



## **KENYA MEDIA STAKEHOLDERS UPR NETWORK Joint Submission to the Universal Periodic Review of Kenya**

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

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### **Introduction**

1. The Kenya Media Stakeholders UPR Network (KMSUN) is happy to contribute to the second cycle Universal Periodic Review (UPR) of Kenya.<sup>1</sup> The submission assesses Kenya's performance in meeting its obligations to respect, protect and fulfill freedom of expression, right to access to information and media freedom. These rights are considered instrumental rights in the protection of others rights and enhancing transparency and accountability since the first UPR cycle.
2. During its first UPR review, most of the recommendations touching on freedom of expression, media freedom and right to access information enjoyed the support of Kenya. Our report assesses among others the following:
  - 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;
  - Ensure that human rights defenders and witnesses are protected and can freely talk to the International Criminal Court investigative team so that the court can carry out its mission successfully;
  - Strengthen measures to address corruption;
  - Resolve issues related to truth, justice and reconciliation within the national framework;
  - Take effective steps to improve accountability with a view to eradicating impunity;
  - 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 liable to justice;
  - Extend an open and standing invitation to all UN Special procedures.

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<sup>1</sup> The Kenya Media Stakeholders UPR Network comprises of ARTICLE 19, Kenya Correspondents Association, Kenya Union of Journalists, Pen International, National Coalition of Human Rights Defenders in Kenya, Association of Media Women in Kenya, Journalists for Justice, African Women and Child Features, Media Focus on Africa and Africa Media Initiative.



3. This submission presents an overview of the Network’s appraisal of the State’s implementation of these recommendations and makes recommendations to further improve Kenya’s compliance with its international obligations. In particular, it focuses on:
  - Scope and cooperation with international human rights mechanisms;
  - Access to information and transparency regimes;
  - Direct and indirect censorship and attacks of journalists and bloggers;
  - Access to ICTs and protection of right to privacy.

### **Scope and cooperation with international human rights mechanisms**

4. While Kenya has ratified most of the international and regional human instruments, its reporting on international human rights treaty obligations has improved, and it has on a few occasions invited special mandate holders to the country, three challenges still exist. First, there is a yawning gap between state reports and actual state of fulfilment of human rights on the ground. This is because most citizens, especially minorities and persons with disability, are not aware of their rights even though they are guaranteed on paper. Second, the state though a member of the Human Rights Council, still has a number of periodic reports pending or keeps submitting them long after the due date. Third, Kenya has neither ratified most of the optional protocols nor recognised specific competencies of treaty bodies allowing individual and inter-state complaints. It has not ratified the UNESCO Convention against Discrimination in Education, and the Convention on the Prevention and Punishment of the Crime of Genocide.
5. Kenya is yet to extend invitations for formal country visits to the UN and African Commission on Human and Peoples Rights (ACHPR) Special Rapporteurs on freedom of opinion and expression, or on human rights defenders, to assist with meeting its international human rights obligations. Equally, Kenya has often not responded to letters of allegations and urgent appeals. It has also not responded to questionnaires on thematic issues by special mandate holders.

### **Access to Information and Transparency regimes**

6. Prior to the enactment of the Constitution of Kenya, 2010( the Constitution), there existed no clear constitutional provision recognising the right to information and attempts to introduce the right to information law through an Act of parliament did not prove fruitful.
7. The Constitution guarantees the right of access to information in a number of provisions. First, through Article 33 “(1) it provides that every person has the right to freedom of expression, which includes (a) Freedom to seek, receive and impart information or ideas...”Second, Article 35 provides thus: “Every citizen has the right of access to (a) information held b the state; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”Third, Article 232(1) provides that the principles and values of public service include transparency and provision to the public of timely, accurate information.



