

# **Criminality in “Hate Speech” Provision in the Laws of Kenya- Jurisprudential Challenges**

By Dr. Peter Onyango Onyoyo (Ph.D) – Law lecturer, school of law, University of Nairobi in Kenya – Commercial Law Department.

**Résumé:** *What is hate speech and what is an open speech are still subject to wider intellectual and academic debate. What is at issue is the criminalisation of hate speech and how the law looks at it. Since it was entrenched in the constitution “hate speech” has been manipulated by political class as a weapon to threaten the opposition but in substance the law courts have not managed to prosecute hate speech charges brought before them with success. Perhaps lack of evidence, proof, and whether hate speech is interpreted as a criminal offence. This article aims to discuss the jurisprudence of hate speech in the laws of Kenya and its practicality in the judicial authority.*

**Keywords:** *Hate speech, Cybercrime, Free speech, Hate crime, Democracy, Politics, Law, Incitement, Homophobia, and the Constitutional Rights.*

## **BACKGROUND**

The principle of freedom of speech is one of the main civic and political rights under human rights law and the most abused part of law especially in the less democratic societies.<sup>1</sup> There are opinions on public matters which can be considered as hate speech and which need more illustration so to make a clear distinction between hate speech and free speech. Dissenting opinion on hate speech law argues that the provision on hate speech can as well become oppressive law subjugating some perceived individuals from mainstream politics. According to them such tendency may lead to some form of authoritarianism, or plutonic rules that can be despotic in nature.

*Hate speech – that is, speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin – poses vexing and complex problems for contemporary constitutional rights to freedom of expression. The constitutional treatment of these problems,*

---

<sup>1</sup> MICHAEL HERZ & PETER MOLNAR (eds.), *The Content and Context of Hate Speech: Rethinking Regulations and Responses*, Cambridge University Press, 2012.

*moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and other western democracies. In the United States, hate speech is given wide constitutional protection, whereas under international human rights covenants and in other western democracies, such as Canada, Germany, and the United Kingdom, it is largely prohibited and subjected to criminal sanctions.<sup>2</sup>*

In multi-ethnic societies such as Kenya, there has been more of USA model and European model when it comes to criminal justice against hate speech. The lesson was learned in 1992 clashes and 2007/8 Post Elections Violence that left many victims. The crimes committed were results of propaganda through media, hate speech in public rallies, hate speech through text messages, and open speech turning into criminal offence against the security of individuals and ethnic groups. An expressed or tacit speech that targets some individual or group in a manner to wish criminal acts against them or their person is by all means considered as a criminal intention to directly or indirectly commit a crime.

It is in order to question the legal interpretation of hate speech<sup>3</sup>, its content, and its essence in criminology and penology in the laws of Kenya. Is hate speech a true crime or perpetration to commit or influence others to commit crime? What is the difference between hate speech and “open-speech”. Does hate speech contravene the fundamental freedoms and human rights of individuals? Can the alleged hate speech be considered part of offences in the penal code in Kenya according to criminal jurisprudence? What is the rationale of hate speech in criminal justice in general and how can the law courts in Kenya enforce anti-hate speech laws? What is the role of politics in the hate speech in Kenya? Can freedom of opinion be limited by law and under what circumstance?

Hypothetical answers to the above questions shall require substantive legal research and wider investigations into the Kenyan case law, statutes and the general philosophy of the crime that the law is seeking to prohibit. It is in this approach that we will be able to reveal why “hate speech” provision in the laws of Kenya is not making any judicial progress as it is. How effective is the office of the public prosecutor in Kenya to bring suspects of “hate speech” to criminal justice? What are some of the key rulings on “hate speech” cases by the Kenyan law courts and what informs such rulings?

---

<sup>2</sup> Ibid.

<sup>3</sup> Dr Sarah Sorial, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (2014) 29 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 59.

## Hate Speech in the Laws of Kenya

In a spirit of taking human rights home, Kenya entrenched hate speech in its laws as a way of protecting individuals and groups from any organised or spontaneous criminal offence against them that may be provoked by “hate speech”. Hate speech can be linked to national politics, terrorism, negative ethnicity, cybercrimes related to hate<sup>4</sup> and many other areas that are related to some sorts of crime or formidable violations of human rights. However, hate speech provision does not originate in the Kenyan legal system since it has a wider perspective in the international human rights law. First and foremost, European Human Rights Court has formidable cases linked to legal perception of hate crime that can as well inform our evaluation on the Kenyan situation.<sup>5</sup>

The Constitution of Kenya 2010 indicates that speech that amounts to propaganda to war, incitement to violence, and advocacy for hatred. When proved through investigations that speech directly or indirectly includes such elements then it can be graduated to hate speech which is punishable by the Kenyan criminal law.

