

PROHIBITION OF HATE SPEECH BILL, 2008

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PROHIBITION OF HATE SPEECH BILL, 2008

A Bill for

An Act of Parliament to make provision for the prohibition of Hate Speech and for connected purposes.

BE IT THEREFORE ENACTED by the parliament of the Republic of Kenya, as follows:-

Short Title

1. ô This Act may be cited as the Prohibition of Hate Speech Act.

Interpretation

2. ô In this Act unless the context otherwise requiresó

"broadcast" means the transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the public;

"dwelling-house" includes any building or structure or part of a building or structure (including a tent, caravan, vehicle, vessel or other temporary or moveable structure) which is for the time being kept by a person who is the owner or occupier for the residence therein of such person, the person's family or the person's servants or any of them;

"print" has the meaning assigned thereto by section 4 of the Penal Code;

õpolice forceö has the meaning assigned thereto by section 4 of the Penal Code;

õpolice officerö has the meaning assigned thereto by section 4 of the Penal Code;

"possession" has the meaning assigned thereto by section 4 of the Penal Code;

"public" has the meaning assigned thereto by section 4 of the Penal Code;

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"public place" has the meaning assigned thereto by section 4 of the Penal Code;

publish means to cause the print, writing, painting, effigy or other means by which the material is conveyed to be so dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, that the material becomes known or is likely to become known to the public;

section of the public means any group of persons identifiable by-

- (a) race, ethnic or social origin, religion, conscience, belief, culture, language, gender, marital status, age, disability or birth; or
- (b) any other characteristic where discrimination based on that other characteristic-
 - (i) causes or perpetuates systemic disadvantage; or
 - (ii) undermines human dignity; or
 - (iii) adversely undermines the equal enjoyment of an individual's rights and freedoms;

stir up hatred includes to threaten, abuse or otherwise incite harm or provoke violence against any section of the public;

"written material" includes electronic records, any sign or other visual representation.

Objects of the Act

3. The objects of this Act shall be:

- (1) To foster national unity by promoting responsible exercise of the freedom of expression in political and other public discourse;
- (2) To preserve public order within Kenya;
- (3) To preserve and promote the ethnic and cultural diversity of Kenya; and

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(4) To promote a democratic society.

Use of words or behaviour or publishing written material

4. (1) It shall be an offence for a person

(a) to publish or distribute written material;

(b) to use words, behave or display written material

(i) in any place other than inside a dwelling house, or

(ii) inside a dwelling house, so that the words, behaviour or material are heard or seen, as the case may be, by persons outside the dwelling; or

(c) to distribute, show or play a recording of visual images or sounds

if the written material, words, behaviour, visual images or sounds, as the case may be, are intended or, having regard to all the circumstances are such that the foreseeable consequence would be to stir up hatred.

(2) In proceedings for an offence under subsection (1), if the accused person is not shown to have intended to stir up hatred against a section of the public, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and not having suspected, and having had no reason to suspect, that the material or recording might stir up hatred.

(3) Where the offence under subsection (1) is committed in the circumstances contemplated under paragraph (b) of that subsection, it shall be a defence for the accused person

(a) to prove being inside a dwelling house at the relevant time and having had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the dwelling house;

(b) if it is not shown that such accused person had intention to stir up hatred, to prove not to have intended that the words, behaviour or

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material concerned would stir up hatred and not to have been aware that the words, behaviour or material might stir up hatred or provoke to violence.

Provided that this defence shall not be available in circumstances where a dwelling house is used as a public place.

Broadcast intended or likely to stir up hatred

5. — (1) Where an item involving visual images or sounds intended, or having regard to all the circumstances the foreseeable consequence would be, to stir up hatred is broadcast, each of the persons mentioned in subsection (2) shall be guilty of an offence if such persons intended thereby to stir up hatred or, having regard to all the circumstances, the foreseeable consequence would be to stir up hatred thereby.

(2) The persons referred to in subsection (1) are-

- (a) the person providing the broadcasting service concerned;
- (b) any person by whom the item concerned is produced or directed; and
- (c) any person whose words or behaviour in the item concerned are intended, or considering the circumstances the foreseeable consequence would be, to stir up hatred.

(3) In proceedings against a person referred to in paragraph (a) or (b) of subsection (2) for an offence under this section, if the person is not shown to have intended to stir up hatred, it is a defence for such person to prove

- (a) not to have had any knowledge and reason to suspect that the item concerned would involve the material to which the offence relates; or
- (b) in a case other than one to which paragraph (a) relates, that, having regard to the circumstances in which the item was broadcast, it was not reasonably practicable for the person to secure the removal of the material aforesaid or to prevent the broadcast.

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(4) In proceedings against a person referred to in subsection (2) (b) for an offence under this section, it is a defence for the person to prove not to have had any knowledge and reason to suspect:

- (a) that the item would be broadcast; or
- (b) that in the circumstances in which the item would be broadcast it was a foreseeable consequence that it would stir up hatred.

(5) In proceedings against a person referred to in subsection (2) (c) for an offence under this section, it is a defence for the person to prove not to have had any knowledge and reason to suspect:

- (a) that an item involving the use of the material to which the offence relates would be broadcast; or
- (b) that the circumstances in which such an item would be broadcast might result in stirring up hatred.

(6) In proceedings for an offence under this section, it is a defence for the accused person to prove not to have had any knowledge and reason to suspect that the material to which the offence relates would stir up hatred.

