LEGAL ANALYSIS

KENYA: OFFICIAL SECRETS ACT 1970, REVISED 2012) AND AMENDMENT (2020)

AUGUST 2020

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Executive summary

In August 2020, ARTICLE 19 analysed the Republic of Kenya's Official Secrets Act of 1970, revised in 2012, as well as a proposed amendment in 2020 (the Official Secrets Act or the Act). Historically, ARTICLE 19 has expressed profound concern regarding the scope of the Act, and takes this opportunity to reiterate its concerns surrounding the Act's fundamental compatibility with Kenya's obligations to protect and promote freedom of expression and information under international human rights law.

Further, ARTICLE 19 is greatly concerned that the expansion of the Official Secrets Act to modern technologies, including any telecommunications apparatus, grants far-reaching warrantless search powers of digital communications which have serious implications for rights to access information as well as privacy. This proposed amendment has already faced significant criticism for its grave implications for the personal freedoms of citizens and journalists in Kenya, particularly those who "rub the government the wrong way."

ARTICLE 19 notes that while protection of national security *can* be a genuine and legitimate interest for restricting freedom of expression, the Official Secrets Act and its proposed amendment as a whole fail to provide an adequate balance between the public's right to freedom of expression and information and national security interests. In particular:

- **The Act carries a potentially limitless scope.** Its key provisions punish a wide range of seemingly ordinary conduct engaged in routinely by journalists, government officials, and members of the public. As such, it seriously threatens the free conduct of investigative journalism and could*, inter alia,* punish journalists who passively receive information. No exceptions at all are made if the underlying documents or information expose wrongdoing or abuses by the government.

- **The 2020 draft Amendment provides sweeping warrantless police powers** to the Cabinet Secretary, a non-judicial official, to compel Internet and telecommunications platforms to provide data on communications and user information. These powers can have a chilling effect on the ability of individuals and media to engage in free speech. Because there is presently no judicial oversight, the standard for search is highly subjective and potentially limitless. It is also unclear how these provisions may interact with the ability of individuals to use encryption to protect anonymity of communications.

- Many key provisions of the Act **lack of clarity of key terms related to national security**; they are broadly defined to an extent that does not provide legal clarity as to prohibited conduct.

- **The Act does not require a proof of substantial harm caused** by disclosure. Thus, it is entirely conceivable under the framework of the Official Secrets Act that individuals can face severe criminal sanctions and prison time for disclosures that cause no harm at all.

- The Act does not require **evidence of actual harm** caused by disclosure or communication. Hence, individuals can face severe criminal sanctions and prison time for disclosures that cause little or no harm at all.

- **No public interest defence is available.** The Act fails to provide a safeguard of an

affirmative defence to prosecution where an individual can present evidence that their disclosures benefited the public good. All restrictions on expression on grounds of national security, whether criminal or civil, should be subject to a public interest defence so sanctions only attach where damage to national security clearly outweighs any public interest value in disclosure. Section 16 provides reference to "excuse", but this does not establish a sufficient public interest defence.

- **Sanctions are disproportionate and severe.** Criminal penalties range up to fourteen years in prison, which are decidedly severe given the lack of intentionality and harm requirements or the availability of any public interest defence. Any legal sanctions, particularly criminal, should not be so severe as to have a disproportionate effect on freedom of expression and information, and should account for any potential chilling effects.

- **No protections are offered for confidential sources and information.** The framework of the Act, specifically the newly proposed amendments, could be used to gather information on journalistic sources without judicial oversight. The protection of sources is an integral part of the protection and promotion of the right of freedom of expression.

