



COMMENT

on the Harmonised Draft Constitution of Kenya -
Provisions affecting Freedom of Expression and
Freedom of Information

published on 17 November 2008 by the Committee of
Experts on Constitutional Review
Focus

December 2009
London

ARTICLE 19 · Free Word Centre · 60 Farringdon Road · London EC1R 3GA · United Kingdom
Tel +44 207 324 2500 · Fax +44 207 490 0566 · info@article19.org · <http://www.article19.org>

ARTICLE 19 Kenya and East Africa, ACS Plaza · Lenana Road · P.O.Box 2563
00100· Nairobi · Kenya Tel: +254 20 386 22 30/2 · Fax: +254 20 386 22 31

I. Introduction

On 17 November 2009, the Committee of Experts on Constitutional Review of Kenya,¹ published the Harmonised Draft Constitution of the Republic of Kenya (*hereinafter* “Draft Constitution”). The Draft Constitution is expected to be adopted on or before 2 March 2010. Once adopted, it will then be subject to a constitutional referendum.

With the purpose of contributing to public debate on current constitutional reform in the country, ARTICLE 19 has followed the development of the drafting of the new Constitution. In May 2009, we issued a Note commenting on the provisions relating to freedom of expression in the present Constitution and called on the Committee of Experts on Constitutional Review to ensure that the new provisions comply with international freedom of expression standards.²

In this Comment ARTICLE 19 does not undertake comprehensive analyses of the Draft Constitution as such but focuses on specific provisions that are relevant to the right to freedom of expression.³ The key articles in this respect are Article 50 (proclaiming the freedom of expression), Article 51 (guaranteeing the freedom of the media) and Article 52 (proclaiming the right of access to information). Other analysed provisions include Article 33 (establishing the regime of limitation to the constitutional rights and freedoms), and Article 121 (providing safeguards for fair allocation of airtime to political parties).

This Note ends with recommendations relating to the constitutional protection of the right to freedom of expression, the media freedom and the right to freedom of information.

II. Analysis

ARTICLE 19 welcomes the fact that the Draft Constitution introduces a number of positive changes in relation to the regime of rights and freedoms which are new to the constitutional order of Kenya. Firstly, in contrast to the current Constitution (in which only 16 articles deal with rights and freedoms), the Draft Constitution contains 38 such articles. The importance of rights and freedoms in the Draft Constitution is further highlighted by the fact that the rights and freedoms are set out in one of the first chapters and ahead of the chapters concerning the government of Kenya. Moreover, the new chapter of rights and freedoms is already renamed as a Bill of Rights, which wields more authority. In this context, it is worth noting that the provisions relating to the right to freedom of expression, the freedom of the media and the right to freedom of information have increased significantly from one in the current Constitution to ten in the draft Constitution.

The positive changes with respect to freedom of expression, access to information and media freedom in the Draft Constitution include:

- explicit recognition of a number of new constitutional rights and freedoms such as:

¹ The Committee was established pursuant to section 32 (1) (a) (i) of the 2008 Constitution of Kenya Review Act with a task to prepare a new Constitution for Kenya. For more information, see <http://www.coekenya.go.ke>.

² ARTICLE 19, *Note on the Existing Kenyan Constitutional Provisions on Freedom of Expression*, May 2009, available at <http://www.article19.org/pdfs/analysis/note-on-the-existing-kenyan-constitutional-provisions-on-freedom-of-expressi.pdf>.

³ See the enclosed Annex with a list of all provisions referred to in this Comment.

