

ARTICLE 19

# Kenya: Draft Campaign Financing Bill, 2011

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April 2012

Legal analysis

# Executive summary

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In April 2012, ARTICLE 19 analysed the Draft Campaign Financing Bill, 2011 (“the Draft Bill”) of Kenya, which is currently undergoing a stakeholder review process by the Constitutional Implementation Committee of Kenya. ARTICLE 19 welcomes the initiative to foster greater transparency and accountability in the financing of election and referendum campaigns. However, a number of shortcomings in the Draft Bill jeopardise these objectives, and a series of amendments are required before the Draft Bill complies with international standards on freedom of expression and information.

In the analysis, ARTICLE 19 emphasises that transparency in campaign financing is indispensable for embedding accountability and integral to the promotion of good governance and democracy. Only with full access to information can the media scrutinise the conduct of election candidates and inform public debate on the dynamics and distribution of political and economic power in Kenya. The engagement that transparency fosters between candidates for public office and the electorate also maximises enjoyment of the right to political participation.

The analysis finds that positive measures in the Draft Bill include the establishment of limits on political campaign expenditures, caps on the amount individuals can donate to candidates, and the imposition of a ban on anonymous donations. The establishment of a framework for the collection and reporting of data to a new oversight Committee is a significant step towards furthering a culture of accountability in the financing of political campaigns.

However, ARTICLE 19 also finds that various elements of the Draft Bill fall short of international standards on freedom of expression and access to information. The Draft Bill designates as confidential all campaign financing information submitted to the oversight Committee, with only limited disclosure exceptions for information that is the subject of a complaint or investigation. This runs counter to the principles of proactive and maximum disclosure that are central to the right of access to information. The selection criteria for the oversight Committee are also left ambiguous, and there are inadequate safeguards to ensure the accountability of this committee to the public.

ARTICLE 19 urges the Kenyan legislature to revise the Draft Bill and adopt it only after it is brought into compliance with international standards on freedom of expression and information. The need for greater transparency in all aspects of public life in Kenya further demonstrates the urgent need for a comprehensive access to information framework to be implemented in the country.

## Recommendations

1. The criteria for selection and membership in the Campaign Finance Committee must be clearly enumerated in the Bill.
2. Information submitted to the Campaign Financing Committee by candidates should not be kept confidential, but should be proactively disclosed and publicly available in accordance with international standards on freedom of information.
3. Limits on election and nomination campaign expenditures should be subject to Parliamentary approval.
4. The Kenyan legislature must adopt the Freedom of Information Bill, subject to the recommendations previously made by ARTICLE 19.

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## About the Article 19 Law Programme

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, Comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org). For more information about the work of ARTICLE 19 in Kenya, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa at [henry@article19.org](mailto:henry@article19.org).

# Introduction

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The Draft Campaign Financing Bill, 2011 (“the Draft Bill”)<sup>1</sup> of Kenya is currently undergoing a stakeholder review process by the Constitutional Implementation Committee of Kenya.

ARTICLE 19 welcomes the initiative to foster greater transparency and accountability in the financing of election and referendum campaigns. Elections have historically proven to be a critical time for Kenya, marked by significant incidents of civic unrest and violence. The Draft Bill should serve to increase dialogue on election issues, and thereby lessen the chances that recourse will be taken to violence. However, we believe that a number of shortcomings in the current Draft Bill potentially jeopardise the legislature’s objectives, and a series of amendments are required before the Draft Bill complies with international standards on freedom of expression and information.

ARTICLE 19’s analysis builds upon the extensive work that ARTICLE 19 has done to promote and protect the right to freedom of expression and information in Kenya. In recent years, ARTICLE 19 Kenya and East Africa, as part of the Freedom of Information Network in Kenya, has tirelessly advocated for the adoption of a dedicated freedom of information law in the country. In furtherance of these efforts we have reviewed numerous drafts of Freedom of Information legislation, supporting the process for implementing the right as guaranteed in Article 35 of the Constitution.<sup>2</sup> We have also produced analyses of legislation such as the Media Council of Kenya Bill 2006, the Communications (Broadcasting) Regulations 2009 and 2011 and the harmonised Draft Constitution. Additionally, ARTICLE 19 has analysed numerous election-related laws in various countries for their compliance with freedom of expression standards, lending our expertise to legal reform initiatives worldwide. We have also produced three standard-setting documents relevant to the use of media during elections, in particular, *the Guidelines for Election Broadcasting in Transitional Democracies*,<sup>3</sup> and *Reporting Elections Broadcast Guidelines*.<sup>4</sup> Recently, we have also analysed the Kenyan Publication of Electoral Opinion Bill, 2011.<sup>5</sup>

