



# **COMMENTARY**

**on**

## **The Regulation of “Hate Speech” in Kenya**

**June 2010**

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## KEY RECOMMENDATIONS

### Recommendations:

- Kenya's current Constitution should be amended to contain a provision which clearly and fully protects the right to freedom of expression, as required by Article 19 of the ICCPR, and the duty of the state to prohibit incitement to hatred, as required by Article 20 of the ICCPR.
- Article 33(2) of the Proposed Constitution should, in accordance with Article 21(4), reflect Article 20 of the ICCPR and indicate that any propaganda for war shall be prohibited by law and any advocacy of hatred that constitutes incitement to discrimination hostility or violence shall be prohibited by law.
- Section 77(3)(e) of the Penal Code should be amended to penalise persons who utter words which are intended to promote hatred towards a targeted group and which also create an imminent risk of discrimination, hostility and violence towards that group.
- Section 96 of the Penal Code should be amended indicate that "incitement to violence" refers to statements which actually create an imminent risk of violence against persons belonging to a targeted group. There should be no reversal in the burden of proof in incitement to violence cases.
- Section 138 of the Penal Code should be repealed.
- The Code of Conduct for Journalists and Media Enterprises in Kenya in the Second Schedule of the Media Act 2007 should repealed and redrafted by media representatives as a self-regulatory and voluntary code of conduct.
- Section 11 of the Code of Conduct in the Second Schedule of the Media Act 2007 should be repealed.
- Section 25 on Hate Speech of the Code of Conduct in the Second Schedule of the Media Act 2007 should be deleted.
- Principle 9 of the *Camden Principles on Freedom of Expression and Equality* should be incorporated into the Code of Conduct in the Second Schedule of the Media Act 2007.
- The Communications (Amendment) Act 2008 should legally oblige public service broadcasters to avoid negative stereotypes of individuals and groups, and their mandate should require them to promote intercultural understanding and to foster a better understanding of different communities. In fulfilling their moral and social responsibilities, private media organisations should combat discrimination by, among other things, avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance and reporting on different groups or communities and giving their members an opportunity to speak to be heard in a way that promotes a better understanding of them.
- Section 15(2)(a) of the Broadcasting Regulations, 2009 should be repealed.
- The National Cohesion and Integration Act, 2008 should be amended to remove the words "and Integration" from its title.
- Section 13(1) of the National Cohesion and Integration Act, 2008 should be amended to provide that a person who uses any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence commits a crime. The advocacy should be understood as requiring an intention to promote hatred towards a target group. The term incitement should be understood as statements which create an imminent risk of discrimination, hostility or violence against persons belonging to a targeted group.

## **I. Introduction**

1. In this Commentary, ARTICLE 19 analyses and sets out its concerns about the legal (constitutional and legislative) framework concerning the regulation of hate speech in Kenya. It does so with regard to the existing Constitution and legislation, as well as the Proposed Constitution of 6 May 2010. The Commentary analyses key provisions directly concerning hate speech and related provisions to the protection of the rights to freedom of expression and equality in the following texts: (1) the current Constitution of Kenya, 1963 (and as subsequently amended)<sup>1</sup>; (2) the Proposed Constitution which was officially published on 6 May 2010<sup>2</sup>; (3) the Penal Code, as revised in 2009<sup>3</sup>; (4) the Media Act, 2007 as amended in 2008<sup>4</sup>; (5) the Kenya Communications (Amendment Act) 2009; (6) the Broadcasting Regulations, 2009<sup>5</sup>; (7) the National Cohesion and Integration Act, 2008.<sup>6</sup> The Commentary does not purport to analyse every provision of these texts. Instead, the underlying aim of this Commentary is to focus upon provisions concerning the regulation of hate speech.
  
2. This Commentary – which is written and published at a moment of major constitutional reflection and reform in Kenya – builds upon ARTICLE 19’s work on the situation of human rights, in particular freedom of expression, in Kenya over recent years. It follows on directly from ARTICLE 19’s Commentary on the Prohibition of Hate Speech Bill published in November 2009, which is not considered in this analysis.<sup>7</sup> ARTICLE 19’s recent work in Kenya has also encompassed analyses of the Communications (Broadcasting) Regulations 2009<sup>8</sup>, the harmonised Draft Constitution published on 17 November 2009<sup>9</sup>, as well as statements on the role of the media during the post-election crisis as well as during and in the run-up to those elections that took place on 27 December 2007.<sup>10</sup> It also builds on ARTICLE 19’s work on understanding the

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<sup>1</sup> Available at [http://www.kenyalaw.org/Downloads/Acts/Constitution%202009%20\(final\).pdf](http://www.kenyalaw.org/Downloads/Acts/Constitution%202009%20(final).pdf)

<sup>2</sup> Available on the site of the Committee of Experts on Constitutional Review at [http://www.coekenya.go.ke/images/stories/Resources/the\\_proposed\\_constitution\\_of\\_kenya.pdf](http://www.coekenya.go.ke/images/stories/Resources/the_proposed_constitution_of_kenya.pdf)

<sup>3</sup> Available at [http://www.kenyalaw.org/Downloads/Acts/Penal%20Code%20Cap%2063\(%202009Final%20Final\).pdf](http://www.kenyalaw.org/Downloads/Acts/Penal%20Code%20Cap%2063(%202009Final%20Final).pdf)

<sup>4</sup> Available at [http://www.kenyalaw.org/kenyalaw/klr\\_home/](http://www.kenyalaw.org/kenyalaw/klr_home/)

<sup>5</sup> Available at [http://www.kenyalaw.org/kenyalaw/klr\\_home/](http://www.kenyalaw.org/kenyalaw/klr_home/)

<sup>6</sup> Available at [http://www.kenyalaw.org/kenyalaw/klr\\_home/](http://www.kenyalaw.org/kenyalaw/klr_home/)

<sup>7</sup> ARTICLE 19, Comment on Prohibition of Hate Speech Bill, 2007, November 2009

