

Paper laid by the Chair of the
Energy, Communication & Information
to the Table of the House on
05/11/2013

**THE KENYA INFORMATION COMMUNICATION (AMENDMENT)
BILL, 2013 IS CONSTITUTIONAL.**

There has been an uproar in the media fraternity over the passage of the Kenya Information Communication (Amendment), Bill 2013 by the National Assembly on Thursday, 31st October 2013. The media has complained that the Bill, if assented to by His Excellency the President, shall be the death knell for media freedom in Kenya and further that it is unconstitutional. Unfortunately, only the media's point of view is being put to the public thereby leaving the public with the impression that the media is right. This is not the case. The Kenya Information Communication (Amendment), Bill 2013 is constitutional.

PROVISIONS OF THE CONSTITUTION OF KENYA

Article 33 of the Constitution provides that every person has the right to freedom of expression. However Article 33(2) limits that right and states as follows:

(2) *The right to freedom of expression does **not** extend to—*

(a) *propaganda for war;*

(b) *incitement to violence;*

(c) *hate speech; or*

(d) *advocacy of hatred that—*

(i) *constitutes ethnic incitement, vilification of others or incitement to cause harm; or*

(ii) *is based on any ground of discrimination specified or contemplated in Article 27 (4).*

Article 33(3) of the Constitution then states as follows:

(3) *In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.*

The right of freedom of expression is therefore limited by the Constitution itself. The media is therefore expected, by the Constitution of Kenya to exercise its freedom of expression in a manner that is responsible and that respects the rights and reputations of others.

Article 34 of the Constitution provides that the freedom and independence of electronic, print and all other types of media is guaranteed but does not extend to the freedom of expression prohibited by Article 33(2) of the Constitution.

The Kenya Information Communication (Amendment), Bill 2013 was enacted pursuant to Article 34(5) of the Constitution of Kenya which states as follows:

Parliament shall enact legislation that provides for the establishment of a body, which shall—

(a) *be independent of control by government, political interests or commercial interests;*

(b) *reflect the interests of all sections of the society; and*

(c) *set media standards and regulate and monitor compliance with those standards.*

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THE MEDIA'S COMPLAINT

The media's main thrust of complaint has been the manner of appointment of the body contemplated by Article 34(5) of the Constitution of Kenya. They erroneously claim that the Cabinet Secretary responsible for information, communication and technology shall be solely responsible for appointing members of the body and shall therefore effectively control this body. This is false. The process for appointing members of all bodies created by the Act is constitutionally sound and, as per Article 10 of the Constitution, is geared to ensure good governance, integrity, transparency and accountability. In summary the procedure for establishing the bodies is as follows:

(a) Communications Authority of Kenya.

This body is to take over from the Communications Commission of Kenya. The Kenya Information Communication (Amendment), Bill provides that the Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and performance of its functions. Further the Authority shall be guided by the national values and principles of governance set out in the Constitution. The procedure for appointing members of the Authority follows the following procedure:

- (i) Advertisement of vacancies in at least two newspapers of national circulations inviting applications from qualified persons.
- (ii) Interviewing and short-listing the applicants.
- (iii) Vetting of nominees by the National Assembly.
- (iv) Appointment of approved nominees by the President.

(b) Communications and Multimedia Appeals Tribunal

This Tribunal shall receive complaints from any person aggrieved with any publication or conduct of a journalist or media enterprise. This is to ensure that the media does not infringe on the rights and reputations of others and to provide for redress and punishment when the media does infringe on the rights and reputations of others.

The Tribunal shall consist of not more than seven persons with the Chairperson nominated by the Judicial Service Commission and who shall be qualified for appointment as a judge of the High Court of Kenya and who shall also possess experience in communication policy. The Tribunal shall also consist of at least four (4) persons possessing experience in media, telecommunication, postal, courier system, radio communications and information technology who are not in the employment of the Government, the Media Council or the Communications Authority.

Again the procedure for appointment of members of the Tribunal is constitutional and is as follows:

- (i) Advertisement of vacancies in at least two newspapers of national circulations inviting applications from qualified persons. This is done by the Cabinet Secretary.
- (i) The Cabinet Secretary shall thereafter convene a selection panel for the purpose of selecting suitable candidates for appointment as members of the Tribunal.

- (ii) The selection panel shall consist of five persons drawn from the Ministry for the time being responsible for information, communication and technology, the Media Council, the Telecommunications Service Providers Organisation of Kenya, the Courier Industry Association of Kenya and the Communications Authority of Kenya.
- (iii) Short-listing and interviewing of the applicants.
- (iv) Forwarding of the names to the Cabinet Secretary.
- (v) The Cabinet Secretary shall appoint the members of the Tribunal by gazettelement.