8. Nearly four years after the promulgation of the constitution the access to information Bill is yet to be tabled in Parliament. The realisation of the right to access information remains a challenge. This situation is made worse because of five reasons. First, the continued retention of laws inimical to transparency and enhanced disclosure of information in the country's statute books. Second, pervasive culture of secrecy in the public service. Third, lack of a framework for responsibilities of information holders and claimants, the scope of the right to access information and what exemptions may be permissible. Fourth, lack of proper record keeping mechanisms to allow easy documentation, archival and retrieval when expected to be disclosed. Fifth, the judiciary has not been very progressive in its interpretation and enforcement of the right to access information.
9. Through a number of cases in the High Court in Kenya in the recent past, the Court has made three holdings as regards the rights of access to information in Kenya. First, the right to information is only enjoyable by Kenyan citizens and not foreign citizens. Second, the right to information is enjoyable by natural citizens and not Kenya juridical persons such as corporations or associations. Third, to access information a citizen must file a request for that specific information. These holdings are best captured in the *Famy Care Limited vs public procurement Administrative Review Board & Another*.
10. In early 2014, the Auditor General in his fiscal year 2012/2013 report revealed that as much as Ksh 500billion has been squandered or cannot be accounted for since 2012. The Kenyan National Auditor General Office is an independent office charged with the responsibility to any entity funded from public funds.
11. In a recent survey by ARTICLE 19 Eastern Africa in which 22 Internally Displaced Persons were assisted to seek information they required to claim their fundamental human rights from 10 public institutions, an estimated 90 per cent of them did not receive any response even after they make three attempts in a period of 90 days. It is clear from the survey that lack of information has hampered the equitable distribution of humanitarian assistance and entrenched lack of transparency in expenditure of resources raised to support IDPS as a vulnerable group.
12. Similarly, while social protection resources have been set aside to help cushion poor and vulnerable households, orphans and elderly persons, there is no clear framework to enable the targeted groups to know what they are entitled to and what procedures are expected to be followed before they benefit from such allocations. This continues to see most of them suffer untold miseries as political patronage skews allocation to undeserving groups.



## Direct and indirect Censorship and Attacks of Journalists and bloggers

13. Kenya's media landscape is a success story with serious structural challenges. The Constitution of Kenya, 2010 guarantees media freedom in the most comprehensive articulation ever in the country's history. However, the media concentration and cross-media ownership, regulation of news content under the guise of protection of children and prohibiting incitement to discrimination, violence and hatred and ethnic politicization in the Kenyan media coverage continue to be challenges that must be resolved.
14. The state continues to employ both legal and extra-legal measures to censor journalists directly and indirectly. Attacks on journalists and bloggers by state security agencies and different political party sympathizers are becoming common. Mostly such harassment and attacks are not fully investigated and no one is held accountable despite timely reports to the police on occurrences.
15. Recent examples include:
  - Two investigative journalists with the Kenya Television Network (KTN), Mohamed Ali and John Allan Namu were threatened with arrest by the Inspector General of Police, David Kimaiyo in September 2013 after they did a story on the terror attack on the West Gate Shopping Mall in Nairobi.
  - A journalist with the *Standard Newspaper* based in Kwale, Coast Region of Kenya, Tobias Chanji was forcefully arrested by security agents in March 2014 after he went to investigate a raid they were carrying out on the home of an alleged terror suspect. He was later released without charge and his arrestors were not held to account for the illegal confinement.
  - Lydia Ngoolo, a journalist with *The Star Newspaper* based in Mwingi Township, Eastern Kenya, went into hiding in May 2014 after police officers, a businessman and a politician threatened her over a story related to terror suspects passing through the town.
16. Apart from the legal and extra-legal restrictions on the media, soft censorship, manifested in an array of official conduct seeking to sway media output, is disturbingly getting entrenched in Kenya. Soft censorship is used twofold; in promotion of positive coverage of public officials and intimidation of media outlets to prevent critical exposes.
17. A less visible but widespread tool of soft censorship in Kenya is government's massive advertisement budgets. The government is abusively allocating its advertising to reward positive coverage and punish critical coverage. This is extra destructive as tax payer money is used and abused to promote partisan political and economic interests. This is opaque and purposefully prejudiced use of official advertising subverts media freedom and public knowledge. There is a dire need for more transparency and protection on impartiality in all government payments and funding for media, whether for advertising, subsidy or consultancy payments.



18. Protection of sources for journalists is integral to the exercise of the right to freedom of expression. Journalists in Kenya are subject to confidentiality under the Code of Conduct for Practice of Journalism. The Code provides that: “*confidential sources shall be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed.*”<sup>2</sup> The Code further provides that unnamed sources in reporting shall only be used in cases where the pursuit of truth demands such non-disclosure.<sup>3</sup> However, contrary to these provisions and international standards, reported threats to reveal confidential sources of information emanate from government officials and police officers. Continued reportage of incidents of forced revelation of sources by journalists creates a chilling effect on media freedoms giving rise to self censorship.

