

PRESS STATEMENT

DELIVERED AT THE END OF ADVOCACY VISIT TO KENYA BY COMMISSIONER PANSY TLAKULA

28 AUGUST 2015

The Special Rapporteur on Freedom of Expression and Access to Information in Africa of the African Commission on Human and Peoples' Rights (African Commission) undertook a five-day advocacy visit to Nairobi, Kenya starting on 24th August 2015. This was her first advocacy visit to Kenya. The Special Rapporteur was invited by the Kenya National Commission on Human Rights (KNCHR) who worked in collaboration with ARTICLE 19, Transparency International, and International Commission of Jurists-Kenya to organise the visit.

The Special Rapporteur, Adv. Pansy Tlakula, was accompanied by a team of four experts of the Working group which developed the Model Law on Access to Information for Africa (Model Law). The purpose of the meeting was threefold. First, to meet with government officials and legislators to advocate for the speedy enactment of the Kenya Access to Information Bill in accordance with the Kenyan Constitution, as well as regional and international access to information standards as embodied in the Model Law.

Second, to share with the judiciary and Kenyan human rights actors, the African Court on Human and Peoples' Rights (African Court) decision *in Konate v Burkina Faso*, on the inconsistency of criminal defamation laws with Article 9 of the African Charter on Human and Peoples' Rights (African Charter), guaranteeing the right to freedom of expression. Third, to promote continued engagement by the Government of Kenya with the African Commission with respect to the obligations of the State under the African Charter especially with a view to Kenya making a declaration under Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Court Protocol) giving Kenyan nationals the right of direct access to the African Court.

During the visit, the Special Rapporteur held ten meetings with the senior government officials, legislators, commissioners of independent constitutional commissions, civil society, the Editors Guild, media stakeholders and journalists.

In her meeting with the Cabinet Secretary for Information, Communication and Telecommunication Hon Dr Fred Matiang'i, the Minister indicated that the government was keen to review and strengthen the civil defamation laws and subsequently repeal criminal defamation. He also intimated the resolve of the government to review the Media Act, 2013 by removing the government representative on the council of the Media Council of Kenya to allow media self-regulation to blossom. The Honorable Minister also indicated that the government has prepared an Access to Information Bill and Data Protection Bill which had been forwarded to Parliament.

Since a Private Members Bill on Access to Information has been published and undergone the First reading in Parliament, the Special Rapporteur urges consensus and harmonization of both efforts, so that Kenya takes its place of pride on the African continent, in the promotion of the right of access to information. The Special Rapporteur is equally pleased that in her meeting with the Senate, members also promised to harmonize Access to Information Bills from both houses.

Enactment of the access to information law needs to be accompanied by building of civil capacities. There will be need for civic education to enable ordinary people to access information on the law and empowering government officials to make information accessible to citizens. The Special Rapporteur notes with appreciation the Judicial Training Institute's willingness to collaborate with the Kenya National Commission on Human Rights and CSOs on training of magistrates on Access to Information and the development of a curriculum to that effect. Constitutional Commissions in collaboration with CSOs have also committed to play their role in the process towards the adoption of an access to information legislation.

In recent history and during my meetings with government officials, Kenya has repeatedly reaffirmed its commitment to ensuring the right to freedom of opinion and expression as defined by international law. Its national legal framework is mostly in line with the relevant international standards.

Nevertheless, some concerns have emerged in the translation of commitments and norms into practice.

With regard to access to information, despite the adoption of important normative instruments, the Special Rapporteur notes the lack of a framework legislation on access to information. The responsiveness of public institutions to requests for information and the lack of consistency of the various norms should also receive further attention.

On criminal defamation, the Special Rapporteur notes that the African Court in the case of *Konate V Burkina Faso*, found criminal defamation provisions in statute books in Burkina Faso to be in violation of the African Charter. She encourages Kenya to make clear and steadfast steps to repeal criminal defamation so that all Kenyans, including journalists, can enjoy their constitutionally guaranteed right to freedom of expression.

With regard to the transformation of the Kenya broadcasting corporation, the Special Rapporteur is concerned about the appointment processes for the management of the Kenya Broadcasting Corporation and the membership of the board of independent regulatory entities such as the Communications Authority of Kenya and the Media Council of Kenya. She also notes with concern, issues of transparency with regard to dissemination of information on private media ownership and control.

In conclusion, the Special Rapporteur urges that:-

Government:

1. Expedite the process of enactment of Access to Information laws.
2. Repeal laws that are inconsistent with the right of Access to Information as guaranteed by Article 35 of the Constitution e.g. official secrets Act.
3. Repeal criminal defamation laws and other similar laws which criminalise freedom of expression.
4. Transformation of KBC into a public service media
5. Make a declaration under Article 34 (6) of the Courts protocol to give Kenyan nationals the right of direct access to the African Court.

Kenya National Commission on Human Rights and Civil Society

1. Continue a coordinated and sustained advocacy for the adoption of right to information legislation and for its effective implementation
2. Effectively use Constitutional provisions and right to information legislation as well as alternative policy avenues for advocacy to influence to all stakeholders, especially the policy makers
3. Help in building the capacity of all stakeholders to understand and strategically utilise right to information provisions in the Constitution and other relevant legislation.

Media

1. Work with civil society and other stakeholders to sensitise the public on the importance of the adoption of an access to information law for ordinary Kenyans, especially in the realisation of socio-economic rights
2. Strengthen the capacity of the Media Council of Kenya as an effective self-regulatory mechanism

Note to Editors

Kenya ratified the African Charter on Human and Peoples Rights in 1992.

The Special Rapporteur on Freedom of Expression was established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 71 at the 36th Ordinary Session held in Dakar, Senegal from 23rd November to 7th December 2004. The mandate of the Special Rapporteur was subsequently expanded by Resolution 122 in November 2007 to include access to information with a duty to:-

- analyse national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise Member States accordingly;
- undertake fact-finding missions to Member States from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and make appropriate recommendations to the African Commission;
- undertake promotional country Missions and any other activities that would strengthen the full enjoyment of the right to freedom of expression and the promotion of access to information in Africa;
- make public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, including by issuing public statements, press releases, and sending appeals to Member States asking for clarifications;
- keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission; and
- Submit reports at each Ordinary Session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa.