



## **A SHADOW REPORT ON FREEDOM OF INFORMATION IN KENYA**

*This Shadow Report was prepared by*

*The Africa Freedom of Information Centre in consultation with Article 19 East and Horn of Africa  
and the International Commission of Jurists-Kenya*

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## **Executive Summary**

This shadow report is presented by the Africa Freedom of Information Centre (AFIC), Article 19 East and Horn of Africa and International Commission of Jurists-Kenya Chapter to the African Commission on Human and Peoples Rights.

AFIC is a pan-African network and resource centre consisting of 35 civil society organizations in 22 African countries, promoting access to information in Africa through comparative research, coordinating regional advocacy, facilitating information-sharing and capacity building. AFIC promotes democratic rule and socio-economic justice for African citizens through fostering a culture of increased transparency, integrity and accountability among governments, regional and international bodies.

The International Commission of Jurists (ICJ Kenya) is a membership, non-governmental, non-partisan and not-for-profit organization registered as a society. ICJ Kenya is an autonomous national section of the International Commission of Jurists based in Geneva, Switzerland. The organization admits to its membership lawyers, judges, and human rights defenders who share common beliefs and values of freedom, justice, peace, equality, fraternity, liberty, equity and respect for human dignity.

ICJ Kenya works for the promotion of human rights, respect for the rule of law, and entrenchment of democracy and good governance. Its vision is to be a premier organization promoting a just, free and equitable society and its mission is to protect human rights, and promote rule of law and democracy in Kenya and across Africa. ICJ Kenya fulfils its mandate through research, documentation and implementation of activities within its four core programmatic areas of Human Rights Protection, Access to Justice, Democratization and International Cooperation.

ICJ Kenya has been spearheading the campaign for the enactment of a Freedom of Information law since the year 2000. ICJ Kenya believes that the right of access to information is vital in any governance system; and that transparency, accountability and public participation as important tenets of good governance are enhanced by the availability of information.

ARTICLE 19 Eastern Africa is a pioneer organisation in applying free speech to all aspects of our lives, including public policy, health, governance, conflict, war, education and environment. Our mission is to work with others to ensure fuller realisation of freedom of expression and right to access information both as fundamental rights and key levers for good governance, transparency, accountability and rule of law. ARTICLE 19 Eastern Africa has implemented programmes on access to information and freedom of expression in Kenya, Sudan, Somalia, Uganda and Rwanda. ,

In authoring this shadow report, AFIC and its members intend to constructively contribute to the realisation of the right of access to information protected by Article 9 of the African Charter on Human and Peoples' Rights.

The report highlights the positive steps taken by the Kenyan Government to improve ATI. Beyond the Constitution, many laws or bills which are either sector-specific or relating to public service delivery in general acknowledge the role of the right to information

This shadow report also highlights the failure and contraventions by the Kenyan authorities to uphold and promote the rights to information; the lack of legislation to facilitate access to information, legislative limitations, poor proactive disclosures, criminal defamation, and media violence and intimidation.

## 1. Country Context

Kenya was traumatized by ethnic violence that followed a disputed presidential election in 2007. International pressure, led to numerous democratic changes including a new constitution. The constitutional review process agreed upon was one of the Agenda 4 items agreed on as part of the peace negotiations spearheaded by H.W Kofi Anaan. The Constitution of Kenya 2010 introduced key reforms in Kenya. Among them is a progressive Bill of Rights Chapter. Article 35 of the Bill of Rights enshrines the Right to Information in Kenya. The Constitution therefore raised bar for the right to information by expressly providing for it under the constitution.

The recognition of the right to information and freedom of expression was one of the important inclusions in the new constitution. Under Article 35, the right to information was codified for the first time. Indeed Article 33 of the Constitution of Kenya provides in the relevant part for freedom of expression.

Principles and values of public service have been provided under the Constitution. Article 10 of the Constitution of Kenya lays down principles and values of public service. These include; transparency, accountability, inclusion, public participation among others. In addition, Article 232(1) (f) of the Constitution provides that the principles and values of public service include transparency, and provision to the public of timely and accurate information.

The inclusion of these clauses was a triumph for freedom of information and expression in Kenya. Kenyans recognized that the right to information was fundamental to enforcing other rights; promoting transparency and eradicating corruption; and it is of course essential to the functioning of democracy. With Kenya's turbulent history in mind, freedom of information can be a key tool in conflict prevention as a free exchange of information promotes trust between institutions of government and its citizens.

Numerous relevant right to information and freedom of expression treaties also form part of Kenya's law. According to Article 2(6) of the Constitution of Kenya 2010, any treaty or convention ratified by Kenya shall form part of the law of Kenya. Universally, the right to freedom of information is enshrined in Article 19

of the 1948 Universal Declaration of Human Rights<sup>1</sup> and the International Convention of Civil and Political Rights,<sup>2</sup> to which Kenya is a party. Kenya has also ratified four of the six African treaties recognizing the right to information; The African Charter on Human and Peoples' Rights,<sup>3</sup> African Union Convention on Preventing and Combating Corruption,<sup>4</sup> African Charter on the Values and Principles of Public Service and Administration<sup>5</sup> and the African Union Youth Charter.<sup>6</sup> Kenya is also a party to the United Nations Convention against Corruption,<sup>7</sup> whose chapter two is of particular importance with regard to the right to information.