The analysis of the Draft Bill emphasises that transparency in campaign financing is indispensable for embedding accountability and integral to the promotion of good governance and democracy. Only with full access to information can the media scrutinise the conduct of election candidates and inform public debate on the dynamics and distribution of political and economic power in Kenya. The engagement that transparency fosters between candidates for public office and the electorate also maximises enjoyment of the right to political participation.

This analysis finds that positive measures in the Draft Bill include the establishment of limits on political campaign expenditures, caps on the amount individuals can donate to candidates, and the imposition of a ban on anonymous donations. The establishment of a framework for the

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<sup>1</sup> The Draft Bill is on request from ARTICLE 19. The November 2011 version of the Draft Bill is also available at <http://www.cickenya.org/sites/default/files/bills/The%20Revised%20Campaign%20Financing%20Bill.pdf>.

<sup>2</sup> ARTICLE 19, Analysis of the Draft Freedom of Information Bill of Kenya, January 2012; available at <http://www.article19.org/resources.php/resource/2940/en/kenya:-freedom-of-information-bill>

<sup>3</sup> ARTICLE 19, Guidelines for Election Broadcasting in Transitional Democracies, August 1994 (re-printed in 1997); available at <http://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf>.

<sup>4</sup> Reporting Elections Broadcast Guidelines; available at [http://webworld.unesco.org/download/fed/iraq/english/broadcast\\_guidelines\\_en.pdf](http://webworld.unesco.org/download/fed/iraq/english/broadcast_guidelines_en.pdf).

<sup>5</sup> ARTICLE 19, Kenyan Publication of Electoral Opinion Bill, 2011, February 2012; available at <http://www.article19.org/data/files/medialibrary/2969/12-02-17-kenya.pdf>.

collection and reporting of data to a new oversight Committee are significant steps towards furthering a culture of accountability in the financing of political campaigns.

However, various elements of the Draft Bill fall short of international standards on freedom of expression and access to information. The Draft Bill designates as confidential all campaign financing information submitted to the oversight committee, with only limited disclosure exceptions for information that is the subject of a complaint or investigation. This runs counter to the principles of proactive and maximum disclosure that are central to the right of access to information. The selection criteria for the oversight Committee are also left ambiguous, and there are inadequate safeguards to ensure the accountability of this committee to the public.

ARTICLE 19 urges the Kenyan legislature to amend the Draft Bill based on our recommendations and to bring it into compliance with international standards on freedom of expression and information. The need for greater transparency in all aspects of public life in Kenya further demonstrates the urgent need for a comprehensive access to information framework to be implemented in the country.

# International Freedom of Expression and Information Standards

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The right to freedom of expression and freedom of information is widely held to be a “cornerstone” right, crucial both in its own regard and for the functioning of democracy. It is a condition for engagement in public governance and in debates on issues of public interest. Without freedom of information and transparency, the public will be unable to oversee public bodies and hold them accountable for corruption or abuse of powers.

## Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights (UDHR)<sup>6</sup> recognises access to information as integral to the right to freedom of expression:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>7</sup>

## International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.<sup>8</sup> Kenya acceded to the ICCPR on 1 May 1972 and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR:

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

In General Comment No.34, the UN Human Rights Committee (HR Committee) elaborated upon the application of Article 19 of the ICCPR as including the right of access to information. The General Comment specifies the duties of governments to proactively put in the public domain Government information of a public interest and to “make every effort to ensure easy, prompt, and effective and practical access to such information.”<sup>9</sup>

The General Comment also emphasises the importance of the right to freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. In this respect, “[t]he

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<sup>6</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>7</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> circuit).

<sup>8</sup> Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

<sup>9</sup> CCPR/C/GC/34, at Paragraph 19.

free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”

While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following respects:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, public health or morals.

Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put in jeopardy the right itself. Determining whether a restriction is narrowly tailored is often articulated as a three-part test. It is required that restrictions are i) provided by law, ii) pursue a legitimate aim; and iii) that they conform to the strict tests of necessity and proportionality.<sup>10</sup>

In relation to the right of access to information, the requirements of Article 19(3) translate into a three-part test. A public body must disclose any information that it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;<sup>11</sup>
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public’s interest in having the information.<sup>12</sup>

Any attempt by a government to suppress or withhold from the public information of a legitimate public interest must therefore be justified according to this three-part test.

### Regional Standards on Freedom of Information

As a member state to the African Union, Kenya is also bound by the freedom of information obligations imposed by the African Charter on Human and Peoples’ Rights (the Charter),<sup>13</sup> and the Declaration of Principles on Freedom of Expression in Africa (the Declaration).<sup>14</sup> Article 9 of the Charter states:

1. 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.

Principle IV of the Declaration states:

<sup>10</sup> *Velichkin v. Belarus*, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

<sup>11</sup> For an example of legitimate interests see Articles 38-45 of the Draft African Model Law for African Union Member States.

<sup>12</sup> The Public’s Right to Know: Principles on Freedom of Information Legislation1 (ARTICLE 19 Principles), London: 1999, Principle 4, available at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

<sup>13</sup> African Commission on Human and Peoples’ Rights, African [Banjul] Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html).

<sup>14</sup> African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression in Africa, adopted by Resolution of the Commission at the 32nd Ordinary Session, 2002, available at [http://www.achpr.org/english/doc\\_target/documentation.html?../declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html).



1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

Kenya is also a signatory to the the AU Convention on Preventing and Combating Corruption,<sup>15</sup> that *inter alia*, requires state parties to adopt legislative and other measures to related to funding of political parties. Namely, it stipulates that state parties must adopt legal and other measures to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the principle of transparency into funding of political parties.<sup>16</sup>

Furthermore, under the African Charter on Democracy, Elections and Governance,<sup>17</sup> Kenya undertook a commitment to regularly holding transparent, free and fair elections.

In September 2011 the Pan-African Conference on Access to Information adopted the African Platform on Access to Information (APAI),<sup>18</sup> a regional declaration indicating support for right to information principles, drafted by nine African groups working on freedom of expression, access to information and the media, including ARTICLE 19. The APAI elaborates on the right to freedom of information, and sets out minimum standards for access to information at a national level. This landmark regional declaration declares that the right to know is vital for good governance and a fundamental right of all people.

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<sup>15</sup> The African Union Convention on Preventing and Combating Corruption, adopted by the heads of state at the African Union Summit held in Maputo on 11 July 2003; available at [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf). Kenya signed the Convention on 17 December 2003 and ratified it on 3 February 2007.

<sup>16</sup> *Ibid.*, Article 10.

<sup>17</sup> The African Charter on Democracy, Elections and Governance, adopted by the 8th Ordinary Session of the African Union Assembly in Addis Ababa on 30 January 2007; available at <http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>. Kenya signed the Charter on 28 June 2008.

<sup>18</sup> African Platform on Access to Information, 19 September 2011; available at <http://www.article19.org/data/files/medialibrary/2740/APAI-FINAL.pdf>.

### **Convention Against Corruption**

The UN Convention Against Corruption, that Kenya was among the first UN member states to ratify, encourages fostering transparency in the financing of politics as a measure to tackle corruption. Article 7(3) provides that:

Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

### **Constitution of Kenya**

The right to freedom of information is constitutionally guaranteed in Kenya. Article 35 of the 2010 Constitution states:

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.

Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The State shall publish and publicize any important information affecting the nation.

# Analysis of the Draft Campaign Financing Bill, 2011

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## Structure and Purposes of the Bill

The Draft Bill contains 34 provisions divided between seven parts: 'preliminary' including definitions of key terms; 'establishment of the campaign finance committee'; 'establishment and administration of candidate and party expenditure committees'; 'campaign expenses'; 'contributions and donations'; 'campaign expenditure reimbursement'; 'offences', and 'general provisions'.

