

ANALYSING THE KENYA FILM AND CLASSIFICATION BOARD'S DISCRETION TO BAN AND ITS IMPACT ON THE REALISATION OF DIGITAL RIGHTS AND DIGITAL INCLUSION IN KENYA

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Abstract

This article critically examines the scope of discretion vested in the Kenya Film Classification Board (KFCB) under the Film and Stage Plays Act in regulating films and stage productions in Kenya. Specifically, the paper questions the absence of a clear standard or test for the determination of what constitutes 'decency' or 'public interest' in the KFCB's approval or disapproval of films and posters for public exhibition. Furthermore, the paper evaluates the compatibility of this discretionary power with the constitutional guarantee of artistic freedom of expression under Article 33 of the Kenyan Constitution. Finally, the paper explores the potential impact of KFCB's discretion on digital rights and digital inclusion in Kenya. By interrogating these issues, this paper seeks to contribute to the ongoing debates on the appropriate balance between regulation and protection of artistic expression, on the one hand, and the realisation of digital rights and digital inclusion, on the other.

1 Introduction

The Kenya Films and Classifications Board (KFCB) is a Kenyan state corporation founded in 1963 with the commencement of the laws outlined in the Films and Stage Plays Act of 1962 (the Act).¹ Its core mandate is to regulate the creation, broadcasting, possession, distribution and exhibition of films.² When KFCB came into being, it exercised its mandate by examining films and their creation, broadcasting, possession, distribution and exhibition of films by examining them for content, imposing age restrictions and giving consumer advice about various films.³ The Act gave the board the power to approve or refuse to approve films and posters.⁴ The Act also stated that approval is not to be granted to films that in the board's opinion, offended decency or are undesirable in the public interest.⁵ In 2013, the Kenya Information and Communications Amendment Act of 2013⁶ was enacted, granting the board the further mandate to monitor television stations and screen their content. The Communications Authority of Kenya published a programming code in 2015 that prescribed a watershed period (5:00am to 10:00pm) during which no content meant for adults was to be aired.⁷ In 2018, the chief executive officer of the KFCB, Ezekiel Mutua, announced that he would take stern action against media organisations advertising a certain brand of condoms during the watershed period.⁸ Earlier in 2016, The KFCB stretched the limits of their mandate further when they attempted to go after the organisers of the Project X party,⁹ on the (unsubstantiated) grounds that they were part of an international syndicate that intended to utilise the event to shoot pornographic films.¹⁰ Later in April of the same year, KFCB forced the Coca-Cola

1 N Adagala & D Muyonga 'A critical evaluation of the proposed Kenya's Film stage plays and publication Bill 2016' (2016) 3(12) *International Journal of Innovative Research and Advanced Studies*.

2 Film and Stage plays Act 34 of 1962 section 3.

3 Adagala & Muyonga (n 1).

4 Film and Stage plays Act 34 of 1962 section 3.

5 Film and Stage plays Act 6 of 2009 section 16.

6 The Kenya Information and Communications Amendment Act of 2013.

7 Kenya Communications Authority 'Programming Code for Free to Air radio and TV Stations in Kenya' 2015.

8 Kenya Film Classification Board 'KFCB warns on adult content during watershed hours,' 10 April 2018 <https://kfcbb.go.ke/kfcb-warns-adult-content-during-watershed-hours#:~:text=This%20is%20in%20response%20to,vio%20late%20them%20because%20of%20money> (accessed 17 August 2023).

9 Posters and announcement of the Project X party were doing rounds on the internet in 2016, posters and other media promised would be partygoers an atmosphere of pure debauchery; S Reporter 'Police ban planned project X party, organiser sought' *The Star* (Nairobi) 6 March 2016 at 12 <https://www.the-star.co.ke/news/2016-03-06-police-ban-planned-project-x-party-organisers-sought/> (accessed 9 August 2023).

10 K24 TV 'KFCB announces that it has taken measures to ensure 'Project X' event is aborted' 7 March 2016 <https://youtu.be/OTj9hsBD-xE> (accessed 9 August 2022).

company to scrap a kissing scene in one of their advertisements because it ‘violated family values’.¹¹

The seeming acquiescence of the state and the public as well as the lack of resistance to the acts of the KFCB has seen it transcend its position as a film regulatory board and instead incarnated in the form of the last line of defence against the ‘great monster of immorality in the country’.¹² The effect of the KFCB’s onslaught on immorality in the media has seen them perform actions that seem to be diametrically opposed to the freedom of artistic expression as provided by the 2010 Constitution of Kenya (the Constitution).¹³ KFCB has been active in censoring far more than films; its crusade against the immoral has led the board to attempt to exercise its mandate on every possible form of artistic expression.¹⁴ In 2016, KFCB ordered Google to pull down a song called *Same Love* because it advocated for gay rights in Kenya.¹⁵ The KFCB in 2018 banned Marie Stopes advertisements on both television and radio on the grounds of allegedly incentivising abortion.¹⁶ KFCB’s CEO Ezekiel Mutua stated that the hospital, which is well known for advocacy for abortion care, was targeting teenage girls by providing them alternatives in situations of unwanted or unplanned pregnancies.¹⁷

KFCB has, over the years endeavoured to maintain a hard stance against any material that can be deemed obscene or indecent.¹⁸ Unfortunately, KFCB has not made public the standard it uses. Without an inkling of an idea on the standards used by the KFCB, Kenyans have an ingrained image of KFCB as being tone deaf and

11 ‘Coca-Cola advert banned in Kenya over kissing scene’ *BBC News (Africa)* 13 April 2016 <https://www.bbc.com/news/world-africa-36035210> (accessed 9 August 2023).

12 JS Lupo, Introduction to Symposium on Pastoral Power, Clerical State, *Contending Modernities*, 21 September 2023 – <https://contendingmodernities.nd.edu/blog/> (accessed 26 August 2023).

13 The Constitution of Kenya 2010 article 33(1)(b).

14 Article 19 ‘Kenya: Film Classification Board must stop stifling artistic expression’ 29 September 2021 <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/> (accessed 26 August 2023).

15 S Njau ‘Films board gives Google a week to take down gay song video’ *Business Daily Africa* (Nairobi) 23 February 2016 <https://www.businessdailyafrica.com/bd/corporate/companies/films-board-gives-google-a-week-to-take-down-gay-song-video-2109166> (accessed 9 August 2023).

16 B Otieno ‘Fresh fry, Marie Stopes ads banned over sexual, abortion content’ *Business Daily* 11 September 2018 <https://www.businessdailyafrica.com/news/Pwani-Oil-Marie-Stopes-ads-over-sexual--abortion-content/539546-4754968-2k51tiz/index.html> (accessed 19 August 2023).

17 H Kimuyu ‘TV advert with “sex scenes and ‘pro-abortion content” feels Mutua’s wrath’ *Nairobi News* (Nairobi) 12 September 2018 <https://nairobi.news.nation.africa/tv-advert-with-sex-scenes-pro-abortion-content-feel-mutuas-wrath/> (accessed 9 August 2023).

18 KFCB ‘KFCB concerned over rampant sharing of inappropriate audio-visual content’ 26 April 2023 <https://kfcb.go.ke/kfcb-concerned-over-rampant-sharing-inappropriate-audio-visual-content> (accessed 26 August 2023).

unchanging.¹⁹ This begs several questions. What is the source of this code of 'African values' that the KFCB so fiercely protects? What is the effect of the KFCB's stance on complex issues such as reproductive rights and sexual minority rights on the perception of the public? How does the KFCB and its powers and mandates affect the realisation of digital rights and digital inclusion in Kenya? This article aims to answer these questions.

Digital rights are essentially a transference of rights people have in their material reality and the realisation of these rights in the context of new digital technologies.²⁰ With the rapid progress in technology, it has become integral that people enjoy the same rights in digital spaces as they do in their material reality.²¹ Digital inclusion refers to the efforts made to ensure that all individuals and communities, regardless of their socio-economic status, have access to and can effectively use digital technologies.²² This includes both access to technology and the development of digital skills. The goal of digital inclusion is to bridge the digital divide and promote equitable access to digital resources and opportunities for all.²³ The KFCB is uniquely placed to either help progress or completely derail the realisation of digital rights and digital inclusion. Banning of films advertisement or media because of controversial content can be seen as state legitimisation of perceptions manifesting as discrimination of women and other groups in online spaces such as sexual minority groups.²⁴

In light of the above, this article seeks first to historicise film censorship in Kenya. Second, it seeks to reconcile the mandate of the KFCB with the provisions of the Constitution 2010. Finally, it seeks to highlight the digital landscape in Kenya and show the effect of KFCB's actions on the realisation of the ideal of digital rights and digital inclusion.

Accordingly, the article will trace the history of film and media censorship in Kenya from the pre-independence period to the current era in order to trace the source of modern policies and laws on film and media censorship. Thereafter it outlines the current digital landscape in Kenya and seeks to situate the powers and mandate of

19 Article 19, 'Kenya: Film classification board must stop stifling artistic expression' 29 September, 2021 – <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/> (accessed 26 August 2023).

20 Iberdrola 'Digital rights, essential in the digital age' <https://www.iberdrola.com/innovation/what-are-digital-rights> (accessed 26 August 2023).

21 As above.

22 UN roundtable on Digital Inclusion '*Definition of Digital Inclusion*'.

23 Christopher Tournis Gamble, Bridging the Digital Divide: The Imperative of Digital Inclusion, LinkedIn, 26 May 2023 – <https://www.linkedin.com/pulse/bridging-digital-divide-imperative-inclusion-tournis-gamble/> (accessed 26 August 2023).

24 Article 19, 'Kenya: Film classification board must stop stifling artistic expression' 29 September, 2021 – <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/> (accessed 26 August 2023).

the KFCB within this landscape. Finally, it puts forward recommendations on streamlining the mandate of KFCB in order to accelerate the realisation of digital rights and inclusion.

2 Conceptual framework

The framework underpinning this article focuses on the intricate interplay between the state's authority in media regulation, the fundamental rights and freedoms of citizens, and their collective impact on digital rights and digital inclusion in Kenya. Within this framework, the article delves into the powers vested in the KFCB as granted by section 16 of the Films and Stage Plays Act, with a primary focus on their implications within the realm of media content regulation amid the emergence of digital technologies.

At the core of examination are two key variables. First, there's the concept of the state's police powers, referring to the governmental jurisdiction exercised through entities such as the KFCB, aimed at overseeing and managing media content for reasons spanning public decency, societal interests, and governance.²⁵ Second, citizens' rights and freedoms constitute a pivotal element. This encompasses the spectrum of individual rights assured by the Constitution, including the freedom of artistic expression outlined in Article 33 of Kenya's Constitution. The framework extends its scope to encompass digital rights, which involve the guarantee of equitable digital engagement, encompassing aspects like freedom of expression, data privacy, and unhindered access to digital platforms.

Moreover, the framework encompasses the notion of digital inclusion, characterised by endeavours to ensure universal access to and proficient use of digital technologies, thereby working towards narrowing the digital divide across socioeconomic strata. Embedded within the analytical approach is a multi-faceted perspective that amalgamates legal, historical, and digital rights considerations. This multifaceted lens is employed to scrutinise the matter from different angles, recognising the historical backdrop of media regulation while scrutinising how past colonial-era practices persist in molding the contemporary regulatory landscape.