- the freedom of artistic creativity, the freedom of artistic expression and the freedom of scientific research (Article 50);
- the freedom of speech and debate in the Parliament (Article 150);
- the right of access to information (Article 52);
- the right to environmental information (Article 67);
- the consumers' right to information (Article 69);
- the right of every citizen to campaign for a political party or cause (Article 55);
- the right of every person to complain before the Human Rights and Gender commission and to initiate court proceedings alleging violation of constitutional rights including the constitutional rights in relation to freedom of expression (Article 31)
- explicit proclamation that all media are independent (Article 51);
- explicit and detailed regulation of the State and Parliament's duties and responsibilities for the implementation of the draft Constitution's Bill of Rights (Article 30)
- authority of courts to enforce the draft Constitution's Bill of Rights including the constitutional rights in relation to freedom of expression (Article 32);
- requirement for respect for human rights in the interpretation of the constitutional provisions (Article 310);
- direct application of the Bill of Rights to all laws and its binding character with respect to all State organs and all persons (Article 29).

The key provisions of the Draft Constitution in relation to freedom of expression are analysed below.

1. The right to freedom of opinion

We note that the right to freedom of opinion is part of the complex right to freedom of conscience, religion and belief.⁴ This formulation of the right to freedom of opinion in Article 49 is not in compliance with international human rights treaties in which the same right is defined on a par with the right to freedom of expression. For example, Article 19 of the Universal Declaration of Human Rights provides that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Likewise Article 19 of the *International Covenant on Civil and Political Rights* (hereinafter "ICCPR") states:

Everyone shall have the right to hold opinions without interference.

Similarly, the Declaration of Principles on Freedom of Expression in Africa guarantees freedom of expression in several articles, in particular Article I states that

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through

⁴ See the text of Article 49 in the Annex to this Comment.

- any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

We consider that Kenya's Bill of Rights in the Draft Constitution should not divert from the international and regional human rights standards that are binding on Kenya. Moreover, we are concerned that while under international law any interference with the right of freedom to hold an opinion is prohibited, Article 49 of the draft Constitution is subject to limitations (the limitations are discussed in more detail below). Any limitation on the freedom to hold an opinion is a violation of international law.

2. The right to freedom of opinion

ARTICLE 19 welcomes the broad scope of the right to freedom of expression as proclaimed in Article 50 of the Draft Constitution. In accordance with international freedom of expression standards, the right belongs not only to citizens but to every person. Article 50 of the Draft Constitution also explicitly provides that the right to freedom of expression includes the freedom to seek, receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research. This formulation is a useful guidance in the implementation of the Constitution and ensures respect to all aspects of the right to freedom of expression.

We are concerned about the restrictions to the right to freedom of expression. The Draft Constitution declares that the right to freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred. This provision is seemingly a reference to Article 20 the ICCPR which provides for prohibition by law of war propaganda, and advocacy of hatred that constitutes incitement to discrimination, hostility or violence. We note that although linked to Article 19 of the ICCPR, Article 20 does not aim at imposing absolute limitations to the right to freedom of expression. Instead the purpose of Article 20 is to ensure that states take firm actions against certain acts such as propaganda of war, incitement to violence, hate speech and advocacy to hatred. Although limitations on the right to freedom of expression are possible under international law, they are not absolute and therefore should be made with consideration of the circumstances of the case and in accordance with the three-part test provided for in Article 13 (3).

The absolute limitations of the right to freedom of expression in the Draft Constitutions are therefore not in compliance with international law. They automatically deprive persons of their right to freedom of expression without taking into consideration whether it is necessary to restrict the expression in the circumstances.

Further we consider that Article 50 paragraph 3 is confusing. It is unclear what is meant by the requirement that every person shall respect the rights and reputation of others in the exercise of the freedom of expression. The provision is confusing inasmuch as every person should respect the rights and reputations of others not only in the exercise of the right to freedom of expression as the draft Constitution provides but in all circumstances.

3. Access to information

Compared to other constitutions, the access to information regime set out in the Draft Constitution is fairly comprehensive. The respective provisions include:

- A general right on access to information (Article 52);
- A right to access information about the environment (Article 67);
- A right of consumers to information necessary for them to gain full benefit from goods and services (Article 69);
- Three guarantees for openness of state bodies such as:
 - Public sittings of Parliament and of its committees (Article 149);
 - Prohibition of Parliament to exclude the public and any public and private media from any sitting unless in exceptional circumstances (Article 149);
 - Obligation of national government to ensure that enactments are available or accessible in all public libraries including in Braille and other appropriate media for persons with visual or other impairments (Article 151).

