COMPENDIUM ON LAWS ON THE CIVIC SPACE IN KENYA

An examination of the existing laws, proposed ammendments policies and regulations that affect civic space in Kenya.

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[1] https://www.khrc.or.ke/about-us.html; https://www.civilsocietyrg.org/; https://www.article19.org/regional-office/eastern-africa/; https://katibainstitute.org/; https://www.devex.com/organizations/international-center-for-not-for-profit-law-icnl-54008; https://www.google.com/search?q=creco&rlz=1C1GCEU_enKE945KE946&oq=creco&aqs=chrome..69i57j46i175i199j46j46i175i199j0j0i10j46i175i199j0j46i175i199j0i10.1703j0j4&sourceid=chrome&ie=UT F-8; https://www.google.com/search?q=civicus&rlz=1C1GCEU_enKE945KE946&oq=civicus&aqs=chrome..69i57j0l9.6674j0j9&sourceid=chrome&ie=UTF-8; https://icj-kenya.org/

DEDICATION

This compendium is dedicated to all Kenyans who have tirelessly, fearlessly, valiantly and heroically fought for rights and freedoms and resisted the oppressive and repressive regimes from the time Kenya was established as a colony in 1920 to date. To the merchants of impunity, we ALUTA CONTINUA. Long live CSPP.

Civil society actors at a solidarity press conference with Mutemi Kiama who had been unjustly arrested for criticizing the government's excessive borrowing.
April 2021.

BACKGROUND AND OVERVIEW

Civic space has been described as the cornerstone of a democratic society- an open civic space enables citizens and civil society organizations (CSOs) to "organize, participate and communicate "without arbitrary interference. [2] The global phenomenon of 'closing' civic space is characterized by a prevalent trend of repressive laws and practices "designed to prevent people from organizing, speaking out, and engaging in democratic rights and duties."[3] There are three fundamental freedoms that delineate the parameters of civic space- freedoms of assembly, expression and association. The ability of CSOS to operate freely is predicated on these freedoms. Furthermore, recognition of the autonomy of CSOs and the existence of laws and regulations that are "predictable, transparent and free from political interference" undergirds the ability of CSOs to operate without undue restrictions.[4] In our society, it is critical to broaden the conversation to democratic space and thus include the adversely affected actors within and outside the State.

For the state of repression or closing space in Kenya and Africa has from the colonial to the post-independence regimes manifested within contexts whereby the intolerant and oppressive governments(mainly the Executive) apply both prohibitive and punitive tactics to curtail the operations of independent voices and institutions(both state and non-state). Currently, it takes the form of enforcing restrictive legislative, administrative and policy actions like the use of anti-terror legislation to delegitimize non-governmental organizations (NGOs), threats of deregistration of NGOs, shutdown of media houses, vilification and arbitrary arrests of human rights defenders (HRDs) and citizens during protests. This onslaught also permeates online platforms with attempts to curtail online freedom of expression by targeting bloggers and social media users. [5] Finally, it goes to the extent of undermining the independence of the key organs of the State especially the Judiciary, Legislature, Commissions and Independent Offices among others.

Within this broad context, CSOs remain the major culprits because of the critical role the sector plays in protecting the citizenry and holding the increasingly powerful governments to account. It is for that reason CSOs have through multi-sectoral approaches in Kenya engaged in robust counter efforts to challenge proposed and existing legislation with far-reaching restrictions on the freedoms of assembly, association and expression. Since 2016, the Civic Space Protection Platform (CSPP) has been working on a number of strategies such as strategic litigation, research and advocacy; political education and action geared towards consolidating civic space in Kenya.

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[2] Civicus, Monitor Tracking Civic Space https://monitor.civicus.org/whatiscivicspace/

[3]Maina Kiai (2015) Reclaiming civic space through U.N. supported litigation https://sur.conectas.org/wp-content/uploads/2015/12/19_SUR-22_ENGLISH_MAINA-KIAI.pdf p.246 [4] Emelie Aho (2017) Shrinking space for civil society - challenges in implementing the 2030 agenda https://www.forumciv.org/sites/default/files/2018-03/Shrinking-Space%20-%20Challenges%20in%20implementing%20the%202030%20agenda.pdf

[5]Bernard Moseti (2016) 60 bloggers arrested in Kenya this year https://www.nation.co.ke/news/60-bloggers-arrested-in-Kenya-this-year-report/1056-3470388-1e9204z/index.html

It against this background that CSSP has developed this compendium which is anticipated to "help to advance the development of laws that are aligned to international human rights law by drawing attention to those laws or provisions that deviate from them."[6] The compendium of laws on the civic space examines existing laws, proposed amendments, policies and regulations in Kenya that affect or are relevant to civic space by using a three-pronged approach.

The compendium assesses the substantive provisions of the laws, regulations and policies that affect the exercise of the freedoms of association, expression and assembly by civil society. The legal provisions are subsequently measured against international and regional human rights standards to determine the extent to which they either conform to or deviate from these standards.

This legislative analysis is also anchored on the extent to which the relevant provisions comply with the freedoms enshrined in the Constitution of Kenya (2010) bolstered with jurisprudential analysis on constitutional interpretation of the freedoms of expression, assembly and association in selected judicial decisions. An assessment of the impact of the legal provisions concludes the analysis and provides a nuanced understanding of the ensuing challenges with respect to ability by CSOs and other actors to exercise the respective freedoms of association, expression and assembly among others.

Moreover, the report creates an understanding of the broad concept and context of civic/ democratic space in Kenya. Indeed, there is a correlation between the state of democracy and respect for these rights and vice versa. Thus, every time restrictions creeps in, it is a clear sign of an emerging and deepening repression and dictatorship. It is evident that there are many retrogressive laws and policies, touching on many issues and sectors which has negative effects to civil rights and liberties. While some are colonial, others have been initiated by the current government[7].

It is in that basis we have proffered the requisite legislative changes to address the gaps and anomalies identified from the analysis in the final section of the compendium. We call upon the people of Kenya to continue fighting for their rights and defending the Constitution.

Davis Mulandi Malombe,
Ag. Executive Director,
Kenya Human Rights Commission
(KHRC). April 13, 2021

On Behalf of CSPP

[6] Terms of Reference, Compendium of laws on the civic space in Kenya
[7] For instance the Security Amendment Bills of December 2011; the Computer Misuse and Cyber Crimes Act among others.

1 CHAPTER I: LAWS AFFECTING THE EXERCISE OF THE FREEDOM OF ASSOCIATION BY CIVIL SOCIETY

1.1 International and Regional Standards on the Freedom of Association

The freedom of association is guaranteed under Article 20 (2) of the Universal Declaration on Human Rights and Article 22 of the International Covenant on Civil and Political Rights (ICCPR). The only restrictions that may be placed on the exercise of this right are those "prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[8] This article however precludes legal restriction on the exercise of this right by members of the police and armed forces. The freedom of association is reaffirmed in the UN Declaration on "Human Rights Defenders" which recognizes the right "individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."[9] States have an obligation adopt legal guarantees and administrative measures to ensure enjoyment of the right to association.[10] The ACHPR recognizes the right to free association subject to adherence of the law. This right includes the guarantee that no one may be compelled to join an association.[11] There are several other international treaties that recognize the right to associate.[12]

Definition of association

An association has been defined as a group of individuals or legal entities that come together to "collectively act, express, promote, pursue or defend a field of common interests." Forms of associations include "civil society organizations, clubs, cooperatives, non-governmental organizations (NGOs), religious associations, political parties, trade unions, foundations or online associations".[13] The minimum number of persons who can form an association is two persons.[14] Whereas the right

[8] Article 22 ICPPR
[9] Article 1, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereafter Declaration on Human Rights Defenders)
[10] Article 2, Declaration on Human Rights Defenders
[11] Article 11, ACHPR
[12] Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 15 of the International Convention on the Rights of the Child, Article 7(c) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 26 and 40 of the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, Article 15 of the 1951 Convention Relating to the Status of Refugees, Article 24(7) of the International Convention for the Protection of All Persons from Enforced Disappearance, and Article 29 of the Convention on the Rights of Persons with Disabilities.
[13] FOOA online! The right to peaceful assembly http://freeassembly.net/wp-content/uploads/2017/09/FOAA-Online-The-Right-to-Freedom-of-Peaceful-Assembly.pdf p.10
[14] The Guidelines on Freedom of Assembly and Association (FOAA) in Africa https://www.achpr.org/presspublic/publication?id=22 Para.9

to freedom of association is an individual right, it is asserted collectively once individuals come together to work towards a common goal. The freedom is therefore guaranteed simultaneously at an individual and group level. [15] Legal registration is not a prerequisite for the protection of the right to freedom of association under international law; thus informal/unregistered associations have the same protection as legal entities.[16] States therefore have an obligation not to compel associations to register in order to operate freely, neither should they be criminalized due to their informal status.[17]

The right to freedom of association includes the right of associations to choose with whom to associate.[18] As provided by the Guidelines on FOAA in Africa; "the choice to exercise the right to freedom of association shall always be voluntary; individuals shall not be compelled to join associations, and shall always be free to leave them. Those founding and belonging to an association may choose whom to admit as members, subject to the prohibition on discrimination."[19]

Under international law states have both a positive and negative obligation towards the promotion and protection freedom of association. The latter requires states not to interfere with the while the former requires facilitation of the exercise of the right.[20] The measures taken by states must therefore ensure that an enabling environment is created for the exercise of the right and impediments such as threats and intimidation towards those exercising the right are prevented and investigated.[21]

Limitations of freedom of association

Any restriction to the freedom of association must meet the three-pronged test in order to be permissible. Firstly, the limitation must be lawfully prescribed and not merely introduced through administrative orders or decrees. The test of legality also requires that the legal provisions limiting the freedom should not be overly broad and thus easily prone to misinterpretation.[22] Secondly, the restriction must be made in pursuit of legitimate aims including; national security, public safety or public order, public health or morals, and to protect the rights and freedoms of others.[23] The third test requires that the restriction should be necessary in a democracy; given the integral function of associations towards enhancing citizen participation in democratic processes, every restriction must be proportional to a pressing social need.[24] It is noteworthy that the mandate of the Special Rapporteur on Protection of HRDs reiterates that any restrictions to human rights standards should meet a higher

[15] Note 11- FOOA online! p.20
[16] *Ibid*, p.10
[17] Note 12- Para. 10
[18] Note 11- FOOA online! p.28
[19] Note 12- The Guidelines on FOAA in Africa para. 8
[20] Note 11- FOOA online! p.31
[21] *Ibid*
[22] *Ibid* p. 38- 44
[23] *Ibid* p. 41
[24] *Ibid* p. 45

standard when applied to HRDs. Situations of national emergency for instance call for a greater enhancement on the ability monitor and document security related violations rather than further suppressing the ability to defend human rights.[25]

Registration of associations

Whereas it is a well-established principle in international law that the right to freedom of association protects both registered and non-registered groups, there is also recognition that registration or acquiring a legal personality may be a requirement under national law that enables benefits such as soliciting resources or owning property. Owing to this, states are required to facilitate the acquisition of legal personality to associations that elect to do so as this is a "core element" of the freedom of association.[26] States that require authorization prior to registration should avoid bureaucratic procedures that result in delays and instead adopt best practices for "simple, non-onerous and expeditious" approvals.[27] This conforms to the threshold recommended in the Africa Guidelines on FOAA that registration procedures should be simple, "clear, non-discriminatory and non- burdensome, without discretionary components."[28] Any limitations placed on a name chosen by an association during registration should meet the three-pronged test of legality, necessity and in pursuit of a legitimate aim.[29] The Africa Guidelines provide as follows;

> *The law shall not limit the names of associations, unless they are misleading, for instance due to resembling the names of other associations, or where they violate the prohibition of hate speech as defined by regional and international human rights law.*[30]

The oversight of associations should ideally be conducted by a single state entity that executes this function in an impartial manner.[31] A best practice by civil society actors is the establishment of "independent self-governance standards" which serve to enhance transparency of their work.[32]

Access to resources

The right to freedom of association includes the right to mobilize resources, both human and financial.[33] Access to funding by human rights defenders is a core element of the right to freedom of association- this includes "the ability to solicit, receive and use funding" which enables human rights organizations to discharge

[25] Commentary to the UN Declaration on HRDs https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly201 1.pdf p.102
[26] Note 11- FOAA online, 52
[27] *Ibid*, 53
[28] Note 12- The Guidelines on FOAA in Africa p.13
[29] Note 11- FOAA online, 71
[30] Note 12- The Guidelines on FOAA in Africa, Para. 15
[31] *Ibid*, 31
[32] *Ibid*, 32
[33] Note 11- FOOA online, 79

their functions.[34] Requiring prior state authorization to receive international funding adversely affects the ability of human rights organizations to operate. Furthermore, governments should allow access to funding to these organizations as part of international cooperation to which these governments are also subject. [35] As provided by the Africa Guidelines on FOAA;

Associations shall be able to seek and receive funds from local private sources, the national state, foreign states, international organizations, transnational donors and other external entities. States shall not require associations to obtain authorization prior to funding.[36]

Legal frameworks and policies related to resources have a significant impact on the freedom of association; they can strengthen the effectiveness and facilitate the sustainability of associations or, alternatively, subjugate associations to a dependent and weak position.

Reporting requirements & Suspension of associations

Although it is recognized that transparency and accountability is a legitimate aim for requiring associations to submit reports to state authorities, such reporting should not be arbitrary and burdensome.[37] Furthermore, the reporting requirements should presume the lawfulness of associations and their activities and not interfere with their internal management.[38] Failure to comply with reporting requirements under national law is not a sufficient ground to justify suspension or closure of an association.[39] Suspension of associations is a grave restriction on the freedom of association and must therefore be subject to strict adherence of international human rights standards on proportionality, pursuit of legitimate aims such as national security and should be applied only as a last resort. [40] Additionally, suspension should only be done following a court order; the judgment on the suspension should be in conformity with regional and international human rights law.[41] Associations whose rights have been infringed should have access to a remedy; restitution shall include the right to be compensated for damages that occurred as a result of the infringement.[42] The right to access an effective remedy in the event of violation of the rights of individuals or associations promoting and protecting of human rights, is recognized in the UN Declaration on HRDs.[43]

[34] Note 23- Commentary to the UN Declaration on HRDs, 95
[35] *Ibid*, 96
[36] Note 12- The Guidelines on FOAA in Africa, para 38
[37] Note 11- FOOA online, 85
[38] Note 12- The Guidelines on FOAA in Africa, para 47
[39] Note 11- FOOA online, 85
[40] *Ibid*, 89
[41] Note 12- The Guidelines on FOAA in Africa, para 58
[42] *Ibid*, para 62
[43] Article 9, UN Declaration of HRDs

1.2 National Intelligence Service Act, 2012

The main purpose of this legislation is to provide for the functions, organization and administration of the National Intelligence Service pursuant to Article 239(6) of the Constitution; to give effect to Article 242(2) and other relevant provisions of the Constitution; to provide for the establishment of oversight bodies and for connected purposes. The provisions of this legislation mainly apply to members of the National Intelligence Service. These are public officers not known to be active members of civil society organizations. Nevertheless, it is worth stating that since the dark days of the reign of President Moi, it was suspected and feared that some intelligence officers had been strategically planted by the government within civil society to gather reliable information and influence the activities in the sector.

Provisions Affecting Freedom of Association

The legislation limits the freedom of association set out in Article 36 of the Constitution of Kenya, by preventing a member of the Service from joining or participating in the activities of an association. However, members of the NIS may join and participate in the activities of a professional association.[44] The Act does not define a professional association. However, it could be presumed to mean associations relating to the practice of a particular profession. In fact, this would be absolutely necessary for the NIS for legal purposes in respect of validity of actions undertaken by members of respective professions.

The legislation also limits the right to fair labour practices set out in Article 41 of the Constitution, by prohibiting a member of the Service from forming, joining, agitating or participating in the activities of trade unions or going on strike to extent necessary for maintaining good order and discipline in the NIS.[45]

Extent of Compliance with International Human Rights Law

The International Covenant on Civil and Political Rights permits the lawful restriction of the freedom of association in respect of armed forces and the police.[46] These are disciplined security services responsible for matters relating to national security. Although intelligence agencies have not been mentioned expressly in the Covenant, they it is logical to presume that the intention was to include them because they are disciplined security services that are armed and responsible for matters relating to national security. Unlike the ICCPR, the African Charter on Human and Peoples' Rights does not make specific reference to the limitation of the freedom of association in respect of armed forces, the police, intelligence agencies or any security forces.[47]

[44] National Intelligence Service Act, 2012, Section 38
[45] Section 40
[46] ICCPR, Article 22
[47] ACHPR, Article 10

Challenges and Impact on Civic Space

In view of the foregoing, it can be concluded that the limitation of the freedom of association provided in this legislation does not violate the provisions of the Constitution of Kenya[48], the International Covenant on Civil and Political Rights; and the African Charter on Human and Peoples' Rights.

1.3 Trustees (Perpetual Succession) Act[49]

The main purpose of this legislation is to provide for the incorporation of any group of trustees for into a legal personality with perpetual succession to property. It is noteworthy to state that this legislation is different from the Trustee Act[50] which is concerned with matters relating to trustees in their individual capacity. Various civil society organizations have opted to be registered in as trusts instead of non- governmental organizations. The Trustees (Perpetual Succession) Act is a pre- independence legislation which has been amended several times over the years, with the latest amendments having been made in the late 1980's.

Provisions Affecting Freedom of Association

The Constitution of Kenya provides that a legislation limiting a right or fundamental freedom shall not be construed as limiting it unless the provision is clear and specific about the right or fundamental freedom to be limited and the nature and extent of limitation.[51] The Trustees (Perpetual Succession) Act does not provide for the limitation, whether express or implied, of any fundamental freedom or right guaranteed in the Constitution.

Extent of Compliance with International Human Rights Law

Given that the Trustees (Perpetual Succession) Act does not limit any fundamental right or freedom in international law, it is largely compliant with international human rights law.

Challenges and Impact on Civic Space

It is noteworthy to state that although the provisions for incorporation of a trust within this legislation are clear, there has been an unofficial suspension of the issuance of certificates of incorporation to persons who have applied for the same. This information is well known among legal practitioners and trustees who are interested to constitute themselves into corporate bodies but it is not clear what the

[48] Constitution of Kenya, Article 24
[49] Chapter 164, Laws of Kenya

[50] Chapter 167, Laws of Kenya
[51] Constitution of Kenya, Article

official position of the government is. This has resulted in certain civil society organization anchoring the legality on trust deeds drafted under the Trustee Act. This exposes them to personal liability as trustees jointly and severally given that they act in person and not as a body corporate envisaged in the Trustees (Perpetual Succession) Act. One of the reasons why CSO's opted to function was trusts to escape the harassment inflicted upon their partners who were registered under the Non-Governmental Organizations Act. This became evident during the tenure of the Fazul Mohamed, a CEO of the NGO Coordination Board, who acted as a puppet of the government in the repression of non-governmental organizations that took a stand against the government. The board extended its jurisdiction into the harassment of CSO's that operated as trusts but had not obtained certificates of incorporation. For instance, HAKI Africa was threatened with closure and prosecution of their leaders alongside its partner, Muslims for Human Rights which is registered under NGO Coordination Act. Their bank accounts were also frozen and they had to seek judicial intervention to restore normalcy of operations. It was contended that Haki Africa is not registered as an NGO. The motivation of the government was that they were supporting terrorists. In fact, they were legally defending the rights of terror suspects against extra-judicial killings, enforced disappearance and torture.

Evidently, this development of non-issuance of certificates of incorporation of trusts is limiting civic space. In the absence of a valid legal reason for the same, this amounts to the violation of the freedom of association.

1.4 Societies Act[52]

The purpose of this legislation is to make provision for the registration and control of societies.

Provisions Affecting Freedom of Association

This legislation outlaws all societies that are not registered or exempted from registration.[53] It infers that all informal associations in Kenya are unlawful. The provisions that affect freedom of association provide for:

(a) The definition of societies, registered societies and unlawful societies
(b) The procedure for application, registration, refusal of registration and cancellation of registration of societies

These provisions are set out in the section herein below which compares them with international human rights instruments.

Extent of Compliance with International Human Rights Law

The Societies Act defines a society as "any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in

[52] Chapter 108, Laws of Kenya

Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society"[54]. This definition fits into the definition given to associations under the African Commission on Human and Peoples' Rights Guidelines on Freedom of Association and Assembly Africa (2017). Therefore, it is expected that the Societies Act should be compliant with the ACHPR guidelines. However, noting that this legislation became law in 1968 and has been amended a few times from then till 2015, it is evident that the standards set for African governments in the guidelines were not taken into account. First, the ACHPR guidelines provide that "no more than two people shall be required in order to found an association"[55] while the Societies Act sets the minimum membership as ten persons. Second, the ACHPR guidelines provide that "states shall not compel associations to register in order to be allowed to exist and to operate freely. Informal (de facto) associations shall not be punished or criminalized under the law or in practice on the basis of their lack of formal (de jure) status."[56] Conversely, the Societies Act provides that every society that is not registered and not exempted from registration is an unlawful society.[57] Third, the ACHPR guidelines provide that "registration shall be governed by a notification rather than an authorization regime, such that legal status is presumed upon receipt of notification" while the Societies Act adopts an authorization regime.[58]

Challenges and Impact of Civic Space

It is a well-known fact that civil society organizations and networks in Kenya opt to organize themselves in an informal framework to advance causes that are unpalatable to the state. The avoidance of oppressive regulatory frameworks is meant to guarantee the freedom to promote the agenda in question without muzzling and intimidation by the state. It is also designed to accommodate non-state actors who wish to temporarily engage in the cause at hand without being bogged down by the financial burden and administrative rigours of managing a formal institution, Historically, CSO's advocating for a multi-party democracy and constitutional reform organized themselves in informal groups constituting concerned individuals, registered institutions and unregistered groups. Examples of these include the *Ufungamano Group, Bunge la Wananchi, The Yellow Movement* and *We the People.* Outlawing unregistered associations of human rights defenders is a constriction of civic space to the extent that it seeks to interfere with the freedom of association of these groups.

1.5 Prevention of Terrorism Act

The main purpose of this legislation is to provide measures for the detection and prevention of terrorist activities.

[54] Section 2(1)
[55] Paragraph 9
[56] Paragraph 11
[57] Section 4
[58] Section 9 - 11

Provisions Affecting Freedom of Association

Section 35 of this legislation focuses on limitation of fundamental rights and freedoms in accordance with Article 24 of the Constitution but does not mention the limitation of the freedom of association. However, a keen review of the statute reveals that the state has wide powers to limit this fundamental freedom. For instance, the legislation defines a terrorist group as follows:

"(a) an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or

(c) *a specified entity"*[59]

(d)

The legislation grants the Inspector General of Police and the Cabinet Secretary in charge of Internal Security wide powers to declare a group to be "a specified entity".[60] This clause is subject to abuse in harassment of civil society groups that are involved in monitoring the violation of rights of suspects of terrorism. Although such a group may challenge the order by the Cabinet Secretary designating it as a 'specified entity', the decision on the review of such an order can be withheld for upto 60 days by the Inspector General. More interestingly, orders for designation as 'a specified entity' are gazetted by the Cabinet Secretary upon recommendation by the Inspector General of Police but the application by an aggrieved group for revocation of such an order has to be made to the Inspector General, not the Cabinet Secretary. Obviously, the Inspector General is unlikely to rescind his own decision.

In 2019, the Prevention of Terrorism Act was amended to include Section 40C which provides as follows:

"(1) The Centre shall be an approving and reporting institution for all civil society organisations and international non-governmental organisations engaged in preventing and countering violent extremism and radicalisation through counter-messaging or public outreach, and disengagement and reintegration of radicalised individuals.

(2) The Centre may request any person or government body for any information relating to terrorism.

(3) Members of the public have a responsibility to furnish the Centre with any information relating to terrorism which is within their knowledge."

In essence, the amendment empowers the National Counter-Terrorism Centre to control the engagement of local and international CSO's in countering violent extremism and public outreach. It also empowers the NCTC to demand information held by these organizations. This amendment is a camouflaged extrapolation of the limitation of the freedom of association and the right to privacy.

[59] Section 2
[60] Section 3

Compliance with International Human Rights Standards

The requirement under section 40C for civil society organizations and international NGO's to seek approval for and report their activities to the National Counter Terrorism Centre is inconsistent with the regional standards set by the ACHPR Guidelines on Freedom of Association and Assembly in Africa which provide as follows:

"Matters relating to the oversight of associations shall be overseen, where necessary, by a single body that conducts its functions impartially and fairly."[61]

The ACHPR Guidelines provide as follows:

"States shall respect, in law and practice, the right of associations to carry out their activities, including those denoted above, without threats, harassment, interference, intimidation or reprisals of any kind."[62]

Challenges and Impact on Civic Space

The broad discretionary powers given to the Inspector General and Cabinet Secretary to declare a group as "a specified entity" led to the harassment and intimidation of two human rights organizations involved in advocacy, documentation of human rights violations and legal defence of rights of terror suspects. On April 7, 2015, the Inspector General of Police issued a list of "terror organizations" in which the Mombasa Republican Council was named alongside al Shabaab, Nigeria's Boko Haram, al Qaeda, and the Islamic State of Iraq and Syria (ISIS). In that list was also another list of 85 local entities suspected to be associated with al Shabaab. They included Muslims Human for Rights (MUHURI) and Haki Africa – two entities which had been at the forefront in advocating for community land rights, legal aid for the poor, good governance, and peace and security in the Coast region. The state accused these civil society organizations of raising funds to bail out a terror suspect and having close ties with the terrorist group, Al Shabaab.[63]

Civil society organizations protested against the amendment of the Act to include section 40C arguing that they already report to the NGOs Coordination Board, the amendment would force NGOs to get approvals from two different state agencies.[64]

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[61] Note 12- The Guidelines on FOAA in Africa, para. 31
[62] *Ibid*, 29
[63] The Star, *Is this Why NGOs had to go?* 13th June 2015, https://www.the-star.co.ke/siasa/2015-06-13-is-this-why-these-ngos-had-to-go/
[64] https://www.capitalfm.co.ke/news/2019/07/25-coast-civil-groups-demand-review-of-anti-terrorism-law-curtailing-rights-organizations/

references to provisions in the old constitution and colonial laws such as Kenya Independence Order in Council.[65]

The purpose of this legislation is to make provision for the preservation of public security. The Act defines "the preservation of public security" to include:

a) The defence of the territory and people of Kenya;
b) The securing of the fundamental rights and freedoms of the individual;
c) The securing of the safety of persons and property;
d) The prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the Government or the Constitution;
e) The maintenance of the administration of justice;
f) The provision of a sufficiency of the supplies and services essential to the life and well-being of the community, their equitable distribution and availability at fair prices; and
g) The provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.[66]

Provisions Affecting Freedom of Association

This legislation authorizes the President to make regulations that provide for "the control or prohibition of any procession, assembly, meeting, **association or society**."[67] This is a very broad provision that gives room for blanket bans.

Extent of Compliance with International Human Rights Law

The expansive powers of the President to limit any association are too broad and contravene the ACHPR Guidelines on Freedom of Association and Freedom of Assembly which provide that:

"Any limitations imposed by states shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law."[68]

Challenges and Impact on Civic Space

The overbroad powers of the President mentioned hereinabove pose a threat to civil society organizations given that they can be invoked at any time that the President deems it fit.

[65] Section 3 and 4
[66] Section 2
[67] Section 4(2)(e)
[68] Paragraph 24

Further, the context of this legislation is colonial. It does not reflect the present day constitutional and legislative reality.

1.6 Associations Bill, 2018

The purpose of this draft legislation is to provide for the registration, incorporation and regulation of associations. It also seeks to establish a tribunal for dispute resolution related to associations. The bill sets out its objects as to:

a) Provide a framework for the registration, incorporation and regulation of associations;
b) Promote corporate governance of associations registered under this Act; and
c) Provide a mechanism for the resolution of disputes relating to associations.

Provisions Affecting Freedom of Association

This is a poorly drafted bill with ambitious provisions that interfere with the governance and statutory oversight over institutions registered in existing legislation while purporting to repeal only the Societies Act.

This bill defines an association to include an organization, club, religious institution, company, partnership, trust or group of ten or more persons established in Kenya, or having its headquarters, chief place of business, or branch in Kenya.[69] However, it excludes the following institutions:

a) *any corporation incorporated by or under any other written law;*
b) *a registered trade union within the meaning of the Trade Unions Act, including a branch of a trade union registered under that Act, a probationary trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;*
c) *a co-operative society registered as such under any written law;*
d) *any international organization of which Kenya is a member, or any branch, section or organ of any such organization;*
e) *a building society as defined under the Building Societies Act;*
f) *a bank licensed under the Banking Act; and*
g) *any combination or association which the Attorney-General may, by order, declare not to be a society for the purposes of this Act;*
h) *any association, which in the opinion of the registrar, is meant to further a political agenda;*
i) *any company, association or partnership, formed and maintained to carry on any lawful business for profit;*
j) *a school registered under the Basic Education Act, Advisory Council, Board of Management, County Education Board, School Committee or similar organization established under and in accordance with the provisions of any written law relating to education.*

[69] Clause 2

This definition is too expansive and encroaches into the sphere of the Trustees (Perpetual Succession) Act, the Companies Act, Non-governmental Coordination Act, Public Benefits Organizations Act and legislation relating to professional associations such as the Law Society of Kenya, Kenya Medical Practitioners and Dentists Board, Pharmacy and Poisons Board, among others. Inevitably, its ambitious provisions result in a conflict between the jurisdiction of the registrars and oversight bodies established in existing legislation with a potential quasi-judicial catastrophe.

Further, it would infer that institutions established in existing legislation would have to seek additional registration under this bill. It is even more problematic and confusing that the bill only seeks to repeal the Societies Act and make no amendments to the legislation relating to institutions that it has included in the definition of association.

The bill confers upon the Registrar of Associations broad discretionary powers to unilaterally refuse, suspend or cancel registration of associations[70]; call for any document and information on associations; require amendments to be effected to the constitution of an association; and prevent the dissolution of an association by its officers and members.

Where an association does not comply with orders of the Registrar to amend its constitution within the prescribed period this constitutes commission of a criminal offence with a punitive penalty of upto Ksh.500,000 to the association and upto Kshs.300,000 or imprisonment for upto one year to every officer of the association upon conviction.[71] There is no justification on why non-compliance within context has been criminalized in a matter that can be resolved in alternative ways including payment of a prescribed penalty to the registry of associations or in extreme cases, suspension of registration.

One of the requirements for registration of a foreign association in Kenya is the presentation of work permits and alien identification cards issued under the Kenya Citizens and Immigration Act, 2011 by its foreign officers[72]. While this appears to be a reasonable demand, in the recent years, denial, cancellation or refusal of extension of work permits has been one of the tactics that the government has used to muzzle international organizations that engage in monitoring of violations and advocacy that highlights the shortcomings of the government. Effectively, this could bar the registration of these foreign associations in Kenya.

The bill proposes to empower the registrar to cancel the registration of an association where there is an unresolved dispute that results in a situation where the registrar cannot determine who are the lawful officers of the association.[73] This is an extreme measure against an association and its members.

[70] Clause 68
[71] Clause 29
[72] Clause 32
[73] Clause 37

The bill proposes that every association to maintain an updated list of members. Failure to do so constitutes a criminal offence with a penalty of upto Ksh.100,000 to the association and Kshs.100,000 or imprisonment to every officer of upto one year to every officer.[74] Once again this is an extreme penalty against an association and its officers for an omission that could be addressed through alternative non-penal measures.

Extent of Compliance with International Human Rights Standards

The definition of association sets the minimum membership to ten persons. This is inconsistent with the ACHPR Guidelines on Freedom of Association and Assembly which provides that only two persons are necessary to constitute an association.

There is an inference from the inclusion of 'trust', 'company' and 'partnership' in the definition of 'association' that such institutions already registered under existing legislation would be required to register again as associations. This is inconsistent with the ACHPR Guidelines which provide that "associations shall not be required to register more than once or to renew their registration"[75] and that "only one body should be tasked with registering associations."[76]

The bill provides for the outlawing of associations not registered under it, with attendant criminal sanctions thereto [77] . This is inconsistent with the ACHPR Guidelines which provide that "states shall not compel associations to register in order to be allowed to exist and to operate freely. Informal (de facto) associations shall not be punished or criminalized under the law or in practice on the basis of their lack of formal (de jure) status."[78]

The bill provides that "a person who has been convicted of a crime involving fraud or dishonesty shall not, for a period of ten years from the time the person completed serving sentence, be eligible to be appointed or elected—

a) As an officer;
b) To any other office the holder of which is responsible for the collection, disbursement, custody or control of the funds of the association or for its accounts; or
c) As trustee or auditor of an association."[79]

This provision is inconsistent with the ACHPR Guidelines which provide that "the fact of past criminal conviction alone shall not prevent an individual from founding an association."[80] The ACHPR Guidelines elaborate on this principle as follows:

[74] Clause 41
[75] Paragraph 17
[76] Paragraph 21
[77] Section 11(1)(a)
[78] Paragraph 11
[79] Clause 35
[80] Clause 10

"Past criminal conviction shall only potentially limit an individual's ability to found an association where the nature of that conviction directly raises concern relative to the true purpose of the association. Direct reason for concern would be raised, for instance, where an individual seeking to set up an association has previously been convicted of fraud and there is well-founded reason to believe the association is not being set up in good faith."