Furthermore, the study delves into whether the KFCB's discretionary powers, which guide their assessment of 'decency' and 'public interest', align with the constitution's provisions safeguarding artistic freedom. The lens then broadens to assess the potential influence of these powers on digital rights and digital inclusion.

25 Jus Mundi, Police powers doctrine, 10 May 2023 <https://jusmundi.com/en/document/publication/en-police-powers-doctrine#:~:text=The%20police%20powers%20doctrine%20provides,in%20accordance%20with%20due%20process> (accessed 26 August 2023).

Central to the narrative is the exploration of the potential disconnect between conventional regulatory practices and the requisites of the digital era. This exploration leads to questions about the possible repercussions of the KFCB's actions. Could their practices impede digital rights by constricting information availability and curbing online expression? Similarly, the study probes whether these regulatory undertakings might inadvertently hamper digital inclusion, particularly for marginalised sectors of society.

3 Historical appraisal of film censorship laws and practices in Kenya

3.1 Colonial period

The curtain on film censorship in Kenya (British East Africa at the time) was raised in 1912 with the enactment of the Stage Plays and Cinematography Exhibitions Ordinance.²⁶ This law empowered licensing officers to inspect all films to ensure they did not contain any 'unpleasant' scenes and 'undesirable' ideas before issuing a license.²⁷ The law however did not definitively state what constituted these scenes and instead left it to the discretion of the licencing officers to decide what was acceptable and what was not.²⁸

It is important to note that the government enacted the new law without appointing corresponding staff.²⁹ Qualification for license officer positions was open to police constables, as well as volunteer European women looking for something to do in their spare time.³⁰ Further, censorship officials received little to no training in film review or basic cinematograph techniques.³¹ This situation led to an indiscriminate butchering of films in the colony, especially as female European and Indian censorship officials comprised the vast majority of board members.³² They ruthlessly cut any and all scenes they believed to be unpleasant or put 'undesirable' ideas into the minds of Africans.³³ What bothered these licensing officials the most was depictions of nudity, especially that of white women. They maintained the belief that white women's bodies exemplified purity and virtue and that cinematographs depicting their nudity had a dangerous effect on 'coloured youth and men'.³⁴ So stringent were

26 S Kaunga Ndanyi 'Film censorship and identity in Kenya' (2021) 42(2) *Ufahamu: A Journal of African Studies* 24.

27 East Africa Protectorate: Ordinances and Regulations, Vol XIV KNA, NRB.

28 Ndanyi (n 26) at 25.

29 As above.

30 Ndanyi (n 26) at 26.

31 Ndanyi (n 26) at 25.

32 Ndanyi (n 26) at 26.

33 As above.

34 Ndanyi (n 26) at 27.

they in any depiction of romance that even scenes of hand holding during courtship were struck out.³⁵ In addition to nude scenes, films with scenes that glamourised crime were also cut or banned.³⁶

The unease of the settlers saw the colonial administration rounding up African children in urban centres, where surveilling black bodies was an easy undertaking.³⁷ Children were arrested for petty crimes – such as pickpocketing or loitering – that officials believed induced the greatest cause for concern. A horrified colonial official noted that, ‘a potential criminal gets “good ideas” from crime films, which he then tries to put into practice.’³⁸

The Mau Mau rebellion, which began in the early 1950s and intensified in the 1960s, had a significant impact on censorship policies.³⁹ The British colonial government viewed the rebellion as a threat to their authority and a potential source of inspiration for anti-colonial activists. As a result, films that depicted the rebellion or criticised British colonial rule were often censored or banned outright.⁴⁰ The film *The Great Alaskan Mystery* (1944), attracted the scrutiny of colonial officials when they discovered – after issuing a license for public viewing – that the film had a scene depicting a staircase being blown up while a man was descending it.⁴¹ Although it reached audiences in Kenya a decade after its release, the War Council recommended that films showing such scenes should not be exhibited at the *present time* (during the Mau Mau war).⁴² The Kenyan struggle for independence, also influenced censorship policies. The British colonial government became increasingly sensitive to the portrayal of African culture in films as the struggle for independence gained momentum.⁴³ It was more likely to censor or ban films that celebrated African culture or depicted the struggle for independence.⁴⁴

In 1963, Kenya gained independence, and the new government continued to regulate film content.⁴⁵ The 1963 Film Censorship Act replaced the previous regulations and established the KFCB as the government agency responsible for reviewing and approving films.⁴⁶

35 Ndanyi (n 26) at 27.

36 As above.

37 As above.

38 As above.

39 Ndanyi (n 26) at 28.

40 As above.

41 As above.

42 CH Hartwell to Colonel Brown, Chairman, Film Censorship Board, Law and Order Stage and Cinematography, 1 April 1954 DC/KSM/19/155 KNA, Nairobi in SK Ndanyi ‘Film censorship and Identity in Kenya’ (2021) 42(2) *Ufahamu: A Journal of African Studies* at 26.