Mindful that, at present, the right to access information is not a constitutional right in Kenya we commend the proposed comprehensive access to information regime.

In particular, we welcome that Article 52 goes beyond the “traditional” right of access to information held by public bodies and grants a right of access to information held by a private body where this is necessary to enforce a right. It is also worth commending the broad scope of the right of access to information. It makes it possible to obtain information which is held not only by the executive but also the legislature and the judiciary and the municipal administration. For the broad scope of the right of access to information the Draft Constitution is exemplary.

At the same time we note three major weaknesses. Firstly, in contradiction to international standards, according to which every person has access to information, the Draft Constitution provides that only citizens of Kenya are entitled to the right of access information. Secondly, the Draft Constitution does not require the government to pass a law giving effect to that right. Without such a law the access to information regime will not become fully operative. Thirdly, the wording of Article 52 gives the impression that this right is absolute. We recall that like the right to freedom of expression, the right to access to information is subject to limitations such as protection of state secrets, rights of others, etc.

Finally we welcome the constitutional requirement for the state to publish important information affecting the nation.

4. Limitations on the right to freedom of expression and the right to freedom of information

Both Article 50 and Article 52, that guarantee the rights to freedom of expression and of freedom of information respectively, do not contain limitation clauses. The limitations to these and the remaining rights in the Draft Constitution are set out in Article 33. In this section, we point out to incommpliance of Article 33 of the Draft Constitution with the limitation clause of Article 19 of the ICCPR.

i. Analysis of the constitutional limitations on the right to freedom of expression

On the outset we note that Article 33 is too verbose and may be confusing for both ordinary citizens and the judiciary. The importance of Article 33 requires that it is simple and clear. Moreover, international law requires that the limitations imposed on human rights should be provided by clear and precise legislation. Having in mind similar exceptions provided in international treaties and other Constitutions we believe this Article can be simplified and its clarity improved.

We welcome the requirement of Article 33 that restrictions on the freedom of expression should be provided by a clear and specific law. We also commend the requirement that account should be taken of whether there are less restrictive means to achieve the purpose for which the restriction is imposed. This requirement is in accordance with international law according to which if it is possible to accomplish the same goal in an alternative way less intrusive to the right to freedom of expression, the chosen measure is not in fact ‘necessary’.

We note with serious concern that Article 33 does not include the three-part test to assess the legality of the restrictions on the right to freedom of expression. We recall that the test, established in Article 19 of the ICCPR, requires the restrictions of the right to freedom of expression should be 1.) be provided for by law; 2) pursue one of the following explicitly provided legitimate aims: respect of the rights of others, respect of the reputations of others, protection of national security, protection of public order, or protection of public health or morals; 3) be necessary for the accomplishment of a legitimate aim.

Below we point to the discrepancies between Article 33 of Draft Constitution and the above-mentioned three part test:

1. Article 33 makes it possible for the right to freedom of expression to be restricted for various purposes inasmuch as it does not set out legitimate aims of restrictions. Paragraph 1 (b) item (iv) does not set out the principle that the enjoyment of rights and fundamental freedoms should not prejudice the rights and fundamental freedoms of others as a legitimate aim, but as one consideration out of many to be taken. In contrast, Article 19(3) of the ICCPR clearly lists the aims in the pursuit of which the restrictions on the right to freedom of expression are justified: the rights or reputations of others; and the protection of national security, public order, or public health or morals. This is an exhaustive list: a restriction that does not serve one of these legitimate aims constitutes a violation of the right to freedom of expression. Mindful that Article 79 (2) of the present Constitution contains a list of legitimate interests, it is unclear for us why the same list is missing in the draft Constitution. We consider that the lack of legitimate interests in the Draft Constitution is one of its major defects.
2. Article 33 requires that the limitations are “reasonable and justifiable in an open and democratic society”. This standard is less rigorous than “necessary” as provided for in Article 19 (3) of the ICCPR. A reasonable and justifiable restriction may not be deemed necessary in a democratic society. International courts read the word ‘necessary’ as imposing several quality requirements on any law and/or practice which abridges freedom of expression. In the first place, to justify a measure which interferes with free speech, a government must be acting in response to a pressing social need, not merely out of convenience as the word “reasonable” implies.

