



## Legal and Regulatory Frameworks Affecting Civil Society Organisations' Online and Offline Activities in Kenya

### Credits:

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## 1.0 Introduction

The cornerstone of a free and democratic society is a vibrant civil society and independent media. Civil society, human rights defenders and the media continue to be key actors in driving social change, whether within their countries or at the global level. They play an important role in the provision of services to the public, keeping them informed, engaged and where necessary, mobilising them to take action. They also monitor the implementation of international human rights standards; provide oversight and actively advocate for citizen engagement, transparency and accountability in governance and the management of resources. More importantly, they work closely with the people at the grassroots level to deliver services, educate communities and defend their rights. In a nutshell, the roles can be summarised as: watchdog, advocate, service provider, expert, capacity builder, incubator, citizen champion, representative, solidarity supporter and definer of standards.

An enabling environment for civil society is critical to ensure that the political and policy context does not interfere with the operations of civil society and the media. According to the CIVICUS Civil Society Index 2008–2011, only 8% of civil society organisations (CSOs) in 33 countries believed that the legal and policy environment for civil society was fully enabling for their operations.<sup>1</sup>

The origins of the civil society movement in Kenya can be dated back to the 1920s with the emergence of self-help groups and welfare societies.<sup>2</sup> A 2013 report by the Non-Governmental Organisations (NGO) Coordination Board showed that 8,260 civil society organisations contributed approximately 80 billion Kenya shillings (US\$800 million) to the national economy and employed 200,000 people.<sup>3</sup> Further, sector financing grows annually by 12% with the number of NGOs increasing at an annual rate of 500 organisations, the report indicated.

Recent statistics indicate that Kenya ranks number 145 out of 182 countries covered in the UNDP Human Development Indicators (2015).<sup>4</sup> It scored 36.54/100 in the World Bank Rule of Law Index (2015);<sup>5</sup> and 51/100 in the Freedom in the World 2016 report, in which 0 was most free. It was ranked as “free” in the Freedom on the Net 2016 report.<sup>6</sup>

Today, Kenya’s civil society is one of Africa’s bravest and most vocal. This can be attributed to the enlarged civic space in the country following the adoption of the country’s 2010 constitution that guaranteed various rights and freedoms. Thus, civil society has become vigilant in their work, especially about holding the government and key institutions accountable for their actions. Today, civil society activism has

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<sup>1</sup> World Economic Forum, 2013, The Future Role of Civil Society,

[http://www3.weforum.org/docs/WEF\\_FutureRoleCivilSociety\\_Report\\_2013.pdf](http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf)

<sup>2</sup> CSO Reference Group, 2013, What is the likely impact of the Statute Law (Miscellaneous Amendments Act 2013) on Kenya?, <http://pboact.or.ke/resources/documents/category/7-statements?download=29:what-is-the-likely-impact-of-the-statute-law-miscellaneous-amendments-act-2013-on-kenya>

<sup>3</sup> Ibid. 2

<sup>4</sup> UNDP Human Development Indicators, 2015, U<http://hdr.undp.org/en/countries/profiles/KEN>

<sup>5</sup> World Bank, 2015, World Bank Rule of Law Index, <http://info.worldbank.org/governance/wgi/index.aspx#reports>

<sup>6</sup> Freedom House, 2016, Freedom on the Net 2016, <https://freedomhouse.org/report/freedom-net/2016/kenya>

extended to the online space, given the increasing levels of access to Information and Communication Technologies (ICT).

As of September 2016, the number of internet users stood at 37.7 million, representing an internet penetration rate of 85.3%.<sup>7</sup> On the other hand, mobile subscriptions stood at 38.5 million representing a penetration of 87.3%. Many of the internet users are active on social media networks such as Facebook (5.5 million)<sup>8</sup> and Twitter (700,000).<sup>9</sup>

The internet has continued to provide a unique platform that enables individuals to seek, receive and impart information and ideas from any part of the world. Considering this, the internet is an enabler for the enjoyment of the rights to freedom of opinion and expression; right of access to information; right to freedom of assembly and association; the right to development; and other economic, social and cultural rights. The internet is also useful in the promotion of democracy, transparency, accountability and citizen engagement in governance.

In a resolution adopted in June 2016, the Human Rights Council recognised the global nature of the internet and affirmed that the same rights that people have offline must also be protected online, in particular freedom of expression.<sup>10</sup> This followed a 2011 report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, that made several recommendations for the promotion and protection of freedom of expression online.<sup>11</sup> Some of these included calls on States to: adopt privacy and data protection laws; decriminalise defamation; avoid measures to block or filter content on the internet; ensure access to the internet is maintained at all times; and take measures to make the internet widely available, accessible and affordable to all segments of the population. It is therefore crucial that civil society and the media harness the benefits of ICT to advance human rights.

More recently, the internet has played a major role in the organisation of prominent civic actions worldwide. Social movements such as the Arab Spring, Occupy Movement in the United States, Brazilian Protests in 2013, and the Gezi protests in Turkey have demonstrated the power of social media in organising civic actions. In Kenya, the internet has continued to play a powerful role in civic activism. Recent social media campaigns in response to key issues affecting the country, such as the #SomeoneTellCNN, #MyDressMyChoice, #HeForShe, #IsUhuruInKenya, #DeadBeatKenya #MPigs and #!millionforJadudi, among others, demonstrate the increased use of digital activism.

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<sup>7</sup> Communications Authority, 2016, First Quarter Sector Statistics Report for the Financial Year 2016/2017 (July-September 2016), <http://ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q1%202016-2017.pdf>

<sup>8</sup> Internet World Stats, <http://www.internetworldstats.com/stats1.htm>

<sup>9</sup> Hapa Kenya, The number of social media users in Kenya, <http://www.hapakenya.com/2014/10/13/number-of-social-media-users-in-kenya/>

<sup>10</sup> Article19, The promotion, protection and enjoyment of human rights on the Internet, Resolution A/HRC/32/L.20,

<sup>11</sup> Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

One of the challenges to digital activism is that it may lack leadership or trust and hence render it unable to sustain impact due to lack of organisation. Secondly, it suffers the risk of misinformation being spread by third parties. Thirdly, limited internet access can hamper the reach of digital activism as not all areas have access to the internet.

On the other hand, efforts to push back against civic activism by governments are increasing across the world. The result has been the shrinking of civic space which has been defined as an environment of reduced opportunities for civil society organisations and NGOs to undertake public actions. While the restrictions on civic space vary across countries, the following trends are emerging in many countries: exclusion from participation in policy-making; feeling unsafe or stigmatised; restrictions on peaceful protests; limitations and exclusion from funding; and restrictions through legislation.<sup>12</sup>

This analysis therefore seeks to assess how the existing legislative frameworks, particularly those relating to ICT, affect online and offline activities of civic society in Kenya. Through the analysis, CIPESA expects to understand civil society perceptions and attitudes toward the laws as well as the existing legal challenges on their work online and to make recommendations for advocacy strategies on how to address these concerns.