A preambular paragraph explains the purpose of the Draft Bill in the following terms:

An Act of Parliament to provide for the funding of election campaigns, to control the use of funds in the nomination process, election campaigns and elections; to provide for the management, spending and accountability of funds during election and referendum campaign; and for connected purposes.

ARTICLE 19 welcomes the objectives of the Draft Bill as a positive move towards tackling the culture of secrecy surrounding election and nomination campaign financing, thereby undermining the closed environment in which the public are denied access to information on these issues and where corruption may flourish.

Despite the apparent commitment to furthering accountability, nowhere in the Draft Bill is availing the public of their "right to know" acknowledged as essential for achieving the Bill's objectives. The absence of a guarantee for this right indicates a conceptual failure by the Bill's drafters to recognise that full transparency is indispensable for embedding accountability and integral to the promotion of good governance and democracy.

ARTICLE 19 again stresses that full access to information is the "oxygen" that feeds freedom of expression on political issues. Securing this right would facilitate media and public scrutiny of candidates for political office, and thereby provide a more comprehensive picture of the distribution and dynamics of political and economic power in Kenya. The engagement this fosters between candidates for public office and the electorate also maximises enjoyment of the right to political participation. The importance of the right to information should therefore be emphasised as central to the rationale underpinning and justifying the Bill.

### **Recommendations:**

- The preambular paragraph to the Draft Bill should cite the right to information and the right to political participation as key principles underpinning the Draft Bill and as essential to its objective of attaining accountability.

## Establishment of the Campaign Finance Committee

Part II of the law establishes the Campaign Finance Committee ("the Committee").

### *Functions of the Committee*

Article 4 of the Draft Bill enumerates the functions of the Committee as: registering nomination and campaign expenditure committees for candidates and political parties; supervising these

bodies in relation to party nomination and election campaign expenses; setting the spending limit for party nomination and election campaign expenses; overseeing party nomination and election campaign expenses; issuing advice on all matters relating to party nomination expenses and election campaign expenses; regulating election expenses, and receiving expenditure reports from candidates and political parties.

Absent from this list are the duties the Committee has as a public body to promote the right of access to information. This includes the duties of proactive and maximum disclosure, which are discussed in greater detail below. The Draft Bill must be amended to include these duties.

#### *Membership of the Committee*

Article 3(1) of the Draft Bill states that membership of the Committee shall be determined by the Independent Electoral and Boundaries Commission (the Commission), which was established by Article 88 of the Constitution.

Apart from specifying that the Registrar of Political Parties shall be a member of the Committee (Article 3(2)), the Draft Bill leaves all other memberships to the discretion of the Commission.

ARTICLE 19 observes that nothing in the Draft Bill indicates how individuals are nominated for Committee membership, or how selection processes will be made transparent. Similarly, the total number of Committee members and their maximum term in office is not specified. The constitution of the Committee in terms of gender, ethnicity, language or political association is also left to the determination of the Commission. There are no requirements that candidates have requisite moral characteristics, such as a criminal record clear of convictions for crimes of dishonesty, and processes for prematurely removing an individual from office for wrongdoing are not defined.

Further, Article 34 of the Draft Bill grants the Commission a general power to “make regulations for the better performance of its functions under this Act”. It is not clear whether regulations of the Commission in respect of the Committee are subject to an approval process in Parliament or not.

ARTICLE 19 is concerned that the Draft Bill delegates too much discretion to the Commission. The Draft Bill should make it clear what the selection criteria for Committee membership is, ensure that the selection process is transparent, what the maximum and minimum number of Committee members is, and indicate measures for ensuring that membership is reflective of the Kenyan population in terms of gender, ethnicity, language and political association. These matters should not be left to the Commission to determine alone.

#### **Recommendations:**

- The Draft Bill should specify the selection criteria for Committee membership, ensure transparency in the selection process, determine the number of Committee members, and ensure the membership is reflective of the Kenyan population.
- The list of Committee functions should include the duty to comply with access to information obligations.