<http://www.article19.org/pdfs/analysis/kenya-hate-speech.pdf>

<sup>8</sup> ARTICLE 19, Memorandum on the Kenya Communications (Broadcasting Regulations, 2009, November 2009. Available at <http://www.article19.org/pdfs/analysis/memorandum-on-the-kenya-communications-broadcasting-regulations-2009.pdf>

<sup>9</sup> ARTICLE 19, Memorandum on the Harmonised Draft Constitution of Kenya, published on 17 November 2009 by the Committee of Experts on Constitutional Review Focus, December 2009. Available at <http://www.article19.org/pdfs/analysis/kenya-comment-on-the-harmonised-draft-constitution.pdf>

<sup>10</sup> ARTICLE 19, “Kenya: ARTICLE 19 Calls for Expansion of Freedom of Expression Rights to be Integrated into the New Draft Constitution of Kenya” 15 May 2009, available at <http://www.article19.org/pdfs/press/kenya-article-19-calls-for-expansion-of-freedom-of-expression-rights-to-be-i.pdf>; ARTICLE 19, “Kenya: Civil Society Adopt the Machakos Declaration on Freedom of Expression in Kenya” 8 May 2009, available at <http://www.article19.org/pdfs/press/kenya-civil-society-adopt-the-machakos-declaration-on-freedom-of-expression-.pdf>; ARTICLE 19, “Kenya: ARTICLE 19 Welcomes Adoption of Truth and Reconciliation Commission Bill” 31 October 2008, available at <http://www.article19.org/pdfs/press/kenya-article-19-welcomes-adoption-of-truth-justice-and-reconciliation-commi.pdf>; ARTICLE 19, “Kenya: Fact-Finding Mission Reports Fear Factor In Kenyan Media Coverage of Political Crisis” 3 March 2008, available at <http://www.article19.org/pdfs/press/kenya-media-rpt-pr.pdf>; ARTICLE 19, International Media Support and Reporters Sans Frontieres, *How Far To Go? Kenya’s Media Caught In the Turmoil Of A Failed Election* 3 March 2008, available at <http://www.article19.org/pdfs/publications/kenya-how-far-to-go.pdf>; ARTICLE 19, “ARTICLE 19 Condemns Muzzling Of Media” 3 January 2008, available at <http://www.article19.org/pdfs/press/kenya-muzzling-media-pr.pdf>; ARTICLE 19, Kenya Correspondents Association, The Kenyan Section of the International Commission of Jurists, *Guidebook on Election Coverage for Media Correspondents in Kenya* 5 December 2007, available at <http://www.article19.org/pdfs/tools/kenya-elections.pdf>

rights to freedom of expression and equality as fundamental and mutually reinforcing rights, in particular the *Camden Principles on Freedom of Expression and Equality*, which were released in April 2009.<sup>11</sup>

3. At the outset of this analysis, it is important to note that the term “hate speech” has been used variously to mean expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination against groups identified by characteristics such as national or ethnic origin, race, colour, descent and religion.<sup>12</sup> However, in international human rights law it is given definition by Article 20 of the International Covenant on Civil and Political Rights.
4. Part II of this Commentary considers the relevant international human rights standards on freedom of expression and the regulation of hate speech. Part III considers the legal framework on the regulation of hate speech in Kenya, including the the Proposed Constitution of 6 May 2010. The Annex contains the key provisions considered in this Commentary. This analysis shows that, in various ways, Kenya’s existing laws on the regulation of hate speech go beyond what is required under international human rights law and have the potential effects of restricting legitimate forms of expression on issues concerning racial and ethnic issues. The Proposed Constitution reflects an unclear and confused picture of Kenya’s international legal obligations on the regulation of hate speech. During this period of heightened constitutional reflection in Kenya, which has itself been a response to inter-ethnic tensions and violence, Kenya’s state organs should seize the opportunity to repeal or amend Kenya’s legislative and constitutional provisions regulating hate speech according to international standards on freedom of expression.

## **II. International human rights standards on freedom of expression and the regulation of hate speech**

5. ARTICLE 19’s Commentary is informed by international human rights law, in particular the right to freedom of expression as protected by Articles 19 of the Universal Declaration of Human Rights, as well as Articles 19 and 20 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), one of key international human rights treaties to which Kenya acceded on 1 May 1972.<sup>13</sup> It is recalled that Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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<sup>11</sup> The Camden Principles on Freedom of Expression and Equality available here <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

<sup>12</sup> The Council of Europe Committee of Ministers has indicated that the term “hate speech” includes “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin”. Committee of Ministers Recommendation, October 30, 1997. This definition was referred to by the European Court of Human Rights in *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 22. The OSCE (ODIHR) recently defined hate speech as: “[f]orms of expression that are motivated by, demonstrate or encourage hostility towards a group — or a person because of their membership of that group ... Since hate speech may encourage or accompany hate crimes, the two concepts are interlinked.” See OSCE (ODIHR), *Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region* (OSCE/ODIHR, 2009) p 17. The International Criminal Court for Rwanda defined hate speech as “stereotyping of ethnicity combined with its denigration” in *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, paras 1020-1021.

<sup>13</sup> See UN Treaty Collection [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en)

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

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

6. Article 20 of the ICCPR then states:

- 1. Any propaganda for war shall be prohibited by law.
- 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

7. It is noted that the UN Human Rights Committee has stated that there is no contradiction between the duty to adopt domestic legislation against incitement under Article 20(2) and the right to freedom of expression.<sup>14</sup> The Committee has recognised the overlapping nature of Articles 19 and 20, stating that it considered that “restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”<sup>15</sup> Thus, any law seeking to implement the provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3).