## **2.0 Findings**

Kenya's civil society has over the past two decades been one of East Africa's bravest and most vocal. However, over the years, this has been changing, with the voice of civil society slowly shrinking. Today, the relationship between civil society and government is one of suspicion and apprehension.<sup>13</sup> The Kenyan government has intensified its efforts to crack down on independent civil society. Some of the measures adopted include legislative hurdles, administrative harassment, and public campaigns to tarnish the reputation of CSOs.

### **2.1 Legislative Hurdles**

In a free and democratic society, the state should adopt legislation that furthers the dreams and aspirations of the people, including addressing their specific needs. Such laws should be informed by local, regional and international standards and best practices which are crucial benchmarks for assessing progress. Increasingly, laws are being used to negatively target the operations of civil society and the media. Examples of actions by Kenya in this regard include the adoption of legislation that limits constitutionally guaranteed rights and freedoms such as freedom of assembly and association, freedom of expression and opinion, and freedom of the media.

Other laws restrict operations of civil society by attempting to limit their financing and access to foreign funding, adopting unreasonable registration and burdensome reporting and compliance requirements, and allowing unlimited discretion of the sector regulators.

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<sup>12</sup> ICNL, 2015, Promoting an enabling civil society environment, <http://www.icnl.org/globalforum2015/wp-content/uploads/2015/04/LGBT-cso-s-enabling-environment-charhon-consultants2015.pdf>

<sup>13</sup> Simon Alison, 2016, Kenya: Think Again – Civil Society in Kenya is Down, but not Out, All Africa.com, <http://allafrica.com/stories/201601050964.html>

### 2.1.1 Freedom of Assembly and Association

**The Public Benefits Organisations Act (PBO)**,<sup>14</sup> was assented to in January 2013, to replace the outdated Non-Governmental Organisations Coordination Act, 1990 and introduce a new legal framework for the establishment, operation and regulation of public benefit organisations. However, the law is yet to come into force despite advocacy since 2013 by civil society organised as the Civil Society Organisations (CSO) Reference Group.<sup>15</sup> Civil society organisations are today set up under various laws such as the Societies Act; Companies Act; Trustees Act; and, Trustees Perpetual Succession Act. The failure of the government to set a commencement date for the PBO Act in effect violates the right to freedom of association guaranteed under Article 36 of the constitution.

Section 4 of this Act makes it the duty of the government to provide an enabling environment for public benefit organisations to be established and to operate. It is important to note that Section 1 of the Act provides that the Act could only come into operation “on such date as the Cabinet Secretary may, by notice in the Gazette, appoint”. The result is that since the law was assented to four years ago, the government has intentionally delayed gazetting the law and has instead made several attempts to amend it even before it comes into force.<sup>16</sup> One of the controversial proposals for amendment was the capping of external funding to a public benefit organisations to 15 percent of their total funding.<sup>17</sup> The amendment proposed under the Statute Law (Miscellaneous Amendments) Bill 2013, was subsequently rejected by Parliament.<sup>18</sup>

It is also worth noting that a Task Force set up in 2015 to gather public views on the suggested changes to the PBO Act recommended the prohibition of the registration of organisations working towards the promotion of gay rights. The NGO Coordination Board had denied registration to a gays’ lobby, a move the High Court in 2015 termed “unconstitutional” and ordered the Board to recognise and register the organisation.<sup>19</sup>

Civil society organisations also petitioned the High Court and successfully obtained orders in October 2016 mandating the Minister in-charge to gazette the date of entry into force of the law within 14 days of the decision.<sup>20</sup> The presiding judge termed the delay in gazetting the commencement date “an abuse of discretion” and deemed it “unconstitutional”. Further, the judge ruled that the decision to appoint a Task Force to review the Act before it became operational was illegal. Nonetheless, while the decision was

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<sup>14</sup> Public Benefits Organisations Act, 2013, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2018%20of%202013>

<sup>15</sup> CSO Reference Group, <http://pboact.or.ke/cso-reference-group>

<sup>16</sup> Sam Kiplagat, 2014, 100,000 jobs at risk over law on NGO financing, The Star, October 27, 2004, [http://www.the-star.co.ke/news/2014/10/27/100000-jobs-at-risk-over-law-on-ngo-financing\\_c1026689](http://www.the-star.co.ke/news/2014/10/27/100000-jobs-at-risk-over-law-on-ngo-financing_c1026689)

<sup>17</sup> Statute Law (Miscellaneous Amendments) Bill, 2013, [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/TheStatuteLaw\(MiscellaneousAmendments\)Bill2013.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/TheStatuteLaw(MiscellaneousAmendments)Bill2013.pdf)

<sup>18</sup> Jeremiah Kiplangát and John Ngirachu, 2013, “MPs throw out Bill targeting NGOs, Daily Nation,” December 04, 2013. <http://www.nation.co.ke/news/politics/MPs-throw-out-Bill-targeting-NGOs/-/1064/2099062/-/yestraz/-/index.html>

<sup>19</sup> Vincent Agoya, 2015, Judges order NGOs board to register rejected gays' and lesbians' lobby, The Nation, April 27, 2015, <http://www.nation.co.ke/news/Gays-win-big-court-battle/1056-2698776-i3uen/index.html>

<sup>20</sup> The Observatory, 2016, High Court orders the commencement of the PBO Act without further delays, 1,000 days after its signing into law, November 04, 2016, <http://www.omct.org/human-rights-defenders/urgent-interventions/kenya/2016/11/d24042/>

widely welcomed, it is yet to be implemented three months later. As such, Kenyan civil society continues to work in a closing space with the current regulatory framework characterised by abuses and arbitrary actions towards CSOs.

Administrative harassment has been noted where the NGO Coordination Board has imposed additional conditions evidenced through long, unnecessary administrative procedures and unattainable demands by the regulator. For example, section 10(i) of the Non-Governmental Organization and Coordination Act requires applicants during application to “such as other information as the Board may prescribe”, while section 9 allows the Director to “request such further or better information on the proposed Organization as he may require”.

Additional forms of harassment include vague grounds for denial of registration, unchecked discretion in setting terms and conditions of registration, excessive scrutiny of operations, arbitrary raids and audits, personal intimidation and harassment, and the limitation of ability to set up local offices. For example, there is no criteria or guidelines on the nature of the terms and conditions that may be imposed on a certificate of registration granted under section 12 of the Act. Moreover, ‘national interest’ which is listed as a ground for refusal of registration under section 14 of the Act, is not defined. In addition, the Act does not provide a timeline within which the registration process should take.

In December 2014, the NGO Coordination Board de-registered 540 organisations for what it termed non-compliance with the law, accusing 15 of them of using their charitable status as a front for raising funds for terrorism.<sup>21</sup> The affected organisations included: - Médecins Sans Frontières, Concern Worldwide, Adventist Development, and Relief Agency International and Centre for Health Solutions, Kenya. A few months later in October 2015, the NGO Coordination Board issued a notice to deregister a total of 959 organisations for, among others, misappropriation, diversion and embezzlement of donor funds, undeclared foreign funding, money laundering and terrorism financing.<sup>22</sup>

It is clear from the nature of these mass de-registration exercises that the government was keen on clamping down on CSOs, without observing due process and by using simple administrative reasons to unreasonably justify the maximum penalty of de-registration.