Key recommendations

- Section 3 of the Act should be repealed in its entirety. Its provisions are exceedingly broad, relate to a seemingly limitless degree of conduct, and are fundamentally incompatible with Kenya's obligations to promote freedom of expression.
- Section 5 should be stricken as written, or if a prohibition on obstruction of activities is included it should clearly and narrowly define what is meant by "interference" with police officers, to ensure that no legitimate expressive activity is included.
- Section 6, as amended, which grants wide warrantless search and surveillance powers of digital content and communications, should be stricken in its entirety. Searches must be subject to independent judicial review and require cause.
- Definitions of key terms which may be used to curtail freedom of expression must be narrowly and precisely defined to comply with international freedom of expression standards.
- Civilian law enforcement should not be included in the framework of national security and should hence be stricken from any definitions of 'munitions' or 'prohibited places.'
- The Act should not include references to sedition or 'subversive activities' as such concepts typically fail the requirements on permissible restrictions to freedom of expression under international standards.
- Any definition of foreign agency should be narrowly and precisely crafted as to not risk the possibility of labelling individuals are foreign agents for political purposes. As such, the language regarding one "reasonably suspected" to be a foreign agent should be stricken, as should be the ability of one to be a foreign agent merely for acting "in the interests of a foreign power."
- Section 7 should be stricken in its entirety, as it interferes with the freedom of association with others under Article 22 of the International Covenant on Civil and Political Rights.
- Section 12 should either be stricken or amended to explicitly provide greater safeguards for the public's right to access judicial proceedings and challenge determinations of secrecy.
- Sections 13 through 15, which create various presumptions of intent (i.e. guilt) based on alleged conduct alone, are antithetical to fundamental due process standards, particularly in the context of a national security law, and should be stricken in their entirety.

Table of contents

Introduction

In this legal analysis, ARTICLE 19 reviews the Official Secrets Act (1970, Revised 2012, the Act) and the draft Amendment (2020) to the Act, that is currently being considered by the Kenyan Parliament, for its compliance with international human rights standards.

ARTICLE 19 has already expressed serious concerns over the scope of the Official Secrets Act and called on Kenya to repeal Sections 3, 7, and 15 of the Act in their entirety, on grounds that the Act "places a blanket gag on possession, release, communication or transfer of official information."[1] We are concerned that the Kenyan Government instead moved to propose even further problematic restrictions in the draft 2020 Amendment. The Amendment has already faced significant criticism for its grave implications for the personal freedoms of citizens and journalists in Kenya, particularly those who "rub the government the wrong way."[2]

We observe that the Media Council of Kenya recently commissioned a study on media factors affecting media viability, or the ability of media outlets to sustainably produce high-quality journalism and for citizens to have stable access to reliable information. It concluded *inter alia* that the Official Secrets Act was prohibitive to freedom of the press.[3] Other academic legal analysis has pointed out that the Act has not been judicially tested for its compatibility with African regional human rights standards, calling into question the necessity of the Act with respect to Kenya's obligation to promote and protect access to information.[4]

Secrets laws have significant and often deleterious implications for freedom of expression and the right to access and receive information and go against State obligations to actively promote open government.[5] States should ensure that their legislation provides mechanisms to address the problems that "secrecy culture" within government creates for freedom of expression. The balancing between freedom of expression and national security is not a matter of balancing interests of the State against the interests of citizens. Robust protection of the right to free expression ultimately leads to more open, accountable, and better government, and more effective security services. Further, individuals should be protected from any legal sanctions or harms for releasing information on wrongdoing by public or private bodies.[6] These issues bear a greater urgency under a framework, where, as we have observed in recent years, journalists frequently report in Kenya under significant risk.[7]

Hence, ARTICLE 19 encourages the Kenyan legislature to take the opportunity of the current Amendment to the Official Secrets Act to consider the Act's overall necessity and viability in light of Kenya's own freedom of expression obligations. The analysis that follows is intended to provide assistance and clarity in relevant standards, and ARTICLE 19 remains available to guide those involved in drafting or amendment through this process.

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[1] ARTICLE 19 Individual Submission to the Universal Periodic Review of Kenya, 14 June 2014, p. 2.
[2] See, e.g., D. Kiprono, Rethink plan to amend the Official Secrets Act, The Standard, 26 June 2020.
[3] See, e.g., V. Bwire, Legal, policy framework in Kenya does not support media – MCK, The Star, 20 July 2020.
[4] See, e.g., A. Olaniyi Salau, The right of access to information and national security in the African regional human rights system, African Human Rights Law Journal Vol. 17 No. 2, 2017.
[5] *C.f.* ARTICLE 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016, Principle 3.
[6] *Ibid.*, Principle 9.
[7] ARTICLE 19, Kenya: Attack on journalists adds to concerns for press freedom, 28 March 2018.

Applicable human rights standards

Freedom of expression and information under international law

The right to freedom of expression is protected by a number of international human rights instruments, in particular Article 19 of the **Universal Declaration of Human Rights (UDHR)**[8] and Article 19 of the **International Covenant on Civil and Political Rights (ICCPR)**.[9] On a regional level, the right to freedom of expression is guaranteed by the **African Charter on Human and Peoples' Rights**[10] and in the Declaration of Principles on Freedom of Expression in Africa (African Declaration).[11]

The right to access information (the right to information or freedom of information) is an integral part of the right to freedom of expression.[12] It is also a right of the public at large: it guarantees a collective right of the public to receive information others wish to pass on to them. Right to information is also central to the functioning of democracy. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news.' In such a climate, corruption thrives, and human rights violations can remain unchecked. The content of the right to freedom of information has been elaborated in a greater detail in The Public's Right to Know: Principles on Freedom of Information Legislation[13] as well as in numerous reports of the UN Special Rapporteur on Freedom of Expression.[14]

Limitations on the right to freedom of expression and information

While the right to freedom of expression and information is a fundamental right, it is not guaranteed in absolute terms. All restrictions must be strictly and narrowly tailored and may not put in jeopardy the right itself. The determination whether a restriction is narrowly tailored is often articulated as a three-part test. Restrictions must:

- **Be prescribed by law**: a norm must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[15] Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible;

[8] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[9] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.
[10] CAB/LEG/67/3 rev. 5 I.L.M. 58 (1982), Article 9.
[11] African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, the revised version adopted at the 65th Ordinary Session, 21 October to 10 November 2019, Article II.
[12] *C.f.* Human Rights Committee, General Comment No. 34, CPR/C/GC/3, 12 September 2011; or the 2006 Joint Declaration of Special Rapporteur on FoE, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, 20 December 2006; and the 2004 Joint Declaration of the Special Rapporteur on FoE, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on FoE, 6 December 2004.
[13] ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London, 1999.
[14] See e.g., A/HRC/14/23, paras 30–39; A/HRC/7/14, paras 21-31; E/CN.4/2005/64, paras 36–44; E/CN.4/2004/62, paras 34–64; E/CN.4/2000/63, paras 42 – 44.
[15] HR Committee, *L.J.M de Groot v. The Netherlands,* No. 578/1994, CCPR/C/54/D/578/1994, 1995.

- **Pursue a legitimate aim:** exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals;

- **Be necessary and proportionate**. Necessity requires that there must be a pressing social need for the restriction, with a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction be appropriate to achieve its protective function and is no more intrusive than other instruments capable of achieving the same limited result.[16]

The same principles apply to electronic forms of communication or expression disseminated over the Internet.[17] Further, the African Commission has consistently affirmed that restrictions must be as minimal as possible such that the right's infringement is not more than strictly necessary to achieve its desired objective.[18]

As for freedom of information, in their 2006 Joint Declaration, international human rights mandates highlighted that exceptions to the principle of maximum disclosure of information should be subject to the "harm" and "public interest" tests. Access to information should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.

National security restrictions

Moreover, the **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**[19] (Johannesburg Principles) are instructive on restrictions on freedom of expression that seek to protect national security. In particular, they stipulate that restrictions sought to be justified on the ground of national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force.[20] The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology.

The Principles also provide that a State may not categorically deny access to all information related to national security, but only specific and narrow categories of information. There is a fundamental public interest in knowing about wrongdoing, and national security cannot be invoked as a justification to prevent dissemination of information regarding government misdeeds. Further, nobody should be punished on national security grounds for disclosure of information if:

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[16] HR Committee, *Velichkin v. Belarus*, No. 1022/2001, CCPR/C/85/D/1022/2001, 2005.
[17] General Comment, *op.cit.*, para 43.
[18] African Commission on Human and People's Rights (The African Commission), *Amnesty International & Others v Sudan* (2000) AHRLR 297, 1999, para 80.
[19] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, 1996, developed by ARTICLE 19 and international freedom of expression experts. The Principles have been endorsed by the UN Special Rapporteur on FoE and have been referred to by the UN Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.
[20] *Ibid.*. Principle 2.

- the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or
- the public interest in knowing the information outweighs the harm from disclosure.[21]

Further, the **Tshwane Principles on National Security and the Right to Information**[22] also consider extensively the types of restrictions that can be imposed on access to information in the context of national security.

Protection of sources

The protection of journalists' sources is an essential element of freedom of expression. The media routinely depend on contacts for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist.

Standards on protection of sources have been elaborated in a number of reports (e.g. the 2015 report to the UN General Assembly, the Special Rapporteur on FoE[23]) and case law of regional courts.[24] Importantly:

- In May 2015, the East African Court of Justice ruled that journalists could not be compelled to reveal sources merely because the information they provided related to national security or defence.[25]

- The African Commission on Human and People's Rights has stated that "media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes", except where meeting certain specified exceptions.[26]

Journalists should never be compelled to disclose sources, or their files or records taken, absent exceptional circumstances where vital interests are at stake, and where there is ample transparency and opportunity for defence. In particular, they should never be required to reveal their sources unless this is necessary for a criminal investigation or the defence of a person accused of a criminal offence and they are ordered to do so by a court, after a full opportunity to present their case."[27]

The right to privacy

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[21] *Ibid.,* Principle 15.
[22] The Global Principles on National Security and the Right to Information (Tschwane Principles), June 2013.
[23] Report of the UN Special Rapporteur on FoE, A/70/361, 8 September 2015, paras. 14, 24.
[24] See also, the European Court of Human Rights, Factsheet -Protection of journalistic sources; see in particular *Sanoma v Uitgevers B.V. v the Netherlands*, [GC], App. No. 38224/03, 14 September 2010, para 50.
[25] East African Court of Justice, *Burundi Journalists Union v. Attorney General of the Republic of Burundi*, No. 7/2013, 15 May 2015, paras 107-111.
[26] Declaration of Principles on Freedom of Expression in Africa, *op.cit.*, Principle XV.
[27] *C.f.* Statement regarding key issues and challenges to freedom of expression, OAS Special Rapporteur on Freedom of Expression, OSCE Representative on Freedom of the Media and Special Rapporteur on FoE, 19, February 2000.

The right to privacy complements and reinforces the right to freedom of expression. It is essential for ensuring that individuals are able to freely express themselves, including anonymously,[28] should they so choose. The mass-surveillance of online communications therefore poses significant concerns for both the right to privacy and the right to freedom of expression. The right to privacy is protected in international law through Article 17 of the ICCPR[29] that, *inter alia*, states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence.[30]

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has argued that like restrictions on the right to freedom of expression under Article 19, restrictions of the right to privacy under Article 17 of the ICCPR should be interpreted as subject to the three-part test.[31] In terms of surveillance (within the context of terrorism in this instance), he stated that:

> States may make use of targeted surveillance measures, provided that it is case-specific interference, on the basis of a warrant issued by a judge on the showing of probable cause or reasonable grounds. There must be some factual basis, related to the behaviour of an individual, which justifies the suspicion that he or she may be engaged in preparing a terrorist attack.[32]

The Special Rapporteur on FOE has also observed that interference with the right to privacy through State surveillance is permissible only under certain conditions. Namely:

> [T]here must be a law that clearly outlines the conditions whereby individuals' right to privacy can be restricted under exceptional circumstances, and measures encroaching upon this right must be taken on the basis of a specific decision by a State authority expressly empowered by law to do so, usually the judiciary, for the purpose of protecting the rights of others, for example to secure evidence to prevent the commission of a crime, and must respect the principle of proportionality.[33]

The Constitution of Kenya

Article 33 of the 2010 Constitution of Kenya guarantees freedom of expression, including the freedom to seek, receive or impart information or ideas. Some exceptions to the right to freedom of expression exist, including propaganda for war, incitement to violence, hate speech, and advocacy of hatred on grounds of ethnic incitement. Further, Article 31 of Kenya's Constitution protects the right to privacy, and Article 35 protects the right of access information.