The Government of Kenya also joined the Open Government Partnership<sup>8</sup> in a national action plan to advance transparency and accountability. In particular Government prioritized citizen feedback, open data, open budgets, and dissemination of citizen budgets and participatory budgeting. Consultations between Government and civil society on the second action plan are underway.

## **2. Kenya's and Combined 8-11<sup>th</sup> Periodic Report**

Kenya is required to periodically inform the African Commission on Human and Peoples Rights about the state of the right to information and freedom of expression in the country.

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<sup>1</sup> <http://www.un.org/en/documents/udhr/> (accessed 19 August 2015).

<sup>2</sup> <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 19 August 2015).

<sup>3</sup> <http://www.achpr.org/instruments/achpr/> (accessed 19 August 2015).

<sup>4</sup> Article 9 of the African Union Convention on Preventing and Combating Corruption. [http://www.au.int/en/sites/default/files/AFRICAN\\_UNION\\_CONVENTION\\_PREVENTING\\_COMBATING\\_CORRUPTION.pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf) (accessed 19 August 2015).

<sup>5</sup> Article 6 African Charter on the Values and Principles of Public Service and Administration. <http://www.au.int/en/content/african-charter-values-and-principles-public-service-and-administration> (accessed 19 August 2015).

<sup>6</sup> Article 4 of African Union Youth Charter. [http://www.au.int/en/sites/default/files/AFRICAN\\_YOUTH\\_CHARTER.pdf](http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf) (accessed 19 August 2015).

<sup>7</sup> [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (accessed 19 August 2015).

<sup>8</sup> <http://www.opengovpartnership.org/country/kenya> (accessed 20 August 2015).

This facilitates the requirements under Article 62 of the African Charter on Human and Peoples Rights, obliging Kenya,

*“..to submit every two years...a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the..Charter.”*

It is a worrying that the Government of Kenya had consistently violated Article 62 of the Charter by not reporting to the ACHPR as required. Kenya was overdue by four reports and was therefore required to combine the all the missed reports limiting its ability to address important issues.

This shadow report is based on Kenya’s Combined 8-11<sup>th</sup> Periodic Report, submitted to the African Commission for Human and Peoples Rights.<sup>9</sup> Kenya’s Report has been prepared through wide consultation between Government officials, Civil Society Organizations and independent national human rights institutions.

Paragraphs 71-78 the Periodic State Report summarize the state of the right to information and freedom of expression in Kenya.<sup>10</sup> The report claims there has been an increase in public access to Government information which enhances transparency and accountability. Paradoxically the report calls the lack of censorship of social media a ‘challenge.’

Kenya’s report mostly states the legal provisions in Kenya’s laws that improve the right to information. The report does not provide record of instances and examples where these provisions have been applied and implemented. The report does not indicate the willingness to implement or provide a roadmap for implementation of right to information frameworks.

Kenya’s report reiterates the provision in the Kenyan constitution that guarantees the freedom of expression, the right to access information and the rights to persons with disabilities to access information. The reports states that

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<sup>9</sup> On 11<sup>th</sup> of March 2015 the Government of Kenya submitted the initial and combined state report in line with article 62 of the African Charter on Human and Peoples Rights. [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf)

<sup>10</sup> [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf) (accessed 20 August 2015).

the Government enacted the Kenya Information and Communications Act <sup>11</sup>that provides a framework for the establishment of ‘e-Government’, a portal where one can access Government documents and information. The reports also states Kenya has an independent media industry following the enactment of the Media Act<sup>12</sup>, which create a regulatory framework to govern the media in Kenya. Finally, the reports states that the Government also enacted the Kenya Information and Communication (Amendment) Act<sup>13</sup> which amended the Information and Communications Act, 1998 to regulate hate speech and freedom of expression.

### 3. Applicable Framework and Standards

For the purpose of this shadow report, comparative focus will be on three main standards; Article 9 of the African Charter on Human and Peoples Rights, the African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of Expression in Africa and the African Commission on Human and Peoples Rights Model Law on Access to Information.

Applicable Framework and Standards	
Framework	Questions to be answered
The African Charter on Human and Peoples Rights	Does every individual have the right to receive information?
African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of Expression in Africa	Does Kenya adhere to Principles of freedom of expression in Africa? Has it passed law on freedom of information in line with Article IV of the Declaration?
The African Commission on Human and Peoples Rights Model Law on Access to	Does Kenyan draft FOI bill reflect the spirit of the Model law?

<sup>11</sup> Kenya Information and Communications Act, (2013) CAP 411A.

<sup>12</sup> Kenya Media Act, (2013) Cap 411B.

<sup>13</sup> Kenya Information and Communication (Amendment) Act No. 41 A of 2013.

Information	
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The focal provision of this shadow report will be Article 9 of the African Charter on Human and Peoples Rights that seeks to guarantee the right to information, expression, and dissemination of ideas.<sup>14</sup>

The African Commission on Human and Peoples' Rights in 2002 adopted Declaration of Principles on Freedom of Expression in Africa. <sup>15</sup> Their purpose is to elaborate Article 9 of the African Charter on Human and Peoples' Rights regarding freedom of expression and access to information.

The African Commission on Human and People's Rights adopted the Model Law on access to information in February 2013.<sup>16</sup> The Model Law is characteristically a comprehensive set of provisions embodying the global standards on access to information. It is primarily is guide State Parties to adopt progressive national legislation that reflect international standards and best practices.<sup>17</sup>

This report will also consider the African Platform on Access on to Information (APAI) Declaration.<sup>18</sup> The Declaration concerns itself with the promotion of freedom of information legislation in Africa. The Declaration lists fourteen key

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<sup>14</sup> Article 9 of the Charter states that: " 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.

<sup>15</sup>[http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32\\_freedom\\_of\\_expression\\_eng.pdf](http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf) (accessed 20 August 2015).

<sup>16</sup> The ACHPR on 12 April 2013 officially launched its Model Law on Access to Information at a ceremony held during the ACHPR's 53rd Ordinary Session in Banjul, The Gambia. <http://www.achpr.org/instruments/access-information/> (accessed 20 December 2015).

<sup>17</sup> The objectives of this Model Law are to: (a) give effect to the right of access to information as guaranteed by the African Charter on Human and Peoples' Rights, to (i) any information held by a public body or relevant private body; and(ii) any information held by a private body that may assist in the exercise or protection of any right; (b) establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information of information= holders as swiftly, inexpensively and effortlessly as is reasonably possible; (c) ensure that in keeping with the duty to promote access to information, information holders create, keep, organise and maintain information in a form and manner that facilitates the right of access to information; (d) promote transparency, accountability, good governance and development by educating people about their rights under this Act. [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_model\\_law\\_access\\_to\\_information\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf). (accessed 20 December 2014).

<sup>18</sup> <http://www.africanplatform.org/campaign/apai-declaration/> (accessed 20 August 2015).

principles that advance access to information. It was adopted at the first Pan African Conference on Access to Information held in Cape Town South Africa in September 2011 <sup>19</sup>, with the full support of the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples Rights.

The requirements of these standards will determine the extent to which the Kenyan authorities have implemented the right to information and freedom of expression in accordance with the applicable standards.

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<sup>19</sup> Adopted in Cape Town, South Africa, on the 19th Day of September 2011.

#### 4. Contravention of the Right to Information in Kenya

State of Right to Information in Kenya	
Principle or Law Contravened	Core Issue
The model law on access to information in Africa and the principle of establishing a domestic law on FOI	<ul style="list-style-type: none"> <li>i. Lack of freedom of information legislation</li> </ul>
The principle of maximum disclosure	<ul style="list-style-type: none"> <li>i. Limitations on interpretations of constitutional provisions contained in Article 35</li> <li>ii. Laws that prohibit/criminalize disclosure of information</li> <li>iii. Unlimited exemptions of information.</li> <li>iv. Lack of comprehensive frameworks to implement Article 35 of the Constitution</li> <li>v. Developing jurisprudence that limits the scope and implementation of the right to information</li> </ul>
The principle of the obligation to publish key information and the principle to	

<p>promote an open government</p>	<ul style="list-style-type: none"> <li>i. Poor proactive disclosure</li> <li>ii. Open data limitations</li> <li>iii. Lack of established proactive disclosure regimes.</li> </ul>
<p>The principle of a process to facilitate access to information</p>	<ul style="list-style-type: none"> <li>i. No procedure on how access to information can be facilitated</li> <li>ii. Lack of implementation frameworks for ATI</li> </ul>
<p>Article 9 of the African Charter: Freedom of Expression and Opinion</p>	<ul style="list-style-type: none"> <li>i. Criminal Defamation</li> <li>ii. Regulatory Control of Freedom of Expression</li> <li>iii. Media Violence and Intimidation</li> </ul>
<p>The principle of clear and narrow exceptions</p>	<ul style="list-style-type: none"> <li>i. Lack of legislation on RTI results in lack of clarity on exceptions applicable.</li> <li>ii. Retrogressive legislations that give broad exceptions on sharing information</li> </ul>

#### 4.1 Model Law on Access to Information in Africa and the Principle of Establishing a Domestic Law.

##### a) Lack of Freedom of Information Legislation

The African Convention on Preventing and Combating Corruption which Kenya has ratified provides that “[e]ach State Party shall adopt such legislative and other

*measures to give effect to the right to any information*".<sup>20</sup> Further part IV of the Declaration of Principles of Freedom of Expression in Africa requires that "the right to information shall be guaranteed by law". Currently there is no right to information law in Kenya and no proper framework exists which the public can use to access information.

However, there are constitutional guarantees that give the Kenyan citizen a right to seek information from the state<sup>21</sup>. The right to information is now recognized and codified under the Constitution of Kenya in Article 33 (1) (a) and Article 35.