INDEPENDENCE NOT COMPROMISED

It is therefore clear that the Cabinet Secretary's, and by extension, the Government's role in appointing members of the Communications Authority of Kenya and the Communications and Multimedia Appeals Tribunal is merely facilitative. The Government shall **not** pick members of the two bodies. The members of the two bodies shall therefore be independent. It is instructive to note that the procedures for appointment of the members of the two bodies is reflective of the procedure for appointing members of Constitutional Commissions as set out at Article 250(2) of the Constitution of Kenya which states as follows:

“The chairperson and each member of a commission, and the holder of an independent office, shall be—

- (a) identified and recommended for appointment in a manner prescribed by national legislation;*
- (b) approved by the National Assembly; and*
- (c) appointed by the President.”*

The independence of constitutional Commissions and independent offices has not been compromised by the fact that they are appointed by the President. The process of advertisement, short-listing, interview, vetting by the National Assembly and finally appointment by the President ensure their integrity and independence.

OTHER PROFESSIONS SIMILARLY REGULATED

The Constitution of Kenya at Article 34(5) has provided that Parliament shall enact legislation to set media standards and regulate the industry. This is what the National Assembly did on Thursday, 31st October 2013. It is important to note that other professions are similarly regulated without compromising the freedom and integrity of those professions. Examples are as follows:

1. Accountants

The Accountants Act, No. 15 of 2008, provides for the establishment of the Institute of Certified Public Accountants as well as Registration and Disciplinary Committees. Accountants may be de-registered for professional misconduct.

2. Legal Profession

The Advocates Act, at section 53, provides for the establishment of the Advocates Complaints Commission which consists of such Commissioner or Commissioners as shall be appointed by

the President for the purpose of enquiring into complaints against any Advocate, firm of Advocates, or any member or employ of the firm.

3. Engineers

The Engineers Registration Act provides for the establishment of the Engineers Registration Board whose members are appointed by the relevant Cabinet Secretary and the Institution of Engineers of Kenya. The Board is responsible for regulating the activities and conduct of registered engineers.

4. Medical Practitioners

The Medical Practitioners and Dentists Act establishes the Medical Practitioners and Dentists Board which regulates doctors and dentists. The Board consists of a chairman appointed by the Cabinet Secretary, the Director of Medical Services, a Deputy Director of Medical services to be nominate by the Cabinet Secretary, four medical practitioners nominated by the Cabinet Secretary, a representative of each of the universities of Kenya which train doctors, and five medical practitioners and two dentists elected by all medical practitioners and dentists.

In all these professions errant members may be expelled for gross misconduct and their licenses withdrawn. It is the same ethical standards that are now being applied to the media. The media therefore has no leg to stand on when it complains about the Kenya Information Communication (Amendment), Bill 2013.

MEDIA REGULATION IN OTHER DEMOCRACIES

Article 24 of the Constitution of Kenya provides that a right or fundamental freedom in the Bill of Rights may be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is important to note that regulation of the media as set out in the Kenya Information Communication (Amendment), Bill 2013 is no different to that found in other open and democratic societies.

(i) United States of America

The current regulatory framework in the United States was established by the 1934 Federal Communications Act, which established the **Federal Communications Commission (FCC)**.

The Federal Communications Commission issues licences to media houses, limits the number of radio and television stations a company can own, has rules governing public service and local programming, and reviews station operations as part of licensing process. The FCC has established the following rules:

- The **equal time rule**, which states that broadcasters must provide equal broadcast time to all candidates for a particular office.
- The **right of rebuttal**, which requires broadcasters to provide an opportunity for candidates to respond to criticisms made against them. A station cannot air an attack on a candidate and fail to give the target of the attack a chance to respond.

- The **fairness doctrine**, which states that a broadcaster who airs a controversial program must provide time to air opposing views.

The FCC can fine broadcasters for violating public decency standards on the air. In extreme cases, the FCC can even revoke a broadcaster's license, keeping him off the air permanently. The FCC has fined radio host Howard Stern numerous times for his use of profanity, for example, and fined CBS heavily for Janet Jackson's "wardrobe malfunction" during the halftime performance at the Super Bowl in 2004.

(ii) United Kingdom

The United Kingdom's Parliament is currently discussing the Royal Charter on regulation of the media. This follows gross abuse by the media in the United Kingdom of professional ethics.

(iii) Canada

In Canada, media is regulated by the Canadian Radio-television and Telecommunications Commission (CRTC). The Canadian Radio-television and Telecommunications Commission (CRTC) is an administrative tribunal, established under a Canadian Act of Parliament that regulates and supervises broadcasting and telecommunications in Canada. As an administrative tribunal, the CRTC works to serve the needs and interests of consumers, citizens and creators. The CRTC reports to Parliament through the Minister of Canadian Heritage. The CRTC's mandate is to ensure that both the broadcasting and telecommunications systems serve the Canadian public. The CRTC uses the objectives in the Broadcasting Act and the Telecommunications Act to guide its policy decisions.

In broadcasting, the CRTC ensures that all Canadians have access to a wide variety of high-quality Canadian programming. Programming in the Canadian broadcasting system should reflect Canadian creativity and talent, our bilingual nature, our multicultural diversity and the special place of aboriginal peoples in our society.

In telecommunications, the CRTC ensures that Canadians receive reliable telephone and other telecommunications services, at affordable prices.

