



**ARTICLE 19 Individual Submission to the Universal Periodic Review of Kenya
For Consideration at the 35th Session of the UN Working Group in January 2020.**

Submitted on: June 7, 2019.

Executive Summary

1. ARTICLE 19 welcomes the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Kenya. This submission puts in consideration Kenya's compliance with its international human rights obligations in respect of freedom of expression, information, association and assembly since the last UPR on the 22 January 2015.
2. During its second UPR review, Kenya accepted the following recommendations on freedom of expression, information, association, and assembly. Namely to:

Freedom of Opinion and Expression

- Effectively cooperate with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.
- Take all the necessary measures to bring to an end attacks on journalists and ensure that the Information and Communication Act is in line with the human rights obligations of Kenya, in particular press freedom.
- Guarantee freedom of expression, press, associations and peaceful assembly of journalists, activists and participants in demonstrations.
- Ensure full respect for freedom of expression and the press.
- Ensure, in both legislation and its implementation, freedom of expression and freedom of the press as guaranteed in its Constitution.

Freedom of Association and Assembly

- Implement full the 2013 Public Benefits Organizations Act, and safeguard rights and space for civil society, in line with the Kenyan Constitution.
- Implement the 2013 Public Benefits Organizations Act, and ensure that any amendments to the Act are undertaken in consultation with civil society.
- Guarantee freedom of expression, press, associations and peaceful assembly of journalists, activists and participants in demonstrations.
- Repeal or amend any laws that may constrain or limit a vibrant civil society, in line with international human rights obligations and the Constitution.
- Respect the provisions of the Constitution on human rights in its amendments to the Public Benefit Organizations Act and amendments to media laws.
- Ensure that non-governmental organizations and human rights defenders can freely conduct their activities.
- Ensure that laws enacted to regulate non-governmental organizations will not undermine their independence or unduly restrict their activities in the defence of human rights.
- Fully implement the Public Benefit Organizations Act as soon as possible.

Freedom of the Press

- Review the Kenya Information and Communication (Amendment) Act and the Media Council Act in order to safeguard that the principles of the Kenyan Constitution are guaranteed and upheld.
 - Take all the necessary measures to bring to an end attacks on journalists and ensure that the Information and Communication Act is in line with the human rights obligations of Kenya, in particular press freedom.
 - Guarantee freedom of expression, press, associations and peaceful assembly of journalists, activists and participants in demonstrations.
 - Ensure full respect for freedom of expression and the press.
 - Respect the provisions of the Constitution on human rights in its amendments to the Public Benefit Organizations Act and amendments to media laws.
 - Ensure, in both legislation and its implementation, freedom of expression and freedom of the press as guaranteed in its Constitution.
3. This submission presents an overview of ARTICLE 19's assessment of the State's implementation of recommendations accepted during the previous UPR cycle, and makes recommendations to further improve Kenya's compliance with regional and international obligations. It specifically focuses on:
- Cooperation with international human rights mechanisms
 - Access to information, data protection and privacy
 - Freedom of expression
 - Attacks, harassment, and intimidation of journalists, bloggers and human rights defenders
 - Freedom of association and assembly

Freedom of Association

4. The government, through different acts of impunity, continues to undermine the work of civil society organizations by the lack of operationalization of the PBO Act 2013 despite two High Court orders in October 2016¹ and May 2017² ordering the state to commence the Act without any amendments. Despite several pronouncements by the Executive in different instances with the most recent being the launch of Kenya's 3rd National Action Plan (NAP) under the Open Government Partnership (OGP), the commencement remains elusive.³
5. There have been plans to introduce alternative legislations to replace the Public Benefits Organizations Act 2013 and its many merits through the introduction of the Associations Bill in October 2018 originated by the Office of the Attorney General. The Associations Bill has many provisions which are out of line with the PBO Act 2013, the rightful CSO sector legislation.
6. The Associations Bill for one creates hefty criminal penalties that include imprisonment and heavy fines for a range of offences including operating and attending a meeting of an unregistered association. This could serve to discourage people from participating in activities of associations and also forming them.