(7) In any proceedings for an offence under this section alleged to have been committed in respect of an item

- (a) a script on which the item was based shall be evidence of what was included in the item and of the manner in which the item or any part of it was performed; and-
- (b) if such a script is given in evidence on behalf of any party to the proceedings, then, except in so far as the contrary is shown, whether by evidence given on behalf of the same or any other party, the item shall be taken to have been performed in accordance with that script.

(8) In this section, 'script', in relation to an item, means the text of the item (whether expressed in words or in musical or other notation) together with any directions for its performance, whether contained in a single document or not.

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Preparation and possession of material likely to stir up hatred

6. ô (1) It shall be an offence for a person ô
- (a) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another; or
 - (b) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another;

if the material or recording is intended to stir up hatred or, having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof, that the foreseeable consequence would be to stir up hatred.

(2) In proceedings for an offence under this section, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and that such person did not suspect, and had no reason to suspect, that the material or recording may, in the circumstances, stir up hatred.

(3) In proceedings for an offence under this section, where it is proved that the accused person was in possession of material or a recording such as is referred to in subsection (1) and it is reasonable to assume that the material or recording was not intended for the personal use of the accused person, the accused person shall be presumed, until the contrary is proved, to have been in possession of the material or recording in contravention of sub-section (1).

Exemptions

7. ô This Act does not render unlawful anything said or done reasonably and in good faith:

- (1) in the performance, exhibition or distribution of an artistic work;

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- (2) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (3) in making or publishing a fair and accurate report of any event or matter of public interest.

Penalties

8.ô A person guilty of an offence under this Act shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.

Offences by corporate bodies

9.ô Where an offence prescribed in this Act has been committed by a body corporate, such a body corporate and or every person charged with, or concerned or acting in control of such corporate body shall be guilty of that offence unless it is proved by such person that through no act or omission by the person, such person was not aware that the offence was being or was intended or about to be committed, or that the person took all reasonable steps to prevent its commission.

Search and seizure

10.ô If a Magistrate is satisfied upon the sworn evidence of a police officer not below the rank of Inspector that there are reasonable grounds for suspecting that material or a script or recording the possession of which would be in contravention of this Act is in or at any premises or other place, the magistrate may issue a warrant authorising members of the police force, at any time or times within one month from the date of the issue of the warrant, on production if so requested of the warrant, to enter and search the premises or other place specified in the warrant and to seize any such recording, material or script as aforesaid found.

Powers of arrest

11. ô (1) If a member of the police force reasonably suspects that a person has committed an offence under section 3 (1) (b), the police officer may arrest such person without warrant.

(2) A member of the police force acting under the authority of a warrant issued in accordance with section 11 may arrest without warrant a person reasonably suspected of having committed an offence under section 5(a) and (b).

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Forfeiture

12.ô (1) The court may order any written material or recording shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or otherwise disposed of in such manner as the court may determine.

(2) A court shall not order written material or a recording to be forfeited under this section if a person claiming to be the owner of it or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to such person to show cause why the order should not be made.

(3) An order under this section shall not take effect until the ordinary time for instituting an appeal against the conviction or order concerned has expired or, where such an appeal is instituted, until it or any further appeal is finally decided or abandoned or the ordinary time for instituting any further appeal has expired.

Amendment of Cap. 63.

13.ô The Penal Code is amended in section 77 by deleting paragraph (e) appearing in subsection 3.

Application of the Act

14.ô (1) This Act does not exclude or limit the concurrent application of any other law in so far as the provisions of such other law are not inconsistent with this Act.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act shall prevail.

Memorandum of Objects and Reasons

The purpose of this Bill is to make provision for the prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking hatred or violence against any section of the public. It is premised on the experience that hate speech and other forms of incitement to violence involve a violation of the right to be free from discrimination.

Clause 2 provides for the interpretation of the various terms used in the Bill. The phrase "section of the public" is defined to mean any group of persons identifiable by race, ethnic or social origin, religion, conscience, belief, culture, language, gender, marital status, age, disability or birth; or any other characteristic where discrimination based on that other characteristic causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner. The phrase "stir up hatred" is defined to include to threaten, abuse or otherwise incite harm or provoke violence against any section of the public.

Clause 3 outlines the intended objectives of the Bill if passed into law.

Clause 4 seeks to make it an offence to publish or distribute written material, to use words, behave or display written material if the written material, words, behaviour, visual images or sounds, as the case may be, are intended or, having regard to all the circumstances it is a foreseeable consequence that they will stir up hatred against a section of the public.

Clause 5 prescribes offences related to dissemination of hate propaganda and incitement to hatred or violence through means of public broadcast.

Clause 6 seeks to create an offence of possession of material or any recording not held for private use and which is intended to or, considering all the circumstances, is likely to result in stirring up hatred.

Clause 7 seeks the exemption of the application of the Act with regard to particular forms of expression provided these are done reasonably and in good faith. These forms of expression include performance of artistic works, discourse for any genuine academic, scientific or other genuine purpose and also the making or publication of a fair and accurate report of any event of public interest.

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Clause 8 provides the penalties for the offences under the Act. A person guilty of an offence under the Act shall be liable for imprisonment for a term of up to ten years or to a fine of up to one million shillings or to both.

Clause 9 makes provision with respect to offences by corporate bodies.

Clause 10 provides for seizure of materials etc which may be used in committing an offence under the Act.

Clause 11 provides for the police to arrest without a warrant in certain instances.

Clause 12 provides for forfeiture of materials, etc. used in the commission of an offence under the Act.

Clause 13 seeks to amend section 77 of the Penal Code so as to align the provisions of the Penal Code with the new provisions contained in the Bill.

Clause 14 provides for the application of the provisions in the Bill.

The enactment of the Bill shall not occasion expenditure of public funds.