

**Submission to the United Nations Human Rights Committee, List of Issues of Kenya**

**128th Session, March 2020**

**Executive Summary**

1. ARTICLE 19 welcomes the opportunity to submit this information to the United Nations Human Rights Committee (the Committee), ahead of the adoption of the list of issues prior to the upcoming review of Kenya. This submission sets out ARTICLE 19’s key concerns in relation to the fulfilment of the International Covenant of Civil and Political Rights (ICCPR), in particular to the right to freedom of expression and information (**Article 19**), the right to freedom of peaceful assembly (**Article 21**), and the right to freedom of association (**Article 22**), and the right to privacy (**Article 17**).
2. ARTICLE 19 remains concerned by ongoing and serious restrictions to civic space in Kenya. Our research has found an overall decline in freedom of expression in the country since the last review of the Committee in 2012.[[1]](#footnote-1) This includes numerous attempts of the government to introduce new and undue legal restrictions, as well as significant harassment and violence against protesters, journalists and human rights defenders, particularly in the context of national elections in 2017. Despite these negative trends, there has been limited progress in certain areas, notably with the passage of the Access to Information Law in 2016, as well as successful constitutional challenges of legislation restrictive of freedom of expression.

**Article 19: Right to Freedom of Expression and Information**

**Legal Framework for Free Expression**

*Constitution*

1. 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 the ICCPR and other human rights treaties which Kenya has ratified, directly into national law.[[2]](#footnote-2)

*Penal Code*

1. Since the previous review, the Kenyan judiciary has struck down several provisions of national law on the basis of their incompatibility with Constitutional freedom of expression guarantees.
2. In April 2017, the High Court of Kenya declared Section 132 of the Penal Code unconstitutional.[[3]](#footnote-3) 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.[[4]](#footnote-4) 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.
3. 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*”.[[5]](#footnote-5) The court held criminal defamation to be an unnecessary, excessive, and unjustifiable restriction on freedom of expression in an open and democratic society.
4. Other content-based restrictions on expression – that do not comply with international human rights law and standards – remain in the penal code, however. Of particular concern is Section 181 of the Penal Code, which prohibits the “distribution and exhibition of indecent content with the potential to corrupt morals” punishable by imprisonment for 2 years or a fine of seven thousand shillings. In practice, this provision has granted significant and excessive leeway to the authorities to target LGBT-related content. We note that while Article 19(3) of the ICCPR allows for the restriction of expression on the grounds of protecting public morals, the Human Rights Committee has clarified in General Comment 34 that any such restrictions cannot be based on principles that derive solely from a single tradition, and that such restrictions must also take into consideration the principle of non-discrimination.[[6]](#footnote-6)

**Legislation Restricting Online Expression**

1. In 2018, the government adopted the Computer Misuse and Cybercrimes Act (CMCA),[[7]](#footnote-7) which poses significant threats to the free exercise of human rights online. Following the successful constitutional challenge of the criminal defamation provision in the penal code, this legislation appears partially aimed at re-criminalising defamation.
2. Section 22 of the CMCA provides that anyone who intentionally publishes ‘false, misleading or fictitious’ information, that among other things is either a) likely to propagate war or incite others to violence; b) constitutes hate speech; or c) negatively impacts the rights or reputations of others. While clause (c) criminalizes “defamation”, clauses (b) and (c) criminalize a broad and ill-defined range of “hate speech”. It is punishable by up to two years’ imprisonment and/or a fine. The Human Rights Committee has consistently called for States to decriminalize defamation, making clear that individuals’ reputations can be adequately protected, where necessary, through civil defamation laws. In relation to “hate speech”, we note that Article 20(2) of the ICCPR only requires States to prohibit advocacy of (national, racial or religious) hatred that constitutes incitement to hostility, discrimination or violence. The breadth of this provision goes far beyond this, and the absence of clear requirements to show the expression intended to and was likely to incite harmful acts, is contrary to international standards, as set out in the Rabat Plan of Action.
3. Section 23 of the CMCA further criminalises anyone who “knowingly publishes” false information “that is calculated or results in panic, chaos or violence among citizens of the Republic, or which is likely to discredit the reputation of a person”, punishable by a prison sentence of up to ten years’ imprisonment and/or a fine.
4. The constitutionality of Sections 22 and 23 of the CMCA is currently being litigated by BAKE.[[8]](#footnote-8) The Kenyan High Court has provisionally suspended twenty-six sections of the CMCA in total by conservatory order, pending a final ruling in the challenge, which is due in January 2020.[[9]](#footnote-9) The suspension prevents the authorities from prosecuting individuals using the suspended provisions.[[10]](#footnote-10) Notably, the High Court usually exercises its judicial discretion to suspend legislative provisions by way of conservatory orders only where it is convinced that there is a ‘danger to life and limb or imminent danger to the Bill of Rights at that very moment.’[[11]](#footnote-11)
5. The government is considering the regulation of social media platforms, bloggers and group administrators, through the introduction of the Kenya Information and Communications (Amendment) Bill 2019. This Bill that is before the National Assembly contains provisions that would severely and unduly restrict freedom of expression online, including in the following ways:

* It requires social media platforms to register with the Communications Authority of Kenya (CAK) and further requires licensee’s to produce users’ data at the request of CAK without reasonable cause and/or a court order, threatening the right to privacy and security of the communications of social media users;
* It imposes mandatory registration and licensing requirements on bloggers, in effect subjecting them to direct regulation;
* It requires social media users to publish, write or share content which is ‘fair, accurate and unbiased’, in effect imposing a requirement of impartiality, and ‘truth’ on individual users, through exceptionally vague language that is open to abuse by the authorities to target speech they do not like;
* It requires group administrators to notify social media platform licensees of their intention to create a group platform. This proposed requirement to 'control undesirable content and discussion" is similar to a previous attempt by CAK under the 'Guidelines on Prevention of Dissemination of Undesirable Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communications Networks' (Guideline 13.6).

**Counter-Terrorism and National Security Laws and Surveillance Practices**

1. During the last review of Kenya in 2012, the Human Rights Committee recommended in its Concluding Observations that the government ‘enact legislation on counter-terrorism and ensure that it (a) define terrorist crimes both in terms of their purpose and their nature with sufficient precision, and (b) not impose undue restrictions on the exercise of rights under the Covenant’.[[12]](#footnote-12) This has not yet been implemented, and counter-terrorism legislation remains inconsistent with provisions of the ICCPR.

1. The 2012 Prevention of Terrorism Act (PTA) remains open to abuse against political opponents, civil society, and protesters, however. 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”.[[13]](#footnote-13) 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.”[[14]](#footnote-14)
2. 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 civil society organisations, 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.[[15]](#footnote-15) The ban on these groups was lifted by the Mombasa High Court on 12 November 2015.
3. 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.[[16]](#footnote-16)
4. Amendments to the PTA, introduced through the Security Laws (Amendment) Act (SLAA) of 19 December 2014, further broadened the authorities’ scope to misuse counter-terrorism powers against the media and civil society.[[17]](#footnote-17) Section 64 of the SLAA introduced into the PTA:

* 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.

1. Section 12 of the SLAA amended the Penal Code, introducing Section 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.”

1. Section 12 and 64 of the SLAA were declared unconstitutional and the relevant sections of both the PTA and penal code were 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.[[18]](#footnote-18) Several other sections of the SLAA that compromised essential procedural safeguards and due process guarantees were struck down in the same ruling.[[19]](#footnote-19)
2. 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 vague provision – subject to extremely harsh penalties – is open to being applied against human rights activists, and political opponents.

**Surveillance**

1. The authorities have extensive powers to conduct mass and targeted surveillance, without appropriate human rights safeguards: this includes in particular Section 56 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” (Part V Section 42). Sections 36 (1) and (2) of the PTA (2012), as well as Article 36 of the NIS Act also raise concerns for the right to privacy, and require reform.
2. 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.[[20]](#footnote-20) 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 and have a chilling effect on individuals promoting and protecting human rights in the country.

