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A PRELIMINARY CRITIQUE OF DRAFT MEDIA LAWS WITH SPECIAL REFERENCE TO THE KICA BILL 2013

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By Muiru Ngugi

I have quickly perused through the recently published Kenya Information and Communications Authority (KICA) and Media Council of Kenya (MCK) Bills, and I have the following initial reaction.

In a nutshell, the KICA Bill intrudes into the territory that rightfully belongs to the MCK. It also has innocuous looking sections that could be used for ends inimical to freedom of expression and media freedom by overzealous state operatives.

For me, the critical issue is the inclusion of broadcast content regulation in the KICA Bill, while it should be in the MCK Bill.

KICA is essentially an engineering regulatory body and the only reason I can think of why KICA is anchored in Article 34 of the Constitution, which is part of Kenya’s Bill of Rights, is because it will be regulating the technical aspects of some media formats, not because technical specifications are an issue under the Bill of Rights. I would even go further and argue that KICA is not envisaged by any clause in Article 34 (how could it while no one died while agitating for engineering technical standards during the Second liberation?), but I am willing to let them anchor it there if they can recognize that MCK is the constitutional body envisaged in that Article and is therefore superior to KICA. I am willing to bet that if a judicial review application was made to the constitutional court to determine the question of which body is envisaged by Article 34 of the Constitution, the court would find that the body is not KICA.

Interestingly, if you agree that the body envisaged under Article 34 (5) is the MCK, and that MCK is the body that is supposed to set the standards mentioned in the article, those standards being professional not technical specifications, the MCK Bill curiously fails to mention those standards, while the KICA Bill does, and even goes ahead to purport to regulate those standards - standards that KICA is ill-equipped to set and regulate for the simple reason that it is primarily supposed to regulate technical specifications.

The standards referred to in Article 34 can only be professional journalism standards, which include broadcasting standards, not engineering or technical standards. It is disingenuous to have KICA regulate technical standards in the morning, and professional journalism standards in the afternoon. KICA should therefore only concern itself with technical standards, while MCK should deal the professional journalism standards, including standards for broadcast content.

I am also surprised to find broadcasting content regulation under the KICA Bill, whose Article 6E establishes the Broadcast Standards Committee (BSC). Discussions with the CS, CIC, and other stakeholders at the Intercontinental Hotel, although not centered on the KICA Bill, appeared to have resolved that BSC would be transferred to the MCK Bill so that all media content can be regulated under one roof by the Complaints Tribunal/Commission. Was this renegotiated again?
The KICA Bill also appears to recognize that the BSC, in its current reincarnation, will be boxing above its weight, and that is why there is a provision to co-opt experts on an ad hoc basis as per Article 6E (2) (a), (b), (c). Curiously, while the BSC might co-opt an expert, such an expert is barred from voting, meaning that the BSC can disregard his/her professional advice. Curiously also, in 6E sub-section 3, the BSC is empowered to receive reports and advice from MCK but because MCK does not have voting powers under the BSC, its advice and reports can be disregarded. The point to take here is that drafters recognize that MCK is better placed to regulate this area, but they are not willing to entrust this role to MCK for some strange reason.

Article 5B of the KICA is also misplaced in my view; it should be in the MCK bill. First off, it repeats what is already in the Constitution, that is, the forms of speech that are not constitutional.

Second, given that KICA is primarily meant to regulate frequencies and engineering standards, it is very strange that Article 5B proceeds to purport to police the profession of journalism, which primarily deals with content production. This Article goes further to police all content, not just broadcast content. This means that the KICA is also designed to regulate the rest of the media, although it is presented as regulator of innocuous engineering details.

Article 5B sub-section (5) says that the "The Authority may make Regulations for the better carrying out of the Provisions of this section." Given that 5B is a trawling clause covering all media, not just broadcast media, it is clear that the Regulations to be made might and will affect all media content, in other words media freedom.

The provision of 5C also grants authority to the government to control the media. Sub-section (l) states that the "The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act." If this is an independent authority, an administrative body set up for the simple reason of regulating a highly complex and technical area, why does it need undefined guidelines from a government official, guidelines that might ultimately affect journalistic work?

Even more confusing is the fact that in the minds of the drafters, there is what appears to be a clear distinction between content produced by broadcasters and content produced by other media. This distinction is curiously captured in the definitions section, where "media" is defined in an incomplete and misleading fashion, since it says that the "media' means broadcast, electronic and other types of media but does not include print and book publishing." Media does not include print and book publishing? This is deliberate divide and rule tactic meant to introduce non-existent divisions within journalism and therefore weaken the profession.

Article 12 of the KICA Bill also takes about setting "media standards" and "regulating and monitoring compliance with those standards." This is clearly MCK territory. Under MCK, the formulae exists for setting media standards in the form of ethics (which can be updated, granted) and regulating and monitoring those standards through the co-regulation model, training regulation and ultimately, the complaints commission.

Another curious section is Article 50 which empowers KICA to delegate its authority to the Post Office. Specifically, it says that the "The Authority may designate the Postal corporation of Kenya to be the public postal licensee and assign to it, by notice in the Gazette, any of the powers, duties
and functions of the Authority under this Part." This is a continuation of the old practice of censorship through the post office. And guess what, since broadcast content is not transmitted through the post office anymore, this section can only apply to the print media, which KICA is currently pretending not to be interested in. I see this as a clever ruse to get the Bill to pass, then start getting interested in the content of every media.

The naming of the KICA Bill is also wrong. Its "Information" aspect is a content issue that is best left to MCK. I am also suspicious of the term “AUTHORITY” in KICA name; it gives the impression that KICA is superior to MCK, a mere “Council.” This is even more curious if you consider that the body that is rightfully established by the Constitution is MCK. KICA is therefore using the term “authority” to intimidate MCK and arrogate to itself additional authority it does not have to regulate freedom of expression in this country.

KICA should really be Kenya Communication Authority (KCA), dealing with the regulation of frequencies, spectrum distribution, and signal licensing; while MCK should regulate all free expression issues since content is a by-product of free expression, not of engineering.

If you put transmitters, receivers, and spectrum together, and leave them in a properly refrigerated room for their comfort for a year without humans, they will not produce content. The regulation of machines should be different from the regulation of humans. The KICA Bill makes the mistake of conflating the two.

Finally, I submit that the operationalization of KICA will affect free expression, media freedom, and the independence, stature, purview and authority of MCK.