The right as articulated in Article 35 recognises the right of a citizen to make demand for public information held by the state; and *Information held by another person and required for the exercise or protection of any right and fundamental freedom*. It also reiterates the duty of government to publish and publicize information.

Article 33 makes guarantee for the Freedom of Expression in Kenya and states in 33 (1) (a) that "Every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas."<sup>19</sup>

Kenya is in the initial stages of debating a Freedom of Information Bill, whose progress has been lackluster. The Bill has been shelved by the parliament several times. In August 2015 Kenya's Freedom of Information Bill made was tabled in Parliament as a private members Bill and is coming up for second reading before Parliament.<sup>22</sup>

Efforts to pass FOI legislation in Kenya, mostly through the initiatives of civil society have been ongoing since the year 2001. To date, there have been 4 drafts on FOI legislation in Kenya, (2002, 2005, 2008 and 2013) 3 of which have developed by civil society and one by government. It is also indicative that all efforts to introduce these Bills in Parliament have been through private members.

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<sup>20</sup> Article 9 African Convention on Prevention and Combating Corruption. [http://www.au.int/en/sites/default/files/AFRICAN\\_UNION\\_CONVENTION\\_PREVENTING\\_COMBATING\\_CORRUPTION.pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf) (accessed 20 August 2015).

<sup>21</sup> CoK; Article 33 (1) (a) and Article 35

<sup>22</sup> Kenya Parliament Order Papers Wednesday 19<sup>th</sup> August <http://www.parliament.go.ke/the-national-assembly/house-business/order-papers?limitstart=0> (accessed 20 August 2015).

The Access to Information Bill 2015 was published in August 2015 as a private members bill fronted by the Hon. Priscilla Nyokabi. The Bill has undergone first reading in the national assembly. The parliamentary Committee on Energy, Communication and Information invited submissions on the bill to be presented by 31st August 2015. At the time of writing this report the bill was not discussed before the parliament.

Therefore as required by the Model Law on Access to Information, Kenya does not have a legislative obligation on the state to put in place the institutional arrangements for access to information. The Model Law intends to assist Kenya in formulating, adopting or reviewing access to information legislation, to meet a minimum threshold of good practice and providing uniform benchmarks for effective implementation the right to information.<sup>23</sup>

## 4.2 The Principle of Maximum Disclosure

### a) Constitutional Limitations

Even though the Kenyan constitution provides for the right of access to information, this right is not absolute. This right is limited to enforcement by citizens. Article 35 of the constitution reads:

*“Every citizen has the right of access to – (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”*

In other words non-Kenyans, private entities and juridical persons cannot enjoy the right of access to any information that is held by the State or any non-State actor.

The developing jurisprudence from the courts has also had the effect of limiting the scope of application of the right to information. In the case of *Famy Care Limited vs. Public Procurement Administrative Review Board & Another*<sup>37</sup>, the court ruled that Article 35 applies only to Kenyan citizens and not to foreigners and that further the right of access to information can only be enforced by Kenyan natural citizens and not Kenyan Juridical persons (thus exempting legal

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<sup>23</sup> Preamble, African Commission Model Law on Access to Information 2013

and other entities such as private companies from having a right of access to information). The effect of the ruling was the exemption of legal and other entities such as private companies from having a right of access to information.

This ruling was similar to that in the case of *Nairobi Law Monthly Limited Vs. Kengen Ltd and Edward Njoroge*. The High Court in Kenya ruled that the right to information extends only to human persons who are citizens and not to corporations like Nairobi Law Monthly.

These rulings present represent a significant shift from the past opaque dispensation and ushers in a new era where information is not to be hoarded but proactively shared to promote transparency, accountability and participation in public affairs. This interpretation is contrary to the internationally established principle of maximum disclosure that establishes the obligation of public bodies to disclose information and the corresponding right of every member of the public to receive this information. The principle further stipulates that everyone present in the territory of a country should benefit from this right<sup>38</sup>.

#### **b) Domestic Laws that Prohibit Disclosure**

Kenya also has laws that stifle the disclosure of information, despite the adoption of the 2010 constitution; several anachronistic laws that curtail access to information and freedom of expression remain on the books. These include the Official Secrets Act, the Statistics Act (2006), the Public Archives and Documentation Act and the National Assembly (Privileges and Immunities) Act.

So far the Parliament has not been progressive in the repeal of these laws, and in fact there were attempts to further curtail ATI by the attempted introduction earlier in the year of the Powers and Privileges (Amendment) Bill.

Foremost of these legislations is the Official Secrets Act (OSA) <sup>28</sup>that formalized and institutionalized the culture of secrecy through an official oath of secrecy on all public servants. Section 3 (7) of the OSA provides a complete cloak of secrecy over all official documents and severely punishes disclosure.

The Service Commissions Act 29, the main statute that governs the Public Service Commission's (PSC) also prohibits and criminalizes the disclosure of any information of any information unless with the written consent of the president. Section 5 of the Service Commissions Act (SCA) puts an obligation on all members assuming office of the PSC and their staff to take a prescribed oath of secrecy.