***The Prevention of Public Security Act (PPSA)***<sup>23</sup> commenced in 1960 and among its key objectives are securing the fundamental rights and freedoms of the individual; securing the safety of persons and property; prevention of crime including unlawful attempts to overthrow the government or the constitution; and, the maintenance of the administration of justice. Section 4 of the Act permits the President to make orders and regulations for the preservation of public security.

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<sup>21</sup> Yves Niyiragira, Current Challenges Facing The Civil Society In Kenya, Fahamu Kenya,

[https://www.rosalux.de/fileadmin/rls\\_uploads/pdfs/sonst\\_publicationen/rls-onl\\_current-challenges-kenya.pdf](https://www.rosalux.de/fileadmin/rls_uploads/pdfs/sonst_publicationen/rls-onl_current-challenges-kenya.pdf)

<sup>22</sup> List of Kenyan NGOs that risk de-registration, The Standard, October 29th 2015,

<https://www.standardmedia.co.ke/article/2000181037/list-of-kenyan-ngos-that-risk-de-registration>

<sup>23</sup> Prevention of Public Security Act 2 of 1960, see text: <http://www.kenyalaw.org/lex//actview.xhtml?actid=CAP.%2057>

The regulations provide among others for the registration, restriction of movement (into, out of or within Kenya), and compulsory movement of persons, including the imposition of curfews, provided that a person's movement shall not be restricted on account of their political beliefs or activities. They also provide 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; and the control or prohibition of any procession, assembly, meeting, association or society.

Section 6 of the PPSA requires regulations made under it to be placed before Parliament for approval. Further, under section 7, regulations may also provide for the apprehension, trial, and punishment of persons including through the death penalty and the forfeiture of property connected with the offence.

Several individuals who were detained under this law in the past have successfully appealed their detention in the post-2010 constitutional era. These include cases such as *Joshua Thairu Muthiga v. Attorney General [2015] eKLR*<sup>24</sup> and *Lewis Wilkinson Kimani Waiyaki v Hon. Attorney General [2016] eKLR*.<sup>25</sup>

A recent case by the Law Society of Kenya challenging the constitutionality of a dusk-to-dawn curfew imposed in Lamu by the Inspector General of Police under the Act, was allowed with the High Court granting a conservatory order, stating that the "perpetual extension of the curfew should not be allowed in any open and democratic society based on human dignity, equality and freedom."<sup>26</sup>

**The Public Order Act**<sup>27</sup> regulates the conduct of public meetings and the imposition of curfews in the country. It provides for a notification system under section 3, where an organiser of a public gathering is required to notify the police (i.e. officer-in-charge of the police station in the area) of the intention to convene a gathering or hold a procession. The police may disperse such a gathering or procession where "there is clear, present or imminent danger of a breach of the peace or public order." Whereas freedom of association may be limited by statute, the police as a matter of practice routinely disperse public gatherings even when no such threat exists, especially where they concern issues the government of the day is sensitive towards.

**The National Police Service Act**<sup>28</sup> establishes the National Police Service,<sup>29</sup> whose mandate is generally the maintenance of law and order, investigation, prevention and detection of crime, collection of criminal intelligence, apprehension of offenders, among others. The Directorate of Criminal Investigations is charged with the responsibility of investigating serious crimes, keeping criminal records, collecting criminal intelligence, and conducting forensic analysis. It is important to note that the police have power

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<sup>24</sup> Joshua Thairu Muthiga v Attorney General [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/113091/>

<sup>25</sup> Lewis Wilkinson Kimani Waiyaki v Hon. Attorney General [2016] eKLR, <http://kenyalaw.org/caselaw/cases/view/124115/>

<sup>26</sup> Law Society of Kenya v Inspector General Kenya National Police Service & 3 others [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/108733/>

<sup>27</sup> The Public Order Act, [http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2056#part\\_VI](http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2056#part_VI)

<sup>28</sup> The National Police Service Act, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2011A%20of%202011>

<sup>29</sup> National Police Service, see: <http://www.nationalpolice.go.ke/>

under section 58 of this Act to arrest without warrant, detain such persons under section 59, and to search premises without warrants under special circumstances, as provided under section 60 of the Act.

Further, and despite Article 10 of the Constitution requiring public officers to implement the public participation framework, the government and some of its various agencies have adopted discriminatory practices by limiting the capacity of CSOs and media to participate in decision-making processes. This has been through failing to invite or involve organisations in key meetings or processes, non-responsiveness and lack of feedback to communication, giving short notices to meetings or unrealistic deadlines for feedback.

### 2.1.2 Freedom of Expression and Opinion

***The Kenya Information and Communication Act***<sup>30</sup> establishes the industry regulator, the Communications Authority, and aims to among others, facilitate the information and communications sector, including broadcasting, multimedia, telecommunications and postal services and electronic commerce. The law regulates the licencing of various service providers offering telecommunications, radio, postal, and broadcasting services.

Section 27A of the act requires telecommunication operators to register personal information of their subscribers' SIM cards and to keep this information in a secure and confidential manner. Further, it requires that such information may not be disclosed without the written consent of the subscribers, though it allows disclosure where requested by the regulator in the performance of its functions, or with respect to criminal or civil proceedings. Whereas this provision suggests the protection of the right to privacy of subscribers, it fails to provide a procedure for how such information may be requested, how consent of the subscriber is obtained, or the framework through which the operators can account for information requests received in respect of the information held by them.

Section 30 prohibits the modification of messages or interference with the contents of messages sent through a licenced communication system. Further, section 31 of the Act prohibits telecom operators from intercepting and disclosing the contents of messages sent through their systems. The offences are punishable on conviction by a fine not exceeding 300,000 Kenya shillings (\$3,000), or to imprisonment for a term not exceeding three years, or to both. The import of this provision is that intermediaries may be held liable for allowing illegal surveillance through their systems. The law also provides for a number of cybercrimes. Section 83W, for example, equally prohibits unauthorised access to and interception of any function of or any data within a computer system. The applicable penalty is a fine not exceeding 200,000 Kenya shillings (\$2,000) or to imprisonment for a term not exceeding two years or both. However, persons acting in reliance of any statutory power i.e. authorised personnel, which could include state agencies, are not liable under the section.

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<sup>30</sup> The Kenya Information and Communication Act, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%202%20of%201998>

The Act also establishes a seven-member Communication and Multimedia Appeals Tribunal under its section 102, whose mandate is to hear complaints regarding any publication by or conduct of a journalist or media enterprise; 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 any action taken, any omission made or any decision made by any person under this Act. The Tribunal under section 102E is empowered to make a variety of orders, including imposition of fines of more than 20 million Kenya shillings (\$200,000) on any media enterprise and not more than 5 million Kenya shillings (\$50,000) on any journalist found culpable.

The decisions of the Media Council can be appealed in both the Complaints Commission and the Multimedia Appeals Tribunal, while decisions made in the Complaints Commission and the Tribunal decisions may be appealed in the High Court. This tribunal becomes an additional and unnecessary body to regulate journalistic conduct and media in addition to the already existing Media Council, Complaints Commission under the Media Council Act, and the Communications Authority. The singular maximum fine the Tribunal may impose is excessive and punitive and as such may curtail the profession given the threat of the sanction.