National Cohesion and Integration Act No. 12 of 2008 defines hate speech under section 13 as *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 (e) provides, produces or directs a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior 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.*<sup>6</sup>

---

<sup>4</sup> Russell G Smith, Peter Grabosky and Gregor Urbas, *Cyber Criminals on Trial* (Cambridge University Press 2004) <<http://ebooks.cambridge.org/ebook.jsf?bid=CBO9780511481604>> accessed 13 August 2014.

<sup>5</sup> Uladzislau Belavusau, ‘Dernier Cri from Stasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania), A’ (2010) 16 European Public Law 373.

<sup>6</sup> [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalCohesionandIntegrationAct\\_No12of2008.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalCohesionandIntegrationAct_No12of2008.pdf)

## **National Cohesion and Integration Commission**

National Cohesion and Integration Commission (NCIC) was created in 2009 by the Constitution 2010 as a body that would tame use of hate speech and promote national cohesion and integration. Since its inception a number of politicians have been arraigned in law Court for hearing and adjudication for charges on hate speech. *The mandate of the commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advice the government thereof.*<sup>7</sup> It has come up with reports and guidelines meant to help journalists about the offence of hate speech.

Among its main contributions the commission developed training manuals meant for police, the public and media fraternity. It has made invaluable contribution to the understanding of hate speech and how to deal with it. Most of this stuff has never been implemented and the first members of the commission have since been replaced including the first Director Dr. Mzalendo Kivunja when their term expired.

The commission recommended the charging of three Kikuyu musicians of fuelling tribal hate speech.<sup>8</sup> It is one of the success stories of the NCIC in the history of Kenya. However, most of their findings have not received an easy way in the criminal justice system in Kenya.

### **“Hate Speech” and “Democracy”**

In Kenya it was a crime of treason to imagine the death of the President, a practice adopted from the English colonial regime in which it was punishable to imagine the death of the “King or the Queen”. In democratic set-ups such as Kenya the flexes its muscles on “imagination” which in reality cannot be adduced as evidence of “hate crime”. Imagination cannot be practically proved and there is no way a suspect can be tied on points of hearsay or imaginations. Such draconian law could only exist in dictatorial and authoritarian regimes but not in the democratic settings such as the modern Kenya.

---

<sup>7</sup> <http://www.cohesion.or.ke/>

<sup>8</sup> <http://www.ghafla.co.ke/news/music/item/2645-3-kikuyu-musicians-charged-with-hate-speech>

Can political speech be limited by law during political campaigns? Can political speech be considered hate speech?

Freedom of speech (free speech) is one of the prerequisites for a democratic society.<sup>9</sup> The concept of democracy, meaning governing by the people become meaningless if there is no freedom to give and receive information. All democratic societies in one way or the other grant some freedom of speech through constitutional rights in respect to given social contexts.

None the less such freedom of speech cannot be absolute since the society must also protect certain essential values. When the protection of such values collide with other values then freedom of speech must be specified through legislation or administrative policies. Some of such values that worth protection are: right of privacy, personal honour, the rights of religious, ethnic and political groups, national security, and a well-functioning democratic process generally.<sup>10</sup> Constitutional provisions guaranteeing protection of the freedom of speech may vary from one State to the other and how the Courts interpret such rights.

In the transitional State such as Kenya the freedom of speech and democracy sometimes appear to be in collision course. Any leader in authority considers his rights to freedom of expression, and speech and avoids anything that may be interpreted as harm caused by such speech. The pretext of such allegations are always placed on the concept of democracy. So any restriction to the freedom of expression is challenged by denial of democracy and return to militant regimes.

In some States it remains an issue of extensive debate to distinguish hate speech from constitutional democracy. To what extent can an authority insist on hate speech without betraying the constitutional rights of individuals or groups? In the Kenyan case, when the Government acts on hate speech alleged against members of the opposition it appears as getting the country back to militant democracy. The dilemma is on the hate speech and freedom of expression.

## **“Hate Speech” and “Hate Crime”**

---

<sup>9</sup> Sorial, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (n 3).

<sup>10</sup> Jorgen Albaek Jensen, ‘Freedom of Speech and Legal Regulation of Political Campaigns in the United States’ (1996) 2 European Public Law 293.

Hate crime differs from hate speech in that it highlights bias behaviour that portrays hatred usually violent, that occurs when a perpetrator targets a victim because of his or her perceived membership in a certain social group. This may include ethnicity, gender identity, language, nationality, physical appearance, religion, or sexual orientation. It is a criminal act as opposed to speech. For instance, damaging of the statue erected by the Sikh Community in Kisumu is a typical hate crime but not hate speech.

Burning of effigy of a person is a hate crime but not hate speech. Tearing the flag of a nation in public is a hate crime but not hate speech. Gender based crimes are parts of hate crimes but not hate speech.

