



Date: 7 July 2021

**Honorable Aden Duale,  
Member of Parliament (MP),  
Garissa Township Constituency,  
Garissa County, Kenya.**

**CC:**

Hon. Justice (Rtd) P. Kihara Kariuki Attorney General of Kenya;  
Hon. Justin Muturi, Speaker of the National Assembly;  
Noordin M. Haji, Director of Public Prosecutions;  
Hon. William Kipkemoi Kisang, Chairperson, National Assembly Departmental Committee on Communication, Information and Innovation; and  
Mr. Michael Sialai, CBS, Clerk, National Assembly.

**Dear Honorable Aden Duale,**

**RE: REQUEST TO WITHDRAW THE COMPUTER MISUSE AND CYBERCRIMES  
(AMENDMENT) BILL, 2021**

We, civil society actors defending human rights including the rights to freedom of expression and access to information, share our deep concern over the proposed amendments to the Computer Misuse and Cybercrimes Act, (CMCA) 2018 via the **Computer Misuse and Cybercrimes (Amendment) Bill, 2021**.

We appeal to you directly, as the main sponsor of the Bill, in your capacity as a Member of Parliament tasked with promoting the rights and interests of the Kenyan populace, and the immediate former Majority Leader of the National Assembly of Kenya to **immediately withdraw the Bill for the following reasons:**

**a) The Bill limits the rights to freedom of expression and access to information under Articles 33 and 35 of the Constitution of Kenya, 2010 respectively.**

**i) *Outright Ban on Pornography***

Under Article 33 (2) of the Constitution of Kenya, 2010, the right to freedom of expression can only be legitimately restricted where it amounts to ‘propaganda for war; incitement to violence; hate speech; or advocacy of hatred that - constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4).’

Based on this, the proposed ban on pornography under clause 3 of the Bill is not one of the permitted grounds specified under Article 33 (2) of the Constitution of Kenya, 2010, thus violating the right to freedom of expression, online and offline. Further, pornography is not a form of expression that may be restricted under international law. If Kenya adopts this proposal, it will be in violation of its obligations under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR).

This proposal also violates Article 24 of the Constitution of Kenya, 2010 as the Bill has not complied with the standard thereunder. We draw attention to the *Geoffrey Andare* case where the High Court found Section 29 of the Kenya Information and Communication Act, CAP 411A unconstitutional, on grounds that the State failed to discharge its duty under Articles 24 and 33 (2) of the Constitution of Kenya, 2010. Here, the Court emphasised that:

- Article 24 (3) of the Constitution of Kenya, 2010 imposed a duty on the State to demonstrate that limitations on the right to freedom of expression was permissible in a free and democratic society. This requires ‘demonstrating the relationship between the limitation and its purpose, and show[ing] that there were no less restrictive means to achieve the purpose intended.’<sup>1</sup>
- Article 24 of the Constitution of Kenya, 2010 qualifies the presumption of constitutionality, with respect to any law which limits or intends to limit fundamental rights and freedoms.<sup>2</sup>
- Any limitation on the right to freedom of expression which falls outside the scope of the limitations permitted under Article 33 (2) of the Constitution of Kenya, 2010, using vague, imprecise and undefined terms, limits this right to a level that the Constitution did not contemplate or permit, leading to a finding of unconstitutionality.

## ii) *Rendering Websites Inaccessible*

The proposal under clause 2 of the Bill to expand the National Computer and Cybercrimes Coordination Committee’s functions to ‘recommend that websites be rendered inaccessible in the Republic of Kenya’ will interfere with the rights to freedom of expression and access to information, both online and offline. In turn, the enforcement of these recommendations will violate Articles 33 and 35 of the Constitution of Kenya, 2010, and will undermine ongoing

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<sup>1</sup> *Geoffrey Andare v Attorney General & 2 others* [2016] eKL, para 96 <[Petition 149 of 2015 - Kenya Law](#)>

<sup>2</sup> *Ibid*, para 72, quoting *CORD Case*: “[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 .... there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.”

efforts by state and non-state actors to expand access to communication platforms and digital technologies in Kenya.

Under Principle 38 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, States are prohibited from interfering with individuals' right to 'seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless this interference is justifiable and compatible with international human rights law and standards.'<sup>3</sup> UN experts and high-level officials, including the UN Secretary-General, have also formally affirmed that "blanket Internet shutdowns and generic blocking and filtering of services are considered by United Nations human rights mechanisms to be in violation of international human rights law."<sup>4</sup>

**b) The Bill violates the principle of the rule of law, under Article 10 of the Constitution of Kenya, 2010.**

*i) Legally Uncertain and Unenforceable Definitions*

The principles of legality and legal certainty are integral ingredients of the principle of the rule of law enshrined in Article 10 of the Constitution of Kenya, 2010.<sup>5</sup> The principle of the rule of law requires laws, especially those that create criminal offences, to be well-defined, predictable, regular and certain, to curb abuse of power, arbitrariness and illegality.