Challenges and Impact on Civic Space

As illustrated above, the Associations Bill, 2018 unnecessarily complicates the process of registration for civil society organizations by including in its jurisdiction, institutions that are already registered in existing legislation.

The conferment upon the Registrar, of discretionary powers that permit him to refuse, suspend or cancel registration of an association unilaterally, is perilous. It creates room for harassment and intimidation of CSO's as has been the practice in the Non-Governmental Coordination Board.

The bill unnecessarily proposes to criminalize procedural omissions by associations that need not have penal sanctions. This hostile legal framework would constrict the enjoyment of the freedom of association.

1.7 Kenya Citizenship and Immigration Act, 2011

The purpose of this legislation is to provide for matters relating to citizenship, issuance of travel documents and immigration. Some of its provisions should be read together with a related statute titled "the Kenya Citizens and Foreign Nationals Management Service Act, 2011".

Provisions Affecting Freedom of Association

The Kenya Citizenship and Immigration provides that "a person who was a citizen of Kenya by birth and who ceased to be a citizen of Kenya because he or she acquired the citizenship of another country may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship"[81]. The only requirements are the proof of the applicant's previous Kenyan citizenship and proof of the citizenship of the other country. Subsequently, the Cabinet Secretary should cause the application to be registered and issue the applicant with a certificate of registration of citizenship. This means that regaining of Kenyan citizenship by a person who acquired it by birth when dual citizenship was not permitted by law, is not automatic. There has to be a formal application.

In light of the above, a person who had lost his citizenship by acquiring the citizenship of another country before the promulgation of the Constitution of Kenya in 2010 and the commencement of this legislation, would be regarded as a foreign

[81] Section 10

officer who requires a work permit and alien identification card if such person intends to form or be appointed as an officer of any organization in Kenya. If the person fails to acquire requisite documentation, such person would have committed an offence under the legislation.

The legislation provides for revocation of citizenship by the Cabinet Secretary in accordance with the Constitution[82]. Such a decision would result in the loss of rights of a citizen including "the right to enter, exit, remain in and reside anywhere in Kenya"[83] and effectively terminate the legality of holding an office in an organization in Kenya as a citizen thereby requiring such person to apply a work permit as a foreign worker. An appeal to this decision can be made to the High Court and subsequently to the Court of Appeal and Supreme Court.

The legislation provides that a person's residence permit or work permit can be revoked where such a person:

a) *fails, without the written approval of the Director, to engage within ninety days of the date of issue of the permit or of that person's entry into Kenya, whichever is the earlier, in the employment, occupation, trade, business or profession in respect of which the permit was issued or take up residence;*
b) *ceases to engage in the said employment, occupation, trade, business or profession; or*
c) *engages in any employment, occupation, trade business or profession, whether or not for remuneration or profit, other than the employment, occupation, trade, business or profession in respect of which the permit was issued;*
d) *has violated any of the terms of his or her stay under the permit;*
e) *has violated any of the provisions of this Act or Regulations made under it;*
f) *has been declared a prohibited immigrant or inadmissible person;*
g) *has become an undesirable immigrant;*
h) *acquired the permit by fraud, false representation or concealment of any material fact;*
i) *has during any war in which Kenya was engaged unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in such a manner as to assist an enemy in that war; and*
j) *the person has after acquiring the permit been convicted of an offence and sentenced to imprisonment for a term of three years or longer"*[84]

This renders the presence of such a person in Kenya unlawful unless otherwise permitted by law. The legislation gives the Cabinet Secretary power to issue an order for the removal of a person whose presence in Kenya becomes unlawful and that

[82] Article 17
[83] Section 22(1)(a)
[84] Section 41

person can be removed indefinitely or for such period as may be specified in the order.[85]

Extent of Compliance with International Human Rights Law

In general, this legislation has no provisions that contradict international human rights law. However, in practice, the Cabinet Secretary's authority to expel non- citizens and declare them inadmissible persons[86] in Kenya has been invoked to limit the freedom of association of foreign human rights defenders. This is a practice that existed before the enactment of this legislation.

Challenges and Impact on Civic Space

Although, the Cabinet Secretary's powers and those of the Department of Immigration under this legislation are subject to review by the High Court, the practice by the government has been refusal to comply with the orders of the court.

1.8 Labour Relations Act, 2007

The purpose of this legislation is to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratization of trade unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development.

Provisions Affecting Freedom of Association

The legislation guarantees **employees**' right to freedom of association. Every employee has a right to participate in forming a trade union or federation of trade unions; join a trade union or leave a trade union.[87] The Act also provides that "every member of a trade union has the right, subject to the constitution of that trade union to—

a) *participate in its lawful activities;*
b) *participate in the election of its officials and representatives;*
c) *stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and*
d) *stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union*

[85] Section 43
[86] Section 43
[87] Section

representative in accordance with the provisions of this Act or a collective agreement."[88]

Further, the legislation provides that "every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to—

a) *Participate in its lawful activities;*
b) *Participate in the election of any of its office bearers or officials; and*
c) *Stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office."*[89]

The legislation also guarantees the rights to freedom of association of **employers**. It provides that "every employer has the right to—

a) *Participate in forming an employers' organization or a federation of employers organizations; and*
b) *Subject to its constitution, join an employers organization or a federation of employers' organizations."*[90]

The right to freedom of association is also enjoyed by trade unions. The legislation provides that "every trade union, employers' organization or federation has the right to—

a) *Subject to the provisions of this Act—*
    i. determine its own constitution and rules; and
    ii. hold elections to elect its officers;
b) *plan and organize its administration and lawful activities;*
c) *participate in forming a federation of trade unions or a federation of employers organizations;*
d) *join a federation of trade unions or a federation of employers organizations, subject to its constitution, and to participate in its lawful activities; and*
e) *affiliate with, and to participate in the affairs of any international workers organization or international employers organization or the international labour organization, and to contribute or receive financial assistance from those organizations."*[91]

The legislation gives the Registrar of Trade Unions the authority to withdraw a certificate of registration where he believes that "any person has undertaken an unlawful activity, whether in contravention of this Act or any other law, on behalf of the proposed trade union or employers' organization."[92] This is an overbroad provision which can be abused.

[88] Section 4(2)
[89] Section 4(3)

[90] Section 6
[91] Section 8
[92] Section

The Act provides for the amalgamation of trade unions, employers organizations or federations.[93]

The legislation gives the Registrar the authority to cancel or suspend the registration of a trade union, employers' organization or federation where "he is satisfied that it: Was registered as a result of fraud, misrepresentation or mistake;

a) *Is operating in contravention of this Act;*
b) *Is being used for an unlawful purpose;*
c) *Has failed to conduct elections in accordance with the requirements of this Act; or*
d) *Is not independent."*[94]
e) *Any person aggrieved by the decision of the Registrar under the Labour Relations Act has a right of appeal to the Industrial Court.*[95]

The legislation provides that "no person shall be an official of more than one trade union or employer's organization."[96] The rationale behind this is not substantiated in the Act. In an era where a person can belong to more than one profession/sector, this is an unjustified limitation of the right to freedom of association.

The legislation provides that "no person who has been convicted of a criminal offence involving fraud or dishonesty shall be an official of a trade union or employer's organization."[97]

Extent of Compliance with International Human Rights Law

Neither the ICCPR nor the ACHPR Guidelines bar individuals from being members of more than one association. The limitation of people from being members of more than one union or employers' organization under section 31 of the Labour Relations Act goes against the spirit of regional and international standards.

Challenges and Impact on Civic Space

In the today's world, there are persons who have acquired qualifications that permit them to serve in more than one profession and can serve in both at the same time. This means that they should have a right to be a member of all trade union that caters to the respective professions that he is qualified to serve in to ensure his interests are catered for adequately. Any legal limitation of this liberty is an infringement on the person's freedom of association. It is a constricted worldview of the modern day reality that should be remedied.

[93] Section 26
[94] Section 28
[95] Section 30
[96] Section 31(2)

[97] Section

1.9 Finance Act, 2019

The purpose of this legislation is to amend the relating to various taxes and duties.

Provisions Affecting Freedom of Association

None of the provisions of this legislation limits the freedom of association or any other right guaranteed in the constitution of Kenya expressly or by implication.

Extent of Compliance with International Human Rights Law

This legislation does not contravene international human rights law.

Challenges and Impact on Civic Space

While there is no limitation of fundamental rights and freedom in this legislation, CSO's should ensure that they comply with the tax requirements set out therein.

1.10 Companies Act, 2015

The purpose of this legislation is "to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors".[98]

Provisions Affecting Freedom of Association

There is no provision that limits the right to freedom of association expressly as required by the Constitution of Kenya. Nevertheless, the legislation limits the registration and continuance of business of foreign companies in Kenya through a mandatory requirement that such a company appoints a local representative. Where a foreign company operate 21 days after the local representative(s) leave, such operation constitutes an offence.[99]

Extent of Compliance with International Human Rights Law

The ACHPR Guidelines on Freedom of Association and Assembly in Africa provide that:

> "Foreign and international associations may establish branches in accordance with procedures duly laid down in national law. Any limitations imposed by states shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that

[98] Section 2
[99] Section 979

purpose within a democratic society, as these principles are understood in the light of regional and international human rights law."

The Companies Act, 2015 does not contravene this provision.

Challenges and Impact on Civic Space

It is noteworthy to state that some civil society organizations and international organizations are registered as Companies limited by guarantee under section 7 of the Companies Act, 2015 which provides as follows:

1) *"For the purposes of this Act, a company is a company limited by guarantee if—*
   - (a) *It does not have a share capital;*
   - (b) *The liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its liquidation; and*
   - (c) *Its certificate of incorporate states that it is a company limited by guarantee.*

(2) Subsection (1) does not prohibit a company limited by guarantee from having a share capital if it was formed and registered before the commencement of this section."

Examples of such CSO's include Africa Centre for Open Governance and Open Society Initiative for East Africa.

In general, the Companies Act does not limit the freedom of association. In the past there has been contention by the NGO Coordination Board that institutions such as AFRICOG should be registered as non-governmental organizations.[100] In 2017, the High Court quashed the purported deregistration of AFRICOG by the Executive Director of the NGO Coordination Board.[101]

1.11 NGO Coordination Act[102]

The NGO Coordination Act establishes the NGO Co-ordination Board, a body with an oversight mandate over NGOs in Kenya.

Provisions affecting Freedom of Association

The Act defines an NGO as;

[100] https://africog.org/ngo-board-seeks-to-de-register-africog-for-operating-illegally-citiezen-tv-august-15-2017/

[101] High Court Miscellaneous Application No.598 of 2017, http://kenyalaw.org/caselaw/cases/view/145604/

[102] An Act of Parliament to make provision for the registration and co-ordination of Non-Governmental Organizations in Kenya and for connected purposes

> *A private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services.*[103]

The Act distinguishes between international NGOs and national NGOs based on the country of incorporation, the latter are incorporated in Kenya while the former may be incorporated in one or more countries other than Kenya but operate within Kenya under a certificate of registration.[104] The NGO Board is comprised of the following officials: a chairman appointed by the President, three independent members with expertise in development and welfare management appointed by the Minister[105], five Permanent Secretaries representing the Ministry responsible for NGOs, foreign affairs, treasury, economic planning and social services, the Attorney General, seven members appointed by the Minister on the recommendation of the Council[106] and an Executive Director.[107] The Executive Director (an ex officio member of the Board) who heads the Bureau (defined in the Act as the executive directorate of the Board) is appointed by the Minister and is responsible for the day to day management of the Board.[108]

The NGO Coordination Board is mandated with the following functions as provided under Section 7:

k) *Facilitate and co-ordinate the work of all national and international NGOs operating in Kenya*
l) *Maintain the register of national and international NGOs operating in Kenya, with the precise sectors, affiliations and locations of their activities*
m) *Receive and discuss the annual reports of the NGOs*
n) *Advise the Government on the activities of the NGOS and their role in development within Kenya;*
o) *Conduct a regular review of the register to determine the consistency with the reports submitted by NGOs and the Council*[109]
p) *Provide policy guidelines to the NGOs for harmonizing their activities to the national development plan for Kenya*
q) *Receive, discuss and approve the regular reports of the Council and to advise on strategies for efficient planning and co-ordination of the activities of the*

[103] Section 2, NGO Coordination Act
[104] Section 2, NGO Coordination Act
[105] The Act does not specify which Minister
[106] The Act establishes an NGO Council under Section 23 for self-regulation of NGOs. The Council is required to "advise the Board with respect to the code of conduct and such other statutes as may facilitate the regulation of Non-Governmental Organizations on matters of their activities, national security, training, the development of national manpower, institutional building, scientific and technological development and such other matters of national interest."
[107] Section 4, NGO Coordination Act
[108] Section 5, NGO Coordination Act

NGOs in Kenya; and

r) Develop and publish a code of conduct for the regulation of the NGOs and their activities in Kenya.

NGOs are required to register by submitting an application to the executive director of the Bureau in a form prescribed in the Act along with payment of subscribed fees.[110] A certificate of registration is issued to every NGO registered under the Act and the certificate "shall be conclusive evidence of authority to operate throughout Kenya or such parts of the country as are specified therein."[111] Operation of an NGO without a registration amounts to an offence; persons convicted of this offence shall subject to a penalty of a fine not exceeding fifty thousand shillings or to an imprisonment for a term not exceeding eighteen months or to both[112].

Section 10 (4) provides that the Minister has the prerogative, on the recommendation of the Board and by notice in the Gazette, to exempt an NGO from registration. The parameters for sanctioning non-registration of an NGO are not provided under this section. The Act however provides for organizations that are exempt from registration under Section 20, with respect to "an organization established by a State or group of states for welfare, research, relief, public health or other forms of development assistance."

Issuance of a certificate of registration is provided under Section 12. The certificate of registration shall be conclusive evidence of authority to operate throughout Kenya or any parts of the country specified in the certificate. The certificate may contain such terms and conditions as the Board may prescribe.[113]

Section 14 provides for refusal of registration under the following scenarios; if the activities or procedures of the NGO are not in the national interest, if the information required to be submitted during application for registration is falsified[114] or if the NGO Council recommends that an applicant should not be registered and the Board is satisfied with such a recommendation.

Cancellation of a certification of registration can be made by the NGO Board under Section 16 (1) if the NGO has violated the terms or conditions attached to the certificate, breached the NGO Coordination Act or upon submission of a satisfactory recommendation by the NGO Council. The section further provides that notice of the cancellation of a certificate shall be served on the affected Organization and shall take effect within fourteen days after the date of that notice.[115]

[110] Section 10 (1) & Section 11, NGO Coordination Act

[111] Section 12 (1) & (2)

[112] Section 22 (1) & (2)

[113] Section 12(4)

[114] Under Section 10 (3) the information includes; officers of the organization, the postal address of the organization, sectors of the proposed operations, districts**,** divisions and locations of the proposed activities, proposed average annual budgets, duration of the activities and sources of funding.

[115] Section 16 (2) NGO Coordination Act

Section 19 (1) provides that an organization aggrieved by a decision made by the Board can appeal the decision to the Minister within sixty days from the date of the decision. The Minister is required to issue a decision to the appeal within thirty days from the date of such an appeal.[116] If the organization is aggrieved by the Minister's decision, they can submit an appeal to the High Court within twenty-eight days of receiving the written decision of the Minister.[117]

Under Section 32 the Minister is authorized to make regulations that bring into effect any of the provisions of the Act. The regulations may include; guidelines for employment of Kenyan nationals, prescribing fees payable by NGOs for registration or renewal or registration, information to be supplied in every application for registration, the format of the reports of activities to be submitted by the NGOs and procedures for application for exemption from payment of taxes.

Section 33 provides that any person who makes a false statement or declaration upon making a request for an exemption under section 32 shall be guilty of an offence and shall be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both. A first offender under this section is disqualified from holding any office in an NGO for a period of ten years and upon conviction, the NGO board may deregister the organization. A second conviction shall lead to deregistration of the organization.

Section 34 provides for appeal by a deregistered organization upon a first conviction as provided under Section 33; the appeal can be made to the Minister who is required to make a decision within twenty eight days. The Ministers decision can be further appealed to the High Court.

1.12 Non-Governmental Organizations Coordination Regulations (1992)[118]

Regulation 4 provides that the Board shall maintain a register of the national and international organizations operating in Kenya and that this register should be periodically published.

Under Regulation 8(1) application for the registration of a proposed organization shall be subject to the Director's approval of the proposed name of the organization. Upon receipt of an application and payment of the specified fee, the Director shall cause a search to be made in the index of the registered organizations and thereafter notify the applicant that the name is either approved or disapproved.[119] Disapproval of the name can be done on the following grounds;

(i) *it is identical to or substantially similar or is so formulated as to bring*

[116] Section 19(3) NGO Coordination Act
[117] Section 19(3A) NGO Coordination Act
[118] The NGO Coordination Regulations (1992) were made pursuant to Section 32 of the NGO Coordination Act
[119] Section 8 (3) (a) & (b)

confusion with the name of a registered body or organization existing under any law;

(ii) *such name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable.*

Where an application for registration is granted by the Board, the Director shall register the proposed organization by entering the name and particulars of the organization in the register of organizations. [120] The Board shall then issue a certificate of registration as prescribed in the Act. Where refusal of registration is done pursuant to section 14 of the Act, the Board is required to notify the decision to the applicant within fourteen days.[121] The Board may review any of the conditions attached to a certificate as provided under Section 12 (4), either on its own motion or on application by a registered organization.[122]

If the Board is of the opinion that the registration of any organization should be cancelled in accordance with Section 16 (1) of the Act, it shall send the organization a notification of intended cancellation while taking every reasonable precaution to ensure fairness in the exercise of its discretion.[123] The notification of the cancellation shall be made in the Gazette unless an appeal is pending. If an organization appeals the cancellation of registration as provided under section 19 of the Act, the organization shall continue with its operations until determination of the appeal.[124]

Registered organizations are mandated to submit annual report to the Board on or before the 31st May every year in the prescribed forms.[125]

An appeal made to the Minister under section 19 of the Act is required to be made in writing, setting out the grounds for the appeal and signed by the chief officer of the organization. The Minister's decision on the appeal shall be communicated in writing to the appellant organization.[126]

The regulations provide for the procedures for exemption from payment of duty and tax. Regulation 29 provides that any organization importing equipment or goods required for its activities in Kenya can apply to the Board for exemption of duty where there is sufficient proof that —

a) *The foreign exchange for such goods is not raised in Kenya*
b) *The importation of such equipment will generate foreign currency for the Country*
c) *The importing organization has earned through income generating activities foreign exchange equivalent to the price of imported equipment*
d) *The cost of the imported equipment does not exceed 35% of the total annual budget of the organization*

[120] Regulation 10 (1)
[121] Regulation 12
[122] Regulation 13 (1)
[123] Regulation 17 (1)
[124] Regulation 17 (4-5)
[125] Regulation 24
[126] Regulation 27 (1-2)

e) *The price of similar goods in the local market exceeds the price of imported equipment by at least 30%*

The Board is required to forward the application for exemption to the Minister responsible for finance along with recommendations on the application.

Regulation 30 provides for application for exemption of value added tax and income tax in the following scenarios; where VAT applies to goods and services required to meet an NGO's objectives or its income generating activities and income tax for expatriated employees.

Extent of compliance with International Human Rights Law

The NGO Coordination Act provides for mandatory registration of NGOs and its enactment sought to bring all NGOs under one regulatory framework; this has however not been realized due to deficiencies in the law as well as the preference by organizations to register themselves in other legal regimes that better suit their structures.[127] In an ideal scenario, oversight of associations would be conducted by a single state entity.[128]

Section 23 of the Act on the establishment of the NGO Council provides that membership of the Council shall comprise of all NGOs registered under the Act. This provision raises constitutional issues, given that compulsion to join an association is not permissible. The constitutional requirement for voluntary membership of associations is in line with international standards. Whereas an umbrella entity for NGOs is a recommended best practice for voluntary self-regulation of NGOs, mandatory membership to such an entity as is the case with the NGO Council is unlawful.[129]

The provision under section 12 (4) of the Act providing that certificate of registration issued by the NGO Board may contain terms and conditions that that the Board may prescribe is too broad. The test of legality applies to this provision; the provision falls short of prescribing the powers vested on the NGO Board to determine terms and conditions upon registration, which leaves it open for arbitrary restrictions. The failure by the Act to provide guidelines on formulation of the terms and conditions attached to the certificate of registration gives the NGO Board "'excessive discretion" which is subject to abuse.[130]

One of the reasons for refusal of registration under Section 14 is if the activities or procedures of the NGOs are not in the national interest - this provision is overly

[127] ICNL- NGO Law in Kenya https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya
[128] Note 12- The Guidelines on FOAA in Africa, para 31
[129] Note 125- ICNL
[130] The Observatory- Kenya: After years of broken promises, will the PBO Act become more than paper tiger? https://www.omct.org/files/2018/07/24955/kenya_briefing_note_july_2018.pdf , 46

broad and does not meet the legality test. The NGO Board is mandated under Section 7 (1)to provide policy guidelines to NGOs to harmonize their activities to the national development plan for Kenya. This power can be arbitrarily exercised to limit the nature of activities undertaken by NGOs thereby restricting their freedom of association. An example of this overreach is the NGO Board requiring NGOs to implement specific projects that are aligned with national development goals.[131] Another reason for refusal of registration is upon recommendation to the Board by the NGO Council – given that the Council is a self regulatory mechanism, there is ambiguity in the provision on the circumstances under which such a recommendation would be made.

The provisions in the Regulations on disapproval of the name of the organization are not in full conformity with international standards. The first reason for disapproval under Regulation 8 (1) is if the organization has a similar or formulated in a manner likely to cause confusion with the name of an existing organization under any law – this is a reasonable justification. However, the second reason is overly broad in stating that a name can be disapproved if the Director of the NGO Board finds it "repugnant to or inconsistent with any law or is otherwise undesirable." Undesirability of a name provides significant latitude that can be used to arbitrarily restrict freedom of association.

A petition that challenged refusal by the NGO Board to register an organization that was seeking to address human rights violations by gay and lesbian people illustrates the arbitrary exercise of the powers of the NGO Board. The NGO Board's disapproval of the proposed names of the organization was based on Regulation 8 (1); the Board required the applicant to drop the names 'gay' and 'lesbian' on account of "furthering criminality and immoral affairs". The High court ruled that the Board had infringed on the petitioner's freedom of association by refusing to accept the names proposed for registration. Furthermore, the court interpreted the words "every person" as provided in Article 36 of the Constitution guaranteeing freedom of association to include all persons living in Kenya despite their sexual orientation.[132] The Court of Appeal affirmed this decision in a majority opinion that found that the applicant's freedom of association had been infringed.[133] The registration procedure by the NGO Board gives "ample and discretionary power" to refuse registration. [134] This does not conform to the threshold in the Africa Guidelines on FOAA requiring that registration procedures should be non-discriminatory and without discretionary components that would result in arbitrary restriction of the freedom of association.[135] Additionally, the Act does not specify the length of time that the Board will take to consider an application for registration- this process has taken up

[131] https://www.nation.co.ke/dailynation/news/govt-asks-kenyan-ngos-to-align-projects-with-big-four-202870
[132] Petition 440 of 2013, http://kenyalaw.org/caselaw/cases/view/108412/
[133] Civil appeal 145 of 2015 http://kenyalaw.org/caselaw/cases/view/170057/
[134] Note 128- The Observatory, 3
[135] Note 12- The Guidelines on FOAA in Africa, 13

to two years in practice. Such unreasonable delays in registration presents a barrier to the operation of NGOs.[136]

The provision under Section 16 (1) mandating the NGO Board to cancel a certificate of registration if an NGO has violated the terms or conditions attached to the certificate or breached the NGO Coordination Act does not meet the proportionality test in international human rights law. Although the Act provides that the notice of cancellation shall take effect within fourteen days of being served with the notice and an appeal can be made within sixty days during which the certificate of registration shall subsist, cancellation of registration should be a last rather than first resort.

Section 33 of the Act criminalizes NGOs for the actions of their officials by giving discretionary power to the Board to deregister an NGO upon conviction of an official of the NGO for an offence. This is a punitive provision that does not meet the standards under international human rights law for restricting the freedom of association.

Challenges and impact on civic space

The NGO Coordination Act was enacted during a period of "mutual suspicion between the government and the civic sector" and the deficiencies in the law have failed to provide an enabling environment for the development of CSOs in Kenya.[137] The Act has a narrow definition of an NGO; the regulatory framework in the Act has failed to incorporate other organizations conducting public benefit work that prefer to register under other legal regimes such as the Trustees Act. The multiplicity of registration regimes has created duplication in regulation and also resulted in lack of coordination between the state agencies.[138] Registration of NGOs in the different regimes as companies, societies and trusts has created a confusing structure which was supposed to be addressed by the enactment of the Public Benefits Organizations Act, which was meant to repeal the NGO Coordination Act and streamline the regulation of public benefit organizations. The failure by the government to implement the PBO Act to date has created a legal limbo that emboldened arbitrary and illegal regulatory actions by the NGO Board and also left NGOs vulnerable to intimidation.[139] The gaps in the regulatory framework under the Act have created blurred lines between the Director of the NGO Bureau and the Board in the past leading to severe restrictions in the operational environment for NGOs stemming from the unlawful exercise of sweeping powers by the Director of

[136] Note 125- ICNL
[137] https://thisisafrica.me/politics-and-society/role-state-shrinking-political-spaces-csos-kenya/
[138] Note 125- ICNL
[139] https://www.devex.com/news/legal-limbo-leaves-kenya-civil-society-vulnerable-to-targeting-91059

the Bureau.[140] Furthermore, politicization of the Board resulted in deregistration of entities affiliated with individuals perceived to be opposed to the government.'[141]

The regulatory framework under the NGO Coordination Act has been used in conjunction with other restrictive provisions in laws such as the Prevention of Terrorism Act to infringe the freedom of association.[142] In April 2015 following a terrorist attack at Garissa University College, two human rights organizations Muslims for Human Rights (MUHURI) and Haki Africa were listed among entities suspected to be associated with the Al-Shabaab terrorist group. Their bank accounts were subsequently frozen, medical insurance of their staff suspended and offices raided by officers of the Kenya Revenue Authority (KRA) based on unfounded allegations of tax evasion. Both organizations were informed through the media that the NGO Board had deregistered them; the reasons given for MUHURI were failure to provide the Board with notification of changes in the organization's Board, tax evasion and illegal employment of foreign personnel while Haki Africa was accused of operating without a registration certificate. MUHURI demonstrated compliance during the 14- day notice issued by the NGO Board by submitting a KRA tax clearance certificate while Haki Africa had been operating as a registered Trust as they had repeatedly followed up on their prior application for registration under the by the NGO Board. Both organizations challenged the actions by the government to link them with Al-Shabaab - the court ordered their removal from the terrorist list and found that the freezing of their accounts was unconstitutional.[143]

In October 2015 the NGO Coordination Bureau purported to arbitrarily deregister over 900 NGOs through a media announcement for reasons of financial mismanagement and supporting terrorism.[144] The Kenya Human Rights Commission (KHRC) was among the targeted organizations; despite subsequent correspondence by KHRC inquiring on the reasons for the cancellation of its registration, the Board refused to respond.[145] KHRC filed a petition challenging the constitutionality of actions take Board to commence the organization's deregistration, ordering the Central Bank of Kenya (CBK) to freeze of its bank account and investigation by the Directorate of Criminal Investigations (DCI) as well as failure by the Board to adhere to due process. The Court ruled in favour of KHRC and held that the actions by the NGO Board to deregister the organization and freeze its bank accounts were unconstitutional.[146]

Despite the court ruling in April 2016, KHRC continued to face "recurring administrative harassment" by the NGO Board; in January 2017, the NGO Board

[140] https://thisisafrica.me/politics-and-society/role-state-shrinking-political-spaces-csos-kenya/
[141] https://www.nation.co.ke/kenya/news/politics/civil-servants-still-engage-in-politics-despite-warnings--419132
[142] Note 128- The Observatory, 5
[143] *Ibid*, 4-5
[144] https://reliefweb.int/report/kenya/ngos-kenya-protest-threatened-deregistration-959- organisations
[145] Note 128- The Observatory, 5
[146] Petition 495 of 2015 http://kenyalaw.org/caselaw/cases/view/121717/

publicized a memorandum with allegations of offences committed by KHRC, which included financial mismanagement. The memorandum recommended freezing of their accounts by the CBK, criminal investigation by the DCI and recovery of taxes by the Kenya Revenue Authority (KRA). The politicization of the NGO Board became increasingly evident in the aftermath of the August 2017 elections during which CSOs like KHRC and the Africa Centre for Open Governance (Africog) were vocal on electoral irregularities and ensuing violence; these CSOs were also considering filing a petition to challenge the irregularities in the election.[147] On 15 August 2017, the NGO Board instructed the DCI to investigate AfriCOG and arrest its directors for failure to register the organization and operation of illegal bank accounts. The following day, police and KRA officials attempted to raid the Africog premises. The Interior Cabinet Secretary thereafter ordered the Board to suspend actions against KHRC and Africog pending review of their compliance status. A High court ruling following a petition by Africog challenging the NGO Board actions quashed the decision of the NGO Board. [148]

The NGO Bureau has limitations in human and financial resources; the Bureau's operations are centralized in Nairobi with limited staffing of overseeing thousands of NGOs across the country. The Board is also said to lack the technical capacity for registration of NGOs with this role described as being "perfunctory". [149]A recent report by the Board indicates that that there are 11,262 registered NGOs in the country of which 8,993 have active projects.[150]

Despite significant economic contribution to the Kenyan economy, NGOs are not exempt from taxation on account of their public benefit work; procedures for tax exemption are onerous and thus do not encourage philanthropy. [151] The tax exemption provisions in the NGO Coordination Regulations suggest that the rationale for the exemptions was to safeguard foreign currency in the country rather than provide incentives to enhance charitable objectives.[152]

1.13 Public Benefit Organisations Act, 2013[153]

The preamble of the Act recognizes the "important role that public benefit organizations play in serving the public good, supporting development, social cohesion and tolerance within society; promoting democracy, respect for the rule of law, and providing accountability mechanisms that can contribute to improved

[147] Note 128- The Observatory
[148] *Ibid*
[149] https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya#_ftn42
[150] https://www.nation.co.ke/kenya/news/bulk-of-ngo-funding-goes-to-health-and-education-sectors-245610
[151] https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya#_ftn42
[152] http://www.ielrc.org/content/w0002.pdf, 11
[153] An Act of Parliament to provide for the establishment and operation of public benefit organisations; to provide for their registration; to establish an administrative and regulatory framework within which public benefit organisations can conduct their affairs and for connected purposes

governance." Self-regulation is highlighted as an effective means of enhancing transparency and accountability of public benefit organisations (PBOs). The Act is an outcome of efforts to establish an enabling environment for PBOs necessitated by the inadequacy of the current regulatory and institutional framework.

Provisions affecting Freedom of Association

Section 1 provides that the Act shall come into operation on such date as the Cabinet Secretary[154] may appoint through notice in the Gazette.

