



**FREEDOM OF EXPRESSION AND THE LEGAL FRAMEWORK FOR HATE SPEECH
IN KENYA: AN IN-DEPTH ANALYSIS OF REGULATION AND ENFORCEMENT**

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
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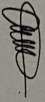
I, GACHARA WANJIKU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Date: 11th April 2024

This dissertation has been submitted for examination with my approval as University Supervisor.

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JANET NJAMBI

ABSTRACT

In this paper, I delve into the landscape of hate speech regulation in Kenya, specifically focusing on the potential collaboration between the National Cohesion and Integration Commission (NCIC) and the Kenya National Commission on Human Rights. By examining the existing legal frameworks, organisational structures, and the impact of joint oversight on combating hate speech, I aim to provide a thorough analysis of empowering the NCIC in this realm. Through exploring the historical context of the NCIC, evaluating its readiness for expanded responsibilities, and gauging public perceptions of collaboration, I seek to shed light on the feasibility and implications of such a partnership. Drawing insights from South Africa, the United Nations Hate Speech Strategic Plan, and advocating for a human rights approach to countering online ethnic hate speech, this paper endeavours to enhance accountability in the criminalization of hate speech in Kenya.

LIST OF STATUTES

1. The Constitution of Kenya
2. The National Cohesion and Integration Act of 2008
3. The Kenya National Commission on Human Rights Act
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5. Equality and Prevention of Unfair Discrimination Act, 4 of 2000

LIST OF CASES

1. Republic v National Cohesion and Integration Commission; Chama Cha Mawakili Limited (Judicial Review Application E057 of 2022)
2. Johnstone Muthama & 8 others v Inspector General of Police & 2 others [2016] eKLR.

LIST OF ABBREVIATIONS

COK	Constitution of Kenya 2010
NCIC	National Cohesion and Integration Commission
NCIA	National Cohesion and Integration Act
KNCHR	Kenya National Commission on Human Rights
SAHRC	South African Human Rights Commission
LSU	Legal Service Unit
UN	United Nations

CHAPTER 1

1.0 BACKGROUND

Hate speech is most of the time the common method adopted by politicians from different ethnicities in Kenya to attract supporters for their candidature during the previous 1992,1997,2007 and the most recent 2022 elections.¹The National Cohesion and Integration Commission (NCIC) has the mandate to assist in fostering and promoting equal opportunity, positive relationships, harmony, and peaceful coexistence of people from various ethnic and racial communities, and provide the government with guidance on all issues on this.² Eliminate all forms of racial or ethnic discrimination, and forbid individuals, organisations, political parties, and associations from supporting it. Investigate accusations of discrimination and, if warranted, recommend appropriate corrective action to the Attorney General, Human Rights Commission, or other authorities on any matter impacting ethnic and racial relations on its initiative or at the request of any organisation, office, or person.³ Make improvements on issues impacting interethnic relations by initiating, advocating for, and promoting them to conduct research and analysis, and provide the government with suggestions on any issue relating to ethnic affairs including whether ethnic relations are improving.⁴

In Article 33(2) of the Constitution of Kenya 2010, the freedom of expression does not extend to hate speech or advocacy that constitutes ethnic incitement. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.⁵ In the years following the 2007 violence, and with the establishment of so many social media platforms, hate speech shifted from mainstream to online media. In the 2013 general elections, large numbers of threats and incitements to violence were reported on social media networks.⁶

¹ Dialogue Africa Foundation, 2009. Kriegler Report- and Waki Report on 2007 Elections, on 7 October, pg no.64.

² [Functions Of The Commission](#) on 25 October 2023.

³ [Functions Of The Commission](#) on 25 October 2023.

⁴ [Functions Of The Commission](#) on 25 October 2023.

⁵ Article 33 (1), of the *Constitution of Kenya* (2010).

⁶ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

Hootsuite 2021 reports that there were 59.24 million mobile connections and more than 11 million social media users in Kenya in January 2021. This number, equating to about 20% of the entire population, had grown by 2.2 million (+25%) between 2020 and 2021. Despite uniting and connecting people on so many grounds, social media platforms are also contributing to spreading suspicion, disseminating inflammatory statements, and spreading hate speech.⁷ 54% of the hate speech and related offences cases pending before the court in Kenya in 2022 were perpetrated on social media.⁸ The perpetrators in these cases include politicians, journalists, bloggers, public officials, artists, and religious leaders among others. Some of the propagandists who are involved in hate speech discourse are used as instruments for politicians and their parties. Notably, the crime of hate speech is punishable by law. The NCI Act provides that ‘A person convicted of hate speech is liable to a fine not exceeding KES 1,000,000 or to imprisonment of up to 3 years or both.’ It fails to provide the elements of hate speech that would lead to uniform prosecution of hate speech crimes. The Kenyan judiciary faces a backlog of cases, resulting in a lack of successful prosecutions for suspected individuals due to the confusion caused between what is hate speech and what is freedom of expression. In October 2021, the judiciary announced the setting up of five specialised courts in Nairobi, Mombasa, Nakuru, Kisumu, and Eldoret to deal with hate speech cases in the run-up to, and during, the 2022 general elections. At the same time, the NCIC developed a wall of fame to recognize political aspirants who promote cohesion and a wall of shame to dishonour political aspirants who perpetrate hate speech or related offences even before they are charged in court.⁹ Post-election violence of 2007-2008 foregrounded the effects of hate speech.¹⁰ The Commission developed media guidelines and sensitised the media on conflict-sensitive reporting.¹¹ As a result,

⁷ Kenya’s National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

⁸ Kenya’s National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

⁹ Kenya’s National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

¹⁰ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-13.

¹¹ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-13.

the media embraced peace 13 Strategic Plan July 2015 – June 2020 journalism and exercised conflict-sensitive reporting when covering news and stories on politicians’ pronouncements and violent conflict amongst ethnic groups. The Commission established a free toll-reporting number (15666) to gather information from the public on issues of hate speech. During the election period, NCIC received approximately 1500 messages. Though none of the messages resulted in prosecution as preliminary investigations carried out did not meet the threshold for prosecution, the platform however provided ground for early warning, for reporting cases of hate speech and ethnic contempt.¹² NCIC in partnership with CCK and mobile service providers including Safaricom and Airtel developed guidelines on undesirable bulk political content/messages. NCIC reviewed these messages to ensure no inciteful messages were circulated to the public. NCIC developed a police training manual on enforcing the law on hate speech, which was used to train over 400 police investigators, and prosecutors, training of trainers at the Kiganjo police training college, CID Training School, Administration Police Training School, and the GSU Training School. In addition, the Commission held a judges and magistrates colloquium intending to sharpen their understanding of hate speech as a crime and expose the social economic challenges it poses to the country's development. The commission in partnership with the National Police Service and with the support of donors also trained and equipped over 320 police officers and 107 social cohesion monitors with voice recording gadgets and deployed them in all the 47 Counties for purposes of monitoring political rallies and social gatherings. The role of the social cohesion monitors was to observe the community to identify and report any issues that may undermine national cohesion. On the other hand, the police were equipped with the capacity to identify, investigate, and prosecute offences of hate speech and ethnic contempt.

In 2023, Research on the prevalence, causes, and potential remedies for online ethnic-based hate speech in Kenya was done jointly in 2023 by students from the

¹²National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-13.

Allard K. Lowenstein International Human Rights Clinic at Yale Law School and ALT Advisory.¹³ The study was based on a stakeholder consultation process in Nairobi and legal and policy analyses. According to the study, there has been an increase in online hate speech, particularly during elections that are more and more dependent on online campaigning, despite commendable attempts by local civil society to stop it. This interacts with the influence of large technology companies, which control the most popular social media platforms, and their frequently enigmatic content filtering procedures, which eventually result in the impunity of online hate speech a key recommendation given to change the situation was that the government, regulators, and civil society coordination must be improved. Domestic regulators, particularly the National Cohesion and Integration Commission (NCIC), must be reinforced through expanded mandates and better resources.¹⁴

Despite the efforts of the commission and having many laws, policies, concepts, and strategies that promote aspects of cohesion and integration, there is too little emphasis on their implementation.¹⁵ This is due to several factors including planning; scarce resources; unclear roles; competition among various partners; political interference and inadequate understanding of the existing opportunities and gaps. NCIC must identify the ethnic and discriminatory undertones they carry along, to decrease marginalisation.¹⁶

Human rights advocates are appalled by the current legal framework on hate speech and this is what Katiba Institute asserts ‘Kenyan law on “hate speech” is a bit of a mess – including because of using this vague expression.’¹⁷ Moses Kuria, Raila Odinga, and Mithika Linturi have been spotted apologising to the public

¹³ Yale Law School Lowenstein Clinic, “A Human Rights a response To Online Ethnic Hate Speech In Kenya’, 2023 [Report: A human rights response to online ethnic hate speech in Kenya \(altadvisory.africa\)](#) on 7 October 2023.

¹⁴ Yale Law School Lowenstein Clinic, “A Human Rights aResponse To Online Ethnic Hate Speech In Kenya’, 2023 [Report: A human rights response to online ethnic hate speech in Kenya \(altadvisory.africa\)](#) on 7 October 2023.

¹⁵ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-13.

¹⁶ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-15.

¹⁷ [What really is hate speech? The weakness in law](#), on 26 October 2023.

after making hateful pronouncements. The NCIC summoned Raila Odinga but only a mere apology was given and the NCIC chairperson.¹⁸

Samuel Kobia mentioned that ‘madoadoa’ is considered hate speech in Kenya.¹⁹The NCIC took the step of carrying out investigations about the use of the word ‘madoadoa’ and unveiled a list of terms and phrases that it considered as hate speech at the end of August polls.²⁰ The phrases were said to be common among the political class and have been considered a form of incitement among the words including ‘madoadoa’.²¹ The question is why didn’t the commission follow the provision in sections 13(2) and (3) of the National Cohesion and Integration Act, the general design is problematic and does not give the commission this mandate to; develop a portal on reporting radicalization and hate speech, design and develop a reintegration and rehabilitation policy, promote early warning and early response mechanisms to avoid escalation of conflict into violence, facilitate intra and inter-ethnic peacebuilding and organic reconciliation dialogue, and monitoring public spaces for detection of hate speech and ethnic contempt in collaboration with the National Intelligence Service which would consequently give more accountability.

