

Approved for tabling.

REPUBLIC OF KENYA




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28/11/19

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION  
AND INNOVATION

REPORT ON THE CONSIDERATION OF KENYA INFORMATION AND  
COMMUNICATION (AMENDMENT) BILL (N.A BILL NO. 61 OF 2019)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 28 NOV 2019	DAY: THURSDAY
TABLED BY:	Hon. William Kariuki Chairperson
CLERK-AT THE TABLE:	Lemuel Mosey.

PARLIAMENT  
OF KENYA  
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NAIROBI-KENYA

NOVEMBER, 2019

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

CODE IP	Content Development & Intellectual Property Trust
CA	Communications Authority
BAKE	Bloggers Association of Kenya
CEWG	Creative Economy Working Group
KICTANET	Kenya ICT Action Network
ICT	Information Communication & Technology
KICA	Kenya Information and Communications Act
CIPIT	Center for Intellectual Property and Information Technology Law

## **LIST OF ANNEXURES**

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## **THE CHAIRPERSON'S FOREWORD**

The report contains the Committee's proceedings on the consideration of the Kenya Information and Communication (Amendment) Bill (National Assembly Bill No. 61 of 2019) which was read a first time on 2<sup>nd</sup> October, 2019.

The Kenya Information and Communication (Amendment) Bill (National Assembly Bill No. 61 Of 2019) an Act of Parliament seeks to amend the Kenya Information and Communication Act, 1998 sponsored by Hon. Malulu Injendi, MP was referred to the Departmental Committee on Communication, Information and Innovation for consideration and thereafter the Committee is to report to the House pursuant to National Assembly Standing Order No.127 (1).

The Committee placed an advertisement in the local dailies on 18<sup>th</sup> October, 2019 inviting the public to submit their views on the Bill on or before 1<sup>st</sup> November, 2019.

Upon receipt of the memoranda, the Committee held a total of three meetings to consider the Bill and the submissions which are incorporated in this report. A total of ten (10) memoranda were received from members of the public and institutional stakeholders in the ICT sector.

The Committee further held County forum meetings with stakeholders from Nairobi County whereby they met with CODE-IP, Google Kenya, Lawyers Hub, Kictanet, Amnesty International, Bloggers Association of Kenya, CIPIT, Kenya Union of Journalists and the Communications Authority of Kenya.

Thereafter, the Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

On behalf of the Departmental Committee on Communication, Information and Innovation and pursuant to the provisions of the Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Kenya Information and Communication (Amendment) Bill(National Assembly Bill No. 61 Of 2019)

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. Finally I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

**Hon. William Kisang, M.P.**

## **EXECUTIVE SUMMARY**

The Kenya Information and Communication (Amendment) Bill, 2019 (National Assembly Bill No. 61 Of 2019) an Act of Parliament to amend the Kenya Information and Communication Act, 1998 was read a first time on **2<sup>nd</sup> October, 2019** and subsequently referred to the Departmental Committee on Communications, Information and Innovation for consideration and thereafter report to the House pursuant to Standing Order No.127.

From the memorandum of objects and reasons the objective of the Bill is to amend the Kenya Information and Communications Act, 1998 to provide for regulation of use of social media platforms. Further the Bill seeks to introduce new sections to the Act on licensing of social media platforms, sharing of information by a licensed person, creates obligations to social media users, registration of bloggers and seeks to give responsibility to the Communications Authority to develop a bloggers code of conduct in consultation with bloggers.

## **PREFACE**

### **1.1 Establishment of the Committee**

1. The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows;
  - a. Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
  - b. Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
  - c. Study and review all legislation referred to it;**
  - d. Study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
  - e. Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
  - f. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);
  - (fa) examine treaties, agreements and conventions;
  - g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - h. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - i. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
  - j. Examine any questions raised by Members on a matter within its mandate.