Hate crime through social media or any other means of internet communication can as well amount to hate crime. Such crimes are prohibited by cybercrime laws in various democracies.<sup>11</sup> There are many users of social media that use it as a way of sending evil messages against some individuals, social groups or persons with intent not only to damage their reputation but also to incite the public against them. The case of Moses Kuria in Kenya depicts such evil use of cyber to send criminal information against some communities or individuals.<sup>12</sup>

*Clearly, digital technologies lie at the heart of cyber crime and these include computers, communication technologies and networked services. Grabosky and Smith (1998) describe the wide range of services included within the concept of digital technologies and for the purposes of the present discussion we shall assume that computers, communications technologies and other networked services form the infrastructure in which cyber crime may be committed. References to computers and digital technologies will be used interchangeably.*<sup>13</sup>

Hate crime can also be associated to lynch (derived from Charles Lynch in the 18<sup>th</sup> Century). It is the act of identifying a person through an ambush with intent to kill, torture, punish, bull, or humiliate. It occurs during civil wars, genocide, bullying or clashes based on hate crimes. It is not a hate speech but a hate crime.<sup>14</sup> Mpeketoni tragedy in Lamu in 2014 in Kenya was a typical hate crime. The killers used lynching mechanism to isolate their victims in a form of

---

<sup>11</sup> Smith, Grabosky and Urbas (n 4).

<sup>12</sup> 'Moses Kuria' (*The Star*) <<http://www.the-star.co.ke/sections/moses-kuria>> accessed 12 August 2014.

<sup>13</sup> Smith, Grabosky and Urbas (n 4).

<sup>14</sup> *Hate Crime Statistics, 2010* (Federal Bureau of Investigation) <<http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims>>.

hate crime. Criminal justice prosecuted them on the basis of criminal offence according to the Penal Code. Hate crime is exclusively prosecutable under criminal law.

Speech is strictly on expressed statement that is perceived as hate that may provoke criminal act against a person, an ethnic group, or a social group. Speech is verbal and its typology is recorded using recording machines.<sup>15</sup> Hate speech can be prosecuted under civil or criminal law or both.

When hatred is expressed in print media, social media or through other technologies then it turns into hate crime (*means to produce or reproduce words or pictures in visible form by printing, writing, typewriting, duplicating, cyclostyling, lithography, photography or any other means of representing the same in visible form*).<sup>16</sup> It is an act *per se* other than use of criminal word. “Word” that is expressed in public with intent to cause crime is a hate speech.

Abusive word or an insult is not hate speech when it does not have the threshold of crime such as incitement to violence against somebody.<sup>17</sup> Abuse or an insult that threatens somebody security is an offensive act. For instance, calling somebody stupid, silly or names are not considered under “hate speech”. But the same may turn to be hate speech if the intent amounts to incitement, violence or criminal act as illustrated by David O. Brink below.

*Hate speech employs discriminatory epithets to insult and stigmatize others on the basis of their race, gender, sexual orientation, or other forms of group membership. The regulation of hate speech is deservedly controversial, in part because debates over hate speech seem to have teased apart libertarian and egalitarian strands within the liberal tradition. In the civil rights movements of the 1960s, libertarian concerns with freedom of movement and association and equal opportunity pointed in the same direction as egalitarian concerns with eradicating racial discrimination and the social and economic inequalities that this discrimination maintained. But debates over hate speech regulation seem to force one to give priority to equality or to liberty. On the one hand, egalitarian concerns may seem to require restricting freedom of expression. Hate speech is an expression of discriminatory attitudes that have a long, ugly, and sometimes violent history. As such, hate speech is deeply offensive to its victims and socially divisive. Though one might well be reluctant to restrict speech, it might seem that the correct response to hate speech, as with other forms of discrimination, is*

---

<sup>15</sup> Ibid.

<sup>16</sup> PENAL CODE, CAP 63.

<sup>17</sup> Dr Sarah Sorial, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (2014) 29 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 59.

*regulation. On the other hand, libertarian concerns may seem to constrain the pursuit of equality. Though one may abhor hate speech and its effects, the cure might seem at least as bad as the disease. Freedoms of expression are among our most fundamental liberties. Offensive ideas are part of the price one must pay to protect these constitutional rights.*<sup>18</sup>

“Hate speech” does not necessarily require criminal act in order to justify its ultimate meaning at law. But if through censor hate speech is made with intent or motive to cause violence, incitement against a person or a social group then it is criminal even without the consequence. There are many cases that alleged hate speech does not necessarily lead to violence but it is presumed to have the capacity to do so if not acted upon by law enforcers.

The history of hate crimes and hate speeches can be traced down to European colonization. The use of hate crimes were recorded even during the Second World War, against the Jewish Communities. Malicious speeches were recorded by Nazi Government in Germany with intent to incite the public against the Jewish.<sup>19</sup>

Both hate speech and hate crimes have psychological consequences on the victims. They are considered punishable by the law in almost all jurisdictions. In some States they occur often while in some they are restrained to the lowest level possible. It is necessary to consider the harm incitement contained in a speech causes to the perceived victims.<sup>20</sup>

It is a huge contribution from the rule of law and human rights that many Constitutions entrench provisions that prohibit hate speech and hate crimes. The Constitution of Kenya 2010 makes it unlawful the use of hate speech but very slow on hate crimes. In this manner still hate crime in terms of burning of effigy, destruction of monuments to show hatred, bullying of persons or damaging images of persons are still not fully enforced by the existing laws (no hate crime prevention Act yet). Violent hate crimes are still rare but not absent in a multi-ethnic society such as Kenya.