Secondly, the impact of restrictions must be proportionate, meaning that the harm to freedom of expression caused by a restriction must not outweigh its benefits to the interest it is directed at. In other words, the benefit of any restriction must outweigh its cost.

In view of these discrepancies we consider that Article 33 of the Draft Constitution makes it possible for the right to freedom of expression to be restricted in such a broad or untargeted way that it violates international law.

ii. Analysis of the constitutional exceptions on the right to freedom of information

Similar to above, we note with serious concern that Article 33 of the Draft Constitution does not include the three-part test, recognized by international law, for the assessment of the legality of exceptions on the right to freedom of information. We recall that the test demands that all exceptions to the right to freedom of information should meet the following requirements:

1. The information must relate to a legitimate aim listed in the law;
2. Disclosure must threaten to cause substantial harm to that aim; and
3. The harm to the aim must be greater than the public interest in having the information.⁵

The list of legitimate aims which may justify withholding information is subject of some controversy. However, overall, the list of legitimate aims which may justify withholding information is similar to the legitimate aims which justify restrictions on the right to freedom of expression. Therefore the above-stated observations relating to the non-compliance of the legitimate aims for restriction of freedom of expression are relevant for the exceptions to the right to freedom of information. In short, the Draft Constitution fails to guarantee that the exceptions of the right to freedom of information are justified only when they pursue the legitimate aims recognized in Article 19 of the ICCPR.

Further, Article 33 of the Draft Constitution fails to set out that refusals to disclose information are legitimate only if the disclosure poses an actual *risk of serious harm* to that interest simply because it relates to one of these interests.

Finally, the limitations set out in Article 33 of the Draft Constitution do not guarantee that even if the information harms legitimate interests it should nevertheless be disclosed if the withholding is going to lead to a greater public harm. An example of this would be information which exposed corruption in the armed forces. Although this may at first sight appear to weaken national defence, eliminating corruption in the armed forces will, over time, actually strengthen it.

On the basis of the above-mentioned reasons we consider that the Article 33 of the Draft Constitution fails to provide a regime of exceptions on the right to freedom of information that complies with international law. Although the shortcomings may be overcome by special legislation on freedom of information, it is very important that the constitutional provisions set out the standard of limitations in a clear and accurate manner.

⁵ See ARTICLE 19, *The Public's Right To Know: Principles on Freedom of Information Legislation*, available on the Internet at <http://www.article19.org/pdfs/standards/righttoknow.pdf>.

5. Freedom of the media

ARTICLE 19 welcomes the explicit guarantee of the freedom and independence of all types of media in Article 51 of the Draft Constitution. Such a proclamation in the Constitution can serve as a useful tool for journalists and media who seek to protect themselves from interference. For the same reason, we commend the constitutional provision prohibiting the exercise of state control in the media field.

At the same time, we are of the opinion that the restrictions of state powers are too broad. The wording of Article 51 paragraph 2 implies that any control or interference by the state is prohibited. The prohibition would make sense if the right to freedom of expression were an absolute right. We note that under international law interferences with the right to freedom are prohibited if they do not meet the three-part test set out in Article 19 paragraph 3 of the ICCPR. Therefore the absolute prohibition of state control and interference in Article 51 paragraph 2 is too broad and in conflict with international law.

