

FACTUAL COMMENTS ON THE PETITION TO THE PRESIDENT BY MEDIA OWNERS ON THE KENYA COMMUNICATIONS (AMENDMENT) BILL, 2008

There has been a lot of concern about the Communications Amendment Bill 2008. It is unfortunate that the reality has been blocked out. Please find a sober analysis that clearly shows that the position taken by Media Owners has been misleading the public.



| PETITION BY MEDIA PRACTITIONERS | CCK AMENDMENT BILL AND REALITY |
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| <p>1. The Bill is a serious assault on Press Freedom. If assented to, it will reverse most of the democratic gains made since the 1990's on Press Freedom.</p> <p>2. The Bill confers on CCK and by extension, the Minister for Information the power to control <u>contents</u> i.e. what Kenyan will watch on television, what they will read in the newspapers and what they will listen to on Radio stations. This control will be via the power to "issue guidelines for programming codes" and the wide powers given to the Minister under Sec. 5A to issue to the Commission "policy guidelines of a general nature" Ambiguities and generalities such as "good taste and standards" in section 46 l can be used to further control the media.</p> <p>The Bill confers on the Minister excessive powers to grant, refuse or cancel Broadcasting Licences on the basis inter-alia, of non fulfillment of "such other conditions as may be prescribed" by the Minister.</p> | <p>1. This is a general conclusion at the outset of the memorandum and is NOT based on any evidence from the BILL. There is already a Media Act that protects Press Freedom. The 2008 ACT does not contradict the MEDIA Act and is NOT a MEDIA BILL.</p> <p>It is important to note that the Bill mostly deals with Information and Communication Technology (ICT) issues and that broadcasting is only a small part of it (the Bill).</p> <p>2. Basically in section 46H, it states, "The Commission shall have the power to set standards for the manner, time and type of programmes to be broadcast by licensees under this act.</p> <ul style="list-style-type: none"> a) Prescribe programming code b) Review the programming code at least once every two years c) Prescribe a watershed period programming when large numbers of children are likely to be watching programmes <p>Provided that the programming code referred to herein shall not apply where a licensee is a member of a body which has proved to the satisfaction of the commission that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms. . ."</p> <p>THE BILL EMPOWERS CCK TO ESTABLISH STANDARDS (GUIDELINES) FOR CONTENT REGULATION, AND TO DO SO, ONLY IN THE ABSENCE OF THE MEDIA DOING SO THROUGH A CREDIBLE</p> |

MEDIA SELF-REGULATION.

THIS IS ACTUALLY A FALLBACK PROVISION WHICH SHOULD BE READ WITH THE MEDIA ACT. THE ACT DOES NOT EMPOWER THE CCK TO TELL MEDIA WHAT TO AIR BUT WHAT STANDARDS TO BE ADHERED TO – e.g when pornography can be shown etc. This is similar to the regulations in the USA, UK, CANADA and many other democratic nations.

THE BILL DOES NOT EMPOWER CCK TO CENSOR OR INTERFERE WITH THE CONTENT OF NEWS, SHOWS ETC BUT TO SET STANDARDS FOR THE WHOLE INDUSTRY.

THE BILL COVERS ONLY BROADCASTING AND NOT NEWSPAPERS and does NOT regulate reporters, photographers etc, nor interfere with journalism practices.,

In comparison, In the USA, the Federal Communication Commission (FCC) has the power to license, short-license, withhold licence, fine, revoke, renew broadcast licenses and issue construction permits.

On the issue of Good Taste and Standards, in the USA, the Federal Communication Commission (FCC) sets standards including language to be used on air.

The FCC for example Bars individuals from uttering obscene or indecent language over a broadcast station.

3. The Commission lacks independence. The trend is to require Parliamentary vetting/approval of Commissioners of important Public Institutions. All the Commissioners will be appointees of the President and the Minister.