The term ‘madoadoa’ as used in the 2022 electioneering by key politicians portrays how the law was deaf on such criminal pronouncements. The term was borrowed from 2007/8 hate speech and to find it repeated 15 years later portrays weak prosecution as well as weak legal enforcement system, because of interference with the investigations and prosecution of cases: Most hate speech suspects are politicians or individuals allied with powerful politicians. Political interference has influenced the enforcement, investigations, and/or judicial

¹⁸ Olingo A, NCIC summons Raila over ‘madoadoa’ remarks, [NCIC summons Raila over 'madoadoa' remarks | Nation](#) on 6 November 2023.

¹⁹ [Raila Odinga apologises for madoadoa remarks - The Standard](#) on 27 December 2023.

²⁰ Muli F, Hatupangwingwi, Madoadoa, Watajua hawajui among terms banned by NCIC as hate speech, [Hatupangwingwi, Madoadoa, Watajua hawajui among terms banned by NCIC as hate speech](#) on 6 November 2023.

²¹ Muli F, Hatupangwingwi, Madoadoa, Watajua hawajui among terms banned by NCIC as hate speech, [Hatupangwingwi, Madoadoa, Watajua hawajui among terms banned by NCIC as hate speech](#) on 6 November 2023.

processes during the processing of hate speech cases.²² This is aggravated by the fact that the NCI Act can be repealed on the floor of Parliament.²³

To sum up, my background, although the Constitution provides for the NCI Act of 2008 with a clear mandate, its leadership has been hampered by legal and policy hurdles that consistently create delays as the integrated referral system in place is not as responsive to the expectations of Kenyans. There is a need to establish an amiable environment so that the provisions of the NCI Act can be mainstreamed in most public and private sectors. This way, cohesion, and integration can be mainstreamed into Kenya's socio-economic and political structures. The revision of the NCI Act remains an available option for strengthening the legal mechanisms to operationalise the process of making national cohesion and integration into the day-to-day practice of the public service as reflected in performance contracting approaches. Hate speech should be criminalised with strictness because it incites violence and creates a politically and consequently economically imbalanced society, which threatens peace around the world.²⁴

This dissertation will focus on the underpowerment of the National Cohesion Integration Commission in curbing hate speech in Kenya as well as the role of the media in Kenya in propagating hate speech about the Rwandan genocide and 2007 post-election violence in the subsequent chapters. The problem of hate speech in Kenya is caused by a myriad of issues - including the media and the understated role of the Commission. However, the main focus of this dissertation is the role of the Commission. The role of the NCIC in curbing hate speech would be effectively met with a concerted effort from the media.

1.1 STATEMENT OF PROBLEM

This dissertation explores whether the National Cohesion and Integration Commission (NCIC) and the Kenya National Commission on Human Rights should work together to oversee the criminalisation of hate speech. The inquiry

²² Kenya Law Reports, *Report of The Committee of National Elders Conference On Cohesion and Integration*, 2007, 85-86.

²³ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

²⁴ [Say #NoToHate - The impacts of hate speech and actions you can take | United Nations](#) on 27 February 2023.

revolves around the existing legal frameworks governing these commissions, their organisational structures, and the potential impact on accountability mechanisms in addressing hate speech. The study aims to explore the historical role of the NCIC, assess its capacity for expanded responsibilities, and consider public perceptions regarding the proposed collaboration. By delving into these aspects, the dissertation seeks to provide a comprehensive analysis of the feasibility, implications, and improvements associated with empowering the NCIC with oversight responsibilities in the context of hate speech regulation.

1.2 RESEARCH OBJECTIVES

1. To carry out an analysis of the legal framework of hate speech and the mandate of the National Cohesion and Integration Commission.
2. To carry out a comparative analysis between South Africa and Kenya; and the lessons from the United Nations Hate Speech Strategic Plan.
3. To analyse countering online ethnic hate speech in Kenya a human rights approach.

1.3 RESEARCH QUESTIONS

1. What is the existing legal framework of hate speech in Kenya and the mandate of the National Cohesion and Integration Commission?
2. How do South Africa and Kenya compare in terms of hate speech dynamics, and what insights can be drawn from their experiences in relation to the United Nations Hate Speech Strategic Plan?
3. How do we counter online ethnic hate speech in Kenya with a human rights approach?

1.4 HYPOTHESIS

If the NCIC is given an oversight role in collaboration with the Kenya National Commission on Human Rights through legislative reforms, then accountability in the criminalisation of hate speech would be enhanced.

1.5 JUSTIFICATION

The necessity to investigate possible cooperation between the Kenya National Commission on Human Rights and the NCIC in monitoring the outlawing of hate speech is the driving force behind this research. To maintain coherence, the changing social situation necessitates a

thorough examination of the current legal structures. Examining the organisational structure of both commissions is essential to comprehend their combined ability to successfully combat hate speech. In addition, the study seeks to strengthen social norms that prohibit hate speech and accountability systems in reaction to it. An examination of the NCIC's functions from a historical standpoint sheds light on how flexible it is to take on new duties. Furthermore, public opinion is quite important, and finding out what the public thinks about the collaboration is essential to its successful execution.

1.6.0 THEORETICAL FRAMEWORK

The NCIC and the Kenya National Commission on Human Rights are two important commissions in Kenya that play a crucial role in promoting national cohesion, addressing hate speech, and promoting human rights. The dissertation aims to explore the feasibility, implications, and potential improvements associated with empowering the NCIC with oversight responsibilities in the context of hate speech regulation. The theoretical framework for the study is based on several key aspects, including the legal frameworks governing the commissions, their organisational structures, the potential impact on accountability mechanisms, the historical role of the NCIC, and public perceptions regarding the proposed collaboration. By delving into these aspects, the dissertation seeks to provide a comprehensive analysis of the collaboration between the NCIC and the KNCHR in addressing hate speech and promoting national cohesion in Kenya.

1.6.1 HARM PRINCIPLE THEORY

The harm principle is often explained as “your right to swing your fist ends where my nose begins.” In other words, people should be free to act as they wish as long as their actions do not cause harm to others.²⁵ The harm principle is central to the political philosophy of liberalism, which values individual rights and personal liberty. According to philosopher John Stuart Mill, “The only purpose for which power can be rightfully exercised over any member of a civilised society, against his will is to prevent harm to others.”²⁶ This harm principle theory goes hand in hand with criminalising hate speech in Kenya and more specifically to persons associated with the political class or are politicians themselves in that this theory argues that hate speech causes harm to individuals and groups targeted by it and therefore, the state should prevent this harm by

²⁵ [What is The Harm Principle? Ethics Explainer by The Ethics Centre](#) on 2 March 2023.

²⁶ [Harm Principle - Ethics Unwrapped](#) on 2 March 2023.

criminalising such speech. He insists that the harm principle regulates more than relations between government and individuals.²⁷

Logan Drake in his article, *Free to Hate: Can we justify why curbing hateful speech*, analyses John Mill's harm principle theory by giving where its application is valid, the harm principle provides rather strict criteria for limiting hate speech, resulting in almost no limiting of speech. Mill does not consider emotional harm to be real harm, and because of this, the harm principle could conceivably limit some instances of targeted vilification, the particularly threatening sorts that create real and serious harm to the person being immediately vilified. If the harm is serious enough, it seems as if we could use the harm principle to limit some instances of targeted vilification. With the situations used in the background harm occurred since many lives were claimed during the 2007/8 post-election violence.²⁸

1.6.2 DEMOCRACY AND PUBLIC TRUST CONCEPT

Democracy is built on the principles of free speech and the exchange of ideas, but hate speech can undermine these principles and harm democracy.²⁹ When politicians engage in hate speech, they can use their positions of power and influence to spread harmful messages and perpetuate prejudice and discrimination against certain groups.³⁰ This can create an environment of fear and intolerance, where certain groups feel unwelcome or unsafe.³¹

Furthermore, hate speech by politicians can erode public trust in government institutions and the democratic process. When people see their elected representatives engaging in hateful rhetoric, they may feel that their interests are not being represented and that the political system is not working for them.³² This can lead to a lack of confidence in the government and its ability to address the needs and concerns of all members of society.³³ Criminalising hate speech by politicians can help to prevent these negative outcomes. It sends a strong message that such behaviour will not be tolerated and that politicians are accountable for the impact of their

²⁷ [Mill's Moral and Political Philosophy](#) on 2 March 2023.

²⁸ Logan Drake, *Free to Hate: Can We Justify Curbing Hateful Speech?*, 2018, page 4 "[Free to Hate: Can We Justify Curbing Hateful Speech?](#)" by Logan Drake on 2 March 2023.

²⁹ [Freedom of Speech — Principles of Democracy](#) on 2 March 2023.

³⁰ [Analysis: Taming hate speech in Kenya](#) <https://reliefweb.int/report/kenya/analysis-taming-hate-speech-kenya> on 2 March 2023.

³¹ Rekker, R., & Van Spanje, J. *Hate Speech Prosecution of Politicians and its Effect on Support for the Legal System and Democracy*, 52(2), 886-907, 2022.

³² [High Stakes: Political Violence and the 2013 Elections in Kenya | HRW](#) on 2 March 2023.

³³ [Kenya's National Action Plan Against Hate Speech](#) on 2 March 2023.

words.³⁴This can help to promote respect for diversity and create a more inclusive and welcoming society.³⁵Moreover, criminalising hate speech by politicians can also act as a deterrent, preventing them from using this kind of language in the first place.³⁶This can help to ensure that the democratic process is not undermined by hate speech and that public trust in government institutions is maintained.³⁷

In conclusion, democracy and public trust are closely linked to the criminalization of hate speech by politicians. By holding politicians accountable for their words and promoting respect for diversity, we can help to create a more inclusive and democratic society where all members feel valued and represented.