Similarly, international law does not prohibit sanctioning persons for expression which has breached the rights of others, or the other legitimate interests set out in Article 19 paragraph 3. The absolute prohibition of penalising persons for the content of broadcast, publication or dissemination will render futile the protection of the rights and legitimate interests breached by the content of broadcasts or publications. The proposed provision will prohibit judges from imposing sanctions on persons who were convicted of libel or illegal disclosure of national secrets.

We commend the Draft Constitution for the explicit provision concerning licensing. The experience of licensing worldwide demonstrates that states often silence critical voices or give advantage in the media to persons close to them by the use of licensing. In this respect, a constitutional provision guaranteeing the independence of the licensing body is appropriate and needed. However, we note that the focus of Article 51 paragraph 3 is not the independence of the licensing body but on the licensing procedures. We recall that international law provides for the independence of licensing bodies and set out a number of safeguards for this. For example, the licensing body should not be part of any government institution. Its members should not be appointed by the government. ‘Rules of incompatibility’ should apply to candidates for membership on the board. Once appointed, members of the licensing board should be protected against removal outside of exceptional circumstances. The regulatory body should be accountable to the public through a multi-party body, such as parliament or a parliamentary committee. The body should be adequately funded in a way which protects it against political interference. The non-recognition of these standards by the draft Constitution weakens the protection of the licensing body against political interference and governmental manipulations despite the good intention of the drafters.

Further we note that the Draft Constitution permits licensing of broadcasting and “other electronic media”. It is unclear what is meant by “other electronic media”. We are concerned about the lack of clarity because the provision may be interpreted in various ways and used as justification for licensing of Internet providers or Internet-based media.

In addition, we can note that the purpose of licensing is vaguely defined and does not aim at protection of pluralism. Paragraph 3 sets out that the licensing procedures “shall be designed to ensure the necessary regulation of the airwaves and other forms of signal distribution”. The

interpretation of the provision makes it possible to conclude that the licensing body is free to choose how to regulate the airwaves. We observe that licensing is the form of regulation of airways and as such interferes with the right to freedom of expression it should aim at one of the legitimate aims set out in Article 19 paragraph 3. In this connection we note, mindful of the positive obligations of states to safeguard pluralism in the media, that international courts have recognised that licensing should aim at the protection of pluralism. For this reason licensing bodies are obliged to promote and protect pluralism. In other words by the licensing procedures they should ensure a diversity of broadcasting organisations, of ownership of those organisations, and of viewpoints and languages represented in the programmes they carry.

We support the guarantee for the editorial freedom of state-owned media. At the same time, we note that this guarantee is implied in the general guarantee for the freedom and independence of all types of media as provided for in Article 51 paragraph 1. In addition, we note that the editorial freedom of any media should be guaranteed. Moreover the government should not interfere with the managerial or personnel decision of any media.

Noting the importance of public media, we are of the opinion that the Draft Constitution should ensure guarantees for the independence of all public media as opposed to State-owned media. Public media more effectively serve the interests of the people. They are not under the direction of the governments but of independent boards of governors. Further their mission is not to be a mouthpiece of the government but to promote the public interest, including through politically impartial reporting. We note that State-owned media are less likely to accomplish this mission because they are under the control of the government which also controls their funding.

We have strong reservations with respect to statutory media self-regulation. Self-regulation implies that journalists and publications take it upon *themselves* to regulate the media. In other words self regulation excludes interference from any state institution including Parliament. The provision in Article 51 paragraph 4 goes beyond this standard by imposing an obligation on Parliament to regulate media self-regulation.

