PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI), IN RELATION TO THE HUMAN RIGHTS TO FREEDOM OF EXPRESSION, ASSOCIATION, AND ASSEMBLY: A CASE OF KENYA

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THE INDEPENDENT EXPERT ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY REPORT, 2024

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Introduction

According to the UN, laws restricting the human rights to freedom of expression, association and peaceful assembly based on sexual orientation and gender identity (SOGI) have continued to emerge. In 2023, at least 54 States had laws that restricted the right to freedom of expression, and at least 58 States had laws restricting the rights to freedom of association and peaceful assembly, based on SOGI.

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The fundamental human rights to freedom of expression, association, and peaceful assembly are intertwined and essential components of pluralistic and democratic societies. These rights are essential to protecting all minority populations, and as a conduit for diverse perspectives that strengthen democratic societies. It is against the foregoing background that this paper briefly analyzes the existing laws, policies and practices that infringe upon the human rights to freedom of expression, association, and peaceful assembly in **KENYA**.

1) **LAWS, PRACTICES AND POLICIES EXPLICITLY OR IMPLICITLY BANNING OR RESTRICTING FREEDOM OF EXPRESSION BY CIVIL SOCIETY ORGANIZATIONS OR ACTIVITIES ADVOCATING FOR LGBT PERSONS' HUMAN RIGHTS AND ATTEMPTS OR INCENTIVES TO INTRODUCE SUCH LAWS**

The **Penal Code of Kenya, Chapter 63** of **the Laws of Kenya**, remains the key statute addressing SOGIESC. *Sections 162, 163*, and *165* make prohibitions against having carnal knowledge of any person against the order of nature; or carnal knowledge of an animal; and make it punishable by imprisonment for 14 years. The laws of Kenya do not permit same-sex relations however, over the last years, judicial interventions have aided in the advancement of various human rights of the LGBT.

Article 33 of the **Constitution of Kenya, 2010** guarantees every person the right to freedom of expression including the freedom to seek, receive, or impart information or ideas; freedom of artistic creativity, and academic freedom and freedom of scientific research. The Article however imposes restrictions on this right by stating that the right toes not extend 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 based on any grounds including race, age, sex, pregnancy, marital status, health status, ethnic or social origin, colour, religion, conscience, belief,

culture, dress, language, or birth. The Supreme Court of Kenya in the case of **Non-Governmental Organization Coordination Board vs Erick Gitari and Other, Supreme Court Petition No. 016 of 2019** in giving effect to the provisions of Article 27 of the Constitution of Kenya, 2010, held that sexual orientation is also a ground upon which discrimination is prohibited within the Kenyan Constitution and laws.

In the recent past however, practices by various actors have contributed to a threat to the exercise of the freedom of expression for LGBT persons and on the basis of SOGI. In the year 2019 for example, the Kenya Films Board declined to issue a filming licence to Creative Economy Working Group, an organization on its intended film called 'Rafiki" translated to 'Friend' in English, which film related to a relationship between a lesbian couple. The Board declined to grant the licence on the ground that the intended film had been classified as restricted under the **Kenya Films and Stage Plays Act, Chapter 222 of the Laws of Kenya**. Through a letter dated 26th April 2019[2] the Board informed the organization that the film had been classified as **RESTRICTED,** outlining that the film contained classifiable elements such as homosexuality which run a foul Kenyan laws as well as the culture of the Kenyan people. The letter also warned against the exhibition or distribution of the film **"Rafiki"** anywhere within the Republic of Kenya; indicating that the Board was exercising its mandate to promote the culture of the Kenyan people as well as protection of children from exposure

[2] The letter read as follows: **"This is to convey the decision of the Kenya Film Classification Board that the film Rafiki submitted to the Board for examination and classification on 10th April 2018 has been RESTRICTED. The film should not be distributed, broadcast or exhibited anywhere within the Republic of Kenya. Anyone found in possession of the said film will also be in breach of the law. The Board notes with great concern that the said film objectionable classifiable elements such as homosexual practices that run counter to the laws and culture of Kenyan people. It is our considered view that the moral of the story in this film is to legitimize lesbianism in Kenya contrary to the law and the Board's content classification guidelines. In light of the above, the film Rafiki should not be exhibited or distributed in any form or platform anywhere the Republic of Kenya. Any exhibition of the said film for public consumption in Kenya will be in violation of the section 16 of the Films and Stage Plays Act, Cap 222 of the Laws of Kenya and will attract severe penalties. Please note that the mandate of the Board is premised on the need to promote Kenya's culture, national aspirations and values and to protect children from exposure to harmful content. Films made in Kenya for public consumption must therefore reflect and respect the dominant values of the Kenyan society."**

to harmful content. The Creative Economy Working Group challenged the actions of the Film Classification Board in the case of **Wanuri Kahiu & another vs CEO - Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party) & Kenya Christian Professionals Form (Proposed Interested Party), Petition No. 313 of 2018 [2020] eKLR,** alleging violation of the freedom of expression among other rights. While dismissing the Petition, the Court held that the limitation by the Board was reasonable and justifiable. The court reasoned that the restriction was justifiable and legitimate as it sought to protect children and the youth among others, from films with themes which are adverse against national soul, ideas, and aspirations for the Kenyan society and more so, protection of children from abuse and harmful cultural practices. The Court partly made the following remarks:

> **[103]** In the instant petition, it is of great significant to note that the 2nd Respondent was created under the Films and Stage Play Act to regulate film industry and to ensure professionalism in the industry. The Regulation is meant to ensure that the media content being released for public consumption is suitable and compliant with the laws of the country. The statute and the regulations made thereunder legitimately addresses classifiable elements such as violence and crime, sex, obscenity and nudity, occult and horror, drugs, alcohol and other harmful substances are within the mandate of the 2nd Respondent. It is therefore the obligation of the state to ensure that the publicity of the classifiable elements is checked in all films including the film **"Rafiki".**
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> **[109]** The overall objective of the Films Act, as provided in the preamble or long title thereon, is to control the making and exhibition of cinematograph films, for the licensing of Stage Plays, theatres, and cinemas, and purpose incidental thereto. It is evident that parliament's concern, resulting to the legislation of the Films Act, was principally the prestation of the public from content that is prejudicial to maintain of public order, offensive to decency, or undesirable acts in the public interest. This no doubt is clearly captured under section 16(4) of the Act.
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> **[110]** It should be noted that the parliament inserted specific provisions in the Films Act, in the instance the content that is undesirable in the public interest and offensive to decency. The parliament further deemed it fit to directly address the protection of children from harmful, indecent, age in appropriate content or material as expressly captured in section 17 of the Films Act.
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> **[112]** From the above my understanding of the inclusion of *"women"* in the provision is clear manifestation that the Parliament had the objective of protecting not only children but also

the adults. I find therefore that the Films Act cannot be viewed as an Act with the sole objective of protecting only children from harmful context. This interpretation is further supported by Article 55 of the constitution, where the constitution mandates the state to put in place positive measures to protect the youth from exploitation. It is therefore the recognition of the expansive scope of the objective of the Films Act and the changing needs and values of society, that the Board has been granted the discretion to prescribe guidelines to be applied in the classification of films, under **section 15(2) (b) of the Act.**

[113] In the instant petition, it cannot be gainsaid that audio/visual medium, as a means of expression and communication, is distinctively different from plain text or even exclusively audio medium. The influence held by audio-visual medium cannot be disputed with the unrivalled capability of influencing the views and perceptions of, not only an individual, but of a whole generation. It is therefore of paramount importance to note that where grant rests, so does grant responsibility, and failure to regulate great power exposes every member of the society to great risk of abuse and exploitation.

[114] From the above-mentioned no doubt the court aptly captured the pressing societal concern posed by cinema as an audio visual medium of expression. From the above it is clear that a mural picture is significantly different from other avenues of expression. It is for that reason that the risk of abuse of such an influence is a pressing and substantial societal concern and is a boom awaiting to explode and cause untold damages.

[115] I find that the effect of release, accessibility and public exhibition of content that is offensive or adverse to public interest cannot be overlooked. The danger and/or risk posed is almost of irreversible nature in our short terms and if not controlled it can sweep both young and old. I find that the protection of the public from audio-visual content that is prejudicial to the maintenance of public order, offensive to decency, and undesirable acts in the public interest is indeed a pressing and substantial societal concern.

[130] From the above it is clear that even the most liberal jurisdiction, such as that of United States of America, still advocates for some form of prior restraint to the production, distribution and exhibit of cinematograph film.

[131] In view of the numerous jurisdiction making use of Administrative prior classification, I find the measure taken by 2nd Respondent to be reasonable and justifiable in a democratic society based on human dignity, equality and freedom. The measures designed clearly target at meeting the objectives of the Films Act. In view of such measures there is a rational nexus between the refusal of the certificate of Approval to a film and the pressing and substantial societal need to protect the public from content that is prejudicial to the maintenance of public order, would offend decency, or would be undesirable in the public interest, in the current case being the issue of homosexuality and lesbianism. It should be appreciated that the more important an objective is to society; that it is possible in return, to result in strongest measure, so as to achieve the objective sought; needless to say that the measures put in place by the Films Act are proportional to the objective legislated upon by parliament.