Before section 29 of the Act was declared unconstitutional, a number of bloggers had been arrested and charged in court for the transmission of “offensive” messages and “misuse of telecommunication system,” acts which the controversial provision prohibited. When it was operational, the provision was used to arrest and detain bloggers and social media users for online commentary which were critical of high ranking government officials who allegedly abused their offices, such as in the cases of bloggers Robert Alai, Cyprian Nyakundi, and Elijah Kinyanjui.<sup>31</sup>

**The Penal Code** has recently come under criticism for containing outdated and unconstitutional provisions. Human rights advocates are calling for the repeal of criminal defamation provisions in statutes across the world. A Joint Declaration by the International Mechanisms for Promoting Freedom of Expression stated that criminal defamation was “not a justifiable restriction on freedom of expression”, adding that “all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>32</sup>

In February 2017, the High Court in *Jacqueline Okuta & another v Attorney General & 2 others* declared the said section 194 of the Penal Code unconstitutional and invalid to the extent that it covered offences other than those contemplated under Article 33 of the constitution and therefore halted the continued enforcement of the provision.<sup>33</sup> The provision prohibited defamation and categorised libel as a misdemeanour generally punishable by imprisonment for a term not exceeding two years or with a fine,

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<sup>31</sup> Article 19, Freedom of Expression in Eastern Africa,

<https://www.article19.org/resources.php/resource/38251/en/newsletter-freedom-of-expression-in-eastern-africa>

<sup>32</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration by the International Mechanisms for Promoting Freedom of Expression <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&>

<sup>33</sup> *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR, <http://kenyalaw.org/caselaw/cases/view/130781/index.php?id=3479>

or with both. In making its finding, the court declared that: “the invocation of criminal defamation to protect one’s reputation is in my view unnecessary, disproportionate and therefore excessive and not reasonably justifiable in an open democratic society based on human dignity, equality and freedom.”

Further, section 66A of the code prohibits the publication, broadcast or distribution of “insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public”. This offence is punishable by a fine not exceeding 5 million Kenya shillings (\$50,000) or imprisonment for a term not exceeding three years or both. The provision further prohibits the publishing or broadcast of any information which “undermines investigations or security operations by the National Police Service or the Kenya Defence Forces”. This offence is punishable with a fine not exceeding five million shillings (\$50,000) or imprisonment for a term not exceeding three years, or both. In addition, section 132 of the code criminalises the undermining of the authority of a public officer.

Whereas the provision has further limits on freedom of expression and freedom of the media under Articles 33 and 34 of the Constitution, the descriptions of the offences are overly broad and subjective, leaving then open to wide interpretation. In addition, they would interfere with the ability of the media to carry out their work as there is no standard set for what would be described as “undermining” while also interfering with the right of the public to information. Moreover, the punitive penalties set under the provision would constitute an additional chilling effect on freedom of expression and the media.

**The Media Council Act**<sup>34</sup> establishes the Media Council of Kenya and the Complaints Commission to regulate the conduct and operations of local and foreign journalists, media practitioners and media enterprises. Both the Media Council and the Complaints Commission are required by section 11 and section 30 respectively, to be independent of control by government, political or commercial interests. Section 45 of the Act requires journalists and media enterprises to maintain professional and ethical standards and comply with the code of ethics set out in the second schedule to the Act.

The nine-member Media Council is responsible for, among others, protection of the freedom and independence of the media; prescription of media standards, including for training; regulation of ethical and disciplinary standards; accreditation of journalists; and dispute resolution.

On the other hand, the seven-member Complaints Commission is mandated under section 31 of the Act to handle disputes between the government and the media, between the public and the media and intra media on ethical issues; ensure adherence to high standards of journalism under the code of conduct for the practice of and the achievement of impartial, speedy and cost effective settlement of complaints. The Commission is empowered to make various orders, including apologies, declarations, reprimands, suspension, recommendations and fines of up to 100,000 shillings (\$1,000) for a journalist, and 500,000 shillings (\$5,000) for a media enterprise.

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<sup>34</sup> Media Council Act, <http://www.kenyalaw.org/lex//actview.xhtml?actid=No.%2046%20of%202013>

The dispute resolution functions of the Media Council and the Complaints Commission appear to be duplicative and as such may cause confusion as to which organ one should approach. Furthermore, the multiplicity of institutions regulating journalists and the media undermines media freedom as they add unnecessary compliance burdens on journalists and media enterprises. It is also important to note that these are statutory bodies and the needs of the media industry would best be served through self-regulation. Moreover, the development of the Code of Conduct by Parliament, which forms part of this Act, essentially denies the media the opportunity to self-regulate.

Furthermore, journalists critical of the government reported an environment of increasing self-censorship. Cases include:

- Popular cartoonist Gado,<sup>35</sup> is alleged to have left the Nation Media Group having served for more than a decade following alleged government pressure on the company.<sup>36</sup>
- Denis Galava, a Special Project Editor at the Daily Nation, was sacked for an editorial that was critical of the government over its performance on security, unemployment, economy and corruption.<sup>37</sup>
- Yassin Juma, a freelance journalist, was taken in for questioning over a social media post regarding an attack on Kenya Defence Forces soldiers in Somalia.<sup>38</sup>

Meanwhile, the centralisation of government advertising and the transition to digital broadcasting are causing unease in the media. A number of mainstream media entities have been forced to re-organise their businesses and in turn either shut down operations or retrench staff. For example, in July 2016, Nation Media Group shut down its media outlets such as QTV, Nation FM and Rwanda-based K FM.<sup>39</sup> In October the same year, it was reported that Royal Media Services had sacked close to 50 employees, in what the company said was a result of developments in the broadcasting industry that had affected the business environment.<sup>40</sup>

**The draft Films, Stage Plays and Publications Bill 2016**<sup>41</sup> developed by the Kenya Film Classification Board (KFCB) proposes to regulate the creation and distribution of films, classification of broadcast and online content, advertisements, print publications, stage plays and registration of cinemas. Key proposals in the draft bill include the requirement for film certificates before filming; requirement for police officers to be

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<sup>35</sup> Gado Cartoons. See: <http://gadocartoons.com/>

<sup>36</sup> Freedom House, 2016, Freedom on the Net – Kenya, <https://freedomhouse.org/report/freedom-press/2016/kenya>

<sup>37</sup> Article 19, Freedom of Expression in Eastern Africa, <https://www.article19.org/resources.php/resource/38251/en/newsletter:-freedom-of-expression-in-eastern-africa>

<sup>38</sup> Committee to Protect Journalists, 2016, Kenya detains blogger for two days, <https://cpj.org/2016/01/kenya-detains-blogger-for-two-days.php>

<sup>39</sup> Rawlings Otieno and Graham Kajilwa, 2016, Nation Media Group shuts down TV and radio stations, The Standard, July 1st 2016, <https://www.standardmedia.co.ke/article/2000207137/nation-media-group-shuts-down-tv-and-radio-stations>

<sup>40</sup> Royal Media Services To Sack Over 50 Employees, who Work For Citizen and Vernacular Radio Stations, VENZA News, <http://venasnews.co.ke/2016/10/26/royal-media-services-sack-50-employees-work-citizen-vernacular-radio-stations/>

<sup>41</sup> Draft Films, Stage Plays and Publications Bill 2016, <http://www.ifree.co.ke/wp-content/uploads/2016/11/DRAFT-BILL-KFCB-21-7-Draft-10-1.pdf>

present in the making of certain films; classification of films; and various restrictions on the public display and distribution of films.

