



## Joint Submission to the Universal Periodic Review of Kenya by ARTICLE 19 and the Katiba Institute

For consideration at the 35<sup>th</sup> Session of the UPR Working Group in January 2020

### Executive Summary

1. ARTICLE 19 and the Katiba Institute welcome the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Kenya. This submission assesses Kenya's compliance with its international human rights obligations, in particular examining progress against recommendations accepted during the second cycle of the UPR (January 2015) relating to the right to freedom of expression and information, and the right to freedom of peaceful assembly and of association. It addresses the following areas:
  - Legal framework for free expression
  - Media regulation
  - Safety of journalists
  - Online expression
  - Artistic expression
  - Freedom of peaceful assembly
  - Freedom of association
  - Access to information
  - Data protection and privacy
2. In the period under review, there have been some positive legislative changes, including the coming into force of the Access to Information Act. A series of significant Kenyan judicial decisions have also struck down a series of problematic legislative provisions that were routinely abused to limit freedom of expression, online and offline.
3. Notwithstanding positive developments, the period under review has been marred by violence against people for exercising their freedom of expression rights, in particular in the run up to the 2017 elections. The government has also made numerous attempts to reintroduce or innovate new limitations on freedom of expression, in particular online, as well as freedom of association.

### Legal Framework for Free Expression

4. Despite accepting recommendations to bring its legal framework into compliance with international human rights law,<sup>1</sup> including by reviewing the Penal Code,<sup>2</sup> legislative change has mostly resulted from judicial intervention, rather than at the initiative of the Executive.
5. Article 33 of the Constitution of Kenya 2010 gives strong protection to the right to freedom of expression, subject to the exclusions of Article 33(2), with Article 34 further protecting freedom of the media, and Article 35 protecting the right of access to information. Article 2 of the Constitution incorporates international law, including human rights treaties which Kenya has ratified, directly into national law.<sup>3</sup>

### **Penal Code**

6. In the period under review, the Kenyan judiciary has struck down numerous provisions of national law on the basis of their incompatibility with Constitutional freedom of expression guarantees.

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<sup>1</sup> 142.19. (Ghana); 142.127 (United Kingdom of Great Britain and Northern Ireland); 142.138 (Japan)

<sup>2</sup> 142.4 (Sweden); 142.20 (Indonesia)

<sup>3</sup> The Constitution of Kenya 2010. Available at: <http://www.kenyalaw.org/lex//actview.xhtml?actid=Const2010>

7. In April 2017, the High Court of Kenya declared Section 132 of the Penal Code unconstitutional resulting in its repeal.<sup>4</sup> The provision criminalised anyone whose statements or acts “[excited] defiance of or disobedience” to public officers, or were “calculated to discredit” them, punishable by up to three years’ imprisonment. These extremely vague terms enabled its routine misuse by state officials to government critics.<sup>5</sup>
8. The constitutional challenge was brought by Robert Alai, a social media commentator and blogger, together with ARTICLE 19. Alai had been arrested and charged under Section 132 for a Facebook post that criticised President Uhuru Kenyatta’s comments regarding the opposition leader and CORD Principal Raila Odinga.
9. In February 2017, the High Court declared Section 194 of the Penal Code, on criminal defamation, unconstitutional, in a case brought by Jacqueline Okuta and Jackson Njeru. Both had been pursued under Section 194, in relation to their posts on the Facebook page “*Buyer Beware Kenya*”.<sup>6</sup> The court held criminal defamation to be an unnecessary, excessive, and unjustifiable restriction on freedom of expression in an open and democratic society.

### ***Restrictive counter-terrorism and national security laws***

10. During its second UPR, the government accepted recommendations to ensure the compliance of its counter-terrorism laws with its international human rights obligations.<sup>7</sup>
11. The Prevention of Terrorism Act<sup>8</sup> (PTA) remains open to abuse against political opponents, civil society, and protesters. It adopts an overbroad definition of terrorist acts (Section I, Article 2), including any act that “prejudices public safety or national security”, and that “destabilises the religious, political, Constitutional, economic or social institutions of a country”. The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has noted that, notwithstanding the absence of an internationally agreed definition of “terrorism”, vague definitions in national laws enable States to take “highly intrusive, disproportionate, and discriminatory measures, notably to limit freedom of expression.”<sup>9</sup>
12. The PTA enables the blacklisting of organisations believed to be “acting in association with” a designated terrorist group, the freezing of their assets, and restrictions placed on their activities, with insufficient due process guarantees. This has been applied to CSOs in the period under review, as in the case of Haki Africa and Muslims for Human Rights (MUHURI) on 7 April 2015, in the aftermath of the Garissa terrorist attacks.<sup>10</sup> The ban on these groups was lifted by the Mombasa High Court on 12 November 2015.
13. Various other sections of the PTA obstruct media freedom, including Section 19, related to disclosure of and interference in information relevant to a terrorism investigation, punishable by up to twenty years’ imprisonment. Robert Alai was arrested on 18 June 2019 for allegedly posting and sharing on social media pictures of Kenyan police officers who were killed in a terror attack in Wajir. Despite Alai having taken down the pictures at the request of police, he was arraigned in court and charged with disclosure of information in relation to terrorist activities under Section 19.<sup>11</sup>
14. Amendments to the PTA, introduced through the Security Laws (Amendment) Act (SLAA) of 19 December 2014, broadened the authorities’ scope to abuse counter-terrorism powers against the media and civil society.<sup>12</sup> Section 64 of the SLAA introduced:

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<sup>4</sup> Petition 174 of 2016 Robert Alai v The Hon Attorney General & another [2017] eKLR Available at:

<http://kenyalaw.org/caselaw/cases/view/135467/>

<sup>5</sup> Kenya: Win for freedom of expression as penal provision declared unconstitutional," Article 19, press release, April 26, 2017, <https://www.article19.org/resources.php/resource/38727/en/kenya:-win-for-freedom-of-expression-as-penal-provision-declared-unconstitutional>

<sup>6</sup> Jacqueline Okuta & Anor vs. AG & Others [2017]

<sup>7</sup> 142.17 (Finland); 142.184 (Austria); 142.186. (Canada); 142.187(Chile); 142.190 (Norway);

<sup>8</sup> The Prevention of Terrorism Act 2012

<sup>9</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism “Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders”, 1 March 2019 A/HRC/40/52 at para 19.

<sup>10</sup> International Federation for Human Rights, *Kenya: Human rights organisations are not terrorist organizations*, 14 April 2015, available at: <https://www.refworld.org/docid/555da76934.html>

<sup>11</sup> Kenya: Blogger Alai to face terror-related charges, Article 19 press release on June 21, 2019. Available at <https://www.article19.org/resources/kenya-blogger-alai-to-face-terror-related-charges/>

<sup>12</sup> The Security Laws (Amendment) Act 2014; available at: [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws\\_Amendment\\_Act\\_2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf)

- Section 30A, broadly prohibiting the “[publication or utterance of] a statement that is likely to be understood as directly or indirectly encouraging or inducing [someone] to commit or prepare to commit an act of terrorism”, punishable by 14 years’ imprisonment.
  - Section 30F, broadly prohibiting the broadcast of “any information which undermines investigations or security operations relating to terrorism”, and the publication or broadcast of images of victims of terrorist attack without consent, both punishable by up to three years’ imprisonment and/or a fine.
15. Section 12 of the SLAA amended the Penal Code, introducing Article 66(a), criminalising:
- Anyone who “publishes, broadcasts, or causes to be published or distributed, through print, digital, or electronic means, insulting, threatening or inciting material, or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace”, punishable by imprisonment of up to 5 years and/or a fine.
  - Anyone who “publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defense forces”
16. Sections 12, 30A and 30F of the SLAA were declared unconstitutional and suspended in a ruling by the High Court on 23 February 2015, for violating the right to freedom of expression and the media, with particular implications for investigative journalism.<sup>13</sup> Several other sections of the SLAA that compromised essential procedural safeguards and due process guarantees were struck down in the same ruling.<sup>14</sup>
17. Other problematic provisions of the SLAA, including Section 62, inserting Section 12(D) into the PTA, remain in place. This provision broadly criminalises anyone who “adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious, or social change” punishable by up to 30 years’ imprisonment. This broad provision, subject to heavy penalties, is open to being applied against human rights activists, and political opponents.

### **Surveillance powers**

18. The authorities have extensive powers to conduct mass and targeted surveillance, without appropriate human rights safeguards: this includes in particular Section 42 of the SLAA (2014), modifying the National Intelligence Service (NIS) Act (2012), to grant the Director General of the National Security Agency unfettered discretion to authorise surveillance to deal with “any threat to national security or to perform any of its functions” (Article 46). Sections 36 (1) and (2) of the PTA (2012), as well as Article 36 of the NIS Act, are also of concern, and require reform.
19. These surveillance capabilities have seemingly enabled state interference in the work of Human Rights Defenders (HRDs). In December 2018, a report by the National Coalition of Human Rights Defenders for Kenya identified that a majority of HRDs who participated in the survey, reported experiencing security breaches including unlawful access of their social media and email accounts as well as phone-tapping.<sup>15</sup> HRDs working at county level reported greater vulnerability to such breaches. Infiltration of civil society groups and meetings by state agents was also reported. These practices contribute to self-censorship among HRDs.

### **Media regulation**

20. The media sector in Kenya is regulated through the Media Council Act (2013) (MCA)<sup>16</sup> and the Kenya Information and Communications (Amendment) Act (2013) (KICA).<sup>17</sup> Both are overly restrictive, containing severe penalties for journalists and media outlets.
21. The MCA established the Media Council of Kenya: a regulator with oversight over print, broadcast, and electronic media. Although ostensibly independent, with its members appointed by an independent panel and through open recruitment, reports of government influence on the selection of its members remain. The membership of the Council is currently incomplete, as a result of apparent government efforts to stall the selection of applicants in February 2019.

<sup>13</sup> Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR; available at: <http://kenyalaw.org/caselaw/cases/view/106083/>

<sup>14</sup> Sections 16, 20, 26.

<sup>15</sup> Perception Survey on Communication Surveillance and Privacy of Human Rights Defenders in Kenya, report by the HRD Coalition. Available at: <https://hrdcoalition.org/perception-survey-on-communication-surveillance-and-privacy-of-human-rights-defenders-in-kenya/>

<sup>16</sup> The Media Council Act (2013).

<sup>17</sup> The Kenya Information and Communications (Amendment) Act, 2013; available at: <http://bit.ly/1M1zTDB>.

22. The Council sets media standards and is responsible for the implementation of its code of conduct, including hearing complaints and imposing sanctions for breaches. Available sanctions include the withdrawal of accreditation from media outlets, and seizure of assets to ensure payment of applicable penalties. The maximum penalties that can be imposed in case of breaches of the Code of Conduct range from USD 5,000 against individual journalists and media workers, to USD 200,000 against media companies. Where decisions by the Council are appealed, the MCA provides for a government-appointed Communications and Multimedia Appeals Tribunal to hear the complaints, facilitating undue government interference in the media.
23. The KICA created the Communications Authority of Kenya – a government agency under the authority of the ICT Ministry – which is responsible for licencing broadcast and other media. Several sections of the KICA unduly restrict free and independent media. Section 90 sets out broad powers for the search and seizure of broadcast equipment, for the purpose of any proceedings, and Section 17 establishes wholly disproportionate fines and custodial sentences for various offences relating to the use of radio frequencies.
24. In a positive step, Section 29 of KICA was ruled unconstitutional in April 2016.<sup>18</sup> Section 29 related to the “improper use of a licensed communications system” and effectively criminalised publishing vaguely defined unlawful information online: this included grossly offensive, obscene content, and content causing annoyance, inconvenience, or needless anxiety, punishable by up to three years’ imprisonment and/or a fine. The ruling held this to be an overbroad restriction on the freedom to seek, receive, and impart information.<sup>19</sup>
25. Prior to its suspension, the authorities had increased their use of Section 29 to target social media users, bloggers, and journalists, posting content that criticised public officials, or that expressed dissent. For example:
- Geoffrey Andare was charged for a Facebook post criticising a representative of an NGO in relation to allegations of sexual harassment.
  - Journalist Yassin Juma was arrested and detained in January 2016 for a Facebook post containing a photo of a Kenyan soldier, allegedly killed in an attack on Kenyan peacekeepers in Somalia. Mr Juma was released on procedural grounds, as the authorities failed to prepare key documentation.
  - In January 2016, Judith Akolo, a journalist with KBC, was taken to the Directorate of Criminal Investigations (DCI) offices and questioned for three hours for retweeting a post by a third party, which referred to an internal police memo showing recruitments with a one-day application deadline. Akolo was asked to explain how she obtained the memo, despite not having written the original tweet – whilst the individual who had written the post was not questioned.
26. Attempts to intimidate and harass the media to prevent coverage of the opposition, and minimise negative coverage of the ruling party, have continued. An egregious example of state interference occurred in the aftermath of the contested Presidential elections:
- a) The Interior Cabinet Secretary summoned the Kenya Editors Guild to the State House on January 26, 2018, and threatened to revoke the licenses of any media companies that broadcast a planned 30 January rally and symbolic “swearing-in” of opposition leader Raila Odinga in Uhuru Park.<sup>20</sup> This threat was justified on the basis of alleged national security concerns.
  - b) On the orders of the Interior Cabinet Secretary, the Communications Authority suspended four channels (three broadcasters) (Citizen TV’s national and local channels, KTN and NTV) in advance of the 30 January event, in an unconstitutional act of prior censorship that clearly violates Kenya’s international human rights law obligations.
  - c) On 31 January, the Interior Cabinet Secretary announced that the stations would remain suspended until investigations into what he termed a “serious breach of security” were concluded. The outlets were alleged to have ignored earlier advice. A legal challenge to the suspension was brought by activist Okiya Omtatah. In a 1 February ruling, the Milimani High Court held that the Communication Authority of Kenya must immediately restore the stations’ broadcasts.<sup>21</sup> The ruling was not implemented until 7 February, however – when the government declared the threat to national security had been fully investigated.

<sup>18</sup> Petition 149 of 2015, Geoffrey Andare vs. Attorney General & 2 others [2016] eKLR. Available at: <https://www.article19.org/data/files/medialibrary/38343/Judgment-Petition-No.-149-of-2015-2-1.pdf>

<sup>19</sup> Kenya: Win for freedom of expression as repressive law declared unconstitutional," Article 19, press release, April 19, 2016, available at: <https://www.article19.org/resources.php/resource/38343/en/kenya:-win-for-freedom-of-expression-as-repressive-law-declared-unconstitutional>

<sup>20</sup> Editor’s guild accuses President Kenyatta of gagging media over coverage. Available at: <https://www.nation.co.ke/news/Editors-Guild-condemns-threats-media/1056-4283676-ax4enuz/>

<sup>21</sup> Court ruling available at: <https://www.theelephant.info/wp-content/uploads/2018/02/High-Court-Orders-on-Media-Shutdown.pdf>

## **Safety of journalists**

27. Kenya accepted recommendations relating to combating attacks against journalists and guaranteeing their freedom of expression, including in the context of demonstrations.<sup>22</sup> However, Kenya has failed to put in place measures to ensure the safety of journalists and media. Public commentary on issues around corruption, elections, matters of national security, terrorism, political parties, and land ownership, is particularly dangerous.
28. Within the period under review, between 1 January 2015 and 31 April 2019, ARTICLE 19 documented 285 incidents of attacks against journalists and media workers, including harassment, arbitrary arrests and physical attacks. State actors were believed to be responsible for or connected to a significant proportion of these attacks, including police, politicians, and other government officials. Acts of violence targeting journalists was particularly pronounced in the run-up to the 2017 elections.<sup>23</sup>
29. In the period under review, the following cases are particularly emblematic of these broader trends:
- a. On 12 August 2017, Duncan Khaema, a political reporter with Kenya Television Network (KTN), alongside cameraman David Otieno, were arrested and charged under the PTA with possessing a helmet and body armour without a proper license. They were covering violent post-election protests in Nairobi's Kibera slums. Although the two had produced the certificate of importation, end user certificate, and clearance certificates from the government's chief firearm licensing officer, the police insisted that they should have their individual license as well. The police assaulted the two men prior to their arrest. Both were later released on free police bond. The two media workers had earlier been confronted by a General Service Unit (GSU) officer who demanded to know who had authorised journalists to cover their operation.
  - b. On 13 August 2017, Citizen TV reporter Wilkister Nyabwa and cameraman Justus Netia were arrested by police in Kisumu immediately after they had finished doing the 9pm news link. Their arrest was linked to a story that had aired on Citizen, in which they reported on police raids on houses in Manyatta, Obunga, Kondele and Nyalenda, during which they allegedly assaulted residents. The media workers were later released after interrogation and recording their details with police.
  - c. On 9 October 2017, also in Kisumu, five journalists were harassed, beaten and injured by the police while covering anti-IEBC protests. More than 20 officers from the GSU assaulted Rashid Ronald of KTN and Faith Matete of the Star, injuring Ronald on the leg. According to the journalists, the officers responsible said both journalists and protestors are one and the same while on the streets. The officers then lobbed tear gas canisters at NTV's Ouko Okusa, his cameraperson Doreen Magak and Daily Nation reporter Rushdie Oudia. The officers claimed the journalists had exposed their operation alleging brutality against protesters.<sup>24</sup>
30. There is a recurring pattern of law enforcement authorities failing to investigate or take protective action in response to criminal complaints from journalists, human rights defenders, and other communicators. In the past five years, no state actor has been held accountable for threatening, intimidating, or physically attacking a journalist or blogger in Kenya.
31. There is a clear and urgent need for the establishment of a national mechanism for the protection of journalists, to ensure a safe and enabling environment for journalists and media workers to carry out their work, and to combat impunity for attacks against them.<sup>25</sup> We note that whilst both the Office of the Director of Public Prosecutions and the Office of the National Police Spokesperson in January 2018, requested a media stakeholders' working group to forward cases requiring investigation, no developments have been forthcoming in any of the cases submitted.

## **Online expression**

56. ARTICLE 19 is concerned that the government has increasingly targeted online expression, bringing in new legislation to achieve this objective following successful constitutional challenges to older laws.
57. Numerous bloggers and social media users were arrested or brought in for questioning under the abovementioned Section 132 of the Kenyan Penal Code, prior to the provision being declared unconstitutional, for example.

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<sup>22</sup> 142.126 (Switzerland); 142.129 (Uruguay);

<sup>23</sup> <https://www.article19.org/resources/not-worth-the-risk-threats-to-free-expression-ahead-of-kenyas-2017-elections/>

<sup>24</sup> Kenya: Violations of Media Freedom May 2017 – April 2018, report by Article 19. Available at: <https://www.article19.org/wp-content/uploads/2018/05/Kenya-Report-1.pdf>

<sup>25</sup> National mechanism for safety of journalists in Kenya coming soon. <http://www.reporter.co.ke/2018/01/10/national-mechanism-for-safety-of-journalists-in-kenya-coming-soon/>

58. Sixty bloggers/journalists were arrested, fired and/or detained in 2016 in relation to their online expression, according to research by BAKE.<sup>26</sup>
59. Popular blogger and social media influencer Robert Alai has been repeatedly arrested, detained and released for his social media activity:
- In 2015: Alai was arrested under Section 29 of KICA for criticising the Ethics and Anti-Corruption Commission via Facebook. The court proceedings were dropped following this being declared unconstitutional.<sup>27</sup>
  - In 2017: Alai was arrested, in connection with information he published about the health of a family member of President Kenyatta. Content posted on his Facebook page in relation to the story was removed without explanation. No charges were filed and he was released.
  - In 2019: Alai was charged under Section 27 of the PTA for publishing an image of deceased police officers on Twitter. The court case is ongoing.
60. Administrators of WhatsApp Groups and Facebook pages have also been arrested, detained, or pursued through the courts, for content posted into those groups or pages.<sup>28</sup>
- In November 2016, for example, Jackson Njeru, an administrator for the Facebook page, “Buyer Beware,” was arrested and jailed for three months. He was charged with contempt of court for posting on the Facebook page requesting page subscribers to contribute bail funds for Jacqueline Okuta who had been charged under Section 29 of KICA.
61. The Computer Misuse and Cybercrimes Act (2018) (or CMCA)<sup>29</sup> poses significant concerns for freedom of expression, with sections 22 and 23 introducing worrying “fake news” provisions, as well as effectively reintroducing criminal defamation.
62. Section 23, for example, provides for fines of up to 5 million KSH (approx. USD 50,000), and/or up to 10 years’ imprisonment, for the publication of “false” or “fictitious” information that results in “panic” or is “likely to discredit the reputation of a person.”<sup>30</sup>
63. The most problematic provisions of the CMCA were suspended on 29 May 2018 following a challenge filed by the Bloggers Association of Kenya (BAKE), with ARTICLE 19 and the Kenya Union of Journalists intervening as interested parties.<sup>31</sup> The Kenyan High Court suspended twenty-six sections of the CMCA, pending a final ruling.<sup>32</sup> The suspension prevents the authorities from prosecuting individuals using any of the suspended provisions.<sup>33</sup> It is imperative that in its final ruling, the High Court ensures the full protection of the rights to freedom of expression and information, and media freedom.

### **Artistic expression**

64. The Kenya Films and Classification Board (KFCB) has increased its interference in artistic expression in the period under review, in particular to limit the distribution of content it deems to conflict with traditional values, through the overzealous application of restrictive guidelines and legislation. The KFCB is a statutory body, established by the colonial-era Films and Stage Plays Act 1962, which has power to ‘regulate the creation, broadcasting, possession, distribution and exhibition of films’, through the application of its Guidelines of 2012.<sup>34</sup>
65. In 2016, the KFCB proposed a new “Film, Stage Plays and Publications” Bill that would have had grave implications for artistic freedom, as well as media freedom and freedom of expression more broadly, and further bolstered its powers. The proposed Bill was heavily criticised by civil society groups and stakeholders in the creative industries,

<sup>26</sup> BAKE (2016) ‘State of the Internet in Kenya.’

<sup>27</sup> Agoya, V (2016) ‘Court drops case against blogger Robert Alai over offensive post’ <<http://nairobi.kenya.com/news/court-drops-case-blogger-robert-alai/>> accessed on 23 July 2019.

<sup>28</sup> Some of the people arrested (Kenyan and non-Kenyan citizens) included: Japeth Mulewa, Oliver Nyabwazi Moraira, (blogger) Paul Odhiambo, Longton Jamil, (blogger) Robert Alai, Jackson Njeru, James Gatdet Dak.

<sup>29</sup> Computer Misuse and Cybercrimes Act, 2018; available at:

<<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/C/Computer%20Misuse%20and%20Cybercrimes%20Act%20No.%2015%20of%202018/docs/ComputerMisuseandCybercrimesAct5of2018.pdf>> accessed on 19 July 2019.

<sup>30</sup> Section 23, Computer Misuse and Cybercrimes Act, 2018

<sup>31</sup> The Bloggers Association of Kenya (BAKE) v Attorney General & 5 Others, 2018- Constitutional Petition No. 206 of 2018.

<sup>32</sup> The court order suspended the following sections of the Computer Misuse and Cybercrimes Act, 2018: ss. 5, 16, 17, 22, 23, 24, 27 - 29, 31 - 41, and 48 – 53. See: Business Daily, ‘Court suspends Computer Misuse and Cybercrimes Act’ (2018) <<https://businesstoday.co.ke/court-suspends-computer-misuse-cybercrimes-act/>>

<sup>33</sup> The Court asserted, in response to the application to review, set aside, vary or suspend the exparte orders made on 29 May 2018, that the court which issued the conservatory orders bore in mind the delicate balance which needs to be struck between the need to ‘protect the petitioner’s rights that were alleged to be under threat of violation by the coming into force of the impugned Act and the public interest that citizens be governed by an Act that passes the constitutional muster.’ See: *Bloggers Association of Kenya (Bake) v Attorney General & 5 others* (2018), para 28 <<http://kenyalaw.org/caselaw/cases/view/159286/>> accessed on 23 July 2019.

<sup>34</sup> Cap 222 of the Laws of Kenya. Available at: [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/FilmsandStagePlaysAct\\_Cap222.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/FilmsandStagePlaysAct_Cap222.pdf); KFCB 2012 Guidelines. Available at: [http://kfcg.co.ke/wp-content/uploads/2016/08/Film\\_Classification\\_Guidelines.pdf](http://kfcg.co.ke/wp-content/uploads/2016/08/Film_Classification_Guidelines.pdf)

and withdrawn. A new draft has yet to be put forward, but is urgently needed to ensure this legislation fully protects the rights to freedom of expression and information, and media freedom, for all.

66. In the period under review, the KFCB has, in particular, targeted depictions of sexual and gender minorities, based on discriminatory arguments of “protecting public morals”. These decisions not only violate Kenya’s international human rights obligations on freedom of expression and non-discrimination, but also Kenya’s constitutional guarantees for these rights in Articles 33, 10(2)(b), and 27.
- On 15 June 2017, the KFCB requested a network to immediately discontinue the broadcast of children’s television programmes that allegedly contained “glorified” homosexuality, following the receipt of public complaints. The programmes included cartoons such as Hey Arnold, and Loud House, shown on Nickelodeon.<sup>35</sup> In a statement, the chairperson of the KFCB claimed the programmes “target vulnerable children with subtle messages that are deliberately designed to corrupt their moral judgment regarding the institution of the family,” and that the age ratings were inconsistent with their content classification guidelines and national laws, citing Section 181 of the Penal Code prohibiting the “distribution and exhibition of indecent content with the potential to corrupt morals”.
  - In April 2018, KFCB banned the distribution and screening of the film *Rafiki* for containing depictions of homosexual acts that are illegal under Kenyan law, and, according to the KFCB chairperson, sought to “promote lesbianism”, against the culture and moral values of Kenyan society.<sup>36</sup> The film-maker Wanuri Kahiu, together with the Creative Economy Working Group, challenged the constitutionality of the ban itself, as well as the legislation and guidelines on which the decision was made. In September 2017, the ban was temporarily lifted through a conservatory order to enable the film to be entered into the Oscars.<sup>37</sup> The legal challenge is ongoing at the time of writing.

### **Freedom of Peaceful Assembly**

67. In the previous UPR Cycle, Kenya accepted one recommendation on peaceful assembly and committed to specifically guarantee freedom of expression, press, associations and peaceful assembly of journalists, activists and participants in demonstrations in both law and practice.<sup>38</sup> Despite that, the right to freedom of peaceful assembly is not sufficiently protected in Kenyan law, and the right is routinely violated by law enforcement authorities responding to protests.
68. While the right to freedom of peaceful assembly is protected in Article 37 of the 2010 Constitution, public authorities still undermine this constitutional guarantee by applying the colonial-era Public Order Act of 1950, which is out of step with the Constitution and Kenya’s obligations under international human rights law.<sup>39</sup>
69. Section 5(1) and (2) of the Public Order Act require mandatory notification of assemblies to the local police station, without the availability of appeal where notice is disallowed. A regulating officer can deny the assembly only if notice of another assembly at the same venue, time and date has already been received.<sup>40</sup> Participation in an unlawful assembly can be punished with up to one year of imprisonment (Section 5(11)).
70. In March 2019, the government published a draft Public Order Act Amendment Bill 2019, which has since been through its first reading.<sup>41</sup> The Bill raises serious concerns for the right to freedom of peaceful assembly. In particular, subsections 11(a) and 11 (b) seek to impose criminal and civil liability on anyone who, while participating in an assembly causes grievous harm, damage to property or loss of earnings, punishable by up to six years’ imprisonment and/or a fine of KS 100,000. It is not clear why specific offences against the person and property, with such severe sentences and additional civil liability, are required specifically in the context of protests, other than for the purpose of intimidating persons from exercising their fundamental rights.

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<sup>35</sup> KFCB, CEO’s Statement, 15 June 2017. Available at: <https://kfcg.co.ke/wpcontent/uploads/2017/06/STATEMENT-ON-CHILDREN-TELEVISION-PROGRAMMES-PROMOTING-HOMOSEXUALITY-IN-KENYA-ISSUED-ON-15TH-JUNE-2017.pdf>

<sup>36</sup> KFCB, CEO’s Statement. Available at: <https://bit.ly/2uQBUGY>,

<sup>37</sup> Wanuri Kahiu & another v CEO, Kenya Film Classification Board - Ezekiel Mutua & 4 others [2018] eKLR; See, ARTICLE 19, ‘Kenya: Court rules to temporarily remove ban on Rafiki film’, 27 September 2018. Available at: <https://www.article19.org/resources/kenya-court-rules-to-temporarily-remove-ban-on-rafiki-film/>

<sup>38</sup> 142.129. (Uruguay);

<sup>39</sup> The Public Order Act. Available at: <https://www.nis.go.ke/downloads/Public%20Order%20Act,%20Cap%2056.pdf>

<sup>40</sup> 9 Section 5 (4) Public Order Act

<sup>41</sup> Public Order Act Amendment Bill 2019 Available at:

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/PublicOrder\\_Amendment\\_Bill\\_2019.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/PublicOrder_Amendment_Bill_2019.pdf)

71. In the period under review, state officials have routinely denied or prohibited peaceful assemblies. In the run up to the December 2017 general elections, the Interior Cabinet Secretary banned three planned protests in Kisumu, Mombasa, and Nairobi towns, due to take place on 12 October 2017, claiming that they would disturb business operations in the three cities. He stated that the ban was in response to a “clear, present and imminent danger of a breach of peace and public order”, and that the Inspector General of Police had been notified accordingly. There was no clear legal basis for the ban. We note that States have a positive obligation, in accordance with international standards, to facilitate peaceful assemblies, including when they may cause temporary disruption and inconvenience.
72. On 6 March 2019, activist Boniface Mwangi was arrested and charged with organising a revolution against the government of Kenya, in relation to his organisation of anti-corruption protests on 30 April 2019. Another anti-corruption protester, Beatrice Waithera, was also arrested on charges of organising a “revolution likely to cause civil unrest”.<sup>42</sup> After public outcry and the payment of bail by human rights organisations, both were released, although the cases against them remain open.
73. Schedule 6 of the National Police Service Act 2011 sets out guidance on police use of force. This guidance does not comply with international human rights law, allowing for the use of lethal weapons in a range of circumstances where there is no immediate risk to life. The police often justify the excessive use of force in the context of peaceful protests by reference to this legal authority.
74. The Kenya National Commission on Human Rights recorded 37 deaths in the aftermath of the contested 2017 general elections, between 9-15 August 2017. 35 of these related to the excessive use of force by security agents. Seven of the documented victims were minors, including a 6-month old baby who died after being caught in an operation by anti-riot police at protests in Kisumu.<sup>43</sup> Only the death of the baby was investigated: an inquest into her killing held the police responsible.<sup>44</sup>

## **Freedom of Association**

75. During the previous UPR cycle, the government accepted recommendations relating to the legal framework and creation for a safe and enabling environment for civil society organisations, and protecting the right to freedom of association.<sup>45</sup> This is yet to be seen in practice.
76. The government has yet to implement the Public Benefits Organisation Act 2013 (PBO Act).<sup>46</sup> The PBO Act, passed by Parliament in 2012 and assented to law in January 2013 by the outgoing President Mwai Kibaki, was mostly welcomed as it promised to create a more enabling environment for civil society. In sections 6 to 13, it provides unambiguous criteria for registration and licensing of public benefits organizations, improved accountability, and promotes self-regulation, as well as including tax incentives for organizations carrying out activities for public benefit. As a result, civil society is still regulated by the restrictive 1990 NGO Coordination Act.
77. Attempts were subsequently made to introduce a series of amendments through a Statute Law, that would effectively dismantle the protections promised by the PBO Act. The amendments threatened to introduce would have severely limited NGOs’ ability to operate, in particular by targeting their access to resources, including for example by capping the funding Public Benefit Organisations could receive (i.e. foreign funding) at 15%, subjecting any funds above that cap to a higher tax bracket of 30%.
78. Despite two High Court rulings ordering the implementation of the PBO Act without amendments in October 2016 and May 2017 respectively, the government has continued to stall.<sup>47</sup> In this context, we remain sceptical that the government

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<sup>42</sup> Activist Boniface Mwangi arrested for ‘plotting revolution. Business Today, 6 May 2019. Available at: <https://businesstoday.co.ke/activist-boniface-mwangi-arrested/>

<sup>43</sup> Mirage at Dusk - First Presidential Elections: A Human Rights Account of The 2017 General Election. Available at: <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1030/Mirage-at-Dusk-First-Presidential-Elections-A-Human-Rights-Account-of-The-2017-General-Election>

<sup>44</sup> Kenya: Inquest finds police culpable for death of baby in 2017 post-election protests. ARTICLE 19 Press Release, 18 February 2019. Available at: <https://www.article19.org/resources/kenya-inquest-finds-police-culpable-for-death-of-baby-in-2017-post-election-protests/>

<sup>45</sup> 142.143. (Norway); 142.125 (Sweden); 142.128. (United States of America); 142.135. (Denmark); 142.137. (Ireland); 142.129. (Uruguay); 142.127 (United Kingdom of Great Britain and Northern Ireland); 142.133 (Canada); 142.140. (Netherlands); 142.132. (Botswana); 142.136 (France); 142.142. (Norway);

<sup>46</sup> Public benefits Organizations Act 2013; available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicBenefitsOrganisationNo18of2013.PDF>

<sup>47</sup> KENYA: Last warning from the court to implement the PBO Act 2013 within 30 days, ICJ Kenya Chapter, 18 May 2017; available at: <https://icj-kenya.org/news/latest-news/102-kenya-last-warning-from-the-court-to-implement-the-pbo-act-2013-within-30-days>



intends to implement the PBO Act, despite recent promises to do so, most recently at the launch of Kenya's 3<sup>rd</sup> National Action Plan (NAP) under the Open Government Partnership (OGP).<sup>48</sup>

79. On 31 October 2016, the High Court ordered that the Cabinet Secretary for Devolution and Planning commence the Act within 14 days.<sup>49</sup> Notice of commencement was given on 9 September 2016, but regulation of the NGO sector was then transferred from the Ministry of Devolution and Planning to the Ministry of Interior and Internal Security. On 13 May 2017, the High Court ordered the Cabinet Secretary for the Ministry of Interior to publish in the Kenya Gazette the official commencement date of the Act within 30 days.<sup>50</sup> The ruling directed that the government was in contempt of court orders since it had not complied with a similar court order made in 2016.
80. The Attorney General introduced a draft Associations Bill in October 2018<sup>51</sup> as an alternative to the PBO Act of 2013. However, its provisions are more restrictive than the PBO and do not comply with international human rights standards. Section 2 provides for the mandatory registration for all associations, and Section 11 includes impermissibly broad criteria for declaring associations unlawful, also allowing the Registrar of Associations excessive powers to de-register associations. Severe criminal penalties are foreseen in the bill, including fines of up to KSH 100,000 (approx. 1,000 USD) or 1 year's imprisonment for operating a meeting of unregistered organisation or attending a meeting of an unregistered organisation, with fines of up to KSH 300,000 (approx. 3,000USD) or 3 years' imprisonment for managing or helping to manage an unlawful association. If passed into law, the Bill would significantly undermine freedom of association, and the work of civil society organisations.