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[28] *Ibid*, para 84.
[29] Article 17 states: 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2) Everyone has the right to the protection of the law against such interference or attacks.
[30] *C.f.* also HR Committee, General Comment 16, U.N. Doc. HRI/GEN/1/Rev.1 at 21, 1994.
[31] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37, 28 December 2009, para 17.
[32] *Ibid.*, para 21.
[33] Report of the Special Rapporteur on FoE, A17/27, 17 May 2011, para 59.

Analysis of the Official Secrets Act and the draft Amendment (2020)

General comments

Prior to analysing the provisions of the Official Secrets Act in greater detail, ARTICLE 19 would like to provide general observations on the Act, and principles that should inform any attempt by Kenya to impose criminal sanctions for the dissemination of 'secrets.' These principles will guide the discussion that follows.

- **Lack of clarity of key terms related to national security:** We observe that many key provisions of the Act are very broadly defined to an extent that the Act does not provide legal clarity as to prohibited conduct. We recall that all legislation posing restrictions on expression or information on grounds of national security should include a clear and narrow statutory definition of national security and any accompanying terms, particularly those carrying legal effect.[34]

- **Burden of proof does not rest with authorities:** The Act creates many situations where one is presumed to be guilty, or bad intent is imputed onto individuals, without the government having to actively establish that it exists. This reverses the burden that must exist pursuant to international legal principles.

- **The Act does not require a proof of substantial harm caused** by disclosure: Thus it is entirely conceivable under the framework of the Official Secrets Act that individuals can face severe criminal sanctions and prison time for disclosures that cause no harm at all.

- **No public interest defence is available:** The Act, in addition to not considering intent, fails to provide a safeguard of an affirmative defence to prosecution where an individual can present evidence that their disclosures benefited the public good. All restrictions on expression on grounds of national security, whether criminal or civil, should be subject to a public interest defence so sanctions only attach where damage to national security clearly outweighs any public interest value in disclosure.

- **Sanctions are disproportionate and severe.** Criminal penalties range up to fourteen years in prison, which are decidedly severe given the lack of intentionality and harm requirements or the availability of any public interest defence. Any legal sanctions, particularly criminal, should not be so severe as to have a disproportionate effect on freedom of expression and information. In particular, in imposing sanctions, decision-makers should account for any potential chilling effects.

- **No protections are offered for confidential sources and information.** The framework of the Act, specifically the newly proposed amendments, could be used to gather information on journalistic sources without judicial oversight. The protection of sources is an integral part of the protection and promotion of the right of freedom of expression.

[34] *C.f.* the Johannesburg Principles, *op.cit.*, Principle 2(a).

Recommendations:

- Kenya's legislature should conduct a close review of the Official Secrets Act and the measure's compatibility with freedom of expression standards.

- Any laws that restrict freedom of expression on national security grounds should reference Kenya's obligations under regional and international human rights standards to safeguard freedom of expression. While the Act currently references Kenya's Constitution with respect to Article 35 on access to information, this provision does not go far enough to offer substantive protections.

Compelled production of Internet and telecommunications data

Section 6 is the subject of the current 2020 Amendment to the Official Secrets Act, and as such we analyse this provision first.

Section 6 updates a prior provision concerning mandated production of data surrounding telegraphs, to include a broadly-defined "telecommunications apparatus." This definition is intended to apply to various forms of data, including Internet, computer, and mobile phone data. Under Section 6, the Cabinet Secretary, under a condition of "public interest," may *unilaterally* issue a warrant to force one who controls a telecommunications apparatus used for sending or receiving data outside of Kenya, to produce transcripts of the data and "all other documents relating to such data."

First, ARTICLE 19 observes that this process **has no requirement for judicial oversight**. Ordinarily, due process requires that infringements on personal privacy be subject to a warrant reviewed by a court or independent adjudicatory body. The Cabinet Secretary is no such entity; they are a part of the executive body of the government. There is no procedural safeguard allowing the owner of a telecommunications apparatus or an individual whose data is implicated to challenge the Cabinet Secretary's determination.

Second, we note that a telecommunications apparatus with the capability of sending data outside Kenya can include **any modern electronic device** including a phone or computer. "Data" is broad enough to include correspondence (including both the substance and information on sender and recipient), electronic mail, Internet activity, location data, stored documents, and transactions. This provision is the digital equivalent of granting the Cabinet Secretary the unfettered ability to break into and enter any individuals home under the pretext of 'public interest.'