Other statutes that bolster the culture of secrecy by obliging Directors and staff to take oaths of secrecy include **The Statistics Act (2006) and the Public Archives and Documentation Act.**

Recently, there have been attempts by parliament to further limit the provision of information emanating from parliament by the attempted introduction earlier in the year of the Powers and Privileges (Amendment) Bill.

The Preservation of Public Security Act gives the president sweeping powers to censor, control, or prohibit information that is deemed a security risk.<sup>24</sup> This significantly limits the amount of information that is available to the public. Under the terms of this piece of legislation wide powers are granted to the Government to limit the circulation of information that is in the custody of the State.

Similarly, the Films and Stage Plays Act places restrictions on those who intend to make movies, run exhibitions or display posters in the sense that all these activities can be stopped by a police officer or the Board of Censors.<sup>25</sup> This statute does not contain any provision for appeal nor does it require a police officer to assign any reason for his or her decision. Like the other statutes, any person who fails to comply with such an order shall be liable for prosecution.

### **4.3 The Principle of Clear and Narrow Exceptions**

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<sup>24</sup> Section 4 of Preservation of Public Security Act Cap 57 see also Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>25</sup> PART III – Films and Stage Plays Act Cap 222.

In the absence of ATI legislation there are no clear exceptions on the right of access to information and as such, in most instances, broad and sweeping interpretations are applied particularly on the ground of national security.

The current situation with regards to internal security and the threats presented by terrorism acts in the country have resulted in the introduction of new security laws that would have the effect of introducing several provisions in newly developed security laws that curtailing the disclosure of information and the freedom of expression..

Foremost of these is the Security Laws Amendment Act that creates sweeping surveillance powers for the authorities and additionally makes several substantive amendments to the Penal Code, Criminal Procedure Code, Evidence Act, Prevention of Terrorism Act and National Services Act, among others.

Some of the amendments that the Act has introduced that would be detrimental to RTI & FOE include:

#### **Covert Operations**

- The Act amends the National Intelligence Services Act by allowing the Director General to authorize any member of the service to: (i) obtain *any* information, material, record, document or thing for the purpose of the operation; (ii) monitor communication; (iii) install, maintain or remove anything; (iv) do anything considered necessary to preserve national security<sup>26</sup>.

There would effectively give *carte blanche* to the Director-General to order mass surveillance of online communications for the purposes of national security.

#### **Publication of offending material**

- Introduction of the provisions that would criminalizes anyone who publishes or utters a statement that is likely to be understood as directly or *indirectly*

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<sup>26</sup> Section 66 of the Security Laws (Amendment) Bill

encouraging or inducing another person to commit or prepare to commit an act of terrorism<sup>27</sup>.

The provisions concerned could criminalize legitimate expression, such as artists writing poems or songs about political matters.

**Broadcasting:**

- The Act proposes a new section 30F (1) which prohibits the broadcasting of any information, which may undermine investigations or security operations relating to terrorism without authorization from the National Police Service.
- The section 30F (2) further criminalizes anyone who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and that of the victim. Both offences are punishable by a term of imprisonment not exceeding three years or a fine not exceeding 5 million shillings (i.e. over USD 50,000), or both<sup>28</sup>.
- The proposed amendment constitutes an unjustified interference in journalistic activity.
  
- The Act also criminalizes the publication of ‘obscene ,and offensive’ material, which is ‘likely to cause fear and alarm to the general public or disturb public peace. It is punishable by a fine not exceeding one million shillings and imprisonment not exceeding three years. If the offence is committed by a media enterprise, it is punishable by a fine not exceeding 5 million shillings<sup>29</sup>

Apart from these proposed amendments, there are still existing legislations that curtail access to information on the ground of national security. The Evidence Act, for instance, gives officials wide discretion to decide the release of any

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<sup>27</sup> Section 75 of the Security Laws (Amendment) Bill

<sup>28</sup> Section 75 of the Security Laws (Amendment) Bill

<sup>29</sup> Section 66 of the Security Laws (Amendment) Bill

information that they deem prejudicial to public policy.<sup>30</sup> If the response is in the affirmative, this information will not be released. Notably, there are no requirements for appeal or view. Nor are the officials required to assign any reason for their decision.

Kenya's 1985 Penal Code empowers the Minister of Internal security to ban the importation or production of any publication on grounds of, among others, national security.<sup>31</sup> While it is acceptable to withhold information on grounds of national security, this power is too wide and does not meet the principle of having narrow exceptions.

Privileged information is also a ground for non-disclosure in Kenya. Under the terms of the Public Service Commission's Act<sup>32</sup> any communication within the Public Service Commission is privileged. This information can not be disclosed or produced in any proceeding, except with the written authorization. This requirement flouts the principle of narrow exceptions and adversely limits the right to information.

#### **4.4 The Principle of the Obligation to Publish Key Information and the Principle to Promote an Open Government**

##### **a) Poor Proactive Disclosure**

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<sup>30</sup> Section 131 of the Kenya Evidence Act Cap 80.

<sup>31</sup> Section 52, of Kenya Penal Code Cap 63.