43 Ndanyi (n 26) at 30.

44 As above.

45 Ndanyi (n 26) at 34.

46 Film and Stages plays Act 34 of 1962.

3.2 Post-independence and the new constitutional era

Following Kenya's independence in 1963, the government took over the responsibility of regulating film censorship. The Films and Stage Plays Act of 1962 replaced the previous British colonial regulations and established a government agency responsible for reviewing and approving films, the KFCB.⁴⁷ In 1968, the government amended the Film Censorship Act to give the KFCB broader powers to regulate film content.⁴⁸ The KFCB could now require filmmakers to obtain licenses, and it had the authority to ban films or order the deletion of certain scenes or dialogue deemed to be offensive or immoral.⁴⁹ During the 1980s (the Moi era), the KFCB's censorship policies became more restrictive. During Daniel Arap Moi's era in Kenya, state control and censorship extended beyond just the print and broadcast media. Film censorship, like other forms of media, was tightly regulated by the government.⁵⁰ The Moi administration exercised strict control over the film industry, leading to the censorship and restriction of films that were considered politically sensitive or critical of the government.⁵¹

Given the rampant governmental interference, a need for political reformation was warranted. This impetus was provided by, among other things, the decriminalisation of defamation, which marked the turning point of a new age of censorship as the government could not jail anyone saying something it did not like, thus came moral censorship.⁵² With the powers granted to the KFCB by the 1968 revision of the Act, grounds of censorship gyrated from political grounds to social ones.⁵³

After the promulgation of the 2010 Constitution of Kenya, the KFCB continued to operate under the provisions of the new Constitution.⁵⁴ The KFCB's mandate to regulate film and stage play content is enshrined in the Constitution's Bill of Rights, which guarantees freedom of expression and information, and also allows for limitations in the interest of public morality, security, or order.⁵⁵

47 Film and Stages plays Act 34 of 1962.

48 UNESCO *The African film industry: Trends, challenges and opportunities for growth* (2021) at 265.

49 Film and Stages Plays Act 38 of 1968.

50 George Ogola 'Moi and the media: How Kenyan Journalism suffered under his iron heel' *The Conversation*, 18 February (2020) – <https://theconversation.com/moi-and-the-media-how-kenyan-journalism-suffered-under-his-iron-heel-131681> (accessed 26 August 2023).

51 Ogola (n 50).

52 *Jacqueline Okuta & Another v Attorney General & Others* eKLR (2017).

53 SV Otieno 'Freedom of expression in Kenya: A study of section 16 of the Film and Stage Plays Act and its role in curtailing freedom of expression' unpublished LLB thesis, Strathmore University Law School, 2019 at 19.

54 Ndanyi (n 26) at 32.

55 The Constitution of Kenya, 2010 article 33.

Under the new Constitution, KFCB has continued to review and classify films and stage plays based on their content.⁵⁶ KFCB is required to adhere to the principles of good governance, including transparency, accountability, and public participation.⁵⁷

In 2016, the KFCB proposed a bill known as Films, Stage Plays and Publications Act of 2016 ('the FSSP Act').⁵⁸ If passed, the FSSP Act would allow the board's compliance officers to raid, search, and seize equipment or materials from organisations perceived to be producing or exhibiting materials that they deem to have questionable content the bill however was not enacted in the end due to backlash and criticism from media stakeholders.⁵⁹ Later in 2018, the KFCB once again faced criticism for its decision to ban the film *Rafiki*, because it contained 'homosexual scenes' and was in contravention of the values of the Kenyan people.⁶⁰ The ban was challenged in court, and in a landmark ruling in the case *Wanuri Kahiu & another v CEO – Kenya Film Classification Board Ezekiel Mutua & 2 others*⁶¹ the Kenyan High Court lifted the ban and ruled that KFCB had acted unconstitutionally and violated the filmmakers' right to freedom of expression.⁶²

Another notable event was the KFCB's ban on the music video for the song *Takataka* by a Kenyan artist Alvindo in 2019.⁶³ The KFCB banned the video for its allegedly explicit and obscene content, including scenes of violence against women.⁶⁴ The ban sparked debate about the KFCB's role in regulating artistic expression and prompted criticism from some who argued that the board was overreaching.⁶⁵

56 Ndanyi (n 26) at 32 & 33.

57 The Constitution of Kenya, 2010 article 10.

58 Ndanyi (n 26) 30.

59 Editorial 'Bill on film, theatre and publications a threat to legal freedoms' *All Africa* (Kenya) 10 November 2016 <https://allafrica.com/stories/201611110350.html> (accessed 9 August 2023).

60 AFP 'Lesbian film ban "ridiculous" says Kenya Film Commission' *Nation Africa* (Nairobi) 23 May 2018 updated 28 June 2020 <https://nation.africa/kenya/news/lesbian-film-ban-ridiculous-says-kenya-film-commission-47586> (accessed 9 August 2023).

61 *Wanuri Kahiu & another v CEO – Kenya Film Classification Board Ezekiel Mutua & 2 others* (2018) 313 eKLR.

62 AFP (n 60).

63 L Llado 'Kenyan government bans Taka Taka song' *Music in Africa* 17 April 2019 <https://www.musicinafrica.net/magazine/kenyan-govt-bans-taka-taka-song> (accessed 26 August 2023).

64 Llado (n 63).

65 W Osoro 'KFCB bans Alvindo's "Takataka" song, threatens to sue him' *The Standard* (Nairobi) 16 April 2019 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjJ2_Clrn9AhXOiVwKHWiXC_wQFnoECBEQAw&url=https%3A%2F%2Fwww.standardmedia.co.ke%2Fentertainment%2Fnews%2Farticle%2F2001321254%2Fkfc-bans-alvindos-takataka-song-threatens-to-sue-him&usg=AOvVaw3b0qu_-k4fjJtZYSC_-vPu (accessed 9 August 2023).