### **Access to Information**

81. In September 2016, the Access to Information Act was enacted,<sup>52</sup> although the government only noted recommendations to do so during its last UPR review.<sup>53</sup>
82. While this development is positive, the full realisation of the right of access to information depends upon the issuance of regulations, required of the Cabinet Secretary under Section 25 of the Act.<sup>54</sup> Without these regulations in place, there is ambiguity over the level of fees that must be paid.
83. Various government departments are not proactively disclosing information as requested by Section 5 of the Act, and most State agencies have not digitized their records as required by Section 17(3)(c) of the Act. Although the Act provides for the issuance of forms to make access to information requests, there is a need for standardization across departments.
84. Civil society and media attempts to make use of the Access to Information Act reveal the challenges of implementation:
- The contract between the governments of Kenya and China for the development of the Standard Gauge Railway line between Mombasa and Nairobi, for example, has not been disclosed, notwithstanding numerous requests.<sup>55</sup>
  - The Katiba Institute filed a constitutional petition against the government in 2017 for failure to provide information pursuant to a request which sought to examine government advertising expenditure as a possible violation of electoral law. In a landmark judgement, the High Court found that the [President's Delivery Unit](#) (PDU) and state officers working in the Office of the President were under both a constitutional and legal obligation to allow any citizen to access information in the State's possession since it was held on behalf of the public.<sup>56</sup> The government has challenged the ruling.

### **Data Protection and Privacy**

85. In 2019, the launch of the National Integrated Identity Management System (NIIMS) through the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018, raises grave concerns. The Act was passed through a

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<sup>48</sup> Ruto directs public entities to comply with order to list all suppliers: <https://www.capitalfm.co.ke/news/2019/01/ruto-directs-public-entities-to-comply-with-order-to-list-all-suppliers/>

<sup>49</sup> Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others [2016] eKLR; available at: <http://kenyalaw.org/caselaw/cases/view/128172>

<sup>50</sup> Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others [2017] eKLR; available at: <http://kenyalaw.org/caselaw/cases/view/135653/>

<sup>51</sup> Associations Bill 2018; available at: <https://www.statelaw.go.ke/wp-content/uploads/2018/09/Associations-bill-2018.pdf>

<sup>52</sup> The Access to Information Act 2016. Available at: <https://www.cuk.ac.ke/wp-content/uploads/2018/04/Access-to-Information-ActNo31.pdf>

<sup>53</sup> 143.54 (Greece); 143.55 (Latvia).

<sup>54</sup> Kenya: New dawn for transparency as Access to Information law is passed. Article 19 press statement, available at: <https://www.article19.org/resources/kenya-new-dawn-for-transparency-as-access-to-information-law-is-passed/>

<sup>55</sup> Uhuru tells NTV's Mark Masai to forget about SGR contract. *Pulse Live* on 30 April 2019. Available at:

<https://www.pulselive.co.ke/news/president-uhuru-kenyatta-will-not-give-ntvs-news-anchor-mark-masai-a-copy-of-the-sgr/tntwtxsg>

<sup>56</sup> Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR available at: <http://kenyalaw.org/caselaw/cases/view/144012/>

Miscellaneous Amendments statute – thereby sidestepping full parliamentary and public scrutiny - but substantively altered sections 3, 5 and 9 of the Registration of Persons Act. It requires all people to register their personal details with the government, including biometrics and DNA, to receive a unique identifier (“Huduma Number”) in order to access public services. This constitutes a fundamental violation of the right to privacy as guaranteed by Article 31 of the Constitution, and international human rights law and standards. Given the history of ethnic conflict in Kenya, the collection of DNA is a particularly concerning development.

86. While the right to privacy is protected by a number of sectoral laws, there is a need for comprehensive data protection legislation to ensure the effective protection of the right to privacy, and freedom of expression and information.<sup>57</sup>
87. A new draft Data Protection Bill is currently being considered by the National Assembly. As currently drafted, the bill does not ensure that the rights to freedom of expression and to information are fully protected, in accordance with the Constitution, the Access to Information Act, and international law.<sup>58</sup> Among the key elements for reform include, *inter alia*:
- The application of exemptions for freedom of expression, literature, and artistic purposes should be in relation to the entirety of the law, rather than limited to processing of data,
  - Exemptions related to journalistic work are unduly narrow, and risk obstructing media freedom.
  - The definition of personal information should specifically exempt information about the public activities and functions of public officials and those exercising public functions as well as public registers and other information not of a personal nature about activities of government should remain public.

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<sup>57</sup> These include the Access to Information Act; and the Public Archives and Documentation Service Act. Others are the Kenya Information and Communications Act (KICA); Private Security Regulation Act; and the Elections (Technology) Regulations, 2017.

<sup>58</sup> ARTICLE 19, ‘Legal Analysis of The Data Protection Bill, 2019’, *forthcoming*