1.7 LITERATURE REVIEW

From the preceding sections, it is noteworthy that there is a gap in the role of the National Cohesion and Integration Commission, when it comes to the investigation and prosecution of persons who have allegedly committed the crime of hate speech, this study will closely analyse what academic authors have to say on the same.

Doreen Nekesa and Samuel Ngigi in their book, interrogate the prevalence and development of hate speech over time, investigate the perpetrators of hate speech and the targeted groups, critically analyse the consequences of hate speech, dissect the freedom of speech vs. the protection from hate speech, highlight various challenges in curbing hate speech and reflect on strategies and methods of curbing hate speech being used by various agencies. Their book is keen to note that the legal system has a poor track record of holding powerful officials to account. The high-profile names linked to hate speech have not been prosecuted despite the offensive utterances made in public against certain group(s). The failure to prosecute means that the crimes will continue. NCIC has noted that the tendency to politicise prosecution of hate speech is a real threat.³⁸

³⁴ [Hate speech and incitement to hatred or violence | OHCHR](#) on 2 March 2023.

³⁵ [Why tackle hate speech? | United Nations](#) on 2 March 2023.

³⁶ [Why tackle hate speech? | United Nations](#) on 2 March 2023.

³⁷ Tsesis. A, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 42 Wake Forest Law Review 497 (2009).

³⁸ Nekesa D, Ngigi S, *Understanding Hate Speech in Kenya*, vol 70, 2018.

According to Dr Peter Onyonyo, Politicians must be the first to be tamed by stringent regulations 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.³⁹

Lwanga Charles, in his dissertation, analysed how hate speech promoted inter-ethnic conflict in Nairobi and Uasin Gishu county after the general elections in 2007/8 in Kenya. In his study, he assesses the effects of hate speech in creating tension among communities as well as inciting violence in the nation. The study assesses what brought about the displacement of people in 2007/8. The study came up with recommendations on how post-election violence can be avoided by promoting strong elections management laws which will prevent any future election conflicts and the security personnel being re-trained on matters affecting the handling of election-related violence not causing clashes after elections.⁴⁰

Margaret Nasambu Barasa in her paper: Re-defining hate speech towards reform agenda: the discursive use of referential strategies in Kenya's 2017 pre-election campaigns, focuses on ways in which referential strategies by key leaders in the 2017 pre-election political discourse reflect and determine hate speech. The author examines the interplay of politics, social theory, and linguistics towards achieving Kenya's reform agenda. The theory used in her paper has been discussed in the preceding section profoundly.⁴¹

Gichuhi Kimotho and Rahab Nyaga in their book digitised ethnic hate speech talk about the nature of digitised hate speech by describing the forms of ethnic hate speech on social media in Kenya; the effects of ethnic hate speech on Kenyans' perception of ethnic entities; ethnic conflict and ethics of citizen journalism. Their study adopted a descriptive interpretive design and utilised Austin's Speech Act Theory, which explains the use of language to achieve desired purposes and direct behaviour. Their paper goes ahead to give how a big problem in Kenya has been politicising ethnicity to capture public office. Politicians have perfected the art of appealing to and mobilising ethnic support during election campaigns. Political power in Kenya implies economic power. The perception, therefore, encouraged by the politicians, is that an ethnic group benefits economically when their man gets a political office. Appeals to own ethnic groups for

³⁹ Onyonyo P, 'Criminality in hate speech provision in the laws of Kenya, *Jurisprudential challenges Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges* on January 4 2023.

⁴⁰ Lwanga C, 'Analysis of Hate Speech in promoting inter-ethnic conflict in Nairobi and Uasin Gishu County after general elections in 2007/8 in Kenya' November 2022.

⁴¹ Barasa M, 'Re-defining Hate Speech Towards Reform Agenda the Discursive Use of Referential Strategies in Kenya's 2017 Pre-Election Campaigns,' vol 3, December 2018.

political support and attacks on opponents and their ethnic groups result in polarisation along ethnic lines. All these play out in the full glare of the media and once media reports go out, more of the citizens are sucked in and take sides. During the 2013 political elections, digital media platforms were widely used in Kenya. Citizen journalists found endless ways of expressing themselves through digital media. Virtually anybody could express themselves at any time and on any topic. This shows that without speech regulation, the consequences of hate speech will hit hard in this country.⁴²

Andrea Scheffler in his book, *The Inherent Danger of Hate Speech Legislation*, a case study from Rwanda and Kenya on the failure of a preventative measure. His paper analyses whether hate speech legislation is an appropriate response to the Rwandan genocide in 1994 and Kenyan post-election 2007/8 violence considering its objective to prevent harm emanating from speech. His main question is whether there are alternative means of curbing hate speech without jeopardising freedom of expression. He concludes that based on the analysis of Rwandan and Kenyan cases, hate speech legislation is not an appropriate tool to prevent harm emanating from hate speech. The empirically verifiable costs of the tool by far outweigh its putative benefit. He opines that we have several traditional as well as more innovative concepts that are more promising to effectively prevent harm emanating from speech which is the use of monitoring institutions, the government, and the international community to create awareness. My study does not fully appreciate his methods. This is because in Kenya a commission has already been established to regulate hate speech, and the commission in furtherance has guidelines on how hate speech should be monitored in the media, that is National Cohesion and Integration Commission.⁴³

Gomes, Keen, and Georgescu insist that it is important to look at the underlying causes of hate speech and address them. In Kenya, tribal politics is the major cause of hate speech and this is a result of ignorance by leaders to address fundamental issues like historical injustice that comprises land, inequality and regional imbalances, economic equality, and opportunities for all

⁴² Kimotho S, Njeri R, 'Digitized Ethnic Hate Speech: *Understanding Effects of Digital Media Hate Speech on Citizen Journalism in Kenya*, Vol 7, June 2016.

⁴³ Scheffler A, 'The Inherent Danger of Hate Speech Legislation', 2015.

among others. It is important to address instances of hate speech; and in this context, the instances of hate speech in Kenya are during the electioneering period.⁴⁴

The KNCHR in its report, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* affirms that there is a causal link that exists between incitement via hate speech and wanton violence.⁴⁵ While the reports do not purport that incitement is the only cause of the violence they do state that it was one of the main causes.⁴⁶ This report shows that due to the violence caused by incitement, there is sufficient cause to demand the immediate and conclusive prosecution of hate speech by the ODPP.⁴⁷ It is also noted that due to the lack of independence of the judiciary, the effective prosecution of these cases is hampered.⁴⁸

1.8 METHODOLOGY

<i>Research Question</i>	<i>What methodology have I used to arrive at the claims?</i>
1. What is the existing legal framework of hate speech in Kenya and the mandate of the National Cohesion and Integration Commission?	i) Doctrinal analysis Here a descriptive and detailed analysis of legal rules relying on primary sources will be used, that is cases and statutes.
2. How do South Africa and Kenya compare in terms of hate speech dynamics, and what insights can be drawn from their experiences concerning the United Nations Hate Speech Strategic Plan?	Both parts will take a qualitative approach with desk-based research. Here the study will use secondary sources mainly journal articles, reports, journals, and media reports.
3. How do we counter online ethnic hate speech in Kenya with a human rights approach?	The study will rely on secondary sources, mostly books and journal articles, to get recommendations on how to effectively improve the criminalisation of hate speech.

⁴⁴ Keen E, Georgescu M, Gomes R. *Bookmarks: A Manual for Combating Hate Speech Online through Human Rights Education* / Written and Edited by Ellie Keen, Mara Georgescu; Final Editing, Rui Gomes. (Gomes R, ed.). Council of Europe; 2014.

⁴⁵ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008.

⁴⁶ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008, para.391.

⁴⁷ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008, para.735.

⁴⁸ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008, para.695.

1.9 CONCLUSION

This dissertation concludes by exploring the pressing issue of hate speech in Kenya and highlighting the National Cohesion and Integration Commission's (NCIC) mandate as well as viable joint efforts with the Kenya National Commission on Human Rights. The study recognizes the prevalence of hate speech, particularly in political contexts, and the challenges posed by the existing legal framework and the potential of the media in combating hate speech in Kenya. By exploring the role of the NCIC, assessing its capacity, and considering public perceptions, the research aims to provide a comprehensive analysis of the feasibility, implications, and improvements associated with empowering the NCIC to oversee the criminalization of hate speech. The theoretical framework draws on the harm principle theory and the concept of democracy and public trust, emphasising the need for accountability in addressing hate speech. The literature review highlights existing gaps and insights from academic works, setting the stage for the subsequent chapters to delve deeper into legal frameworks, comparative analyses, and human rights approaches to counter online ethnic hate speech in Kenya. The next chapter analyses the legal framework of hate speech in Kenya and the mandate of the National Cohesion and Integration Commission.

CHAPTER TWO

AN ANALYSIS OF THE LEGAL FRAMEWORK OF HATE SPEECH AND THE MANDATE OF THE NATIONAL COHESION AND INTEGRATION COMMISSION

2.0 INTRODUCTION

This chapter delves into a comprehensive exploration of the legal framework of hate speech in Kenya by analysing provisions that define and criminalise hate speech as well as the various bodies in Kenya that sensitise people on hate speech and their roles. The bodies are the National Cohesion and Integration Commission, The Media Council of Kenya, and the Kenya National Commission on Human Rights as well as religious and educational institutions established to foster national unity and create awareness on the dangers of hate speech.

2.1 THE CONSTITUTION OF KENYA

Firstly, Kenya's legal framework on hate speech is principally governed by the Constitution of Kenya 2010, which gives the right to freedom of expression and does not extend to abuse of the right and bring about instances of hate speech.