4 The current digital landscape in Kenya and the problematisation of the powers and mandate of the KFCB within this landscape

4.1 The digital landscape in Kenya

Digital technology has rapidly transformed the way people in Kenya live, work, and communicate.⁶⁶ The government of Kenya has recognised the importance of digital technology and has undertaken various initiatives to promote digital rights and digital inclusion in the country.⁶⁷ The digital rights and digital inclusion landscape in Kenya includes the legal framework, relevant statutes, policies by the government, and events bearing on digital rights and digital inclusion in the past decade.⁶⁸

The Constitution of Kenya 2010 recognises the right to freedom of expression, which includes freedom of artistic creativity, academic freedom, and freedom of scientific research.⁶⁹ This constitutional provision has been used to safeguard digital rights, including the right to access information, freedom of the press, and freedom of assembly online.⁷⁰

The legal framework for digital rights in Kenya includes the Access to Information Act ('the AIA'), which guarantees the right of access to information held by public and private bodies.⁷¹ The AIA also provides for the creation of a public access to information database to promote transparency and accountability in government.⁷² The Data Protection Act, which was passed in 2019, provides for the protection of personal data collected, processed, or stored in Kenya.⁷³ It also establishes the office of the Data Protection Commissioner, which is responsible for enforcing data protection laws in Kenya.⁷⁴

66 F Ngila 'How technology changed lives of Kenyans in the past 10 years' *Business Daily* 07 January 2020 <https://www.businessdailyafrica.com/bd/data-hub/how-technology-changed-lives-of-kenyans-in-the-past-10-years-2275412> (accessed 26 August 2023).

67 Ngila (n 66).

68 Londa 'Kenya digital rights and inclusion 2020 report: A paradigm initiative publication' 2021 — <https://paradigmhq.org/wp-content/uploads/2022/06/Londa-Kenya-Report-2021-lr.pdf> (accessed 26 August 2023).

69 The Constitution of Kenya, 2010 article 33.

70 Article 19 'Kenya: Harmonise legal framework on freedom of expression with ICCPR recommendations' 28 May 2021 <https://www.article19.org/resources/kenya-harmonise-free-expression-with-iccpr-recommendations/> (accessed 26 August 2023).

71 Access to Information Act 31 of 2016.

72 As above.

73 Data Protection Act 24 of 2019.

74 Data Protection Act 24 of 2019 sections 5 & 8.

For the individual Kenyan citizen, these laws and protections mean that their digital rights are recognised and safeguarded by the government.⁷⁵ They have the right to access information held by public and private bodies, which promotes transparency and accountability in government.⁷⁶ The Data Protection Act protects their personal data from unauthorised access, ensuring their privacy and security online.⁷⁷ The establishment of the office of the Data Protection Commissioner provides a mechanism for citizens to report any violations of their data protection rights and seek redress.⁷⁸ Additionally, the Independent Electoral and Boundaries Commission ensures the integrity of the electoral process, including digital aspects, giving citizens confidence in the democratic process.⁷⁹ Overall, these laws and protections promote digital inclusion and empower individuals to exercise their digital rights in Kenya.

The government of Kenya has undertaken various initiatives to promote digital inclusion. One of the most significant initiatives is the Digital Literacy Program, which aims to provide every primary school child with a laptop and access to digital learning materials.⁸⁰ The program seeks to bridge the digital divide by ensuring that all children have access to digital technology and the skills necessary to use it.⁸¹ The National Broadband Strategy aims to increase access to affordable broadband internet services throughout the country, with the goal of achieving 100% coverage by 2030.⁸² In 2018, the Kenyan government proposed a social media tax, which would have required citizens to pay a fee to use social media platforms such as Facebook, Twitter, and WhatsApp.⁸³ The proposal was met with widespread criticism, and the government eventually dropped the plan.⁸⁴

75 Data Protection Act 24 of 2019 section 5.

76 Constitution of Kenya 2010, article 35.

77 Data Protection Act 24 of 2019 section 3.

78 Data Protection Act 24 of 2019 section 5.

79 The Constitution of Kenya 2010, article 86.

80 'Digital Literacy Program (DLP)' Ministry of ICT <https://ict.go.ke/digital-literacy-programmedlp/#:-:text=The%20government%20initiated%20the%20program,technology%20in%20the%20learning%20environment> (accessed 9 August 2023).

81 Digital Literacy Program (n 80).

82 'National Broadband strategy 2018- 2023' Ministry of ICT <https://www.ict.go.ke/wp-content/uploads/2019/05/National-Broadband-Strategy-2023-FINAL.pdf> (accessed 9 August 2023).

83 Article 19 'Eastern Africa: New tax and licensing rules for social media threaten freedom of expression' 26 June 2018 <https://www.article19.org/resources/eastern-africa-new-tax-and-licensing-rules-for-social-media-threaten-freedom-of-expression/> (accessed 26 August 2023).

84 The Finance Bill 2018.

In 2019, the Kenyan government launched a digital identification system, which uses biometric data to register citizens.⁸⁵ However, the system has been criticised for its potential impact on privacy and civil liberties.⁸⁶ In 2019, the government of Kenya launched the National ICT Policy, which provides a framework for the development of the information and communications technology sector in the country.⁸⁷ The policy recognises the importance of digital rights and inclusion and seeks to promote the use of digital technology to improve service delivery, increase efficiency, and enhance the quality of life for all Kenyans.⁸⁸

After the new regime came into power in the 2022 general election, emphasis on digitisation of government processes and services was enhanced significantly.⁸⁹ On June 13, 2022, the Government of Kenya set forth an ambitious ten-year Information and Communication Technology (ICT) Digital Masterplan, stretching from 2022 to 2032.⁹⁰ This visionary strategy was designed to align Kenya with global technological progress and empower its digital economy.⁹¹ It revolved around four pivotal pillars: digital infrastructure, efficient digital services and data management, fostering digital skills, and nurturing an environment for digital innovation and entrepreneurship.⁹²

Fast-forwarding to February 23, 2023, the government unveiled a bold initiative to revolutionise its public services through digitalisation, fostering a heightened sense of digital competitiveness.⁹³ The Ministry of Information Communication and The Digital Economy commenced the implementation of the Kenya National Digital Master Plan 2022-2032.⁹⁴ This comprehensive

85 A Macdonald 'Kenya mulls digital ID scheme and new uses for controversial huduma number' Biometric Update 16 January 2023 <https://www.biometricupdate.com/202301/kenya-mulls-digital-id-scheme-changes-and-new-uses-for-controversial-huduma-namba#:~:text=The%20Huduma%20Namba%20biometric%20ID,been%20stuck%20in%20Kenya's%20parliament> (accessed 26 August 2023).