**Media Freedom**

1. The media sector in Kenya is regulated through two laws: the Media Council Act (2013) (MCA) and the Kenya Information and Communications (Amendment) Act (2013) (KICA).[[21]](#footnote-21) Both are overly restrictive of international and regional standards freedom of expression and media freedom, containing severe criminal penalties for journalists and media outlets.
2. The MCA Act established a media regulator with oversight over print, broadcast, and electronic media: the Media Council of Kenya. Although ostensibly an independent regulator, with its members appointed by an independent panel and through open recruitment, reports of government influence on the selection of its members remains. The membership of the Council is currently incomplete, as a result of apparent government efforts to stall the selection of applicants in February 2019.
3. The Media 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.
4. Where decisions by the Media 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.

1. The KICA Act 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 in the country. 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 criminal fines and imprisonment for various offences relating to the use of radio frequencies.
2. A constitutional challenge by media organisations in 2014, resulted in the High Court declaring aspects of the MCA, in particular sections 3(2)(a) and 6(2)(c) unconstitutional.[[22]](#footnote-22) Following a constitutional challenge, Section 29 of KICA was also ruled unconstitutional in April 2016. [[23]](#footnote-23) 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, violating Article 33 of the Constitution.[[24]](#footnote-24)
3. 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. The constitutional challenge was brought by web developer Geoffrey Andare, who was charged under Section 29 for a Facebook post criticising a representative of an NGO in relation to allegations of sexual harassment. In another emblematic case, the journalist Yassin Juma was arrested and detained in January 2016 in relation to 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 in relation to this offence 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.
4. A subsequent constitutional challenge to the KICA, in which ARTICLE 19 intervened, was decided by the High Court in 2019.[[25]](#footnote-25) The court held Section 84D of the KICA to be overly restrictive of expression and therefore unconstitutional. Section 84D criminalised the publication or distribution through electronic means, any ‘obscene’ information subject to a hefty fine or two years’ imprisonment, or both. This provision had a particular chilling effect on online expression, and media.
5. Attempts to intimidate and harass the media to prevent coverage of the opposition, and minimise negative coverage of the ruling party, have continued.
6. An egregious example of state interference occurred in the aftermath of the contested Presidential elections. On January 26, 2018, the Interior Cabinet Secretary summoned the Kenya Editors Guild to the State House, 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.[[26]](#footnote-26) This threat was justified on the basis of alleged national security concerns. Subsequently, 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 violated Kenya’s international human rights law obligations. 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 to refrain from broadcasting the rally. A legal challenge to the suspension was brought by activist Okiya Omtatah. In a 1 February 2018 ruling, the Milimani High Court held that the Communication Authority of Kenya was required to immediately restore the stations’ broadcasts.[[27]](#footnote-27) The ruling was not implemented until 7 February, however – when the government declared the threat to national security had been fully investigated.
7. In another example of state pressure on private media the editor of the *Daily Nation,* Dennis Galava,was fired in 2016 after publishing an opinion piece which heavily criticised President Uhuru Kenyatta’s administration.[[28]](#footnote-28) It is widely considered that the government pressured the paper’s ownership - the Nation Media Group, the largest media establishment in East and Central Africa - to remove Galava from his post.