### **Establishment of Candidate and Party Expenditure Committees**

Part III of the Draft Bill requires the establishment of various candidate and party expenditure committees, depending upon the nature of the contest in issue. These are: Party Candidate

Expenditure Committees (PCEC) for candidates contesting in a party nomination process<sup>19</sup>; Party Expenditure Committees (PEC) for parties that have nominated one or more candidates in an election<sup>20</sup> and Independent Candidate Campaign Expenditure Committees (ICCEC) for independent candidates who are contesting in an election.<sup>21</sup>

These committees are tasked with regulating the expenses associated with nomination and election campaigns; including ensuring limits on campaign expenditure are not exceeded and that prohibited donations are not accepted. They are also required to submit financial reports to the Committee to demonstrate their compliance with the Bill.

ARTICLE 19 welcomes the requirement that candidates and political parties establish campaign expenditure committees. In particular, these committees serve an important role in collecting and reporting on public interest matters related to campaign contributions and campaign expenditure. Formalising the collection and reporting of such data in a standard manner for all candidates will enhance the quality and quantity of information that is eventually available for informing public debate on campaign financing matters.

## Limits on Campaign Expenditure

The Draft Bill establishes that the total amount any candidate or party can spend during an election or nomination campaign will be limited.

Limiting campaign expenditure has a direct impact upon a candidate's right to freedom of expression. Communicating a political campaign has numerous costs, including: fundraising for the campaign itself; travel; staffing and consultancy costs associated with developing and managing a campaign; and the direct costs of advertising a message through billboards, fliers, and the mainstream media. By restricting the amount of money a candidate has to meet these costs, the Draft Bill necessarily restricts candidates' freedom to communicate their message.

ARTICLE 19 notes that a restriction on campaign expenditure may be justified to the extent that the restriction is provided by law, pursues a legitimate aim, and is necessary and proportionate.

- **Provided by law:** ARTICLE 19 observes that there is a lack of clarity over which body has the competence to set campaign expenditure limits. Article 4(c) of the Draft Bill reserves to the Committee the power to "set the spending limit for party nomination and election campaign expenses". Meanwhile, Article 14 states that it is the Commission that will set spending limits. It states that the Commission may set limits for (a) candidate nomination expenditure; (b) candidate election expenditure; (c) party election expenditure, and (d) a fresh election to be held under Article 138(6) of the Constitution. The Constitutional Implementation Committee must address this irregularity. This analysis proceeds on the assumption that it is the Commission that will have the power to set campaign expenditure limits.

ARTICLE 19 is also concerned that it appears the Commission will be free to decide the limit on campaign expenditure without any Parliamentary scrutiny or stakeholder consultation. The nature of this limit will have a substantial impact upon the operation of democracy in Kenya, and as such it is appropriate that the limit, when determined, is

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<sup>19</sup> Article 6 of the Draft Bill.

<sup>20</sup> Article 7 of the Draft Bill.

<sup>21</sup> Article 8 of the Draft Bill.

democratically approved following adequate stakeholder consultation.

- **Legitimate aim:** Two legitimate aims, both related to the protection of the rights of others, can be identified that justify a restriction on campaign expenditure.

*Firstly*, a limit on campaign expenditure prevents the costs of campaigning escalating to a point where access to public office is reserved for the extremely wealthy. This upholds the right guaranteed in Article 25(c) of the ICCPR that all people should have access, on general terms of equality, to public service in their country.

*Secondly*, restricting campaign expenditure also guarantees the right of all people to participate in “genuine periodic elections” that reflect the will of the electors, as guaranteed in Article 25(b) of the ICCPR. The more that campaign costs escalate, the more incentive there is for candidates to solicit large donations from wealthy individuals. This subverts the democratic principles that underpin elections, as candidates stand to gain more by appealing to large donors than the general public. Limiting campaign expenditure therefore preserves the right of each individual to hold an equal influence over the outcome of an election through the exercise of their vote.

ARTICLE 19 notes that while the objective of preserving democratic participation justifies a limitation on campaign expenditure, it is not clear from the text of the Draft Bill that this is the rationale for the provision. The provision would therefore be strengthened if the Draft Bill explicitly stated that limiting campaign expenditure was intended as a measure to protect the fundamental right to political participation and the equal enjoyment of that right.

- **Proportionality:** The Draft Bill includes a number of features to ensure that the limit placed on campaign expenditure is proportionate. Article 14 (3) of the Draft Bill requires the Commission to take into consideration the difference in the size of the electoral constituency; the categories of candidates; the population in the electoral constituency; the number of party members in the electoral constituency; and the communication infrastructure of the electoral constituency. This provision should ensure that restrictions are narrowly tailored to each specific election or nomination contest.