The right to freedom of expression is enshrined in the Constitution of Kenya, Article 33 and it indicates that speech that amounts to propaganda to war, incitement to violence, and advocacy for hatred is, when proved through investigations that speech directly or indirectly can be graduated to hate speech which is punishable by Kenyan criminal law.⁴⁹ In addition to that, any ground of discrimination specified or contemplated in Article 27 (4) which provides that a person shall not be discriminated directly or indirectly on grounds such as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁵⁰

One of the challenges that come up when criminalising cases in Kenya including hate speech cases is that the court process is long besides being expensive to deploy.⁵¹ Hate speech cases can take too long to prosecute while the evidence could as well be hard to get by.⁵² Meanwhile, some lawyers put their argument on the lapse of time to prove the evidence after some years of

⁴⁹ Article 33, *Constitution of Kenya*, 2010.

⁵⁰ Article 27 (4), *Constitution of Kenya*, 2010.

⁵¹ Onyonyo P, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges', 2014, 15 [Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges](#) on January 4 2023.

⁵² Onyonyo P, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges', 2014, 13 [Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenge](#) on January 4 2023.

adjudication just to ask the court to terminate the case.⁵³ This emphasises the importance of thoroughly examining the mandate of the NCIC and assigning it a crucial oversight role, particularly when addressing cases related to hate speech. This approach is important in mitigating the accumulation of pending hate speech cases in the judicial system and ensuring the swift prosecution of such matters. Given the sensitive nature of these cases, delays may perpetuate societal imbalances, making it imperative to expedite the legal processes involved.

2.2 THE NATIONAL COHESION AND INTEGRATION ACT

The National Cohesion and Integration Act establishes the NCIC to address the instances of hate speech.⁵⁴ Section 13 of the NCIC defines hate speech as the use of threatening, abusive, or insulting words an offender faces fines of up to one million shillings, three years in jail, or both.⁵⁵ The section also states what is "ethnic hatred" and it is hatred directed towards a group of people and includes references to colour, race, nationality, or ethnic or national origins.⁵⁶

2.2.1 THE NATIONAL COHESION AND INTEGRATION COMMISSION; THE ROLE OF THE NATIONAL COHESION AND INTEGRATION COMMISSION

In this part of the chapter I will look at the various roles the institutions that sensitise hate speech have been empowered with, particularly those concerning hate speech. A key institution is the National Cohesion and Integration Commission, which plays the role of publishing the names of persons or institutions whose words or conduct may undermine or have undermined or contributed towards undermining good ethnic relations, or who are involved in ethnic discrimination or the propagation of ethnic hate.⁵⁷ This was witnessed when the NCIC chair, Samuel Kobia put up a 'wall of shame' that would include names of individuals who defy the code of conduct as well as national values during national elections.⁵⁸ Another function of the NCIC is, to propose, push for, and support legislative, administrative, or policy changes that have an impact on ethnic relations they have done this by publishing a lexicon of hate speech terms in Kenya the lexicon identifying hate speech terms and coded language that have the potential to incite violence between two or more ethnic communities in Kenya.⁵⁹ They also do acts that

⁵³ Onyonyo P, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges', 2014, 15 [Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges](#) on January 4 2023.

⁵⁴ Section 15, *National Cohesion and Integration Commission* 2008.

⁵⁵ Section 13, *National Cohesion and Integration Commission* 2008.

⁵⁶ Section 13, *National Cohesion and Integration Commission* 2008.

⁵⁷ Section 25, *National Cohesion and Integration Commission* 2008.

⁵⁸ [NCIC in the Media](#) on 12 December 2023.

⁵⁹ Hatelex: A Lexicon Of Hate Speech Terms In Kenya, pg 3-5, [A Lexicon of Hate Speech Terms In Kenya](#) on December 24 2023.

facilitate the efficient discharge of their functions such as carrying out a periodic review of the hate speech terms, updating the list and sharing it with the general public. The NCIC has been established under this Act.⁶⁰The Commission was established to combat hate speech by promoting the elimination of discrimination based on ethnicity or race. Its objectives include discouraging individuals, institutions, political parties, and associations from advocating discrimination, fostering tolerance, understanding, and acceptance of diversity, and encouraging the full participation of all ethnic communities in various aspects of national life. It is also tasked with planning, supervising, coordinating, and promoting educational programs to raise public awareness, investigating complaints of ethnic or racial discrimination, and making recommendations for remedial measures. Moreover, it addresses issues affecting ethnic and racial relations, identifies barriers hindering harmonious relations, and recommends strategies to overcome these challenges to the government and relevant authorities.⁶¹

2.2.2 THE 2020-2025 NATIONAL COHESION AND INTEGRATION COMMISSION STRATEGIC PLAN

The NCIC has continually performed the aforementioned functions by coming up with the July 2020- July 2025 strategic plan despite it being a work in progress.⁶² The purpose of the strategic plan is to monitor the progress of the institutional journey, and its framework through which the institution management can mitigate and address all the unidentified challenges and exploit strengths and opportunities.⁶³ Importantly it provides measurable parameters that you can utilise to measure progress and performance.⁶⁴ One of the objectives of the previous 2015-2020 strategic plan was to reduce hate speech perpetration with the post-election 2007/8 foregrounding the effects of hate speech.⁶⁵ The objective was partially met since hate speech occurrences are still dealt with to date. The Commission established a free toll-reporting number (15666) to gather information from the public on issues of hate speech.⁶⁶ NCIC in partnership with CCK and mobile service providers including Safaricom and Airtel developed guidelines on undesirable bulk political content/messages amongst other measures.⁶⁷ However, this was not

⁶⁰ Section 15(1), *National Cohesion and Integration Commission* 2008.

⁶¹ Section 25(2), *National Cohesion and Integration Commission* 2008.

⁶² National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-17.

⁶³ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 2-3.

⁶⁴ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-17.

⁶⁵ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-14.

⁶⁶ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-17.

⁶⁷ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-17.

enough thus they came up with two further strategic plans one of the challenges that hindered the realisation of their objectives was the inadequate legal and policy environment, although the Constitution provides for the NCI Act of 2008 with a clear mandate, its leadership has been hampered by legal and policy hurdles that consistently create delays as the integrated referral system in place is not as responsive to the expectations of Kenyans.⁶⁸ There is a need to establish an amiable environment so that the provisions of the NCI Act can be mainstreamed in most public and private sectors.⁶⁹ The NCI Act alteration is still a viable alternative to reinforce the legislative frameworks operationalising the process of bringing national cohesion and integration into public service practices daily, as demonstrated by performance contracting methodologies.⁷⁰ This issue could be solved by ensuring that the commission has an oversight role when it comes to matters of hate speech and works in collaboration with the KNCHR thereby strengthening interagency cooperation. Section 45 of the NCI Act provides that the commission may fail to hear complaints if they involve subject matter that would be more appropriately dealt with by a court or involve subject matter that has been adequately dealt with by a court.⁷¹ When such cases are forwarded to court the commission automatically loses track of the case and the case may not be dealt with expeditiously.

2.2.3 LODGING A COMPLAINT TO NATIONAL COHESION AND INTEGRATION COMMISSION

The process of lodging a complaint to the commission is as follows, the commission handles complaints of discrimination, harassment and hate speech. A person can complain to the commission through several avenues that is, visiting the NCIC offices in Nairobi, calling the official lines, 020 2585702, writing a letter through the postal address; P. O Box 7055-00100, Nairobi, texting through a short code number, 15666, sending an email to complain@cohesion.or.ke or info@cohesion.or.ke, filling an online complaint form on our website and through the NCIC's social media pages. Once the complaint is lodged, the commission processes and reviews it, and NCIC reviews the complaint to determine its validity and relevance.⁷² They assess whether it falls within their jurisdiction and if it aligns with their mandate to promote national unity and integration. There after they carry out an investigation, if

⁶⁸ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-16.

⁶⁹ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 17.

⁷⁰ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 17.

⁷¹ Section 46 (1) (b), (c), *National Cohesion and Integration Act 2008*.

⁷² [About](#) on 10 February 2024.

the complaint involves specific incidents or individuals, the NCIC initiates an investigation. They may gather evidence, interview relevant parties, and assess the impact of the alleged actions on social harmony.⁷³ They then give a resolution and outcomes based on their findings. The commission takes appropriate action some of the possible outcomes include: an apology if discrimination occurred, the NCIC may facilitate an apology from the responsible party, reinstatement in cases of unfair treatment, they may advocate for reinstatement to a job or position, compensation, the NCIC can recommend compensation for lost wages or damages, policy changes they may suggest changes to policies or practices to prevent future incidents and lastly promoting anti-discrimination policies the NCIC actively promotes awareness and implementation of anti-discrimination policies.⁷⁴ The recommendations given by the National Cohesion and Integration are binding after hearing the complaint and can also be referred to for conciliation.⁷⁵

2.3 THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ACT

The Kenya National Commission On Human Rights Act establishes the Kenya National Commission On Human Rights under section 13. The commission has been tasked with several functions which are, to promote respect for human rights and develop a culture of human rights in the Republic, promote the protection and observance of human rights in public and private institutions, monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discrimination under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated, on its initiative or based on complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs.⁷⁶

2.4 THE MEDIA COUNCIL ACT

The media in Kenya is governed by the Media Council Act and media practitioners are guided by the code of conduct in the Act. The Act is particular on hate speech and it prohibits quoting individuals making derogatory remarks based on ethnicity, race, creed, colour, and gender.⁷⁷ The

⁷³ Section 44, 45, 46,47,48,49 and 50, *National Cohesion and Integration Act 2008*.

⁷⁴ Section 52,53 and 55, *National Cohesion and Integration Act 2008*.

⁷⁵ Section 46 (3) and 49, *National Cohesion and Integration Act 2008*.

⁷⁶ Section 8, *Kenya National Commission on Human Rights Act, 2011*.

