo, the establishment of the Personal Data Protection Authority (PDPA), which is an application of the law on the protection of personal data, has been slow in coming into being. And as long as the implementation of the Authority is delayed, data breaches related to COVID-19 will continue to occur.

WHAT ABOUT ARTIFICIAL INTELLIGENCE?

The use of digital solutions by the Togolese government is growing. Indeed, even if Togo has considerably enriched its legal framework to adapt it to the digital revolution, the issue of artificial intelligence is still under the carpet. However, artificial intelligence, although not yet having a clearly defined legal or regulatory framework, is increasingly used in the fight against COVID-19, in defiance of the most basic human rights rules.

This is the case of the “Novissi” system, which was put in place by the Togolese government at the time of the first sanitary restrictions.¹⁶ This system, in its first phase, had used data from the basic data of biometric voter cards without the consent of users, to the great indignation of political actors who had considered this a lack of inclusion, because the establishment of these biometric cards had been surrounded by controversy against the backdrop of a boycott by opposition militants.

The very use of this data at the time, without the intended beneficiaries' affirmed consent to the use of the collected electoral data for this purpose, was itself a violation of Article 14 of the Personal Data Protection Act.

The telephone data of the inhabitants were sifted without their knowledge: frequency and duration of calls, amount of credit available on the telephone, etc.

This algorithm, which was made operational without the user's consent, presented several biases that led to other violations and situations of inequality:

- The use of telephone data de facto excludes the rural population that does not use cell phones, as they lack the means to access them.
- The telephone data do not indicate the real precariousness of the targeted populations.
- Mobile money services are not available in rural areas.
- Operators have transferred their clients' data to the State without informing or asking for their consent as prescribed by law.

In addition to these very real dangers (under-regulation, regulation, and deliberate abuse), we are also experiencing unprecedented risks to the right to privacy. The guarantees of privacy are floundering in too many cases. Many people are completely unaware of who holds their data and how it is being used.

This situation, in which the Togolese government communicates very little or not at all, seems to reveal the Togolese state's eagerness to hide existing disparities.



Given that the issue of artificial intelligence is unclear in Togo, the lack of a clear definition is likely to open the door to even greater abuse.



16. <https://novissi.gouv.tg/>

RECOMMENDATIONS

In light of the various violations of citizens' digital rights in recent years, it is important to make some recommendations to the various stakeholders, including the Togolese government.

Regarding the collection of data related to the pandemic and the use of new technologies, the government must:

- Take into account all international human rights standards that may be affected by the use of tracking technologies, artificial intelligence, etc. to ensure compliance with internationally accepted standards;
- Ensure the temporary nature of the devices concerned: they had to end as soon as possible and no later than September 16, 2021, as provided by the law concerning the state of emergency;
- Consider the possibility of also using other means besides artificial intelligence in order to ensure the inclusion of everyone and to keep the voluntary nature of the TOGOSAFE application and the publication of the application's source code;
- Minimise the collection of unnecessary data related to PCR tests;
- Make only the following personal data accessible to the persons authorized to check the documents (border authorities): surname, first names, date of birth of the person concerned as well as the positive or negative result of the possession of a compliant document, excluding, in particular, the nature of the document (vaccination, negative test, certificate of recovery);
- Evaluate existing data protection laws to determine whether they sufficiently protect the right to privacy and the right to data protection in the context of pandemics and government crisis management;
- Take measures to introduce legislative and regulatory provisions framing the use of new technologies, in particular artificial intelligence, taking into account human rights achievements;
- Conduct an evaluation of the respect of human rights by all past, present and future systems based on Artificial Intelligence and being deployed to the public by the Togolese government and its partners;

- Inform and consult with Internet and human rights stakeholders on the deployment of public solutions;
- Provide all the information that is necessary for individuals to understand when and how technologies are used, particularly in the context of public services;
- Comply with the legal and regulatory provisions and the existing principles of transparency on the award of contracts for services or supplies in the field of data management;
- Enforce existing legislation where necessary to comply with the State's obligation to protect individuals from human rights violations committed by State entities or providers;
- Take steps to ensure that all relevant regulatory bodies have access to sufficient expertise, have received appropriate training on new technology systems and their human rights implications, and have the financial and other resources they need to effectively carry out their functions;
- Prevent and mitigate the risks of discrimination associated with the use of new technologies for groups that are at increased risk of having their rights disproportionately affected by these systems;
- Allowing each user, at any time, to self-delete data on the mobile app on the central server by unsubscribing and uninstalling the app and PCR testing data.



The Government must evaluate existing data protection laws to determine whether they sufficiently protect the right to privacy and the right to data protection in the context of pandemics and government crisis management.

Londa 2021 expands on last year's report with findings from 22 countries, examining themes of privacy, freedom of expression, access to information, segmentation and exclusion, digital transformation, affordability, gender and others within existing legislative frameworks, and against the backdrop of a widening digital divide. This edition captures the gaps and proffers recommendations to achieve a digitally inclusive and rights - respecting Africa.



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