### **1.2 Mandate of the Committee**

2. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.
3. In executing its mandate, the Committee oversees the following Departments;
  - i.) State Department of Broadcasting and Telecommunications and
  - ii.) State Department of ICT & Innovation

### 1.3 Committee Membership

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House in December 2017 and comprises of the following Members-

Hon. Kisang William Kipkemoi, M.P (**Chairperson**)  
MP for Marakwet West Constituency  
**Jubilee Party**

Hon. George Macharia Kariuki (**Vice Chairperson**)  
MP for Ndia Constituency  
**Jubilee Party**

Hon. Liza, Chelule Chepkorir, MP  
M.P for Nakuru County  
**Jubilee Party**

**Jubilee Party**

Hon. Alfah O. Miruka, MP  
M.P for Bomachoge Chache Constituency  
**Kenya National Congress**

Hon. Gertrude Mbeyu Mwanyanje, MP  
MP for Kilifi County  
Orange Democratic Party

Hon. Annie Wanjiku Kibeh, MP  
MP for Gatundu North Constituency  
**Jubilee Party**

Hon. Wamuchomba, Gathoni, MP  
MP for Kiambu County  
**Jubilee Party**

Hon. Joshua Kimilu, Kivinda, MP  
MP for Kaiti Constituency  
**Wiper Democratic Party**

Hon. (Eng.) Mark Nyamita Ogola, MP  
MP for Uriri Constituency  
**Orange Democratic Party**

Hon. Marwa Kitayama Maisori, MP  
MP for Kuria East Constituency  
**Jubilee Party**

Hon. John Kiarie Waweru, MP  
MP for Dagoretti South  
**Jubilee Party**

Hon. Mwambu Mabongah, MP  
MP for Bumula Constituency  
**Independent**

Hon. Erastus Nzioka Kivasu, M.P.  
MP for Mbooni  
New Democrats Party

Hon. Maritim Sylvanus, MP  
MP for Ainamoi Constituency  
**Jubilee Party**

Hon. Innocent Momanyi Obiri, MP  
Bobasi Constituency  
**People's Democratic Party**

Hon. Mwangaza Kawira, MP  
MP for Meru County  
**Independent**

Hon. Godfrey Osotsi Atieno, MP  
Nominated  
**African National Congress**

Hon. Jonah Mburu, MP  
MP for Lari Constituency

Hon. Anthony, Tom Oluoch, MP  
MP for Mathare Constituency  
**Orange Democratic Party**

#### **1.4 Committee Secretariat**

5. The Committee is facilitated by the following secretariat:-

**Ms. Hellen Kina  
Clerk Assistant II/ Lead Clerk**

**Ms. Marlene Ayiro  
Senior Legal Counsel**

**Ms. Ella Kendi  
Clerk Assistant II**

**Mr. Gorod Abdirahaman  
Fiscal Analyst II**

**Ms. Lorna Okatch  
Research Officer III**

## **2.0 OVERVIEW OF THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL (N.A BILL NO. 61 OF 2019)**

6. The objective of the Bill is to amend the Kenya Information and Communications Act to provide for regulation of the use of social media platforms.
7. The Kenya Information and Communications (Amendment) Bill, 2019 seeks to introduce new definitions and a new Part into the Kenya Information and Communications Act, 1998 (“KICA”) relating to the regulation of social media.
8. **Clause 2** of the Bill proposes to introduce new definitions for the terms “blogger”, “blogging”, “social media platforms” and “widgets”.
9. **Clause 3** of the Bill proposes to insert a whole new Part immediately after Part VI of the Act comprising the proposed new sections 84IA, 84IB, 84IC, 84ID and 84ID.
10. The proposed new section **84IA** provides for the mandatory licensing of all social media platforms on terms and conditions to be stipulated by the Communications Authority, including—
  - (a) the establishment of a physical office in the country;
  - (b) the registration of all users of the platform;
  - (c) retention of user data and submission to the Commission when required; and
  - (d) conducting due diligence to ensure that all its users are adults.
11. The proposed new section **84IB** permits social media platforms to collect, use, preserve, and share information of its users when responding to legal proceedings.
12. The proposed new section **84IC** places an obligation on a social media user to be responsible in the use of the media, including ensuring that their content does not degrade or intimidate a recipient of the content, is not prejudicial against a person or group of people based on their race, gender, ethnicity, nationality, religion, political affiliation, language, ability or appearance; and is fair, accurate and unbiased.
13. Further, the proposed new section provides that where a social media platform is created for a group of persons, the administrator of the group is obliged to—
  - (a) notify the licensee of the social media platform of his or her intentions to form a group;
  - (b) approve the members of the group;
  - (c) approve the content to be published in the platform; and
  - (d) control undesirable content and discussions in the group.