**Discriminatory Restrictions on Artistic Expression**

1. The Kenya Films and Classification Board (KFCB) has increased its interference in artistic expression, 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 restrictive approach is underpinned by the aforementioned Section 181 of the Penal Code, criminalising the distribution of supposedly obscene content. 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.[[29]](#footnote-29)
2. In 2016, the KFCB proposed a new “Film, Stage Plays and Publications” Bill that would have significantly undermined artistic freedom, as well as media freedom and freedom of expression more broadly.[[30]](#footnote-30) The proposed Bill was heavily criticised by civil society groups and stakeholders in the creative industries, and withdrawn in October 2016.[[31]](#footnote-31) There has been significant delay in bringing forward a new draft bill. On the 18th of December 2016, the Ministry of Sports, Culture and Arts and the Executive Office of the President convened a meeting of creative sector umbrella organizations and associations, and subsequently oversaw the formation of a sectoral team to work with the government to resolve concerns surrounding the bill. This sectoral team of external stakeholders was also requested to finalize the development of the national film policy, a process that was initiated over ten years ago, and had since stalled. The sectoral team submitted its report and the finalized Draft Film Policy (2017) to the Ministry on the 9th of June 2017, however, its recommendations remain under consideration. On February 4th 2019, the Cabinet Secretary for ICT Mr. Joe Mucheru claimed that the government had embarked on a process to review and pass the relevant legislation and policy in the forthcoming months.[[32]](#footnote-32)
3. Since the previous 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.
4. 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.[[33]](#footnote-33) 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”.
5. 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.[[34]](#footnote-34) 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. ARTICLE 19 has intervened as an interested party.[[35]](#footnote-35) On 21 September 2018, the ban was temporarily lifted (until 30 September 2018) through a conservatory order to enable the film to be entered into the Oscars.[[36]](#footnote-36) The matter is still in court for determination on merits at the hearing stage.

**Safety of Journalists, Human Rights Defenders, and Other Communicators**

1. Kenya has failed to put in place measures to ensure the safety of journalists and media, as well as others facing serious risks for exercising their right to freedom of expression and informing the public. Public commentary on issues around corruption, elections, matters of national security, terrorism, political parties, and land ownership, is particularly dangerous.
2. 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.[[37]](#footnote-37)
3. The following cases are particularly emblematic of these broader trends.

* On 12 August 2017, Duncan Khaema, a political reporter with Kenya Television Network (KTN), alongside cameraman David Otieno, were arrested and charged with possessing a helmet and body armour without a proper license under the Prevention of Terrorism Act. 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 released on police bond but the charges against them have not been dropped. Khaema and Otieno had earlier been confronted by a General Service Unit officer who demanded to know who had authorised journalists to cover their operation.
* 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. Nyabwa and Netia were later released after interrogation and recording their details with police.
* 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 leg. According to the journalists, the officers responsible said both journalists and protesters are “one and the same” while on the streets. The officers subsequently threw tear gas canisters at NTV’s Ouko Okusa, his camera-person Doreen Magak and Daily Nation reporter Rushdie Oudia. The officers claimed the journalists had exposed their operation alleging brutality against protesters.[[38]](#footnote-38)

1. We are also particularly concerned with harassment of journalists and bloggers online. Sixty journalists and bloggers were arrested, fired and/or detained in 2016 in relation to their online expression, according to research by BAKE.[[39]](#footnote-39)
2. 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.
3. Against this backdrop of threats to the safety of journalists, and the absence of accountability, we consider it essential for a national mechanism on the safety of journalists to be established in the country. Such a mechanism is of critical importance, and should be prioritised 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.[[40]](#footnote-40)
4. Individuals have been increasingly harassed for their online expression.
5. 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.[[41]](#footnote-41)
* 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. He was later released without charge.
* In 2019: Alai was arrested under Section 27 of the PTA for publishing an image of deceased police officers on Twitter. He has since been formally charged under Sections 19, 27, and 29 of the PTA. The matter is currently ongoing in court.

1. 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.[[42]](#footnote-42)

**Access to Information**

1. In September 2016, the Access to Information Act was enacted.[[43]](#footnote-43)
2. 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.[[44]](#footnote-44) Without these regulations in place, there is a lack of clarity in relation to the means by which information can and should be requested, the format in which the responsible authorities should provide information, as well as remedies in the event of non-compliance with the Access to Information Act, among other things. Implementation of the Act has, as a result, been hampered.
3. The Commission on Administrative Justice (CAJ) conducted a survey on the Status of Proactive Disclosure of Information by Public Bodies, and found that 48% of public entities 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.[[45]](#footnote-45) Although the Act provides for the issuance of forms to make access to information requests in Section 8(4), there is a need for standardization across departments.
4. 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.[[46]](#footnote-46)
* 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 judgment, the High Court initially 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.[[47]](#footnote-47) On appeal, the court reversed its earlier decision, effectively exempting the PDU from fulfilling its obligations under the Access to information Act.[[48]](#footnote-48)

