

The logo for ARTICLE 19, featuring the text "ARTICLE 19" in white on a red, stylized banner.

## **ARTICLE 19 Individual Submission to the Universal Periodic Review of Kenya**

*For consideration at the 21<sup>st</sup> session of the UN Working Group in January–February 2015*

**14 June 2014**

### **Executive summary**

1. ARTICLE 19 welcomes the opportunity to contribute to the second cycle of the Universal Periodic Review (UPR) of Kenya. The submission considers Kenya's compliance with its international human rights obligations in respect of freedom of expression, information and association since the last UPR on the 6 May 2010.
2. During its first UPR review, Kenya accepted the following recommendations on freedom of expression and information, namely to:
  - Review its national legislation on freedom of expression so that it fully complies with the relevant provisions of the International Covenant on Civil and Political Rights, and ensure the effective protection of human rights defenders against harassment or persecution;
  - Enact as a matter of urgency the Access to Information Bill;
  - Investigate harassment and attacks against journalists and human rights defenders in order to bring those responsible to justice;
  - Extend an invitation to the Special Rapporteur for human rights defenders.
3. This submission presents an overview of ARTICLE 19's assessment of the State's implementation of these recommendations and makes recommendations to further improve Kenya's compliance with international obligations. In particular, it focuses on:
  - Cooperation with international human rights mechanisms
  - Access to information
  - Legal framework for freedom of expression
  - Attacks, harassment, and intimidation of journalists and human rights defenders
  - Freedom of expression online
  - Freedom of association

### **Cooperation with international human rights mechanisms**

4. While Kenya's reporting on international human rights treaty obligations has improved, the gap between reporting and implementation of recommendations made by treaty bodies remains stark.
5. On cooperation specific to freedoms of expression and information, Kenya is yet to extend official invitations for formal country visits to the UN Special Rapporteurs on freedom of opinion and expression or on human rights defenders, to assist with meeting its international human rights obligations. In June 2014, Kenya is reported to have extended an invitation for a formal country visit to the Special Rapporteur on the rights to freedom of peaceful assembly and of association, but a date for this visit has yet to be fixed.

### **Access to information**

#### Access to Information and Data Protection legislation

6. The Access to Information Bill 2013 and Data Protection Bill 2013 are yet to be tabled in Parliament. Efforts to enact an access to information law have been on-going for almost a decade, since the first

Draft Bill of 2005. The Constitution of Kenya 2010 guarantees the right of access to information and the right to privacy in Article 35 and Article 31 respectively.

7. Kenya continues to struggle with corruption. Transparency International's Corruption Perception Index 2013 ranked Kenya at 136 out of 177 countries surveyed. The public procurement sector is the most affected. The Anglo Leasing scandal is an example of corruption where public resources have been paid to phoney companies for services not rendered. In May 2014, the National Treasury paid over 8 million Euros to two Anglo Leasing affiliated firms that had allegedly obtained payout judgments against Kenya in British and Swiss jurisdictions. Such cases demonstrate the need for greater transparency and accountability that an access to information law would facilitate.
8. The State continues to enforce a number of laws with secrecy provisions contrary Article 35 of the Constitution. Section 7 of the Sixth Schedule of the Constitution requires that all existing laws in force continue to operate but must be construed with alterations to bring them into conformity with it. For example, the Public Officers Ethics Act, fails to make adequate provisions for access to information regarding declarations by public officials on their assets, income and expenses. It further criminalises with heavy penalties any disclosure by third parties receiving the declarations. Ensuring disclosure of this information is essential in the fight against corruption and fostering transparency and accountability. The Official Secrets Act places a blanket gag on possession, release, communication or transfer of official information. Similarly, a number of security laws such as the National Intelligence Services Act make the sector a secrecy enclave.

#### Limited progress on Enabling Access to Information and Transparency regimes

9. Kenya committed to the Open Government Partnership (OGP) in 2012. The OGP is a global multilateral initiative to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.
10. On 8 July 2011, Kenya launched an open data portal ([www.opendata.go.ke](http://www.opendata.go.ke)) to enable government agencies to publish data and statistics. The initiative has been welcomed as one of the most significant steps Kenya has made to improve governance and implement Kenya's constitutional guarantee of access to information. However, the portal is not frequently updated due to poor coordination and unwillingness of most state departments to proactively provide information.
11. Moreover, the government has not reported on the status of the implementation of the country action plan through which it made a commitment to enact the Access to Information Bill 2013 and Data Protection Bill 2013.