86 Macdonald (n 85).

87 Ministry of ICT, 'National Information, Communications and Technology (ICT) Policy' November 2019.

88 Ministry of ICT (n 87).

89 Ministry of ICT, 'The Kenya national masterplan 2022 – 2032' April 2022.

90 International Trade Administration, 'Kenya launches new ten-year digital masterplan' 13 June 2022 <https://www.trade.gov/market-intelligence/kenya-launches-new-ten-year-digital-masterplan> (accessed 9 August 2023).

91 International Trade Administration (n 90).

92 Ministry of ICT, Innovation and Youth Affairs, 'The Kenya national digital master plan 2022-2032' <https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf> (accessed 9 August 2023).

93 C Suche & S Musa 'State to digitize all government services by June' *Kenya News Agency* (Mombasa) 23 February 2023 <https://www.kenyanews.go.ke/state-to-digitize-all-government-services-by-june/> (accessed 9 August 2023).

94 H Abdullahi 'Ten-year national digital master plan unveiled' *Kenya News Agency* 12 April 2022 <https://www.kenyanews.go.ke/ten-year-national-digital-master-plan-unveiled/> (accessed 26 August 2023).

roadmap embraced five core pillars, propelling the nation's digital transformation agenda: establishing robust digital infrastructure, optimising digital services and data management, equipping citizens with essential digital skills, promoting digital entrepreneurship, and ensuring policy and regulatory alignment.⁹⁵

Continuing into May 24, 2023, President Ruto provided an encouraging update on the progress of this digital revolution.⁹⁶ Out of the entire spectrum of 7,000 government services, nearly 5,000 had already been seamlessly digitised, marking a significant leap toward efficiency and accessibility.⁹⁷ On June 5, 2023, Kenya took a strategic stride by launching the 'Huduma Kenya Digitalization Plan'.⁹⁸ Over the next three years, spanning from 2023 to 2026, this innovative roadmap aimed to enrich citizens' access to digital government services.⁹⁹ The plan encompassed the establishment of a centralised biometrics system, the integration of AI-powered service delivery methods, and the implementation of the Unified Personal Identification (UPI) platform, setting the stage for a more streamlined and efficient digital future.¹⁰⁰ On June 30, 2023, a monumental achievement was celebrated as President William Ruto unveiled an era of online accessibility to over 5,000 government services.¹⁰¹

However, despite the significant advancements in digitisation, the digital rights and digital inclusion landscape in Kenya has not existed without challenges. The government has also been criticised for its use of surveillance technology, including the installation of CCTV cameras in public spaces and the use of biometric data in the registration of citizens.¹⁰²

This is the digital rights landscape in which this article situates the KFCB and its mandate. As seen above, the sphere of digital rights and inclusion has been and continues to progress towards a reality where every individual Kenyan citizen can exercise their rights as freely in

95 International Trade Administration (n 90).

96 K Ayodi 'President Ruto anks on digital revolution to create one million jobs' *Nacosti* 18 December 2022 <https://www.nacosti.go.ke/2022/12/15/president-ruto-banks-on-digital-revolution-to-create-one-million-jobs/> (accessed 18 December 2022).

97 Office of the President 'President Ruto unveils online government services' <https://www.president.go.ke/president-ruto-unveils-online-government-services/> (accessed 26 August 2023).

98 B Thomas-Aguilar 'Huduma Kenya: Digital transformation for social good' *VMware (Kenya)* 8 January 2019 <https://news.vmware.com/esg/huduma-kenya-digital-transformation-social-good> (accessed 9 August 2023).

99 Thomas-Aguilar (n 98).

100 Macdonald (n 85).

101 B Makong 'President William Ruto has disclosed that 5,000 of the country's 7,000 government services have been digitised so far, as the country races toward digitising all essential services' *Capital News (Nairobi)* 24 May 2023 <https://www.capitalfm.co.ke/news/2023/05/5000-govt-services-digitized-so-far-president-ruto-says/> (accessed 9 August 2023).

102 V Kapiyo & G Githaiga 'Is surveillance a panacea to Kenya's security threats' *Global Information Society Watch* 2014.

the digital realm as they would in the physical one. It is in this advancement towards a future characterised by digital equality that we situate the powers granted unto the KFCB by section 16 of the Film and Stage Plays Act and the manner (manifestly reminiscent of colonial precedent) that it has been wielding this power.

4.2 Problematisation of the KFCB'S Actions within this landscape

4.2.1 *Lack of a clear standard*

The first, and most apparent problem posed by the KFCB's mandate is the lack of a clear standard for what constitutes obscene material by the KFCB poses significant problems. Firstly, it leads to inconsistency in the classification of films and stage plays, resulting in confusion among filmmakers and the general public.¹⁰³ Secondly, it raises questions about the objectivity of the board in the exercise of its mandate, as the lack of clear guidelines provides room for personal biases and subjective judgments.¹⁰⁴ This is exhibited most explicitly by the slew of decisions made by [then] chairman of the KFCB, Ezekiel Mutua between 2015 and 2018 such as declaring gay lions a product of the erosion of current values.¹⁰⁵ Thirdly, it limits artistic freedom, as filmmakers may self-censor their work for fear of falling foul of the board's subjective standards.¹⁰⁶ Therefore, there is a need for the KFCB to provide clear guidelines for the classification of films and stage plays to enhance consistency and transparency in its decision-making processes.