8. As a result of ratifying the ICCPR, Kenya is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national legislation.<sup>16</sup> It is important to note that Kenya has made no reservation or declaration in relation to Article 20 of the ICCPR. ARTICLE 19 also notes that Kenya has ratified the African Charter on Human and Peoples’ Rights on 15 July 1983 which also guarantees freedom of expression.<sup>17</sup> Although ARTICLE 19 relies on international human rights provisions on the right to freedom of expression in particular, this Commentary is based on a comprehensive and coherent understanding of international human rights law as contained in other provisions of the ICCPR, including its provisions on equality.<sup>18</sup>

9. In addition to such international human rights legal instruments, ARTICLE 19 also relies on *The Camden Principles on Freedom of Expression and Equality* (the “Camden Principles”), a progressive interpretation of international law and standards prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts.<sup>19</sup> In relation to the “Incitement to hatred”, Principle 12 of the *Camden Principles* elaborates on Article 20 of the ICCPR and states:

12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

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<sup>14</sup> General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), 29 July 1983, UN Doc HRI/GEN/1/Rev 6 at 133 para 2.

<sup>15</sup> *Ross v Canada*, Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997, 18 October 2000.

<sup>16</sup> Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969. Kenya acceded to the ICCPR on 1 May 1972.

<sup>17</sup> See [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf) Article 9 of the African Charter on Human and Peoples’ Rights states: “1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.” Kenya ratified the African Charter on Human and Peoples’ Rights on 23 January 1992.

<sup>18</sup> See notably Articles 2, 3, 14, 26 and 27 ICCPR.

<sup>19</sup> ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (April, 2009). See <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

- i. The terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
- ii. The term “advocacy” is to be understood as requiring an intention to promote hatred towards the target group.
- iii. The term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
- iv. The promotion, by different communities, of a positive sense of group identity which does not constitute hate speech.

12.2. States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.

12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

12.4. States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.

12.5. States should review their legal framework to ensure that any hate speech regulations conform with the above.

### **III. Comments on the Current Legal Framework on the Regulation of Hate Speech**

#### **A. The Constitution, 1963 (as subsequently amended)**

10. The current Constitution of Kenya has several provisions relevant to the protection of freedom of expression and the regulation of hate speech.
11. Article 70 of Chapter V on the “Protection of fundamental rights and freedoms of the individual” indicates that everyone in Kenya is “entitled to the fundamental rights and freedoms of the individual”, including freedom of expression, without discrimination on various grounds. It further provides that the provisions under this Chapter “shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Thus, this provision establishes and emphasises that the rights contained in the Chapter may only be subject to the limitations contained within its provisions. Any restrictions on hate speech must therefore be encompassed by the provisions in this Chapter.
12. Article 79(1) of the Constitution provides that no person shall be “hindered” in the enjoyment of their right to freedom of expression.
13. Article 79(2) of the Constitution then provides for permissible restrictions on freedom of expression. However, these are more extensive than those provided for under international law. Whilst international standards strictly require restrictions on freedom of expression to be “provided by law”, Article 79(2) of the Constitution permits restrictions where they are “contained in or done under the authority of any law”. It is unclear whether this meets the strict standard of “provided by law”. Furthermore, Article 79(2)’s list of legitimate purposes for restricting freedom of expression is much more extensive than those permitted under international law. Restrictions on freedom of expression may be permissible if they “[make] provision ... that is reasonable required in the interests of defence, public safety, public order, public morality and public health ... protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical operation of telephony, telegraphy, posts, wireless broadcasting or television...or that imposes restrictions upon

public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society”.

14. The provisions of Article 79(2) do not address hate speech as such or directly deal with the appropriate relationship between the right to freedom of expression and the right to equality in relation to such harmful speech. Article 79 does indicate that restrictions on the right to freedom of expression may be justifiable to protect the “rights and freedoms of others”, which should include the right to protection from discrimination as protected by Article 82.
15. Article 82 provides for protection from discrimination on a number of grounds which are “race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex”. Article 82(2) indicates that “no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority”. Article 82(3) defines “discriminatory” as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such discrimination”.
16. Whilst Article 82 provides for protection from discrimination and Article 79(2) provides for permissible restrictions on freedom of expression, the Constitution does not reflect Kenya’s international legal obligations to implement Article 20 of the ICCPR.

**Recommendations:**

- **Kenya’s Constitution should be amended to contain a provision which clearly and fully protects the right to freedom of expression, as required by Article 19 of the ICCPR, and the duty of the state to prohibit incitement to hatred, as required by Article 20 of the ICCPR.**

**B. The Proposed Constitution officially published on 6 May 2010**

17. The Proposed Constitution was officially published on 6 May 2010 in accordance with section 34 of the Constitution of Kenya Review Act, 2008. However, this proposal does not fully address the shortfalls in the protection of freedom of expression in the current Constitution which have been outlined above.
18. Article 33 of Proposed Constitution includes a radically revised provision on freedom of expression. It states:
  33. (1) Every person has the right to freedom of expression, which includes—
    - (a) freedom to seek, receive or impart information or ideas;
    - (b) freedom of artistic creativity; and
    - (c) academic freedom and freedom of scientific research.
  - (2) The right to freedom of expression does not extend to—
    - (a) propaganda for war;
    - (b) incitement to violence;
    - (c) hate speech; or
    - (d) advocacy of hatred that—



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- (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
- (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

19. The “limitations of the rights and fundamental freedoms”, including freedom of expression, are contained in Article 24.

20. Article 27(4) states:

27. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

21. What are the combined effects of these provisions on the constitutional protections against hate speech in Kenya? A number of comments can be made. Article 33(2) distinguishes between “(b) incitement to violence”, “(c) hate speech” and “(d) advocacy of hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4)”. The term “vilification of others” lacks any definition and may be interpreted more broadly than the concept of incitement contained in Article 20 of the ICCPR to include criticisms and disparaging comments which fall below the threshold of international law. Another problem with Article 33(2) is unclear and has the potential to confuse. Articles 33(2) (b), (c) and (d) present overlapping concepts which, in various ways, relate to Article 20 of the ICCPRs definition of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. However, in setting out three apparently distinct concepts of harmful speech, this provision raises questions about the boundaries between them, particularly the “hate speech” (usually a popular term, rather than a legal one) and advocacy of hatred.