> **[133]** From the above valid exercise of the margin of appreciation differ from county to country, dependent on the values and principles close to the hearts of the society in respective countries. Therefore, following the line of argument, the content exhibited in the film **"Rafiki"** may receive varied classifications depending on the society it is submitted to. Consequently, the fact the film received a different rating in South Africa, for example, cannot be a basis for this court to overturn the decision of the Board.
> **[134]** From the aforesaid; I find that the Board validly exercised its margin of appreciation, by considering the values, principles and culture of our country, as provided by the constitution and different legislations and therefore correctly exercising its mandate by declining to grant a certification of approval.
> **[135]** From the above and considering all rival submissions I find that the **Film and Stage Plays Act** and **Kenya Films Classifications Guidelines 2012** are constitutional, legal, valid and the limitations implied therein are reasonable and justified in a democratic society.

The Court thus declined to annul the decision by the Kenya Films Classification Board and held that the restriction was valid and for legitimate reasons within the Kenyan context.

1) **LAWS, POLICIES, AND PRACTICES THAT EXPLICITLY OR IMPLICITLY BAN AND RESTRICT THE FREEDOM OF ASSOCIATION AND FREEDOM OF PEACEFUL ASSEMBLY BY CIVIL SOCIETY ORGANIZATIONS OR ACTIVISTS ADVOCATING FOR LGBT PERSONS' HUMAN RIGHTS AND ATTEMPTS OR INCENTIVES TO INTRODUCE SUCH LAWS**

Article 36 of the **Constitution of Kenya, 2010** guarantees the right to freedom of association while **Article 37** guarantees the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. These provisions have however been misused various State agencies in Kenya with action aimed at limiting and restricting the enjoyment of this right by persons on SOGI grounds. In various occasions, the Non-Governmental Organizations Coordination Board for instance has declined to register associations perceived to be advocating and championing SOGI and LGBT issues. The courts have however intervened in such instances for instance, in the case of **Republic vs Non-Governmental Organizations Co-ordination Board & another ex-**

parte Transgender Education and Advocacy & 3 others, Judicial Review Miscellaneous Application No. 308A of 2013; [2014] eKLR, the applicants had challenged the actions by the Non-Governmental Organization Board which had declined to register an association called Transgender Education and Advisory Organization. The court allowed the complaint and issued mandatory orders compelling the Kenyan government to register the said organization. The court found that the state had acted unreasonably and illegally in declining to register the said organization as the reasons advanced for declining the registration were unreasonable and that the denial of the registration on the basis of the gender or sex was discriminatory and unconstitutional. Similarly, the Supreme Court of Kenya in the case of **Non-Governmental Organization Coordination Board vs Erick Gitari and Other, Supreme Court Petition No. 016 of 2019**, found that the Non-Governmental Coordination Board had acted contrary to the Constitution and violated the right to freedom of association as a result of its actions on failing to register the Respondent's association. The NGO Board had declined to register the association by the proposed names namely: '**National Gay and Lesbian Human Rights Commission, National Coalition of Gays and Lesbians in Kenya'** and **'National Gay and Human Rights Association**,'.

2) ATTEMPTS TO INTRODUCE PRACTICES, POLICIES OR LAWS INHIBITING THE RIHT TO FREEDOM OF EXPRESSION, ASSOCIATION AND ASSEMBLY, AMONG OTHERS

There have also been various other attempts to introduce such laws to restrict the freedom of expression moreover on SOGI and LGBT issues as evidenced by the **Family Protection Bill, 2023**, being pushed by religious leaders and some Members of the National Assembly, which seeks to

introduce various restrictions and limitations on the right to freedom of expression, association, and the right to assembly, demonstration, picketing, and petition, among others.

The objective of the **Family Protection Bill** is firstly identified as seeking to protect the family, just as the name suggests. Section 11 of the Bill creates the offence of gross indecency and it stipulates that:

(1) A person who willfully commits a grossly indecent act commits an offence and is liable, on conviction, to imprisonment for a term of not less than ten years.