14. Under the proposed section, failure to use social media responsibly, or the failure of an administrator to discharge his or her obligations under the section constitutes an offence which attracts a fine not exceeding two hundred thousand shillings or to an imprisonment of a term not exceeding one year, upon conviction.
15. The proposed new section **84ID** requires the mandatory registration and licensing of all bloggers and obliges the Communications Authority to keep a register of all bloggers. A person who blogs without a licence commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment of a term not exceeding two years.
16. The proposed new section **84IE** requires the Communications Authority to develop a code of conduct for bloggers.

### 3.0 PUBLIC PARTICIPATION/STAKEHOLDER CONSULTATION

17. Pursuant to *Article 118(1) (b)* of the Constitution and National Assembly Standing Order No. 127(3) which provides that the Parliament shall facilitate public participation, the Committee placed an advert in the local dailies on 18<sup>th</sup> October 2019 inviting the public to submit their views to the Clerk of the National Assembly on or 1<sup>st</sup> November, 2019.
18. By the deadline for submission, the Committee had received ten (10) memoranda from; CODE-IP, Google Kenya, Lawyers Hub, Kictanet, Amnesty International, Bloggers Association of Kenya, CIPIT, Kenya Union of Journalists, Article 19 and the Communications Authority of Kenya.
19. In considering the Kenya Information Communication (Amendment) Bill, 2019, the Committee took into account the memoranda and oral submissions received from the public and its deliberations. The following constitutes the views of the Committee on the issues arising with regard to each Clause of the Bill—

#### Section 2 Interpretation

20. Amnesty International submitted that the definition of the term blogging provided in the bill meant that everyone on a social media platform is a blogger because of collection, writing and presenting the news articles on whatsapp, Facebook, Twitter, Youtube and various websites. They further submitted that the Bill fails to define the term blog which it also seeks to regulate and presupposes that blogs are social media platforms as per the definition provided.
21. Kictanet recommended that the definition of the term ‘blogging’ be deleted as the requirement for one to register before sharing information online, contradicts provisions of Article 33 and 34 of the Constitution. The Committee agreed with the views of Amnesty International and Kictanet as the definition of the term blogging was not clear.
22. Lawyers hub stated that there was a need for the Committee to re-define the term blogging as blogging unlike what was provided for in the bill is not only limited to writing of news and news articles but also includes writing observations, opinions, events, journals and personal interest and experiences.
23. CIPIT recommended deletion of the entire section as the proposed definitions creates limitation to freedom of expression by requiring people who regularly comment on topical issues to seek licenses prior to speech.

#### Clause 841A - Licensing of Social Media Platforms

24. CA submitted that the proposal contravenes Article 31 on the right to Privacy and Article 34 on the Freedom of the Media of the Constitution of Kenya. The proposed amendments have been secured by the enactment of the Data Protection Act 2019, which regulates the processing of any personal information with Kenya.
25. Kictanet submitted that;
  - (i) Sub section (1) be deleted as it was unclear whether the section meant that the social media platform will require licenses or the platforms will require licenses to operate in Kenya.
  - (ii) Subsection (2a) gives the Commission unchecked discretionary power to determine what a company or an individual is required to do to be licensed.
  - (iii) Subsection (2b) be deleted as it was impractical to require every social media user in the Country be registered as this would result in a number of absurdities and waste of resources.

(iv) Sub section (2c) proposal was a threat to the right to privacy as per the provisions of Article 31(c). The users of the platform should be guaranteed the right to be forgotten and not have their data retained by any persons.

26. Amnesty International raised concern on the power given to the Commission to decide what amounts to acceptable hate speech. They indicated that Article 33(2) of the Constitution prescribes the kind of speech where freedom of expression does not extend to. They were of the opinion that the Bill invents its own limitations that are outside what was contemplated under Article 33(2) of the Constitution.

They further submitted that the proposal to have licensee collect, use preserve and share information in a legal process, does not define the legal process and that the requirement is in breach of privacy and data protection regulations.

27. BAKE submitted that the requirement that one registers with the Commission is unnecessary and limits the freedom of expression for the following reasons;

(i) It contravenes requirement of Article 34 (2) (a)

(ii) There was no justifiable reason for requiring people to register with the Commission as this violates freedom of association and expression

(iii) Registration of all users using legal documents is contrary to the nature of the social media which is an informal interaction

(iv) Requirement to keep data and submit is a gross violation of privacy of the users of social media

(v) Some social media groups are temporary

(vi) It purports to give the Commission duties that are ultra vires its Constitutional mandate

The Committee agreed with the stakeholders as the provisions of the Bill were in contravention with the Constitution and further that the Data Protection Act regulates the processing of data in the country.