Hate speech is highlighted in the laws of Kenya due to its outspread use by politicians. The strongest wave was experienced in 2007/8 Post Elections Violence when politicians made utterances that caused violence around the country. It is from this episode of the Kenyan history that “hate speech” entered into the laws of Kenya and NCIC was instituted to prevent

---

<sup>18</sup> David O Brink, ‘MILLIAN PRINCIPLES, FREEDOM OF EXPRESSION, AND HATE SPEECH’ (2001) 7 Legal Theory 119.

<sup>19</sup> *Hate Crime Statistics, 2010* (n 14).

<sup>20</sup> Sorial, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (n 17).



it. Kenya is still in the process of reviewing its criminal law that should include interalia, hate crime.

## **Judicial Restraints on “Hate Speech” charges in Kenya**

Hate speech in Kenya is a criminal offence and can amount to preventing an individual from holding public office as in the case of Hon. Ferdinand Ndung’u Waititu in Petition 19 of 2014 Feb 28, 2014. It is the petitioner's case that the Constitution, the Water Act and the Public ... 2012 where he was charged with incitement to violence and hate speech. The High Court ruled that the appointment of Ferdinand Waititu is therefore null and void ab initio. Section 103 of the ruling made by Judge Mumbi Ngugi reads and I quote: *It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions. Where there are allegations that these organs have failed to discharge this obligation, the Court is obligated to step in, when called upon to do so, to investigate whether the process of recruitment and the individuals recruited meet the constitutional requirements. The High Court is the ultimate guardian of the Constitution on behalf of the people of Kenya. Where the people feel that an individual who was appointed to some office does not meet the requirements of that office, the High Court cannot turn them away simply because the responsibility for that appointment is reserved by the Constitution to the Executive or Legislature. Whereas the appointment is a preserve of the Executive and the right of concurrence is given to Parliament, the enforcement of the Constitution is left to the High Court.*” (Benson Riitho Mureithi v J. W. Wakhungu & 2 others [2014]eKLR). In the petition dated 15th January 2014, the petitioner challenges the constitutionality of the appointment of the Interested Party as the Chairman of the Athi Water Services Board by the 1st respondent for a term of three years vide Gazette Notice No. 115 dated 10th January 2014.

Hon. Ferdinand Ndung’u Waitutu has been accused of hate speech when he was Member of Parliament Representing Embakasi constituency so could not meet the constitutional requirements of public appointment. He has been charged for propaganda for war and

incitement for violence in his constituency.<sup>21</sup> He was relieved from his Government position and arrested later released on bail.

American Constitution has provision to guarantee free speech and free press and such law does not permit the State to interfere with such rights except in cases where such advocacy is directed to incitement or producing imminent lawless action and is likely to incite or produce such action.<sup>22</sup>

## **Hate Speech and Political Legitimacy in Kenya**

A section of CORD Senators were compelled by police to record statements after being accused of hate speech during a political rally.<sup>23</sup> While National Cohesion and Integration Act prohibits hate speech it has become a political tool to oppress the oppositions.<sup>24</sup> Allegations have emerged from a section of the opposition alliance CORD that the Jubilee Government is targeting them through hate speech allegations. The same allegations do not get similar resonance from the Governing alliance as in the case of Mr. Moses Kuria.

Moses Kuria who was charged with hate speech crime was given the certificate to vie for the political position in Gatundu South by the ruling party TNA.<sup>25</sup> Tacitly this translates into ordaining hate speech in the modern Kenyan constitutional dispensation. He was charged with posting serious messages on his Facebook page and twitter with the intent to stir up ethnic hatred between the Kikuyu, Luo and Somali communities. Attempt by the prosecution to have Kuria detained for the purpose of taking his finger prints was opposed as the investigating officer was in court ready with the processor to demonstrate the evidence.<sup>26</sup>

The case was quashed by the Prosecutor and I quote: *The prosecution has asked the court to free Kuria on condition he will not utter further inflammatory statements. Kuria denied that*

---

<sup>21</sup> 'Kenya MP Charged for Hate Speech' (*BBC News*) <<http://www.bbc.com/news/world-africa-19751394>> accessed 12 August 2014.

<sup>22</sup> '6 Major U.S. Supreme Court Hate Speech Cases' (*About*) <<http://civilliberty.about.com/od/freespeech/tp/Hate-Speech-Cases.htm>> accessed 12 August 2014.

<sup>23</sup> *CORD Senators, MPs Grilled Over Hate Speech Allegations* (2014) <[http://www.youtube.com/watch?v=eAT0XOXUnPk&feature=youtube\\_gdata\\_player](http://www.youtube.com/watch?v=eAT0XOXUnPk&feature=youtube_gdata_player)> accessed 12 August 2014.