#### **Legal framework for freedom of expression**

12. Two controversial media laws came into force in January 2014: The Kenya Information Communications (Amendment) Act 2013 (KICA Act); and The Media Council Act 2013.
13. The main issues impeding media freedom contained in these Bills are provisions that:
  - Threaten media independence, allowing for undue control by government, political and commercial interests;
  - Introduce undue state involvement in media regulation;
  - Impose excessive fines on media outlets and journalists for professional breaches which have been equated with criminal offence within the KICA Act, and that undermine the independence of bodies dealing with complaints against the media.
14. Both laws are currently facing constitutional challenge by a coalition of media stakeholders before the Kenyan High Court. On 31 January 2014, the Court issued an injunction stopping their implementation until the matter is resolved.

15. Existing media laws in Kenya generally do not adhere to international and regional standards on freedom of expression that Kenya has committed to uphold.
16. In the Books and Newspapers Act 1960 (as amended):
  - Section 11 requires a bond of USD\$12,000 with sureties as security towards payment of any monetary penalty or damages that may be imposed before authorization to print a newspaper can be granted, and an individual may be banned forever from publishing a newspaper upon a conviction for second offence of not executing such a bond;
  - Sections 9 and 14 provide excessive fines and imprisonment as punishment for contravention of the Act;
  - Section 19 provides extensive discretion to police officers to seize any book or newspaper, wherever found, actually or reasonably suspected to have been printed or published in contravention of the law.
17. Similarly, section 90 of the Kenya Information and Communications Act 2009 provides powers to search and seize broadcast equipment for the purpose of any proceedings, and section 17 provides disproportionate criminal fines and imprisonment for various offences related to the use of radio frequencies.
18. Defamation remains a criminal offence in Kenya even after the repeal of sections 56, 57 and 58 of the Penal Code in the Statute Law (Miscellaneous Amendments) Act 1997. Journalists continue to be charged with “sedition” or “seditious libel” under Sections 194 and 196 of the Penal Code. Special protection is offered to the President, Cabinet Secretaries and Parliamentary officials in Section 198. This is contrary to regional and international human rights standards, such as African Union resolution on repealing criminal defamation laws in Africa (ACHPR/Res 169 2010) which urges States to ensure that public officials tolerate more criticism than ordinary citizens.
19. Freedom of expression is undermined through civil courts, which continue to award public officials disproportionate amounts in damages for civil defamation. This trend creates a chilling effect on freedom of expression. International standards require public officials to tolerate more criticism than ordinary citizens, and there should be defences in civil defamation laws to protect expression that is truthful, and in the public interest, which is currently not provided for in Kenyan law.

### **Attacks, harassment and intimidation of journalists and bloggers**

20. Journalists and bloggers continue to be victims of threats, physical assaults and killings mainly related to stories published about corruption by public officials and abuse of office. For example:
  - Francis Nyaruri, a correspondent with the *Weekly Citizen* newspaper was killed and his decapitated body found in a forest in January 2009. No one has been held accountable since, nor an inquest opened in the period under review.
  - On 6 September 2013, Robert Wanyonyi, a Kenya Television Network (KTN) reporter received threats following a story about mistreatment of a patient at a local district hospital. He had received similar threatening phone calls, including death threats, on 4 and 5 August 2013. In 2011 Wanyonyi briefly went into hiding after receiving repeated death threats connected to coverage of coffee theft at a factory in Bungoma County. To date, neither of these cases has been investigated.
  - On 16 November 2013, three journalists: Eric Wainaina of the Standard Group; Daniel Njenga of the Nation Media Group; and Joe Nyagah of Royal Media Services, were harassed by Thika East police officers, outside the police station, while covering a story about rival directors of land-buying companies. The officers accused them of being members of the Al-Shabaab terrorist group. Although the journalists were released, there has been no investigation into the harassment or intimidation that occurred.
  - On 10 April 2014, Vincent Mabatuka, a *Standard* newspaper journalist, received threatening text messages and phone calls following a story a week earlier entitled “Cry for justice by distraught residents of Kimoriot and Tuyobei Settlement Scheme” in Baringo County. The story led to negative

reactions from public officials who allegedly warned of dire consequences should he continue to write on land issues in the area. Mabatuka filed a police report, however the case is dormant.

### **Freedom of expression online**

21. In 2013, there were 16.4 million Internet users in Kenya compared to just 3 million in 2007, according to the Communications Commission of Kenya. As the Internet becomes a critical medium for sharing information, it is crucial that it is protected.
22. However, during the March 2013 general elections, the Kenya police and National Cohesion and Integration Commission made public their monitoring of online content for “hate speech.” While the curbing of hatred that constitutes incitement to hostility, discrimination or violence is a legitimate aim, there are no published guiding policies to ensure that such surveillance is guided by law and respects international human rights standards on the rights of expression and privacy.