<sup>32</sup> Section 30 Public Service Commission Act (No 13 of 2012)

In the recent past, there has been some effort by the state to actualize access to information in governance. Various initiatives have been introduced that aimed at ensuring availability of and accessibility to information by all Kenyans

For instance, there has been some attempt to use Information & Communication Technologies to facilitate access to information and participation of the public as envisaged by the launch of the Kenyan Open Data Portal and development of ICT infrastructure in the country.

Other reform strategies have been introduced within government ostensibly to improve service delivery and performance through the introduction of Citizen's Service Delivery Charters which were instituted with the aim of providing certain information to the public including; mandates of each public institution, services to be provided, and standards of services provided. Under these charters, citizens are mandated to fully participate and demand for information and accountability of results of all public officials. <sup>33</sup> Still the culture of secrecy persists, and is one of the greatest obstacles to proactive disclosure of government held information

Apart from lack of access to information legislation, other challenges in promoting open government in Kenya relate to weak implementation capacity for public officials and public bodies.

Public officials are unaware of their obligations of providing information as stipulated in the constitution. Retrogressive provisions barring release of government information as contained in the Official Secrets Act, The National Assembly (Powers and Privileges) Act, the Preservation of Public Security Act among others has resulted in officials who are still reluctant to release information.

There also exists a Code of Regulations prohibits officials from directly communicating with the media which naturally aggravates the situation<sup>34</sup>.

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<sup>33</sup> International Commission of Jurists Steps In  
[http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/kenya/Kenya-The%20ICI%20on%20FOI.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/Kenya-The%20ICI%20on%20FOI.pdf) (accessed 20 August 2015).

<sup>34</sup> Part D Regulation 40, Code of Regulations (2006)

The lack of criteria / guidelines to guide the operations of officials on what information should be released or withheld is one of the major hindrances in realising proactive disclosure of information to citizens, as most officers decide to err on the side of caution and not release information. This conduct does not promote public confidence as required by the terms of Kenya's Public Officer Ethics Act.<sup>35</sup>

### **b) Open Data**

With the current advent of ICTs and E government, there has been some attempt to use Information & Communication Technologies to facilitate access to information and participation of the public. On July 8th 2011, the President of Kenya launched the Kenya Open Data Initiative, a web portal that made key government data freely available to the public through a single on line portal. Information uploaded on the portal included census results, national and regional expenditure reports and information on key public services.

The Kenyan government has made other commendable efforts to actualize access to information through online platforms through the establishment of an open data portal, commitment to OGP and the establishment of digital villages (Pasha centers) that are set up to bring connectivity to the rural areas.

However, there are limitations to how far this is effective. Majority of the Kenyan population live in the rural areas and are not able to access online platforms. According to a survey undertaken by the Kenya ICT board, only 6.5 per cent of the Kenyan population households have access to personal computers with the total number of internet subscribers at 11.5 per cent of the same population.

The number of mobile phone subscribers is at 24, 968, 891, which is more than half of the Kenyan population but most of it is in the urban population<sup>36</sup>. This means that the poor and marginalized communities are not able to access information through online platforms.

The quality of information provided online is also in question. Many users of Open Data have often complain that the biggest issue with the data available now is the fact that most of it is outdated and it has not been possible to obtain updated data in good

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<sup>35</sup> Section 9 Kenya's Public Officer Ethics Act Cap 183.

<sup>36</sup> <https://opendata.go.ke/Education/Julisha-Survey-on-kenya-ICT-market-overview-2011>

time due to the lack of legislative framework to push for release of information from government.

#### **4.5 The Principle of a Process to Facilitate Access to Information**

The procedure that an applicant seeking disclosure must follow is not provided by the law. Indeed, it is unclear whether he or she should lodge an application directly to the public authority or through a Ministerial department. For instance, should an application to the President's Office be sent to the Head of Civil Service, the Ministry or a Government department that holds the information. This is also problematic in the sense that there is no guidance on the forum that an aggrieved person would go to challenge an unfavorable decision of these public officials.

Even though there are constitutional guarantees that enable citizens to request for government held information, the lack of an Access to Information law has meant that there is no established implementation framework and lack of a clear process on how citizens can request for information.

There is also lack of clarity on what proactive disclosure obligations of public bodies entails and how disseminations of information will be undertaken. The lack of a complaints mechanism has meant that aggrieved persons are unsure of where to lodge their complaints in the event that they are denied information, and the process of appeal.

Other issues that are unaddressed in the absence of an implementation framework include the need to reach persons with disabilities, costs to be incurred, the provision of information in local languages and the most effective method of communication.

#### **4.6 Article 9 of the African Charter: Freedom of Expression and Opinion**

### **a) Criminal Defamation**

While Freedom of expression is enshrined in Article 33 of Kenya's Constitution, criminal defamation laws with penalties still remain,<sup>37</sup> waiting to be repealed or amended to conform to Kenya's 2010 Constitution. Unless existing criminal libel laws are reformed, and replaced with civil laws, the new laws such as Kenya's proposed Freedom of Information Bill could have little effect.

It is generally recognized that criminal defamation laws are still the primary means of addressing unwarranted attacks on journalists and bloggers. To minimize the potential for abuse or unwarranted restrictions on freedom of expression in practice, it is essential criminal defamation laws are withdrawn. Criminal sanctions naturally prohibit expression as they create a sense of fright.

### **b) Regulatory Control of Freedom of Expression**

In January 2009, the government passed a controversial Communications Amendment Act despite warnings from civil society groups that it could hinder free expression.<sup>38</sup> The Act established that any person who publishes or transmits obscene information in electronic form commits an offense. It also outlines other forms of illegality associated with the use of ICTs. The prescribed punishments include up to KSh 200,000 (approximately US\$2,340) in fines and two years' imprisonment.<sup>39</sup>

### **c) Media Violence and Intimidation**

At least 28 journalists were threatened or attacked during coverage of the 2013 elections, largely by local officials and police in connection with coverage of corruption.<sup>40</sup> *Standard newspaper* reporter Sammy Jakaa received death threats via mobile-telephone text message after exposing graft by Kenyan security agents in the Ugandan-Kenyan border town of Malaba.<sup>41</sup> Lucas Ngasike from the

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<sup>37</sup> Section 67 Kenya Penal Code Cap 63.

<sup>38</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>39</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>40</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>41</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

*Standard* and Rashid Ekeno from its sister broadcaster KTN, received death threats for exposing a food-aid scandal perpetrated by local officials in the western, drought-ridden Turkana district.<sup>42</sup> Guards at the Machakos courthouse assaulted cameraman Jonathan Mutiso of the state-controlled Kenya Broadcasting Corporation (KBC) for filming their attack on an escaped suspect. Mutiso was forced to erase his footage.<sup>43</sup>

Ethnic Somali journalists face continued threats and intimidation emanating from Islamist militias based in neighboring Somalia as well as Kenyan security agents. Both sides accused the journalists of supporting their opponents.<sup>44</sup> Text and e-mail threats became particularly acute for some of these journalists after the Kenyan army invaded the town of Kismayo in southern Somalia in late September 2011 as part of a campaign to secure Kenya's borders from attacks by the Somali Islamist militia Al-Shabaab.<sup>45</sup>

#### **d) Civic Space**

The Public Benefit and Organizations Act 2013 have raised concern as to what happens to human rights organizations working Kenya particularly those focused on the right to information. The relationship between local NGOs and the Government of Kenya has always been characterized by mutual suspicion. The Act has aggravated the situation, as the Act fundamentally affects civic space, democracy and development. It offers lessons and reflections on the state of governance and civil society in Kenya and the challenges of protecting and advancing fundamental freedoms within a new constitutional order.

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<sup>42</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>43</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>44</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>45</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

## 5. Positive Developments of Freedom of Information and Freedom of Expression in Kenya

### 5.1 Proactive Legislation and Right to Information Recognition

Several domestic pieces of legislation reinforce the right of access to information by the public. These statutes govern information that is transmitted by print or electronic media.

Even though the draft Freedom of Information Bill has yet to be passed by the parliament, access to information has improved with the passage of the 2010 constitution. New rights guaranteed to the media effectively weakened laws such as the Official Secrets Act<sup>46</sup>, which prevented the release of information on national security grounds.

Kenya's Media Act established a statutory media regulatory body, the Media Council of Kenya.<sup>47</sup> The council is set up to ensure that neither the government nor media owners enjoy full control over the body, although some journalists and media personalities have expressed doubts about the impartiality of any state-funded regulator. The Kenya's Media Act underscores the importance of promoting and protecting the freedom and independence of the media. This piece of legislation also seeks to promote the "*constitutional freedom of expression, and, by extension the right of the public to receive information.*"<sup>48</sup>

Beyond the Constitution, many laws or bills which are either sector-specific or relating to public service delivery in general acknowledge the role of the right to information as a facilitative right for the realization of economic, socio-cultural and political rights and for improving good governance. These include the County Government Act, The Public Finance Management Act, Health Bill, Water Bill, Public Procurement and Asset Disposal Bill and Public Service (Values and Principles) Act,

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<sup>46</sup> Official Secrets Act Cap 187.

<sup>47</sup> Section 3 Kenya Media Act (2013) Cap 411B.

<sup>48</sup> Section 7 Kenya Media Act (2013) Cap 411B.

all of 2015, that include provisions to promote transparency and accountability premised on the principle of right to information.<sup>49</sup>

At the decentralized level, the County Government Act provides for public communication and access to information in the management of county affairs. The Act recognizes that timely access to information, data, documents and other information relevant or related to policy formulation and implementation is important for promoting citizen participation in the running of county governments.<sup>50</sup>

The judiciary has also recognized the necessity of right to information in advancing democracy. In *Peter M. Kariuki vs. Attorney General*<sup>51</sup> the court acknowledged the right to information in determining appropriate damages for the petitioner.

Kenya's leading media outlets, especially in the print sector, are often critical of politicians and government actions. They remain pluralistic, rigorous, and bold in their reporting, although they also frequently pander to the interests of major advertisers and influential politicians.

