



NOTE
on the existing
Kenyan Constitutional Provisions on
Freedom of Expression
ARTICLE 19

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The Committee of Experts for the Constitutional Review Process are tasked with preparing a new Constitution for Kenya. The Committee of Experts began their task in early 2009, after a delayed start. The Committee were expected to produce a draft by the first quarter of 2010, however the new Minister for Justice and Constitutional Affairs, Mutula Kilonzo, has shown his determination for speedy reforms, and for a new constitution to be entrenched before the 2012 Kenyan elections. The draft Constitution is therefore due to be presented to Parliament by 1 December, 2009, before its expected adoption three months later. Once adopted, the constitution would then be subject to a constitutional referendum, as was the procedure for the 2005 draft Constitution that was rejected.

ARTICLE 19 calls on the Committee to ensure that the provisions on human rights in the draft Constitution, due to be presented for adoption by Parliament on or before 2 March 2010, are fully consistent with international human rights law. We urge, in particular, that the provisions relating to freedom of expression and the right of access to information comply with international and regional human rights law, including:

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- Article 19 of the *Universal Declaration on Human Rights* (UDHR)¹
- Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR)²
- Article 9 of the *African Charter on Human and People's Rights* (ACHPR)³

Article 19 of the ICCPR protects freedom of expression as follows:

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.

The guarantee of freedom of expression in the current Constitution of Kenya, 1963, as amended, found at Article 79 (see Annex),⁴ falls short of international human rights law and standards on the right to freedom of expression, the right to access information, and media freedoms. We highlight our main concerns with the existing guarantees below.

The Guarantee is Exclusively Negative in Nature

Article 79(1) provides that no person shall 'be hindered' in the enjoyment of the right to freedom of expression. This is an unduly negative formulation of the right which, as international law makes clear, may require positive State action, as well as an absence of interference, to protect fully. It is, for example, well established that States must take positive measures to prevent undue concentration of media ownership, to promote diversity of the media and to guarantee the right to access information held by public bodies.

Freedom to Seek Information and Ideas

Article 79(1) of the current Constitution of Kenya protects the right to hold opinions, to receive and communicate information and ideas, and to freedom of correspondence. It may be noted that this differs from international standards inasmuch as they also refer to the right to 'seek' information and ideas. It is not clear from the jurisprudence of international bodies what, precisely, is the import of this additional word, but it is important to ensure that constitutional guarantees of this fundamental right are as broad and protective as possible.

Restrictions on Freedom of Expression

Under Article 79(2) of the current Constitution of Kenya, restrictions on freedom of expression are permitted by only where they are "contained in or done under the authority of any law", and where they are "reasonably required" or "reasonably justifiable in a democratic society" for the protection of one of a list of legitimate interests. These interests include, among others, 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, and regulating the technical operation of telephony and broadcasting. Article 79(2) also allows for restrictions on those working for local government authorities.

It may be noted that this is broader than what is permitted under international law in several ways. First, it is not clear that a requirement that a restriction is contained in or under the

¹ UN General Assembly Resolution 217A(III), 10 December 1948.

² UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976. Acceded to by Kenya on 1 May 1972.

³ Adopted 26 June 1981, entered into force 21 October 1986. Acceded to by Kenya on 23 January 1992.

⁴ The relevant sections of the Draft Constitution of Kenya 2004 (the "Bomas Draft") and the Draft Constitution of Kenya 2005 (the "Kilifi" Draft) are also attached in the Annex.

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authority of a law is as strict a requirement as ‘provided by law’, the standard in Article 19(3) of the ICCPR. Provided by law implies not only that there is a law containing the restriction, but that it meets certain standards of precision and clarity.

Second, ‘reasonably required’ does not imply such a rigorous standard as ‘necessary’, again as provided for in Article 19(3) of the ICCPR. Necessary is clearly a high standard under international law and, although it does not mean indispensable, it must respond to a pressing need which cannot be protected by any measure which is less intrusive of freedom of expression.

Third, the list of legitimate interests in Article 79(2) is much longer than that found in Article 19(3) of the ICCPR, which includes only the rights and reputations of others, national security, public order (*ordre public*), and public health and morals. While some of the additional items in the Article 79(2) list are arguably covered by the ICCPR list – such as the authority and independence of the courts – others clearly go beyond it – including preventing the disclosure of information received in confidence, only some of which would be protected under the ICCPR, and restrictions on those working for local government authorities.