**Article 21: Right to Freedom of Peaceful Assembly**

1. The right to freedom of peaceful assembly is not effectively guaranteed in Kenyan law, and the right is routinely violated by law enforcement authorities responding to protests.
2. Research by ARTICLE 19 has identified the following key trends in relation to the restrictions on the right to protest in Kenya: excessive use of force by police in the course of protests, unlawful killings, the failure to use de-escalation tactics, arbitrary arrests, and lack of accountability for such violations. ARTICLE 19 monitored 152 protests between January 2018 and July 2019, in which at least 21 protesters and/or bystanders were injured and 7 protesters were killed.[[49]](#footnote-49)

**Legal Framework for Peaceful Assembly**

1. 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.[[50]](#footnote-50)
2. 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 an assembly is denied permission. In practice, the notification regime functions as a form of authorisation. Whilst a regulating officer is legally only able to refuse permission to an assembly if notice of another assembly at the same venue, time and date has already been received (under Section 5 (4) of the Act), in practice refusals are much more common and not justified under these narrow grounds.[[51]](#footnote-51) Participation in an unlawful assembly can be punished with up to one year of imprisonment (Section 5(11)) of the Public Order Act.
3. Since the previous review, state officials have routinely denied or prohibited peaceful assemblies. In the run up to the repeat of the August 2017 general elections, the Interior Cabinet Secretary banned protests in Kisumu, Mombasa, and Nairobi towns due to take place on 12 October 12 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. 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, and that the Human Rights Council has recognised that this is particularly important in the context of elections.
4. 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 participating in an illegal assembly, under Section 78 of the Penal Code’.[[52]](#footnote-52) After public outcry and the payment of bail by human rights organisations, both were released, although the cases against them remain open.
5. In March 2019, the government published a draft Public Order Act Amendment Bill 2019, which has since been through its first reading.[[53]](#footnote-53) The Bill raises concerns for the right to freedom of peaceful assembly. In particular, as currently drafted 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 imprisonment of up to six years and/or a fine of KS 100,000. We consider that if adopted, the law is likely to have a chilling effect on the exercise of the right to peaceful assembly.

**Use of Force**

1. In 2012, the Human Rights Committee recommended Kenya to ‘initiate training programmes for State security officers and law enforcement officials which emphasize alternatives to the use of force, including the peaceful settlement of disputes, the understanding of crowd behaviour, and the method of persuasion, negotiation and mediation with a view to limiting the use of force’.[[54]](#footnote-54) Despite this recommendation, law enforcement continue to exercise the disproportionate and unlawful use of force in the context of managing peaceful assemblies.
2. 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.
3. The Kenya National Commission on Human Rights recorded 37 deaths in the aftermath of the contested 2017 general elections, between 9- 15 August 2017, as the police deployed excessive force against peaceful assemblies. Seven of the documented victims were minors, including a 6-month old baby, Samantha Pendo, who died after being caught in an operation by anti-riot police at protests in Kisumu.[[55]](#footnote-55) An inquest into Pendo’s death was carried out, with the Chief Magistrate Court in Kisumu finding the police responsible for her death.[[56]](#footnote-56) The case is ongoing at the High Court, however the other cases remain in impunity.

**Article 22: Right to Freedom of Association**

The Kenyan government has yet to effectively guarantee the right to freedom of association or create and maintain a safe and enabling environment for civil society.