There have been several instances where the lack of clarity in legislation has led to devastating consequences. One example is the prohibition of alcohol in the United States during the 1920s, commonly referred to as the 'Prohibition era'.¹⁰⁷ The 18th Amendment to the US Constitution attempted to ban the manufacture, sale, and transportation of alcohol, but it did not clearly define what constituted 'intoxicating liquors'.¹⁰⁸ This lack of clarity led to confusion and inconsistent enforcement, as well as the emergence of organised crime groups that smuggled and sold illegal

103 N Adagala & D Muyonga 'A Critical Evaluation of the Proposed Kenya's Film, Stage Plays and Publications Bill 2016' (2016) 3(12) *International Journal of Innovative Research and Advanced Studies*.

104 Adagala & Muyonga (n 103) 136.

105 'Kenyan officials want 'crazy gay' lions isolated' *CBC News* (Johannesburg) 09 November 2017 <https://www.cbsnews.com/news/kenya-crazy-gay-lions-isolated-ezekiel-mutua-film-classification-board/> (accessed 9 August 2023).

106 Adagala & Muyonga (n 103) 134.

107 History.Com editors 'Prohibition' 29 October 2009 <https://www.history.com/topics/roaring-twenties/prohibition> (accessed 9 August 2023).

108 History.Com editors (n 107).

alcohol.¹⁰⁹ The prohibition also led to an increase in public health problems, including the consumption of dangerous bootleg alcohol, which resulted in thousands of deaths.¹¹⁰

Another example is the war on drugs initiated in the United States during the 1970s.¹¹¹ The laws and policies enacted to combat drug use and trafficking did not provide clear guidelines on how to differentiate between drug users and drug traffickers, leading to the disproportionate incarceration of people of colour for drug-related offenses.¹¹²

KFCB's lack of clear standards limits artistic freedom and expression as filmmakers may self-censor their work for fear of falling foul of the board's subjective standards. This issue has been a major concern for Kenya's film industry, which seeks to promote artistic expression while complying with the KFCB's mandate to protect the public from harmful content.¹¹³

To address this problem, KFCB needs to provide clear guidelines for the classification of films and stage plays to enhance consistency and transparency in its decision-making processes. The guidelines should be based on the Kenyan Constitution, which guarantees freedom of expression, creativity, and cultural diversity while also protecting citizens from harmful content.¹¹⁴

4.2.2 *Balancing national values against morals vis a vis the Constitution of Kenya*

The Constitution of Kenya outlines the national values and principles of governance that should guide the actions of all public entities, including the KFCB.¹¹⁵ However, the Constitution does not define specific moral standards that should be applied in determining what constitutes obscene material. The problem with the KFCB asserting an ethereal standard of morality is that it can and leads to arbitrary and inconsistent application of the law.

It is clear that the regulation of obscenity is fraught with complex and often contradictory motives and purposes. While some

109 History.Com editors (n 107).

110 As above.

111 History.Com editors 'War on drugs' 17 December 2019 <https://www.history.com/topics/crime/the-war-on-drugs> (accessed 26 August 2023).

112 Drug Policy Alliance 'The Drug War, Mass Incarceration and Race' June 2015 https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf (accessed 9 August 2023).

113 Article 19 'Kenya: Film Classification Board must stop stifling artistic expression' 29 September 2021 <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/> (accessed 26 August 2023).

114 The Constitution of Kenya, 2010 article 33.

115 The Constitution of Kenya, 2010 article 10.

proponents of regulation may argue that obscenity poses a threat to public safety, others may seek to prevent the production and consumption of such materials altogether.¹¹⁶ Furthermore, the impact of obscenity on human behaviour remains the subject of intense debate among psychologists, and the constitutionality of obscenity laws cannot be determined solely on the basis of their supposed effects on behaviour.¹¹⁷

Yet amidst this confusion, it is worth noting that the regulation of obscenity is typically motivated by a belief in the immorality of such materials, and a desire to protect individuals from the supposed corrupting influence of such content.¹¹⁸ While obscenity may not be considered a crime in the strict legal sense, it is often viewed as a sin that undermines the character and morals of individuals, and threatens the social fabric of the community as a whole.¹¹⁹ Indeed, this belief in the corrupting influence of obscenity is a driving force behind the regulatory efforts of many communities around the world.¹²⁰

This dynamic is particularly evident when the KFCB is studied.¹²¹ Section 16 of the Film and Stage Plays Act provides KFCB with broad powers to classify and restrict access to films and plays that are deemed to be ‘contrary to public interest’ or ‘likely to cause harm to children.’¹²² However, the exact criteria for what constitutes ‘contrary to public interest’ or ‘harmful’ content remains subject to varied interpretation, and the KFCB has often been accused of overstepping its mandate in its efforts to regulate the content of films and stage plays.¹²³

Ultimately, the regulation of obscenity raises important questions about the relationship between morality, law, and social norms.¹²⁴ While many may believe that obscenity is inherently immoral and harmful, it is important to recognise that these beliefs are not universal, and that the imposition of moral standards through legal regulation can be fraught with difficulty.¹²⁵ Instead of focusing solely on moral concerns, it is crucial that lawmakers and regulators consider the broader national values and social norms that underpin the regulation of obscenity and other forms of expression.¹²⁶

116 L Hekin ‘Morals and the Constitution: The Sin of Obscenity’ (1963) 63(3) *Columbia Law Review* at 139.

117 Hekin (116) at 157.

118 Hekin (n 116) at 393.

119 Hekin (116) at 137.

120 Henkin (n 116) 393.

121 Film and Stage Plays Act 34 of 1962 section 15.

122 Film and Stage Plays Act 34 of 1962 section 16.

123 *Wanuri Kahiu & Another v CEO - Kenya Film Classification Board Ezekiel Mutua & Others* [2020] eKLR.