We recall that the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has argued that like restrictions on the right to freedom of expression under Article 19, restrictions of the right to privacy under Article 17 of the ICCPR should be interpreted as subject to the three-part test.[35] Further, in terms of surveillance (within the context of terrorism in this instance), he stated that:

[35] A/HRC/13/37, *op.cit.*, in which the Special Rapporteur stated that "Article 17 of the Covenant should also be interpreted as containing the said elements of a permissible limitations test. Restrictions that are not prescribed by law are "unlawful" in the meaning of article 17, and restrictions that fall short of being necessary or do not serve a legitimate aim constitute "arbitrary" interference with the rights provided under article 17;" para 17.

> States may make use of targeted surveillance measures, provided that it is case-specific interference, on the basis of a warrant issued by a judge on the showing of probable cause or reasonable grounds. There must be some factual basis, related to the behaviour of an individual, which justifies the suspicion that he or she may be engaged in preparing a terrorist attack.[36]

As such, Section 6 does not provide for a particularised factual basis or adherence to the three-part test. Further, coupled with Section 19 of the original Official Secrets Act, which requires any individual, upon demand, to "give any information in his power relating to the offence or suspect offence" or else face criminal penalties, creates an onerous framework for compelling the disclosure of any information.

Recommendation:

- Section 6, as amended, which grants wide warrantless search and surveillance powers of digital content and communications, should be stricken in its entirety. Searches must be subject to independent judicial review and require cause.

Definitions under the Official Secrets Act

The Act begins in Section 2 with an outline of various definitions of key terms applicable to the law, many of which are alarmingly broad and potentially limitless in their plain language. In particular, ARTICLE 19 is concerned with the following definitions:

- **"Agent of a foreign power"** entails any person "reasonably suspected" of having been employed by a foreign power "for the purpose of committing an act . . . prejudicial to the safety or interests of the Republic of Kenya." The definition continues to include in the term any individual "reasonably suspected" of attempting to "commit such an act in the interests of a foreign power." ARTICLE 19 finds this provision to be highly problematic as it creates a presumption of criminality, based on mere perception, with no due process requirement. There is no definition of what constitutes reasonable suspicion, and no apparent ability for an individual to challenge such a determination. Importantly, the agency provision does not *require one to actually be an agent of a foreign power*. The provision can cover many individuals who may, for political ends, be labelled as such without any proof beyond perception. The final clause regarding acting in the interest of a foreign country allows it to capture conduct that has nothing to do with a foreign country, but is merely parallel to interests.

- **"Disaffected person"** includes any person carrying on a "subversive activity." While "subversive" takes the definition of section 77(3) of the Penal Code (Cap. 63), we observe that generally speaking, sedition laws, which include laws that proscribe subversive activities, are undemocratic and infringe on the right to freedom of expression. In most democracies, sedition laws have formally been rescinded. Specifically, such laws run afoul of a central tenet of human rights law that restrictions on freedom of expression must be "necessary." Vague or broadly defined restrictions on 'subversion' are generally unacceptable as they go beyond what is strictly required to protect an interest even if a

[36] *Ibid.*, para 21.

legitimate interest exists and is provided by law.

- **"Munitions of war"** include "stores of the armed forces or the police, or any articles deemed capable of being converted into any of those things or made useful in the production thereof." The expansion of 'munitions,' which typically entails weapons of the armed forces, to civilian law enforcement, is highly problematic. The free flow of information regarding civilian law enforcement is considerably less likely to trigger national security concerns in a manner that military munitions would. Accountability for law enforcement is an integral part of democratic society.

- **"Prohibited place"** includes "establishments or stations of the armed forces or the police." As above, civilian law enforcement should not be placed at a level of secrecy privilege as the armed forces, particularly for the purposes of accessing or photographing such facilities in public. Further, a "prohibited place" also includes any place "declared by the Minister" where information about that place "would be prejudicial to the safety and interests of the Republic." This last clause is incredibly broad and offers nearly unlimited discretion, not defined in law, for a government official to define the scope of collection of and access to information.

Further, the final provision of the Section treats a communication of a document or information to occur regardless if that information is communicated or received in whole or in part. This provision effectively makes one liable for the entire transmission of a document or information and broadens potential liability or severity even if only a portion is communicated or received.