⁷⁷ Section 25, *Media Council Act, 2013*.

use of racist or negative ethnic terms is discouraged.⁷⁸ It states that consideration should be given to the potential impact on specific ethnic or racial groups and the overall population.⁷⁹ Additionally, keenness must be paid to changes in public attitudes regarding the acceptability of such terms.⁸⁰ Section 5 of the Act establishes the Media Council of Kenya and one of its functions is carrying out proper verification of facts of news related to ethnic disputes and it should be done in a manner which is conducive to maintaining national harmony and peace. The press being the fourth estate, acts as the watchdog and accountability tool to the remaining three arms of the government thus it should ensure hate speech sensitization through different media platforms.

2.5 AN EVALUATION OF THE STRENGTHS AND WEAKNESSES OF KENYA'S LEGAL FRAMEWORK ON HATE SPEECH

This part of the chapter will dissect the strengths and limitations of Kenya's legal framework on hate speech, evaluating its capacity to mitigate the adverse consequences of divisive rhetoric while safeguarding the principles of free expression. One of the strengths of our legal framework is clear legal definitions. An example is Article 33 of the Constitution of Kenya, which is unambiguous and gives limitations on the freedom of expression which can be understood by a layman.⁸¹ Even if the law makes progressive steps such as the establishment of the NCIC it needs to expand its role and give them more powers this creates a proactive environment for handling hate speech cases. Consequently, to reduce the occurrence of abuse of freedom of speech, institutions such as the NCIC have been established to address hate speech and ensure effective enforcement.⁸² However, the general design of the legal framework is not entirely effective and is faced with some challenges such as political instrumentalisation, where hate speech laws are subject to political manipulation or do not apply as strictly to the political class which is a major problem in our country.⁸³

⁷⁸ Section 25, *Media Council Act*, 2013.

⁷⁹ Section 25, *Media Council Act*, 2013.

⁸⁰ Section 25, *Media Council Act*, 2013.

⁸¹ Article 33, *Constitution of Kenya*, 2010.

⁸² Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

⁸³ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) > on 7 October 2023.

There is also little to no public awareness of the effects of hate speech in the country, which is attributed to many factors, the main one being finances.⁸⁴ To create awareness through campaigns and workshops, funds have to be allocated for such tasks and being a developing country it becomes difficult to do so with other problems such as starvation facing the country.⁸⁵ The NCIC should create awareness continually of this sensitive issue.

2.6 CONCLUSION

In conclusion, the analysis of the regulatory framework on hate speech lays down the groundwork to show that there is a need to enhance the role of the National Cohesion and Integration Commission. It should have an expanded oversight role meaning creating a proactive space for the commission in the realm of hate speech mitigation through collaboration with law enforcement authorities particularly, the Kenya Human Rights Commission to create a coordinated approach to curb hate speech and encourage dialogue on matters of hate speech in forums to create awareness and consequently foster national cohesion. My next chapter will carry out a comparative analysis of hate speech between Kenya and South Africa and give recommendations based on the United Nations Strategic Plan on hate speech.

⁸⁴ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) > on 7 October 2023.

⁸⁵ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) > on 7 October 2023.

CHAPTER 3

COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA AND KENYA; AND THE LESSONS FROM UNITED NATIONS HATE SPEECH STRATEGIC PLAN

3.0 INTRODUCTION

The preceding chapter of the paper looked into the legal framework of hate speech in Kenya. This chapter delves into a comparative analysis of hate speech law in Kenya and South Africa and highlights the legal framework of hate speech in South Africa. South Africa is best fit in this comparative study because South Africa and Kenya have similarities in their governance framework, firstly, both countries are regarded as British colonies and this speaks to their constitutional developments since they were both under British rule.⁸⁶ Thus they both have a common law legal system and they share similar historical circumstances under which their hate speech laws were formed. In South Africa, there was apartheid from 1948 to 1994 where there was racial segregation and discrimination. On the other hand, in Kenya, we experienced a crisis of violent 2007/8 post-election violence triggered by ethnic clashes. As much as the constitutional dynamics differ, they share several similarities, such as having a legal system based on English common law and an independent judiciary.⁸⁷ South Africa's future perspective on hate speech is promising in that constitutional recommendations are being followed and changing the perception of hate speech by strict criminalisation of the crime thus, a comparative analysis between the two countries can allow Kenya to borrow a few guidelines and implement them for efficient criminalisation of hate speech cases.

The final part of the chapter will look into the United Nations' Strategic plan on hate speech because it points to concrete ways in which the United Nations can play its part in addressing hate speech around the world while upholding freedom of opinion and expression, in collaboration with governments, civil society, the private sector and other partners.

The legal framework around hate speech is essential to maintaining the values of equality, diversity, and social cohesion in South Africa's ever-changing socio-political environment. As a country that has established its course through history, the legal safeguards against hate speech

⁸⁶ [Up to five years in prison for peaceful expression: South African parliament passes "hate speech" bill - ADF International](#) on 12 February 2024.

⁸⁷ Dialogue Africa Foundation, 2009. Kriegler Report- and Waki Report on 2007 Elections, on 7 October, pg no.64.

are evidence of its dedication to promoting diversity and opposing discrimination. To foster a community that cherishes unity despite its rich diversity, this overview will delve into the legal framework governing hate speech in South Africa, analysing key statutes and the larger context in which these laws function. In the subsequent sections, this paper will focus on the legislation that underpins hate speech in South Africa comparably with the legal framework in Kenya. That is the Constitution of the Republic of South Africa and so forth.

3.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

In Kenya, like South Africa, the right to freedom of expression is constitutionally protected, while placing limitations on speech that propagates war, violence, advocacy for hatred and incitement to cause harm, in line with Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁸⁸ Section 16 of the Constitution provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. However, this freedom is limited and does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁸⁹

3.2 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 4 OF 2000

Section 10 of the Act provides that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; and/or to promote or propagate hatred.⁹⁰ Publication of such expression is allowed if the expression is genuinely for purposes of artistic creativity, academic and scientific inquiry, fair and accurate reporting or such publication of any information, advertisement or notice is in the public interest.⁹¹ The Act provides that hate speech and harassment are not subject to determination of fairness, this way the legislation sends a clear message that such acts are strictly prohibited in South Africa.⁹² The equivalent of this Act in Kenya is the National Cohesion and Integration

⁸⁸ Article 19, *International Covenant on Civil and Political Rights*, 16 December 1966, General Assembly resolution 2200A (XXI).

⁸⁹ Section 16, *The Constitution of the Republic of South Africa*, 1996.

⁹⁰ Section 10, *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹¹ Section 10, *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹² Section 15, *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

Commission. Investigations under the Promotion of Equality and Prevention of Unfair Discrimination Act in South Africa are conducted by the South African Human Rights Commission and other relevant constitutional institutions. These institutions have the power to, assist complainants in instituting proceedings in an equality court, especially those who are disadvantaged, conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of the Act, unfair discrimination, hate speech, or harassment, request information from relevant components falling within the definition of the State or any person on measures related to achieving equality, legislative and executive actions, compliance with legislation, codes of practice, and programs.⁹³

The equality court, where proceedings are instituted under the Act, must hold an inquiry in a prescribed manner to determine whether unfair discrimination, hate speech, or harassment has taken place as alleged.⁹⁴ After the inquiry, the court may make various orders, including interim orders, declaratory orders, settlement orders, orders for damages, and other appropriate orders based on the circumstances. If a party to the proceedings is aggrieved by an order made by the equality court, they have the right to appeal against such order to the High Court or the Supreme Court of Appeal within the prescribed period and manner.⁹⁵

3.3 EQUALITY COURTS

The jurisdiction of equality courts in South Africa is outlined in the Promotion of Equality and Prevention of Unfair Discrimination Act. Equality courts have the authority to hear matters related to unfair discrimination, hate speech, and harassment. Some key points regarding the jurisdiction of equality courts include that equality courts have jurisdiction to hear matters concerning unfair discrimination, hate speech, or harassment, as alleged under the Act.⁹⁶ Equality courts are specialised courts designated to hear matters relating to unfair discrimination, hate speech and harassment; they are established under the Equality Act and work in collaboration with the South African Human Rights Commission and Commission on Gender Equality and are mandated, to assist complainants in taking their matters to the Equality Courts.⁹⁷

⁹³ Section 25 (2), *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹⁴ Section 21 (1), *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹⁵ Section 25 (2), 26 (6), *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹⁶ Section 21 (1), *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

⁹⁷ Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

The Equality courts were extended to the magistrate's courts primarily to bring access to justice to the marginalised and vulnerable citizens to assert their rights. The Equality Courts deal with complaints about unfair discrimination, hate speech or harassment.⁹⁸ The specific role they play concerning hate speech is to carry out investigations of the complaints lodged, institute proceedings and advise complainants.⁹⁹ These courts are central to the protection of the right to equality. The court will determine whether the right to equality has been violated, sanction offenders and provide relief to persons whose rights have been violated.¹⁰⁰ The courts have the power to include actions which offenders must perform to promote respect for and observance of the law and to deter further violations. Equality courts determine matters involving unfair discrimination, hate speech or harassment.¹⁰¹

In South Africa, all Magistrate District and High Courts have been designated as Equality courts to increase accessibility to courts in matters involving violations of the right to equality. In addition, these courts follow simplified processes to strengthen access to justice. The simplified processes mean that attorneys are unnecessary, allowing cases to be resolved easily and quickly. Court officials are trained to assist members of the public who wish to use the services of the Equality Court at no cost. This is one of the many recommendations that the Kenyan legal framework can borrow to enhance the hate speech criminalisation process by making it expeditious and inexpensive.¹⁰²

The courts can make orders that include payment of damages regarding impairment of dignity, pain and suffering, and emotional and psychological suffering. Orders may include a referral of the matter to the Director of Public Prosecution for the institution of criminal proceedings against the perpetrator of hate speech. The courts may also issue take-down notices, which are notices instructing internet and broadcasting service providers to remove content following the publication of unlawful content.¹⁰³

⁹⁸ [Justice/Equality Courts/Home](#) on 29 January 2024.

⁹⁹ [Justice/Equality Courts/Home](#) on 29 January 2024.

¹⁰⁰ Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

¹⁰¹ [Justice/Equality Courts/Home](#) on 29 January 2024.

¹⁰² Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

¹⁰³ Kaersvang D, 'Equality Courts In South Africa: Legal Access For The Poor', *Journal of International Institute*, 2008, 2-4, [Equality Courts in South Africa: Legal Access for the Poor](#) on 29 January 2024.

Equality courts working in collaboration with the South African Human Rights Commission (SAHRC) is also another approach that can be borrowed and applied in the Kenyan legal framework in a different dynamic, in terms of the Equality Act the South African Human Rights Commission is mandated, to assist complainants in taking their matters to the Equality Courts. The SAHRC may also be requested by Equality Courts to mediate equality-related matters. This shows that there is proactiveness in handling hate speech matters which should be implemented in Kenya which supports the statement of the problem in this paper, that is the NCIC having an expanded role which enables proactiveness and working with Kenya National and Human Rights Commission to curb instances of hate speech in this country.¹⁰⁴ In Kenya we have a constitutional and human rights court division which has unlimited original jurisdiction to determine all criminal and civil matters. The Court interprets the Constitution and hears cases concerning violation and/ or infringement of the Bill of Rights. In addition, it handles appeals emanating from Subordinate Courts (Magistrates Court, Kadhis Court, Tribunals, Court Martials, Small Claims Court).¹⁰⁵

3.4 SOUTH AFRICA HUMAN RIGHTS COMMISSION

Since its establishment by Constitutional Mandate, the South African Human Rights Commission has been mandated to raise awareness of human rights issues, monitor and assess the observance of human rights, offer education and training on human rights, address human rights violations and seek effective redress.¹⁰⁶ The Legal Service Unit (LSU) under SAHRC is responsible for providing quality legal services for the protection of human rights in South Africa. The LSU endeavours to discharge the protection mandate of the Commission through the efficient and effective investigation of complaints of human rights violations, the provision of quality legal advice and assistance, as well as seeking redress through the courts for victims of human rights violations.¹⁰⁷

¹⁰⁴ Institute for Democracy in South Africa, Political Information and Monitoring Service –South Africa, Equality Courts, at 13, June 22, 2005, www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1352 on 29 January 2024, Section 14, *South African Human Rights Commission Act* 2013.

¹⁰⁵ [High Court of Kenya – The Judiciary](#) on 12 February 2024.

¹⁰⁶ Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

¹⁰⁷ Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

In Kenya, the NCIC may decline to entertain a complaint if it is deemed frivolous, vexatious, misconceived, lacking in substance, or if it involves subject matter that would be more appropriately dealt with by a court, this means if a hate speech case subject matter is not best fit to be dealt with by the commission it is forwarded to the high court or magistrates courts, which are now ‘equality courts’ in South Africa.¹⁰⁸ The problem in forwarding the cases to our courts in Kenya is the broad range of cases handled in those courts. If this is compared to South Africa, the equality courts have limited jurisdiction to only three matters as provided for by the Promotion of Equality and Prevention of Unfair Discrimination Act which are unfair discrimination, hate speech and harassment.¹⁰⁹

The legal framework of hate speech in South Africa allows the equality courts to be proactive and flexible in handling hate speech cases because of the limited subject matter jurisdiction and it is clear that the subject matter of such issues has a considerable number of legal correspondences. This not only allows for swift resolution and expertise but also reduced overload which is a major problem in the Kenyan judicial system.¹¹⁰ The Judiciary gives a proposed solution to case backlog “...judiciary has put in place measures to effectively deal with the age-old problem of never-ending case backlogs in the courts. Among these measures include the recruitment of more Judicial Officers and Staff, building and refurbishment of more courts, and adoption of modern management practices...”.¹¹¹

The refurbishment of more courts suggests revamping the already existing courts and about hate speech this would mean limiting the subject matter jurisdiction of the High Court Constitutional and Human Rights division to sensitive matters such as hate speech or transforming the Judiciary’s relationship with other institutions of the justice chain and other stakeholders involved in court administration to better manage inter-dependencies and other matters of common interest that embraces the NCIC working together with the Kenya National Human Rights Commission alongside with the judiciary which would resemble the formation of ‘equality courts’ of South Africa.¹¹² The three entities should work together to create a proactive environment by organising more robust media literacy programmes and community engagement where they hold forums with local communities to promote cohesion. As much as the backlog of

¹⁰⁸ Section 45 (1) (b),(c), *National Cohesion and Integration Act* 2008.

¹⁰⁹ Section 1 (2), *The Promotion Of Equality And Prevention Of Unfair Discrimination Act*, 2000.

¹¹⁰ Amadi A, [Here is the Judiciary’s Solution to Case Backlog](#) on 12 February 2024.

¹¹¹ Amadi A, [Here is the Judiciary’s Solution to Case Backlog](#) on 12 February 2024.

¹¹² Judiciary Transformation Framework, 11, 2012-2016.

cases is a problem facing the legal system in Kenya in its entirety, it also affects hate speech cases and is a sensitive matter that causes large-scale violence and escalated ethnic suspicion if not addressed promptly as evidenced in the 2007/8 post-election violence.¹¹³ Thus, we should have an avenue that allows the NCIC to be proactive.

The functions aforementioned are quite similar to those of the NCIC in as much as it does not have a legal service unit. The differentiation comes in with their five strategic objectives, one of them being advancing the realisation of human rights by advocating for adherence of legislation with human rights-based approaches. This can be applied in Kenya if the NCIC works collaboratively with the Kenya National Human Rights Commission. A concerted effort enhances swift responses to hate speech cases and ensures enhanced protection of human rights. There is strength in numbers since the two commissions will reach more people by creating awareness.

3.5 FUTURE PERSPECTIVES AND RECOMMENDATIONS-UNITED NATIONS STRATEGY AND PLAN OF ACTION ON HATE SPEECH

South Africa is a party to international laws and agreements, which means that the country accepts all the legal obligations that are imposed through international instruments such as the Universal Declaration on Human Rights, adopted on 10 December 1948, which provides for protection against discrimination and also regulates hate speech recognising the need to eliminate unfair discrimination. The International Covenant on Civil and Political Rights, adopted on 16 December 1966, provides for the right to freedom of expression but restricts the right if it is hate speech. South Africa demonstrated its commitment to promote equality and regulate speech by enacting domestic laws such as the Equality Act. The Act provides for penalties for being found guilty of hate speech, which includes amongst others, offering an apology, a prohibitive interdict, or the payment of compensation.¹¹⁴

The example of Kenya offers important insights into the challenges associated with charging individuals with hate speech offences. There is evidence to suggest that hate speech charges and

¹¹³ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

¹¹⁴ Hate Speech Information Sheet, South African Human Rights Commission, [Hate Speech Information Sheet, South Africa](#) on 27 January 2024.

accusations are rarely brought to a successful conclusion. Cases are either abandoned, frequently for political reasons, or they linger on without resolution. When political leaders are prosecuted, instead of seeking true reform, the leadership capitalises on notoriety. This is evident in Kenya, where claims have been made that prosecutions for hate speech are merely being used to intimidate opposition parties. The opposition has also sought to have the definition of hate speech reviewed as a result of this. This has also led the opposition to seek a review of the interpretation of hate speech. The vulnerability of legislative remedies being used in fighting political battles is therefore significant. South Africa is also not immune to the law and legal institutions being used in political battles. The possibility of the proposed provisions on insults, which are broad and vaguely defined in hate speech legislation, falling prey to such battles should be considered.¹¹⁵

Curbing hate speech globally requires a comprehensive strategic plan involving legislative measures, education initiatives and public participation to strengthen social harmony. The United Nations came up with a strategic plan of action on hate speech with thirteen commitments that should be embraced by member states as well as globally. States are the primary duty bearers under this international legal framework, and hence the main responsibility to address and counter hate speech lies with State actors. The strategy provides an essential framework for how the United Nations, working with civil society organisations, media outlets, tech companies and social media platforms, can support and complement States in their efforts to address and counter hate speech.¹¹⁶

The commitments include monitoring and analysing hate speech, addressing root causes, drivers and actors of hate speech, engaging and supporting the victims of hate speech, convening relevant actors, engaging with new and traditional media, using technology, using education as a tool for addressing and countering hate speech, fostering peaceful, inclusive and just societies to address the root causes and drivers of hate speech, engaging in advocacy, developing guidance for external communications, leveraging partnerships, building the skills of United Nations staff and supporting Member States.¹¹⁷ These commitments should be included as roles of the NCIC

¹¹⁵ [South Africa and Kenya's Legislative Measures to Prevent Hate Speech – ACCORD](#) on 27 January 2024.

¹¹⁶ United Nations Strategy and Plan of Action, *Hate Speech Detailed Guidance on Implementation for United Nations Field Presences*, September 2020.

¹¹⁷ United Nations Strategy and Plan of Action.

and this would contribute to giving the commission proactiveness in turn addressing the challenges of hate speech cases.

The fourth commitment in the UN strategic plan states that key actors in the hate speech regulatory framework should convene and reframe hate speech laws where necessary to lessen the occurrence of the crime. This recommendation is closely related to the NCIC having an oversight role and working closely with the Kenya NCIC for effective implementation of the strategy and also to create opportunities for the two commissions to discuss the challenges and opportunities of addressing hate speech per the Strategy and international human rights law.¹¹⁸

The United Nations Strategy and Plan of Action on Hate Speech is included in this paper because it is closely related to the 2012-2026 Judiciary Transformation Framework. One of the proposed remedies for expeditious delivery of justice was aligning its performance to international best practices, especially in the area of human rights.¹¹⁹

3.6 CONCLUSION

In conclusion, while both acts aim to promote equality and prevent discrimination, the Promotion of Equality and Prevention of Unfair Discrimination Act specifically targets unfair discrimination, hate speech, and harassment through the establishment of equality courts. On the other hand, the National Cohesion and Integration Act has a broader focus on promoting national unity and social cohesion, with investigations involving a wider array of stakeholders to address issues that impact social harmony and integration. Despite having different approaches, the comparative study of the legislative frameworks addressing hate speech in Kenya and South Africa shows a shared commitment to promoting social harmony and safeguarding human rights. A model for addressing hate speech is South Africa's comprehensive legal system, which is based on its constitution, the Equality Act, and specialist Equality Courts. Kenya has constitutional protections, however, it would be advantageous to implement some measures, like special courts and collaborative human rights commissions. Both countries stand to benefit by coordinating their approaches with the global plan of action on hate speech put together by the UN, emphasising the value of investigation, addressing underlying causes, and involving a

¹¹⁸ United Nations Strategy and Plan of Action.

¹¹⁹ Judiciary Transformation Framework, 11, 2012-2016.

variety of actors. The next chapter will focus on a human rights approach to countering online ethnic hate speech in Kenya.

CHAPTER FOUR

A HUMAN RIGHTS APPROACH TO COUNTERING ONLINE ETHNIC HATE SPEECH IN KENYA

4.0 INTRODUCTION

The preceding chapter of the paper looked into a comparative analysis of hate speech law in Kenya and South Africa. It highlighted the legal framework of hate speech in South Africa. This chapter delves into countering online ethnic hate speech in Kenya. The purpose of carrying out this study is because we live in an evolving world and technological advancements play a big role in the dissemination of information. The media is a key player when it comes to the circulation of information. Kenya's National Action Plan Against Hate Speech gives statistical analysis that "...in the years following the 2007 violence, and with the establishment of so many social media platforms, hate speech shifted from mainstream to online media.¹²⁰ In the 2013 general elections, large numbers of threats and incitements to violence were reported on social media networks. Hootsuite 2021 reports 59.24 million mobile connections and more than 11 million social media users in Kenya in January 2021. This number, about 20% of the entire population, had grown by 2.2 million (+25%) between 2020 and 2021. Despite uniting and connecting people on so many grounds, social media platforms are also contributing to spreading suspicion, disseminating inflammatory statements and spreading hate speech. 54% of the hate speech and related offences cases pending before court in Kenya in 2022 were perpetrated on social media. The perpetrators in these cases include politicians, journalists, bloggers, public officials, artists, and religious leaders among others. Some of the propagandists who use hate speech are used as instruments for politicians and their parties."¹²¹ The above statistics bring to light the developed unchecked growth of online hate speech simultaneously with the penetration of digitalisation in the country, to carry out a study of online ethnic hate speech in Kenya. The study is particular to online ethnic hate speech as opposed to other forms of hate speech such as privately expressed forms because of the numbers, 54% of hate speech cases in 2022 were perpetrated on social media thus online ethnic hate speech carries a huge percentage of hate speech cases generally and if looked into then hate speech cases will be rectified and

¹²⁰ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

¹²¹ Kenya's National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

consequently the numbers will be lowered.

4.1 MEDIA AS A WATCHDOG

The media has the potential to combat hate speech in Kenya, the National Cohesion and Integration Commission sought to build the capacity of the media and the criminal justice system in hate speech management by developing the ‘Media guideline on hate speech’ and the ‘training manual for investigators and prosecutors’.¹²² A key recommendation given under Article 19 Global Campaign for Free Expression was that the media fulfilling their moral and social responsibilities, private media organisations should combat discrimination by, among other things, avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance and reporting on different groups or communities and allowing their members to speak to be heard in a way that promotes a better understanding of them.¹²³

The Media Council of Kenya is an independent national institution established by the Media Council Act, No. 20 of 2013 to set media standards and ensure compliance with those standards as set out in Article 34(5), Constitution of Kenya.¹²⁴ Media independence means the press does not face political interference or media capture. Political and legal interference of the media in Kenya has a debilitating impact to the extent that this undermines the capacity of the media to appropriately and effectively fulfil their functions in building democratic societies and protecting and defending the basic human rights of the people.¹²⁵ According to Guess, Munger, Nagler, and Tucke, the public has faith in the media because it can serve as a watchdog for the interests of the public".¹²⁶ Democracy is distinguished from other political systems by the accountability of those in power, and to the extent that the media serves as a tool to ensure day-to-day accountability, it aids in making democracy real and effective. The media has been implicated in the notorious 1994 genocide in Rwanda and the 2007 post-election violence in Kenya.¹²⁷ Particularly, radio

¹²² Kenya’s National Action Plan Against Hate Speech, [Kenya's National Action Plan Against Hate Speech](#) on 7 October 2023.

¹²³ Article 19: Global Campaign For Free Expression, Free Word Centre, [kenya-commentary-on-the-regulation-of-hate-speech-.pdf](#).

¹²⁴ Article 34(5), *Constitution of Kenya* 2010.

¹²⁵ Omolo P, ‘Press Freedom and the Role of the Media in Kenya’, Michigan State University, *Africa Media Review* Vol. 7 No. 3 1993, pg 29 [Press Freedom and the Role of the Media](#) on 25 February 2024.

¹²⁶ Guess A, Munger K, Nagler J & Tucker J. (2019). How accurate are survey responses on social media and politics? *Political Communication*, 34-56.

¹²⁷ Mullen, Gary A. ‘Genocide and the Politics of Identity: Rwanda through the lens of Adorno’, *Philosophy Today* 2006, 170-175.

stations were held accountable for exacerbating the conflicts by disseminating hate messages and misinformation, leading to violence, casualties, and mass displacement.¹²⁸ While the media has the potential to facilitate dialogue and mutual understanding, it can also escalate social tensions through stereotyping and inaccurate reporting. The media can propagate hate speech or statements rooted in racial or ethnic discrimination, which is undesirable and potentially intolerable in an inclusive society.¹²⁹ Thus media guidelines provided for by the National Cohesion and Integration Commission should be adhered to, to reduce occurrences of hate speech.¹³⁰

4.2 THE PROBLEM OF ONLINE HATE SPEECH IN KENYA

Online hate speech in Kenya has become prevalent over the years due to fast digitalization with little digital literacy in the country and the role of politicians in driving ethnic hate speech. The subsections below will analyse the issues mentioned above and give recommendations.

4.2.1 DIGITAL TRANSFORMATION WITHIN A CULTURALLY DIVERSE COUNTRY

With the evolution of technology digital literacy has become a challenge in many countries including Kenya. It is a necessity that influences our daily lives. It relates to understanding technology and using it appropriately meaning creating or using information beneficially and not for purposes that would put society in harm's way.¹³¹ Kenya's estimated population is at 55.1 million with at least 42 different Kenyan ethnic groups. Kenya has incredible ethnic diversity. More than half of the country's ethnic groups have Bantu origins. The largest ethnic group in Kenya is the Kikuyu people.¹³²

At the same time, Kenya is undergoing digitalisation at a fast rate. Kenya is the East African regional centre for Information and Communications Technology (ICT), according to the U.S. International Trade Administration.¹³³ The nation excels in several areas, including "mobile

¹²⁸ Mullen, Gary A. 'Genocide and the Politics of Identity: Rwanda through the lens of Adorno', *Philosophy Today* 2006, 170-175.

¹²⁹ Odera E, 'Radio And Hate Speech: A Comparative Study of Kenya (2007 Pev) and the 1994 Rwanda Genocide', University of Nairobi, 2015, pg 15-16 [Radio and Hate Speech a comparative study of Kenya PEV and Rwanda genocide](#) on 24 February 2024.

¹³⁰ National Cohesion and Integration Commission, *Final draft*, 2015-2020, 12-13.

¹³¹ [Importance of Digital Literacy \[2024 Guide\]](#) on 25 February 2024.

¹³² [Republic of Kenya, cultural landscape, EAC article](#) on 25 February 2024.

¹³³ Kenya - Information, Communications and Technology (ICT)," U.S. International Trade Administration, <https://www.trade.gov/country-commercial-guides/kenya-informationcommunications-and-technology-ict> on 25 February 2024.

money, mobile banking, FinTech services, value-added services (VAS), broadband connectivity, and general ICT infrastructure. The country's ICT sector is set to account for up to 7% of the country's GDP as of 2022 through IT-enabled services. Internet access has continued to spur economic growth which contributed to the government's development of the Digital Economy Blueprint, a framework to improve Kenya's ability to leapfrog economic growth in the region.¹³⁴ Mobile phone and internet adoption in Kenya are estimated at 133.1% and 42.0% of the total population, respectively.¹³⁵ About three-quarters of Kenyan citizens have access to internet services. As of the close of 2022, the Communications Authority of Kenya (CAK) reported 47.7 million mobile data or internet subscriptions in the country, with 66.8% utilising mobile broadband.¹³⁶ Over the past decade, Kenya's telecommunications sector has experienced substantial double-digit growth, characterised by widespread 3G and 4G LTE coverage. Furthermore, the country boasts the fourteenth-fastest mobile internet speed globally, clocking in at 13.7 megabits per second.¹³⁷

With the above statistics digitalization with little digital literacy is harmful and these are viable platforms for the spread of online ethnic hate speech. Digital literacy programs have been organised in the country however, the awareness programs compared to the levels of media advancement are incomparable. UNESCO supported Kenya's National Coalition on Freedom of Expression and Content Moderation in organising a Training-of-Trainers workshop for its members. The workshop aimed to deepen participants' competencies in Media and Information Literacy to address disinformation and hate speech on digital platforms.¹³⁸ More robust programmes should be carried out to create awareness of the positive use of media platforms as well as show citizens that it is an avenue for job opportunities.

¹³⁴ Kenya - Information, Communications and Technology (ICT)," U.S. International Trade Administration, <https://www.trade.gov/country-commercial-guides/kenya-informationcommunications-and-technology-ict> on 25 February 2024.

¹³⁵ Kemp S, 'Digital 2022: Kenya', [Digital 2022: Kenya — DataReportal – Global Digital Insights](#) on 25 February 2025.

¹³⁶ Kenya - Information, Communications and Technology (ICT)," U.S. International Trade Administration, <https://www.trade.gov/country-commercial-guides/kenya-informationcommunications-and-technology-ict> on 25 February 2024.