A PBO is defined under **Section 5 (1)** as;

A voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan, non-profit making and which is-

a) *organized and operated locally, national or internationally;*
b) *engages in public benefit activities in any of the Areas set out in the Sixth Schedule*[155]
c) *is registered as such by the Authority.*

The definition of a PBO excludes trade unions, public bodies, religious organizations primarily devoted to religious teaching or worship, societies, cooperative societies, saccos, micro-finance institutions and community based organizations whose objectives include the direct benefit of its members.[156]

Institutional Framework

Section 34 establishes the Public Benefit Organizations Regulatory Authority (hereafter "the Authority"). The Authority is mandated with the following functions; register and de-register PBOs; maintain a register of PBOs registered under the Act; interpret the national policy on PBOs so as to assist in its smooth implementation and observance by Government ministries, departments and agencies; receive and review annual reports of PBOs; advise the Government on the activities of PBOs and their role in development within Kenya; issue forms, instructions, and model documents; facilitate information sharing and networking between PBOs and the Government; institute inquiries to determine if the activities of PBOs do not comply with the PBO Act or any other law; provide advice and training to PBOs.[157]

Section 35 (1) establishes the Board of the Authority whose membership shall consist of:

[154] Section 2 (1) defines Cabinet Secretary as the Cabinet Secretary for the time being responsible for matters relating to planning and national development
[155] The areas listed in the sixth schedule include: legal aid, agriculture, children, culture, disability, energy, education, environment and conservation, gender, governance, poverty eradication, health, housing and settlement, human rights, HIV/AIDS, information, informal sector, old age, peace building, population and reproductive health, refugees, disaster prevention, relief, pastoralism and marginalized communities, sports, water and sanitation, animal welfare and the youth.
[156] Section 5 (2)
[157] Section 42 (1)

The chairperson appointed by the Cabinet Secretary; three members, at least one of whom shall be of different gender from the other two, who have rendered distinguished service in the civil society, appointed by the Cabinet Secretary; the Principal Secretary in the ministry; responsible for matters relating to PBOs; the Principal Secretary in the ministry responsible for matters relating to finance; the Principal Secretary in the ministry responsible for matters relating to foreign affairs; the Attorney-General; one public officer representing the Principal Secretary responsible for such departments as the Authority shall determine; the chairperson of the governing board of the Federation; two members of the governing board of the federation, being one woman and one man, nominated by the members of the governing board of the Federation and appointed by the Cabinet Secretary; and the Director.[158]

The chairperson of the Board is required to possess at least ten years experience, in matters relating to civil society.[159] Members of the Board will hold office for a period of three years, renewable for a final term of three years.[160]

Section 45 (1) provides that there shall be a Director of the Authority who shall be appointed by the Authority ; the Director shall act as the chief executive officer, responsible for the management of the Authority its staff, subject to the directions of the Board and also act as a secretary to the Board.[161] The Director may be removed from office by the Board for reasons of infirmity, criminal conduct or breach of professionalism[162]; the removal must be supported by votes of not less than two-thirds of the members of the Board.[163] The Board shall also be responsible for appointing a Deputy Director and any other staff to support the statutory functions of the Authority.[164]

Section 50 (1) establishes the Public Benefit Organizations Disputes of the Tribunal (hereafter the Tribunal) comprised of the following members to be appointed by the Chief Justice and approved by the National Assembly;

(a) A chairperson who shall be an advocate of the High Court of not less than seven years standing;

(b) Two advocates of the High Court of not less than five years standing;

(c) Two persons having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal.

[158] Section 35 (1)
[159] Section 35 (2)
[160] Section 37
[161] Section 45 (4)
[162] The required standard is provided under Section 27 (1) j as follows: maintenance of a high standard of professionalism in service and interactions and dealing with people through honesty, fairness, integrity, respect for confidentiality, objectivity, care, diligence, prudence, timeliness and straightforwardness;
[163] Section 45 (8)
[164] Section 46 (1)

Under Section 51 (1) The Tribunal has jurisdiction to hear and determine complaints arising out of any breach of the provisions of the PBO Act, which also includes appeals. The power of the Tribunal to hear a complaint or an appeal, summon witnesses and call for production of evidence shall be equivalent to that of a subordinate court of the first class.[165] A decision by the Tribunal shall be final except where a judicial review is sought by appealing to the High Court; the decision of the High Court shall be final.[166]

Registration of PBOs

Section 6 (1) provides that a PBO must be registered under the Act in order to enjoy the benefits that accrue from the Act. No organization registered under any other law in Kenya can be registered under the PBO Act, while its registration in that law subsists.[167] Section 6 (3-5) further provide as follows:

3) *Without prejudice to subsection (1), registration of an organization under this Act supersedes any prior registration of that organization under any other law in Kenya.*
4) *Where an organization is registered under this Act and under any other law, that organization shall be deemed registered under this Act and that other registration shall be deemed invalid.*
5) *Organizations shall be deemed to be similar under this section if the name, objects and the officials, taken together, are similar whether wholly or partially.*

An organization shall only be deemed to be a PBO once registered under the Act or if registered under another law, the Public Benefit Organizations Regulatory Authority[168] bestows the status of PBO upon the organization.[169]

Section 8 provides for the application procedure; organizations are required to make an application for registration to the Authority along with supporting documents including a copy of the PBO's constitution, names and addresses of its founders, the public benefit purposes for which the PBO is organized, the postal and physical address of the PBO's principal place of doing business and the prescribed fee. The Act prescribes the content for the applicant PBO constitution to include; the organization's objectives, that that participation in and membership of the PBO shall be voluntary, make provision for the organization to be a body corporate and have an identity and existence distinct from its members or governing body.

The Authority is required to consider applications for registration within sixty days (60) of receiving the application and to register the organization as a PBO within that period. If the Authority is dissatisfied that the applicant has not complied with the

[165] Section 52 (1)
[166] Section 52 (10-11)
[167] Section 6 (2)
[168] The Public Benefit Organizations Regulatory Authority is established under Section 34 of the Act
[169] Section 7

requirements for registration, the Authority shall notify the applicant in writing giving reasons for the decision and give a notice not exceeding thirty days for the applicant to comply. The Authority can extend this thirty-day period for a maximum of twenty (21) days if the applicant shows good cause to warrant the extension. The Authority is required to register the organization within fourteen (14) days of receiving the requisite application documents.[170]

The Authority is mandated under Section 10 (1) to issue a certificate of registration in the prescribed form. International organizations are required to apply for registration if they intend to directly implement any activities and programmes in Kenya. The PBO Authority can exempt an international organization from registration and instead grant the organization a permit to operate in Kenya if that organization has no intention to directly implement activities or programmes in Kenya.[171]

If a PBO does not receive a decision from the Authority upon expiry of sixty days of the applying for registration, the PBO can file an appeal to the Tribunal for an order requiring the Authority to either issue the organization the certificate of registration or communicate refusal of registration and the reasons for the refusal.[172] The certificate of registration serves as conclusive evidence of the authority to operate throughout Kenya as specified in the PBO's constitution or in the certificate of registration.[173]

Section 16 (1) provides that the Authority can refuse to register an organization as a PBO if it holds the opinion that;

a) *The application for registration does not comply with the requirements of The PBO Act*
b) *The objectives of the proposed PBO contravene any written law*
c) *The applicant organization has committed a serious violation or repeated violation of the PBO Act, other laws or regulations*
d) *The applicant has given false or misleading information in any material particular*
e) *The name of the proposed public benefit organization is similar to the name of another institution, other organization or entity as to be likely to mislead the public as to its true identity.*

Refusal by the Authority to register a proposed PBO shall be communicated to the PBO within fourteen days of the decision, including reasons for the refusal.[174] An applicant that is aggrieved by a decision of the Authority can apply to the Authority for review of its decision within thirty days of receiving a written notice of the

[170] Section 9 (1-4)
[171] Section 11 (1-2)
[172] Section 12
[173] Section 10 (2)

[174] Section 16

decision.[175] In case of dissatisfaction with the decision of the Authority upon review, the applicant can appeal the review decision to the Tribunal within thirty days of having received a written notification of the decision.[176] The Tribunal is mandated to consider and determine the appeal within sixty days of receiving the appeal.[177]

If a PBO violates the provisions of the PBO Act, the Authority may serve on the organization a default notice that specifies the nature of the default.[178] The PBO in response to the default notice may write to the Authority with indications of the steps taken to remedy or rectify the default.[179] If the PBO fails to remedy the default or comply with the provisions of the PBO Act within the period specified in the default notice or does not respond satisfactorily in writing to the Authority, the Authority shall fine, suspend or cancel the certificate of registration of the organization. However, the time limit for compliance by the PBO shall be no less than fifteen days after receipt of the default notice.[180] A PBO can apply to the Authority for review of a decision for a fine, suspension or cancellation of a certificate within sixty days of receiving this decision, if the PBO is dissatisfied with this decision.[181] The PBO may elect to appeal the fine, suspension or cancellation of certificate directly to the Tribunal.[182]

Self-Regulation of PBOs and Reporting Obligations

Section 20 (1) recognizes the freedom of every organization to associate with others by participating in forming a forum of PBOs under the Act, as well as exercising the right to join and exit the forum of PBOs. Organizations that elect to join the forum have a right subject to the constitution of that forum to participate in its lawful activities and the election of its officials and representatives.[183]

Section 21 (1) establishes the National of Federation of Public Benefits Organizations (hereafter "the Federation"), an umbrella organization for all PBOs registered under the Act and any self-regulation forums of PBOs recognized by the Authority.

The Federation shall be managed by a governing board consisting of not more than nine members and a secretariat supervised by a chief executive officer who shall also act as the secretary to the governing board of the Federation.[184] Members of the governing board shall be elected into office by members of the Federation and shall hold office for a five-year term, renewable for a second term.[185]

The Federation is mandated with the following functions;

[175] Section 17 (1)
[176] Section 17 (2-3)
[177] Section 17 (4)
[178] Section 18 (1)
[179] Section 18 (2)
[180] Section 18 (3)
[181] Section 18 (4)
[182] Section 18 (5)
[183] Section 20 (2)
[184] Section 21 (4)
[185] Section 21 (5-8) further provide for the conduct of the elections

a) *Providing leadership on matters of interest to the sector and for the promotion of the sector generally;*
b) *Promoting self-regulation by the forums for self-regulation of PBOs;*
c) *Co-coordinating self-regulation forums;*
d) *Monitoring the performance of the self regulation forums and advise the Authority in the monitoring and enforcement of compliance by these forums and their respective PBOs members with the provisions of this Act, the regulations and the general code of conduct and the codes of conduct adopted by the self-regulation forums;*
e) *Advising the Authority generally on the development of the PBO sector;*
f) *Facilitating the building of the capacity of non-governmental organizations for the*
g) *Enhancing the effectiveness of these organizations;*
h) *Rendering such advice to donors and the Authority on any issue relating to the sector.*[186]

Section 21 (10) provides for regular consultations between the Cabinet Secretary, the Authority and the Federation to facilitate harmonization of policies and co- ordination of the sector. The Tribunal shall determine any disputes arising between a member of the Federation and the Federation, between the members of the Federation and between the Federation and the Authority.[187] The Tribunal shall also determine appeals from any decision of the Cabinet Secretary or the Authority concerning the Federation or a decision of the Federation itself.[188]

Section 23 (1) provides for voluntary membership to self-regulation forums. Each forum shall enter into a recognition agreement with the Authority; the Authority shall recognize any such forum upon satisfactory proof that the forum represents a significant number of organizations registered by the Authority. Members of each forum shall be bound a code and standards established by the forum.[189]

Section 29 provides for fiscal transparency of PBOs and requires that each organization;

a) *Implements internal accounting and administrative procedures necessary to ensure the transparent and proper use of its financial and other resources;*
b) *Utilises its financial and other resources for the attainment of its aims, objects and purposes.*

Every PBO is mandated to keep proper books of account, including an annual statement of accounts and records of its operation and activities; the financial accounts must be certified by an independent auditor and submitted to the Authority along with a report of the organization's activities within six months of the

[186] Section 21 (9)
[187] Section 21 (12)
[188] Section 21 (13)
[189] Section 24 (1)

end of each financial year.[190] **Section 33** provides for protection of personal liability for members of a governing body of a PBO for any act done in good faith on behalf of the organization, or by virtue of the office held in the governing body.

Transitional Provisions

The fifth Schedule of the Act contains provisions for transition from the NGO Coordination Act regulatory framework to that of the PBO Act. Section 2 (1) provides that all the funds, assets and other property, both movable and immovable, which immediately before the date of commencement of the PBO Act were vested in the NGO Coordination Board, shall vest in the Authority. This includes all rights, powers, liabilities and duties that were vested in the former Board as well as legal proceedings by or against the former Board which shall not be affected by the coming into operation of the PBO Act. Furthermore, any reference in any written law or in any document or instrument to the former Board shall be construed to refer to the Authority after commencement of the Act. This similarly applies to administrative decisions made by the former Board or by the Cabinet Secretary – these decisions shall have the same effect as though the Authority or the Cabinet Secretary under the PBO Act made them.[191] Section 1 of the third Schedule, which outlines the procedure for nominating members of the Board of the Authority provides as follows;

> *The Cabinet Secretary shall, within fourteen days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, declare vacancies and invite applications from persons qualified under this Act for nomination as members of the Board.*

This provision needs to be read along with Section 6 (1) of the fifth schedule, which states as follows;

> *A person, other than a public officer, who was a member of the former Board immediately before the commencement of this Act shall be deemed to be a member of the Board of the Authority and shall continue in office as if appointed under this Act for the remainder of the three year term as provided for under this Act and shall be eligible for re-appointment once.*[192]

Every NGO registered under the NGO Coordination Act (until repealed) shall be deemed registered under the PBO Act once the law is operationalized and shall have up to one year from the date of commencement of the PBO Act to seek registration as a PBO.[193] An organization that fails to seek registration under the PBO Act after the one-year period and having received specific notice to do so shall cease to have PBO status thirty days after expiry of the notice period.[194]

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[190] Section 31-32
[191] Section 2 (2-5)
[192] Section 6, fifth Schedule
[193] Section 5 (1), fifth Schedule
[194] Section 5 (2), fifth Schedule

The Second Schedule of the Act outlines the benefits of registering as a PBO under the Act. The benefits include indirect support from the government in the form of; exemptions from income tax on income received from membership fees, donations or grants; income tax on income generated from activities to support the public benefit purposes for which the organization was established; tax on interest and dividends on investments and gains earned on assets or the sale of assets; stamp duty; and court fees. PBOs are granted preferential status under value added tax (VAT) and customs duties applicable to importation of good and services used to further the public benefit purposes of the organization. The Act seeks to incentivize donations and other tax incentives provided include employment tax preferences and special tax incentives for donations to form endowments.

Extent of compliance with International Human Rights Law

The PBO Act is described as offering "the best legal operational framework for CSOs" in Kenya and the provisions of the Act "mirror most if not all" of globally recommended best practices for regulation of CSOs.[195] The legislation complies with international and human right standards on the exercise of the freedom of association and represents a significant departure from the current regulatory framework under the NGO Coordination Act.

Challenges with provisions and impact on exercise of FoA by Civil Society

Section 1 of the PBO Act has presented a major challenge on the exercise of freedom of association by civil society. The implementation of the Act is contingent on the appointment by the Cabinet Secretary of a date of commencement through the Kenya Gazette. The PBO Act has remained in limbo since being enacted in 2013 due to failure by the government of Kenya to implement the Act.

A 2015 petition by civil society sought to challenge the failure by the government to commence the PBO Act as well as any attempts to amend he Act before coming into operation. The High Court ruled that the failure of the Cabinet Secretary, Ministry of Devolution and Planning to appoint a date for the coming into operation of the PBO Act was a violation on the Constitution and issued an order compelling the Cabinet Secretary to gazette a commencement date for the Act within fourteen days of the ruling. Additionally, the Court issued a declaration that the appointment of a Task Force by the Cabinet Secretary to propose amendments to the Act was illegal and in contravention of the Constitution.

With respect to the validity of Section 1 of the PBO Act, the Court stated that delegation of statute implementation by Parliament was not uncommon, as there may exist practical reasons as to why an Act does not come into effect immediately

[195] https://www.opengovpartnership.org/stories/grasping-opportunities-in-kenya-using-ogp-to-improve-the-operating-environment-of-csos/

upon presidential assent. The Cabinet Secretary's failure to exercise the delegated responsibility given by Parliament to bring the PBO Act into force was contrary to the Constitution, superseded the wishes of Parliament and abused discretion without plausible reason.[196]

When the civil society petition was filed in 2015, the Cabinet Secretary Devolution and Planning was the first respondent in the petition. Following the Court ruling in October 2016, the Devolution Cabinet Secretary issued a notice of commencement of the PBO Act; the hopes by civil society that the Act would be finally commenced were however short lived as the oversight of the NGO sector was thereafter transferred from the Ministry of Devolution and Planning to the Ministry of Interior in December 2016. This act was described as a maneuver to circumvent the High Court ruling and maintain the status quo. Civil society subsequently filed a contempt of court application against the Interior Cabinet Secretary- the court found the Cabinet Secretary to have been in contempt of court and ordered for the Act to be commenced within thirty days of the ruling that was made in May 2017.[197] The impasse on commencement of the PBO Act subsists to date.

The PBO Act defines the Cabinet Secretary under Section 2 (1) as the Cabinet Secretary for the time being responsible for matters relating to planning and national development. At the time the Act was enacted in 2013, the Ministry responsible for oversight of NGOs was the Ministry of Devolution and Planning. The current oversight of the sector by the Ministry of Interior is contrary to the intention of the PBO Act. It is noteworthy that the Ministry of Devolution no longer has its previous national planning portfolio but currently has two dockets: the state department for devolution and the state department for development of arid and semi-arid lands (ASALs). [198] Given the centrality of the Cabinet Secretary in implementing and overseeing the regulatory framework under the PBO Act, the question of which Ministry is best suited for this role is pertinent and needs to be considered along with the continued efforts to push for commencement of the PBO Act.

There is an ambiguity in Section 45 (1) of the Act, which provides that the Director of the Authority, who is the chief executive officer, is to be appointed by the Authority; it is unclear who the appointing officer in the Authority is. Given that the Director of the Authority acts under the direction of the Board, appointment by the Board would be more suitable. This provision also seems to be inconsistent with the Section 46 (1) on appointment of the Deputy Director to be done by the Board of the Authority.

A practical challenge with respect to constitution of the Board of the Authority is that composition of the Board will be compromised of the chairperson of the

[196] Petition 351 of 2015 http://kenyalaw.org/caselaw/cases/view/128172
[197] https://www.fidh.org/en/issues/human-rights-defenders/kenya-last-warning-from-the-court-to-implement-the-pbo-act-2013
[198] http://www.devolution.go.ke/

Federation as well as members of the governing board of the Federation, which essentially means that a duly constituted Board is contingent on the establishment of the Federation and election of its officials.

The NGO Coordination Act framework is more focused on exerting control while the PBO Act seeks to engender an enabling environment for the sector. The transition from the NGO Board to the Board of the PBO Authority will require an overhaul in the regulatory approach.[199] This is not just a question of adherence to the law but also necessitates a fundamental change in mindset and value driven regulation.

1.14 Taxation Laws

Tax regulations can either enhance or inhibit the exercise of the freedom of association. NGOs and non profit organizations registered under the different legal regimes in Kenya are required to comply with tax regulations and any exemptions thereto are prescribed pursuant to their respective parent legislations or existing taxation laws. The provisions of three tax laws and their correlation to freedom of association will be examined in this section. **The Income Tax Act**[200] makes provisions for the charge, assessment and collection for income tax and connected purposes; the **Value Added Tax (VAT) Act**[201] makes provisions for the imposition of value added tax on supplies made in, or imported into Kenya and for connected purposes**;** the **Customs and Excise Duties Act** [202] provides for the management and administration customs, including the assessment, charge and collection of customs and excise duties and for connected purposes.

Provisions affecting Freedom of Association Income Tax Act

Section 3 (2) provides for the types of income subject to which income tax is chargeable. These include profits from any business, any employment or services rendered, rights granted to use or occupy property and dividends or interest. Since donations to non-profit organizations are not explicitly provided under this section, applications for exemption from income tax can be made as provided in the First Schedule the Act. Exemption from income tax is applicable to the extent that any Act of Parliament or the Income Tax Act provides for such exemption.[203]

[199] https://www.nation.co.ke/oped/opinion/Why-new-NGOs-law-should-be-implemented/440808-5070334-13px36v/index.html

[200] Cap 470 of the Laws of Kenya, 2018
[201] Act No. 35 of 2015
[202] Cap 472 of the Laws of Kenya, 2018
[203] Paragraph 2, Schedule 1

The income of an institution or body of persons that is of a 'public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education' is entitled to apply for tax exemption subject to the requirement of having been established in Kenya or with regional headquarters is situated in Kenya. In order to grant tax exemption, the Commissioner of Income Tax must be satisfied that; the income is to be expended either in Kenya or that its expenditure will be used for purposes that will benefit residents in Kenya, that such income is solely applied towards executing the purposes of the entity in question and that its business is carried out by its beneficiaries in fulfillment of its purposes.[204]

Section 13 of the Act provides that income accrued in or derived from Kenya as specified in the First Schedule shall be exempt from tax after notice is given by the Minister in the Gazette that such income has been exempted and such exemption shall subsist to the extent specified in the notice. The notice is required under Section 13 (3) to be presented to the National Assembly, which is then required to pass a resolution within twenty days to either approve or annul the notice.

1.15 Customs and Excise Duties Act

Part A of the Third Schedule of the Act provides exemptions from duty; exemption for goods imported by charitable institutions is permitted subject to the goods being bona fide gifts of which office equipment, stationery and office furniture are excluded. In order to grant exemption from duty, the Commissioner must be satisfied that the goods are;

> *"Imported by or consigned to charitable organisations registered as such, or which are exempted from registration, by the Registrar of Societies under section 10 of the Societies Act (Cap. 108) or by the Non-Governmental Organizations Co-ordination Board under section 10 of the Non- Governmental Organizations Co-ordination Act, 1990 (No. 19 of 1990) and whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act and approved by the Commissioner of Social Service for free distribution to poor and needy persons or for use in medical treatment or rehabilitation work in their institutions provided that the Treasury has given its approval in writing where the duty exceeds KSh. 500,000."*[205]

Furthermore, subject to the same conditions outlined above, the Commissioner must be satisfied that the imported goods are donated for free to the charitable organizations and this similarly applies to donations of equipment and passenger motor vehicles.[206]

[204] Paragraph 10, Schedule 1
[205] Paragraph 12 (1) (a), Third Schedule
[206] Paragraph 12 (1) (b) & (c), Third Schedule

1.16 VAT Act

Goods and services exempted from VAT charges are provided under the First Schedule of the VAT Act. One of the relevant exemptions relates to provision of humanitarian goods during an emergency within a specified period and for a specified purpose; this is applicable to NGOs or relief agencies authorized by the Cabinet Secretary responsible for disaster management. The exemption from VAT is subject to the condition that:

s) *The goods are for use in areas where a natural disaster or calamity has occurred in Kenya*
t) *The goods are intended for use in officially recognized refugee camps in Kenya;*
u) *The goods are household utensils, food stuffs, materials for provision of shelter or equipment and materials for health, sanitary or educational purposes*
v) *In the case of a natural disaster or calamity, the importation or purchase locally is made within six months or such further period, not exceeding twelve months, as the Commissioner may permit in each case.*[207]

The supply of services rendered by educational, political, religious, welfare and other philanthropic associations to their members is exempted from VAT. In addition, exemption of social welfare services provided by charitable organizations is also provide for; these organizations include those exempted from registration by the Registrar of Societies under section 10 of the Societies Act or by the NGO Coordination Board under section 10 of the NGO Co- ordination Act, or whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act and approved by the Commissioner of Social Services.[208]

Enactment of the Finance Act, 2019 resulted in amendments to the VAT Act providing for taxation of the 'digital market place', defined under the VAT Act as 'a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.' [209] Subsequent to the requirement by the amendment that the Treasury Cabinet Secretary publishes regulations to bring the digital VAT tax into operation, the Draft Value Added Tax (Digital Marketplace Supply) Regulations, 2020 were published.[210]

An extensive range of taxable digital services is proposed as follows:

a) *Downloadable digital content including downloading of mobile applications, e-books and movies;*
b) *Subscription-based media including news, magazines, journals, streaming of TV shows and music, podcasts and online gaming;*

[207] Paragraph 100, Part 1- First Schedule
[208] Paragraph 11, Part 2- First Schedule
[209] Section 5 (9)
[210] https://www.kra.go.ke/en/media-center/public-notices/842-draft-value-added-tax-digital-marketplace-supply-regulations,-2020

c) *Software programs including downloading of software, drivers, website filters and firewalls;*
d) *Electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;*
e) *Supply of music, films and games;*
f) *Supply of search-engine and automated helpdesk services including supply of customized search-engine services;*
g) *Tickets bought for live events, theaters, restaurants etc. purchased through the internet;*
h) *Supply of distance teaching via pre-recorded medium or e-learning including supply of online courses and training;*
i) *Supply of digital content for listening, viewing or playing on any audio, visual or digital media;*
j) *Supply of services on online marketplaces that links the supplier to the recipient, including transport hailing platforms;*
k) *Any other digital marketplace supply as may be determined by the Commissioner.*[211]

Failure to comply with the provisions in the Regulations shall be subject to penalty of offences under the VAT Act and liability shall also include restriction of access to the digital marketplace.[212]

Extent of compliance with International Human Rights Law

A general principle in international human rights on enabling civil society access to resources is that:

> *"NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions and credits."*[213]

Although states do not have an obligation to grant tax relief to non-profit organisations in protection of the right to freedom of association, when a distinction is made between charitable organizations and those working on human rights issues, this is problematic and discriminatory.[214] It is therefore recommended that laws conferring tax benefits to charitable organizations recognize the protection of human rights as a charitable purpose.[215]

[211] Section 4, Draft Value Added Tax (Digital Marketplace Supply) Regulations
[212] Section 13, Draft Value Added Tax (Digital Marketplace Supply) Regulations
[213] https://www.ohchr.org/Documents/Issues/FAssociation/GeneralPrinciplesProtectingCivicSpace.pdf
[214] https://www.welcomedesk.org/pdf/ISHR-right-to-access-funding.pdf
[215] https://www.ohchr.org/Documents/AboutUs/CivilSociety/ReportHC/16_ISHR021015.pdf

Challenges and impact on civic space

The taxation laws in Kenya do not incentivize philanthropy for public benefit work; the regulatory framework was not devised with the aim of enabling and enhancing the exercise of freedom of association. The PBO Act contains progressive provisions on exempting PBOs from the payment of income tax as well as granting PBOs preferential status under VAT and customs duties The Act also seeks to incentivize donations by providing tax incentives for establishment of endowment funds.[216] These enabling provisions stand in stark contrast to the current tax regulations and would be rendered ineffectual in the absence of corresponding amendments to the tax laws.

Although taxing of the digital economy is intended to increase revenue collection by the government, the proposed VAT regulations would be punitive to 'small and emerging entrants into the market' by subjecting them to a similar threshold of tax obligations as bigger players. The ambiguity in the draft VAT regulations and the blanket provisions necessitate revision.[217] As opined in Article-19 East Africa's submission to the National Assembly;

> *These vague and ill-defined provisions are affecting Kenya's dynamic digital sphere and have introduced legal uncertainty. This is because Kenyan authorities have so far failed to regulate who is captured by the 'digital market-place' provisions… and how they will be taxed.*[218]

The submission further calls upon the National Assembly's Departmental Committee on Finance and National Planning to ensure that the human rights impact of taxing the digital economy is comprehensively assessed prior to effecting the imposition of the digital tax.

[216] Paragraph 1, Second Schedule- PBO Act, 2013
[217] https://news.bloombergtax.com/daily-tax-report-international/insight-kenya-taxation-of-the-digital-economy
[218] https://www.article19.org/resources/kenya-proposed-digital-service-tax-in-finance-bill-should-guarantee-digital-rights/

2 CHAPTER II: LAWS AFFECTING THE EXERCISE OF THE FREEDOM OF EXPRESSION BY CIVIL SOCIETY

2.1 International and Regional Standards on the Freedom of Expression

The freedom of expression is guaranteed under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) which provides that:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

In 2011, the Human Rights Committee established under the ICCPR, issued a General Comment on Article 19 which expounded on the scope of the freedom of opinion and freedom of expression.[219] It stated that freedom of expression includes the freedom to express oneself in political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, religious discourse, commercial advertising. The Committee clarified that the scope of Article 19(2) of the Covenant includes expression that may be regarded as deeply offensive provided that it is within the limits of Article 19(3) and 20.[220] For ease of reference, herein below are the said articles of the Covenant:

Article 19(3)

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1) *Any propaganda for war shall be prohibited by law.*
2) *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

The Committee also pointed out that Article 19(2) protects all forms of expression and the means of their dissemination, which expressions include spoken, written and sign language and such non-verbal expression as images and objects of art. These include books, newspapers, pamphlets, posters, banners, dress, legal submissions. They also include all forms of audio-visual as well as electronic and

[219] Human Rights Committee, 102nd Session, July 2011, General Comment No.34 on Article 19
[220] General Comment No.34 on Article 19, par.11

internet-based modes of expression.[221] The Committee also extensively elaborated on the interplay between freedom of expression and the media; freedom of expression and political rights; the right to access information and the parameters within which freedom of expression may be restricted; and the relationship between article 19 and 20 of the Covenant.[222] These standards set by the Human Rights Committee shall inform the basis on which Kenyan legislation is analyzed herein.

At the regional level, freedom of expression is guaranteed under Article 9 of the African Charter on Human and Peoples' Rights (ACHPR) which provides as follows:

1. *Every individual shall have the right to receive information*
2. *Every individual shall have the right to express and disseminate his opinions within the law*

Kenya has domesticated the international and regional standards on the right to freedom of expression in the Constitution and various legislation. The Constitution guarantees the right to freedom of expression[223], freedom of the media[224] and the right to access information[225]. The right to freedom of expression is guaranteed under Article 33 which provides that:

(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 34 of the Constitution guarantees the freedom of electronic, print and all other types of media. It bars the state from exercising control over or interfering with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalizing any person for any opinion or view or the content of any broadcast, publication or dissemination. It also guarantees the freedom of establishment of broadcasting and

[221] General Comment No.34 on Article 19, par. 12
[222] Par. 13 - 52
[223] Article 33
[224] Article 34
[225] Article 35

other electronic media subject to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution; and independent of control by government, political interests or commercial interests. Further, it provides that state-owned media must be free to determine the editorial content of their broadcasts or other communications independently; be impartial; and afford fair opportunity for the presentation of divergent views and dissenting opinions.

Article 35 of the Constitution provides that every citizen has the right of access to information held by the State or information held by another person that is required for the exercise or protection of any right or fundamental freedom. It also provides that every person has the right to the correction or deletion of untrue or misleading information that affects the person. Further, it makes it mandatory for the state to publish and publicize any important information affecting the nation.

These provisions of the Constitution give effect to the provisions of Article 19 and 20 of the ICCPR; the General Comment on Article 19; and Article 9 of the African Charter on Human and Peoples' Rights.

2.2 Kenya Broadcasting Corporation Act[226]

The Act establishes Kenya Broadcasting Corporation (KBC) as a state-owned public broadcasting service, borrowing from the British model with the British Broadcasting Corporation.[227] Under the Act, the Corporation is intended to assume the Government functions of producing and broadcasting programmes or parts of programmes by sound or television; to provide for the management, powers, functions and duties of the Corporation; and for connected purposes. [228] The Act came into force on 1st February 1989, around the period of the advent of socio- political liberalisation in Kenya, marked by multiparty democracy.[229]

Provisions Affecting Freedom of Expression

Section 3 establishes KBC as a corporate body and section 4 provides for establishment of a board of directors comprising of 12 members who are generally presidential and ministerial appointees.[230] The functions of the board are not well

[226] Cap 221 of the Laws of Kenya, 2012

[227] Nyongesa D. Wafula, (October 2005) Kenya Broadcasting Corporation in a Liberalized Market Economy: The Need For A New Model For Public Service Broadcasting at page 28, para 3 http://erepository.uonbi.ac.ke/bitstream/handle/11295/95936/Wafula_Kenya%20Broadcasting%20Corporation%20In%20A%20Liberalized%20Market%20Economy%20The%20Need%20For%20A%20New%20Model%20For%20Public%20Service%20Broadcasting.pdf?sequence=1&isAllowed=y

[228] Preamble, Kenya Broadcasting Corporation Act, CAP 221 of the Laws of Kenya.

[229] Stephen N. Ndegwa, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' Africa Today , Apr. - Jun., 1998, Vol. 45, No. 2, The Future of Democracy in Kenya (Apr. - Jun., 1998), at page 193, para 3 https://www.jstor.org/stable/pdf/4187218.pdf

[230] Section 4(1), Kenya Broadcasting Corporation Act, CAP 221 of the Laws of Kenya :the chairman of the Board appointed by the President; the managing director of the Corporation is appointed by the board; the Permanent Secretary in the Ministry for the time being responsible for information and

enumerated in the Act save for Section 10 (1) which mandates the Board to direct the establishment of general standards of 'taste, impartiality and accuracy for the contents, including advertisements, of all programmes broadcast by the Corporation'. Provisions under the First Schedule of the Act regulate the constitution of the board, tenure of office, vacation from office and procedures during board meetings. Furthermore, there is no provision on the procedure of appointment of the members of the board who are not Principal Secretaries. Under section 7 of the Act, the State Corporations Advisory Committee under the State Corporations Act determines the remuneration of the members.

Section 8 provides for the duties and functions of the Corporation, which include; provision of independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili or other languages, advising the Government on all matters relating to the broadcasting services and providing facilities for commercial advertising and for the production of commercial programmes. Additionally, the corporation is required to maintain a fair balance in allocation of broadcasting hours between different political viewpoints and during election campaign periods in consultation with the Electoral Commission, to allocate free coverage to registered political parties participating in the election.