Recommendations:

- Definitions of key terms should be revised. All terms which may be used to curtail freedom of expression must be narrowly and precisely defined to comply with international freedom of expression standards.

- Civilian law enforcement should not be included in the framework of national security and should hence be stricken from any definitions of 'munitions' or 'prohibited places.'

- The Act should not include references to sedition or 'subversive activities' as such concepts typically fail the tripartite test and are antithetical to the promotion of freedom of expression.

- Any definition of foreign agency should be narrowly and precisely crafted as to not risk the possibility of labelling individuals are foreign agents for political purposes. As such, the language regarding one "reasonably suspected" to be a foreign agent should be stricken, as should be the ability of one to be a foreign agent merely for acting "in the interests of a foreign power."

"Acts Prejudicial to Republic" in Section 3

Section 3 of the Act proscribes several "acts prejudicial to Republic," covering an extremely broad range of expressive and information gathering conduct from visiting, photographing, communicating, and receiving information, documents, or places. These provisions are very broadly worded, to the extent that multiple prohibitions contained in the section are fundamentally incompatible with the promotion of freedom of expression and Kenya's international human rights obligation. They also carry severe enough penalties, to where their mere existence can have a significant chilling effect. Indeed, their scope is so broad that there

are potentially no limits to their possible application.

Specifically, **Subsection 3(1)** provides that an individual commits an offense merely for "approaching," "inspecting," or even being "in the neighbourhood of" a prohibited place. As above, a prohibited place can include certain facilities related to civilian law enforcement (conceivably, this language could include a local police station). No intent to cause a substantive harm to national security is required, simply a "purpose prejudicial to the safety or interest of the Republic," which is ill-defined and very broad. Subsection 3(1) further criminalises one who "makes any plan" that "might be" intended to be "directly or indirectly useful to a foreign power or disaffected person." The tentative language, considering that a disaffected person includes one accused of subversive activities, is potentially limitless in its scope.

Finally, **Subsection 3(1)(c)** punishes anyone who "obtains," "publishes," or "communicates" information in "whatever manner" to "any other person" and "document or information" which is "calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person." There are no restrictions on what that information can entail and no harm requirement. Hypothetically, this provision could punish a journalist who publishes *any* information that could be considered *indirectly useful* to a "foreign power" or disaffected person. There is no clarity to determine "usefulness" of the information or what information is actually "useful."

Subsection 3(2) punishes photographing a prohibited place without permission. This could punish photographs taken in public, from public places. Additionally, to the extent that prohibited places include civilian law enforcement buildings and facilities, this photography restriction proscribes an exceedingly broad amount of conduct.

Subsection 3(3) punishes the mere *possession* of a document or information that is "made or obtained in contravention of this Act." This is particularly problematic as it appears to contemplate the punishment of journalists who possess information that is communicated in violation of the Act. Even members of the public can fall under the ambit of this provision. Specifically, the wording appears to be so broad as to apply to anyone who lawfully possesses information.

Subsection 3(4) punishes anyone who communicates documents or information related to munitions of war "directly or indirectly to any foreign power" in a manner "prejudicial to the safety or interests of the Republic." This could encompass publication of information in the public interest, given the breadth of the scope of munitions of war, which as noted includes information relating to civilian law enforcement.

Subsection 3(5) punishes anyone who "receives" any document or information, who either knows or "having reasonable grounds for believing" that the information is conveyed in contravention of the Act. This provision, similar to Subsection 3(5), punishes the passive receipt of information, and can extend to journalists receiving information in the public interest, or simply consumers of media among the public.

Subsection 3(6) similarly punishes anyone who communicates documents or information to any person, except authorised recipients, or even "fails to take reasonable care of." It is unclear what it means to "fail to take reasonable care of" information, or what it means to "endanger the safety" of information regarding the government. Along the same lines as the flaws in the prior provisions, this clause threatens the ability for information in the public interest to be

disseminated.

Subsection 3(7) punishes merely "allowing" another to have possession of an official document issued for their use alone, merely possessing an official document issued for the use alone of another person, or failing to restore a document to a person or authority originally issuing it. Again, this provision, among other faults, punishes journalists for the mere receipt of information.