1. The government has yet to implement the Public Benefits Organisation Act 2013 (PBO Act).[[57]](#footnote-57) The PBO Act, passed by Parliament in 2012 and assented to law in January 2013, was largely 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.
2. Instead of implementing the PBO Act, and following the change in government in 2013, the authorities sought to introduce a Statute Law (Miscellaneous Amendments) Bill to amend the PBO Act. The proposed amendments contained in the Statute Law (Miscellaneous Amendments) Bill, would in effect undermine the protective approach of the PBO Act towards safeguarding freedom of association. The amendments would severely limit NGOs’ ability to operate, in particular by targeting their access to resources: they would cap 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%. The amendments were further aimed at giving the government control over key appointments in public benefits organisations’ regulatory bodies; and would require the immediate de-registration of public benefit organisations for non-compliance with the PBO Act, without opportunity to show cause for non-compliance, and with the right to appeal only granted after de-registration.
3. Two separate court challenges in 2016 and 2017 aimed at ensuring the implementation of the PBO Act without amendments, through the necessary commencement act, have succeeded in front of the High Court. The government has continued to stall, however, and has failed to implement the decisions of the High Court, requiring the Commencement Act to be adopted without delay.[[58]](#footnote-58)  In this context, we remain sceptical that the government intends to implement the PBO Act, despite recent promises to do so, most recently at the launch of Kenya’s 3rd National Action Plan (NAP) under the Open Government Partnership (OGP).[[59]](#footnote-59)
4. Indeed, in October 2018, the Attorney General introduced an entirely new draft Associations Bill for consideration, as an alternative to the PBO Act of 2013.[[60]](#footnote-60) However, its provisions are more restrictive than the PBO Act 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 or 1 year of imprisonment for operating a meeting of unregistered organisation or attending a meeting of an unregistered organisation, with fines of up to KSH 300,000 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, further shrinking civic space.

**Article 17: Right to Privacy**

1. The right to privacy is protected under Article 31 of the Constitution of Kenya, 2010. We note that the right to privacy and data protection is protected by a number of sectoral laws, including the Access to Information Act (2016), the Kenya Information and Communications (Consumer Protection) Regulations (2010), and the Elections (Technology) Regulations, 2017, amongst others.
2. To give further effect to the right to privacy, the Data Protection Act 2019 was assented on 8 November 2019. The Act provides for a minimal transition period and was commenced on the 25th of November 2019, though a constitutional challenge to it filed on 14 November 2019 is still in court.
3. The adoption of a comprehensive data protection framework in Kenya represents a significant step forward towards safeguarding the right to privacy in Kenya, providing for the first time coherent guidance on the collection, storage, processing, dissemination and transfer of personal data in Kenya as well as legal recourse following the misuse of the same by individuals, and state and non-state entities.[[61]](#footnote-61)
4. We welcome the minimum rights-protecting principles and rights, including consent, adequacy and relevance, data portability and data rectification, contained in the DPA 2019. These four (4) core principles and rights are particularly crucial.
5. However, we note that the DPA 2019 does not fully align with international standards and require further reform to ensure its effective implementation.[[62]](#footnote-62) In particular, we note the following key areas of concern.
6. The definition of personal data under the DPA 2019 is not in line with the definition under the Access to Information Act, 2016. The DPA 2019 includes some of the information mentioned in the Access to Information Act in its definition of “sensitive personal data.” We believe the definition of sensitive personal data contained in the DPA 2019 should be brought in line with the Access to Information Act, to ensure the bodies charged with implementing their respective data protection mandates (the Office of the Data Protection Commissioner (ODPC) and the CAJ).
7. The Data Protection Act (2019) fails to provide clarity regarding the constitution of the ODPC. We note that the ODPC should operate as an independent constitutional commission, under Article 59 (4) of the Constitution of Kenya, 2010, and not as a State agency, in order to be free from undue political, administrative or commercial pressure, and to fulfil its specified purpose(s).
8. The DPA 2019 fails to adequately balance the right of privacy with the rights to freedom of expression and access to information. Article 52 of the Data Protection Act provides an overly narrow definition of journalistic exemption. Journalists and the media are not exempt from registration requirements, and may be obliged to inform the Office of the Data Protection Commissioner about the type of personal data being processed, as well as the purpose and the category of data subjects. This provision threatens the anonymity of journalistic sources, especially when whistle-blowing has helped to inform criminal and/or corruption investigations. Journalists may find themselves facing criminal investigations where it is determined that the disclosure of personal data in an article, especially data related to public figures, does not meet the public interest test. Penalties under the Data Protection Act include a fine not exceeding five (5) million shillings and/or imprisonment for up to two (2) years.

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