Part VI of the draft bill introduces liability for internet intermediaries such as Internet Service Providers (ISPs), for content on their platforms. Clause 39, requires ISPs to take reasonable steps to prevent the use of their services for hosting or distributing pornography, radicalisation materials, glamorisation of use of drugs and alcohol, hate speech and demeaning any religion and community. Further, it requires ISPs to be registered, and all content exhibited, distributed or streamed through their platforms to be classified, and to comply with the law. A penalty of 2 million Kenya shillings (\$20,000) or a term of imprisonment not exceeding two years, or both, would apply in case of breach.

Increasingly, civil society use films, stage plays and the internet to advance their advocacy on key issues affecting human rights, governance and development. These mediums provide an important platform for the realisation of the rights to freedom of media, information, expression and opinion. Therefore, introducing additional regulation would affect their ability to deliver key messages to the masses. Further, to place a burden on ISPs to assess and determine the suitability of content flowing through their networks would amount to transferring the responsibility of regulation to the ISPs as opposed to the KFCB.

This controversial Bill has been widely rejected by sections of the Kenyan public and stakeholders in the creative sector as being retrogressive and draconian.<sup>42</sup> The KFCB had unpopularity called for the regulation of modern technology, based on what the Board termed as “the challenges they posed”.<sup>43</sup> A wide section of stakeholders felt that the KFCB was keen on expanding its mandate from film classification to content police.<sup>44</sup> Following sustained advocacy and given the lack of public participation in the development process of the draft Bill, the Ministry of ICT, the Board and the stakeholders agreed to review the contentious provisions.

***The Prevention of Terrorism Act***<sup>45</sup> was passed in 2012, in response to the increasing terrorist activities in Kenya at the time. The law empowers the Cabinet Secretary on the recommendation of the Inspector-General of Police, to issue an order, under section 3 of the Act, declaring an entity a terrorist group.<sup>46</sup>

In June 2015, the High Court ruled in favour of Haki Africa and Muslims for Human Rights (MUHURI),<sup>47</sup> barring the Kenyan government from declaring the two organisations terrorist groups, a move that had been widely criticised.<sup>48</sup> The organisations’ accounts were frozen and their licences cancelled by the NGO Coordination Board in May of the same year in what was seen as an effort to clamp down on the activities

<sup>42</sup> Hivisasa, Stage Plays and Publication Bill 2016 draconian, retrogressive, <http://www.hivisasa.com/wb/kiambu/news/174416>

<sup>43</sup> Maurice Alal, 2016, Ezekiel Mutua defends bills says media will not be gagged, The Standard, November 08, 2016 [http://www.the-star.co.ke/news/2016/11/08/ezekiel-mutua-defends-films-bill-says-media-will-not-be-gagged\\_c1452276](http://www.the-star.co.ke/news/2016/11/08/ezekiel-mutua-defends-films-bill-says-media-will-not-be-gagged_c1452276)

<sup>44</sup> Hapa Kenya, 2016, KFCB agrees to scrap controversial film bill & start the process afresh, <http://www.hapakenya.com/2016/10/11/kfcb-agrees-to-scrap-the-controversial-film-bill-start-the-process-afresh/>

<sup>45</sup> Prevention of Terrorism Act, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2030%20of%202012>

<sup>46</sup> Section 2 of the Prevention of Terrorism Act, defines a terrorist group as “an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act.”

<sup>47</sup> BBC News, 2015, Kenya court rules Haki Africa and MHR not terrorists, <http://www.bbc.com/news/world-africa-33092786>

<sup>48</sup> Joint Statement of Civil society organizations, see: <http://pboact.or.ke/resources/documents/category/7-statements?download=58:statement-on-intimidation-of-human-rights-organizations>

of civil society organizations.<sup>49</sup> The penalty for being a member of a terrorist group under the Act is imprisonment for a term not exceeding 30 years.

The Act prohibits any person from broadcasting any information which undermines investigations or security operations relating to terrorism, publishing or broadcastings photographs of victims of a terrorist attack without the consent of the National Police Service. These offences are punishable by an imprisonment term of three years or a fine of 5 million Kenya shillings (\$50,000), or both. This provision interferes with the freedom of the media to cover ongoing events and may have a chilling effect on freedom of expression.

There is no procedural direction under the law to provide for how the consent of the police should be obtained, and on the threshold for what would constitute “undermining” of investigations vis-à-vis the public’s right to know. Whereas counter-terrorism measures require that terrorist activities are denied publicity, and not amplified by the media, this goal can be achieved better through the sensitisation of the media to enable them report on terror incidences without aggravating the situation and promoting radicalisation.

In January 2016, a Kenyan journalist and blogger, Yassin Juma, was arrested and detained by Kenyan security agents for posting photos of the aftermath of an attack against Kenyan soldiers in Somalia by Al Shabaab militants.<sup>50</sup> Following the incident, the Inspector General of the National Police Service was quoted as warning that the police would deal firmly with people who were “using media freedom to spread images that glorify terrorists”. The recent arrest and detention in Uganda of Joy Doreen Biira a news reporter with NTV Kenya in November 2016,<sup>51</sup> is a demonstration of how journalists in the ordinary course of work may come into conflict with the terrorism laws and how actions by agencies were being replicated in the region. The arrest sparked outrage<sup>52</sup> in Kenya and across the region including sparking online protests through the hashtags such as #FreeJoyDoreen and #JournalismIsNotaCrime which trended on popular social media site Twitter. The Uganda born journalist who works in Kenya was arrested, detained and charged in Uganda with the offence of abetting terrorism, where she was alleged to have taken photos and posted comments on social media regarding mass killings in the Ugandan town of Kasese, where 55 people were killed.<sup>53</sup> The outrage was a demonstration of the increased consciousness and solidarity of journalists in Kenya and the region against the abuse of counter-terrorism and security legislation to muzzle freedom of the media.