<sup>24</sup> *Ibid.*

<sup>25</sup> The People, 'Gatundu South TNA Aspirant Moses Kuria Charged with Hate Speech' <<http://www.mediamaxnetwork.co.ke/thepeople/86821/gatundu-south-tna-aspirant-moses-kuria-charged-hate-speech>> accessed 12 August 2014.

<sup>26</sup> *Ibid.*

*on May 16, this year his post read: "I think it is only a matter of time before Kenyans start violence against PERCEIVED (sic) terrorists, their sympathisers, their financiers and those issuing travel advisories without intelligence. I am not sure I will not be one of those Kenyans. When you touch Gikomba the nerve centre of our economic enterprise, you really cross the line. Brace yourself. Choices have consequences."*<sup>27</sup>

The Court cannot proceed with the case when the prosecutor decides to withdraw it from the cause list. This behaviour frustrates all attempts to proceed with hate speech through judicial process due to political influence. The Jubilee Government tends to protect some individuals perceived to be supporting its manifesto and yet it accuses the opposition of getting involved in hate speech allegations. So, hate speech law in Kenya has been turned to a political tool to silence the opponents in what could be termed as free speech war.<sup>28</sup>

The hate speech has become a political tool to fight opponents. The proof of this is when the same ruling party TNA decided to give the accused Moses Kuria the certificate to contest vacant political position with the presumption of innocence until proved guilty. Such is an affront to criminal justice process and a sign that the opposition will never be accorded with the same opportunity if found with hate speech allegations.

## **Hate Crime and Terrorism**

The declaration of war on terrorism has made hate crime one of the most debated topics. Incitement to terrorist act has been alleged as a hate crime.<sup>29</sup> If an individual or a group incites people to commit terrorist act then such speech can be alleged as hate speech crimes prosecutable both by national and international law without infringing on human rights law.<sup>30</sup>

The perceived terrorist suspects are treated with hate in a manner that infringes on their fundamental freedoms and human rights.<sup>31</sup> As many people still believe that terrorism must be outlawed they fail to explain the means to do it.<sup>32</sup>

---

<sup>27</sup> Ibid.

<sup>28</sup> Susan J Brison, 'SPEECH AND OTHER ACTS' (2004) 10 Legal Theory 261.

<sup>29</sup> Yaël Ronen, 'Incitement to Terrorist Acts and International Law' (2010) 23 Leiden Journal of International Law 645.

<sup>30</sup> Ibid.

<sup>31</sup> Stefan Sottiaux, "'Bad Tendencies" in the ECtHR's "Hate Speech" Jurisprudence' (2011) 7 European Constitutional Law Review (EuConst) 40.

<sup>32</sup> 'Editorial: Hate Crimes' (2002) 77 Philosophy 1.

Hate speech and hate crimes are used against people perceived to belong to terror groups by political leaders in various democracies. Since terrorism provokes emotional reactions across the world there is a belief that individuals involved in terrorism are to be hated. Such trends are felt also in the United States of America and other allies.

As this may lead to hate crime propaganda it is still under serious debate whether to tolerate some elements of hate crimes against persons, communities or groups perceived to share the same terrorist ideology or not.<sup>33</sup> Various jurisdictions tend to limit freedom of expression with intent to prohibit crime propaganda and to guarantee most needed national security.

## **Judicial Review on “Hate Speech”**

Hate speech is speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits. Should hate speech be discouraged? The answer is easy—of course! However, developing such policies runs the risk of limiting an individual’s ability to exercise free speech. When a conflict arises about which is more important—protecting community interests or safeguarding the rights of the individual—a balance must be found that protects the civil rights of all without limiting the civil liberties of the speaker.

*R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), involved the juvenile court proceeding of a white 14-year-old who burned a cross on the front lawn of the only black family in a St. Paul, Minn., neighbourhood. Burning a cross is a very hateful thing to do: it is one of the symbols of the Ku Klux Klan, an organization that has spread hatred and harm throughout this country. The burning cross clearly demonstrated to this family that at least this youth did not welcome them in the neighbourhood. The family brought charges, and the boy was prosecuted under a Minnesota criminal law that made it illegal to place, on public or private property, a burning cross, swastika, or other symbol likely to arouse “anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.” The case went all the way to the Supreme Court, which ruled that the Minnesota law was unconstitutional because it violated the youth’s First Amendment free speech rights.*

---

<sup>33</sup> Wibke Kristin Timmermann, ‘The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?’ (2005) 18 *Leiden Journal of International Law* 257.

The situation in Kenya the law prohibits any act that may incite groups into violence. Hate speech can as well be an act other than expressed words. But the speech means speech not gesture.

Some section of youth protested against a statue erected in Kisumu by Sikh Community claiming that it was an idol worship and an affront to their cultural rights.<sup>34</sup> Such action would as well amount to hate speech and a crime. A reaction that annoyed the Asian community living and working in Kisumu.<sup>35</sup> The youth were dispersed by police to restore law and order but no proper rule of law was applied in the matter.<sup>36</sup> Most importantly the situation was linked to the humiliation of the former Prime Minister who intervened to plead with the marauding youth in the presence of the police force other than hate speech.

Burning of effigy of persons considered by political alignment as dissenters is common in Kenya. Is burning of an effigy or political posters of a person amounting to hate speech? Is writing and publication of a book tainting the personality of a person a hate speech? The answer is no. Such offences under tort which can be filed under civil proceedings as libel or defamation and not as hate speech. The example is the publication of the book “Peeling Back the Mask by Miguna Miguna” that damaged the political image of Hon. Raila A. Odinga, the then Prime Minister of the Republic of Kenya could be categorized under civil offence (libel) but not criminal offence (hate speech). The book circulated widely even online and in national media but no legal action was taken against the author by the offended.

Burning of effigy for political purpose can amount to hate speech since it can incite individuals to violence against the person. But generally Kenyan politicians have tolerated such acts as part of democracy and political speech other than hate speech. Such acts can amount to political offence other than hate speech. Such effigy burning has been tolerated by the principle of fundamental freedoms and democracy as in the case [Criminal Case 9 of 2008] in which effigy of President Mwai Kibaki was burnt by youth (<http://kenyalaw.org/caselaw/cases/types/43/550/>).

---

<sup>34</sup> ‘Controversial Kisumu Monument Brought Down’ (*Mwakilishi.com*) <<http://www.mwakilishi.com/content/articles/2014/02/09/controversial-kisumu-monument-brought-down.html>> accessed 12 August 2014.

<sup>35</sup> ‘Kisumu Protests Over Sikh Statue Speak Of Intolerance’ (*The Star*) <<http://www.the-star.co.ke/news/article-156647/kisumu-protests-over-sikh-statue-speak-intolerance>> accessed 12 August 2014.

<sup>36</sup> ‘Standard Digital News : : KTN - KTN Video | Raila Heckled in Kisumu for the First Time’ <[https://www.standardmedia.co.ke/ktn/?videoID=2000074836&video\\_title=raila-heckled-in-kisumu-for-the-first-time](https://www.standardmedia.co.ke/ktn/?videoID=2000074836&video_title=raila-heckled-in-kisumu-for-the-first-time)> accessed 12 August 2014.

Use of caricature in print media and other social media is generally allowed in Kenya as part of the democratic space promoted by the Constitution and no allegations have been raised. Individuals usually take no offence with cartoons or caricature meant for entertainments and the Director of Public Prosecutor ignores its implication as a crime since it is at the liberty of an individual to file a civil lawsuit against the offender.

## **Challenges Facing “Hate Speech” Law**

Hate speech is a criminal offence in the Kenyan jurisdiction. It is against the constitutional Bill of Rights and legislations. However it is also right to argue that it stands at the centre of the Kenyan socio-political controversy. Whenever an allegation of hate speech arises it becomes a political issue and lawyers tend to challenge it in court by saying that indicting so and so may create more damage to the security of the nation due to polarization of ethnic politics. Despite the progress made Kenya still continues to have repressive colonial constitution.<sup>37</sup>

Another challenge is in the interpretation. In many cases the indicted suspects challenge their case arguing that what transpires is not what they meant. The intention was not criminal but to raise some concern on security. This makes it difficult to weigh the situation between criminal justice and the responsibility of leaders to maintain national security as in the case of Ferdinand Ndung'u Waititu.

It is also expensive for the prosecution to follow up every person and every medium in a manner to perform credible investigations on hate speech. It has also made it hard since the department may not have expertise to record speeches made in public by individuals that may amount to hate speech.

Interpretation in law is also lacking to distinguish between free speech (political speech) from hate speech (hate crime). Undeveloped hate speech and hate crime jurisprudence is another challenge.<sup>38</sup> Hate speech jurisprudence quires more development through administrative polices, legislations and Court precedents.<sup>39</sup> Censorship theories in the postmodern time

---

<sup>37</sup> Jacqueline M Klopp, 'Mutua Makau. Kenya's Quest For Democracy: Taming Leviathan. Boulder, Colo.: Lynne Rienner Publishers, 2008. Change and Challenge in African Politics Series, X + 331 Pp. Tables. Figures. Notes. Acronyms. Bibliography. Index. \$65.00. Cloth.' (2009) 52 African Studies Review 181.

<sup>38</sup> Ronen (n 29).

<sup>39</sup> Sottiaux (n 31).

make various definitions of speech and mind-body issues that may require academic work to illustrate the legal aspect of such cases.<sup>40</sup>

Adduced evidence is usually considered insufficient to bring a strong case against the perpetrator.

Impact on peace and security is another challenge that puts hate speech adjudication by the Kenyan courts problematic. If hate speech is addressed to certain communities then such community shall raise the concern of being targeted then it turns to be a political controversy and an issue of constitutional rights. In this case it is within the wisdom of the Court of law to weigh out which side of the story is right and decide whether to dismiss the case in its totality.<sup>41</sup>

Court process is also long besides being expensive to deploy. Hate speech cases can take too long to prosecute while the evidence could as well be hard to get-by. Meanwhile some lawyers put their argument on lapse of time to prove the evidence after some years of adjudication just to ask the court to terminate the case.

The Republic of Kenya is hosting many ethnic minorities that need the protection of law. It is also a fact that some ethnic groups are more powerful than the others in what is known as the tyranny of the majority democracy. In this manner it is a serious challenge to conceptualize “democracy” that is uniform as in the Western democracy.<sup>42</sup> Members of the minority fail to defend their rights as groups through political means since they do not have the tyranny of numbers in Parliament. In this case ideological neutrality is necessary before the country imagines “freedom of expression” as contemplated in the human rights law.

Anti-discrimination legislations still require advanced reconsideration. Such tendencies related to intolerance are dictated by socio-historical context of Kenya. A young democracy hosting over 42 different ethnic groups and various linguistic groups face struggle for limited resources. Such struggle comes along with sentiments of intolerance and predominance of such resources by some elite or groups of persons against the others.

Cybercrimes are difficult to investigate as they deploy hi-tech means of communication that require another technicality at law. It is a question of developing jurisprudence on law and

---

<sup>40</sup> Brison (n 28).

<sup>41</sup> Jensen (n 10).

<sup>42</sup> Klopp (n 37).

technology to understand the complication in adjudicating cybercrimes. It is difficult to trace the sources of information sent through the media and understand who places hate information to the website.<sup>43</sup> Another issue is the jurisdiction of the owner of the website which is available to the world web.

*In this case cybercrimes are more of international law. One of the most important characteristics distinguishing computer-related crime from 'terrestrial crime' is the matter of jurisdiction. The global nature of cyberspace makes it much easier than ever before for a person sitting on one side of the world to commit a crime on the other side. The offending activity (whether it involves the sending of illicit images of children, malicious code, or fraudulent stock tips) can pass through numerous sovereign nations at the speed of light on the way to the target. Which of these nations can prosecute such cases: the jurisdiction where the activity was initiated, the place where it had its effect (that is, where the loss or damage was sustained), or a nation through which the offending communication may have passed on its path from origin to destination?*<sup>44</sup>

The technicality involved in the use of digital media renders the prosecution of cybercrime related to hate speech more complicated. So far Courts tend to avoid crimes that have not been interpreted by national international laws such as cybercrimes. It is at the discretion of the prosecutor to decide whether the matter is to be taken to court or not. The Court only handles cases brought before it otherwise it prefers *laissez faire* attitude.

Defamation against a nation, ethnic groups, or individuals perceived to be sensitive to social justice is still tolerated by the ruling authority in power. Such tolerance is based on mere selfishness or self and group interests. However, the Constitution is clear on such discriminative policies, utterances and tendencies that exclude others. But as so long as those in power protect the interests of those elected them then the constitution may not go against its democratic principles.<sup>45</sup>

Besides political power the question of poverty cannot be dismissed as one of the challenges facing hate speech crime. Well-connected and wealthy individuals in top leadership are rarely punished due to their financial and political capacity to pay the bail and higher the best lawyers. The unfortunate and poor individuals end up in the judicial trap or the snares of

---

<sup>43</sup> Smith, Grabosky and Urbas (n 4).

<sup>44</sup> Ibid.

<sup>45</sup> Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9 International Journal of Law in Context 590.



justice for hateful speech allegations. Access to justice is still a big question that requires further debates.<sup>46</sup> A situation in which the Office of the Director of Public Prosecution fails to act on hateful speech or stops the Court from proceeding with a case due to political influence is tantamount to justice denied.

## **Conclusive Remarks**

Acknowledging that Kenya has borrowed a great deal of hate speech doctrine from the American and European jurisdictions, it is also a fact that the socio-cultural environment may take time to accommodate Western legal ideas in the operational legal system. Civil liberties and fundamental freedoms are concepts that still need time in order to be fully realized in Kenya. Most cases of hate speech still go unobserved by the authorities in place. Reports that have been prepared by constitutional commissions such as TJRC and NCIC usually lack proper cognizance of the Executive. Implementation of hate speech provisions is left at the mercy of the Office of the Director of Public Prosecutions, the Judiciary, the Police Criminal Investigation Department and the Civil Society.

The success of hate speech in the criminal justice does not only need evidence and burden of proof but most importantly the political good will and advancement in the study of modern technology. Legal researchers need to do more work to investigate into the justiceability of hate speech and hate crimes within State laws. The process may require motivated law lecturers with interest in intellectual property law, media law, law and technology and human rights. In the same line of argument Kenya needs prosecutorial officers adorned with special legal training concerning cybercrime.