Freedom of Assembly

7. The government has not improved the situation of enjoyment of right to assembly either through legislative amendments or through better law enforcement practice in the course of

¹ Kiunjuri ordered to gazette law on organisations in 14 days: <https://www.nation.co.ke/news/Kiunjuri-given-14-days-to-gazette-organisations-law/1056-3436062-fx8by3/index.html>

² KENYA: Last warning from the court to implement the PBO Act 2013 within 30 days: <https://icj-kenya.org/news/latest-news/102-kenya-last-warning-from-the-court-to-implement-the-pbo-act-2013-within-30-days>

³ <https://www.capitalfm.co.ke/news/2019/01/ruto-directs-public-entities-to-comply-with-order-to-list-all-suppliers/>

protests. In fact, the Public Order Act 1950 continues to retain provisions that are out of line with the Constitution of Kenya 2010 and international norms on freedom of assembly. Section 5 (11) of the Act for example states that any person who has taken part in an assembly deemed unlawful shall be guilty and liable to imprisonment for one year. This, against the international norm that sanctions should not be applied to participants in protests on the basis of actions committed by others.

8. In March 2019, the government gazetted the Public Order Act Amendment Bill 2019 which has provisions to impose criminal and civil liability on anyone who while at an assembly causes grievous harm, damage to property or loss of earnings to the effect that upon conviction, they shall be liable to imprisonment for a term not exceeding six years or to a fine not exceeding KS 100,000 or both. The Bill does not contain any definitions for 'grievous harm' or 'damage' leaving room for arbitrary interpretation that would be used to impose sanctions that would in have a chilling effect on people's right to assembly.

Freedom of Expression

9. Kenya has failed to put in place measures to ensure the safety and protection of journalists, bloggers, and other expressers contrary to the recommendations accepted in the second cycle. Journalists and bloggers covering sensitive topics such as corruption, elections, security and terrorism, political parties, and land cases have been attacked, harassed, arrested, and even killed for their work. This, despite the fact that Article 33 of the Constitution of Kenya 2010 and Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which Kenya is a signatory to,] grant the freedom of expression.
10. In May 2017 while marking the international world press freedom day, ARTICLE 19 Eastern Africa and Human Rights Watch launched a report,⁴ where it documented how journalists and bloggers were physically assaulted between 2013-2017 leading to at least two deaths in work related scenarios. None of these cases, with the exception of cases of Vincent Makori and Wallace Gachere⁵ which led to prosecutions has been conclusively investigated, to lead to any prosecutions that would serve as a deterrent to those who would want to assault journalists and other expressers.
11. According to ARTICLE 19 Eastern Africa which documents attacks on journalists, bloggers, and other civic expressers, in the period starting May 2017 to April 31st 2019, there have been 160 incidences of different infringements of freedom of expression with most of them being threats and physical assaults to journalists.
12. On January 31st 2018, the government shut down TV broadcast signals of leading stations Citizen TV, Inooro TV, NTV, and the Kenya Television Network to bar live broadcasting of a rally by the opposition. This arbitrary action was in direct infringement of Article 34 of the constitution of Kenya which states that government shall not interfere with the broadcasting activities of media establishments provided they abide by the law.⁶
13. The Office of the National Police Service spokesperson and the Office of the Director of Public Prosecutions (ODPP) in 2018 joined the Kenya Media Stakeholders Working Group to help in the formation of a national mechanisms for the safety and protection of

⁴ <https://www.article19.org/resources/not-worth-the-risk-threats-to-free-expression-ahead-of-kenyas-2017-elections/>

⁵ <https://citizentv.co.ke/news/bwire-attacks-against-journalists-must-stop-212245/>

⁶ <https://qz.com/africa/1195419/kenya-media-shutdown-of-ktn-citizen-ntv-and-inooro-in-television-crackdown/>

journalists. Both offices requested the media stakeholders working group to forward the cases that need investigation and these were shared, no positive outcome has been noted so far. This came shortly after the government had summoned the Kenya Editors Guild and threatened to revoke licenses of any media companies that would broadcast the January 30 rally by the opposition.⁷ In the fashion of impunity from freedom of expression and media freedom violations, the government disobeyed a February 1 court order to reinstate the TV signals and only did so on February 7th.⁸

Recommendations:

14. Conduct investigations into cases of threats, assaults, and killings of journalists, and broadcasting signals disruptions.
15. Establish a national mechanism for the safety and protection of journalists in line with the 2018 Addis Ababa Resolution on the creation of coordination mechanisms for the safety of journalists at the national, sub-regional, and regional level.⁹