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<sup>49</sup> Justus Wanga, 2015, NGOs lose licences over terrorism claim, The Daily Nation, MAY 27 2015,

<http://www.nation.co.ke/news/NGOs-lose-licences-over-terrorism-claim/1056-2731888-nudb7c/index.html>

<sup>50</sup> Angira Zadock, 2016, Journalist Arrested After Posting Photos Of Attack On KDF Camp, Nairobi News, January, 24, 2016,

<http://nairobi.news.nation.co.ke/news/journalist-arrested-after-posting-photos-of-attack-on-kdf-camp/>

<sup>51</sup> Judy Nguta, 2016, Doreen Biira released from police custody, The Standard, November 28, 2016,

<https://www.standardmedia.co.ke/article/2000225070/joy-doreen-biira-released-from-police-custody>

<sup>52</sup> Elsa Buchanan, 2016 Arrest of KTN journalist Joy Doreen Biira in Uganda's Rwenzururu kingdom sparks outrage, International Business Times. November 18, 2016, : <http://www.ibtimes.co.uk/arrest-ktn-journalist-joy-doreen-biira-ugandas-rwenzururu-kingdom-sparks-outrage-1593765>

<sup>53</sup> Human Rights Watch, Uganda: Ensure Independent Investigation into Kasese Killings,

<https://www.hrw.org/news/2017/03/15/uganda-ensure-independent-investigation-kasese-killings>

***The National Cohesion and Integration Act No. 12 of 2008***, was adopted in the aftermath of Kenya's 2007-2008 post-election violence. The Act's purpose is to encourage national cohesion and integration by outlawing discrimination on ethnic grounds and providing for the establishment, powers and functions of the National Cohesion and Integration Commission.

Moreover, the Act in Section 13 states that the offence of hate speech occurs where a person: uses threatening, abusive or insulting words or behaviour, or displays any written material; publishes or distributes written material; presents or directs the public performance of a play; distributes, shows or plays, a recording of visual images; or provides, produces or directs a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour if such a person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred<sup>54</sup> is likely to be stirred up. The offence is punishable by a fine not exceeding 1 million Kenya Shillings (\$10,000) or to a term of imprisonment not exceeding three years or to both.

Further, the Act under section 62 imposes liability on newspapers, radio stations or media enterprises that publish utterances deemed to constitute the offence of ethnic or racial contempt. The offence is punishable by a fine not exceeding 1 million shillings (\$10,000).

### **2.1.3 Right to Data Protection and Privacy**

Section 35 of the Prevention of Terrorism Act allows the limitation of the rights to privacy;<sup>55</sup> rights of arrested persons; freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under the Act; freedom of security of a person to the extent of allowing investigations under the Act; and the right to property.

Section 36 of the Act further grants the police power to intercept communications, upon obtaining an ex parte interception of communications order from a Chief Magistrate or a High Court Judge, with the consent of the Director of Public Prosecutions. Intercepting communication other than through the outlined procedure under the section attracts an imprisonment for a term not exceeding ten years or to a fine not exceeding 5 million Kenya shillings (\$50,000) or to both.

However, in 2014, a new provision- section 36A - was introduced that negates the procedure provided under section 36. The new provision grants National Security Organs the power to intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary.

These powers are too broad, and since the procedures are yet to be prescribed, it leaves the implementation measures without any oversight mechanism, sufficient safeguards or means for redress in case of breach. This provision weakens the protection of the right to privacy under the constitution.

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<sup>54</sup> The term "ethnic hatred" under the Act, means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

<sup>55</sup> It allows a person, home or property to be searched; possessions to be seized; the privacy of a person's communication to be investigated, intercepted or otherwise interfered with.

Despite the introduction of these provisions being challenged, the High Court declined to overturn them, stating that there were sufficient safeguards within the law.<sup>56</sup> Civil society therefore needs to be vigilant and advocate for the publication of the regulations proposed under section 36A.

***The National Intelligence Service Act, 2012*** establishes that National Intelligence Service (NIS), and regulates their functions, organisation, administration and oversight.<sup>57</sup> Formerly known as the National Security Intelligence Service (NSIS), the Directorate of Security Intelligence (DSI) and the “Special Branch”, the agency is responsible for security intelligence and counter-intelligence to enhance national security in Kenya. It is worth noting that the current and several former Director-Generals of the agency have been drawn from within senior ranks of the military,<sup>58</sup> a continuation of militarisation of the leadership of key security agencies.<sup>59</sup>

Despite the growing concerns over surveillance and interception of digital communications, the Act under section 36 allows the limitation of the right to privacy set out in Article 31 of the Constitution, in respect of a person who is subject to investigation by the Service or who is suspected to have committed an offence. Further, it allows the privacy of a person’s communications to be investigated, monitored or otherwise interfered with, provided a High Court warrant and the written authorisation of the Director-General are obtained, as stipulated under section 42.

It is worth noting that section 51 of the Act prohibits members of the service from subjecting any person to torture, cruel, inhuman or degrading treatment. Furthermore, the Act provides an elaborate oversight mechanism over the functions of the Service. This include bodies such as the National Intelligence Service Council; Parliament, through the relevant Committee; and, the Intelligence Service Complaints Board, which receives, enquires into complaints against the service and makes recommendations.

This notwithstanding, a Citizen Lab research in 2015 found that the agency owned a range of IP addresses associated with FinFisher, a sophisticated and user-friendly spyware suite sold exclusively to governments, known to be used in high profile surveillance abuses.<sup>60</sup> Furthermore, in January 2017, it was reported that the Communications Authority had purchased a social media monitoring system for 600 million Kenya shillings (\$6 million) ahead of the August 2017 general election.<sup>61</sup> What is therefore emerging is that the government has deployed advanced surveillance equipment and now has capability to intercept and

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<sup>56</sup> Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 others [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/106083/>

<sup>57</sup> National Intelligence Service Act, 2012, <http://bit.ly/2rvtU0E>

<sup>58</sup> Goodman David, 2015, National Intelligence Service Director General, Major General Philip Wachira Kameru, <http://bit.ly/2sstFsr>

<sup>59</sup> The current Cabinet Secretary for Internal Security and Coordination of National Government, Joseph Nkaissey, is a former Major-General of the Kenya Army

<sup>60</sup> Citizen Lab, 2015, Pay No Attention to the Server Behind the Proxy: Mapping FinFisher’s Continuing Proliferation, <https://citizenlab.org/2015/10/mapping-finfishers-continuing-proliferation/>

<sup>61</sup> Edward Wanyonyi, 2017, Kenya buys Sh600M social media monitoring tool as people starve, The Standard, January 18th 2017, <https://www.standardmedia.co.ke/article/2000230286/opinion-kenya-buys-sh600m-social-media-monitoring-tool-as-people-starve>

infiltrate communication systems at will. Consequently, it is difficult to independently verify whether the responsible agencies comply with the legal requirements beforehand, given the potential for abuse and the inability of the oversight agencies to identify, or act on signs of misuse.

**Data Protection Bill, 2013**<sup>62</sup> is long overdue for adoption. The Bill seeks to give effect to the provisions of Article 31 of the Constitution on the right to privacy, and therefore provide a framework for the collection, retrieval, processing, storage, use and disclosure of personal data. The Bill enumerates the principles of data protection including the procedures and safeguards for the protection of the right to privacy including penalizing the unlawful collection of information. It also confers powers on the Commission for the Administration of Justice oversight and enforcement powers under Part III of the Act. These include power to investigate complaints under the Act, dispute resolution and settlement.

This law, if adopted, would be useful for not only the media and civil society, but also individual members of the public. It would reinforce the protection of the right to privacy in the country generally by setting the standard for the protection of the rights and stemming the abuse of personal data by institutions.<sup>63</sup> However, it would be important that it is reviewed before adoption to include references to electronic data, communications and records, which are especially vulnerable in the digital age.