22. It is significant that Section 21(4) states that the “State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms”.

#### **Recommendations:**

- **Article 33(2) of the Proposed Constitution should, in accordance with Article 21(4), reflect Article 20 of the ICCPR and indicate that any propaganda for war shall be prohibited by law and any advocacy of hatred that constitutes incitement to discrimination hostility or violence shall be prohibited by law.**

#### **C. The Penal Code, as revised in 2009**

23. The Penal Code of Kenya<sup>20</sup>, as revised in 2009, contains a number of provisions which are relevant to the regulation of hate speech in Kenya in various ways.

##### *Subversive activities*

24. Although the Penal Code does not refer to hate speech or incitement to hatred directly, Section 77(1) on “Subversive activities” states that: “any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a

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<sup>20</sup> Chapter 63, Revised Edition 2009 (2008) Published by the National Council for Law Reporting with the Authority of the Attorney General.

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term not exceeding seven years...” Section 77(3) goes on to define “subversive” to include “(a) supporting, propagating ... or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice”; “(b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority” as well as actions “(e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities”.

25. Therefore, speech “intended or calculated to promote feelings of hatred and enmity between different races or communities in Kenya”, as long as it is not uttered in good faith and is not aimed at combating the roots of discrimination, constitutes a subversive activity under Section 77(3)(e) and attracts a prison sentence of up to seven years. Yet Section 77(3)(e) falls far short of the exacting standards of Article 20 of the ICCPR which sets the only time when speech should be prohibited and attract criminal penalties on the grounds that it incites to hatred. In particular, the provision fails to properly reflect the concept of “incitement” under international law which requires to an *imminent risk* of discrimination, hostility or violence against persons belonging to the targeted group.<sup>21</sup>

#### *Incitement to violence*

26. More specifically on the subject of “incitement to violence and disobedience of the law”, Section 96 of the Penal Code provides that a person would be found guilty of an offence punishable by a prison sentence of up to five years if he or she “utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated (a) to bring death or physical injury to any person or to any class, community or body of persons ...” This does not deal with hate speech on the grounds of race, religion or nationality as Article 20 of the ICCPR as such, and also engages the permissible restrictions on freedom of expression contained in Article 19(3) of the ICCPR more generally. The provision may be justified on the basis that it protects the rights to life, freedom from inhuman or degrading treatment, security and health of others. However, the provision is overbroad and unnecessarily reverses the evidentiary burden in cases of incitement to violence and disobedience of the law. As it stands, the provision is likely to catch a wide array of speech merely on the basis that indicates or implies that it might be desirable to attack certain individuals or groups – with the defendant required to prove that he or she did not incite to violence.
27. The provision is currently too far-reaching in its scope because it requires nothing else than evidence of speech or actions which “indicate” or even just “imply” that “it is or might be desirable to do”, or “omit to do any act the doing of which is calculated to bring death or physical injury” to any person or a group of persons. Section 96 needs to be more narrowly tailored to indicate that incitement to violence refers to statements which actually create an imminent risk of violence against persons belonging to a targeted group. Furthermore, Section 96 reverses the burden of proof so that the burden is upon the defendant, rather than the prosecution, in cases of incitement to violence and disobedience of the law. The reversal of the burden of proof ought to be removed.

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<sup>21</sup> The UN Special Rapporteur on the Freedom of Religion or Belief has taken the view that “expressions should only be prohibited under article 20 [of the ICCPR] if they constitute incitement to *imminent acts of violence or discrimination against a specific individual or group*” (emphasis added). See Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, further to Human Rights Council decision 1/07 on incitement to racial and religious hatred and the promotion of tolerance, UN Doc HRC 2/3 20 September 2006, para 47.

*Offences Against Religious Feelings*

28. In the Chapter dealing with “Offences Relating to Religion”, Section 138 of the Penal Code provides that “any person who, with the deliberate intention of wounding the religious feelings of any other person, writes any word, or any person who, with the like intention, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person, is guilty of a misdemeanour and is liable to imprisonment for one year.”
29. This provision essentially provides for the criminalisation of insult to religious feelings and in this way is similar way to laws prohibiting blasphemy or “defamation of religions” which protect religious ideas or tenets. Such laws are in clear contravention of international standards on freedom of expression. Hate speech on religious grounds can only be prohibited under international law if it meets the criteria of Article 20 of the ICCPR, as emphasised by international authorities.<sup>22</sup> In other words, there needs to be actual incitement to hatred against individuals or groups on account of their religion. The “wounding of religious feelings” does not meet this test. Furthermore, Article 19(3) of the ICCPR, which allows restrictions to be placed on the exercise of the right to freedom of expression as provided by law and when necessary “for the respect of the rights and reputations of others, for the protection of national security or public order, or of public health or morals”, does not include protection of religions or protection of religious sensibilities.<sup>23</sup> Freedom of expression does not imply that an individual is to be protected from exposure to a religious view simply because it is not his or her own.<sup>24</sup> As the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion stated, limitations on the right to freedom of expression were “designed in order to protect individuals against direct violations of their rights” and “are not designed to protect belief systems from external or internal criticism.”<sup>25</sup>
30. Such laws on the punishment of religious insult and blasphemy are likely to have a significant chilling effect upon the free discussion of religious ideas and issues. ARTICLE 19 and international human rights authorities have argued consistently that such laws ought to be abolished.<sup>26</sup> In this regard, it is notable that blasphemy laws are being reconsidered and even repealed in a number of states.<sup>27</sup>

<sup>22</sup> In Joint Statement in December 2008, the UN Special Rapporteur on Freedom of Opinion and Expression together with the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information emphasised that restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. 10 December 2008 <http://www.article19.org/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf>; See also Joint Statement of 27 February 2001 <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf>

<sup>23</sup> See also Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953; Article 13(2) of the American Convention on Human Rights, OAS Treaty Series No 36, 1144, adopted at San Jose, Costa Rica, on 22 November 1969, entered into force 18 July 1978; Article 9 of the African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 rev. 5 adopted 27 June 1981, entered into force 21 October 1986.

<sup>24</sup> *Murphy v Ireland*, judgment of 10 July 2003, Application No 44179/98, para 72.