Section 5 (1) provides that the Managing director of the Corporation is to be appointed by the Cabinet Secretary in consultation with the Board and the Cabinet Secretary shall determine the director's terms of service. The Managing Director is vested with the responsibility of the control and executive management of the Corporation.[231] The deputy-managing director is to be appointed by the Board.[232]

While the Corporation is expected to assume the broadcasting services of the Government under Section 9 of the Act, the corporation is expected to earn revenue from commercial services as provided under section 8. Further, Part VIII of the Act regulates the finances of the Corporation and provides for sources of financing to include government grants, acquisition of commercial credit subject to the approval of the Treasury and investments in securities.[233]

Extent of Compliance with International Human Rights Standards

Principle 13 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa provides guidelines for securing the independence of public service media as follows:

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broadcasting; the Permanent Secretary in the Office of the President; the Permanent Secretary in the Ministry for the time being responsible for finance; not more than seven members appointed by the Minister. (the term minister is replaced with cabinet secretary and permanent secretary with principal secretary under the present constitutional dispensation)

[231] Section 11 (1)

[232] Section 5 (2)

[233] Sections 37-41

1) *States shall establish public service media governed by a transparently constituted and diverse board adequately protected against undue interference of a political, commercial or other nature.*
2) *The senior management of public service media shall be appointed by and accountable to the board.*
3) *The editorial independence of public service media shall be guaranteed.*
4) *Public service media shall be adequately funded in a manner that protects them from undue interference.*
5) *Public service broadcasters shall ensure that their transmission systems cover the whole territory of the State.*
6) *The public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receives adequate and politically balanced information, particularly during election periods.*[234]

The provision in the Act requiring the Corporation to offer balanced reporting during election campaign periods conforms to the standard of impartial reporting during elections. However, the constitution of the KBC Board of directors does not comply with the recommended standards and is thus susceptible to external interference. Four of its members are Principal Secretaries in various ministries; the chairperson is a presidential appointee while the remainders of seven board members are ministerial appointees.[235] The procedure for the appointment of the seven members is not outlined under the Act, leaving the appointments squarely at the discretion of the Cabinet Secretary. Additionally, appointment of the Managing Director is vested in the Cabinet Secretary and although the Act provides that the appointment should be done in consultation with the Board, this is not a sufficient safeguard given that the director is answerable to the Cabinet Secretary while performance of the director's duties is subject to the direction of the board. The Corporation has limited editorial independence as all the content planned, programmed and aired is subject to approval by the board, which consists of predominantly government officials and ministerial appointees.[236]

The foregoing provisions do not instill confidence in the independence of the Corporation particularly bearing in mind the critical role of the Board as provided under section 10 of the Act to set the general standards of taste, impartiality and accuracy for the Corporation's programming content.

Furthermore, provisions of the Act to not conform constitutional guarantees on freedom of the media. Article 34 (4) of the Constitution provides that all state- owned media shall—

a) *Be free to determine independently the editorial content of their broadcasts or other communications;*

[234] Declaration of Principles on Freedom of Expression and Access to Information in Africa https://www.achpr.org/legalinstruments/detail?id=69
[235] Section 4 (1)
[236] Section 4 (1) (f) Kenya Broadcasting Corporation Act, CAP 211 of the Laws of Kenya

b) *Be impartial;*
c) *Afford fair opportunity for the presentation of divergent views and dissenting opinions.*

The recommended standard for state owned media is that "state and government-controlled broadcasters shall be transformed into public service broadcasters, accountable to the public through the legislature or other mechanism for public accountability."[237] The provisions of the KBC Act are skewed towards government control rather than enhancing the public service aspect of the Corporation.

Challenges and Impact on Civic space

The liberalization of the media space in Kenya reinforces need to secure the independence of KBC in order to safeguard public interest journalism.[238] Although the state broadcaster's semi-autonomous status enables revenue generation from commercial programing, the Corporation's financial independence remains tenuous:

> *"KBC remains chocked in debts that run several years back, has existing service contracts with third parties, some mired in secrecy while others seem to hugely disadvantage the agency, among other budgetary constraints..."*[239]

Furthermore, it is argued that that establishment of the Corporation as both a commercial entity and public broadcaster is untenable due to the tensions that persist in competing for revenue with private media houses on the one hand and fulfilling its role as a state broadcaster on the other hand, state funding to the Corporation is in decline. [240] The corporation has been left to battle it out with private commercial stations, which are edging it out of the cut-throat competitive broadcast sub-sector market.[241]

The impact of the Corporation on freedom of expression and access to information was strongly felt during the KANU era.[242] While the Corporation enjoyed a monopoly of the airwaves at the time and curtailed the right to access to information by

[237] Note 232- Principle 11 (2), Declaration of Principles on FoE in Africa
[238] https://vicbwire.wordpress.com/2014/05/14/new-kbc/
[239] https://citizentv.co.ke/blogs/bwire-need-to-revamp-kbc-and-enhance-public-communication-260304/
[240] https://www.the-star.co.ke/siasa/2020-04-11-battle-for-the-soul-of-kbc-can-it-be-saved-and-who-will-be-its-saviour/
[241] Nyongesa D. Wafula, (October 2005) Kenya Broadcasting Corporation in a Liberalized Market Economy: The Need For A New Model For Public Service Broadcasting at page 57, para 1 http://erepository.uonbi.ac.ke/bitstream/handle/11295/95936/Wafula_Kenya%20Broadcasting%20Corporation%20In%20A%20Liberalized%20Market%20Economy%20The%20Need%20For%20A%20New%20Model%20For%20Public%20Service%20Broadcasting.pdf?sequence=1&isAllowed=y
[242] Nyongesa D. Wafula, (October 2005) Kenya Broadcasting Corporation in a Liberalized Market Economy: The Need For A New Model For Public Service Broadcasting at page 15, para 2 http://erepository.uonbi.ac.ke/bitstream/handle/11295/95936/Wafula_Kenya%20Broadcasting%20Corporation%20In%20A%20Liberalized%20Market%20Economy%20The%20Need%20For%20A%20New%20Model%20For%20Public%20Service%20Broadcasting.pdf?sequence=1&isAllowed=y

broadcasting state certified content, at present, with diversification of media and pluralism of media enterprises, the negative impact of the monopoly is no longer felt. That said, government control over the corporation's content and programming limits its editorial independence. The Act is therefore in need of reform to correct the anomalies.

2.3 Data Protection Act

The Data Protection Act gives effect to Article 31(c) and (d) of the Constitution on the right to privacy.[243]

Provisions affecting Freedom of Expression Section 2 defines data as information which —

a) *is processed by means of equipment operating automatically in response to instructions given for that purpose;*
b) *is recorded with intention that it should be processed by means of such equipment;*
c) *is recorded as part of a relevant filing system;*
d) *where it does not fall under paragraphs (a) (b) or forms part of in accessible record; or*
e) *is recorded information which is held by a public entity and does not fall within any of paragraphs (a) to (d).*

Section 5 establishes the office of the Data Commissioner**,** who has mandate of oversight on the implementation of the Act.[244] The Data Commissioner is mandated under Section 18 (2) to prescribe the threshold required for mandatory registration of data controllers and processors.[245] The following factors may be taken into consideration in determining such registration; the nature of industry, volumes of data to be processed, if sensitive personal data will be processed and any other criteria that the Data Commissioner may deem necessary.

Section 19 (1) requires that a data controller or data processor applies for registration to the Data Commissioner. A data controller or data processor who gives false information in the application for registration will be guilty of an offence.[246] A certificate of registration shall be issued by the Data Commissioner upon verification of satisfactory requirements for registration having been met [247] The Data

[243] Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.
[244] Section 8 (1)
[245] Section 2 of the Act defines a data controller as "a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data" and a data processors as "a natural or legal person, public authority, agency or other body which processes personal data on behalf of the data controller"

[246] Section 19 (3)
[247] Section 19 (4)

Commissioner is required to keep a register of the registered data controllers and data processors, which shall be a public document that is open for inspection.[248]

Section 25 is a key section that outlines the principles of data protection. Data controllers and processors are required to ensure that personal data is processed in accordance with the right to privacy of the data subject and in a transparent manner. The data should be collected for specified and legitimate purposes. Where the information collected identifies data subjects, it should not be kept for longer than necessary for the purpose of the collection.

Section 26 provides for the right of a data subject to be informed of the extent of use of their personal data and to access this data while in custody of a data controller or data processor. The data subject can object to processing of all or part of their personal data and correct or delete any false or misleading data.

Section 28 permits a data controller or data processor to collect personal data directly from a data subject except in the following circumstances: where the data is contained in a public record or the data subject has availed this data publicly, if they have given consent for their data to be collected by another source and such collection would not prejudice the interest of the data subject or if the data subject is incapacitated and their appointed guardian consents to such collection. Collection of personal data should be for a lawful, specific an explicitly defined purpose.[249]

Where data is **c**ollected from a source other than the data subject, the data must be for the following purpose:

i. Prevention, detection, investigation, prosecution and punishment of crime;
ii. Enforcement of a law which imposes a pecuniary penalty;
iii. Protection of the interests of the data subject or another person.[250]

Section 29 places on a data controller or data processor a duty to notify the data subject of their rights under Section 26 of the Act, the fact that their personal data is being collected and the purpose for which it is being collected, the third parties to whom data will be transferred and the safeguards adopted and whether collection of personal data is voluntary or mandatory.

Processing of personal data shall only be lawful if the data subject consents to the processing for a specified purpose(s) or in the following scenarios: to meet contractual obligations with respect to a data subject, compliance with any legal obligations to which a data controller is subject, protection of the vital interest of the data subject or another person, for reasons of public interest, to facilitate performance of a task by a public authority or for historical, literary or journalistic purposes as well as art and scientific research. Additionally, this can be in pursuit of legitimate interests by the data controller or data processor in disclosing the data to a third party- such disclosure must however take into consideration any harm and

[248] Section 21 (1) & (3)
[249] Section 28 (3)
[250] Section 28 (f)

prejudice to the rights and freedoms or legitimate interests of the data subject.[251]

If data processing is likely to result in a high risk of the rights and freedoms of a data subject, the data controller or processor is required to conduct a data protection impact assessment. This entails an assessment of necessity and proportionality of the data processing, a risk assessment on the rights and freedoms of the data subjects and measures to mitigate these risks along with safeguards for protection of the personal data.[252]

Section 32 regulates consent by data subjects; the burden of proof that consent was obtained for processing personal data for a specified purpose is placed on the data controller or processor. The data subject has a right to withdraw consent at any time but such withdrawal shall not prejudice the lawfulness of processing of data based on prior consent. **Section 36** further provides that a data subject can object to the processing of their personal data, with the exception of legitimate interests that supersede the data subject's interests if such processing is subject to a legal claim.

Section 45 regulates the processing of sensitive personal data[253], which must be subject to the principles of data protection provided in Section 25 of the Act. Sensitive personal data can be processed in pursuit of the legitimate aims of an association subject to non-disclosure of the data outside the association, or where the data subject has made public such data and where processing of the data is necessary for advancement of a legal claim.[254]

Exemptions on requirements of processing personal data apply where such processing is done by an individual for personal reasons, or is necessary for national security or public interest and where disclosure is sanctioned by a written law or by a court.[255] The principles of processing personal data are exempt from data processing with respect to publication of literary or artistic material, for public interest or where the data controller "reasonably reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes."[256]

A general penalty is provided under Section 73 (1); any one who commits an offence under the Act for which no specific penalty is provided shall upon conviction be liable to a fine not exceeding three million shillings or to an imprisonment term not exceeding ten years, or to both.

Section 71 mandates the ICT Cabinet Secretary to make regulations to give effect to the Act and for prescribing anything required as such by the Act.

[251] Section 30 (a) & (b)
[252] Section 31 (2)
[253] Section 2 of the Act defines sensitive personal data as "data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject."
[254] Section 45 (a) and (b)
[255] Section 51 (2)
[256] Section 52 (1)

Extent of compliance with International Human Rights Law

The right to freedom of expression and the right to privacy are mutually reinforcing; interference with an individual's right to privacy hinders exercise of their freedom of expression. Surveillance of citizens has the consequence of suppressing or controlling their thoughts, ideas and actions. Advancements in information communication technologies have changed the relationships between citizens, states and corporate bodies, which further reinforces the need to protect individuals right to privacy and freedom of expression.[257]

The Data Protection Act was largely modeled on the European Union's General Data Protection Regulations (GDPR) and was the outcome of extensive public consultation with key stakeholders from the media, private sector, academia and civil society.[258] The Act is said to be one of the most superior legislations on data protection in Africa.[259] This notwithstanding, there are provisions in the Act that could be implemented in a way that deviates from internationals standards. For instance, public interest is listed among the grounds under Section 30 for exempting the provisions on processing of personal data – public interest is not well defined in the Act and could therefore be subject to a broad interpretation that does not meet the appropriate limitation threshold. [260] The provision of national security as an exemption for the safeguards in processing of personal data under Section 51 of the Act is couched broadly and could be open to abuse.[261] Additionally, Section 52 of the Act is said to provide "a narrow definition of journalistic exemption" which could be construed to require journalists to inform the office of the data commissioner about personal data being processed thereby limiting freedom of the media and expression. The section should be more explicit in exempting journalistic purposes from the requirements of processing personal data particularly given the importance of protecting the

Challenges and impact on civic space

Appointment of the Data Commissioner will be crucial to set in motion the operationalization of the Data Protection Act; although recruitment was underway since April 2020, the Data Commissioner is yet to be appointed.[262] The independence of the office of the data commissioner is an imperative towards adherence with the requisite data protection safeguards. The role of the ICT Cabinet Secretary in establishing the operational functions of the office of the Data Commissioner as provided under Section 5 (5) of the Act could potentially undermine the independence of the office. Additionally, the mandate given to the Cabinet Secretary

[257] https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression

[258] https://www.nairobibusinessmonthly.com/data-protection-act-2019-the-good-and-the-bad/

[259] https://www.cio.co.ke/the-implications-of-the-new-data-protection-act/

[260] https://privacyinternational.org/sites/default/files/2020-02/Analysis%20of%20Kenya%20Data%20Protection%20Act%2C%202019_Jan2020.pdf

[261] Section 52 (1)

[262] https://www.bowmanslaw.com/insights/intellectual-property/data-protection-update-recruitment-of-a-data-commissioner-begins/

to develop regulations to bring provisions of the Act into effect does not explicitly include a role for the Data Commissioner in formulation of the regulations. [263]

Establishment of the office of the Data Commissioner as an independent constitutional commission in accordance with Article 59 (4) of the Constitution as opposed to a state agency, would have guaranteed the independence of the office and served to insulate the office from political and other external interference.[264] The status of the office of the data commissioner as a statutory body is bound to have implications on its financial autonomy, as the office will be reliant on funds allocated by the State Department under which the office falls. Given the experience across other countries that data protection authorities are generally underfunded, this would to present a serious operational constraint to the effectiveness of the office of the data commissioner.[265]

2.4 Statistics Act[266]

The Statistics Act provides for the establishment of the Kenya National Bureau of Statistics for the collection, compilation, analysis, publication and dissemination of statistical information, and the co-ordination of the national statistical system, and for connected purposes.

The realization of human rights is dependent on the availability of concrete data upon which evidence-based policy is conducted and civil, political, social and economic rights can be monitored.[267] In Kenya, civil society relies on statistical information compiled by KEBS for demographic analysis on human rights including the status of marginalized groups such as people living with disabilities, monitoring state enforcement of human rights obligations, which includes using data to inform shadow reporting to international and regional human rights treaty bodies.

There is therefore a correlation between statistics and the exercise of the freedom of expression and other rights such as access to information and right to privacy.

Provisions affecting Freedom of Expression

Section 3 of the Statistics Act establishes the Kenya National Bureau of Statistics (KNBS) as a body corporate and section 4 provides that KNBS shall be the principal agency of the government for collecting, analyzing and disseminating statistical data in Kenya and shall be the custodian of official statistical information. Functions of the Bureau under section 5 include:

a) *Planning, authorizing, co-ordinating and supervising all official statistical programmes undertaken within the national statistical system;*

[263] https://www.laibuta.com/data-protection/what-awaits-the-data-protection-commissioner/
[264] https://www.article19.org/resources/kenya-protect-the-data-protection-framework/
[265] https://www.laibuta.com/data-protection/what-awaits-the-data-protection-commissioner/
[266] Statistics Act, Cap 4 Laws of Kenya
[267] https://www.ohchr.org/Documents/Issues/HRIndicators/StatisticsAndHumanRights.pdf

b) *Establishing standards and promoting the use of best practices and methods in the production and dissemination of statistical information across the national statistical system;*
c) *Collecting, compiling, analyzing, abstracting and disseminating statistical information on the matters specified in the First Schedule;*
d) *Conducting the Population and Housing Census every ten years, and such other censuses and surveys as the Board may determine;*
e) *Maintaining a comprehensive and reliable national socio-economic database.*

Section 5 establishes the Board of Directors for oversight of the Bureau's management. Membership of the Board is comprised of; a Chairman appointed by the President; the Principal Secretary in the Ministry responsible for Statistics and the Ministry responsible for Finance; five other persons representing the private sector, NGOs, research institutions, public universities and the National Co- ordinating Agency for Population and Development. The Board is mandated to execute a number of functions including; to formulate and monitor implementation of policies pertaining to the Bureau and recruit staff for the Bureau.[268] Every employee of the Bureau is bound by an oath of secrecy prior to commencing duties relating to provisions of the Act.[269]

The Cabinet Secretary responsible for statistics is mandated to order a population and housing census on the advise of the Board; the census is required to be published in the Gazette including the dates of the census and information to be obtained in the census.[270] Any other agency intending to conduct a census or survey at national, or local level is required to seek the approval of the Board, which may approve or decline to approve such plans.[271] Where approval is granted, the agency conducting the survey is required to submit copies of its report to the Board.[272]

Amendments to the Statistics Act in 2019 included a new section 3B, which establishes the professional independence of the Bureau and mandates the Bureau to observe the fundamental principles relating to statistics set out in the Fourth Schedule of the Act. These principles include; public disclosure of official statistical information, adherence to strict confidentiality of individual data and maintenance of professional ethics in procedures for processing, storage and presentation of statistical data.[273] The Act defines professional independence as 'independence of production and dissemination of statistics from interference or influence by any individual, interest group or political authority.'[274]

Section 22 of the Act restricts the disclosure of information with personal identifiers

[268] Secton 6 (1)
[269] Section 11
[270] Section 17
[271] Section 18 (1)
[272] Section 18 (3)
[273] http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2019/StatisticsAmendmentAct2019.pdf
[274] Section 2 (e)

of an individual who submitted a return for the purposes of the Act, except with the prior written consent of the individual who made the return. A Proviso in this section is the disclosure of any official secret or confidential information or trade secret prescribed by a written law.

Extent of compliance with International Human Rights Law

The Fundamental Principles of Official Statistics adopted by the UN Economic and Social Council in 2013 provide international standards on official statistics.[275] The ten principles outlined in the Fourth Schedule the Statistics Act conform to the UN fundamental principles.

Section 18 (3) of the Act, which provides that the Board can decline approval of any agency seeking to conduct a survey at the national or local level does not meet the legality test to justify restriction on the exercise of freedom of expression as it stops short at outlining the reasons for such disapproval and neither does it provide a mechanism for redress for an aggrieved party.

Section 22 of the Act exempting 'official secrets, confidential information or trade secrets' prescribed under any written law from the restrictions of disclosure under the Act, is overly broad can be applied in contravention of the right of access to information and freedom of expression.

Challenges and impact on civic space

The 2019 amendment to the Statistics Act incorporating the UN principles of official statistics in the fourth Schedule to the Act, along with other amendments that strengthened the independence of the Kenya National Bureau of Statistics (KNBS), was a welcome move that served to enhance public confidence in the Bureau in the lead up to the 2019 census.[276] The 2019 census was applauded as the first in the country to officially recognize intersex persons.[277] This is an important milestone that was achieved from years of spirited advocacy by civil society on the rights of intersex persons. The results of the census provide an impetus for civil society to strengthen advocacy for the rights of minorities such as intersex persons.

CSOs conducting research are among entities required to apply for a research license to the National Council for Science and Technology Innovation (NACOSTI).[278] This research typically includes national surveys on human rights related issues. The role of the KNBS Board in approving surveys although contemplated by the Statistics Act is not implemented in practice and this could pose a challenge in future if the roles of the NACOSTI and KNBS are not harmonized in law.

[275] https://unstats.un.org/unsd/dnss/gp/FP-Rev2013-E.pdf
[276] https://www.nation.co.ke/news/Census-body-gets-more-powers-as-Uhuru-ascents-to-bill/1056-5235992-istl84z/index.html
[277] https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn/kenyan-census-results-a-big-win-for-intersex-people-idUSKBN1XE1U9
[278] https://research-portal.nacosti.go.ke/

2.5 The Huduma Bill, 2019

The Bill was an attempt by the State *post facto* to fill the procedural and substantive deficits eminent in the process of establishment and operationalization of the National Integrated Identity Management System ('NIIMS'). NIIMS had been introduced through Miscellaneous Amendment Act No. 18 of 2018[279] amending the Registration of Persons Act[280] by introducing a section establishing the system and listing its functions. [281] A spirited civil society led campaign against the amendment ensued, and culminated in the filing of **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR (The NRF Case),** which was a petition consolidated with two other petitions brought by the Kenya Commission on Human Rights and the Kenya National Commission on Human Rights.[282]

Among the deficits highlighted were that the amendment was substantive and ought not have been passed through an omnibus law which did not necessitate public participation; there was lack of a data protection law which would guarantee protection of the data collected under the system; NIIMS would result in marginalization of certain groups; and that there was there was no comprehensive law providing for the legal and institutional framework of NIIMS.[283]

In the course of litigation of the aforementioned petition, the Bill was formulated to address the gaps cited therein. Currently, it seeks to fulfill the court decree of the court in **the NRF (Consolidated) Petition.[284]** Thus, the Bill is intended to create an Act of Parliament that establishes the National Integrated Identity Management System; to promote efficient delivery of public services; to consolidate and harmonise the law on registration of persons; to facilitate assigning of Huduma Namba and issuance of identity documents; to facilitate registration of births and deaths; and for connected purposes. [285]

Provisions Limiting the Freedom of Expression

This Bill does not directly limit the freedom of expression. However, through a series of provisions limiting the right to privacy, the freedom of expression is ultimately limited. According to the United Nations High Commission for Human Rights, the right to privacy is central to the enjoyment and exercise of human rights online and

[279] The President of the Republic of Kenya gave his assent to the said Act on 31st December 2018, and it commenced operation on 18th January 2019.
[280] CAP 107 of the Laws of Kenya.
[281] Section 9A, Registration of Persons Act, CAP 107 of the Laws of Kenya
[282] Petition 56, 58 & 59 of 2019 (Consolidated) http://kenyalaw.org/caselaw/cases/view/189189/ [283] Abdi L. Dahir, (21st February 2019) Quartz Africa 'Kenya's Plan to store its Citizen's DNA is facing massive resistance' https://qz.com/africa/1555938/kenya-biometric-data-id-not-with-mastercard- but-faces-opposition/
[284] Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR at para 1047 (iii) http://kenyalaw.org/caselaw/cases/view/189189/ [285] Preamble, intended Huduma Act 2019 (As cited in Huduma Bill, 2019)

offline. It serves as one of the foundations of a democratic society and plays a key role for the realization of a broad spectrum of human rights, ranging from freedom of expression and freedom of association and assembly to the prohibition of discrimination and more.[286] In the digital age, privacy has become increasingly important in maintaining personal security, protecting identity and promoting freedom of expression.[287]

Section 3 states that the object of the Act is to:

- *Remove duplication from the processes and laws relating to registration of persons;*
- *Establish a digital national population database to be a single source of foundational and functional data for all resident individuals;*
- *Provide mechanisms for registration of births, deaths and issuance of identity documents;*
- *Facilitate transparent and efficient delivery of public services;*
- *Provide for access and use of the information contained under the NIIMS database; and*
- *Maintain integrity, confidentiality and security of registration data collected.*

The Bill establishes the NIIMS,[288] which is to operate as a single source of personal identification for citizens and persons resident in Kenya.[289] The NIIMS database is described under section 6 (1) as an integrated digital population register and a repository of foundational data and functional data of every resident individual.[290] Subsection (2) states the NIMS database shall contain foundational data as outlined in the First Schedule[291] and other functional data generated by a public agency responsible for a function requiring the use of Huduma Namba.

Section 11 requires that upon commencement of the Act, every resident shall enroll into NIIMS, provide the particulars outlined in the First schedule and permit their fingerprints and other biometric data to be taken. The Bill defines biometric data to include *'fingerprint, hand geometry, earlobe geometry, retina and iris patterns, toe*

[286] Office of the United Nations High Commission on Human Rights, The Report of the United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age (3rd August 2018) at para. 11

[287] Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR at para 64 http://kenyalaw.org/caselaw/cases/view/151191/

[288] Section 6, Huduma Bill, 2019: The NIIMS database is an integrated digital population register and a repository of foundational data and functional data of every resident individual.

[289] Section 4, Huduma Bill, 2019

[290] Section 6 (1) Huduma Bill, 2019

[291] Foundational data listed under the First Schedule includes; full name; other names by which an individual is or has been known; date of birth; place of birth; sex; photograph of the individual's head and shoulders; signature; fingerprints and any other biometric data; and nationality. Other categories of information include; contact details, personal reference numbers (such as Kenyan passport number, tax payer PIN, driving license number, National Hospital Insurance Fund number, National Social Security Fund number, National Education Management Information System number, Number of any immigration document issued to an individual, Number of any identity detail issued by any authority outside Kenya.

impression, voice waves, blood typing, photograph, or such other biological attributes of an individual obtained by way of biometrics'.[292] An obligation is imposed on all residents to notify the designated NIIMS registration officer to update the individual's foundational and functional particulars wherever there is any change in any particular.[293]

The Bill makes it mandatory for every person to present the Huduma Namba in order to access an extensive range of public services including: passport issuance; application for a driving licence; registration of a mobile phone number; voter registration; payment of taxes; transacting in the financial markets; opening a bank account; registration of a company or a public benefit organisation; transfer or any dealings in land; registration for electricity connection; access to universal health care services; benefit from the government housing scheme; registering a marriage; enrolling into a public educational facility; accesing social protection services; registration or transfer of a motor vehicle; or any other specified public service. [294]

Under Section 13, the Principal Secretary is required to issue a Huduma card to an individual who has been assigned a Huduma Namba within sixty days from date of such assignment. Subsection (2) provides that minors shall be issued with a Huduma card only upon attaining the age of six years and after capturing of the required biometric data. The Bill criminalizes carrying out or permitting the carrying out of the aforementioned services without a Huduma Namba.[295] A penalty of 1 million shillings or imprisonment for one year accrues to persons who attempt to transact without the Huduma Namba from the NIIMS.[296]

The Bill authorizes every government agency providing a public service to be linked to the NIIMS database; these agencies are mandated to authenticate personal data in their possession with NIIMS, and transmit, access or retrieve information necessary for the proper discharge of the agency's functions.[297] Under section 25 of the Bill, the Principal Secretary has the authority to cancel the enrolment into NIIMS of any individual where it was done through fraud, false representation, bribery or deceit; concealment of material facts; or <u>any other justifiable cause.</u> Once the Huduma Namba and the Huduma card of a person whose enrolment has been cancelled shall be revoked, they are unable to access public services. Although the section provides that prior to cancellation, the Principal Secretary shall provide the individual (or in case of a child their parent or guardian) cause as to why their registration should not be cancelled, there is no redress provided upon revocation. Section 59 of the bill mandates the Principal Secretary to establish mechanisms for lodging complaints by any person aggrieved by any decision under the Act.

[292] Section 2, Huduma Bill
[293] Section 16, Huduma Bill, 2019
[294] Section 8, Huduma Bill, 2019
[295] Section 48, Huduma Bill, 2019
[296] Second Schedule, penalties for offences
[297] Section 17, Huduma Bill, 2019

Part IV of the Bill contains data protection safeguards. Section 39 establishes the right of every individual to access their personal data in the NIIMS database and Section 38 restricts disclosure of data without prior consent from the individual and further that the Hudua namba and any core biometric data collected shall not be published publicly. Section 46 provides that provisions of any existing data protection law shall apply 'with necessary necessary modifications in processing of personal data under this Act.'

Extent of Compliance with International Human Rights Standards

The Bill is a limitation on to the right to privacy and has to be read concurrently with Data Protection Act, 2019 which provides for the protection of personal data during collection, storage, dissemination and transfer. Some of the Bill's provisions do not comply with the international human rights standards, resulting in the violation of the right to privacy, which has a domino effect on the exercise of freedom of expression.

The Bill makes registration under NIIMS mandatory for access to essential public services, which have a bearing on enjoyment of various socio-economic rights including the right to education, health, social security as well as other rights such as the right to property and freedom of movement. Whereas the intent of the limitation is said to be the facilitation of efficient service delivery of the aforementioned services by the government, the Bill is self-defeating to the extent that the penalty for non-registration under NIIMS defeats not only the intent of the Bill but goes further to unjustifiably limit the enjoyment of other fundamental rights and freedoms. Its implementation would thus entrench exclusion solely by virtue of non-registration with NIIMS. Additionally, both the monetary and custodial penalties for non-registration are disproportionate to non-compliance with the Bill.

Although the court in the NRF (Consolidated) Petition did not find the possibility of exclusion of marginalized groups as sufficient reason to declare NIIIMS unconstitutional, the court stated that it was imperative for the government to establish a regulatory framework to address the needs of those who do not have access to identity documents.[298]

As per provisions of the Bill, the Principle Secretary in charge of registration has the discretion to cancel and revoke the registration of a person from the system for any reason he finds justifiable- justifiable causes under the Bill are however not defined. Furthermore, the failure to prescribe a redress mechanism in the Bill contravenes the principle of legality. Relegation of development of a dispute resolution mechanism to the Permanent Secretary under section 59 is ambiguous, as the Bill does not spell out any modalities for such development. The Bill therefore violates the principle requiring that "every individual shall have legal recourse to effective

[298] http://kenyalaw.org/caselaw/cases/view/189189/, 1045

remedies in relation to the violation of their privacy and the unlawful processing of their personal information."[299]

The court in the NRF (Consolidated) petition pronounced itself as follows on the issue of collection of DNA data:

> *"It was our finding that because of the specificity of the information that DNA may disclose and the harm disclosure may cause not just to the data subject but other family members in terms of both identification and genetic information, DNA information requires and justifies a particular and specific legal protection. Likewise, we found that specific authorization anchored in law is required for the use of GPS coordinates in light of the privacy risks we identified in terms of their possible use to track and identify a person's location. Accordingly, we found that the provision for collection of DNA and GPS coordinates in the impugned amendments, without specific legislation detailing out the appropriate safeguards and procedures in the said collection, and the manner and extent that the right to privacy will be limited in this regard, is not justifiable."*

The provisions in the Huduma Bill requiring collection of biometric data to enroll in NIIMS in the absence of adequate safeguards on the right to privacy and are thus in contravention of the court's finding.

Challenges and impact on civic space

Despite the court ruling that a regulatory framework for NIIMS was necessary to forestall further exclusion of those already at the margins of registration, the Kenyan government proceeded with issuance of Huduma Nambas following the registration process, thus suggesting that the court order was not taken seriously. The Nubian Human Rights Forum has since appealed the High Court decision.[300]

Collection of DNA data and GPS Coordinates as envisaged in the bill without a proper regulatory framework to safeguard the right to privacy, could result in serious repercussions of targeted surveillance and reprisals against dissenters of the government. Thus independent actors such as human rights defenders, civil society organizations, whistle blowers and journalists would refrain from undertaking their watchdog role for fear of persecution. Furthermore, making the registration of a public benefit organization on the acquisition of a Huduma namba has implications not only for the exercise of freedom of expression but also for the freedom of association.

The use of Miscellaneous Amendment Bills to make substantive legal changes is an unconventional tactic used by the government to sneak in legislative changes over a short period of time without subjecting the changes to comprehensive public

[299] Note 232- Principle 7, Declaration of Principles on FoE in Africa

[300] https://privacyinternational.org/long-read/3373/kenyan-court-ruling-huduma-namba-identity-system-good-bad-and-lessons

consultations. Ideally, miscellaneous amendments ought to be used for minor legislative revisions rather for making substantive changes such as the introduction of NIIMS.[301] Although the Court in the NRF (Consolidated) Petition did not censure the use of an 'omnibus bill' to introduce the NIIMS amendment, it acknowledged the process was rushed.[302]

2.6 Registration of Persons Act[303]

The Act makes provision for the registration of persons, the issuance of identity cards and other connected purposes.