Subsection 3(8) explicitly references the access to information provision of Kenya's Constitution in Article 35, which we observe is a positive inclusion, but the breadth of the prior prohibitions as well as lack of other procedural safeguards under regional or international human rights law prevents this provision from saving the rest of Section 3.

Recommendation:

- Section 3 should be repealed in its entirety.

Interference with police officers or armed forces

Section 5 of the Act punishes "any person who in the vicinity of any prohibited place obstructs, knowingly misleads or otherwise interferes with or impedes any police officer" or members of the armed forces on duty, commits an offense. We note that no definition of "interfere" is provided and it is unclear whether journalistic or newsgathering activities, or mere observation, would fall under the scope of interference.

Recommendation:

- Section 5 should be stricken as written, or if a prohibition on obstruction of activities is included it should clearly and narrowly define what is meant by "interference" with police officers, to ensure that no legitimate expressive activity is included.

Interference with right to association

Section 7 of the Act punishes "harbouring" which includes "knowingly permit[ting] to meet or assemble in any premises" that are occupied by anyone who "has reasonable grounds for supposing, to be persons who are about to commit or who have committed an offence under this Act." This provision prevents mere association with someone that one must 'suppose' is violating the law. It can be used to criminalise colleagues, co-editors, or other individuals involved in the dissemination of information.

We observe that Article 22 of the ICCPR guarantees the right to freedom of association with others, and this provision contravenes the requirement in Article 22 para 2 that restrictions on the right to association must be prescribed by law, and necessary in a democratic society. Section 7 is not narrowly tailored, it is not necessary to ensure interests of national security, and the scope of the provision is unclear under the law.

Recommendation:

- Section 7 should be stricken in its entirety, as it interferes with the freedom of association with others under Article 22 of the ICCPR.

Limitations on right of public to access judicial proceedings

Section 12 of the Act excludes the public from certain proceedings. Specifically, prosecutors may apply to the court for "all or any portion of the public" to "be excluded during the whole or any part of the hearing." Even though the provision requires the sentence to take place in public, we observe that many critical aspects of judicial proceedings should never be held out of public view, including orders and opinions. Further, where the prosecution may apply to keep aspects of a trial from public view, the public must have an avenue to challenge such determinations.

Recommendation:

- Section 12 should either be stricken or amended to explicitly provide greater safeguards for the public's right to access judicial proceedings and challenge determinations of secrecy.

Suspension of intentionality requirements

Sections 13 - 15 of the Act provide several circumstances where it is simply assumed that an individual has acted "for a purpose prejudicial to the safety or interests of the Republic, unless the contrary is proved." These provisions effectively shift a presumption of innocence to a presumption of guilt, with the burden being on the accused to prove their innocence. Not only are these provisions incompatible with fundamental standards of due process, but they are especially problematic given that the context is one of a national security law.

For instance, **Section 13** presumes that an individual has communicated with an agent of a foreign power if the person merely has possession of an agent's name, address, or "any other information." That information need only be in their possession, or simply be given or obtained from another person. Further, Section 13 applies to possession of any address "reasonably suspected" of being used to receive communications for agents of a foreign power. These terms are broad and highly subjective and do not meet the criterion of legality/legal certainty.

Similarly, **Section 14** holds that it "shall not be necessary" to show a bad purpose if "it appears that his purpose" was "a purpose prejudicial to the safety or interests of the Republic." This is circular and presumes intent without needing to establish it.

Finally, **Section 15**, similarly, holds that possession, publication, or communication of documents or information relating "or used in any" prohibited place, or even "anything in such a place," shall be deemed to have been possessed, published, or communicated "for a purpose prejudicial to the safety or interests of the Republic."

Collectively, these aspects of the law prevent there from being any fair adjudication of intentionality, if it is simply inferred by default from the alleged (unproven) conduct itself.

Recommendation:

- Sections 13 - 15 should be stricken in their entirety.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, 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 organisation 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. For more information about the ARTICLE 19's work in Kenya, please contact Mugambi Kiai, Director of ARTICLE 19 Kenya and East Africa, at mugambikiai@article19.org.