Access to Information

16. More than 2 years after the enactment of the access to information law, the country is yet to put in place regulations to aid in the smooth operation of the law through clarifying issues of cost of access and formats of request and further clarification of the access to information appeals processes. Most discouragingly, despite the provisions of Section 17.3.c of the Act which directs state agencies to computerize its records and information systems in order to facilitate more efficient access to information, most state agencies have not digitized their records. Public information is still not proactively disclosed despite the requirements of Section 5 of the ATI Act 2016; the contract for the development of the Standard Gauge Railway line between Mombasa and Nairobi signed between the governments of Kenya and China has not been disclosed and requests have been met with refusals from government despite the fact that this should be public document.¹⁰
17. Kenya has not yet amended the Media Council Act 2013 and the KICA Act 2013 to bring it in line with international best practice as regards issues of excessive fines on broadly defined media offences, and poor complaints handling stipulations.
 - The Media Council of Act 2013 still retains highly punitive sanctions for media offences like KS 500,000 (USD 5,000) and KS20 million (USD 2 million) for journalists and media companies respectively.
18. Notably, the Computer Misuse and Cyber Crimes Act 2018 was enacted despite widespread opposition to its multiple provisions that were infringing on freedom of expression before 26 clauses were successfully challenged in court¹¹ to thwart the

⁷ <https://www.nation.co.ke/news/Editors-Guild-condemns-threats-media/1056-4283676-ax4enuz/>

⁸ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewiVnOeXka3iAhXxyIUkHYX1ByMQFjAAegQIARAB&url=https%3A%2F%2Fwww.standardmedia.co.ke%2Farticle%2F2001268124%2Fhigh-court-suspends-order-to-shut-down-tv-stations&usg=AOvVaw3u_2eTD5E6k_z_IeSctvRM

⁹ <http://www.africafex.org/attacks/stakeholders-call-for-a-coordination-mechanism-on-safety-of-journalists-in-africa>

¹⁰ <https://www.pulselive.co.ke/news/president-uhuru-kenyatta-will-not-give-ntvs-news-anchor-mark-masai-a-copy-of-the-sgr/tnwtxsg>

¹¹ <https://businesstoday.co.ke/court-suspends-computer-misuse-cybercrimes-act/>

reintroduction of past media offences such as criminal defamation¹² which had already been declared unconstitutional¹³ in 2017.

19. Additionally, in the intersession period, there has also been an increase in attempts by the state to curtail freedom of artistic expression via the Kenya Films and Classification Board (KFCB), a statutory body established by the Films and Stage Plays Act Cap 222 of the Laws of Kenya. Though the board's mandate as per the law is to classify films, it has now taken to, unconstitutionally, to ban products of artistic expression using moralist stances that have perpetrated narratives that discriminate against sexual and gender minorities.

- In April 2018, KFCB banned the distribution and screening of the film *Rafiki* for depicting homosexual themes.¹⁴ This, despite the fact that Article 33 of the constitution of Kenya guarantees the right to freedom of expression for everyone, Article 10.2.b lists inclusivity, equality, and non-discrimination as one of the national values and principles of good governance, and Article 27 guarantees every person the right to equality and freedom from discrimination.
- In 2014, the board also banned the film *Stories of Our Lives* for the same reason. It is also instructive to note that in 2016, KFCB, in reviewing Cap 222¹⁵ proposed many amendments that were inimical to freedom of expression and press freedom. The Bill was however trashed at the initial stage of public consultations.¹⁶

Recommendations:

20. Revise the Media Council Act 2013, Computer Misuse and Cybercrimes Act 2018, and KICA Amendment Act 2013 to bring them in line with international best practice.

21. Put in place regulations to the Access to Information Act 2016 to enable smoother operationalization of the Act.

22. Review the Film and Stage Plays Act Cap 222 to bring it in line with international best practices on freedom of expression, press freedom, and access to information.

Data Protection and Privacy

23. Kenya has also failed to enact a Data Protection law despite accepting a recommendation to do so in the 2nd cycle. Kenya is a rapidly digitizing nation with 46.6 million mobile subscribers with a penetration rate of 97.8%, Over 99% of Kenya's internet subscribers access the internet via mobile phones¹⁷. The government through the Integrated Population Register Services (IPRS) has been digitalizing analogue paper records of the public.