Provisions affecting Freedom of Expression

Section 2 provides that the Act applies to all persons who are citizens of Kenya and who have attained the age of eighteen years or above and where no proof of age exists, are of the apparent age of eighteen years or above. The Cabinet Secretary is mandated under Section 4 to appoint the Principal Registrar and the Deputy Principal Registrar via notice in the Gazette. The Principal Register is required under Section 5 (1) to keep a register of all persons registered under the Act along with the requisite particulars.[304]

Upon registration, a registered person is to be issued with an identity card and shall contain—

a) *A photograph, of the prescribed size and type, of the registered person; and*
b) *Such of the finger and thumb or palm or toe impressions of the registered person as the registration officer may require,*

and for the purpose of obtaining them the registered person shall permit his photograph and his finger and thumb or palm or toe impression to be taken.[305]

Section 9A (1) establishes the National Integrated Identity Management System (NIIMS) and the functions of the system are outlined in subsection (2) as follows:

a) *To create, manage, maintain and operate a national population register as a single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya;*
b) *To assign a unique national identification number to every person registered in the register;*

[301] https://qz.com/africa/1555938/kenya-biometric-data-id-not-with-mastercard-but-faces-opposition/
[302] https://ohrh.law.ox.ac.uk/high-court-of-kenya-suspends-implementation-of-biometric-id-system/
[303] Cap 107 Laws of Kenya (2018)
[304] The particulars include; registration number, full name, sex, declared tribe or race, date of birth or apparent age, and place of birth, occupation/profession/trade/employment, place of residence and postal address, finger and thumb impressions but in case of missing fingers and thumbs, palm or toe or palm and toe impressions, date of registration and such other particulars as may be prescribed.
[305] Section 9 (1) & (2)

c) *To harmonise, incorporate and collate into the register, information from other databases in Government agencies relating to registration of persons;*
d) *To support the printing and distribution for collection all national identification cards, refugee cards, foreigner certificates, birth and death certificates, driving licenses, work permits, passport and foreign travel documentation, student identification cards issued under the Births and Deaths Registration Act, Basic Education Act, Registration of Persons Act, Refugees Act, Traffic Act and the Kenya Citizenship and Immigration Act and all other forms of government issued identification documentation as may be specified by gazette notice by the Cabinet Secretary;*
e) *To prescribe, in consultation with the various relevant issuing authorities, a format of identification document to capture the various forms of information contained in the identification documents in paragraph (d) for purposes of issuance of a single document where applicable;*
f) *To verify and authenticate information relating to the registration and identification of persons;*
g) *To collate information obtained under this Act and reproduce it as may be required, from time to time;*
h) *To ensure the preservation, protection and security of any information or data collected, obtained, maintained or stored in the register;*
i) *To correct errors in registration details, if so required by a person or on its own initiative to ensure that the information is accurate, complete, up to date and not misleading; and*
j) *To perform such other duties which are necessary or expedient for the discharge of functions under this Act.*

The Principal Secretary is charged with the responsibility of the administration, coordination and management of the system.[306]

Section 14 (1) creates a number of offences related to registration which include; failure to apply for registration, knowingly or recklessly providing false information on the particulars required, unlawful deprivation of issuance of an identity card, unlawful entry, alteration or erasure on any identity card or registration document, use of an identity card belonging to any other person and making false representation of identity upon registration or about the status of an identity card. The penalty for these offences is a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding eighteen months or both.

Section 16 empowers the Minister (Cabinet Secretary) to make rules prescribing anything requiring to be prescribed under the Act, develop simple guidelines for the vetting of applicants prior to the issuance or replacement of an identity card among other rules.

Section 18A (1) provides for cancellation of registration and revocation of an identity card by the Director of registration if the card was obtained through—

[306] Section 9A (1)

a) *Misrepresentation of material facts;*
b) *Concealment of material facts;*
c) *Fraud;*
d) *Forgery;*
e) *Multiple registration; or for*
f) *Any other justifiable cause.*

Prior to the cancellation of the registration and revocation of the identity card, the Director of Registration is required under subsection (2) to notify the cardholder in writing of the intention to cancel the registration and revoke the card unless the holder can show cause within fifteen days why the cancellation should not be done. Such cancellation or revocation shall take effect after the expiry of fifteen days of the decision having been made to allow for the right of appeal to a court of competent jurisdiction.

A 2019 amendment bill introduced a new definition of "intersex" under section 3 of the Act, which effectively proposes the recognition intersex persons as belonging to a distinct sex that is neither male nor female for purposes of registration.[307] As discussed earlier in the section on the Huduma Bill, the National Integrated Identity Management System (NIIMS) was integrated to the Registration of Persons Act by adding section 9A in the Act through Miscellaneous Amendment Act No. 18 of 2018.

Subsequent to the amendment of the Act on NIIMS and publication of the Huduma bill, The Cabinet Secretary for Interior introduced The Registration of Persons (National Integrated Identity Management System) Regulations, 2020 for public engagement.[308] The regulations are made pursuant to section 16 of the Act, which empowers the Cabinet Secretary to develop rules to implement provisions of the Act. The objective of the regulations is to bring to effect Section 9A of the Act that establishes NIIMS. Key provisions of the regulations mirror some aspects of the Huduma Bill; one of the criticisms of the bill was the creation of a parallel regulatory framework to the existing framework on registration of persons. The state may have the intention of shelving the Huduma Bill and instead incorporating some of its provisions to the Registration of Persons Act pursuant to Section 9A of the Act, this is however conjecture.

Extent of Compliance with International Human Rights Standards

The right to nationality is guaranteed under a number of international and regional human rights instruments including; The Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), The Convention on the Rights of the Child (CRC) and The African Charter on Human and Peoples' Rights.[309]

[307] The Registration of Persons (Amendment) Bill, 2019
[308] https://www.interior.go.ke/wp-content/uploads/2020/02/THE-REGISTRATION-OF-PERSONS- NATIONAL-INTEGRATED-IDENTITY-MANAGEMENT-SYSTEM-REGULATIONS-2020.pdf
[309] Kenya National Commission on Human Rights - An Identity Crisis? A Study on the Issuance of National Identity Cards In Kenya (2007), 6

The denial of recognition of groups of persons as citizens of a country despite residing in the country for generations is often the result of longstanding discrimination. Such persons "fall outside the formal legal system" that recognizes citizenship rights due to the difficulties they experience in acquiring national identity documents.[310]

Under Kenyan law, issuance of a national identity card is conditional to enjoyment of the rights and freedoms accorded to citizens. Denial of an identity card therefore presents a major impediment particularly for marginalized groups that have historically faced discrimination in issuance of identity cards; these include Kenyans of the Somali ethnic group and Nubians who are not recognized as an ethnic group in Kenya.[311]

The Registration Act does not prescribe vetting procedures for registration and thus contravenes the principle of legality. Vetting committees on registration in Kenya typically require all manner of documentation from individuals even where such documentation does not have a bearing on acquiring citizenship status; this is done on the back of discriminatory policies with a "murky origin", which disproportionately affect ethnic minorities.[312] Lack of legislative guidance on vetting therefore subjects applicants to arbitrary requirements, further compounded by the failure to provide redress for aggrieved persons under law contrary to international human rights standards.

Challenges and Impact on Civic Space

The implementation of NIIMS has been criticized as a move towards "digitizing discrimination" of minority groups that are excluded from the existing registration system and "will only reproduce existing inequalities and exacerbate debates over who is 'really' a Kenyan."[313] The challenges and related impact of NIIMS on civic space has been discussed in the preceding section on the Huduma Bill, which includes the consolidated petition by the Nubian Rights Forum that challenged the constitutionality of NIIMS.

The Kenya National Commission on Human Rights has posited that some of the factors that impede an effective registration system in Kenya include: "historical prejudice, ethnic stigmatization, a weak policy and legislative framework, lack of institutional capacity and general government disinterest in the department of registration of persons."[314] This necessitates a "complete overhaul" of the current institutional structure of registration of persons and a proposal made in this regard is establishment of the office of the Commissioner of Registrar of Persons as an independent office.[315]

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https://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf

[310] https://namati.org/ourwork/citizenship/

[311] Note 307- KNCHR, 8-9

[312] https://www.justiceinitiative.org/voices/out-cold-vetting-nationality-kenya

[313] https://www.nytimes.com/2020/01/28/world/africa/kenya-biometric-id.html

[314] Note 307- KNCHR, 25

[315] *Ibid*, 8-9

2.7 Computer Misuse and Cyber Crimes Act (No. 5 of 2018)

The enactment of the Computer Misuse and Cyber Crimes Act occurred in a context where global technological advancements have spurred legislative responses to address the ensuing challenges from the impact of cyberspace growth. Enactment of the Act was preceded by the development of a National Cyberspace Strategy by the Ministry of Information and Communications.[316] The Act regulates the cyberspace by creating offences relating to computer systems; creating enabling provisions for timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes; creating provisions to facilitate international co-operation in dealing with computer and cybercrime matters; and for connected purposes.[317]

Provisions Affecting Freedom of Expression

Section 3 of the Act provides that the objects o of the Act are to — protect the confidentiality and integrity of computer systems, prevent the unlawful use of computer systems, facilitate the detection, investigation, prosecution and punishment of cybercrimes, and facilitate international cooperation in dealing with computer and cybercrime matters.

Section 4 establishes the National Computer and Cybercrimes Co-ordination Committee. Its membership under section 5 is principally comprised of government officials.[318]

The functions of the National Computer and Cybercrimes Co-ordination Committee are outlined under section 6 as follows —

a) *Advise the Government on security related aspects touching on matters relating to blockchain technology, critical infrastructure, mobile money and trust accounts;*

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[315] *Ibid*, 27

[316] Government of Kenya Ministry of Information Communications and Technology (2014) National Cyber Security Strategy at page 4-5 http://icta.go.ke/pdf/NATIONAL%20CYBERSECURITY%20STRATEGY.pdf

[317] Preamble, Computer Misuse and Cybercrime Act, 2018.

[318] Membership includes; the Principal Secretary responsible for matters relating to internal security or a representative designated and who shall be the chairperson; the Principal Secretary responsible for matters relating to ICT or a representative designated in writing by the PS; the Attorney-General or a representative designated in writing by the Attorney-General; the Chief of the Kenya Defence Forces or a representative designated in writing by the Chief of the KDF; the Inspector-General of the National Police Service or a representative designated in writing by the IG of the National Police Service; the Director-General of the National Intelligence Service or a representative designated in writing by the Director General of the NIS; the Director-General of the Communications Authority of Kenya or a representative designated in writing by the Director-General of the CAK; the Director of Public Prosecutions or a representative designated in writing by the Director of Public Prosecutions; the Governor of the Central Bank of Kenya or a representative designated in writing by the Governor of the Central Bank of Kenya; the Director who shall be the secretary of the Committee and who shall not have a right to vote.

b) *Advise the National Security Council on computer and cybercrimes;*
c) *Co-ordinate national security organs in matters relating to computer and cybercrimes;*
d) *Receive and act on reports relating to computer and cybercrimes;*
e) *Develop a framework to facilitate the availability, integrity and confidentiality of critical national information infrastructure including telecommunications and information systems of Kenya;*
f) *Co-ordinate collection and analysis of cyber threats, and response to cyber incidents that threaten cyberspace belonging to Kenya*
g) *Co-operate with computer incident response teams and other relevant bodies, locally and internationally on response to threats of computer and cybercrime and incidents;*
h) *Establish codes of cyber-security practice and standards of performance for implementation by owners of critical national information infrastructure;*
i) *Develop and manage a national public key infrastructure framework;*
j) *Develop a framework for training on prevention, detection and mitigation of computer and cybercrimes and matters connected thereto; and*
k) *Perform any other function conferred on it by this Act or any other written law.*

Part III of the Act creates a number of offences including; unauthorized access to computer systems which includes access with intent to commit an offence; unauthorized interference to a computer system, program or data; unauthorized interception of a telecommunications system; illegal manufacture, sale procurement, importation, supply, distribution of illegal devices, programs and access codes; unauthorized disclosure of password or access code; cyber espionage; publication of false information; publication of child pornography; computer forgery; computer fraud; cyber harassment; cybersquatting; identity theft and impersonation; phishing; interception of electronic messages or money transfers; willful misdirection of electronic messages; cyber terrorism; inducement to deliver electronic message; intentionally withholding message delivered erroneously; unlawful destruction of electronic messages; wrongful distribution of obscene or intimate images; fraudulent use of electronic data; issuance of false e-instructions; failure of reporting a cyber threat by operators of computer systems or networks; failure of employees to relinquish their employee's access codes upon termination of employment.[319] Some of these offences will be considered in greater detail below.

Section 22 of the Act criminalizes **false publication**. It provides that any person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.

Section 22 (2) of the Act restates the limitation of the freedom of expression guaranteed under Article 33 of the Constitution of Kenya in respect of intentional

[319] Sections 14 to 41

publication of false, misleading or fictitious data or misinformation that is likely to propagate war or incite persons to violence, constitutes hate speech, advocates hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm, or is based on any ground of discrimination specified or contemplated in Article 27(4) of the Constitution, or negatively affects the rights or reputations of others.

Section 23 of the Act criminalizes the **publication of false information**. It provides that a person who knowingly publishes information that is false in print, broadcast, data or over a computer system, 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, commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.

Section 27 of the Act creates the offence of **cyber harassment**. It provides that a person who, individually or with other persons, willfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or detrimentally affects that person; or is in whole or part, of an indecent or grossly offensive nature and affects the person. A conviction on this offence attracts a maximum fine of twenty million shillings or to imprisonment for a term not exceeding ten years, or to both.

Section 27 (3) of the Act gives a provision for a victim of the offence to apply to Court for restraining orders compelling the offender under subsection (1), to refrain from engaging or attempting to engage in; or enlisting the help of another person to engage in, any communication complained of under subsection (1). A person who contravenes an order made under the section commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six months, or to both. [320]

Section 28 creates the offence of **cybersquatting** defined as taking or making use of a name, trademark, domain name or other word or phrase registered, owned or in use by another person on the internet or any other computer network, without authority or right. The penalty for the office is a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both.

Section 29 criminalizes **identity theft and impersonation** where a person who fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification feature of any other person commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or both.

[320] Section 27 (8), Computer Misuse and Cybercrime Act, 2018

Section 33 criminalizes **cyber terrorism** as follows: a person who accesses or causes to be accessed a computer or computer system or network for purposes of carrying out a terrorist act, commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.

Section 37 forbids **wrongful distribution of obscene or intimate images by** a person who transfers, publishes, or disseminates, including making a digital depiction available for distribution or downloading through a telecommunications network or though any other means of transferring data to a computer, the intimate or obscene image of another person. Conviction of the offence attracts a penalty of a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.

Unlawful destruction of electronic messages is an offence under section 39 and occurs where a person who unlawfully destroys or aborts any electronic mail or processes through which money or information is being conveyed commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.

Extent of Compliance with International Human Rights Standards

The offences created in the Act can be measured against the three-pronged test of legality, proportionality and necessity in international human rights to determine the extent to which the provisions limiting the exercise of freedom of expression are justifiable in accordance with human rights standards.

The definition of offences in the Act has been found to be vague and providing leeway to subjective interpretation that may lead to unjustifiable restrictions on the right to freedom of expression. An example is the offence of false publication under section 22 of the Act.[321] The legality test requires that legal provisions are couched in a precise manner and should therefore not be open to misinterpretation due any ambiguity in wording.

The offence of false publication under the Act contravenes the principle of legality as it contains various words, which are not aptly defined in the Act and thus lead to vagueness of the offence as proscribed under the Act. The words ‘false’, ‘misleading’ or ‘fictitious’ are blanketly criminalized without clear definition. A plain reading of the words would impute a subjective construction of information published. The Act operates on the presumption of a singular ‘truth’ to which every person subscribes and unjustifiably introduces this ‘truth’ as a precondition to enjoyment of the freedom of expression. As indicated in a commentary on the law before its

[321] https://theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271

enactment, 'enacting a legal duty of "truth" would create a powerful instrument enabling authorities to control journalistic activities and free expression online.'[322]

Precision in laws prescribing offences necessitates objective description of the elements of the offence with specific wording. The offence of identity theft and impersonation under section 29 for instance contains an element of "dishonestly" using someone else's "unique identification features" but these terms are not defined in the Act. Section 39 on unlawful destruction of electronic messages does not spell out what amounts to the elements of "unlawful" nor "destruction" in the offence.[323]

The publication of false information "likely to discredit the reputation of a person" under section 23 introduces criminal defamation in contravention of international human rights standards. Principle 22 of the Africa Declaration on Principles of Freedom of Expression states "the imposition of custodial sentences for the offences of defamation and libel are a violation of the right to freedom of expression." States are further required to decriminalize defamation in favour of civil libel proceedings.
Section 23 further contravenes constitutional standards following judicial determination on the unconstitutionality of criminal defamation under Kenyan law. [324] The reintroduction of criminal defamation by section 23 can thus be construed as an illegality. Additionally, the use of the words "chaos" and "panic" to describe the outcome of false publications are undefined in the Act and thus open to arbitrary interpretation.

The offences in the Computer Cyber Crimes Act attract very hefty penalties that are considerably disproportionate to the offences hence amounting to an unjustifiable restriction of the exercise of freedom of expression. The offence of false publication under Section 22 and 23 are both punishable with a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both while the offence of cyber harassment under section 27 is subject to a fine of Kshs. 20 million fine or imprisonment of up to 10 years or both. These sanctions do not conform to the standard of proportionality.

In **Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR**, the petitioner challenged the constitutionality of a number of sections in the Computer Misuse and Cyber Crimes Act.[325]

In considering the proportionality of the restrictive measures in section 22 of the Act dealing with the offence of false publication, the court stated as follows:

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[322] https://www.article19.org/resources/kenya-passage-of-flawed-computer-and-cybercrimes-act-threatens-free-expression/
[323] https://www.theelephant.info/features/2018/05/24/taming-the-internet-the-good-the-bad-and- the-ugly-parts-of-the-computer-misuse-and-cybercrimes-act-2018/
[324]https://www.standardmedia.co.ke/commentary/article/2001363055/cybercrime-laws-blow-to-freedom-of-expression
[325] Sections 5,16,17,22,23,24,27,28,29,31,32,33,34,35,36,37,38,39,40,41,48,49,50,51,52 & 53 of the Act

> *A particular restrictive measure may seem correct if it is studied solely for the perspective of the person affected, however from a systemic digital perspective, noting the speed with which information is shared on the internet, the court must not only consider the impact of the limitation on private citizens, but must also consider the limitation from the prospective of interoperability of the internet.*[326]

Based on the consideration above, the court found that the petitioner had not demonstrated that the excessiveness of the limitation in section 22 outweighs the public interest. The court further stated with respect to section 23 that the regulation to control the spread false information which results in "fear and panic amongst members of public and may create chaos, uncertainty and a threat to the national security of the country" as being necessary. On the issue of ambiguity of the elements of the offence, the court found that word "false" as used in the section is a 'plain English word and it does not require a legal definition'.[327]

The petitioner argued that the offence of cybersquatting under section 28 was unconstitutional and that the offence could be dealt with less restrictive measures in trademark and copyright laws. The court however found the assertion of unconstitutionality of section 28 on the grounds that it limits the freedom of expression to be unfounded.[328]

The petitioner challenged the constitutionality **section 37 of the Act** on wrongful distribution of obscene or intimate images on the basis that the terms *"obscene"* or *"intimate"* are not defined in the Act and were therefore insufficient to meet the limitation test on the exercise of freedom of expression under Article 24 of the constitution. On this issue, the court found that the offence was not a novel one as distribution of obscene images was criminalized conduct under the Penal Code; the only difference was the application of section 37 to the use of telecommunication networks or transfer of data to a computer.[329]

The Court upheld the constitutionality of all the impugned sections of the Computer Misuse and Cybercrimes Act stating that the law was in the interest of national security and further, that the need to protect the public from the risks associated with the cyberspace outweighed the contentions raised in the petition. BAKE subsequently appealed this decision.[330]

Challenges and Impact on Civic Space

The criminalization of fake news is patently challenging due to the vague nature and subjectivity of the offence, which consequently increases the likelihood of executive

[326] Para. 40
[327] Para. 50
[328] Para. 80
[329] Para. 86
[330] https://www.blog.bake.co.ke/wp-content/uploads/2020/01/Civil-Appeal-No.-197-of-2020-Cybercrimes-Act-BAKE-.pdf

overreach in curtailing dissenting opinions and access to information. This is occasioned by using fake news laws as a 'dragnet to outlaw reporting on government misconduct' the expression of critical opinions, and the speech of the political opposition, bloggers, human rights defenders, and journalists.'[331]

The prohibition against misinformation holds online users to unrealistic standards of factual accuracy under the threat of grave criminal penalties. Similarly;

> "The provisions around "publication of false information" and "hate speech" are too broadly framed. The worry is that such blanket provisions might lead to a damping down of free expression. Citizens may even self-censor, not sharing different opinions or views, because they worry that these will somehow contravene the act."[332]

Civil society forewarned that the passage of the Computer and Cybercrimes Act would have have a chilling effect on the exercise of freedom of expression and freedom of the media in Kenya.[333] Although the Bloggers Association of Kenya appealed the High Court decision that upheld the constitutionality of the Cybercrimes Act, since the operationalization of the disputed sections of the Act, two bloggers have been charged with the offence of publication of false information contrary to section 23 of the Act.

Robert Alai was accused of publishing false information regarding the death toll from COVID-19 in Mombasa county[334] while the other, Cyprian Nyakundi was accused of spreading false information that a top Kenya Revenue Authority (KRA) official traveled abroad and failed to quarantine upon his return.[335] The Law Society of Kenya subsequently applied for conservatory orders to suspend section 22 (false publications) and 23 (publication of false information) of the Cybercrimes Act pending determination of the appeal by the Bloggers Association. LSK argued that:

> *"The arrest, arraignment and prosecution for COVID 19 related publications under the statute is likely to have a chilling effect. Bloggers, activists, journalists and whistle blowers will be discouraged from publishing information on suspected violation of the Ministry of Health COVID 19 guidelines – with grave public health consequences. Consequently, the application and the appeal itself will become moot and academic if any*

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331 https://www.standardmedia.co.ke/commentary/article/2001363055/cybercrime-laws-blow-to-freedom-of-expression

332 https://theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271

333 https://www.article19.org/resources/kenya-passage-of-flawed-computer-and-cybercrimes-act-threatens-free-expression/

334 Dzuya Walter, (23rd March, 2020) Citizen Digital 'Robert Alai charged with false claims about corona virus death in Momabasa' https://citizentv.co.ke/news/robert-alai-charged-over-false-claims-about-coronavirus-deaths-in-mombasa-327621/

335 Annette Wambulwa, (3rd June 2020) The Star, ' State opposes LSK case against arrest of blogger' https://www.the-star.co.ke/news/2020-06-03-state-opposes-lsk-case-against-arrest-of-bloggers/

members of the public are arrested, prosecuted and convicted under the statute, in the pendency of this matter."[336]

The Court of Appeal rejected the application stating that it was based on "futuristic presumptuous events" and that the applicant had failed to demonstrate that if the orders sought were not granted, this would render the appeal naught.

2.8 Media Council of Kenya Act[337]

The history of enactment of this Act traces back to the year 2002, when the democratically elected National Alliance Rainbow Coalition (NARC) assumed the reins of power in the country. In contrast with its repressive predecessor, the Kenya African National Union (KANU), NARC's reign was characterised by momentary (in its first term) expansion of civic space.[338] This was a logical result of the spirited campaigns by the civil society, exposing the governance deficit in the KANU's regime, which worked in favour of NARC.[339] The expansion reprieved the Civil Society Organizations in various sectors, which could then play their watchdog role freely. The media industry, which had been almost completely muzzled, was among the greatest beneficiaries of this expansion. This saw the then existing media enterprises airing their contents more freely and exponential growth of broadcast journalism with 108 broadcast licenses issued to 46 companies, close to 20 television station being on air, and 378 radio broadcast licenses issued to 80 firms.[340]

In light of the upsurge in the number of broadcasters and in exercise of their right to organise, stakeholders in the media industry formed as self-regulatory body in 2004 i.e the Media Council of Kenya ('MCK' or 'the Council'). By 2006, with corruption and increase in governance deficits, under the NARC regime, the government had increasingly become intolerant of the Media, evidenced by the government ordered raid on the Standard Media group.[341] The intolerance culminated in the enactment of the Media Act, 2007 which transitioned the regulatory institution from an

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[336] Civil Application 102 of 2020
http://kenyalaw.org/caselaw/cases/view/199748/ [337]
Act No. 46 of 2013
[338] P. Wanyande (2009), Discources on Civil Society in Kenya '*Civil Society and Transition Politics: Historical and Contemporary Perspectives*', at pg. 15-16.
http://erepository.uonbi.ac.ke/bitstream/handle/11295/38988/CIVIL%20SOCIETY%20AND%20TRANSITION%20POLITICS.pdf?sequence=1
[339] *Ibid.*
[340] Jackline A. Okore (2014) Regulation of Media: Comparative Analysis Of Regulation Of Broadcasting Services In Kenya, at pg. 10 para. 2.
https://pdfs.semanticscholar.org/909a/9fa2907255f98fafccd8b083518b943ff3be.pdf
See also Nyongesa D. Wafula (2004) Kenya Broadcasting Corporation in a Liberalized Market Economy: The Need For A New Model For Public Service Broadcasting, at pg. 33-34
http://erepository.uonbi.ac.ke/bitstream/handle/11295/95936/Wafula_Kenya%20Broadcasting%20Corporation%20In%20A%20Liberalized%20Market%20Economy%20The%20Need%20For%20A%20New%20Model%20For%20Public%20Service%20Broadcasting.pdf?sequence=1&isAllowed=y
[341] The Standard (2nd March 2018) Uncovering the Standard Group Raid 12 years later.
https://www.standardmedia.co.ke/nairobi/article/2001271670/uncovering-the-standard-group-raid-12-years-later

independent body to a statutory body, resulting in co-regulation of the media industry, with the government. Even though this was one of the moves of the government to constrict press freedom, it was justified as necessary for oversight purposes. The Council's mandate remained to mediate or arbitrate in disputes between the Government and the media, between the public and the media and intra-media; and to administrate the conduct of journalists as professionals. [342] The Act held sway until 2013 when the instant Media Council of Kenya Act was enacted, conforming the 2007 Act with the Constitution of Kenya 2010 (the Constitution) and other regional and international legal instruments, as stipulated under Article 34 (5) of the Constitution. The object of the Media Council of Kenya Act is to establish the Media Council of Kenya and to establish the Complaints Commission, and for connected purposes.

Provisions Affecting Freedom of Expression

Section 4 of the Media Council Act lists the persons and entities who are subject to the application of the Act as; media enterprises, journalists, media practitioners, foreign journalist accredited under the Act and consumers of media services.

Section 3(2) provides that the persons listed under section 4 shall exercise the right to freedom of expression in a manner that

a) Reflects the interests of all sections of society
b) Is accurate and accurate and fair;
c) Is accountable and transparent;
d) Demonstrates respects the personal dignity and privacy of others;
e) Demonstrates professionalism and respect for the rights of others; and
f) Is guided by the national values and principles of governance set out under Article 10 of the Constitution.

2.9 Media Council of Kenya

Section 6 (1) of the Act provides that the functions of the Council are to—

a) Promote and protect the freedom and independence of the media;
b) Prescribe standards of journalists, media practitioners and media enterprises;
c) Ensure the protection of the rights and privileges of journalists in the performance of their duties
d) Promote and enhance ethical and professional standards amongst journalists and media enterprises
e) Advise the government or the relevant regulatory authority on matters relating to professional, education and the training of journalists and other media practitioners
f) Set standards, in consultation with the relevant training institutions, for professional education and training of journalists
g) Develop and regulate ethical and disciplinary standards for journalist, media

[342] Section 4, Media Act, No. 3 of 2007 (Repealed)

practitioners and media enterprises

h) *Accredit journalists and foreign journalists by certifying their competence, authority or credibility against official standards*
i) *Conduct an annual review of the performance and the general public opinion of the media, and publish the results in at least two daily newspapers of national circulation*
j) *Through the Cabinet Secretary, table before Parliament reports on its functions*
k) *Establish media standards and regulate and monitor compliance with the media standards*
l) *Facilitate resolution of disputes between the government and the media and between the public and the media and intra media*
m) *Compile and maintain a register of accredited journalists, foreign journalists, media enterprises and such other related registers as it may consider necessary*
n) *Subject to any other written law, consider and approve applications for accreditation by educational institutions that seek to offer courses in journalism*
o) *Perform such other functions as may be assigned to it under any other written law.*

In performance of its functions, the Council and everyone to whom the Act applies is required under section 6 (2) to adhere to Article 33(2) of the Constitution on limitations of the exercise of freedom of expression by ensuring that the freedom and independence of media is exercised in a manner that respects the rights and reputations of others, protects national security, safeguards public order, public health and public morals and complies with any other written law. The Cabinet Secretary is mandated to make regulations to give further effect to this subsection.[343]

Section 7 of the Act provides for the composition of the members of the Council. It consists of nine members inclusive of the chair the Council, one person nominated by the Cabinet Secretary and seven members. The Cabinet Secretary in charge of media matters convenes the panel for selecting the chairperson and seven members of the Council.[344] An elaborate selection process is further outlined in the section 7 and the requisite qualification for appointment of the Council chairperson and membership is provided under Section 8. The Cabinet Secretary is mandated to appoint the chairperson and seven members of the Council within seven days of receipt of the names of the nominees from the selection panel, by notice in the

[343] Section 6 (3)

[344] The composition of the selection panel as provided under Section 7 (3) includes representatives of the following entities: Kenya Union of Journalists; Media Owners Association; Kenya Editor's Guild;
Law Society of Kenya; Kenya Correspondents Association; Public Relations Society of Kenya; National Gender and Equality Commission; Association of Professional Societies in East Africa; Consumers Federation of Kenya; the Ministry responsible for matters relating to media; Kenya News Agency; and two persons nominated by schools of journalism of recognized universities, one representing public universities and the other representing private universities.

Gazette.[345] Rejection of a nominee is only permissible on the grounds set out in section 8(2), in which case Cabinet Secretary is required to communicate the decision to the selection panel.[346]

Section 11 of the Act envisions an independent Council, free from political or government control and commercial interests. The disqualification of members of parliament, county assemblies and political party officials from the membership of the council as provided in Section 8 (2) is therefore aimed at securing the independence of the Council. The Council members enjoy security of tenure of up to a term of three year, renewable once.[347] Removal of the chairperson or council members from office can only be done on specified grounds which include; violation of the Constitution or any other written law, gross misconduct, physical or mental incapacitation, incompetence or neglect of duty, bankruptcy, absence from three consecutive Council meetings without justifiable cause, conflict of interest arising from association with media enterprises and conviction of a criminal offence with a penalty of more than six months imprisonment without a fine.[348] The procedure for removal from office entails submission of a petition in writing to the National Assembly following which the National Assembly is required to consider the petition and within seven days make a recommendation to the Cabinet Secretary.[349] Upon receiving the recommendation, the Cabinet Secretary shall suspend the member from office pending determination of the petition and shall appoint a tribunal to consider the petition.[350] If the tribunal is satisfied about the grounds for removal, a recommendation shall be made to the Cabinet Secretary who will be bound by the recommendation by the tribunal.[351]

Under section 23 of the Act on funds of the Council, the National Assembly allocate funds to the Council and other sources of revenue include fees collected from accreditation and donations received by the Council. Under section 16 of the Act, the Salaries and Remuneration Commission prescribes the remuneration the Council members and staff. Section 22 protects the Council and its officers are protected from liability for actions and omissions done by them in good faith in the exercise and performance of any power, authority or duty imposed by them under the Act.

[345] Section 7 (11)
[346] The grounds for disqualification are if the nominee is a member of Parliament or county assembly; is an official of a governing body of a political party; has at any time within the preceding five years, held a political office; is an undischarged bankrupt; has been convicted of a felony; has benefitted from, or facilitated an unlawful or irregular allocation, acquisition or use of land or other public property; or has been removed from office for contravening the provisions of the Constitution or any other written law.
[347] Section 12 (1)
[348] Section 14 (1)
[349] Section 14 (2-3)
[350] Section 14 (4)
[351] Section 14 (4-7)

Complaints Commission

Section 27 of the Act provides for the establishment of the Complaints Commission. The key functions of the Commission are to:

a) *Mediate or adjudicate in disputes between the government and the media and between the public and the media and intra media on ethical issues;*
b) *Ensure the adherence to high standards of journalism as provided for in the code of conduct for the practice of journalism in Kenya; and*
c) *Achieve impartial, speedy and cost effective settlement of complaints against journalists and media enterprises, without fear or favour in relation to the Act.*

Akin to the Media Council, appointment of the members of the Commission is to be done by the selection panel as constituted under Section 7 (3) of the Act and the selection procedures shall apply in a like manner.[352] However, the procedure for rejection of nominees differs from the Council process. Section 27 (5) provides that the Cabinet Secretary may reject any nomination on reasonable grounds and shall communicate the decision to the selection panel. The selection panel is then required to select another person from the list of shortlisted candidates. The grounds for refusal to approval a nominated member to the Commission are however not provided.

Section 30 provides that the Complaints Commission shall be independent in its operations and shall be guided by the provisions of Article 159 of the Constitution which vests judicial authority in tribunals established by the Constitution.