**The Computer and Cyber Crime Bill, 2016**<sup>64</sup> proposes to introduce several cybercrimes and make provision for investigation procedures, including international cooperation and mutual legal assistance. The Bill unfortunately replicates several provisions of the Kenya Information and Communication Act (KICA) relating to cybercrimes and it is not clear whether the same would be repealed from KICA. Nonetheless, under Part II it criminalises offences such as cyber bullying and unauthorised access, interference and interception of computer systems. These offences ought to be clearly defined to avoid the ambiguity that currently characterises their definitions so as to ensure precise application, should the bill be adopted.

The bill further proposes an elaborate framework for investigation procedures under Part III, which include procedures for search and seizure of computer data, search warrants, preservation of traffic data, real-time collection of traffic data, interception of content data, penalties for obstruction and misuse, appeals and the limitation of liability for service providers. The provisions are generally compliant with international best practice as they, among others, provide specific criteria and conditions to be met, including the requirement for court-sanctioned warrants based on reasonable grounds and an appeal process. The provisions under this bill on the procedure for warrants relating to electronic communications are more comprehensive than those provided for under the Prevention of Terrorism Act,

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<sup>62</sup> Data Protection Bill, 2013,

[http://www.cickenya.org/index.php/legislation/item/download/299\\_b3de9506b20338b03674eacd497a6f3a](http://www.cickenya.org/index.php/legislation/item/download/299_b3de9506b20338b03674eacd497a6f3a)

<sup>63</sup> New law to punish people who disclose personal data without consent, Daily Nation. See:

<http://www.nation.co.ke/news/New-law-to-punish-people-who-disclose-personal-data/1056-2683828-8dlc7ez/index.html>

<sup>64</sup> Computer and Cyber Crimes Bill, 2016, <http://www.mygov.go.ke/wp-content/uploads/2016/07/MOICT-PUBLICATION-READY-COMPUTER-AND-CYBERCRIMES-BILL-2016-1-1-1.pdf>

and therefore, it would be appropriate to consolidate them into a single law, such as Computer and Cyber Crime bill, and repeal those under the Prevention of Terrorism Act.

#### 2.1.4 Right to Information

The right to information is provided for under the *Access to Information Act, 2016*<sup>65</sup> whose overall objective is to give effect to the right of access to information as provided under Article 35 of the constitution, including among others, through the provision of a framework for access to, and the disclosure of information held by public and private entities.

In section 4, the Act reiterates the right of citizens to access information held by the state or another person where such information is required for the exercise or protection of any right or fundamental freedom. Further, this right is not affected by any reason the person gives for seeking access, or the public entity's belief as to what those reasons are. This provision, together with section 5 which states the categories of information that is accessible, are enabling provision that civil society and media working on accountability can utilise to seek crucial information from the state.

The Act also amends the Official Secrets Act, which gags public officials from providing information by stating that its provisions are subject to Article 35 of the Constitution and the law relating to access to information.

However, the Act in section 6 limits access to information that would for example constitute unwarranted invasion of privacy of an individual, or national security and goes ahead to define the specific types of national security information to which access is limited. This provision appears to diminish the blanket excuse of 'national security' being used as a reason not to disclose information by the state, a challenge civil society and media have had over the years. More importantly, under section 8 the law provides for the application process and provides a 21-day timeframe within which public officials are required to make a decision on information requests, failure to which an applicant may appeal to the Commission on Administrative Justice and the High Court. This is an important provision as previously public bodies were not obligated to respond to information requests. However, the decision to provide or not to, remains discretionary.<sup>66</sup>

## 2.2 Government Propaganda

Some governments have conducted public campaigns to undermine the work, credibility, contribution and participation of civil society and media. Such campaigns are in some cases geared to diminish the role of civil society and media and discredit them in the eyes of the public. On a number of occasions, civil society in Kenya have been branded negatively with a view to tarnish their image in the face of the public. They have been named as supporters of terrorism and promoters of foreign interests.

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<sup>65</sup> Access to Information Act, 2016, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2031%20of%202016>

<sup>66</sup> Muthoki Mumo, 2016, Ezekiel Mutua In Humiliation After CS Vows to Amend His 'Insane' Bill, October 25, 2016, Nairobi News, <http://nairobinews.nation.co.ke/news/ezekiel-mutua-humiliation-cs-vows-amend-insane-bill/>

In 2014, the then Chairman of the National Security Advisory Committee (NSAC), Francis Kimemia, accused the United States Agency for International Development (USAID) of trying to “destabilise” the country by funding “clandestine” anti-government protests that tarnished the country’s and leaders’ reputations regionally and internationally.<sup>67</sup> This followed a demonstration by civil society organisations against government corruption, lack of safety in public spaces, high unemployment and poverty. The US Ambassador to Kenya, Robert Godec, dismissed these claims.<sup>68</sup>

A separate statement later in the same year by the then NGO Council National Chairman Wilson Kipkazi claimed that some NGOs had been funded with millions of shillings and were working to undermine the Jubilee government.<sup>69</sup> The officials pledged to cooperate with the government to weed out suspect NGOs whose activities might endanger national security. The statement was viewed as a hint to a massive de-registration of some NGOs, which happened months later.

The attitude of government towards the media has been hostile with threats issued by the successive governments to introduce laws and policies to clamp down on the media. The Jubilee government, which came into power in March 2013, is no different. The President and his Deputy in diverse occasions in 2015, declared that they did not read newspapers in the country as they were only fit for wrapping meat.<sup>70</sup> Further, the President rubbished the work of journalists, stating that most media reports and stories were false.

The government has also deployed on social media bots to create trending hashtags in response to criticism and calls for more government accountability. There are alleged to be 36 or more Twitter accounts run by government operatives specifically to advance positive government messaging and propaganda, and at the same time, attack and ridicule social media users critical of the government, or change narratives to suit their end.<sup>71</sup> The hashtag #evilsociety was for example used to demean the work of a section of civil society, while the hashtag #OperationLindaNchi was used to cover up allegations of human rights abuses by the police, in response to the hashtag #Kasaraniconcentrationcamp.

### 2.3 Public Perceptions

As part of this survey, CIPESA engaged representatives from the media, civil society and bloggers in focus group discussions to understand their perception on internet freedom in the country. Over a period of

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<sup>67</sup> AFP, 2014, Kenya lashes out at US over demonstrations, The Daily Nation February 13, 2014, <http://www.nation.co.ke/news/USAID-Demonstrations-Nairobi-United-States/1056-2205664-11q0o5/index.html>

<sup>68</sup> Ibid. 80

<sup>69</sup> Undermine state at your own peril, new NGO council boss tells groups, the Standard. See: [http://www.standardmedia.co.ke/mobile/?articleID=2000110342&story\\_title=undermine-state-at-your-own-peril-new-ngo-council-boss-tells-groups](http://www.standardmedia.co.ke/mobile/?articleID=2000110342&story_title=undermine-state-at-your-own-peril-new-ngo-council-boss-tells-groups)

<sup>70</sup> The Daily Nation, Uhuru maintains that newspapers are only good for wrapping meat, <http://www.nation.co.ke/video/1951480-2712484-jg91p4z/index.html>; Irony of Jubilee outburst on ‘meat wrappers’, Joe Ombuor, 2015, The Standard, May 16th 2015, <http://www.standardmedia.co.ke/article/2000162382/irony-of-jubilee-outburst-on-meat-wrappers>

<sup>71</sup> Kenya Today, 2015, Uhuru regime HIRES 36 BLOGGERS as online war with opposition RAGES , October 15, 2015, <http://www.kenya-today.com/news/government-hires-36-bloggers-as-online-war-with-opposition-rages>; The Star, 2015, Corridors of Power, The Star, February 08, 2017, [http://www.the-star.co.ke/news/2017/02/08/corridors-of-power\\_c1502363](http://www.the-star.co.ke/news/2017/02/08/corridors-of-power_c1502363)

two days, CIPESA met with journalists, bloggers and civil society representatives to discuss internet freedom in the country.