Political good will is the bottom line of the research on hate speech jurisprudence. It was the 10<sup>th</sup> Parliament to modify Integration and Leadership Act to favour politicians that do not pass ethical threshold. Political interest has been used to water down law that can see the Republic of Kenya achieving its goal in national cohesion and integration through justice system.

It may take time for Kenya to achieve its goals in the criminal justice but the most certain way is that transitional justice system is not in doubt. The judiciary is also getting better than what it used to be with Judicial Service Commission working with certain autonomy from the Legislature and the Executive.

---

<sup>46</sup> Ibid.

As the judiciary adopt dress code the legislature must adopt speech code. Politicians must be the first to be tamed by stringent regulations in order to enforce hate speech in Kenya. They should prohibit expressions that disparage individuals or groups based on their race, ethnic belonging, social class, political affiliation or gender group.

## REFERENCES

‘6 Major U.S. Supreme Court Hate Speech Cases’ (*About*)

<<http://civilliberty.about.com/od/freespeech/tp/Hate-Speech-Cases.htm>> accessed 12 August 2014

Belavusau U, ‘Dernier Cri from Stasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania), A’ (2010) 16 *European Public Law* 373

Brink DO, ‘MILLIAN PRINCIPLES, FREEDOM OF EXPRESSION, AND HATE SPEECH’ (2001) 7 *Legal Theory* 119

Brison SJ, ‘SPEECH AND OTHER ACTS’ (2004) 10 *Legal Theory* 261

‘Controversial Kisumu Monument Brought Down’ (*Mwakilishi.com*)

<<http://www.mwakilishi.com/content/articles/2014/02/09/controversial-kisumu-monument-brought-down.html>> accessed 12 August 2014

*CORD Senators, MPs Grilled Over Hate Speech Allegations* (2014)

<[http://www.youtube.com/watch?v=eAT0XOXUnPk&feature=youtube\\_gdata\\_player](http://www.youtube.com/watch?v=eAT0XOXUnPk&feature=youtube_gdata_player)> accessed 12 August 2014

‘Editorial: Hate Crimes’ (2002) 77 *Philosophy* 1

*Hate Crime Statistics, 2010* (Federal Bureau of Investigation) <<http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims>>

Heinze E, ‘Hate Speech and the Normative Foundations of Regulation’ (2013) 9 *International Journal of Law in Context* 590

Jensen JA, ‘Freedom of Speech and Legal Regulation of Political Campaigns in the United States’ (1996) 2 *European Public Law* 293

‘Kenya MP Charged for Hate Speech’ (*BBC News*) <<http://www.bbc.com/news/world-africa-19751394>> accessed 12 August 2014

‘Kisumu Protests Over Sikh Statue Speak Of Intolerance’ (*The Star*) <<http://www.the-star.co.ke/news/article-156647/kisumu-protests-over-sikh-statue-speak-intolerance>> accessed 12 August 2014

Klopp JM, ‘Mutua Makau. Kenya’s Quest For Democracy: Taming Leviathan. Boulder, Colo.: Lynne Rienner Publishers, 2008. Change and Challenge in African Politics Series, X + 331 Pp. Tables. Figures. Notes. Acronyms. Bibliography. Index. \$65.00. Cloth.’ (2009) 52 *African Studies Review* 181

‘Moses Kuria’ (*The Star*) <<http://www.the-star.co.ke/sections/moses-kuria>> accessed 12 August 2014

People T, ‘Gatundu South TNA Aspirant Moses Kuria Charged with Hate Speech’ <<http://www.mediamaxnetwork.co.ke/thepeople/86821/gatundu-south-tna-aspirant-moses-kuria-charged-hate-speech>> accessed 12 August 2014

Ronen Y, ‘Incitement to Terrorist Acts and International Law’ (2010) 23 *Leiden Journal of International Law* 645

Smith RG, Grabosky P and Urbas G, *Cyber Criminals on Trial* (Cambridge University Press 2004) <<http://ebooks.cambridge.org/ebook.jsf?bid=CBO9780511481604>> accessed 13 August 2014

Sorial DS, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (2014) 29 *Canadian Journal of Law and Society / La Revue Canadienne Droit et Société* 59

———, ‘Free Speech, Hate Speech, and the Problem of (Manufactured) Authority’ (2014) 29 *Canadian Journal of Law and Society / La Revue Canadienne Droit et Société* 59

Sottiaux S, ‘“Bad Tendencies” in the ECtHR’s “Hate Speech” Jurisprudence’ (2011) 7 *European Constitutional Law Review (EuConst)* 40

‘Standard Digital News : : KTN - KTN Video | Raila Heckled in Kisumu for the First Time’ <[https://www.standardmedia.co.ke/ktn/?videoID=2000074836&video\\_title=raila-heckled-in-kisumu-for-the-first-time](https://www.standardmedia.co.ke/ktn/?videoID=2000074836&video_title=raila-heckled-in-kisumu-for-the-first-time)> accessed 12 August 2014

Timmermann WK, ‘The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?’ (2005) 18 *Leiden Journal of International Law* 257