Section 34 (1) on complaints provides that a person aggrieved by—

a) *Any publication by or conduct of a journalist or media enterprise in relation to this Act; or*
b) *Anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise*

May submit a written complaint to the Complaints Commission setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

Section 34 (9) provides that the Commission "may refer a complaint made under subsection (1) to the Communications and Multimedia Tribunal established under the Kenya Information and Communications Act, 1998, where the Commission determines that the complaint relates to a matter which falls within the mandate of the Tribunal."

Section 35 sets out the procedural aspect of dealing with complaints; the Commission upon receipt of a complaint is required to notify the party against whom the complaint has been made with the particulars of the complaint within fourteen

[352] Sections 27 (2)

days. The party is then required to respond in writing before appearing before the Commission. Upon consideration of the submissions by both parties, the Commission shall conduct a preliminary assessment to determine the admissibility of the complaints. If a breach of the Act or the Code of conduct is found to have arisen, the Commission may resort to a resolution of the complaint through an inter parties mediation process.[353]

Section 32 sets out the procedure for mediation of disputes and in the event that mediation fails or the parties reject the mediation, the complaint shall be determined upon a full hearing by the Commission.

Under section 38, decisions of the Complaints Commission after a full hearing of the complaint may comprise of the following orders:

a) *Publication of an apology and correction as directed by the Commission*
b) *Return, repair, or replacement of any confiscated or destroyed equipment or material belonging to a journalis*
c) *A directive and declaration on freedom of expression;*
d) *A public reprimand of the journalist or media enterprise involved*
e) *An order requiring the offending editor of the broadcast, print or on-line material to publish the Commission's decision*
f) *Imposition of a fine of not more Kshs. 500,000 on any respondent media enterprise and a fine of not more than Kshs. 100,000, on any journalist, found to have violated the Act or Code of Conduct*
g) *Recording criticism of the conduct of the complainant in relation of the Complaint in its findings, where such criticism found to be warranted*
h) *Recommend to the Council the suspension or removal from the register of the journalist involved;*
i) *Any other order that may be deemed necessary*

A person aggrieved by the decision of the Commission has a right of appeal to the High Court as provided under section 42.

The Second Schedule of the Act contains the Code of conduct for the practice of journalism.

Extent of Compliance with International Human Rights Standards

The media is a key player in the civil society. It plays a critical watchdog role and is rhetorically referred to as the fourth arm of the government. The effectiveness of the media in undertaking its oversight role is dependent on its independence. Consequently, independence or lack thereof of its regulators determines media independence and the extent to which the guarantees of freedom of expression and access to information are realized, for the benefit of the public who are consumers of their content.

[353] Section 35 (1) –

An assessment of institutional framework of the regulatory bodies under the Act against international best practices would reveal if the execution of their functions either serves to enhance or limit the freedom of expression, press freedom and the right to access information.

Principle 16 (1) of the Declaration of Principles on Freedom of Expression and Access to Information in Africa,[354] provides that as part of fulfillment of the obligation to promote freedom of expression and access to information, states shall encourage media self-regulation which is impartial, expeditious cost-effective and promotes high standards in the media in accordance with established codes of conduct. Co- regulation that is founded on multi stakeholder collaboration can be encouraged as a complement to self-regulation. The Media Council Act subscribes to the co- regulatory model.

Media Council

The Act provides for a multi-stakeholder selection panel to appoint members of the Council, the Cabinet Secretary has limited powers to reject a nominee selected by the panel on grounds that are enumerated under Section 8 (2). Removal from office is also limited to specified grounds and must be endorsed by the National Assembly – this is an important limit to the powers of the Executive. These provisions engender impartiality in appointments and are intended to insulate the Council from political interference. It can therefore be surmised that the provisions conform to the standard requiring that:

> '*The appointment process for members of a public regulatory body overseeing broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.'*[355]

In the exercise of its functions, the Council is required to adhere to the to the constitutional limitation of freedom of expression on national security grounds as provided under section 6 (2). This provision is broadly phrased and needs to be interpreted in line with the requirement that national security as a ground for limitation of freedom of expression is only justifiable when there is a 'real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.'[356]

[354] Note 232- Principle 17, Declaration of Principles on FoE in Africa
[355] *Ibid* Principle 17 (2)
[356] *Ibid* Principle 22 (5)

Complaints Commission

Public complaints systems for print, broadcast, online media and internet intermediaries are required to be widely accessible and determined in accordance with established rules and codes of conduct.[357]

The procedure for appointment of members to the Complaints Commission is similar to that of the Media Council. However, the removal of members is not insulated from interference as the Act empowers the Cabinet Secretary to reject any nominee on "reasonable grounds". [358] The selection panel although independently constituted, only has recourse under the Act to select another person from the list of shortlisted candidates. This provision is broadly phrased with no safeguard provided to check the discretionary powers of the Cabinet Secretary. This contravenes human rights standard requiring that a complaints body should be protected from any political, commercial or other undue interference.[359]

The constitutionality of the Media Council Act was challenged in a consolidated petition by media stakeholders[360]; the petitioners contended that Section 3(2) of the Act is unconstitutional by dint of the provision subjecting the exercise of freedom of expression to reflect the interests of all sections of society; this provision was argued to curtail the freedom of expression also in light of the fact that Section 4 of the Act provides that the Act applies to media enterprises, journalists, media practitioners, and foreign journalists accredited under the Act and to consumers of media services.[361] The court declared Section 3(2) (a) of the Act as unconstitutional:

> *To the extent that it requires that in exercise of the right to freedom of expression, the persons specified under section 4 of the Act "**shall reflect the interests of all sections of society"** is an unjustifiable limitation of the right to freedom of expression.*

The petitioners also challenged the constitutionality of Section 6 (2) and (3) of the Act. The court held that the requirement under section 6 (2) for every person to who the Act applies to comply with requirements of Article 33 (2) of the Constitution as being reasonable; that is - in a manner that respects the reputation of others and in compliance with any written law. However, there was an overreach in expecting the same of the requirement for the 'protection of national security, public order, public health and public morals'. The Court agreed with the petitioners that these terms are vague and open to subjective judgment and hence unjustifiably limit the freedom of the media and expression. The requirement for the Cabinet Secretary to develop regulations to bring into effect provisions under section 6 (2) was however found to be constitutional.

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[357] *Ibid* Principle 18 (1)
[358] Section 27 (5)
[359] Note 232- Principle 18 (2), Declaration of Principles on FoE in Africa
[360] Judicial Review Miscellaneous Application 30 & 31 of 2014
http://kenyalaw.org/caselaw/cases/view/122358/
[361] Paragraph 153

The petition also challenged the autonomy of the Complaints Commission by virtue of Section 34 of the Media Council Act that vests power in Commission to refer complaints to the Communications and Multimedia Tribunal established under the Kenya Information and Communications Act. It was argued that this provision creates a *'muddled, conflicting and concurrent jurisdiction conferred on the Complaints Commission under the Media Council Act and the Multi-media Appeals Tribunal under the Kenya Information and Communications (Amendment) Act'* and that this duplicative jurisdiction would subject complaints against affected parties to double jeopardy in violation of Article 50 (2) (o) of the Constitution.[362]

The court agreed with the petitioners about an overlap in the jurisdictions of the Communications and Multimedia Tribunal and the Complaints Commission but further clarified that the intention of Section 34 was to enable the Tribunal to hear complaints that were beyond the scope of the Commission under Media Council Act. The court further pronounced itself on this matter as follows:

> *"We agree with the petitioners that the two provisions in the two Acts demonstrate muddled thinking and drafting in respect of the powers and mandates of the two dispute resolution mechanisms. However, we are unable to agree with them that they pose any threat to the right guaranteed under Article 50(2)(o)."*[363]

Challenges and Impact on Civic Space

Although the Media Council discharges the function of regulating media standards, it is considered to be a weak regulatory body. This is also occasioned by a number of factors, such as the multiplicity of regulatory bodies including the Communications Authority of Kenya, the primary regulator of broadcast media.[364] A proposal to elevate the Council to the status of a Constitutional commission in accordance with Article 34 (5) of the Constitution has been submitted by stakeholders in the media industry in order to strengthen the independence of the regulatory body. This status would ensure that the Council is allocated budgetary provisions through the Consolidated Fund and is accountable to Parliament and not the Communication Ministry.[365] Furthermore, media stakeholders are of the view that the Council should be the "sole regulator of media content as well as the conduct of professionals in the industry."[366]

The Complaints Commission is also considered to be a weak body; members of the public have demonstrated a much higher preference in pursuing litigation with

[362] Paragraph 208 & 215
[363] Paragraph 216 -218
[364] https://www.refworld.org/docid/59fc67da6.html
[365] https://khusoko.com/2020/03/10/bbi-why-media-council-of-kenya-needs-to-be-constitutional-commission/
[366] https://www.nation.co.ke/kenya/news/make-media-council-regulatory-commission-editors-say-258970

respect to grievances related to the media rather than utilizing the complaints mechanism in the Media Council Act.[367] Since the establishment of the Complaints Commission in 2013, only 30 complaints have been submitted to it by members of the public.[368] The slow uptake of pursuing grievances with the Commission can be attributed to a number of reasons; accessibility of the Commission, underfunding which affects its effectiveness in resolving disputes, the nature of remedies that the Commission is mandated to award and slow dispute resolution process. For instance, a dispute about a radio show that was lodged with the Commission in 2010 is said to have taken a period of 18 months to conclude.[369]

Lack of a properly resourced and functioning secretariat affects the efficiency of the complaints mechanism. It has been observed that public dissatisfaction with the Complaints Commission and resort to court action is problematic due to the high number of defamation cases against media practitioners that have earned Nairobi the dubious title of the 'libel capital' of Africa.[370] Accessibility of the Commission also presents a challenge as the office is situated in Nairobi. Although the Commission has leveraged on technology by establishing filing of complaints online, the lack of decentralization remains a barrier.

2.10 The Kenya Information and Communication Act (KICA)[371]

This is an Act of Parliament to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.[372]

Provisions Affecting Freedom of Expression

Since its enactment, KICA has undergone a series of amendments effected by Parliament through Statute Law (Miscellaneous Amendment) Acts. Some of these amendments were subsequently challenged in court and found to be unconstitutional. Although Kenya Law regularly compiles court decisions and aims to

[367] https://www.nation.co.ke/kenya/news/make-media-council-regulatory-commission-editors-say-258970
[368] Media Council of Kenya, Complaints Portal, Status of received complaints https://www.mediacouncil.or.ke/en/mck/index.php/complaints2
[369] http://africanmediainitiative.org/wp-content/uploads/2015/10/Giving_the_public_a_say_English_online.pdf, 12
[370] https://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf , 19

[371] Act No. 2 of 1998
[372] Preamble, KICA

update the online database of statutes in the Laws of Kenya accordingly,[373] the requisite changes to KICA are yet to be reflected on the Kenya Law website. In light of this, for a coherent analysis of the current status of the Act with respect to provisions affecting freedom of expression, these provisions will be discussed concurrently with impugned sections of the Act that need to be expunged in compliance with court rulings on their unconstitutionality. The outcome of three petitions will be considered in this respect:

1. **Okiya Omtatah Okoiti v Communications Authority of Kenya & 21 others [2017] eKLR, (hereafter the "Okiya Omtatah Petition")[374]** sections 2, 5B(5) 27D, 40 (1), 46 (1) (b), 46 (3), 83C (2), 83V, 84 W (4), 84W (5) AND 85A (3) of KICA were declared unconstitutional. This petition challenged the constitutionality of using the Statute Law (Miscellaneous Amendments) Act of 2015 to make substantive changes to KICA that limited fundamental rights and freedoms. The court held that although "there is no internationally accepted position on the legality of omnibus bills", Statue Law Miscellaneous legislation should only be used for minor amendments that are non- controversial.

2. **Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR (hereafter the "Cyprian Andama Petition")[375]** section 84 D of KICA was declared unconstitutional.

3. **Geoffrey Andare v Attorney General & 2 others [2016] eKLR**, **(hearafter the "Geoffrey Andare Petition") [376]** section 29 of KICA was declared unconstitutional.

Section 3 of the Act establishes the Communications Authority of Kenya (CAK) and section 5A provides that the Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.

Under Section 5B**,** the Authority is required to comply with the provisions of Articles 34(1) and (2) of the Constitution on freedom of the media in discharging its functions. Section 5B (2) restates the constitutional requirement that the right to freedom of the media and expression can only be limited subject to Article 24 of the Constitution. Such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[377] Subsection (5) provides that the Cabinet Secretary in consultation with the Authority may make regulations for the better carrying out of the provisions of this section.

[373] http://kenyalaw.org/kl/index.php?id=8662
[374] Petition No. 45 of 2016
[375] Petition No. 214 of 2018
[376] Petition No.149 of 2015
[377] Section 5B (3)

Section 5B (5) was challenged in the Okiya Omtatah Petition on the basis that the requirement of the Authority to consult with the Cabinet Secretary flouts Article 34 (5)(a) of the Constitutio [378] and Section 5A of KICA which establishes the independence of the Authority. Prior to the amendment that introduced Section 5B (5) via the Miscellaneous Amendments in 2015, the Authority was not required to consult the Cabinet Secretary in the exercise of its functions. The court held in favour of the petitioner and found that contrary to the Respondents' assertion that the word "consultation" merely referred to seeking of an opinion and did not interfere with the independence of the Authority, there is "a world of a difference" between the Cabinet Secretary being notified of an action taken by the Authority on one hand and the obligation that the latter consults with the former on the other hand.

Section 6 establishes The Board of the Authority, which shall consist of the following members:

a) *A chairperson appointed by the President;*
b) *The Principal Secretary responsible for matters relating to broadcast, electronic, print and all other types of media;*
c) *The Principal Secretary responsible for matters relating to finance;*
d) *The Principal Secretary responsible for matters relating to internal security*
e) *Seven persons appointed by the Cabinet Secretary.*

Under subsection (2) in appointing the seven persons, Cabinet secretary is required to ensure that the appointees reflect the interests of all section of society, equal opportunities for persons with disabilities and other marginalized groups; and that that not more than two-thirds of the members are of the same gender.

Section 6A provides for the qualifications for appointment of chairperson and members of the Board. The tenure of office for the chairperson and Board members is set for a period of three years renewable once.[379] The functions of the Board are outlined in section 7 to include: managing the assets of the Commission, receiving grants and donations to the Commission and disbursing monies therefrom, financial management of the Commission including opening of banking accounts, determining provisions to be made for capital and recurrent expenditure of the Commission and making investments, establishing a broadcasting standards committee or any other relevant committees.

Section 11 establishes the office of the Director General who shall be the chief executive officer of the Authority, responsible for the day to the day management of the Authority. The Board is mandated to recruit and appoint the Director through a competitive process.

[378] Section 34 (5) (a) provides that Parliament shall enact legislation that provides for the establishment of a body, which shall be independent of control by government, political interests or commercial interests.

[379] Section 6C

Part III of the Act regulates telecommunication services and spells out the role of the Authority in issuance of telecommunication licenses.

Section 27D provides that the Cabinet Secretary, in consultation with the Authority may make regulations with respect to—

a) *Procedure for SIM-card registration;*
b) *Timelines for SIM-card registration, storage and retention of subscriber records;*
c) *Confidentiality and disclosure of subscriber information*
d) *Registration of minors;*
e) *Transfer of SIM-cards;*
f) *Registration particulars;*
g) *Suspension and deactivation of SIM-cards; and*
h) *Any other matter that may be prescribed under this sub-Part.*

This was among the sections found to be unconstitutional in the Okiya Omtatah petition due to the obligation placed on the Authority to consult with the Cabinet Secretary.

Section 29 creates an offence of improper use of a licensed telecommunication system when a person uses such a system —

a) *Sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or*
b) *Sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person,*

The penalty for the offence shall is a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

The Court declared Section 29 to be unconstitutional in the Geoffrey Andare Petition. The section was challenged on the basis that the criminal offence is phrased in vague and broad terms and that it has a chilling effect on the exercise of freedom of expression. The court ruled in favour of the petitioner by finding that the words *'grossly offensive'*, *'indecent' obscene'* or *'menacing character'* were ambiguous and further that it was unclear who would determine the messages that cause 'annoyance', 'inconvenience', 'needless 'anxiety' since these terms were not defined in the Act thus rendering their meaning open to subjective interpretation. This contravened the requirement of certainty in legislation creating criminal offences.

Other offences related to telecommunication services under Part III the Act include; obtaining telecommunication services dishonestly, **modification, of messages by a** person engaged in the running of a licensed telecommunication system, tampering with a communication plant and operation of an unlicensed telecommunication system.[380]

Part IV of the Act regulates radio communication and provides procedures relating

[380] Sections 28, 30-34

to acquisition of a radio communication license.

Section 40 (1) provides that the Cabinet Secretary, in consultation with the Authority may develop regulations that prescribe technical requirements to be complied with in the case of radio communication apparatus. The issue of "consultation" by the Authority was considered by the Court in the Okiyah Omtatah Petition and rendered the section unconstitutional. This court decree was applicable to Sections 46 (1) (a) and 46 (3) of the Act outlined below.

Section 46 (1) states that the provisions relating to radio communication shall apply:

a) *To all radio communication stations and radio communication apparatus in or over, or for the time being in or over Kenya or the territorial waters adjacent thereto; and*
b) *Subject to any limitations which the Cabinet Secretary, in consultation with the Authority may, by regulations, determine, to all radio communication stations and radio communication apparatus which is released from within Kenya or its territorial waters, or from any vessel or aircraft which is registered in Kenya.*

Subsection (3) provides that the Cabinet Secretary, in consultation with the Authority may make regulations for the use of radio communication apparatus on board a vessel or aircraft not registered in Kenya while the vessel or aircraft is within the territorial limits of Kenya or its territorial waters.

Part IVA of the Act regulates broadcasting services which are classified into public, private and community broadcasting; the procedures for granting of licenses for the last two categories are outlined in this part while for public broadcasting, section 46E designates The Kenya Broadcasting Corporation established under section 3 of the KBC Act as the public broadcaster.

Part VIA of the Act regulates electronic transactions and cyber security. Section 83C (1) outlines the functions of the Authority in this regard; this includes developing a framework for facilitating the investigation and prosecution of cybercrime offences, among other functions. Subsection (2) provides that the Cabinet Secretary in consultation with the Authority may make regulations with respect to cyber security. This subsection was found to be unconstitutional in the Okiya Omtatah Petition.

Section 84D creates the offence of publishing obscene information in electronic form and provides as follows:

> *Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein, shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or both.*

The Cyprian Andama Petition challenged Section 84D on the basis that the section is vague with regard to the meaning of "lascivious" or "appeals to the prurient interest" or "tends to deprave and corrupt persons" and violates Article 50(2)(b) of the Constitution which requires that every accused person has the right to be informed of a charge with sufficient detail in order to answer to the charge. Further that the lack of precise definition of the terms constituting the charge would result in arbitrary arrest of innocent persons charged under the section.

The court found that the section infringes on the citizens right to freedom of expression as guaranteed in the Constitution and that the broad terminology describing the offence subjected it to arbitrary interpretation thus violating the right to a fair hearing which is a non-derogable. The Court further stated that;

> *"A provision such as Section 84D of KICA is too retrogressive to fit into the modern, open and democratic society envisaged under the current Constitution. The impugned section is too wide in scope, punitive in intent and suppressive in effect to be tolerated by our transformative Constitution"*[381]

PART VIC of the Act relates to fair competition and equal treatment. Section 84Q prohibits anti-competitive conduct in connection with any business activity relating to licensed services. The Authority is mandated under Section 84R to ensure that there is fair competition in the sector; this includes development and enforcement of fair competition and equality of treatment among licensees.

Under Section 84W (1) The Cabinet Secretary is permitted to make regulations with respect to competition issues in consultation with the Commission. Subsection (4) provides that the Authority may, in consultation with the Competition Authority and after due process declare a person or institution, by notice in the Gazette, to be a "dominant telecommunications Service provider" for the purposes of the Act. This section should be read along with section 2 of KICA which defines a "dominant telecommunications service provider" as *a licensee determined to be a dominant telecommunications service provider pursuant to the criteria set out in sections 4 and 23 of the Competitions Act, 2014.*

Section 84W (5) provides that in making a declaration under subsection (4), the Authority shall in consultation with the Competition Authority consider—

a) *The market share of the telecommunications service provider being at least fifty percent of the relevant gross market segment;*
b) *Significant market power enjoyed by the telecommunications service provider; and*
c) *Any other consideration the Authority may determine.*

The court in the Okiya Omtatah Petition found sections 84W (4) and (5) to be unconstitutional on account of the fact the provisions obliged the Communications Authority to consult with both the Cabinet Secretary and the Competition Authority before exercising some of its mandate, thereby eroding its independence.

[381] At para. 73

Section 102 of the Act establishes the Communication and Multimedia Appeals Tribunal. The Tribunal derives its mandate from subsection (1) on complaints to be adjudicated by the Tribunal relating to:

a) *Any publication by or conduct of a journalist or media enterprise;*
b) *Anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or*
c) *Any action taken, any omission made or any decision made by any person under this Act.*

Under Section 102E (1) the tribunal upon hearing parties to complaint is empowered to make a number of decisions among them being; imposing a fine of not more than twenty million shillings on any respondent media enterprise and a fine of not more than five hundred thousand shillings on any journalist adjudged to have violated KICA; and recommending the suspension or removal from the register of the journalist involved.[382]

Section 102F (1) provides that unless expressly provided by KICA, the Media Council Act or any other law, decisions made by the Media Council and the Communications Authority pursuant to the respective laws or any other written law, shall be subject to an appeal to the Tribunal in accordance with such procedures established by the Tribunal.

Subsection (2) provides that any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under KICA, may make a claim or appeal to the Tribunal within sixty days of the decision in respect of which a complaint is being made. Under subsection (3) following an appeal, the Tribunal may make any of the following decisions:

a) *Confirm, set aside or vary the order or decision in question;*
b) *Exercise any of the powers which could have been exercised by the Media Council or the Authority in the proceedings in connection with which the appeal is brought; or*
c) *Make such other order, including an order for costs, as it may consider necessary.*

Section 102G provides for a right of appeal to the High Court for any person aggrieved by a decision or order of the Tribunal within thirty days of such a decision or order**.**

Extent of Compliance with International Human Rights Standards

KICA gives the President or the Cabinet Secretary the final say in appointments to the Board of the Communications Authority – the requirement under section 6 (2) for the Cabinet Secretary to appoint seven members of the Board gives wide

[382] Subsection (f) and (h)

discretionary power to the executive in determining the composition of the Board. This contravenes human rights standards requiring that appointment of officials to such a regulatory body should be subject to a transparent process that involves other relevant stakeholders.[383] Furthermore, although the independence of the Communications Authority is guaranteed by the Constitution under article 34 (5) (a) and Section 5A of KICA, the membership of the board as constituted under section 6 ostensibly negates this independence.

Section 102E (1) (f) imposes punitive sanctions for media enterprises and journalists of fines of up to Kshs. 20 million and Kshs. 500,000 shillings respectively for violations of KICA provisions. Regional human rights standards require that for a limitation on the exercise of freedom of expression to be necessary and proportionate, the least restrictive means should be used to achieve the aim of the limitation and that the benefit of protecting the interest outweighs the authorized sanction. [384] The penalties imposed on media enterprises and journalists are disproportionately punitive and their application would unjustifiably limit the exercise of freedom of expression.

Challenges and Impact on Civic Space

The composition of the Board of the Communications Authority does not insulate the Authority from government control. The executive has previously acted with impunity on matters relating to regulation of the telecommunication sector. A case in point was the Authority's decision to switch off the signals of three media houses in order to disable transmission of a mock swearing in ceremony of the opposition leader Raila Odinga, following the contested 2017 elections.[385] Interference with the independence of the Authority has serious ramifications on the exercise of freedom of the media and expression. Other related challenges with respect to the Authority and government interference are aptly illustrated below:

> *"While the authority's independence is provided for under section 5 of the Kenya Information and Communications Act (KICA), tensions between the ICT Ministry and the board of directors on one side, and the director general of the CA on the other, have flared up in recent years. The two sides disagreed about how to implement a report on Safaricom's market dominance. Requests were also made for funds from the CA that the director general said were improper, such as the permanent secretary's demand that CA funds be used for the presidential swearing-in ceremony. Additionally, in April 2018, the president ordered the transfer of 1 billion Kenyan shillings ($10 million) from the Universal Service Fund (USF) managed by the CA to the Directorate of Criminal Investigation (DCI) to fight cybercrime."*[386]

[383] See note 353.
[384] Principle 9, Declaration of principles on Freedom of Expression and Access to Information in Africa [385] https://www.aljazeera.com/indepth/opinion/putting-kenya-media-shutdown-context-180202092850790.html
[386] https://www.justice.gov/eoir/page/file/1234671/download

Media stakeholders were opposed to the establishment of the Multi-Media Appeals Tribunal in KICA due to the duplicative role of the Tribunal with the Complaints Commission under the Media Council Act and the heavy sanctions that are imposable by the Tribunal. Although the Court in petition did not find the co- existence the two dispute resolution mechanism to be unconstitutional, it noted that provisions in the two Acts creating these mechanisms to "demonstrate muddled thinking and drafting."[387]

2.11 Defamation Act[388]

The preamble of the Defamation Act states that the objective of the statute is to "consolidate and amend the Statute law relating to libel, other than criminal libel, slander and other malicious falsehoods." The scope of the Act is therefore limited to civil rather than criminal defamation. It is noteworthy that The Penal Code proscribed defamation and the criminal sanctions for defamation were historically used by the state in Kenya to unjustifiably limit the freedom of expression. Section 94 of the Penal Code- which provides for the offence of criminal defamation, was held to be unconstitutional in a progressive court decision that was lauded for safeguarding the freedom of expression, in line with international standards of decriminalizing defamation.[389]

Provisions affecting Freedom of Expression

The Defamation Act does have a definition for defamation; the Act provides redress for actions related to 'libel' and 'slander' but neither of these two terms is defined.[390] There are three forms of slander listed in the Act for which special damages need not be alleged or proven by the affected party initiating civil action. These include; slander affecting official, professional or business reputation, slander of women with respect to words imputing unchastely character and slander of title, slander of goods or other malicious falsehood.[391]

Section 6 of the Act insulates newspaper reporting of judicial proceedings by providing that fair and accurate reports of judicial proceedings are absolutely privileged. This section does not however authorize the 'publication of any blasphemous, seditious or indecent matter'. Section 7 provides for qualified privilege of newspaper publications unless it is proven that a publication was made with malice. Additionally, the privilege is not applicable where the defendant upon request by the plaintiff refuses or neglects to publish a 'reasonable letter or statement by way of explanation or contradiction' in the newspaper where the

[387] See note 358 & 361
[388] Defamation Act, Cap 36 Laws of Kenya
[389] https://www.article19.org/resources/kenya-court-strikes-down-criminal-defamation-laws/
[390] "Libel and slander are forms of defamation, which is an untrue statement presented as fact and intended to damage a person's character or reputation. Libel is a defamatory statement made in writing, while slander is a defamatory statement that is spoken."
https://www.britannica.com/story/whats-the-difference-between-libel-and-slander
[391] Sections 4-7

original publication was made.

Section 7A provides for a right of reply for any person or entity whose character, reputation or good standing has been damaged as a result of a factual inaccuracy about them published in a newspaper. Such right of reply is required to be published free of charge in the next possible edition of the newspaper and should be of similar prominence to the original publication. The party seeking to exercise a right of reply should make the request in writing to the newspaper publisher within fourteen days of the publication and this right is not exercisable after a period of 6 months from the date of publication has lapsed. The court has discretion to award additional damages in civil proceedings where a right of reply is deemed reasonable and a publisher either refuses or neglects to publish a correction or fails to give the requisite prominence.[392] The Act considers wireless broadcasting as publication in a permanent form.[393]

Section 12 provides for a defence of publication without malice in an action for libel with respect to a newspaper or any other periodic application. The defence is applicable where a defendant is able to demonstrate that the publication was done without malice and gross negligence and that prior to the civil action, a full apology for the libel was published.

The Act provides for a defence of unintentional defamation where defamatory words are published innocently and the publisher (defendant) makes an offer of amends to the affected party (plaintiff); if the plaintiff accepts the offer, no action can be taken against the defendant with respect to the defamatory words. If the plaintiff does not accept the offer of amends, the defendant shall have a valid defence of unintentional defamation subject to having made the offer to the plaintiff within a reasonable period after receiving notice from the plaintiff of the defamation.[394] Other defences to libel include justification and fair comment.[395]

The award for damages by a court in an action for libel shall be dependent on the severity of the offence in respect of which defamatory words have been published. Section 16 A provides for a minimum threshold of damages; if the offence is punishable by death, the award shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.

Extent of compliance with International Human Rights Law

Respect for the reputation of others is a legitimate restriction on the exercise of the freedom of expression under international human rights law.[396] As with any other

[392] Section 7A (3-4)
[393] Section 8
[394] Section 13
[395] Sections 14 & 15
[396] Article 19 (3) (a) ICCPR

limitation of rights however, protection of reputation must be subject to test of legality, necessity and proportionality. According to the Principles on Freedom of Expression and Protection of Reputation [397] such restrictions must firstly be prescribed by law - the legal provisions should be unambiguous enough to enable prediction with reasonable certainty as to whether certain actions are legal or not. Secondly, protection of the reputation of others should have a 'genuine purpose and demonstrable effect of protecting a legitimate reputation interest' and thirdly, must be necessary in a democratic society. The latter effectively means that the pursuit of protecting reputations should not significantly outweigh the harm ensuing from limiting the exercise of freedom of expression.[398]

The lack of definition of terms relating to defamation such as libel and slander in the Act offends the first test of legality, as there is no recourse in the Act to enable a reasonable assessment as whether certain actions fall within prescribed parameters of defamation. This ambiguity creates a loophole that can be open to abuse and prejudice the exercise of freedom of expression.

The absolute privilege accorded to reporting of judicial proceedings under section 6 of the Act is in line with international standards that exempt judicial proceedings from liability in defamation laws.[399]

The defence of publication without malice provided under section 12 is not absolute given the qualification that in the absence of malice and gross negligence, the defendant should have published a full apology for the libel prior the civil action. This defence falls short of the international standard requiring that statements made on account of public interest should be exempt from liability; these include statements made in the performance of a 'legal, moral or social duty or interest.'[400]

The minimum threshold for the award for damages under the Act exclusively protects the rights of the plaintiff and gives the court wide discretionary powers to issue high awards against the defendant. The proportionality test demands that the remedies or sanctions prescribed for defamation must not be excessive as this would 'significantly limit the free flow of information and ideas.'[401] The goal for such remedies and sanctions is not to punish the person responsible for the defamation but rather to redress the harm occasioned to the plaintiff. [402] Pecuniary

[397] "These Principles set out an appropriate balance between the human right to freedom of expression, guaranteed in UN and regional human rights instruments as well as nearly every national constitution, and the need to protect individual reputations, widely recognized by international human rights instruments and the law in countries around the world" https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf

[398] Principles on Freedom of Expression and Protection of Reputation, Principles 1.1-1.3

[399] Defining Defamation: Principles on Freedom of Expression and Protection of Reputation https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf Principle 11 (a)(iii)

[400] *Ibid*, Principle 11 (b)

[401] *Ibid*, Comment on Principle 12

[402] *Ibid*, Principle 13

compensation must therefore be proportionate to the harm done by the defamation and should only be awarded where non-pecuniary remedies are insufficient to remedy the harm.[403]

Challenges and Impact on Civic Space

Whereas the decriminalization of defamation in Kenya was a laudable step that relegated defamation to civil proceedings, provisions of the Defamation Act need to be aligned with international standards in order to strengthen the safeguards for freedom of speech with respect to matters of public interest. The award of disproportionate costs for defamation in civil suits presents a serious challenge for human rights defenders and whistleblowers and could serve to heighten self- censorship in matters of public interest to avoid personal liability. The case of **Christopher Ndarathi Murungaru v John Githongo [2019] eKLR** in which a renowned human rights defender and whistle blower, John Githongo was ordered to pay Ksh. 27,000,000 to the plaintiff- a former cabinet minister for defamation, illustrates this. In addition, the court ordered that the defendant pays the full costs of the suit while subjecting the exorbitant award to payment of interest rates from the date the judgment was issued. The defamation suit was based on allegations of corruption made in a dossier on the Anglo-leasing corruption scandal.