#### **Access to ICT Infrastructure, Online Freedom and Protection of Right to Privacy**

19. Kenya is one of Africa’s Information, Communication and Technology (ICT) success stories. This is because of the phenomenal uptake of mobile telephony and other ICTs. According to the national telecommunications regulator, the Communications Commission of Kenya, by end of 2013, there were 16.4 million internet users in Kenya compared to just 3 million in 2007.
20. As the Internet becomes a critical medium for sharing information, it is crucial that it is protected. Currently, citizens are and remain vulnerable to the possibility of extensive unjustifiable state monitoring of their online communications and general Internet usage. Human rights defenders and political activists face a potential larger threat to extended monitoring of their activities through online platforms.
21. Article 31 (d) of the Constitution of Kenya 2010 protects the right of every person not to have the privacy of their communications infringed. Technological and security developments have increased opportunities for State surveillance into private communications both offline and online. Kenya has embraced technological advancements in this area to address arising security needs in the country. However, the achievement of these objectives are without due and critical impact assessment on the right to privacy, expression and other civil liberties in society.
22. While Kenya has ratified the Convention of the Rights of Persons with Disability and even enacted the Disability Act, persons with different disabilities continued to be constrained in access information and in exercising their freedom of expression as provided for in Article 21. This is because there is no clear policy on enhancing freedom of expression for persons with

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<sup>2</sup> Section 4 (2) a - <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MediaCouncilAct2013.pdf>

<sup>3</sup> Section 7 (1)



disability and neither has the state taken any appropriate known measures to facilitate their enjoyment of this fundamental right.

## Recommendations

The Kenya Media Stakeholders UPR Network calls upon the Government of Kenya to:

### 23. Scope and cooperation with international human rights mechanisms

- Extend an open and standing invitation to all the UN and African Commission on Human and Peoples' Rights Special Procedures and specifically facilitate the formal country visits of the UN and ACHPR Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression; the rights to freedom of peaceful assembly and of association; and human rights defenders.

### 24. Access to Information and transparency regimes

- Enact a comprehensive Right to Access to Information Bill 2013 and develop a clear framework of enhancing the fulfilment of right to access information as guaranteed by Article 35 of the Constitution of Kenya across public and state bodies.
- Immediately commence the repeal and amendment of provisions of the Official Secrets Act, Public Officers Ethics Act; Kenya National Examinations Council Act that illegitimately hinder access to information to ensure that all laws conform to acceptable international human rights and are can pass the constitutional muster.

### 25. Direct and indirect Censorship and Attacks of Journalists and bloggers

- Amend the Contempt of Court Bill, 2013 to provide additional safeguards in protection of sources by limiting disclosure by journalists to investigation, prosecution and defence of serious criminal offences and where similar information cannot be obtained through alternative means;
- Establish mandatory human rights training for police, security and law enforcement authorities at all levels;
- Speedily, impartially and fully investigate and prosecute state security agents found guilty of violating, threatening or intimidating human rights defenders, journalists and others exercising freedom of expression;
- Investigate harassment and attacks against journalists and human rights defenders in order to bring those liable to justice;
- Enact and implement a comprehensive laws and regulations guaranteeing fair and transparent official advertising;
- The state must ensure that state funding for media development and support should be paid in a transparent manner, with clear audit and reporting rules.



## 26. Access to ICT Infrastructure, Online Freedom and Protection of Right to Privacy

- Pursuant to Article 2(5) of the Constitution of Kenya, domesticate provisions on the language of Article 12 of the Universal Declaration of Rights (UDR) and Article 17 of the International Covenant of Civil and Political Rights (ICCPR) by guaranteeing protection of the law from arbitrary interference and attacks with privacy, family, home and correspondence including online correspondence.
- Institute a review process of all relevant national legislation, procedures and practices regarding surveillance of communications and collection of personal data comply with international standards.
- The state must develop proactive frameworks to provide information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.
- The state must develop a clear policy on how Article 7 of the Constitution of Kenya which requires to promote the development and use of sign language and facilitate the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.
- The state must make it a licensing condition for all media houses including providers of information through the Internet, to make their services accessible to persons with disabilities.