¹²<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwie1P7Zla3iAhUxyYUKHW-xDiUQFjACegQIAxAB&url=https%3A%2F%2Fwww.article19.org%2Fresources%2Fkenya-win-for-freedom-of-expression-as-penal-provision-declared-unconstitutional%2F&usg=AOvVaw1fyDivS2eYoSbjU4kU7LBY>

¹³<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwiM1er4la3iAhWGx4UKHYevDvcQFjADegQIAxAB&url=https%3A%2F%2Fwww.nation.co.ke%2Fnews%2FLaw-on-misuse-of-telecommunication-device-vague%2F1056-3166528-nbwoe2%2Findex.html&usg=AOvVaw36qNnxCiL753D-0zly4IJy>

¹⁴ <https://www.standardmedia.co.ke/article/2001278422/kfcb-bans-rafiki-film-for-depicting-homosexual-content>

¹⁵ <http://jadili.ictpolicy.org/docs/kfcb2016>

¹⁶ <http://www.bottomline.co.ke/film-bill-kfcb-chilling/>

¹⁷ Communications Authority of Kenya, Sector-Statistics-Report-Q1-2018-2019 <https://ca.go.ke/wp-content/uploads/2018/12/Sector-Statistics-Report-Q1-2018-2019.pdf>

Several government services are now available online, compelling citizens to provide personal data in order to access these services.

24. The private sector has also joined in the biometric frenzy with most organisations either piloting or implementing voice, fingerprint, face and iris recognition systems. The rationale for the private databases is to curb fraud. Some of these private entities, for instance banks and mobile network operators (MNOs), have access to the centralized government database for verification of identity documents.
25. Despite all the above instances requiring citizens to submit personal information, there still lacks a legislation to provide legal structure for the protection of this information, and also mechanisms to ensure third parties with access do not misuse it.
 - In early 2019, the government launched the National Integrated Identity Management System (NIIMS) by dint of the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 which introduced several amendments to the Registration of Persons Act, Cap 107. Citizens and foreigners are now required to have their personal details including biometrics registered by the state and to get a unique identifier called the *Huduma Number* which will now be used to access all government services. CSOs have criticized the NIIMS on grounds that it was sneaked in through a miscellaneous amendment despite being a major amendment to the Registration of Persons Act hence giving very little room for public participation¹⁸.
26. Notwithstanding, Kenya is a state party to the African Union which adopted the African Union Convention on Cyber Security and Personal Data Protection during the Twenty third Ordinary Session of the Assembly, held in Equatorial Guinea, 27th June 2014. There are a number of laws that require confidentiality of data¹⁹ However, all these laws do not provide a comprehensive legal framework for data protection and privacy in the modern context²⁰.
27. In the above context, Kenya has a Data Protection Bill which mirrors the European Union's General Data Protection Regulation (GDPR), the Bill was tabled in parliament in 2015 but to date it has not yet passed. The Kenya Information and Communications Act (KICA) prohibits unlawful monitoring of communications. This however is countered by the Prevention of Terrorism Act (2012), NIS Act (2012) Security Laws (Amendment) Act (2014) which grant and allow extensive powers to state authorities to limit fundamental freedoms and encroach on the right to privacy through surveillance contrary to the accepted recommendations in cycle 2 whose basic principle was: to ensure that all counter-terrorism measures undertaken by the government fully comply with the Constitution, the rule of law and international human rights obligations.
 - Regarding privacy, in March 2017, Privacy international launched a report '*Track Capture Kill; Inside Communications Surveillance and Counterterrorism in Kenya*'²¹

¹⁸ <https://www.the-star.co.ke/news/2019-02-19-rights-group-seeks-to-block-huduma-namba-project/>

¹⁹ These include the Official Secrets Act; Children's Act; HIV and AIDS Prevention and Control Act; Witness Protection Act; Banking Act, Credit Reference Bureau Regulations and Capital Markets Act; 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.

²⁰ Data_protection_in_Kenya: https://www.apc.org/sites/default/files/Data_protection_in_Kenya_1.pdf

²¹ 'Track Capture Kill; Inside Communications Surveillance and Counterterrorism in Kenya' https://privacyinternational.org/sites/default/files/2017-10/track_capture_final.pdf

which focuses on the techniques, tools and culture of Kenyan police and intelligence commissions' surveillance practices. It reveals that surveillance is carried out without legal oversight and facilitates human rights violations.

Recommendations

28. Enact a data protection legislation to provide a framework for the safeguarding and sharing of people's personal information. The government should also cease all illegal surveillance and provide a mechanism for it to only be done with judicial consent.
 29. A mechanism to audit personal data in the custody of private entities should be developed to help assess whether such data is required lawfully and how long it should be kept.
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