Finally, we observe that two major shortfalls of the constitutional regime concerning media freedom. Firstly, the Draft Constitution does not contain a prohibition of prior censorship. Explicit prohibitions on censorship can be found in a number of national constitutions. The prohibition recognises that no person or media should have to ask the permission of a State body before publishing. Secondly, the draft Constitution fails to protect the confidentiality of journalist sources. The right to protection of journalistic sources is well recognised in international law as an essential corollary of the right to freedom of expression. It protects journalists from arrests, and prohibits their offices to be searched and equipment seized for identification of their sources. The lack of adequate domestic protection for journalists' sources is one of the major obstacles for freedom of the media. For that reason, we recommend that the Draft Constitution follows the example of other countries (Portugal, FYR Macedonia) in explicitly providing for a right to protection of journalistic sources.

6. Freedom of the media

We commend the provision in Article 121 of the Draft Constitution that Parliament is in charge of the allocation of air time during elections. At the same time we are concerned about the following shortcomings of the proposed allocation of airtime. Firstly, Parliament cannot always be considered as an impartial body for the purpose of creation of election standards. If Parliament is dominated by one party, it can adopt laws in its favour by allocating airtime in a way that reflects the current political configuration of Parliament. We recommend that qualified as opposed to ordinary majority is required for the adoption of legislation allocating the airtime. Secondly, the criterion for allocation of airtime is unclear inasmuch as the adjective “equitable” can be interpreted in various ways. We recall that most laws regulating allocation of airtime speak of “fair allocation”, which is less confusing in this context. Thirdly, we notice that only political parties are entitled to use the allocated time. This provision is unfair with respect to independent contenders who participate in the elections without support of political parties. The limitation adversely affects both their right to freedom of expression and the right of voters to receive information and make informed choices.

We express concerns about the powers of Parliament to allocate airtime generally. Such allocation will amount to interference with the editorial independence of broadcasters. This is not deemed necessary in any other time but during election campaigns and is therefore a violation of the right to freedom of expression.

7. Relationship between international law and domestic law

We are concerned about the silence of the Draft Constitution regarding the relationship between international law and domestic law. Without this regulation it will be unclear what the status is of international human law treaties in Kenya’s legal order.

Kenya is an active member of the United Nations and the African Commission and abides by rules and standards including international and regional human rights law. The Government should respect these principles in all fields, areas and at all times. Therefore we recommend that duly ratified international treaties guaranteeing human rights or fundamental freedoms be part of the domestic legal system and have priority over ordinary legislation.

III. Recommendations

In summary, ARTICLE 19 proposes the following recommendations in relation to the Draft Constitution:

- The right to freedom of opinion *without any interference* should be guaranteed.
- Article 50 paragraph 2, providing for absolute limitations of the right to freedom of expression, should be omitted.
- Citizenship should not be a condition of the exercise of the right to access

information.

- The Government should be required to pass a law on access to information.
- The following limitation clause relating to the right to freedom of expression should be introduced:

The right to freedom of expression may only be subjected to such restrictions as are provided by law and are strictly necessary and proportionate in a democratic society for the protection of national security, public order, public health or morals, for the prevention of crime; or for respect of the rights or reputations of others.
- The following exclusion clause relating to the right to freedom of information should be introduced:

Requested information can be withheld only if:

 - a) it relates to a legitimate aim listed in the law;*
 - b) the disclosure threatens to cause substantial harm to that aim; and*
 - c) the harm to the aim must be greater than the public interest in having the information.*
- Article 51 paragraph 2 should be replaced by the following provision:

The government shall not interfere with or otherwise attempt to control the editorial, managerial or personnel decisions of any media.
- Article 51 paragraph 3 should be replaced by the following provision:

A licensing system may be established for the broadcast media, provided that such licensing:

 - a) is conducted by an independent regulatory authority that is adequately protected against political interference and government manipulation;*
 - and*
 - b) has as its primary aim the regulation of broadcasting in the public interest, to ensure fairness and a diversity of views broadly representing Kenyan society;*
- Article 51 paragraph 4 should be replaced with the following provision:

All public media shall be put under the direction of an independent board of governors and shall have a clear mandate to promote the public interest; including through politically impartial reporting, and the government shall not attempt to interfere with the editorial independence of these media in any way, including through control over funding;
- Prior censorship should be prohibited.
- The right of journalists to protect their confidential sources should be guaranteed.
- Article 121 should be replaced by the following provision:

Parliament shall enact by a qualified majority legislation that makes provision of fair allocation of airtime by public broadcasters to political parties and independent contenders during election campaigns.
- The superior nature of international human rights law in Kenya's law should be

explicitly stated.