Under clause 2 of the Bill, we note that the proposed expansion of the Committee's functions is vague, grants virtually limitless powers of recommendation to the Committee, introduces enforcement challenges, and fails to meet the legal certainty and legality tests under the Constitution of Kenya 2010, and under international law. Specifically, this proposed amendment fails to specify: what criteria will be used by the Committee to recommend websites to be made inaccessible; whether the recommendations must adhere to the permissible limitations of freedom of expression under international law and the Constitution of Kenya, 2010; who the Committee recommends to; which entities (private and/or state) will be tasked with executing and/or implementing the Committee's recommendations to render websites inaccessible; whether liability will be imposed on communications intermediaries; whether these recommendations, and/or their implementation, will be subject to oversight from an independent body, such as the judiciary; and what due process guarantees or remedies will be available to individuals and communities affected by the implementation of these recommendations.

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<sup>3</sup> African Commission on Human and Peoples' Rights (2019), Declaration of Principles on Freedom of Expression and Access to Information in Africa <[https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression\\_ENG\\_2019.pdf](https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf)>

<sup>4</sup> United Nations General Assembly, Report of the Secretary-General (2020), Road map for digital cooperation: implementation of the recommendations of the High-level Panel on Digital Cooperation, A/74/821 <[A/74/821 - E - A/74/821 -Desktop \(undocs.org\)](https://undocs.org/A/74/821)>

<sup>5</sup> *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR <[Petition 39 of 2017 - Kenya Law](#)>

Lastly, the proposed expansion of the Committee's functions will result in a duplication of already existing functions possessed by two regulatory bodies, namely the Communications Authority of Kenya and the Kenya Film Classification Board.<sup>6</sup> This duplication risks introducing legal uncertainty into the regulation of communications services in Kenya, which will infringe on the principles of the rule of law and legality under the Constitution of Kenya, 2010.

Under clause 3 of the Bill, the proposed definition of 'pornography' relies on the term 'sexually explicit conduct' which is vague, extremely subjective and fails to lend legal certainty. This sweeping definition bestows largely unfettered discretion which could be used to prosecute *individuals* in the creative and artistic communities who use nudity, depictions of sex or eroticism - that should only be accessible to adults - to express their artistic, journalistic and academic freedoms.

This provision could also be used to police *content* of a sexual nature - that should only be accessible to adults - that is legitimate and lawful, and protected under the right to free expression under Article 33 (1) (b) and (c) of the Constitution of Kenya, 2010 which provides for freedom of artistic creativity, academic freedom and freedom of scientific research.<sup>7</sup> Based on this, the proposed amendment contravenes the principle of the rule of law and fails to meet the legal certainty and legality tests under the Constitution of Kenya 2010, and under international law.

Clause 4 of the Bill seeks to criminalise conduct using the word 'likely' which is vague, requires subjective interpretation, fails to meet the threshold for causation to establish criminal liability, and contravenes the principles legality, legal certainty and the rule of law. Further, this proposed expansion risks entrenching existing uncertainty and illegality latent in the cyber-harassment provision under Section 27 of the CMCA, 2018.

**c) The Bill introduces legal provisions that duplicate existing provisions in other laws, raising the risk of excessive criminal liability.**

The Bill introduces amendments to the CMCA, 2018 which duplicate existing provisions in other laws. For example, clause 5 of the Bill duplicates a similar provision in Section 27 of the Prevention of Terrorism Act. Likewise, clause 3 of the Bill replicates a similar provision in Section 181 of the Penal Code. This duplication raises the risk that individuals will be charged under separate offences for the same crime, enhancing the risk of excessive criminal liability.<sup>8</sup>

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<sup>6</sup> The Communications Authority of Kenya is mandated, under the Kenya Information and Communications Act, to 'licence and regulate postal, information and communication services in Kenya.' Further, the Kenya Film Classification Board is mandated, under the Films and Stage Plays Act (CAP 222), to 'control the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith.'

<sup>7</sup> ARTICLE 19 (2016), Kenya: Cybersecurity and Protection Bill <[Analysis-Kenya-Cyber-Security-and-Protection-Bill-2016.pdf \(article19.org\)](#)>

<sup>8</sup> ARTICLE 19 (2018), Kenya: Computer and Cybercrimes Bill, 2017 <[Kenya-analysis-April-2018.pdf \(article19.org\)](#)>

Further, this overlap contravenes the established rule against duplicity and the principle of fairness, which entitles a person charged with a criminal offence to 'know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.' This also risks preventing the court from 'hearing the charge [to] know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.'<sup>9</sup> More importantly, they would violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.