Rather than suing the newspaper that published the dossier, the suit was brought against John Githongo in what was criticized as an attempt to muzzle him and use the case to financially cripple him. The lack of a law protecting whistleblowers in Kenya further reinforces the need to protect those who speak in the public interest.[404] This court decision contravenes international human rights standards to the effect that legitimate criticism of public officials for wrongdoing or corruption should not be used to justify the effect of defamation laws.[405]

2.12 National Intelligence Service Act, 2012

Provisions Affecting Freedom of Expression

This legislation limits freedom of expression to the extent that the limitation is done:

(a) in the interest of national security, public safety, public order, public morality or public health
(b) for the purpose of protecting the integrity of Service operations
(c) for the purpose of protecting the reputation, rights and freedoms of the members or private persons concerned in legal proceedings
(d) for the purpose of preventing the disclosure of information received in confidence

[403] *Ibid*, Principle 15
[404] https://www.theelephant.info/op-eds/2019/05/27/in-whose-interest-reflecting-on-the-high-court-ruling-against-john-githongo/
[405] Note 397, Principle 2 (b) ii

(e) for the purpose of regulating the technical administration or the technical operation of telecommunication, wireless broadcasting, communication, internet, satellite communication or television
(f) for the security and protection of information within the service[406]

Second, the legislation expressly limits the right to access to information guaranteed under the constitution of Kenya [407] to the extent that it relates to classified information.[408] Further, it sets out categories of classified information which include 'top secret', 'secret', 'confidential' and 'restricted'. This infers that even within the NIS, there are further limitations to freedom of information in varying degrees in the interest of national security.

Extent of Compliance with International Human Rights Law

The International Covenant on Civil and Political Rights permits limitation of the freedom of expression and freedom of information by law when it is necessary for the respect of the rights or reputation of others and the protection of national security, public order, public health and public morals.[409] The African Charter on Human and Peoples' Rights sets out similar standards.[410] Evidently, great effort was made by the draftsmen of this legislation to ensure compliance with international standards and the Constitution of Kenya.

Challenges and Impact on Civic Space

It would appear that the limitations of fundamental rights and freedoms of members of the NIS do not necessarily limit civic space. However, given the opaque nature of the operations of security intelligence agencies to ordinary members of the public, it is not possible to conduct independent verification on whether it was necessary to categorize specified information as classified. Civilian Oversight has been assigned to the Cabinet Secretary in charge of intelligence service, the National Security Council[411] and National Intelligence Service Council. This kind of oversight occurs in closed-door settings. This means that a wide range of information can be concealed from members of the public easily by being categorized as classified. No member of the service would dare to disclose such information because it would constitute a criminal offence under the legislation. This is prejudicial to the exercise of the freedom of information in a country where previous political regimes have abused the use of intelligence operations in the repression of persons perceived to be political dissidents, a practice that also limited freedom of expression.

[406] Section 33
[407] Constitution of Kenya, Article 35(1)&(3)
[408] Section 37
[409] ICCPR, Article 19(3)
[410] ACHPR, Article 9
[411] National Intelligence Service Act, 2012, Part III

2.13 Trustees (Perpetual Succession) Act

Provisions Affecting Freedom of Expression

The Trustees (Perpetual Succession) Act does not provide for the limitation, whether express or implied, of any fundamental freedom or right guaranteed in the Constitution or international instruments. In fact, the legislation safeguards the right of any person to conduct a search and access information relating to records, documents and certificates of incorporation kept by the Principal Registrar of Documents with the only requirement being completion of the prescribed form and payment of the prescribed fee. Such a person is even entitled to copies of documents certified by the Registrar.[412]

Extent of Compliance with International Human Rights Laws

Given that the Trustees (Perpetual Succession) Act does not limit any fundamental right or freedom in international law, it is largely compliant with international human rights law. In fact, it safeguards freedom of expression as elaborated in Article 19(2) of the ICCPR which includes the right to access information.

Challenges and Impact on Civic Space

This legislation does not limit the freedom of expression.

2.14 Books and Newspapers Act[413]

This is a colonial legislation whose primary objective is to make provision for the registration, deposit and printing of books and newspapers as well as the execution of bonds by printers and publishers of newspapers. In fact, the word "Colony" which refers to the territory of Kenya at the time, remains in use in the statute. It has undergone over the years several amendments till at some point in the late 1980's. It does not make any express provision for limitation of a fundamental freedom or right guaranteed in the Constitution of Kenya.

Provisions Affecting Freedom of Expression

Most of the provisions in this legislation relate to procedures and requirements for deposit and returns of books and newspapers published in Kenya with the Registrar of Books and Newspapers. The Act guarantees the right to any person to inspect the register of books and newspapers; inspect the actual books and newspapers; and obtain certified copies of any document from the Registrar upon payment of the prescribed fee.[414]

[412] Section 9 and 15
[413] Chapter 111, Laws of Kenya
[414] Books and Newspapers Act, Section 15

However, there is a glaring provision requiring publishers of newspapers to execute a bond of Ksh. 1 million as security for damages, monetary penalty for an offence and costs.[415] It is not clear what the motivation of parliament was in including such a provision which would ordinarily be within the purview of the judiciary in the course of proceedings on offences or torts related to the publication of such a newspaper. At the time of the passing of the legislation, this amount was an astronomical figure which could have curtailed the freedom of persons who wished to express their opinions and those of others through the publication of a newspaper.

Extent of Compliance of with International Human Rights Law

General Comment No.34 on Article 19 of the ICCPR by the Human Rights Committee provides that:

"A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."[416]

The requirement of publishers of newspapers to execute a bond of Ksh.1 million is a hindrance to the freedom of expression and freedom of the media.

Challenges and Impact on Civic Space

The requirement for newspapers to execute a bond of Ksh.1 million shillings limits the freedom of expression and the freedom of the media in Kenya. There is no justification for this requirement.

2.15 Access to Information Act[417]

The object and purpose of this legislation is to:

Give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;

a) Provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
b) Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
c) Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
d) Provide for the protection of persons who disclose information of public interest in good faith; and
e) Provide a framework to facilitate public education on the right to access information under this Act.[418]

[415] Books and Newspapers Act, Section 11
[416] Paragraph 13

[417] Act No.31 of

The legislation confers upon the Commission on Administrative Justice, powers of oversight and enforcement under the Act.

Provisions Affecting Freedom of Expression

The Access to Information Act limits the right to access of information under Article 35 of the Constitution in respect of information whose disclosure is likely to:

a) Undermine the national security of Kenya;
b) Impede the due process of law;
c) Endanger the safety, health or life of any person;
d) Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
e) Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
f) Cause substantial harm to the ability of the Government to manage the economy of Kenya;
g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
h) Damage a public entity's position in any actual or contemplated legal proceedings; or
i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.[419]

For avoidance of doubt, it provides that information relating to national security includes:

a) Military strategy, covert operations, doctrine, capability, capacity or deployment;
b) Foreign government information with implications on national security;
c) Intelligence activities, sources, capabilities, methods or cryptology;
d) Foreign relations;
e) Scientific, technology or economic matters relating to national security;
f) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
g) Information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
h) Information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;

[418] Section 3
[419] Section 6(1)

i) Cabinet deliberations and records;
j) Information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;
k) Information that is referred to as classified information in the Kenya Defence Forces Act; and
l) Any other information whose unauthorized disclosure would prejudice national security.[420]

This legislation provides that an applicant may apply in writing to the Commission on Administrative Justice requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information:

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.[421]

Extent of Compliance with International Human Rights Law

The ICCPR states that the right to freedom of expression includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice. [422] The Access to Information Act guarantees the right to access to information and defines information to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production.[423] This definition is consistent with the provisions of the Covenant.

In General Comment No.34 on Article 19 of the ICCPR, the Human Rights Committee stated that "to give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely

[420] Section 6(2)
[421] Section 14
[422] Article 19(2)
[423] Section 2

processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests."[424] The Access to Information Act sets out an elaborate procedure for application for access to information, processing of the application and provision of the information request with specified timelines. It also provides that no fee may be levied in relation to the submission of an application and that a public entity or private body from which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them to the applicant.[425]

The Human Rights Committee also stated that "every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. It also provides that every individual should be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified.[426] The Access to Information Act provides that "at the request of the applicant, a public entity or private body shall within reasonable time, at its own expense, correct, update or annotate any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete."[427]

From a legislative perspective, the Access to Information Act is compliant with the provisions of the ICCPR on the right to access of information.

Challenges and Impact on Civic Space

The aggregate period provided for processing, transferring, extension of time and appeal to the Commission on Administrative Justice is too long for urgent applications.

The Cabinet Secretary has not made the regulations under the Act.

2.16 Prevention of Terrorism Act[428]

The main purpose of this legislation is to provide measures for the detection and prevention of terrorist activities.

[424] Paragraph 19
[425] Part III
[426] Paragraph 18
[427] Section 13
[428] Act No. 30 of 2012

Provisions Affecting Freedom of Expression

The Security Laws (Amendment) Act, 2014 introduced Section 30A and 30F to limit the freedom of expression. These provision provides as follows:

*"**30A** (1) A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.*

(2) For purposes of subsection (1), a statement is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism if—

(a) the circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or

(b) the intention is apparent from the contents of the statement.

(3) For purposes of this section, it is irrelevant whether any person is in fact encouraged or induced to commit or prepare to commit an act of terrorism."

*"**30F** (1) Any person who, without authorization from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.*

(2) A person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence and is liable on conviction to a term of imprisonment for a period not exceed three years or to a fine of five million shillings, or both.

(3) Notwithstanding subsection (2) any person may publish or broadcast factual information of a general nature to the public."

However, these provisions were declared unconstitutional by the High Court in ***Coalition for Reforms and Democracy and 2 others –vs- Attorney General***[429] for violating the freedom of expression and freedom of the media guaranteed under Article 33 and 34 of the Constitution.

The Prevention of Terrorism Act provides for limitation of rights under Section 35 which states that this limitation applies only for the purpose of ensuring investigation, detection and prevention of terrorist acts. It is also done to ensure that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others. The rights limited under this legislation include the right to privacy; rights of an arrested person; the freedom of expression the media and of conscience, religion, belief and opinion; freedom of security of a person; and the right to property.

[429] PETITION NO.628 OF 2014 CONSOLIDATED WITH PETITION NO.630 OF 2014 AND PETITION NO.12
OF 2015 http://www.klrc.go.ke/images/images/downloads/SLAA-ruling.pdf

The legislation provides that "the freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under this Act"[430].

Extent of Compliance with International Human Rights Law

In its Concluding Observations on Kenya's 8th to 11th report, the African Commission on Human and Peoples' Rights made this observtion on freedom of expression:

"The Commission is concerned about laws limiting freedom of expression such as the *Security Laws (Amendment Act) of 2014* recently passed in Kenya which contains a number of provisions not in conformity with fundamental human rights, in particular those which unduly restrict freedom of expression."[431]

The Commission stated that "Kenya should take appropriate measures to effectively guarantee the right to freedom of expression, in particular for journalists and human rights defenders."[432]

Challenges and Impact on Civic Space

Although section 30A and 30F were declared unconstitutional for violating freedom of expression and freedom of media, they have not yet been repealed. They can be abused by overzealous police officers and cause victims to suffer before their prosecution is challenged in court.

2.17 Witness Protection Act[433]

The purpose of this legislation is to provide for the protection of witnesses in criminal cases and other proceedings; and to establish a Witness Protection Agency (WPA) and provide for its powers, functions, management and administration. The purpose of the WPA is to provide the framework and procedures for giving special protection, on behalf of the state, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

Provisions Affecting Freedom of Expression

By its very nature, witness protection requires the restriction of freedom of expression and freedom of information to safeguard the security of witnesses, persons closely connected to them and officers who work under the programme. Consequently, the entire framework of the Witness Protection Act is designed to

[430] Section 35(3)(c)
[431] Paragraph 40, https://www.achpr.org/states/statereport?id=99
[432] Paragraph 56
[433] Act No.16 of 2006

limit disclosure of information that is likely to compromise the integrity of the programme. There are express provisions in the legislation to this effect.

The legislation gives the WPA power to request courts to employ the following protective measures in the course of proceedings:

a) Holding in camera or closed sessions;
b) The use of pseudonyms;
c) The reduction of identifying information;
d) The use of video link; or
e) Employing measures to obscure or distort the identity of the witness.[434]

It also prohibits the disclosure, in court proceedings, of the new identity given to a witness under the programme.[435]

Where a new identity is given to a witness or other participant in the programme and a new entry is made in the register of births, deaths or marriage, the legislation outlaws the disclosure of such information except where it is done in compliance with an order of the High Court, as part of an investigation by the Director of Public Prosecutions or implementation of the Act.[436] Except as otherwise provided by an order of the High Court, a person who acquires knowledge or information as a result of association or connection, duty or service with the programme or the Agency is not compellable, in proceedings in a court, tribunal or commission of inquiry, to produce any document or to divulge or communicate a matter or a thing related to the exercise of functions under the Act or the protection of witnesses included in the programme.[437]

The legislation also safeguards non-disclosure of the former identity of a participant of the programme by that person or another person who has come into contact with the programme.[438] The disclosure of information about the identity or location of a participant under the programme or information which compromises the security of such a person is an offence under the Act.[439] The legislation permits the Cabinet Secretary responsible for Internal Security to prohibit or control access to land or premises under the control of the WPA.[440] It also prohibits the publishing or disclosure to another person, the contents of a document, communication or information which the WPA itself has not made public without the written consent given by or on behalf of the Agency.[441]

The legislation outlaws a person who is or was a participant or a witness considered for inclusion in the programme from disclosing or communicating:

[434] Section 4(3)
[435] Section 24
[436] Section 22
[437] Section 32
[438] Section 23
[439] Section 30
[440] Section 30D
[441] Section 30E

(a) the fact that he or a member of his family has entered a memorandum of understanding under section 7 of the Act;

(b) details of the memorandum of understanding;

(c) information relating to anything done by the Director or any officer under the Act; or

(d) information about any officer gained by the person as a result of anything done under the Act[442]

Extent of Compliance with International Human Rights Law

Article 14 of the ICCPR provides *inter alia* that:

"The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

The limitations on freedom of expression and freedom of information in the Witness Protection Act highlighted hereinabove can be regarded as special circumstances where publicity would prejudice the interests of justice.

Challenges and Impact on Civic Space

While recognizing that it is essential that the operations of the Witness Protection Agency remain covert to safeguard the wellbeing of witnesses, participants in the programme and its members of staff, the opaque nature of these operations facilitated by legislative limitation of freedom of expression and freedom of information, make it very difficult for civil society to monitor compliance with human rights standards. If a witness is aggrieved by a decision of the WPA, the only framework available for appeal is the Witness Protection Complaints Protection Committee established under the legislation and a further appeal to the High Court.

These limitations make it almost impossible for civil society organizations to hold the WPA accountable for its actions. For instance, various civil society organizations have received complaints on the delay in processing of applications by witnesses for protection for upto a month. This is a bewildering matter within the context of the urgency of action necessary in cases of extreme danger. In such situations, civil society organizations such as the National Coalition on Human Rights Defenders and Independent Medico Legal Unit have had to undertake interim interventions.

[442] Section 31

2.18 Preservation of Public Security Act[443]

Provisions Affecting Freedom of Expression

The legislation states that the preservation of public security may make provision for "the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports."[444] While it is essential that the dissemination of false reports be prohibited and controlled, the rest of this provision gives room for a blanket limitation of the right to freedom of expression and freedom of information.

Compliance with International Human Rights Law

As mentioned hereinabove, the limitation of freedom of expression in the Preservation of Public Security Act is too broad. In General Comment No.34 on Article 19 and 20, the UN Human Rights Committee provided guidelines that forbid this.

"34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[445]

Challenges and impact on civic space

The imposition of measures on the preservation of public security is a matter within the discretion of the President.[446] It depends on the character and motives of the

[443] Chapter 57, Laws of Kenya
[444] Section 4(2)(d)
[445] UN Human Rights Committee, General Comment No.34 on Article 19 & 20, par. 34-35
[446] Section 3(1)

person in office and has potential for abuse in the era of oppressive regimes. If the President wishes to limit the freedom of expression and access to information, he only needs to invoke his broad discretionary powers under this legislation.

2.19 Whistleblower Protection Bill, 2018

This draft legislation intends to provide for the procedure for the disclosure of information relating to improper conduct in the public and private sectors and the protection persons who make such disclosure against victimization. A whistle blower is defined as "any person who has personal knowledge of or access to any data, information, fact or event constituting improper conduct and who makes a disclosure of that information in accordance with this Act" or a "person who assists such individual"[447]. The purposes of the draft legislation are set out as follows:

"(a) to facilitate the disclosure and investigation of significant and serious matters in or relating to public or private bodies, which an employee or any other person believes may be unlawful, dangerous to the public or prejudicial to the public interest;
(b) to enhance ethics and integrity in public and private bodies, and among State officers and public officers in the case of public bodies;
(c) to protect all persons who make disclosures under this Act;
(d) to manage, investigate and make recommendations respecting disclosure of improper conduct and reprisals;
(e) to promote public confidence in the administration of public and private bodies;
(f) to enhance the procedures and mechanisms for promoting the administration of justice;
(g) to provide a framework for public participation in preventing and combating improper conduct;
(h) to reward persons who contribute to preventing and combating improper conduct; and
(i) to facilitate any other purpose prescribed in the regulations."[448]

The draft bill charges the Commission on Administrative Justice with the responsibility of enforcing it.[449] It is noteworthy to state that the Commission is also responsible for the enforcement of the Access to Information Act discussed earlier in this report.

Provisions Affecting Freedom of Expression

The bill provides that "disclosure under this Act shall not qualify for protection if the person making the disclosure commits an offence by making it"[450]. While this

[447] Clause 2
[448] Clause 4
[449] Clause 5
[450] Clause 15(2)

provision may appear necessary within the context of national security, the wording is too broad and the principle is contentious. In fact, to safeguard public interest, whistleblowers have risked by committed offences by leaking information relating to grand corruption to the media and CSOs. The provision negates the spirit of the draft legislation.

The bill lists various persons to whom disclosures may be made by whistle blowers.[451] However, the list does not include civil society organizations and legal practitioners yet these are the persons who ordinarily receive information from whistleblowers. Although reference made to "a professional body established by an Act of Parliament" includes the Law Society of Kenya, it should not be presumed to include an advocate of one's choice.

The bill provides that in determining to whom a disclosure should be made, the whistleblower should consider the following factors:

(a) whether there is a reasonable belief or fear on the part of the whistleblower that the whistleblower may be subjected to dismissal, suspension, harassment, discrimination or intimidation in the place of employment;
(b) whether there is a reasonable belief or fear that evidence relevant to the improper conduct may be concealed or destroyed;
(c) whether the person to whom the disclosure is made is likely to frustrate the objective;
(d) whether the impropriety is of an exceptionally serious nature so that expeditious action should be taken to deal with it;
(e) the place where and the prevailing circumstances under which the whistleblower lives, and,
(f) the security clearance of the person receiving the disclosure, if the intended disclosure touches on an issue of national security.[452]

The bill offers various guarantees to whistleblowers. It provides that a whistleblower is entitled to:

(a) confidentiality of the information given;
(b) immunity from civil or criminal liability in relation to the disclosure; and
(c) protection against reprisal.[453]

It also provides that "no employer, person acting on behalf of an employer, or any other person may discharge, demote, suspend, transfer, threaten or harass, directly or indirectly, or in any other manner act adversely against, a person in the terms and conditions of employment because the person provided information in accordance with this Act"[454].

Where the whistleblower is an independent contractor, the bill provides that:

[451] Clause 15(3)
[452] Clause 15(4)
[453] Clause 24
[454] Clause 25(1)

"No person acting or purporting to act on behalf of any public or private body shall—

(a) terminate a contract;
(b) withhold a payment that is due and payable under a contract; or
(c) refuse to enter into a subsequent contract,

because a party to the contract, or an employee of or person related to a party to the contract, is or has been or is found to be a whistleblower."[455]

The bill confers upon the Commission on Administrative Justice power to issue orders and grant reliefs to whistleblowers[456]. However, some of these reliefs ordinarily fall within the jurisdiction of courts. Examples of such orders and reliefs proposed in the bill include:

(a) reinstatement to a position lost as a result of workplace reprisal;
(b) compensation for loss of income;
(c) specific performance of contractual obligations

The bill provides that the Commission may revoke the protection of a whistleblower if it is determined that "the whistleblower participated in the improper conduct complained about"[457]. This provision is potentially counterproductive given that some crucial prosecution witnesses are usually persons who participated in the commission of an offence. In such circumstances, a plea deal (or immunity from prosecution) with the whistleblower who discloses invaluable information would be a better strategy.

The bill provides for the creation of a Whistleblowers Reward Fund[458] presumably to provide an incentive to potential whistleblowers. Such reward is the preserve of whistleblowers whose disclosure results in the arrest and conviction of an accused person; or the recovery of money or assets.

Extent of Compliance with International Human Rights Law

This bill has no provisions that are not compliant with international human rights standards. It is designed to safeguard the interests of whistleblowers.

Challenges and Impact on Civic Space

The bill was drafted in 2017 but has not been presented to Parliament for debate to date. Till then, any persons who wish to act as whistleblowers will not enjoy any special protection.

2.20 Penal Code

The purpose of this legislation is to establish a code of criminal law.

[455] Clause 26
[456] Clause 29
[457] Clause 30(1)(a)
[458] Part VIII

Provisions Affecting Freedom of Expression

The Penal Code gives the Cabinet Secretary responsible for its implementation, the authority to declare any publication, a "prohibited publication" or ban its importation, if he "considers that it is necessary in the interests of public order, health or morals, the security of Kenya, and to be reasonably justifiable in a democratic society".[459] The Code creates the Prohibited Publications Review Board. The board consists of:

(a) the Attorney-General or his representative, who shall be the chairman;

(b) the Director of Public Prosecutions or his representative;

(c) the Commissioner of Police or his representative;

(d) the Director of Medical Services or his representative;

(e) two persons from the religious community, to be appointed by the Minister; and

(e) two other persons of integrity, good character and good standing to be appointed by the Minister

The purpose of the board is to advise the Cabinet Secretary on the exercise of his powers. It is noteworthy to state that this board does not include independent institutions such as the Kenya National Commission on Human Rights or the Commission on Administrative Justice. More interestingly, the board can only exercise its powers after the Cabinet Secretary has issued the declaratory or a prohibition order on the publication. In essence, the ban takes effect before the review.

The Code outlaws the publication of "any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace".[460] However, it also provides that it is a defence "if the accused proves that, prior to publication, he took such measures to verify the accuracy of the statement, rumour or report as to lead him reasonably to believe that it was true". An amendment introduced in 2014 by the Security Laws (Amendment) Act, 2014 that expressly provides for the limitation of freedom of expression and freedom of the media provides as follows:

"(1) A person 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 commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

(2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or a imprisonment for a term not exceeding three years, or both.

[459] Section 52

[460] Section 66

(3) The *freedom of expression and the freedom of the media under Articles 33 and 34 of the Constitution shall be limited as specified under this section* for the purposes of limiting the publication or distribution of material likely to cause public alarm, incitement to violence or disturb public peace." [461] However, this section was declared unconstitutional by the High Court in ***Coalition for Reforms and Democracy and 2 others –vs- Attorney General***[462] for violating the freedom of expression and freedom of the media guaranteed under Article 33 and 34 of the Constitution.

The Code outlaws the publication of anything that constitutes the defamation of foreign dignitaries. It provides that "any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to degrade, revile or expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb peace and friendship between Kenya and the country to which such prince, potentate, ambassador or dignitary belongs is guilty of a misdemeanour."[463]

The Code provides that "any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence".[464] Within this context "public gathering" is defined to include:

"(a) any meeting, gathering or concourse of ten or more persons in any public place; or

(b) any meeting or gathering which the public or any section of the public or more than fifty persons are permitted to attend or do attend, whether on payment or otherwise; or

(c) any procession in, to or from a public place."

The Code provides that any person who "uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace" commits an offence.[465]

The Code outlaws the writing or utterance of words that wound religious feelings. It provides that "any person who, with the deliberate intention of wounding the religious feelings of any other person, writes any word, or any person who, with the like intention, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person".[466]

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[461] Section 66A

[462] PETITION NO.628 OF 2014 CONSOLIDATED WITH PETITION NO.630 OF 2014 AND PETITION NO.12 OF 2015 http://www.klrc.go.ke/images/images/downloads/SLAA-ruling.pdf

[463] Section 67

[464] Section 94

[465] Section 95(1)

[466] Section 138

The Code defines and outlaws libel. It provides that "any person who, by print, writing, painting or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the misdemeanour termed libel."[467] It defines a defamatory matter as a "matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation; and it is immaterial whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead".[468]

Extent of Compliance with International Human Rights Law

While outlawing "subversive activities", the Code defines the phrase to include "indicating, expressly or by implication, any connexion, association or affiliation with, or support for, any unlawful society."[469] It defines "unlawful society" to be any unlawful society within the meaning of section 4(1) of the Societies Act. It should be noted that the Societies Act defines unlawful societies to include those that have not been registered. As mentioned earlier in this report, the ACHPR Guidelines provide that associations need not be registered to be recognized before the law.

In its Concluding Observations on Kenya's 8th to 11th report, the African Commission on Human and Peoples' Rights expressed its concerns on the limitation of the freedom of expression and the freedom of the media:

"The Commission is concerned about the fact that defamation is still a criminal offence in the Criminal Code, and the use of defamation to incriminate journalists and media practitioners.[470]"

The Commission recommended that "Kenya should decriminalize defamation by repealing relevant provisions in the Penal Code."[471]

Challenges and Impact on Civic Space

Although section 66A of the Penal Code was declared unconstitutional by the High Court, it has not been repealed by Parliament.

The retention of defamation and libel as offences continues to be an impediment to the enjoyment of the freedom of the expression and the freedom of the media.

[467] Section 194
[468] Section 195
[469] Section 77
[470] Paragraph 40
[471] Paragraph 56

3 CHAPTER III: LAWS AFFECTING THE EXERCISE OF THE FREEDOM OF ASSEMBLY BY CIVIL SOCIETY

3.1 International and Regional Standards on the Freedom of Assembly (Right of Peaceful Assembly)

The right of peaceful assembly is guaranteed under Article 20 (1) of the Universal Declaration on Human Rights and Article 21 of the International Covenant on Civil and Political Rights (ICCPR). An assembly has been defined as a gathering for a specified purpose and period in a private or public space and includes "demonstrations, inside meetings, strikes, processions, rallies or even sits-in."[472] The term 'right to protest' is often used interchangeably with the freedom of assembly, referring to the "individual or collective expression of oppositional, dissenting, reactive or responsive views, values or interests."[473] Freedom of peaceful assembly is by and large inseparable with the freedom of expression owing to the fact that demonstrations constitute a form of expression. The European Court on Human Rights (ECtHR) has acknowledged this inseparability and interpreted the freedom of assembly as being embodied by freedom of expression. [474]

The term 'peaceful protest' denotes protests that are not violent in line with treaty language in the UDHR and ICCPR on the right of peaceful assembly.[475] The right is thus recognized if organizers of an assembly have a peaceful intention. However, if despite these peaceful intentions there are violent outcomes of the protest attributed to third parties, this does not preclude protection of the right to assemble.[476] Furthermore, peaceful intention to exercise the freedom of assembly should be presumed unless the contrary is demonstrated.[477] It is noteworthy that the term 'peaceful' is excluded from the guarantee to "assemble freely with others" in the Africa Charter on Human and People's Rights (ACHPR)."[478] The Guidelines on Freedom of Assembly and Association in Africa give a broad interpretation of 'peaceful' to include conduct that results in annoyance or impedes the activities of third parties. Occurrence of isolated acts of violence does not render an assembly as non-peaceful.[479] Moreover, the imperative for human rights protections subsists regardless of whether or not a protest is characterized as peaceful.[480]

[472] Note 11- FOOA online! http://freeassembly.net/foaa-online/, 13
[473] Article 19- Right to Protest in Kenya https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf
[474] Note 11- FOOA online!, 13-15
[475] *Ibid* 7
[476] *Ibid* 12
[477] *Ibid* 13
[478] Article 11 ACHPR
[479] Note 12- The Guidelines on FOAA in Africa, 70 (a) and (b)
[480] Note 458- Article 19, 13

Restrictions to the exercise of the right to peaceful assembly in the ICCPR are limited to: "those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[481] This mirrors the restrictions provided in the ACHPR.[482] Enactment of laws of on freedom of assembly should be aimed at facilitating the enjoyment of the right.[483] Limiting the right to peaceful assembly is only justifiable if it passes a three-pronged test; the restriction should be in conformity with law, in pursuance of a legitimate aim and necessary in a democratic society. The limitation must be subject to a "strict test of necessity and proportionality." Necessity requires compelling reasons to outweigh enjoyment of the freedom of assembly while proportionality means the interference should not exceed the pursuit of a legitimate aim and as such states should choose the least intrusive measures.[484]

The three-prong test is also applicable to sanctions for offences committed during protests; sanctions are a form of limitation to the freedom of assembly and must therefore be justifiable. Given the nature of exercising the freedom of assembly in public spaces, disruption to others should be expected. A degree of tolerance from the public and authorities is therefore necessary and dispersal of protests by the latter should be subject to restraint.[485] The freedom of assembly should not be limited on the grounds that obstruction of activities of third parties by protestors will lead to economic consequences.[486] With respect to the imposition of sanctions and liability, the Guidelines for Policing of Assemblies in Africa recommend that organizers or participants of assemblies should not be subjected to sanctions based on acts committed by others. Liability should therefore be personal and assembly organizers should not bear disproportionate responsibilities or liabilities; this includes the public cost of assemblies such as clean up costs.[487] Dispersal of assemblies should be a last resort and this resort should meet the legality, necessity, proportionality and non-discrimination test. If the dispersal is unavoidable, law enforcement officials should communicate the imminent dispersal and provide an opportunity to the participants of the assembly to disperse voluntarily. Furthermore, intentional use of lethal force and the use of firearms to disperse an assembly should be prohibited.[488] In accordance with the UN Basic Principles on the use of force, even in the case of violent protesters, the use of firearms should be strictly restricted to the necessity to protect life.[489]

[481] Article 21 ICCPR
[482] Article 11 ACHPR
[483] Note 12- The Guidelines on FOAA in Africa, 66
[484] Note 12- FOOA online http://freeassembly.net/foaa-online/ 17
[485] *Ibid*, 25-26
[486] Note 12- The Guidelines on FOAA in Africa, 87
[487] *Ibid* 101-102
[488] The ACHPR Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, https://www.achpr.org/legalinstruments/detail?id=65, 22-23

[489] Note 458- Article 19,

The right to choose the venue or location of an assembly is central to exercising the freedom of peaceful assembly and it is often the case that the location is strategically chosen in tandem with the protest messaging. Limiting the right to this choice by predetermining locations is therefore not permissible. Whereas the right to choose a venue is not absolute, any limitation to this right should be prescribed in law and subject to the three-pronged test.[490] Additionally, where such a limitation is imposed, state authorities should "facilitate the ability of an assembly to take place within sight and sound of its target audience."[491]

The permissibility of domestic authorities requiring advance notification of an assembly is accepted in international law but this need not be an obligation. The rationale of the permissibility is "to allow State authorities to facilitate and safeguard the exercise of the right to freedom of peaceful assembly, to protect public safety and order and the rights and freedoms of others, and to meet their obligation to reroute traffic and deploy security when necessary." The notification procedure should not be bureaucratic and prompt confirmation upon receiving the notice should be done by the authorities.[492] Prohibition is only justifiable as a last resort if there is no other "less intrusive response" in pursuit of a legitimate aim. A decision on prohibition should be communicated promptly and this should include the legal rationale for such a decision.[493] There is concurrence in international law discourse that spontaneous assemblies occurring as a rapid response to an unforeseen development should not be subject to prescribed notification procedures.[494]

The Constitution of Kenya guarantees the freedom of assembly in accordance with international and regional human rights standards. Article 37 provides that every person has the right, peaceably and unarmed, to assemble, demonstrate, picket, and present petitions to public authorities. Any restriction to the freedom of assembly must be subject to the limitation of rights provided in Article 24 (1) of the Constitution as follows:

> *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*
>
> *(a) the nature of the right or fundamental freedom;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

[490] Note 11- FOOA online! 32-36
[491] Note 12- The Guidelines on FOAA in Africa, 90 (b)
[492] Note 11- FOOA online! 56-59
[493] Note 12- The Guidelines on FOAA in Africa, 92

[494] Note 11- FOOA online!

(e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Article 24 (2) further qualifies the scope of limitation in Article 24 (1) by stipulating that that a provision in a legislation limiting a right or fundamental freedom must be clear and specific on the nature and extent of the limitation and shall not derogate from the core or essential content of the fundamental freedom.

3.2 The Public Order Act[495]

The Public Order Act makes provision for the maintenance of public order and for connected purposes.

Provisions Affecting Freedom of Assembly

The Act regulates public gatherings, defined in section 2 of the Act as "a public meeting, a public procession, and any other meeting, gathering or concourse of ten or more persons in any public place."

Public meetings or processions must be held in accordance with provisions of Section 5 of the Act.[496]Section 5 (2) provides for notification of public gatherings; notice of a public meeting or a public procession should be provided to the regulating officer "at least three days but not more than fourteen days before the proposed date of the public meeting or procession." Under Section 5 (3), the notice is required to be submitted in a prescribed form and specify the following:

a) Full names and physical address of the organizer of the proposed public meeting or public procession;
b) Proposed date of the meeting or procession and the time thereof which shall be between six o'clock in the morning and six o'clock in the afternoon;
c) Proposed site of the public meeting or the proposed route in the case of a public procession.