The CRTC supervises and regulates over 2000 broadcasters, including TV, AM and FM radio and the companies that bring these services to Canadians. CRTC also regulates telecommunications carriers including major telephone companies. This role involves:

- issuing, renewing and amending broadcasting licences;
- making decisions on mergers, acquisitions and changes of ownership in broadcasting;
- approving tariffs and certain agreements for the telecommunications industry;
- issuing licences for international telecommunications services, whose networks allow telephone users to make and receive calls outside Canadian borders;
- encouraging competition in telecommunications markets;
- responding to requests for information and concerns about broadcasting and telecommunications issues.

(iv) Germany

In Germany there are various regulations aimed at the content of media and securing certain standards. Media is prohibited from publishing state secrets and from inciting racial, ethnic or religious hatred or sedition. There exist regulations that aim at protecting minors from pornography and violence. And finally, there exist the personal rights of the individual. In addition to the general laws, press laws regulate the work of newspaper editors and journalists. These laws contain provisions regarding journalistic accountability, due diligence and a provision demanding the clear (and visible) separation between editorial content and advertisements. At the same time, these laws protect the newsroom from searches and confiscation by state authorities. Journalists have the right to conceal the source of their information. Finally, newspapers are required to publish retractions/counter statements in case of false reporting.

(v) Uganda

In Uganda the Communications Act 2012 created a "contents committee" to review complaints submitted about the contents of various media, including broadcasting, cinema, telecommunications, postal services, and video libraries . The committee will have a chair and four members, all appointed for terms of three years. The law requires Ugandan broadcasters to respect public morality and observe ethical broadcasting standards. The Kenya Information Communication (Amendment), Bill 2013 is much more liberal than the Ugandan law and is more similar to the United States of America regulatory framework.

(vi) Ethiopia

The media has claimed that the Kenya Information Communication (Amendment), Bill 2013 is "draconian". The Bill is however **not** draconian. To the contrary the Bill seeks to implement various Articles of the Constitution of Kenya, particularly Articles 33 and 34. Unlike in Ethiopia, the Bill does not allow the detention of journalists without charge.

SUMMARY OF MIS-INFORMATION ON THE KENYA INFORMATION COMMUNICATION (AMENDMENT), BILL 2013

	POSITION TAKEN BY MEDIA	ACTUAL CORRECT POSITION
1	That members of the Communications and Multimedia Appeals Tribunal shall be appointed and controlled by the Cabinet Secretary for the time being in charge of information and broadcasting. The Bill is draconian and the media shall therefore be gagged.	Members of the Communications and Multimedia Appeals Tribunal shall be appointed by the Cabinet Secretary following a competitive process and shall be independent of the government, media and commercial interests. The Tribunal shall be impartial. The Cabinet Secretary's role is merely facilitative. The process of appointment of members of the Tribunal is similar to that used to appoint members of independent offices and constitutional commissions.

		The Bill seeks to provide mechanisms for responsible journalism and to provide for redress for members of the public in the event of breach of the code of ethics.
2	The Communications and Multimedia Appeals Tribunal shall have powers to detain journalists and raid media houses' bank accounts.	The Tribunal has no power to neither detain journalists nor raid media houses' bank accounts.
3	The Communications and Multimedia Appeals Tribunal shall have powers to levy exorbitant fines.	The maximum fine for gross misconduct is Kshs. 20 million and this is the maximum fine that the Tribunal cannot go beyond, however, it is important to note that in the past rulings have been made fining the Media up to 30 million. On the other hand, comparisons can be made and lessons drawn from the example of the CBS station in the United States of America which was fined One million US dollars (Kshs. 85 million) for the Janet Jackson wardrobe malfunction.
4	That the National Assembly has abrogated itself the power to vet members of the Communications and Multimedia Appeals Tribunal.	The National Assembly shall not be involved in the vetting of nominees to the Communications and Multimedia Appeals Tribunal. The National Assembly shall vet nominees to the Communications Authority of Kenya which shall be taking over from the Communications Commission of Kenya.
5	The Communications and Multimedia Appeals Tribunal shall have powers to de-register journalists.	The Communications and Multimedia Appeals Tribunal shall not have powers to de-register journalists but may recommend to the Media Council the suspension and de-registration of journalists. This is necessary to ensure compliance with the code of ethics and to protect the public from rogue journalists in the same way other professions are regulated.
6	The Kenya Information Communication (Amendment), Bill 2013 is unconstitutional as it seeks to gag the media.	The Kenya Information Communication (Amendment), Bill 2013 is constitutional and in fact seeks to implement the provisions of Articles 33 and 34 of the Constitution. Article 34(5)(c) of the Constitution of Kenya provides that Parliament shall enact legislation to "set media standards and regulate and monitor compliance with those standards."
7	That the Bill provides for 60% local content on all radio and television	The Bill provides for 45% local content. This is in line with international practise where

broadcasts.	each country strives to develop the local film, music and television industry.
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CONCLUSION

The Kenya Information Communication (Amendment), Bill 2013 is constitutional. The Bill, if assented to by His Excellency the President shall not gag the media as claimed but provide for the responsible exercise of freedom of the press which includes protecting the rights of the citizens when news about them is published.



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