### **Freedom of association**

23. The Public Benefits Organisations (PBO) Act 2013 received presidential assent on 14th January 2013. The law provides for the establishment and operation of public benefits organisations, currently known as non-governmental organisations (NGOs). However, over a year later, it has yet to be operationalised by the Cabinet Secretary for Devolution and Planning.
24. In November 2013, proposed amendments to the PBO Act were brought to parliament via the Statute Law (Miscellaneous Amendments) Bill 2013. The amendments threatened to violate constitutional protections on the right to freedom of association by granting unchecked power to the State over the terms of registration of PBO’s and which organisations should be granted PBO status, as well as limitations on funding from external donors. The proposed funding limitations would freeze non state actors’ development partnerships with government, detrimentally affecting humanitarian assistance, and impede constitutionally protected governance oversight activities.
25. There was intense engagement by civil society with legislators and other state officials regarding the content of these amendments. The National Assembly narrowly averted passing legislation in detriment to the rights of association and expression with 83 members of parliament voting against the Statute Law (Miscellaneous Amendments) Bill 2013 and 73 members voting in favour.
26. The six-month period before amendments can be re-introduced has now passed. New amendments to the PBO Act were published on 30 May 2014 in the Statute Law (Miscellaneous) Amendments Bill 2014. The amendments seek to give government control over key appointments in public benefits organisations’ regulatory bodies; and require immediate de-registration of public benefit organisations for non-compliance with the PBO Act, without opportunity to show cause for non-compliance, and with the right to appeal only granted after de-registration.

### **Recommendations**

27. ARTICLE 19 calls upon the government of Kenya to significantly improve the conditions for freedom of expression and association in the country. In particular, the government should:
28. Cooperation with international human rights mechanisms
  - Publish a report on the implementation of the OGP country action plan for the 2 years which ended in 2012 and publish a post 2012 country action plan;
  - Extend a standing invitation to all Special Procedures of the UN Human Rights Council, and specifically facilitate the formal country visits of the UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression; and human rights defenders;

- Ensure a timely follow up to facilitate the formal visit of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. Extend full State support and cooperation with the visit needs and objectives, including facilitating public and civil society participation;

#### 29. Access to information

- Enact the Access to Information Bill 2013 and Data Protection Bill 2013, in line with freedoms of expression and information enshrined in Articles 33 - 35 of the Constitution of Kenya, 2010;

#### 30. Legal framework for freedom of expression

- Comprehensively repeal provisions of legislation affecting media freedom and freedom of expression to ensure it conforms with Article 19 of the ICCPR, specifically:
  - Books and Newspapers Act 1960;
  - Sections 3, 7 and 15 of the Official Secrets Act (Revised 2012);
  - Section 6(10 (a) to (e); Section 6 (b) to (d); 6D (2) and (3); Section 37; Section 102E of the Kenya Information Communications (Amendment) Act, 2013;
  - Section 6; Section 27 (5); Section 45; Section 50 of the Media Act 2013;
- Abolish criminal sanctions for media offences, as found in the Kenya Information Communications (Amendment) Act (2013), and provide proportionate remedies, such as right of reply, corrections, or the publication of a decision, through self-regulatory bodies or civil law;
- Decriminalise defamation by repealing sections 194 and 195 of the Penal code on sedition and seditious libel, and provide heightened protection to expression critical of public officials or authorities;
- Ensure that civil defamation laws comply with international standards on freedom of expression, with robust defences for truthful expression and expression in the public interest, and guarantees against excessive damages;

#### 31. Freedom of expression online

- Protect fundamental human rights online, including the right to freedom of expression and the right to privacy, ensuring that any State monitoring of online communications complies with international standards;

#### 32. Attacks on journalists and human rights defenders

- Adopt in full the recommendations of the 2013 Joint Declaration on Crimes Against Freedom of Expression, including to ensure prompt, independent, and effective investigations into harassment and attacks against journalists and human rights defenders, bringing those responsible to justice, and providing adequate redress to victims;
- Amend the Penal Code (Cap 63, Revised 2012) to subject crimes against freedom of expression, and the crime of obstructing justice in relation to those crimes, to either unlimited or extended statutes of limitations;

#### 33. Freedom of association and an enabling environment for civil society

- Commence the Public Benefits Organisations Act 2013 (PBO Act) as a matter of urgency
- Ensure that the PBO Act protects freedom of association and the rights of civil society by: protecting against unwarranted state interference; protecting against unwarranted legal barriers to entry, activity, communication, assembly and resources;
- Adopt stakeholder recommendations on independence, transparency and enabling environment to proposed amendments to the Public Benefits Organisations Act 2013 via the Statute Law Miscellaneous (Amendment) Bill 2014, as published on 30 May 2014;
- Engage in a participatory and inclusive process with civil society in the implementation of universal periodic review recommendations.