The regulating officer is mandated to keep a public register of all notices received under subsection (2) and any person can inspect this register during working hours.[497]

Under Section 5 (4), following receipt of a notice for a public gathering, the regulating officer is authorized to notify the organizer that it is not possible to hold the meeting should there be another proposed meeting or procession on the same date, time and at the same venue as proposed in the notice. The notification by the regulating officer should be in writing and delivered to the organizer at the address provided pursuant to Section 5 (3). Upon receipt of the notification by the regulating

[495] CAP. 56 of the Laws of Kenya
[496] Section 5 (1)
[497] Section 5 (14)

officer, Section 5 (6) prohibits the organizer from holding the public gathering but permits the organizer to do so on a future date as the organizer may elect to notify. Section 5 (7) requires that the organizer of every public meeting or procession or their authorized agent be present during the meeting or procession and "shall assist the police in the maintenance of peace and order at the meeting or procession." Refusal or neglect by any person to comply with the orders under this subsection amounts to an offence.[498]

Section 5 (8) authorizes the regulating officer or any police above the rank of inspector to stop or prevent the holding of a public meeting or procession in the following scenarios:

a) *If the meeting or procession is not held in compliance with the preceding requirements under sub sections (2) or (6).*
b) *If there is "clear, present or imminent danger of a breach of the peace or public order" during a public meeting or procession.*

The order for dispersal of a meeting or procession under this sub section is required to be effected by "having regard to the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others."

Offence of unlawful assembly:

Section 5 (10) provides that if any public meeting or public procession is held following notification by a regulating officer pursuant to the provisions under Section 5(3), such a meeting shall be deemed to be an unlawful assembly. Under Section 5
(11) "Any person who takes part in any public meeting or public procession deemed to be an unlawful assembly or holds, convenes or organizes or is concerned in the holding, convening or organizing of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year."

Part IV of the Act regulates curfew orders. Section 8 (1) provides as follows:

> *The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorized by or under the curfew order.*

Section 8 (3) requires the publication of a curfew order in a manner sufficient to bring to the notice of all persons affected by the order. The curfew shall remain in

[498] Section 5 (7) & (9)

force for the period specified in the order or may be rescinded earlier by the same authority that issued the order or by the Minister (defined under the Act as "the Minister responsible for administration"). The section further provides a caveat that "no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than three days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than seven days."

Rescission of a curfew order is required under Section 8(4) to be published in a similar manner to the publication of a curfew order as provided in Section 8 (3). Contravention of a curfew order is an offence and anyone found guilty is "liable to a fine not exceeding with a penalty one thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment" as provided under Section 8 (6).

The Act distinguishes a "curfew order" from a "curfew restriction order". The latter can be issued as per Section 9 (1) by a police officer in charge of the police in a county or a police officer in charge of a police division, if the officer considers it necessary in the interests of public order within their area of his responsibility. The order shall specify the hours during which "all persons, or, as the case may be, all members of any class of persons specified in the curfew restriction order" are prohibited from entering, being or remaining in any specified premises. Any exceptions to the curfew order will be in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew restriction order. The curfew restriction order shall not however prohibit or prevent any person from entering, being or remaining in their residential, business or workplace premises.

Under Section 9(3) publication of a curfew restriction is required to be sufficient to notify all persons affected by the order. The order shall remain in force for a period not exceeding twenty-eight days. The issuing authority or the Commissioner of Police may rescind the curfew restriction order and any variation of an order shall be publicized in a similar manner to the requirements on publication of the order.

Contravention of any of the provisions of a curfew restriction order or any of the terms or conditions of a permit shall amount to an offence with a penalty of a fine not exceeding one thousand shillings or to imprisonment for a term not exceeding three months, or to both such ne and such imprisonment as provided under Section 9(6).

Section 14. (1) restricts the use of force and provides as follows:

> *Whenever in this Act it is provided that force may be used for any purpose, the degree of force which may be so used shall not be greater than is reasonably necessary for that purpose; whenever the circumstances so permit without gravely jeopardizing the safety of persons and without grave risk of uncontrollable disorder, firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose*

aforesaid; and firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence.

The provision above does not preclude the lawful right of any person to use force in the defence of person or property as provided under subsection 2**.**

Section 15 provides for the modalities of service; any order, notice or document under the Act is required to be effected personally or via registered post. Where the recipient is an entity such as a corporate body or a society, service shall be deemed to have been effected once served personally to a secretary, director or other officer of the entity acting in the management. Alternatively, the order, notice or document can be sent to the registered office of the entity. If the entity does not have a registered office, service can be made via registered post.

Section 17 provides that "every person who is guilty of an offence under this Act, or under any regulations made thereunder, in respect of which no special penalty is provided shall be liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment." Under Section 18, if a company, society, association or body of persons commits the offence, the persons responsible for management of the affairs and activities of such an entity will be deemed liable unless they can demonstrate that they were not aware of the commission of an offence or took reasonable steps to prevent commission of the offence.

It is noteworthy the Minister is authorized under Section 22 to make regulations on anything prescribed under the Act or generally to give effect to the provisions of the Act.

Extent of compliance with International Human Rights

Law Notification procedures

Notification procedures should meet the proportionality test and consequently should not be overly burdensome or bureaucratic.[499] The requirement under Section 5 (2) that notification of public meetings should be given at least three days and no more than two weeks prior to the meeting meets fails to specify the period within which a response to the notification will be given.[500] Furthermore, the provision under Section 5 (4) mandating the regulating authority to notify the organizer of the assembly that it is not possible to hold the assembly due to a planned meeting on the same date and venue, fails to specify the period within which this should be communicated. Section 5 (8) outlaws an assembly held pursuant to section 5(4). These provisions seemingly lean towards restriction of the right to assembly rather than the international requirement for domestic laws to facilitate enjoyment of the

[499] Note 11- FOOA online! http://freeassembly.net/foaa-online/56

[500] Right to Protest in Kenya, Article 19 https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf 16

freedom. Failure to provide for official acknowledgement of notification of assemblies under the law creates uncertainty for organizers as to whether proceeding with the assembly may result in criminal sanctions. [501] A prompt acknowledgement of receipt of notification of an assembly should be made and clear reasons communicated for any restrictions imposed thereto. The absence of a prompt response by state authorities should be construed to mean that the notified assembly is permissible.[502] The Guidelines for Freedom of Assembly in Africa recommend that where authorities receive notification for multiple assemblies at the same location and time, efforts should be made to facilitate these assemblies. If this is not possible, a reasonable means should be found to allocate the space for the assemblies.[503] The contrary allows notification procedures to shift the burden to assembly organizers to challenge a refusal rather than placing the onus on state authorities to justify the restrictions. This is inconsistent with the rationale for notification procedures, meant to enable state authorities to protect public safety rather than impede exercising the right to assembly.[504]

Blanket ban of assemblies

Section 5 (3) specifies the duration for a public meeting with respect to notification of a meeting to be "between six o'clock in the morning and six o'clock in the afternoon." This implicitly excludes all assemblies taking place beyond 6:00pm, which brings into question the legality of holding night vigils as a form of assembly. The holding of night assemblies should be assessed on a case-by-case basis rather than adopting a blanket ban on these types of assemblies.[505]

The outlawing of assemblies for which no notification has been given effectively quashes spontaneous assemblies. This is not in line with international and regional human rights standards, which recognize the necessity of exempting spontaneous assemblies from notification procedures. Restrictions on spontaneous assemblies are only justifiable to the extent that there is risk of harm that impedes pursuit of a legitimate aim such as protection of public order- this risk should however be "serious and imminent."[506]

Role of assembly organizers

The provision requiring the organizer of an assembly to assist the police in the maintenance of peace and order is overly broad. This further confounds the liability placed on the organizer given that refusal to comply with an order to assist the police amounts to an offence.[507] Whereas the need for cooperation between organizers of assemblies and law enforcement officials is recognized, the primary duty of maintaining public order is a state obligation and should not be shifted to the

[501] *Ibid* 16
[502] Note 11- FOOA online! 59
[503] Note 12- The Guidelines on FOAA in Africa, 74
[504] Note 11- FOOA online!, 54-56
[505] Note 12- The Guidelines on FOAA in Africa, 83
[506] Note 11- FOOA online! 61
[507] Section 5 (7) & 5 (9)

organizers. Furthermore, liability must be personal – if organizers are subject to sanctions based on the actions of other parties, this places an unfair burden on organizers and serves to curtail the freedom of assembly.[508]

Challenges and impact on civic space

Contravention of legal restrictions on the use of excessive force by the police in response to protests remains a prevalent challenge in Kenya. Police violence documented during protests in the lead up to the 2017 elections included several killings and multiple injuries resulting from the use of firearms to obstruct peaceful protests.[509] Despite the fact that many assemblies are conducted peacefully, violent responses by police are "heavily guided by the culture, organizational structure and leadership of the police, as well as public perception of officers' actions".[510] A 2018 survey on public perception of protests found that despite respondents being relatively well informed about their rights during protests, many did not participate in protests due to fear of violence from law enforcement officials, protesters or third parties. The use of tear gas by police to disperse peaceful protestors for instance is a common occurrence during protests.[511]

3.3 The Public Order (Amendment) Bill, 2019[512]

Provisions Affecting Freedom of Assembly

The Public Order Amendment Bill was introduced in March 2019. The bill amends **Section 5** of the Public Order Act - which regulates public meetings and processions by inserting a new subsection as follows:

> *(11A) A person who while at a public meeting or public procession causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or both.*
>
> *(11B) Where a person is convicted of an offence under subsection (11A), the court may [give] an order over and above the sentence imposed, that the person or the organizer compensates the affected persons on such terms as the court may deem proper to grant.*

[508] Right to Protest in Kenya, Article 19 https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf, 16
[509] Policing of protests in Kenya (Ruteere M & Mutahi P) https://www.chrips.or.ke/wp-content/uploads/2019/08/CHRIPS-Policing-Protests-in-Kenya-full-book.pdf, 7
[510] *Ibid* 9
[511] Right to Protest in Kenya, Article 19 https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf, 21
[512] A Bill for an Act of Parliament to amend the Public Order Act (Cap. 56) and for connected purposes

Section 5 (11) of the Public Order Act creates an offence of unlawful assembly and holds liable any person who takes part in a public meeting or procession deemed to be unlawful under the Act. The Act cross-references the offence of unlawful assembly under Chapter IX of the Penal Code, which is punishable by imprisonment for one year. The amendment bill therefore seeks to introduce a new offence with a much stricter penalty in Section 5 (11A). As stated in the Bill, the principal object of the amendment is "to make provision for organizers of public meetings or public procession leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons." The bill further states that it "does not contain any provisions limiting any fundamental rights or freedom."

Extent of compliance with International Human Rights Law

The Public Order (Amendment Bill) contrary to the indication in its memorandum of objects that it does not limit fundamental rights and freedoms, would lead to serious repercussions on the exercise of the freedom of assembly. The amendments effectively "create a fresh layer of limitations" by increasing criminal sanctions and introducing civil liability thus curtailing enjoyment of the right to assembly.[513]

Section 5 (11A) which creates a sanction for an offence of causing 'grievous harm, damage to property or loss of earnings' during a protest is vague as there is no definition of what constitutes damage. This would allow law enforcement officials unwarranted discretion to determine if an individual has violated the law.[514] The amendment contravenes the international human rights standard for laws to be "formulated with sufficient precision to enable an individual to regulate his or her own conduct accordingly." Additionally, for any limitation of fundamental rights to meet the legality test, the law "cannot allow for unfettered discretion upon those charged with its execution.[515]

The provision in Section 5 (11B) imposing liability on organizers of assemblies is also vague; the organizer is required to compensate affected persons on terms to be determined by the court. This is open to abuse as it leaves the determination on compensation to the "individual judgment and discretion of a police officer, prosecutor or judicial officer thereby subject to discriminatory and irregular application." [516] Furthermore, the provision placing liability on organizers of assemblies flouts the standard for personal liability; organizers a public assembly should not be subjected to sanctions based on acts committed by others."[517]

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[513] Amnesty International Kenya Memorandum on the Public Order (Amendment) Bill, 2019 https://www.amnestykenya.org/wp-content/uploads/2019/05/2019-May-AIK-Memorandum-on-Public-Order-Act-Amendments.pdf

[514] *Ibid*

[515] Note 11- FOAA http://freeassembly.net/foaa-online/ 18

[516] Amnesty International Kenya Memorandum on the Public Order (Amendment) Bill, 2019

[517] Note 12- The Guidelines on FOAA in Africa, 101

Imposing onerous responsibilities on organizers of assemblies is bound to curtail enjoyment of the freedom of assembly.

The offence created in subsection 11B is excessively punitive and creates an inconsistency with the provisions of the penal code on unlawful assembly. It is recommended that criminal sanctions should not be government by provisions of criminal law that differ with generally applicable provisions of the penal code.[518]

Challenges with provisions and impact on exercise of FoA by Civil Society

If the proposed amendments are passed, it is likely that this will dissuade people from organizing and participating in protests.[519] Civil society may be held liable either institutionally or individually. Amnesty Kenya's memorandum, encapsulates the challenge presented by the bill which "will criminalize expression and legitimate protests of political parties, public interest organisations including those promoting the rights of consumers, women, youth, labor, landless and displaced people among others. For this reason, we petition the National Assembly to reject the amendments on the basis of incongruence with our constitution and further strengthening of an outdated and colonial relic, The Public Order Act."[520]

3.4 The National Intelligence Service Act, 2012

Provisions Affecting Freedom of Peaceful Assembly

This legislation limits the right to assemble, demonstrate, picket and petition public authorities set out in Article 37 of the Constitution by prohibiting, NIS officers from assembling, demonstrating, picketing or petitioning public authorities except for the purposes of maintaining good order and discipline in the NIS.[521] This limitation was made in the interest of national security.

Extent of Compliance with International Human Rights Law

The ICCPR provides that no restriction may be placed on the exercise of the right to peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security, public safety, public order, the protection of public health or morals; or the protection of the rights and freedoms of others.[522] The African Charter on Human and People's

[518] *Ibid* 55
[519] Right to Protest in Kenya, Article 19 https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf, 17
[520] Amnesty International Kenya Memorandum on the Public Order (Amendment) Bill, 2019 https://www.amnestykenya.org/wp-content/uploads/2019/05/2019-May-AIK-Memorandum-on-Public-Order-Act-Amendments.pdf
[521] Section 39
[522] ICCPR, Article 21

Rights provides that the right to freely assemble with others should only be subject to necessary restrictions provided by law, in particular those enacted in the interest of national security, safety, health, ethics and the rights and freedoms of others.[523]

Challenges and Impact on Civic Space

A careful examination of these provisions reveals that the limitation of the right to peaceful assembly under the National Intelligence Service Act, 2012 does not violate international human rights law.

3.5 Protected Areas Act[524]

The purpose of this legislation is to prevent the entry of unauthorized persons into areas which have been declared to be protected areas. This is a pre-independence legislation that became law in 1949. Although there has been expansion of the list of protected areas through subsidiary legislation, the last substantive amendment to the Protected Areas Act was effected in 1964.

Provisions Affecting Freedom of Peaceful Assembly

This legislation outlaws the entry into protected areas without lawful authorization. Therefore, it infers that a public protest and demonstration may not be extended into such an area by persons who may wish to express their dissent with the decisions or actions of such persons or institutions who may be hosted within these such protected areas. It can also be deduced from the letter and the spirit of the legislation that picketing at such areas is also outlawed.

Extent of Compliance with International Human Rights Law

Although it is not stated expressly in the legislation, it can be inferred that the provisions of the Protected Areas Act, limiting entry into such places, is made in the interest of national security. This limitation is permitted in Article 21 of the ICCPR.

Challenges and Impact on Civic Space

Occasionally, individuals and civil society organizations opt to convene their peaceful protests in the most proximate place that would convey their message of advocacy effectively. Although such places may be designated as protected areas, physical presence, holding of placards and verbal expressions at points of entry and exit may be the most effective way to draw the attention of persons in authority. However, such efforts are often met with hostile and violent responses by security officers under the guise of preserving national security.

[523] ACHPR, Article 11
[524] Chapter 204, Laws of Kenya

3.6 Preservation of Public Security Act

Provisions Affecting Freedom of Assembly

This legislation states that it shall be lawful for the President to make regulations that make provision for "the control or prohibition of any procession, assembly, meeting, association or society."[525] Evidently, this is a very broad provision for limitation of the right to freedom of assembly that gives room for blanket bans.

Compliance with International Human Rights Law

The ICCPR permits States Parties to restrict the right to peaceful assembly in the interest of national security as is the spirit of the Preservation of Public Security Act. However, the limitation of freedom of assembly is too broad and gives room for blanket bans. Consequently, it is not compliant with the ACHPR Guidelines on Freedom of Association and Assembly in Africa which provide as follows:

*"**The blanket application of restrictions, including the banning of assemblies at certain times of day or in particular locations, shall be permitted only as a measure of last resort, where the ban in question complies with the principle of proportionality**. The holding of assemblies in public areas in the proximity of residential areas, as well as the holding of nighttime assemblies, shall be handled on a case-by-case basis, rather than prohibited as such."*[526]

*"Any limitations imposed shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law. **The law shall not allow assemblies to be limited based on overly broad or vague grounds**."*[527]

Challenges and impact on civic space

The overly broad discretionary powers of the President to limit the right to peaceful assembly dangles dangerously over the Kenyan civic space like the proverbial sword of Damocles.[528] At the whims of a disapproving President, the enjoyment of this fundamental freedom can be snuffed out at any moment.

3.7 Penal Code

Provisions Affecting Freedom of Assembly

The Penal Code defines an unlawful assembly as such:

"When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in

[525] Section 4(2)(d)
[526] ACHPR Guidelines on Freedom of Association and Assembly in Africa, Par.83 [527] ACHPR Guidelines on Freedom of Association and Assembly in Africa, Par.85 [528] collinsdictionary.com

such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly."[529]

It also provides that "it is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid."

Extent of Compliance with International Human Rights Law

The definition of an unlawful assembly in the Penal Code is inconsistent with the ACHPR Guidelines which provides that:

"The right to freedom of assembly extends to peaceful assembly. An assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful.

a. 'Peaceful' shall be interpreted to include conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties.

b. Isolated acts of violence do not render an assembly as a whole non-peaceful"[530]

Challenges and Impact on Civic Space

The offence of unlawful assembly is routinely used in Kenya to frustrate the right to peaceful of assembly of civil society organizations. Numerous human rights defenders have been charged with this offence subsequent to a wide range of public demonstrations.

3.8 The Universities (Amendment) Act, 2016.

The main purpose of this act is to make better provisions for the advancement of university education in Kenya. The provisions of this act mainly apply to the commission for higher education, public and private Universities.

Provision Affecting Freedom of Association:

Section 18 (1C) of the Universities (Amendment) Act 2016[1] is to the effect that the election of the members of the student council referred to in subsection (1A), the students' association shall constitute itself into electoral colleges based on either academic departments, schools or faculties, as may be appropriate. Section 18 (1D) is to the students of each Electoral College constituted under subsection (1C) shall elect three representatives –

(a) from amongst persons who are not candidates under subsection (1A) ; and
(b) of whom not more than two-thirds shall be of the same gender.

Section 18 (1E) is to the effect that the representatives of each electoral college shall elect the members of the student council within thirty days of the election under subsection (1 D). Section 18 (F) is to the effect that the student council shall hold office for a term of one year and may be eligible for re-election for one final term.

3.7.6 Extent of Compliance with International Human Rights Law:

The provisions under section 18 of the Universities (Amendment) Act 2016 limit the

[1] http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2016/No._48_of_2016.pdf

fundamental rights and freedoms in international law and as such is largely not compliant with international human rights law.

Challenges and impact on Civic Space:

The provisions enshrined under section 18 of this act pose a huge challenge to civic space because they contravene Article 36 (2) of the Constitution of Kenya. This is premised on the fact that the provisions contained under section 18 (1C) restrict freedom of expression by compelling students to constitute themselves into electoral colleges based on either academic departments, schools or faculties. Student leaders from various Universities in Kenya view this provision as a deliberate attempt by the Government through legislation to compel them to join associations that is a clear violation of the provisions contained under Article 36 (2) of the Constitution of Kenya[2]. Additionally, these provisions pose a serious threat to the realization democratic rights as it essentially scrapped off the popular vote system and now introduces an electoral college that has been viewed as retrogressive and will negatively impact on future political processes in Universities.

3.9 The Public Health (Covid-19) Restriction of Movement and Related Measures) Rules, 2020.

The main purpose of this act is to make provisions for securing and maintaining health. On the 6th of April 2020, some provisions of this Act were amended through legal notice number 50 of 2020 that introduced the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules[3]. The amendments to certain provisions within this act were done as a result of the serious threats posed to health and lives of Kenyans by the spread of the Covid-19 pandemic.

Provision Affecting Freedom of Association:

Section 7 (1) of the Public Health Covid-19 Restriction of Movement and Related Measures) Rules, 2020[4] provides for prohibition of public gatherings. It's to the effect that save for funeral undertaken in accordance with sub-rule (2), any gathering as defined under rule 2 is prohibited during the restriction period

Extent of Compliance with International Human Rights Law:

The provisions under section 7(1) of the Public Health Covid-19 Restrictions of Movement and Related Measures Rules, 2020) limit the fundamental rights and freedoms in international law and as such is largely not compliant with international human rights law.

Challenges and impact on Civic Space:

The provisions under section 7 (1) of the Public Health Covid-19 Restriction of Movement and Related Measures Rules 2020 has been used to restrict human rights defenders and Kenyans from all walks of life from exercising their Constitutional right to assembly, demonstration, picketing and petition as enshrined in Article 37[5]. In the last one year, Law enforcement agencies have used these provisions in the pretext of dealing with risks posed by the Covid-19 pandemic to restrict the constitutional rights enshrined under Article 37, thus not only posing a serious threat to the exercise of fundamental rights and freedoms, but are also a serious threat to civic space.

[529] Section 78

[530] Paragraph 70

[2] http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf

[3] http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN50_2020.pdf

[4] http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN50_2020.pdf

[5] http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf

4 RECOMMENDATIONS

4.1 Recommendations Relating to Freedom of Association

Trustees (Perpetual Succession) Act

- The Trustees (Perpetual Succession) Act and the Trustees Act should be converted into a single piece of legislation, which includes recognition of unincorporated trusts in accordance with the ACHPR Guidelines mentioned hereinabove. This will eliminate confusion.

- There should be enhanced efficiency in the processing of applications for incorporation of trusts under the Trustees (Perpetual Succession) Act. The processing of pending applications should be expedited. A time limit should be set for the Registrar of Trusts to finalize the process of incorporation.

Societies Act and Associations Bill

- The proposed replacement of the Societies Act with the Associations Act should be expedited. However, the scope of the Associations Bill should be limited to institutions envisaged in the Societies Act. The definition of "associations" should be amended to exclude non- governmental organizations/public benefit organizations, trusts, companies, partnerships and professional associations already registered under other legislation.

- The Associations bill should make provision for recognition of unregistered and unincorporated associations in accordance with the ACHPR Guidelines.

- The minimum number of persons required to form an association should be reduced from ten to two in accordance with the ACHPR Guidelines.

- The scope of the powers and discretion conferred upon seemingly all-powerful Registrar in the Associations bill should be reduced and subjected to review by the tribunal set up by the bill particularly where they related to cancellation of registration. For instance, registration should not be cancelled merely on failure to submit documents.

- The imposition of criminal sanctions on the failure to submit documents to the Registrar of Associations under the Associations bill

should be dispensed with. Instead, such matters should be referred to the tribunal in a civil disputes setting.

- The Associations bill should not bar persons with past criminal convictions from holding office in associations except in conformity with the ACHPR Guidelines. Past criminal conviction of an official of an association should not be a ground for the registrar to refuse, suspend or cancel registration of an association.

Prevention of Terrorism Act

- Section 40C of this legislation should be amended to provide for promotion of cooperation with civil society organizations and international non-governmental organizations instead of approval of their activities by the National Counter Terrorism Centre. The NCTC should neither prevent nor determine the activities of local and international CSOs particularly where they relate to advocacy and human rights protection.

- Concerns on the legality of activities by CSO's working on counter-terrorism should be referred to courts instead of the NCTC.

Preservation of Public Security Act

- This pre-independence legislation should be reviewed holistically to reflect the reality in the present day constitutional and legislative context.

- Section 4(2)(e) should be repealed on account of the conferment of overbroad provision for prohibition of association by the President contrary to the ACHPR Guidelines.

Kenya Citizenship and Immigration Act

- The legislation should provide guidelines on the manner in which the Cabinet Secretary exercises his powers under the Act particularly compliance with court orders.

- Amendments to relevant legislation should be introduced to provide for stiffer penalties for public officials who fail to comply with court orders.

NGO Coordination Act

- Repeal of the NGO Act in tandem with the operationalization of the Public Benefit Organisations Act.

Public Benefit Organisations Act

- The Interior Cabinet Secretary should expedite the commencement of the PBO Act without further delay and implement the transitional provisions of the Act.

- Any minor amendments to the PBO Act (required to the extent of providing further clarification to existing provisions where necessary) and which do not marginally deviate from the intents and purposes of the Act should be deliberated and agreed upon in multi-stakeholder engagements.

- Development of regulations to bring any provisions of the PBO Act into effect should be informed by multi-stakeholder consultations to ensure that the regulations are consonant with the parent legislation.

Taxation Laws

- Enactment of the proposed Value Added Tax (Digital Marketplace Supply) Regulations (2019) should be shelved and subjected to wider public scrutiny, including consultation with civic actors as well as the consideration of human rights implications of the regulations.

- Amendment of the Income Tax Act, Value Added Tax Act and Customs and Excise Duties Act to harmonize provisions in these statutes with the provisions of the Public Benefit Organizations (PBO) Act providing tax exemptions and incentives for PBOs.

4.2 Recommendations Relating to Freedom of Expression

Kenya Broadcasting Corporation Act

- Amendment of the Kenya Broadcasting Corporation Act to be in line with international best practices and the Constitution of Kenya to transform the Corporation to a public service broadcaster and in turn safeguard its independence.

- Appointment of the Corporation's officials should be subject to a parliamentary vetting process to ensure that the Corporation is accountable to the Kenyan public.

Computer Misuse and Cyber Crimes Act

- Whereas it is hoped that the Court will make a decision that advances human rights and fundamental freedoms in the Bill of rights in the appeal by the Bloggers Association of Kenya against Petition No. 206 of 2019, the state should refrain from using the impugned sections of the Cyber Crimes Act to charge offenders and instead resort to less restrictive measures under other written laws.

Media Council Act

- Establish the independence of the Media Council of Kenya by transforming the Council to a Constitutional commission in accordance with Article 34 (5) of the Constitution.

- Increasing state funding to the Complaints Commission to strengthen its operational capacity efficiency as dispute resolution mechanism.

- Amend the Media Council Act to provide for clear grounds of removal of members of the Complaints Commission from office.

- Harmonize provisions of the Media Council Act and KICA to address the anomalies created by the duplicative roles of the Complaints Commission and the Multi-media Appeals Tribunal.

The Kenya Information and Communication Act

- Amendment of section 6 of KICA on appointment of members of the Board of the Communications Authority in conformity with the independence of the Communications Authority guaranteed under section 34 (5) of the Constitution of Kenya and provided under Section 5A of KICA.

    - Procedures for appointment of the Board should mirror those of appointment of the members of Media Council of Kenya by an independent multi- stakeholder as provided under the Media Council of Kenya Act.

- Expunge from the Act all sections declared to be unconstitutional vide court decisions in Petition No. 45 of 2016, Petition No. 214 of 2018 and Petition No.149 of 2015.

- Repeal section 102E (1) (f) imposing punitive sanctions for media enterprises and journalists of fines of up to Kshs. 20 million and Kshs. 500,000 shillings respectively for violations of KICA provisions.

- Harmonize provisions of and KICA and the Media Council of Kenya Act to address the overlaps in the regulatory roles of Complaints Commission and the Multi-media Appeals Tribunal.

Data Protection Act

- The state should ensure that adequate funding is provided to the Office of the Data Commissioner to expedite the operationalization of the Data Protection Act.

- Section 52 (2) of the Data Protection Act which provides exemptions to the requirements of processing personal data should include expand the scope for journalistic purposes to ensure that application of this provision does not unjustifiably limit exercise of the freedom of expression.[531]

[531] https://www.article19.org/wp-content/uploads/2019/11/Kenya-Data-Protection-Bill-2019-final-2.pdf

Huduma Bill

- The state should defer the bill to ensure extensive public participation owing to the myriad human rights concerns on the right to privacy and should harmonize any proposed provisions with the Data Protection Act.

- The state should establish "an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements" in accordance with the court's directive in Petition 56, 58 & 59 of 2019 (Consolidated).

Registration of Persons Act

- Establishment the office of the Commissioner of Registrar of Persons and development of clear guidelines for vetting procedures for registration of persons pursuant to the Act.

- Harmonize provisions of the Act with the Data Protection Act

- Revision of the Act to establish "an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements" in accordance with the court's directive in Petition 56, 58 & 59 of 2019 (Consolidated).

Statistics Act

- Amendment of Section 18 of the Statistics Act to provide clear procedures for by the Kenya National Bureau of Statistics Board on approval or disapproval of applications by any agencies in Kenya seeking to conduct a national or local survey.

- Harmonization of the roles of the KNBS Board and the National Council for Science and Technology Innovation (NACOSTI) in approving research relating to surveys.

- Civil society partnership with the Kenya National Bureau of Statistics to enhance the mainstreaming of human rights based approaches to statistical analysis and further disaggregation of data to further examine social inequalities, the status of minorities and social justice issues.

Defamation Act

- Amendment of the Defamation Act to include the definition of defamation and the related offences of libel and slander and the addition of public interest as ground for defence. The principle of proportionality should reflect amendments in the Act on awarding of damages.

The National Intelligence Service Act

- The National Intelligence Service Act, 2012 be amended to provide for a more elaborate and verifiable criterion for classification of information than the one provided therein and includes a framework for independent verification by citizens of Kenya. For instance, members of the public should be permitted to present petitions before Parliament for such verification or compulsion of disclosure of information that has been unnecessarily classified by NIS.

- There should be provision for declassifying information that no longer needs to remain secret as is the case in advanced jurisdictions.

Books and Newspapers Act

- This pre-independence legislation should be reviewed in its entirety taking into account the current constitutional, legislative and socio-political context.

- Without prejudice to the foregoing, the requirement under Section 11 for require publishers of newspapers to execute a bond of Ksh. 1 million as security for damages, monetary penalty for an offence and costs, should be repealed. This should be a preserve of the court.

Access to Information Act

- The Act should make special provisions for expedited processing of urgent applications.

- The Cabinet Secretary should make regulations under section 26 of the Act for better implementation of the legislation.

- The Commission for Administrative Justice should be required to publish and disseminate the reports on the extent of compliance by private and public institutions with the Act.

Prevention of Terrorism Act

- Section 30A and 30F of the Act should be repealed given that they

were declared unconstitutional.

- To comply with the ACHPR Guidelines, section 40C should be amended to delete the requirement for CSO's and international NGO's to seek approval from and report their activities to the National Centre for Counter Terrorism.

Witness Protection Act

- This legislation should be amended to provide for a better mechanism for accountability of the Witness Protection Agency's activities to members of the public in light of the opaque nature of its operations.

Whistleblowers Bill

- This bill should be reviewed to exclude the Whistleblowers Reward Fund, particularly the provision for the allocation of a percentage of the recovered assets and money to whistleblowers who give information that leads to recovery of the same. The proposed fund ought to be replaced with a national recognition of honour for whistleblowers for safeguarding national values and principles.

Penal Code

- Having been declared unconstitutional, section 66A should be repealed by Parliament.

- Defamation should be decriminalized in conformity with the recommendation made by the African Commission on Human and Peoples' Rights in its Concluding Observation on Kenya's 8th to 11th report.

4.3 Recommendations Relating to Freedom of Assembly

Preservation of Public Securities Act

- The overbroad provisions of the Act that give room for blanket ban of assemblies should be amended to reflect the standards set by the ACHPR.

Penal Code

- The definition of "unlawful assembly" should be reviewed to safeguard the right to peaceful assembly as envisaged in the ACHPR Guidelines.

Protected Areas Act

- This pre-independence legislation should be reviewed holistically to adapt it to the current constitutional, legislative and socio-political context.

Public Order Act

- The Public Order Act necessitates an overhaul to expunge provisions that are anachronistic to the current constitutional dispensation and international and regional human rights standards on the freedom of assembly. The Public Order (Amendment Bill) 2019 should be shelved to facilitate a comprehensive revision of the Act.

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