About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: <http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes legal analyses commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Comment further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to legal@article19.org.

About ARTICLE 19 Kenya and East Africa

ARTICLE 19 Kenya and East Africa is the country and regional office of ARTICLE 19 Africa program. ARTICLE 19 Kenya advocates for freedom of expression and access to information in line with international standards and best practice within the East Africa and Horn region. Our advocacy and lobbying in the region is consistent with ARTICLE 19's growing commitment to the empowerment of marginalized groups, promotion of democracy and good governance, and advancement of gender equality along with respect for human rights as key principles of its work. In this respect the Programme also offers expert advice and support to our local partners in Kenya and East Africa promoting on freedom of expression and access to information issues.

<http://www.article19.org/work/regions/africa/index.html>.

ANNEX

GUARANTEES FOR THE INTERPRETATION OF THE DRAFT CONSTITUTION

Excerpts of relevant provisions analysed in the ARTICLE 19's Comment

Supremacy of the Constitution

2. This Constitution is the supreme law of the Republic and binds all State organs at all levels of government and all persons.

Construing the Constitution

- 310.** (1) This Constitution shall be interpreted in a manner that—
- (a) promotes its purposes, values and principles;
 - (b) advances human rights and fundamental freedoms and the rule of law;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.

Rights and fundamental freedoms

28. (1) This Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies.

- (3) The rights and fundamental freedoms set out in this Chapter—
- (a) belong to each individual and are not granted by the State;
 - (b) do not exclude other rights and fundamental freedoms not mentioned in this Chapter, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and
 - (c) are subject only to the limitations contemplated in this Constitution.

Application of the Bill of Rights

- 29.**
- (1) The Bill of Rights applies to all laws and binds all State organs and all persons.
 - (2) Every person shall enjoy the rights and fundamental freedoms set out in the Bill of Rights, to the greatest extent consistent with the nature of the right or fundamental freedom.
 - (3) When applying a provision of the Bill of Rights a court shall—
 - (a) develop the law to the extent that it does give effect to a right or fundamental freedom; and
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
 - (4) When interpreting the Bill of Rights, a court, tribunal, the Human Rights and Gender Commission or other authority shall promote—
 - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights.

Implementation of rights and fundamental freedoms

30. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in this Chapter, as appropriate, in the exercise of all their powers and functions.

(2) The State shall take legislative, policy and other measures to achieve the progressive realisation of the rights guaranteed under Articles 61 to 66.

(3) Parliament and the Human Rights and Gender Commission shall establish standards for the achievement of the rights mentioned in clause (2).

...

(6) The State shall enact and implement legislation to facilitate the fulfilment of its international obligations in respect of human rights and fundamental freedoms and shall—

(a) report on time to international human rights bodies on the implementation of human rights treaties and other instruments;

(b) publish reports intended for submission by the State to international human rights bodies for a reasonable period and facilitate public discussion and debate and participation of civil

society before the reports are revised and submitted.

(7) The State shall disseminate to the public the General Comments and Recommendations of international human rights bodies relating to the implementation of its international obligations.

(8) The national government shall make a statement to Parliament on whether and how it intends to implement those recommendations.

Enforcement of the Bill of Rights

31. (1) A person referred to in clause (2) has the right to complain to the Human Rights and Gender Commission, and to institute court proceedings, alleging that a right or fundamental freedom set out in the Bill of Rights has been denied, violated, infringed or threatened.