Protection Against Censorship

The ICCPR does not specifically rule out censorship, perhaps because this was not felt to be necessary, but its counterpart in Latin America – the *American Convention on Human Rights* – certainly does, except where this is necessary for the protection of children.⁵ So do many better practice national constitutions. This makes it clear, in case there is any doubt, that prior censorship is not acceptable. Many national constitutions also specifically provide, for the avoidance of any doubt, that prior permission is not required for the establishment of a media outlet, with the exception of broadcasters, where a licensing system is necessary to avoid interference in the airways, among other things.

The Right to Information

At the time the ICCPR was drafted, the right to access information held by public bodies was not generally viewed as a human right. This has now changed, and it is widely accepted that the right of access to information is a fundamental right, protected by international human rights, in particular as part of the right to freedom of expression. This is reflected in authoritative international statements and court decisions. It is also reflected in the many national constitutions that specifically guarantee the right to information. Indeed, a majority of more recent constitutions include specific protection for the right to information.

The Independence of Media Regulators and Public Broadcasters

It is very well established under international law that bodies which exercise any sort of regulatory control over the media – whether it be broadcast regulators, governing boards of public service broadcasters or those responsible for allocating frequencies for broadcasting – must be independent in the sense of being protected against interference of a political or commercial nature. A primary means of protecting this independence is in the manner in which appointments to the body are made, but it is increasingly being recognised in newer constitutions that constitutional protection for independence is also important.

⁵ Adopted 22 November 1969, entered into force 18 July 1978, see Articles 13(2) and (4).

Recommendations

- The Committee of Experts for the Constitutional Review should ensure that the new Draft Constitution of Kenya protects the right of freedom of expression, including the right to information, in compliance with international and regional human rights law and standards.
- Protection for the right to freedom of expression should be positive in nature – as in ‘everyone has the right to freedom of expression’ – and should protect the right to seek, as well as to communicate and receive, information and ideas.
- The guarantee should permit only restrictions on the right to freedom of expression which are provided by law, and which are necessary in a democratic society to protect a limited list of stated interests, which do not go beyond those permitted under international law.
- The Constitution should prohibit all prior censorship other than that which is strictly necessary to protect children. It should also prohibit any restrictions on the exercise of journalism or prior conditioning of the establishment of media outlets, other than broadcasters.
- The Constitution should also provide explicitly for the right to information, understood as the right to access information held by public bodies.
- The independence of bodies with regulatory or governance powers over the media, including the broadcast regulator and the governing board of the public broadcaster, should be explicitly protected in the Constitution.

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>.

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>.

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Article 79 of the Constitution of Kenya, 1963:

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 it 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 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.

Provided for in both the Draft Constitutions of Kenya 2004 and 2005:

Freedom of expression

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

- (a) freedom to receive or impart information or ideas;*
- (b) freedom of artistic creativity, including dress; 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; or*
- (c) advocacy of hatred that –*
 - (i) constitutes vilification of others or incitement to cause harm, or*
 - (ii) is based on any prohibited ground of discrimination contemplated in Article 36.*

Freedom of the media

50. (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 concerned in broadcasting, production or circulation of any publication, or*
- in the dissemination of information by any medium; or*

- (b) harass or penalize 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 be independent and impartial and shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.*
- (5) 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;*
 - (b) regulates freedom to broadcast in order to ensure fair election campaigning; and*
 - (c) provides for the establishment of a body which shall be independent of government or political control and reflective of the interests of all sections of the community, and which shall set media standards, and regulate and monitor compliance with those standards.*

Access to information

- 51.** *(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 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.*
- (4) Parliament shall enact legislation to provide for access to information.*

Stipulated in only the Draft Constitution of Kenya 2005:

Section 50 Freedom of the media

- (6) The exercise of the rights provided for in this Article carries with it special duties and responsibilities and is subject to -*
- (a) the limitations or restrictions provided for by this Constitution;*
 - (b) the respect of the rights and reputation of others; and*
 - (c) the maintenance of the integrity, authority and independence of the courts, judicial proceedings and the administration of justice.*