3. In the Bill, Board members (Commissioners) are appointed by the Minister while the Chairman is appointed by the President.

In Kenya, as per the Constitution and regulations, all board appointments are by the President and Ministers and gazetted.

In comparison, In the USA, Federal Communication Commission's five commissioners are appointed by the President. The chairman is also appointed by the President and then all choices approved by the Senate.

However in the UK, the Minister appoints all Commissioners with no reference to Parliament.

4. Although the Bill is styled as an Amendment to the CCK Act, the Bill is in truth 100% a new Statute. In

4. This does not challenge the content of the new statute but is a general argument to stop the bill from becoming law.

terms of design, it should have acknowledged that it is a new Statute which should have been enacted as such and repealed the CCK Act by way of its replacement.

Further, the Bill converges and regulate (controls!) under one statute diverse matters of telecommunications, postal services, broadcasting, information technologies and cyber-crimes. This makes the law clumsy and convoluted.

In the very least, Broadcasting Provisions in the Bill should be expunged and enacted in a separate Statute.

6. The draconian powers to enter Media Houses, search, seize and take away equipment are unacceptable in a democratic state in this day and age. It is little comfort that declaration of a state of emergency is made a condition.

7. The issue of Cross Media Ownership is unclear. Part VI C on "fair competition and equal treatment" is a window for prohibition of Cross Media Ownership. This is a matter best left to market forces.

In the USA's FCC and the UK's OFCOM, all the telecommunications, postal services, ICT, broadcasting are brought under one law and regulatory agency. This is the trend worldwide. **In actual fact, in France and Germany, even the railway is included in their equivalent law.**

In the USA, the FCC requires **broadcasters to afford equal opportunity** to candidates seeking political offices, and includes provisions for rebuttal of controversial viewpoints under the fairness doctrine.

6. This point is outside the scope of the amendment bill of 2008 because it is a part of the 1998 ACT and **IS ALREADY LAW**, which was itself not amended. The President can only deal with the law before him. **He cannot legally refer this issue to Parliament because it is not before him.**

Media are **misleading** in their reportage that this is a new inclusion in the Bill and it is **NOT**.

In comparisons, the United States has an EMERGENCY ACT which includes the emergency war powers of the President and the powers conferred on him/her during times of emergency. This includes powers to **restrict over-the-air reception** devices.

Since independence, under sections 79, 83 & 85 of the Kenyan Constitution as well as the Preservation of Public Security ACT, measures can be taken which derogate from Freedom of Expression to ensure the interests of defence, public safety, public order, public morality or public health. **This is the case in ALL countries in the world.**

7. There is no media market in the world which is left entirely to market forces. There is always regulation to control monopoly and create a competitive environment. It should also be noted that "Fair competition and equal treatment" covers all the players including ICT players, telecoms etc and should be read in conjunction with our monopoly laws.

The punitive, harsh and excessive punishments are not commensurate with the offences and are intended as deterrents to journalists and media houses.

The signal Distribution provisions need re-thinking. It should not for example apply to existing players.

8. The Bill seeks to control NOT to regulate the media.

9. The Media concedes that it is unacceptable for a media house to incite animosity or hatred between communities or spread pornography or other ideals which go against public good or morality. These concerns ought to be addressed through the Media Council, a statutory body which has now commenced discharging its statutory duties.

Executive control of the media and media contents is not the way to go. Public interest will not be served. This is well demonstrated by looking back to the one party state and the sole state controlled media house.

The Bill does NOT contain any punitive measures that would infringe on Freedom of Expression but rather empowers CCK and stakeholders to set guidelines to assure fair reportage. The American FCC's regulations are much more stringent and punitive (see number 9 below).

The challenge we have is that we are operating in an environment where monopolies are currently existing.

In the UK, the OFCOM (Office of Communication) has more definitive provisions to deal with this matter.