The participants pointed out that the internet played an important role in the lives. For some, it was a means of access to the world; a source of income; a tool for communication; and a place to connect, network and bring people together. This indicates that despite being from similar sectors, individuals have different uses and expectations of the internet. While recognising their differences, participants noted the need for co-existence of online communities, just as in offline society. However, they appreciated the need for rules of engagement and standards of conduct to ensure civility online.

The participants at the meetings expressed concern over the increasing efforts to claw back on their freedom of expression more so through the use of legislation and the subsequent prosecution of individuals.

Participants also observed that many bloggers and social media users were not aware of their rights online, or the various limitations to those rights. Further, they pointed out that some understood their rights online in the context of laws in other countries e.g. the United States, which have different standards on freedom of expression as compared to Kenya. As a result, they expressed themselves without considering the significance of local legislation which, as they came to learn, was laden with limitations on rights to freedom of expression and privacy.

On the right to privacy, participants discussed the conflict that existed when dealing with public officials and whether such officials were still entitled to such rights, given the public interest in their affairs. It was noted that the absence of a law to safeguard the privacy of individuals was inhibiting the protection of this right. Further, the participants were advised to balance carefully, the legal consequences of exposing the private acts of public officials and the public interest to know. They acknowledged the need to distinguish what was private and what was relevant for public consumption otherwise they would open themselves to law suits. Participants also expressed concern over the limited privacy protections available in some mobile applications and the role of intermediaries who profit from transacting with user information.

Moreover, it was noted that not all participants were aware of the various technical tools that were put in place by government agencies to regulate content online. The discussants noted that it was difficult at times to distinguish when, for example, filtering tools were used, as they often mimicked and could easily be mistaken for technical glitches such as slow network speeds or inaccessible websites. Therefore, it was noted that internet users needed to be aware of the various tools to defeat internet shutdowns, filtering of online content and similar limitations, and at the same time, to ensure their digital safety.

Lastly, they decried the lack of guarantees for safety for journalists and bloggers in the face of intimidation by state agencies through arrests and prosecution. However, it was worth noting that a provision on criminal defamation was declared unconstitutional by the High Court in February 2017. Despite this, it

was generally agreed that independent, credible and balanced reporting was critical to safeguard threats to media freedom.

### **3.0 Conclusions and Recommendations**

Across the globe, the power and influence of civil society is growing, while at the same time, the roles are changing. Therefore, the importance of civil society can no longer be ignored. Whereas there are efforts not only in Kenya, to restrict civil society, such efforts must be resisted. The country can only gain from having a strong, vibrant and dynamic civil society and independent media.

Civil society and the media must remain vigilant and monitor the use and abuse of legislative provisions and work towards mobilising advocacy and reforms. It will be important for them to remain alive to the provisions of the Constitution on the Bill of Rights; the Public Benefits Organisations Act on the date of entry into force; the National Prevention of Public Security Act on curfews; the Public Order Act on the conduct of public meetings; the Kenya Information and Communication Act on cyber offences and the complaints procedures before the Communication and Multimedia Appeals Tribunal; and the Penal code on libel and prohibited publications and broadcasts. Civil society should also be alive to provisions of the Media Council Act on the Code of Conduct and the dispute resolution process before the Media Council and Complaints Commission; the Prevention of Terrorism Act on prohibitions on broadcasting, police surveillance powers and the limitations of certain rights; and the National Cohesion and Integration Act on hate speech and offences imposing liability on media enterprises. Other provisions to be vigilant about and advocate against include those in the National Intelligence Service Act on surveillance and complaints procedure before the Intelligence Service Complaints Board; and the Access to Information Act on procedures to access information and the disclosure requirements. More so, they are encouraged to monitor the progress towards the adoption of Bills such as the Privacy and Data Protection, Computer and Cyber Crime, and Draft Films, Stage Plays and Publications.

To achieve this, the following measures are recommended.

#### **Civil society and the media should:**

- a) Increase vigilance on violations of human rights, speak out against the violations and make use of the constitution to defend rights through advocacy or litigation. This can be done by creating linkages between online and offline civil action and participation;
- b) Use the internet and related safety tools it offers to advance human rights. This should include increasing civil society and media's online presence, tools for reach through developing and disseminating information and educational resources such as newsletters, brochures, social media, digital resources;
- c) Advocate for legislation reforms to protect whistle-blowers;
- d) Build the capacity of social justice advocates on the use of ICT so that they integrate digital technologies in their work to deliver services to the public;

- e) Build the technical capacity of more individuals to understand ICT policy processes to enable them effectively engage in advocacy;
- f) Work as networks and build effective coalitions, including within the region, among civil society and with other sectors e.g. government, academia and the technical community as opposed to working disjointedly and in silos;
- g) Invest in evidence-based research to inform advocacy on key initiatives;
- h) Develop innovative and strategic responses to emerging challenges in the sector by for example bringing in new voices from other sectors and working closely with them;
- i) Work with government bodies to put in place frameworks to independently investigate attacks against civil society and the media;
- j) Pursue legal reform to remove obstacles to the various rights and freedoms under the constitution; including the development of standards and guidelines for the enjoyment of freedom of expression, assembly and association;
- k) Build bridges with government and end the mutual suspicion that characterises the relationship between civil society and the government;
- l) Adapt to the shifting global context by using technology to engage and inspire young people to join various civil society campaigns, causes or initiatives to promote human rights; and,
- m) Sensitise members of the public through feature programmes to enhance understanding of public participation, the law and internet freedoms including responsible use of the internet.

**The government should:**

- a) Fast-track the review of the ICT Policy 2006, by finalising and adopting the draft ICT Policy 2016;
- b) Harmonise scattered laws that relate to ICT and review those that may adversely affect internet freedom e.g. due to ambiguity of provisions, and ensure they comply with international best practice;
- c) Pass the Data Protection Bill 2012;
- d) Develop standards for recording open data that would make it easier for analysis and facilitate access to information requests;
- e) Build the capacity of judicial officers, prosecutors and police to understand cyber offences;
- f) Develop progressive jurisprudence to handle cyber offences;
- g) Ensure access to the e-government services in both urban and rural areas; and,
- h) Stop restricting, interfering, or unnecessarily controlling or placing barriers that affect the work or operations of civil society, media and bloggers.