Authority of the court to uphold and enforce the Bill of Rights

32. (1) The Constitutional Court and the High Court have jurisdiction, in accordance with Articles 203 and 204, to hear applications for redress for a violation of a right or a fundamental freedom set out in the Bill of Rights.

(3) In any matter brought before it under Article 31, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) conservatory orders;

(d) a declaration of invalidity of any law that infringes the Bill of Rights and is not justified in terms of Article 33;

(e) an order of compensation against the State or any person responsible for the violation of a right or fundamental freedom; and

(f) orders of judicial review.

(4) In proceedings against a public authority for a contravention of the Bill of Rights, a court may not award costs against the plaintiff, or applicant, unless the court determines that the case was frivolous, vexatious or without merit.

GUARANTEES FOR FREEDOM OF EXPRESSION

Freedom of conscience, religion, belief and opinion

49. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

Freedom of expression

- 50.** (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 referred to in clause (1) 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 prohibited ground of discrimination contemplated in Article 37.
- (3) In the exercise of the freedom of expression, every person shall respect the rights and reputation of others.

Political rights

- 55.** (1) Every citizen is free to make political choices, which includes the right to—
- (a) form, or participate in forming, a political party;
 - (b) participate in the activities of, or recruit members for, a political party; and
 - (c) campaign for a political party or cause.

Freedom of the media

- 51.** (1) Freedom and independence of electronic, print and other media of all types are guaranteed.
- (2) The State shall not—
- (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
 - (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—
- (a) are designed to ensure the necessary regulation of the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government, political interests or commercial interests.
- (4) All State-owned media shall—
- (a) be free to determine independently the editorial content of their broadcasts or other communications;
 - (b) be impartial; and
 - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment of a body which shall—
- (a) be independent of government or political control;
 - (b) reflect the interests of all sections of the society; and
 - (c) set media standards and regulate and monitor compliance with those standards.

Fourth Schedule regarding the distribution of functions between the federal government and the devolving governments provides that radio and television broadcasting is a function of the national government

Political parties and the media

121. Parliament shall enact legislation that—

- (a) makes reasonable provision for equitable allocation of airtime, by State-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns; and
- (b) regulates freedom to broadcast in order to ensure fair election campaigning.

Powers, privileges and immunities

150. (1) There shall be freedom of speech and debate in Parliament.

GUARANTEES FOR ACCESS TO INFORMATION

Access to information

52. (1) Every citizen has the right of access to—

- (a) information held by the State; and
- (b) any information that is held by another person and that is required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to demand the correction or deletion of untrue or misleading information that affects that person.

(3) The State shall publish and publicize any important information affecting the nation.

Environment

67. (1) Every person has the right to—

- (c) access information about the environment.

Consumer rights

69. (1) Consumers have the right to—

- (b) the information necessary for them to gain full benefit from goods and services;

Public access and participation

149. (1) Parliament shall—

- (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
- (b) facilitate public involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any public or private media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for doing so.

Registry of Enactments

151. 5) The national government shall ensure that enactments—

- (a) are available or accessible in all public libraries; and
- (b) are available in Braille and other appropriate media for persons with visual or other impairments.

RESTRICTION ON THE RIGHTS TO FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

Limitation of rights or fundamental freedoms

- 33.** (1) No right or fundamental freedom set out in the Bill of Rights may be limited except—
- (a) by a limitation or qualification expressly set out in the provision containing that right or fundamental freedom or by law; and
 - (b) 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—
 - (i) the nature of the right or fundamental freedom;
 - (ii) the importance of the purpose of the limitation;
 - (iii) the nature and extent of the limitation;
 - (iv) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (v) 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 legislation limiting a right or fundamental freedom —
- (b) shall not be construed as limiting a right or freedom set out in the Bill of Rights 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 a right or fundamental freedom set out in the Bill of Rights so as to derogate from the core or the essential content of the right.
- (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.