8. This is an opinion of media owners

9. This is exactly what the 2008 Bill seeks to do. As shown in No.2 above, the commission's programming code works in conjunction with that of a self-regulating body (such as the Media Council), with the media body getting priority. This section is therefore as stated earlier a fallback provision.

Specifically, Section 46H of the 2008 Amendment bill states: "...Provided that the programming code referred herein shall not apply to where a licensee is a member of a body which has which has proved to the satisfaction of the Commission that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms and provided further that such programming code and mechanisms have been filed with and accepted by the Commission."

In other countries such as the USA, the FCC issues guidelines on decency and has a programming code highlighting what type of programs can be shown at what times of day for the protection of the innocence of children and community values.

The FCC bars individuals from uttering obscene or indecent language over a broadcast station: Title V, entitled "Obscenity and Violence", outlines regulations regarding obscene programming on cable television, the scrambling of cable channels for nonsubscribers, the scrambling of sexually explicit adult video service programming, the cable operators' refusal to carry certain programs, coercion and enticement of minors, and online family empowerment, including a requirement for the manufacture of televisions that block programs using V-chip

technology. Title V also gives a clarification of the current laws regarding communication

IF the violator of the terms and conditions of any Federal Communications Commission (FCC) license, permit, or certificate is either a broadcast station licensee or permittee or an applicant for a broadcast license, permit, or certificate, and such violator is **determined by the FCC to have broadcast obscene, indecent, or profane language, the amount of forfeiture penalty shall not exceed \$325,000 for each violation or day of such violation, to a maximum of \$3 million for any single act or failure to act.” (22.75 million Kshs – 2.1 billion Kshs)**

This Bill entrenches PRESS FREEDOM by ensuring BROADCASTERS are empowered to work within an agreed framework so that no one can use any other law to harass broadcasters. Remember, the Bill only deals with BROADCASTING and is NOT a MEDIA BILL as the media have been misleading the public.

10. The President is requested to take into account the environment in which the Bill sailed through Parliament, at a time when a majority of the M.P.s harboured hostility and grudges against the media on account of the principled position taken by the media on their refusal to pay taxes on their allowances.

The President is requested to look beyond the exigencies of the moment and take into account the long term interests of the Kenyan People and State.

11. Given the need for the design of the entire Bill to be re-worked and major amendments effected including the removal of the Broadcasting provisions from the Bill in order to have these in a separate statute, Your Excellency is requested to decline to assent to the Bill and to instead

10. Factually, Parliament passed the Bill and the Bill has overwhelming support of the Supreme Law Making Organ of the country. Lobbying against a Bill should traditionally be done before and NOT after the Bill has gone through Parliament.

THIS IS THE THIRD TIME IN FOUR YEARS, PARLIAMENT HAS CONSIDERED THE BILL AND THIS BILL WAS TABLED AFTER NUMEROUS CONSULTATIONS WITH ALL ICT and BROADCASTING STAKEHOLDERS.

direct consultations and consensus before the Bill is re-introduced in Parliament for debate. It is inappropriate to simply remit the bill with suggested amendments. Consultations and consensus on the entire Bill are crucial.

OVERALL CONCLUSION:

There are entrenched business interests which have taken root because of lack of a regulatory framework. For this reason, there will be aggressive resistance at any attempt at legislation that will change the status quo.

Further this has been demonstrated by the fact that the media has not been able to effect self-regulation.

The developed democracies in the world have similar Bills that regulate broadcasting and this is not a Kenyan imposition.

It is unfortunate that majority of Media have “**black**ed” out any dissenting viewpoints in what has been their **dictatorial** way of curtailing Freedom of Expression. Media have also resorted to **demonizing** anyone who appears to support the Bill in a clear show of **biased** and **rogue** journalism.

In a democracy, it is VITAL for there to be checks and balances to protect society from a **ROGUE GOVERNMENT**, a **ROGUE PARLIAMENT**, a **ROGUE JUDICIARY** and a **ROGUE MEDIA**.

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