Proportionality principles also appear to be integrated into the sanctions regime for candidates who exceed the campaign expenditure limit. Available sanctions include disqualifying the candidate from contested in an election, and fining the candidate a penalty which correlates to the extent by which they exceeded the expenditure limit. These provisions would benefit from a direct reference to the principle of proportionality in imposing sanctions.

### **Recommendations**

- The Draft Bill should make it clear that it is the Commission that is responsible for setting the limit for election or nomination campaign expenditure, and this decision should be subject to Parliamentary scrutiny and approval.
- The Draft Bill should require consultation with effected stakeholders in the establishment of a limit on campaign expenditure.
- The Draft Bill should express in clear terms that the limitation on campaign expenditure is intended to protect the right of all people to political participation, as contained in Article 25 of the ICCPR.
- Direct reference should be made to the proportionality principle in the provisions concerning the imposition of sanctions.

## Limits on Campaign Donations

### *Restrictions on donations*

Article 17 of the Draft Bill prohibits any individual from donating or pledging a sum to a candidate or party campaign account in one year that exceeds five percent of the total contributions for that year.

As with the limitation on campaign expenditure imposed by Article 14 of the Draft Bill, limiting the size of donations that individuals are permitted to make to candidates for public office may be interpreted as a restriction on prospective donors' rights to freedom of expression. However, this restriction can also be said to be justified by the legitimate aim it serves of protecting the right of all people to political participation, as guaranteed by Article 25 of the ICCPR.

ARTICLE 19 welcomes the restriction on campaign contributions. Restricting campaign donations minimises the influence that wealthy individuals can hold over a political campaign, as their financial contribution will not be essential for the campaign's viability. The restriction also incentivises candidates to pursue a greater number of less affluent individuals for small campaign contributions, thus increasing engagement between political candidates and a broader section of society. The limit on donations therefore acts against a culture in which elections become a contest to attract the largest donors rather than to appeal to the largest number of voters. Removing from wealthy individuals the power to influence politics through their campaign contributions reserves to all individuals their right to equal political participation.

### *Anonymous donations*

Article 18(1)(b) of the Draft Bill prohibits the receipt and retention of anonymous contributions to nomination and election campaigns. Failure to report anonymous contributions and to submit that donation to the Committee is made an offence under Article 18(4) and renders that candidate liable to being disqualified from contesting the election.

ARTICLE 19 welcomes the prohibition of anonymous donations. This is an essential measure for maximising transparency in the political process, increasing the likelihood that undue donor influence will be uncovered and deterring the solicitation and acceptance of such contributions. It also increases the likelihood that individuals will only make contributions to nomination and election campaigns if they are willing to publicly stand by those donations.

At the same time, we are concerned that the impact of this positive measure will be seriously limited while the Committee keeps confidential data submitted to it by candidates, as required by Article 13(7) of the Draft Bill. The prohibition on anonymous donations is likely to be most effective if complemented by provisions fully implementing the right to freedom of information in relation to campaign financing. The implications of Article 13(7) are discussed in greater detail below.

### **Recommendations**

- The prohibition on anonymous donations would be more effective if the duty on the Commission to keep submissions to it confidential, contained in Article 13(7) were removed.

## Recording and Disclosure Obligations

A positive feature of the Draft Bill is the obligation it places on the expenditure committees established by nomination and election candidates to collect and report information on campaign



contributions and expenditure.

While the Draft Bill currently lacks adequate safeguards for the right to information, the collection and disclosure of this data to the Committee has the potential to form a solid basis from which a framework implementing this right can be built. ARTICLE 19 finds that the lack of such a framework to be one of the Draft Bill's most significant shortfalls.

#### *Recording obligations*

Article 11 and Article 12 of the Draft Bill require candidates and parties intending to contest in a nomination or an election to establish a bank account solely for the purpose of financing their campaign. The candidate must record their initial personal contribution, the size of donations received, and the contributions made by any nominating political party.

Candidate and party expenditure committees are required to manage the campaign financing account throughout the campaign. The obligation is on the candidate in Article 11 (4) to ensure that an accurate record of all transactions relating to the bank account is kept.

Article 29 requires each candidate to keep records of: funds received for campaign expenses (including amount and nature); names and addresses of donors; anticipated funds and their sources, and total expenditure.

ARTICLE 19 welcomes these provisions, as formalising the collection of such data in a standard manner for all candidates will enhance the quality and quantity of information that is eventually available for informing public debate on campaign financing matters.

#### *Preliminary and final expenditure reports*

The various candidate and party expenditure committees are required to submit to the Committee preliminary and final expenditure reports. The deadlines for submitting these reports vary depending on whether the individual concerned is a party candidate,<sup>22</sup> a party nominated candidate,<sup>23</sup> or for an independent candidate.<sup>24</sup>

Preliminary reports are required to be submitted by candidates at various intervals prior to an election. Article 13 (1) – (5) sets out the varying disclosure obligations, which depend on the nature of the candidate and the contest. They all require the disclosure of the amount of funds in the account of the candidate, the donations which the candidate has received, the donations which have been pledged to the candidate in cash or in-kind, and the funds the candidate intends to use in the campaign. However, it appears that only independent candidates are required to submit the identities of their donors, despite the prohibition on anonymous donations applying uniformly.<sup>25</sup>

Article 28 specifies that final expenditure reports, submitted following an election or nomination, should include: records showing all transactions; records showing all assets acquired and commitments entered into; a balance sheet; an income and expenditure statement; and a cash flow statement.

ARTICLE 19 welcomes the requirement that these reports be submitted to the Committee. However, as commented upon in greater detail below, these reports should be publicly available

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<sup>22</sup> Article 6 of the Draft Bill

<sup>23</sup> Article 7 of the Draft Bill

<sup>24</sup> Article 8 of the Draft Bill

<sup>25</sup> See Article 13(3)(b) of the Draft Bill.



and accessible.

#### *Duty of confidentiality*

ARTICLE 19 is particularly concerned that the Draft Bill requires that the Committee and Commission maintain the confidentiality of all submissions made to it from election and nomination candidates. Article 13 (7) provides that:

The disclosure of funds shall be confidential and shall not be divulged except when such information is the subject of a complaint or an investigation or if it is the subject of proceedings the court of law.

ARTICLE 19 observes that the obligation to maintain the confidentiality of these records is contrary to international standards on freedom of information, and runs counter to the objectives of the law to inculcate accountability in the financing of election and nomination campaigns.

As stressed a number of times in this analysis, information on campaign financing is of utmost importance for informing public debate on prospective candidates for public office, including where they get their financial support and how this squares with their policy positions. This information is vital for painting an accurate and comprehensive picture of the political dynamics at play during a nomination or election process and may even prove decisive for individuals choosing how to exercise their vote. It allows for a degree of public scrutiny that can uncover instances of corruption and undue influence in politics that would otherwise be overlooked.

It is not enough that information submitted to the Committee will become a matter of public record where that information is subject to a complaint or a court proceeding. The Draft Bill must be amended to recognise the principle that governments hold information not only for themselves but, rather, on behalf of the public. As such, the Committee should proactively disclose all the information submitted by candidates for nomination and election. Where requests for information that has not been disclosed are received, the Committee should provide access to that information. In other words, transparency should be the norm and confidentiality the exception.

Lastly, the Draft Bill should make it clear that the public is entitled to petition the Commission to investigate a candidate's compliance with the Draft Bill. Article 32 currently only provides for a process of referring disputes between election or nomination candidates from the Committee to the Commission. Candidates for public office should ultimately be accountable to the public, and it is therefore important that the public has the right to submit complaints in respect of compliance with the Draft Bill to the appropriate authorities. The effective exercise of this right would depend greatly on the removal of Article 13(7) and the implementation of the right of access to information in respect of information held by the Committee.

#### **Recommendations:**

- Article 13(7) of the Draft Bill should be removed.
- The Committee should be required to proactively disclose the financial information submitted to it by candidates for nomination and election. This should include the identities of donors to all nomination and election campaigns.
- Article 32 should provide for a right for any member of the public to petition the Commission to investigate any alleged infringement of the Draft Bill.