<sup>25</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, 28 February 2008 A/HRC/7/14 paragraph 85.

<sup>26</sup> The Parliamentary Assembly of the Council of Europe considered that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence”. Council of Europe, Parliamentary Assembly, Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, adopted on 29 June 2007 (27th Sitting), para 15. The Council of Europe’s Venice Commission subsequently recommended inter alia that “a) incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States ... b) That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component ...”

**Recommendations:**

- **Section 77(3)(e) of the Penal Code should be amended to penalise persons who utter words which are intended to promote hatred towards a targeted group and which also creates an imminent risk of discrimination, hostility and violence towards that group.**
- **Section 96 should be amended indicate that “incitement to violence” refers to statements which actually create an imminent risk of violence against persons belonging to a targeted group. There should be no reversal in the burden of proof in incitement to violence cases.**
- **Section 138 of the Penal Code should be repealed.**

**D. The Media Act, 2007**

31. The Media Act, 2007<sup>28</sup> establishes the Media Council of Kenya whose functions include the mediation or arbitration of “disputes between the government and the media, between the public and the media, and intramedia”.<sup>29</sup> It should be emphasised that the establishment of a Media Council to “regulate” the media does not actually require new legislation. Indeed, in most countries, a “press council” is set up and its members are elected among major stakeholders regardless of specific legislation.<sup>30</sup>

32. The Second Schedule of the Media Act contains the “Code of Conduct for the Practice of Journalism” which is relevant to the regulation of hate speech and the protection of freedom of expression in Kenya in various ways.

*The Code of Conduct for Journalists and Media Enterprises*

33. It has been the position of ARTICLE 19 and other international non-governmental organisations that journalists and print media organisations should regulate themselves and in doing so should draw up a code of conduct.<sup>31</sup> The success of self-regulatory mechanisms in several countries prompted the African Commission on Human and Peoples’ Rights to declare that “[e]ffective self-regulation is the best system for promoting high standards in the media”.<sup>32</sup> It should be a self-regulatory body for journalists that should strive to develop a code of conduct, in consultation with a wide range of stakeholders, and in particular, other representative media bodies, such as journalists’ unions or associations. This is partly on the basis that the peer pressure to improve and embarrassment that a contrary holding can produce can be very effective in promoting greater

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European Commission for Democracy through Law (“the Venice Commission”), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Adopted by the Venice Commission at its 76th Plenary Session, CDL-AD(2008)026, 23 October 2008 para 89.

<sup>27</sup> The abolition of blasphemy in England and Wales entered into force on 8 July 2008. See Article 79 of the Criminal Justice and Immigration Act 2008 (c 4). In March 2010, the Irish government announced that there would be a constitutional amendment referendum held about whether or not to maintain the existing prohibition on blasphemy in the Irish Constitution.

<sup>28</sup> Act 3 of 2007.

<sup>29</sup> Section 4 of the Media Act on the “Functions of the Council”.

<sup>30</sup> A rare exception is the Danish Press Council which was established by statute.

<sup>31</sup> ARTICLE 19, *Central Asian Pocketbook on Freedom of Expression*, October 2006 <http://www.article19.org/pdfs/tools/central-asian-pocketbook.pdf> at 103-104. The International Federation of Journalists believes that codes of ethics or codes of conduct must be drawn up by the professionals themselves. See International Federation of Journalists, *Status of Journalists and Journalism Ethics*, 5 May 2003 <http://www.ifj.org/en/articles/status-of-journalists-and-journalism-ethics-ifj-principles>, Principle 5.1.

<sup>32</sup> Principle IX, Declaration of Principles on Freedom of Expression in Africa, 32nd Session, 17 – 23 October, 2002.

professionalism.<sup>33</sup> The OSCE Representative on Freedom of the Media has stated: “True ethics standards can be created only by independent media professionals, and can be obeyed by them only voluntarily ...”<sup>34</sup> Moreover, the government should not be an active participant in drafting or adopting the code: “official interference will jeopardize the independence of the project”.<sup>35</sup>

34. However, the Code of Conduct in Kenya was developed by both media and state representatives. Also, the decisions of the Media Council and Complaints Commission, which is also established under the legislation, may be legally enforced by the courts system.<sup>36</sup> If such decisions are to be based on the Code of Conduct, its function in reality will not be that of a “code” of practice for journalists, but more like a binding set of rules that journalists need to abide by. In this way, the Media Act does not set up a scheme of self-regulation as recommended by international authorities, and it has clear implications for the protection of the freedom of expression of journalists.

35. The next two parts consider substantive provisions of the Code of Conduct.

#### *Covering Ethnic, Religious and Sectarian Conflict*

36. Section 11 of the Code of Conduct on the coverage of “Ethnic, Religious and Sectarian conflict” states:

11. (a) News, views or comments on ethnic, religious or sectarian dispute should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.

(b) Provocative and alarming headlines should be avoided.

(c) News reports or commentaries should not be written or broadcast in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.

37. In relation to Section 11, it is appropriate that all media organisations, as moral and social responsibility, play a role in promoting intercultural understanding within society. However, the reference to “provocative and alarming” headlines may be interpreted broadly to catch headlines which may shock or disturb, but which nevertheless constitute legitimate speech under Article 19(3) of the ICCPR. It may therefore result in violations of the freedom of expression, a chilling effect on journalists, especially if the Council and the Commission utilise this code to reprimand journalists harshly. Even if news on acts of discrimination and inter-ethnic violence is alarming, there is a strong public interest in having it widely reported even though the media should report in a factual and sensitive manner and be alert to the danger of discrimination or negative stereotypes of individuals and groups being furthered by the media.<sup>37</sup>

#### *Hate speech*

38. Section 25 of the Code of Conduct defines hate speech in the following way.

25. Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.

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<sup>33</sup> On the merits of media self-regulation, see OSCE Representative on Freedom of the Media, *The Media Self-Regulation Guidebook* (Vienna, 2008) [http://www.osce.org/publications/rfm/2008/04/30697\\_1117\\_en.pdf](http://www.osce.org/publications/rfm/2008/04/30697_1117_en.pdf) at 9-19.