124 Henkin (n116) at 413.

125 As above.

126 Henkin (n116) at 414.

This lack of clarity can create confusion and result in the censorship of content that is not necessarily obscene, but which may offend the personal sensibilities of certain individuals within the KFCB or the wider society.¹²⁷ It can also lead to the censorship of content that has social, political, or artistic value, thereby impeding the free expression of ideas and opinions.¹²⁸

It is important to reiterate that the Kenyan Constitution focuses on national values as enshrined in article 10, rather than morality.¹²⁹ As such, legislation should be based on these national values rather than individual moral beliefs. This approach would ensure that regulations are in line with the country's aspirations and values, rather than the subjective opinions of a few individuals or groups. By aligning regulations with national values, the government can effectively regulate obscenity without suppressing artistic expression or violating individual rights.

4.2.3 *The KFCB mandate and the national identity of the people of Kenya*

The Constitution of Kenya recognises and upholds the rights of diverse communities, including ethnic minorities, indigenous peoples, sexual minorities, and other minority groups.¹³⁰ These communities have a right to freedom of expression, which encompasses the ability to seek, receive, and impart information and ideas, regardless of the medium used.¹³¹ The actions of the KFCB often threaten the rights of these communities. For example, the KFCB has attempted to ban content that portrays LGBTQ+ individuals.¹³² Such actions not only discriminate against sexual minorities but also disregard their status as members of Kenya's diverse populace.

Indigenous peoples and ethnic minorities are also at risk of having their ways of life affected by the actions of the KFCB. For instance, KFCB may seek to regulate content that depicts cultural practices that it deems immoral or obscene. However, these practices may be an integral part of the identity and culture of these communities. By seeking to regulate such content, KFCB may be disregarding the cultural rights of these communities.

This approach is particularly problematic in the digital age, where the lines between traditional media and new forms of digital media are increasingly blurred. The KFCB's efforts to regulate online content have been criticised by digital rights and digital inclusion

127 Media Council of Kenya 'Media Sector Legislative Review' 2021 at 23.

128 *WK & Another v CEO - KFCB & Others* (2020) eKLR.

129 The Constitution of Kenya 2010 article 10.

130 The Constitution of Kenya, 2010 Preamble.

131 The Constitution of Kenya, 2010 article 33.

132 *Eric Gitari v NGO's coordination board* eKLR (2013).

advocates, who argue that such regulation is often used to limit fundamental rights and freedoms.¹³³ For instance, KFCB's adamant persecution of LGBTQ material is seen as discriminatory and ignores the fact that sexual minorities are part of Kenya's diverse populace. This was highlighted in the case of *Eric Gitari vs NGO coordination board*,¹³⁴ where the Supreme Court held that sexual orientation cannot be used as a ground for discrimination.

To promote a diverse and inclusive digital environment, it is important for the KFCB to exercise its mandate in a manner that respects the constitutional principles of diversity and identity. This can be achieved by engaging with stakeholders and consulting widely before making decisions that affect the creative industry. Failure to do so not only jeopardise the utilisation of the digital realm by different groups of people but also impedes their digital rights.

5 Conclusion and the way forward

Over the past decade, the issue of film censorship has been a topic of much debate and scrutiny.¹³⁵ This article aimed to contribute to this ongoing conversation by examining the impact of film censorship on digital rights and digital inclusion in Kenya. The article is premised on the conceptual framework that film censorship can have a negative impact on freedom of expression and access to information. This framework emphasises the importance of protecting these fundamental rights, particularly in the digital age where access to information and the ability to freely express oneself are essential to democratic participation and the advancement of knowledge and innovation.

To explore this issue, the article focused on the role of KFCB and its discretionary powers in regulating the production, distribution, and exhibition of films, as well as monitoring online content, including social media platforms. The paper highlighted that KFCB's mandate as per Section 16 of the Film and Stage Plays Act grants it the power to seize and destroy content deemed offensive. However, this regulatory power must be balanced with the fundamental rights to free expression, access to information, and privacy. The board's power to restrict online content and its subjective interpretation of what constitutes 'offensive material' poses a threat to freedom of expression and the right to access information. Moreover, the lack of transparency and accountability in the decision-making process of the

133 Article 19 'Kenya: Film Classification Board must stop stifling artistic expression' 29 September 2021 <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/> (accessed 26 August 2023).

134 *NGOs Co-ordination Board v EG & Others; Katiba Institute* (2023) KESC 17 KLR.

135 Ndanyi (n 26) at 23.

board undermines the principles of digital inclusion, which require that all individuals have equal access to digital resources and opportunities.

To address these issues the author recommends the following:

- (a) That the discretion of the KFCB to ban be based on the national values espoused in Article 10 of the Constitution.
- (b) The creation of a platform for dialogue between film or content creators and the KFCB to ensure that both sides are on the same page regarding developments in the media industry.
- (c) A review of the Kenya Film and Stage Plays Act to ensure that it is aligned with the international human rights standards.
- (d) The KFCB should collaborate with stakeholders in the digital rights and digital inclusion community to develop guidelines for the regulation of online content that promote freedom of expression while protecting vulnerable groups from harm.
- (e) That researchers continue investigating the impact of media regulation on the realisation of digital rights and digital inclusion, especially the role of content regulation bodies in shaping the digital landscape.

In conclusion, the article argues that the KFCB's regulatory practices must be reformed to align with the principles of digital rights and digital inclusion. This requires a shift away from the colonial-era model of media regulation and the adoption of a more democratic and inclusive approach to media governance. By implementing the recommended actions, Kenya can promote a diverse and inclusive digital environment that upholds fundamental human rights.