¹³⁷ Kuo L, 'Kenya has faster mobile internet speeds than the US' [Kenya has faster mobile internet speeds than the United States \(qz.com\)](#) on 25 February 2024.

¹³⁸ [Kenyan Coalition Members trained on Media and Information Literacy for Digital Peace Building | UNESCO](#) on 25 February 2024.

4.2.2 THE ROLE OF POLITICIANS IN DRIVING ETHNIC HATE SPEECH

The first chapter of the paper gives a comprehensive analysis of this. Hate speech is not a new phenomenon according to (Basse, 2016). The increase in hate speech is a result of the availability and access to social media platforms where individuals can post information online and hide behind anonymity. There are different types of hate speech perpetrators. There are offenders by conviction and activists/instrumentalists which he described as people with clear intention of engaging in hate speech. On the other hand, incidentals may post information without thinking about the consequences. Still, when legal or social repercussions arise, they tend to be shocked because they didn't intend to engage in hate speech (McGonagle 2016.) Most hate speech cases in Kenya have been dropped for lack of evidence or offenders especially the politicians have received lenient punishments like public apology. The political class are a notorious producer of hate speech, however, they know how to get away with their act.¹³⁹ The term “politicians” encompasses within the scope of this study, all the six elective posts provided for by the Constitution of Kenya that is the President, Governor, Senator, Women Representative, Member of the National Assembly (MP) and Member of the County Assembly (MCA). In Kenya, people have echoed sentiments by various human rights organisations that the 2007/8 Post Election Violence was not random, as many had initially thought, but rather, well-choreographed with deliberate hate speech propaganda campaigns being launched several months before. Indeed, in an October 2007 report entitled ‘*Still Behaving Badly*’, by the state-funded Kenya National Commission on Human Rights, hate speech by politicians was identified as a major concern in the lead-up to the 2007 elections.¹⁴⁰ As Rusesabagina (2006) observes, hate speech is normally decimated very slowly into the public consciousness – stripping the humanity of an entire group takes time. I argue that the inaction over hate speech has encouraged a culture of impunity in Kenya because leaders know that they can get away with it.¹⁴¹

A lack of accountability, according to Agatha Ndonga, the Head of the Kenya Office at the International Center for Transitional Justice (ICTJ) drives and perpetuates the incitement of

¹³⁹ Nekesa D, Ngigi S, *Understanding Hate Speech in Kenya*, vol 70, 2018.

¹⁴⁰ Kiai M, *Hate Speech and the Political Crisis in Kenya*. KNCHR, Kenya National Commission on Human Rights. 2007. ‘*Still Behaving Badly*’: Second Periodic Report of the Election Monitoring Project. Nairobi: Kenya.

¹⁴¹ Muluka S, Kibeti B ‘Hate Speech: A Derivative Of Kenyan Politics?’ *International Journal of Communication and Public Relations*, 2017.

ethnic hatred within the political system. “[The politicians] are not afraid, because they know that nothing will happen to them. That’s the impunity.”¹⁴² In *Johnstone Muthama & 8 others vs Inspector General of Police & 2 others*, the High Court upheld the rejection of bail applications by six politicians accused of hate speech because, in the Court’s view, “the Petitioners are accused of conduct which threatens the national fabric.”¹⁴³ The Petitioners, in their way, have access to thousands of Kenyans. They are politicians “...when they speak or walk, there are thousands of people who admire or follow them, perhaps for all the wrong reasons...” This emphasis aligns with the emerging global consensus, as expressed by United Nations experts, civil society actors, and other regional legal institutions, that politicians and other influential public figures have a particular responsibility to refrain from and denounce hate speech.¹⁴⁴

4.3 CONCLUSION

One of the six recommendations given by the Yale Law School Lowenstein Clinic in the online ethnic hate speech in Kenya report is regulatory independence and strengthening. There should be improved coordination among the various state and non-state actors to efficiently combat hate speech, including online hate speech in Kenya. The jurisdiction of NCIC should be amended and broadened, or a new agency should be created that oversees all forms of hate speech in Kenya.¹⁴⁵ This means that the role of the National Cohesion and Integration Commission should enable proactiveness in dealing with hate speech in Kenya. Politicians and political operatives who use ethnic-based hate speech—and who employ others to do so on their behalf—for personal gain should be held to account. Codes of conduct should be implemented for politicians, with an emphasis on the communication of national unity.

¹⁴² Yale Law School Lowenstein Clinic, “A Human Rights a response To Online Ethnic Hate Speech In Kenya”, 2023, [Report: A human rights response to online ethnic hate speech in Kenya \(altadvisory.africa\)](#) on 7 October 2023.

¹⁴³ *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR.

¹⁴⁴ UN Office of the High Commissioner for Human Rights, Statement by United Nations High Commissioner for Human Rights, Michelle Bachelet at the 13th Session of the Forum on Minority Issues: Hate speech, social media and minorities, Nov. 19, 2020, Yale Law School Lowenstein Clinic, “A Human Rights a response To Online Ethnic Hate Speech In Kenya”, 2023, [Report: A human rights response to online ethnic hate speech in Kenya \(altadvisory.africa\)](#) on 7 October 2023.

¹⁴⁵ Yale Law School Lowenstein Clinic, “A Human Rights a response To Online Ethnic Hate Speech In Kenya”, 2023, [Report: A human rights response to online ethnic hate speech in Kenya \(altadvisory.africa\)](#) pg 78, on 7 October 2023.

CHAPTER FIVE

5.0 RESTATEMENT OF THE PROBLEM

This dissertation explores whether the National Cohesion and Integration Commission (NCIC) and the Kenya National Commission on Human Rights should work together to oversee the criminalisation of hate speech. The inquiry revolves around the existing legal frameworks governing these commissions, their organisational structures, and the potential impact on accountability mechanisms in addressing hate speech. The study aims to explore the historical role of the NCIC, assess its capacity for expanded responsibilities, and consider public perceptions regarding the proposed collaboration. By delving into these aspects, the dissertation seeks to provide a comprehensive analysis of the feasibility, implications, and improvements associated with empowering the NCIC with oversight responsibilities in the context of hate speech regulation.

5.1 A BREAKDOWN OF THE DISSERTATION CHAPTERS

Chapter One

In this chapter, the paper provided a background to the study, outlined the context and significance of examining hate speech regulation in Kenya. The paper presented the statement of the problem, research objectives, and research questions that guided this investigation. Additionally, the paper proposed a hypothesis and justified the importance of this study. Mapped on the Harm Principle Theory and Democracy & Public Trust Theories, the paper established the theoretical framework that underpins the analysis. Furthermore, the paper conducted a literature review and explored existing scholarly work on hate speech regulation in Kenya.

Chapter Two

An analysis of the legal framework of hate speech and the mandate of the National Cohesion and Integration Commission This chapter delved into a comprehensive exploration of the legal framework governing hate speech in Kenya. The paper analysed the provisions that define and criminalise hate speech, focusing on the roles of key institutions such as the National Cohesion and Integration Commission, the Media Council of Kenya, and the Kenya National Commission on Human Rights. By examining the Constitution of Kenya and relevant legislation, the paper assessed the strengths and weaknesses of Kenya's legal framework on hate speech.

Chapter Three

Comparative Analysis Between South Africa and Kenya; and the Lessons from United Nations Hate Speech Strategic Plan In this chapter, the paper conducted a comparative analysis of hate speech regulation between Kenya and South Africa. The paper explored the constitutional and legislative frameworks in both countries, with a particular focus on the Promotion of Equality and Prevention of Unfair Discrimination Act in South Africa. Drawing insights from the United Nations Hate Speech Strategic Plan, the paper identified key lessons and recommendations for enhancing hate speech regulation in Kenya.

Chapter Four

A Human Rights Approach to Countering Online Ethnic Hate Speech in Kenya This chapter shifts the focus to the problem of online ethnic hate speech in Kenya. The paper examined the digital transformation within Kenya's culturally diverse society and the role of politicians in driving ethnic hate speech online. By considering the media as a watchdog, the paper explored strategies for countering online hate speech from a human rights perspective. The chapter is concluded with insights on mitigating the challenges posed by online hate speech and fostering national cohesion in Kenya.

5.2 CONCLUSION

In conclusion, the findings of my research underscore the pressing need for effective strategies to address hate speech in Kenya. By examining the legal framework, institutional mandates, and comparative insights from South Africa and the United Nations Hate Speech Strategic Plan, I have highlighted the complexities and challenges in regulating hate speech while upholding freedom of expression. The analysis of online ethnic hate speech further emphasises the importance of a human rights approach and proactive measures to counter divisive rhetoric in the digital sphere. Moving forward, collaborative efforts among enforcement authorities, civil society, and media watchdogs are essential to foster national cohesion and combat the detrimental effects of hate speech in Kenya.

5.3 RECOMMENDATIONS

1. **Strengthen Regulatory Independence:** Enhance coordination among state and non-state actors to efficiently combat hate speech, including online hate speech in Kenya. Consider amending and broadening the jurisdiction of the National Cohesion and Integration Commission

(NCIC) or establishing a new agency dedicated to overseeing all forms of hate speech in the country.

2. **Accountability for Politicians:** Hold politicians and political operatives accountable for using ethnic-based hate speech for personal gain. Implement codes of conduct for politicians with a strong emphasis on promoting national unity through responsible communication.

3. **Enhance Enforcement and Dialogue:** Encourage enforcement authorities, particularly the Kenya Human Rights Commission, to adopt a coordinated approach to curb hate speech and facilitate dialogue on hate speech issues. By creating awareness and fostering national cohesion through open forums, a more proactive stance can be taken against hate speech in Kenya.

4. **Media Monitoring and Awareness:** Utilise the media as a watchdog to monitor and counter online ethnic hate speech. Promote responsible journalism practices and raise awareness among media professionals about the dangers of spreading hate speech. Encouraging ethical reporting and fact-checking can help mitigate the dissemination of inflammatory content and contribute to a more informed and cohesive society.

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