<sup>34</sup> Above at 15.

<sup>35</sup> Above at 30.

<sup>36</sup> Sections 33 of the Media Act.

<sup>37</sup> Principle 9.1 of the Camden Principles.

39. The underlying objective of this provision seems to be the minimisation of the role of the media in contributing to racism in society. However, the provision requires more careful phrasing.
40. *First*, the mere quoting of persons making derogatory remarks is not necessarily a negative thing, as this provision implies – particularly if it is to raise awareness of or expose racist, sexist and other discriminatory activities and opinions in society. The quoting racist remarks needs to be closely examined in terms of both their content and intention.<sup>38</sup>
41. *Second*, Section 25 requires “careful account” to be taken of the effects of remarks and of “changes in public attitudes as to what is and what is not acceptable”. The promotion of human rights, such as freedom of expression and equality, and supporting values, such as pluralism and diversity, should not be dependent on public attitudes which may shift and not necessarily evolve progressively. The Camden Principles assist in expressing a fuller, more positive vision of the role of the media in the promotion of intercultural understanding: all media should, “as a moral and social responsibility ... avoid[ing] unnecessary references to race, religion, gender and other group characteristics that may promote intolerance”.<sup>39</sup>
42. *Third*, the title of this provision ought to be reconsidered. “Hate speech” implies that this provision deals with issues of incitement to hatred. However, the actual purpose of the provision, even as it is currently phrased, is actually the “combating of discrimination”. This phrase should be in the provision’s title along with the “promotion of intercultural understanding”.

*Non-discrimination clauses*

43. Codes of conduct or ethics for journalists should include guidelines expressly related to equality and diversity issues.<sup>40</sup> The International Federation of Journalists’ Declaration of Principles on the Conduct of Journalists states: “The journalist shall be alert of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins.”<sup>41</sup>
44. Even though the Code of Conduct for the Practice of Journalism contains provisions on “ethnic, religious and sectarian conflict” and “hate speech”, it lacks provisions on the moral and social responsibilities of the media in combating discrimination and in promoting intercultural understanding.<sup>42</sup> The Camden Principles help to address this gap and emphasise the need for professional codes of conduct for the media and journalists to reflect the equality principle and for effective steps to promulgate and implement such policies.<sup>43</sup>

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<sup>38</sup> In *Jersild v Denmark* a television journalist was convicted under criminal legislation prohibiting dissemination of racist insults. The Court held that his conviction was not a proportionate means of protecting the rights of others when the speech occurred within the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive. The lack of racist intent was the central consideration for a finding in favour of the journalist. *Jersild v Denmark*, judgment of 23 September 1994, Application No 15890/89 para 35.

<sup>39</sup> Principle 9, Camden Principles.

<sup>40</sup> OSCE Representative on Freedom of the Media, *The Media Self-Regulation Guidebook* (Vienna, 2008) [http://www.osce.org/publications/rfm/2008/04/30697\\_1117\\_en.pdf](http://www.osce.org/publications/rfm/2008/04/30697_1117_en.pdf) at 26.

<sup>41</sup> Adopted by 1954 World Congress of the IFJ, amended by the 1986 World Congress <http://www.ifj.org/en/articles/ifj-declaration-of-principles-on-the-conduct-of-journalists>. In the UK, the Editors’ Code of Practice at Article 12 states: “(i) The press must avoid prejudicial or pejorative reference to an individual’s race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability. (ii) Details of an individual’s race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless these are genuinely relevant to the story”.

<sup>42</sup> Principle 9.1 of the Camden Principles.

<sup>43</sup> Principle 9.3 of the Camden Principles.

**Recommendations:**

- **The Code of Conduct for Journalists and Media Enterprises in Kenya in the Second Schedule of the Media Act 2007 should be repealed and redrafted by media representatives as a self-regulatory and voluntary code of conduct.**
- **Section 11 of the Code of Conduct in the Second Schedule of the Media Act 2007 should be repealed.**
- **Section 25 on Hate Speech of the Code of Conduct in the Second Schedule of the Media Act 2007 should be deleted.**
- **Principle 9 of the *Camden Principles on Freedom of Expression and Equality* should be incorporated into the Code of Conduct in the Second Schedule of the Media Act 2007.**

**E. The Communications (Amendment) Act 2009**

45. The Communications (Amendment) Act<sup>44</sup> contains a number of provisions relevant to the regulation of hate speech and freedom of expression. The act amends the Kenya Communications Act, 1998 and makes minor amendments to other statute law.
46. The function of the Communications Commission includes the promotion of “diversity and plurality of views for a competitive marketplace of ideas”<sup>45</sup> and the government may “make regulations generally with respect to all broadcasting services and without prejudice to ... the facilitation, promotion and maintenance and plurality of views for a competitive marketplace of ideas”<sup>46</sup>. These provisions are positive and are consistent with international standards on the establishment of a public policy and regulatory framework which promotes pluralism and diversity.<sup>47</sup>
47. In a similar vein, Section 46I of the Communications (Amendment) Act states that all licensed broadcasters “(a) provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community; ... [and] (j) ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast ...” The intention underlying these provisions, particular Section 46I (j) seems positive. However, as indicated before, the mere quoting of persons making derogatory remarks is not necessarily harmful, especially if it serves raise awareness of discriminatory activities and opinions in society, and the need to combat them.<sup>48</sup>
48. The provision should set down more stringent obligations specifically for public service broadcasters (or public broadcasters, as they are referred to in the legislation) as distinct from other (private) broadcasters. Public service broadcasters should be under *an obligation* to avoid negative stereotypes of individuals and groups, and their mandate should require them to promote intercultural understanding and to foster a better understanding of different communities and the issues they face. This should include the airing of programmes which portray different communities as equal members of society.<sup>49</sup> On the other hand, private broadcasters and media

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<sup>44</sup> No 1 of 2009.