Further, we re-affirm that the offences of cyber-terrorism and child pornography are improperly canvassed under the CMCA, 2018, given similar offences under Part III of the Prevention of Terrorism Act and Section 16 of the Sexual Offences Act, respectively.<sup>10</sup>

**d) The Computer Misuse and Cybercrimes Act, 2018 is *Sub Judice*.**

Hon. Aden Duale, we draw your attention to the fact that the CMCA, 2018 is subject to ongoing legal proceedings. In February 2020, the High Court upheld the constitutional validity of twenty-six (26) impugned provisions in the CMCA, 2018, but this matter is pending appeal at the Court of Appeal.<sup>11</sup> In October 2020, the High Court directed the Speakers of the two Houses of Parliament to regularise the CMCA, 2018, particularly on whether it was a bill concerning counties, lest a finding of nullification takes effect.<sup>12</sup> This process is still pending and will lapse in July 2021.

**e) The cost of implementing the Bill will be an excessive burden on taxpayers.**

Hon. Aden Duale, we stress that the cost of legislative processes is borne by Kenyan taxpayers. We urge you to ensure that taxpayers' contributions are spent prudently and wisely, by refraining from instituting unnecessary and duplicitous legislative amendment processes, noting the current economic situation in Kenya.

**f) The Computer Misuse and Cybercrimes Act, 2018: a tool of violation of the Bill of Rights, Chapter Four (4) of the Constitution of Kenya, 2010.**

The undersigned organisations have monitored and observed an increase in the frequency of one-off and repeat arrests relying on overbroad, vague and subjective content-related offences under the CMCA, 2018. These incidents have revealed violations and infringements of, and interferences with, individuals' rights to freedom of expression and access to information and their freedoms of assembly and association, both online and offline.

For example, in 2020 alone, reports revealed that this law was used to censor information deemed 'false', despite falsity of information not being a permissible limitation of the right to

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<sup>9</sup> *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR <[Criminal Appeal 1 of 2017 - Kenya Law](#)>

<sup>10</sup> ARTICLE 19 (2016), Kenya: Cybersecurity and Protection Bill <[Analysis-Kenya-Cyber-Security-and-Protection-Bill-2016.pdf \(article19.org\)](#)>

<sup>11</sup> *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR <[Petition 206 of 2019 - Kenya Law](#)>

<sup>12</sup> *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* [2020] eKLR <[Petition 284 & 353 of 2019 \(Consolidated\) - Kenya Law](#)>

freedom of expression under Article 33 of the Constitution of Kenya, 2010 and under international law.<sup>13</sup> The following violations, infringements and interferences were documented:

- the use of Sections 22 and 23 of the CMCA, 2018 prohibiting false publications and the publication of false information to target at least seven (7) Internet users, respectively. This included digital technology users, such as students, bloggers, citizen reporters, content creators, journalists, and Members of Parliament. These users created and uploaded online content, including websites and posts, commenting on Kenya's political situation, detailing corruption scandals, or countering the government's official Covid-19 narrative.
- the arbitrary misuse of Sections 22 and 23 of the CMCA, 2018 by one arm of the National Police Service, namely the Directorate of Criminal Investigations (DCI). Reports indicate that DCI officers pressured individuals in custody to either edit the content of articles or pull-down articles, in their individual capacity or via website administrators.<sup>14</sup>

**Given the foregoing, we recommend that you:**

- **withdraw the Computer Misuse and Cybercrimes (Amendment) Bill (Cybercrimes Amendment Bill), 2021, in its entirety.**
- **initiate meaningful consultations with a diverse and representative group of stakeholders to align the Computer Misuse and Cybercrimes Act, 2018 with national and international law and standards.**

We welcome the opportunity to discuss these recommendations with you.

Yours sincerely,

**Mugambi Kiai,  
Regional Director,  
ARTICLE 19 Eastern Africa.**

*On behalf of the undersigned organisations*

**Access Now  
Bloggers Association of Kenya  
Defenders Coalition  
The Kenya ICT Action Network  
The Kenya Union of Journalists**

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<sup>13</sup> ARTICLE 19 (2021), Freedom of Expression and the Digital Environment in Eastern Africa <[Freedom-of-Expression-and-the-Digital-Environment-in-Eastern-Africa.pdf \(article19.org\)](#)>; CIPESA (2020) State of Internet Freedom in Africa, 2020 <[SIFA2020 Edit copy \(cipesa.org\)](#)>

<sup>14</sup> Ibid.