

Concept note**Roundtable on "The missing cog in Kenya's media reforms"****Background**

Kenya promulgated a new Constitution in August 2010. One of its key features is Chapter 4 on the Bill of Rights, and Articles 33, 34 and 35 which among other things, guarantees freedom of expression, media and access to information. The Constitution further provides for a devolved system of Government. If well implemented, it provides for public participation in governance, holding leaders accountable and increase the space for media pluralism with community-based journalists taking a leading role in the expanded information arena.

However, reforms touching on Freedom of Expression and that of the media are threatened by the piecemeal review of legislation – both media-related and non-media-related – that has a bearing on media work. On 5 December 2013, parliament passed the Kenya Information Communication (Amendment) and Media Council bills, which the media fraternity term as being retrogressive and curtail freedom of expression and that of the media. Both laws have been challenged in Court.

Defamation remains a criminal offence in Kenya even after Sections 56, 57 and 58 of the Penal Code were repealed by the Statute Law (Miscellaneous Amendments) Act 1997. Journalists continue to be charged with sedition or seditious libel under Penal Code, Cap. 63, Article 194. Courts continue to award public officials exorbitant amounts in damages over the prescribed maximum fines for civil defamation. This trend creates a deterrent on the exercise of freedom of expression for example the Nation Media Group was recently asked to pay Ksh 20,000,000 after losing a defamation case (Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015], Civil suit NO. 420 of 2011).

The Penal Code also offers special protection from scrutiny to the President, Cabinet Secretaries and Parliamentary officials. However, international human rights courts have consistently held that public officials should tolerate more criticism than ordinary citizens. Further, courts continue to award public officials exorbitant amounts in damages over the prescribed maximum fines for civil defamation. This trend creates a deterrent on the exercise of freedom of expression.

Other offensive laws include the Books and Newspapers Act (Cap 111 of the Laws of Kenya), which asks publishers and printers to execute a bond of Ksh1 million each as well as deposit two copies of each publication with the Attorney General. It also allows for publications to be 2

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banned and vendors to be arrested if they are found selling the banned publications. Official Secrets Act (Cap 187 of 1968) is still operational and prohibits the media from accessing government information however basic it might be. Lack of Freedom of Information law has also allowed for civil servants to use bureaucratic procedures and other measures aimed at concealing information under the pretext of national security especially using the Preservation of Public Security Act, which permits the arrest and detention of journalists on grounds of 'compromising public safety, public order, morality or internal defense. These provisions are not reflective of the international and regional freedom of expression and media freedoms standards which Kenya has committed to uphold.

While there have been attempts by Kenyan Government in the recent past to ensure that the right to information is being actualised in practice with the establishment of platforms such as the Kenya Open Data, membership to the OGP, and the laying of ICT infrastructure around the country, Kenya still lacks a legal framework that institutionalises and provides enforcement on the right to information. The importance of specific legislation on Freedom of Information cannot be refuted since it provides a legal implementation framework with which to realize freedom of expression. Recent rulings have so far held that the court will only make coercive orders to enforce Article 35 where there has been a request made to the state and such a request is denied. This has had the effect of limiting the application of proactive disclosure, which is one of the key principles of Freedom of Information legislation recognized internationally. In its efforts of bolstering freedom of expression and of the media as well as ensuring that legal reforms take a holistic approach, ARTICLE 19 invites you to a meeting to discuss on ***the missing cog in media reforms in Kenya***. Specifically, the meeting will seek to:-

- Identify and analyse laws/policies that have been enacted in line with the Fifth Schedule of 2010 Constitution, teasing out their strengths and weaknesses in promoting Freedom of Expression and of the media
- Identify and analyse laws/policies that have not been changed and hamper freedom of expression and of the media in Kenya
- Examine existing institutional frameworks pointing out their strengths and weaknesses in promoting Freedom of Expression
- Examine the impacts of non-media specific laws which effectively limit media freedom
- Provide sound and effective policy recommendations on undertaking wholesome reforms

The meeting will be held at **Hotel Intercontinental** from **8.30am-12.30pm on 20 August 2015**. Please confirm your availability with Tracey Ishmael (tracy@article19.org) or call +254727862230 3

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About us

ARTICLE 19 Eastern Africa works to secure freedoms of information and expression. We advocate for the development of progressive regional and international standards in laws and their national implementation. It is our aim that all our initiatives lead to substantial improvements in proposed or existing domestic legislation, policies and practice. Pursuant to our mandate, we are currently running a project with the overall objective of bolstering freedom of the media in Kenya as a critical contribution to the implementation of the Constitution of Kenya 2010, and also enhancing good governance and accountability



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