<sup>45</sup> Section 46A(d), 46D(2)(b),

<sup>46</sup> Section 46K(a).

<sup>47</sup> Principle 5, Camden Principles.

<sup>48</sup> In *Jersild v Denmark* a television journalist was convicted under criminal legislation prohibiting dissemination of racist insults. The Court held that his conviction was not a proportionate means of protecting the rights of others when the speech occurred within the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive. The lack of racist intent was the central consideration for a finding in favour of the journalist. *Jersild v Denmark*, judgment of 23 September 1994, Application No 15890/89 para 35.

<sup>49</sup> Principle 9.2, Camden Principles.



should, as a *moral and social responsibility*, combat discrimination by, among other things, avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance and reporting on different groups or communities and giving their members an opportunity to speak to be heard in a way that promotes a better understanding of them.<sup>50</sup>

**Recommendations:**

- **The Communications (Amendment) Act 2008 should legally oblige public service broadcasters to avoid negative stereotypes of individuals and groups, and their mandate should require them to promote intercultural understanding and to foster a better understanding of different communities and the issues they face. In fulfilling their moral and social responsibilities, private media organisations should combat discrimination by, among other things, avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance and reporting on different groups or communities and giving their members an opportunity to speak to be heard in a way that promotes a better understanding of them.**

**F. Broadcasting Regulations, 2009**

49. The Broadcasting Regulations contain a number of provisions on content requirements. These include Section 15(2) states that a licensee shall not broadcast any matter which: “(a) contains the use of offensive language, including profanity and blasphemy; ... (d) is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community”. Section 34(2) states that in considering a programme code submitted by broadcasters to the Communications Commission of Kenya for its approval, the Commission shall have regard to specified standards and rules in relation to, among other things, “(h) individual rights, privacy, discrimination and personal attacks ... [and] (m) programming likely to incite, promote hatred or vilify any person or community on the basis of ethnicity/race/gender/religion/culture/age/disability”.

50. In relation to Section 15(2)(a), laws restricting discussion about religious beliefs, including blasphemy laws, are incompatible with international human rights law on freedom of expression and freedom of religion also. As the UN Special Rapporteur on freedom of religion or belief emphasised: “... any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief. Such an attempt could be counterproductive and promote an atmosphere of religious intolerance.”<sup>51</sup> The UN Special Rapporteur on freedom of religion or belief has recently emphasised that “the right to freedom of religion or belief does not include the right to have a religion or belief that is free from criticism or ridicule”.<sup>52</sup> Licensees should be able to broadcast material which is offends religious sensibilities.

51. In relation to Sections 15(2)(d) and 34(2), the requirement that the state prohibits incitement to hatred under Article 20 of the ICCPR means that it is required to regulate the media accordingly

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<sup>50</sup> Principle 9.1, Camden Principles.

<sup>51</sup> See Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, further to Human Rights Council decision 1/07 on incitement to racial and religious hatred and the promotion of tolerance, UN Doc HRC 2/3 20 September 2006, at para 50.

<sup>52</sup> Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 21 December 2009 A/HRC/13/40 para 39.



also. The state therefore is justified in banning broadcast matter and restricting programming which is likely to cause incitement.

**Recommendations:**

- **Section 15(2)(a) of the Broadcasting Regulations, 2009 should be repealed.**

**G. The National Cohesion and Integration Act, 2008**

*Concept of integration*

52. The apparent purpose of the National Cohesion and Integration Act<sup>53</sup> is to “encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes”.<sup>54</sup> In ARTICLE 19’s view, the notion of “integration” should not be equated to mean assimilation or absorption of a minority into the dominant culture. Rather, “integration” should be understood as the creation of genuine equality of opportunity and the development of a culture that draws upon diverse traditions. The National Cohesion and Integration Act should therefore be directed at pluralism, diversity and the promotion of intercultural understanding.<sup>55</sup>

*Hate speech*

53. Section 13 of the National Cohesion and Integration Act deals with “hate speech” in express terms. Hate speech covers speech which “is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up”. In this section, the term “ethnic hatred” is conceived as “hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”.

54. The types of speech which are covered encompass the use of “threatening, abusive or insulting words or behaviour, or displays any written material”; the publication or distribution of written material; the presentation or direction of the performance the public performance of a play; the distribution, showing or playing of a recording of visual images; or the provision, production or direction of a programme. The penalty for anyone who commits an offence under this provision is a fine not exceeding one million shillings or imprisonment for a term not exceeding three years, or both.

55. Section 13 falls short of international standards in various ways. *First*, under Section 13, an offence of hate speech is committed if there is present an intention to promote ethnic hatred is required *or* ethnic hatred should be likely to be stirred up. Yet the international formulation of Article 20 of the ICCPR clearly requires *both* criteria of intention to promote hatred publicly through the word “advocacy” *and* of the imminence (not just the likelihood) of the risk of discrimination hostility or violence.<sup>56</sup> These are cumulative requirements for hate speech, rather than alternative ones.

56. *Second*, “insulting speech” and, in many cases, speech which is viewed as “abusive” (insofar as it does not constitute incitement to hatred) should not be restricted anyway under either Article 20 of the ICCPR or under Article 19 of the ICCPR. Indeed, international protections on freedom of

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<sup>53</sup> Act 12 of 2008.

<sup>54</sup> The National Cohesion and Integration Act came into operation on 9 March 2010.

<sup>55</sup> See Principles 8-10 of the Camden Principles.

<sup>56</sup> Principle 12 of the Camden Principles.

## ARTICLE 19

### GLOBAL CAMPAIGN FOR FREE EXPRESSION

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expression have long been interpreted as being applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that “offend, shock or disturb”.<sup>57</sup>

#### **Recommendations:**

- **This Act should be amended to remove the words “and Integration” from its title.**
- **Section 13(1) of the National Cohesion and Integration Act, 2008 should be amended to provide that a person who uses any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence commits a crime. The “advocacy” should be understood as requiring an intention to promote hatred towards a target group. The term “incitement” should be understood as statements which create an imminent risk of discrimination, hostility or violence against persons belonging to a targeted group.**

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<sup>57</sup> *Handyside v the United Kingdom*, judgment of 7 December 1976, Application No 5493/72; *Giniewski v France*, judgment of 31 January 2006, Application No 64016/00 para 43.