(2) For purposes of this section, 'grossly indecent act' means –

(a) Public show of lewd or amorous relations between or among persons of the same sex;

(b) Being nude in public or engaging in acts of indecent exposure;

(c) Cross-dressing to portray that the person is of a sex different from the sex assigned at birth;

(d) Assembly, demonstration or parade while identifying or holding out as persons engaged in activities prohibited under this Act or with the intent to engage in act or activity prohibited under this Act;

(e) Knowingly accessing or using bathrooms, washrooms, toilets, hostel and other facilities designated for strict use by persons of the opposite sex.

Section 12 of the Bill creates the offence of 'promotion of prohibited activities'. It states that:

(1) A person who promotes activity prohibited under this Act commits an offence and is liable on conviction to a fine of not less than one million shillings or to imprisonment for a term not less than ten years, or to both.

(2) A person promotes activity prohibited under this Act where the person –

(a) …

(b) Engages or participates in an activity that is intended to indoctrinate a change of perception or public opinion towards an act prohibited under this Act;

Section 13 of the Bill provides that:

(1) A person who funds, sponsors or donates toward an activity prohibited under this Act, commits an offence and is liable, on conviction, to imprisonment for a term of not less than ten years or to a fine not less than ten million shillings, or both.

Section 38 of the Bill imposes limitations on the freedom of association. It stipulates that:

(1) Pursuant to Article 24 of the Constitution, the right to freedom of association under Article 36 of the Constitution including the right to form, join or participate in the activities of an association shall be subject to limitation with respect to a group, society, association, club or organization whose purpose whether partly, overtly, or covertly, is to promote, facilitate, support or sustain an act prohibited under this Act –

(2) A person shall not directly or indirectly –

(a) Form, organize, operate or register;

(b) Promote the formation, organization, operation or registration; or

(c) Participate in an activity to support or sustain,

A group, society, association, club, or organization whose purpose whether partly, overtly, or covertly, is to promote, facilitate, support or sustain an act prohibited under this Act.

(3) A person who contravenes subsection (2) commits an offence and is liable upon conviction to imprisonment for a term of not less than three years.

(4) No group, society, association, club, or organization bearing the name or name 'homosexual', 'lesbian', 'gay', 'bisexual', 'transgender', 'queer', 'questioning', whether in full or abbreviated, shall be registered in Kenya.

Sections 12, 18, 19, and 20 of the Bill prohibit and criminalizes any form of comprehensive sexual and reproductive health and education and comprehensive sexuality education. Section 18 (1) recognizes the rights of parents to choose the kind of education to be given to children subject to their personal conviction, however Section 20 prohibits and criminalizes any form of comprehensive sexual and comprehensive health education. The Bill has a further chilling effect in that even publishing any material pertaining to SOGI and LGBT in general would constitute prohibited conduct. The above proposed provisions are broad, vague, and ambiguous and subject to abuse by the State in that they target all persons and specifically ban and outlaw any such Human Rights Organizations, Institutions, and Defenders, from promoting, advocating, championing, and fighting for the human rights for sexual and gender identity minorities.

Conclusion

Regulation of SOGI is problematic more so where the State seeks to cite morality and cultural grounds. The society is not static and evolves with time and the views of the majority cannot be imposed on the minority or used as a basis to gauge the society. This was the sentiment by the European Court of Human Rights in the case of **Beizaras and Levickas vs Lithuania**, **(Application No. 41288/15),** where the Court pointed out thus:

> [125] Therefore, the Court, sharing the view of the Constitutional Court that the attitudes or stereotypes prevailing over a certain period of time among the majority of members of society may not serve as justifiable grounds for discriminating against persons solely on the basis of their sexual orientation, or for limiting the right to the protection of private life, considers that the assessment made in this case by the national authorities was not in conformity with the fundamental principles of a democratic State governed by the rule of law (see also, mutatis mutandis, Carvalho Pinto de Sousa Morais, cited above, § 46, and Biao v. Denmark [GC], no. 38590/10, § 126, 24 May 2016).

Based on the foregoing and many other reasons, a rights based approach in state interventions in support of families as required by international human rights, requires the prioritization and protection of the rights of individual members of the family and ensuring access to amongst others universal access to sexual and reproductive health, including family planning and other human rights guarantees and freedoms including the freedom of expression, association and to assembly, picket and petition public authorities. States should further take into account the modern day family and societal developments as was appreciated by the European Court in the case of **X and Others vs Austria**, **(Application No. 19010/07)** where it was observed thus:

> [139] The Court reiterates the principles developed in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see *Karner*, § 41, and *Kozak*, § 98, both cited above). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see *Kozak*, cited above, § 98).