However, the courts must play a more central role in promoting positive interpretation and implementation of the right to information.

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<sup>49</sup> Freedom House Report Kenya 2014. <https://freedomhouse.org/report/freedom-press/2014/kenya#.VeAneyWqqko> (accessed 20 August 2015).

<sup>50</sup> Section 87 County Government Act 2012.

<sup>51</sup> Peter M. Kariuki vs. Attorney General Petition 403 of 2006.

## 6. Recommendations

### Recommendations to improve the right to information and freedom of expression in Kenya

- i. Repeal provisions restricting access to information in Kenyan laws
- ii. Ratify remaining access to information and freedom of expression treaties
- iii. Kenyan parliament needs to urgently pass Freedom of Information Bill
- iv. Kenya must prioritise the adoption of a comprehensive legal framework on the right to information.
- v. Encourage political will to adhere to freedom of information
- vi. Focus on Open Government Partnership Commitments

#### a) Repeal Provisions Restricting Access to Information in Kenyan Laws

Provisions in statutes that prohibit the public from accessing information should be repealed. For the public to participate effectively in the management of the affairs of the country, they need to have correct information. Thus, it is imperative for the public to be provided with requisite information that will enable them to take part in policy formulation. This information could also check corruption and promote accountability on the part public officials since they know that their actions are subject to scrutiny. Accordingly, in the absence of the requisite information it would be very difficult for any member of the public to participate meaningfully in the affairs of his or her Government. Without information the citizens may not have an insight into the functioning of Government or participate in its decision-making processes.

Key obstacles, could be removed all together from the statutes limiting access to information. Clauses in statutes such as, Preservation of Public Security Act,

Service Commissions Act, The Evidence Act and the Official Secrets Act must be amended.

Granted, the responsibility of altering laws, by amending or repealing, lies with Parliament. However, other stakeholders, namely, Non-Governmental agencies, Media houses, Faith based organizations and the general public as well as Academics and experts in this area of study, would need to be involved in order to ensure that Parliament discharges this obligation in keeping with due process standards.

**b) Ratify Remaining Access to Information and Freedom of Expression Treaties**

The effectiveness of African mechanisms is dependent on the commitment of Governments to ratify, domesticate and effectively implement regional treaties. Kenya should urgently ratify and domesticate pending African Union treaties including the African Charter on Democracy, Elections and Governance as well as the African Statistics Charter, that have crucial provisions related to the right to information.

**c) Kenyan Parliament Needs to Urgent Pass Freedom of Information Bill and Prioritise a Legal Framework on Right to Information**

The constitutional promise on freedom of information and expression can be fulfilled by a domestic law. This law would, among others, would spell out the application process and conditions under which information would be released or denied as well as the appeal process to be followed by any person who is aggrieved by the decision of the decision-maker. Internal guidelines, which would give effect to provisions of domestic law, should also be promulgated. These could also provide clarity in the implementation of the law. The absence of the rules gives officials a lot of latitude in the sense that they are the ones who decide the circumstances under which information could be released or withheld from the public.

The Bill proposed before parliament has a number of issues the Kenyan Government should consider amending

- Everyone, not just citizens of Kenya, should be entitled to access information under the Bill.
- The Bill should provide for adequate independence and funding of the Information Commission.
- Discretion also holds the potential for abuse.

#### **d) Political Will**

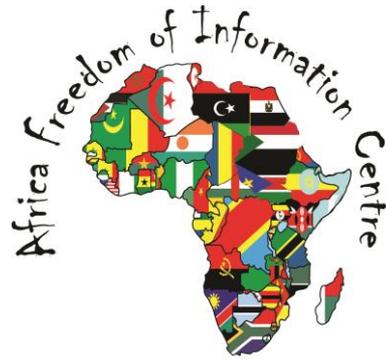
While Kenya is discussing its Freedom of Information Bill, the mere passing of a law does not necessarily signal any real kind of change, especially if the political will does not exist to enforce it. As a champion of African solutions to African problems and active promoter of African integration, President Uhuru Kenyatta should take personal interest in ensuring that Kenya complies with reporting requirements to ACHPR in line with article 62 of the Charter.

In Kenya the presidency is the alpha and omega of political power. For access to information law to be enacted by parliament, the full commitment of the presidency is required. It is also vital that ministers, parliamentarians and senior bureaucrats are encouraged to take up the issue of right to information proactively and consistently pledge their unequivocal support for a new openness regime.

A freedom of information and expression action plan should be formulated by the government in partnership with stakeholders. Setting out clear and achievable milestones could offer some confidence that the government is indeed genuinely concerned with freedom of information.

**e) Focus on Open Government Partnership commitments**

The Open Government Partnership is an international organization promoting and seeking strong commitments from participating government institutions to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. It was officially launched September 20, 2011 by eight founding governments: Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom, and United States. Since then, OGP has grown from 8 countries to the 66 participating countries. Kenya commendably began its process to join the partnership and is in its first cycle. To enter the second cycle Kenya needs to focus on improving anti-corruption, budget transparency, citizen participation, E-Government, political financing and public service delivery all of which can be achieved by improving the right to information.



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