## **Annex: Key Provisions**

### **The Constitution of Kenya, 1963 (as subsequently amended)**

70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

79. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
- (c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

- (a) with respect to persons who are not citizens of Kenya;
- (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
- (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
- (d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to

special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.

(6) Subsection (2) shall not apply to -

(a) anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in subsection (4); or

(b) the giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.

(7) Subject to subsection (8), no person shall be treated in a houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3).

(9) Nothing in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law.

### **Proposed Constitution, May 2010**

21.(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in the legislation limiting a right or fundamental freedom –

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and;

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

27. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

33. (1) Every person has the right to freedom of expression, which includes—

- (a) freedom to seek, receive or impart information or ideas;
- (b) freedom of artistic creativity; and
- (c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

- (a) propaganda for war;
- (b) incitement to violence;
- (c) hate speech; or
- (d) advocacy of hatred that—

- (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
- (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

### **Penal Code, as revised in 2009**

77. (1) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years...

(3) For the purposes of this section, “subversive” means –

(a) supporting, propagating (otherwise than with intent to attempt to procure by lawful means the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;

(b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority;

(c) intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Kenya or the administration of justice, or who incite, intend to incite;

(d) indicating, expressly or by implication, any connexion, association or affiliation with, or support for, any unlawful society;

(e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya: ...

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

96. Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated-

(a) to bring death or physical injury to any person or to any class, community or body of persons; or

(b) to lead to the damage or destruction of any property; or

(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

138. Any person who, with the deliberate intention of wounding the religious feelings of any other person, writes any word, or any person who, with the like intention, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person, is guilty of a misdemeanour and is liable to imprisonment for one year.

### **Media Act, 2007**

#### 11. Covering Ethnic, Religious and Sectarian Conflict

- (a) News, views or comments on ethnic, religious or sectarian dispute should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.
- (b) Provocative and alarming headlines should be avoided.
- (c) News reports or commentaries should not be written or broadcast in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.

#### 25. Hate Speech

Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.

### **The Communications (Amendment) Act, 2009**

#### **46L. (1) All licensed broadcasters shall-**

- (a) provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community;
- (b) ensure that Kenyan identity is developed and maintained in programmes;
- (c) observe standards of good taste and decency;
- (d) gather and present news and information accurately and impartially;
- (e) when controversial or contentious issues of public interest are discussed, make reasonable efforts to present alternative points of view, either in the same programme or in other programmes within the period of current interest;
- (f) respect the right to privacy of individuals;
- (g) respect copyright and neighbouring rights in respect of any work or material;
- (h) keep a program log or machine readable record of its programming for a period of one year after the date of broadcasting;
- (i) ensure that advertisements, either in terms of content, tone or treatment, are not deceptive or are not repugnant to good taste;
- (j) ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast.

#### **(2) Where-**

- (a) Where any cinematograph film has been submitted under any law for classification or censorship and approved for exhibition; and
- (b) where approval of the film for exhibition has been denied or has been given subject to excisions, no broadcaster shall –
  - (i) in the case of any film in respect of which such approval has been denied, broadcast the film or any part thereof; or
  - (ii) in the case of any film that has been approved for exhibition subject to excisions therefrom, broadcast that film or any part thereof if the film or, as the case may be, that part thereof includes any part of the film required to be excised; except with the consent of and subject to any conditions given by the Kenya Film Censorship Board established under [the Films and Stage Plays Act](#) .

Cap. 222.

**46K.** The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to-

(a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;

### **Communications (Broadcasting) Regulations, 2009**

15. (1) A licensee shall broadcast its station identity at intervals as may be prescribed by the Commission from time to time by Notice in the Gazette.

(2) A licensee shall not broadcast any matter which:

- (a) contains the use of offensive language, including profanity and blasphemy;
- (b) presents sexual matters in an explicit and offensive manner;
- (c) glorifies violence or depicts violence in an offensive manner;
- (d) is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community or
- (e) Has no program rating indicated prior to the commencement of such programs Protection of Children.

34. (1) Pursuant to Section of 46H the Act, any body of broadcasters wishing to operate under its own Programme Code shall submit such a code to the Commission for approval;

(2) In considering a Code submitted for its approval, the Commission shall have regard to specified standards to be complied with and rules and practices to be observed, in respect of the following areas:

- (a) the taste and decency of programme material, the subject of a broadcasting service or sound broadcasting service, and, in particular, in respect of the portrayal of violence and sexual conduct in such material;
- (b) advertising, infomercials, sponsorship and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service (other than advertising and other activities as aforesaid falling within paragraph (c));
- (c) advertising, infomercials, sponsorship and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service, being advertising and other activities as aforesaid which relate to matters likely to be of direct or indirect interest to children;
- (d) news, public affairs, analysis and commentaries;
- (e) childrens programmes, coverage and welfare;
- (f) election period and political parties;
- (g) liquor, dangerous drugs and cigarettes;
- (h) individual rights, privacy, discrimination and personal attacks;
- (i) religious programmes, occultism and superstition
- (j) identity of broadcasters subscribing to the code, procedure of being enjoined to the code;
- (k) action to be meted against violators;
- (l) family viewing policy and programme guide/labeling;
- (m) programming likely to incite, promote hatred or vilify any person or community on the basis of ethnicity/race/gender/religion/culture/age/disability;
- (n) such other matters as the Commission may prescribe from time to time by notice in the gazette

### **National Cohesion and Integration Act, 2008**

13. (1) A person who –

- (a) uses threatening, abusive or insulting words or behaviour, or displays any written material;
- (b) publishes or distributes written material;
- (c) presents or directs the performance the public performance of a play;
- (d) distributes, shows or plays, a recording of visual images; or

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(e) provides, produces or directs a programme;

which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(3) In this section, "ethnic hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.