28. CEWG submitted that it was not necessary for the Communications Authority of Kenya to have a list of all social media platform users given the sheer high number of users.

29. Article 19 opined that the section failed to recognize that social media platforms cannot be regulated by legislation which is often slow to keep up with the ever-changing conditions of online publication and distribution of content. They noted that social media provides a unique space of expression and these platforms do not often have a physical presence in a majority of countries.

30. CIPIT proposed the deletion of the entire clause arguing that licensing of bloggers limits freedom that is guaranteed in Article 33 of the Constitution of Kenya, 2010. Further, they submitted that subsection (2) (a) ignores the current realities of online and remote working and the fact that many bloggers create content for non-commercial purposes.

#### **84 IB – Sharing of information**

31. CODE – IP was of the view that the proposal contradicts privacy and data protection legislation

32. Kictanet proposed that the section should be deleted as it was a threat to the right privacy.

33. BAKE submitted that it is a derogation of the right to privacy and human dignity to have the licensee collecting and sharing the information of its users.

34. The requirement under section 84 1B for licensees to keep subscribers' information and share it for any legal process offends the right to privacy. This provision is vague, wide and open to abuse. We restate the need to conform to the principle of legality having laws that are clear and precise.

The Committee in agreeing with the stakeholders stated that the Data Protection Act makes provision for sharing of data of a data subject. This provision also curtails the right to property as is provided for in the Constitution.

35. CEWG stated that this amendment violated the provisions of Article 31 of the Constitution which guarantees the right to privacy, further that the provision of the Bill will expose Kenyans to the arbitral sharing of their information in unclear parameters.
36. CIPIT submitted that the Clause offends Article 31 on the right to privacy of the users since it does not provide mechanism for protection of users.

**Clause 84IC – Social Media user’s responsibility**

37. Kictanet submitted that;
  - (i) Subsection (1) (a), (b) and (c) proposals were impractical to task users of social media platforms to ensure that they only post appropriate content and that this threatens freedom of expression because of the criterion of the expression that is being restricted is vague and subjective.
  - (ii) Subsection (2) was unclear as to who the administrator was and this creates absurdity and that it gives the administrator unchecked powers to determine the discussions hence limiting the freedom of expression.
  - (iii) Subsection (3) was not clear as to what crime is being punished and the reasons.
38. Amnesty International submitted as follows;
  - (i) That the clause sneaks back criminal defamation into the statute books despite being struck off in the Jacqueline Okuta and another v Attorney General and 2 other (2017) Eklr which found that criminal sanctions was an unjustifiable limitation to freedom of expression. They were of the view that the wording in the clause is not clear and concise.
  - (ii) Subsection 84IC (2) was unrealistic to place responsibility on group administrators to police content online under the pain of criminal sanctions. That the process of notifying the licensee each a time a group is formed was impractical, unrealistic and time consuming exercise.
  - (iii) The word ‘undesired content’ had been used however no definition has been provided
39. CODE IP and Google Kenya opined that the proposal formally establishes a legal basis for online censorship, suppression of diverse opinion, unreasonably burdens social media groups administrators with impossible foresight over what members will post in future.
40. BAKE submitted as follows;
  - (i) Subsection (1) (c) is a derogation of freedom of opinion and of conscience because social media is not a news media and lots of content is commentary.
  - (ii) Subsection (2) (c) places onerous duty on the administrator of the group and negates the essence of a social media platform which is to merely give participants a space to express themselves.
  - (iii) Subsection (1) (3) is broad and vague as it prescribes a penalty without declaring an offence which is unconstitutional. The committee agreed with the stakeholders.
41. CIPIT stated that subsection (b) is provided for in the National Cohesion and Integration Act, subsection (2) offends Article 36 on freedom of Association and that this proposal is impossible where people form groups for all sorts of purposes.

**Clause 84 ID – Registration of bloggers**

42. Amnesty International submitted that there was no justifiable reason as to why Members of the public should be licensed to express themselves online. The imposition of conditions prior

to licensing will allow the government to control who is blogging and what is blogged in the Country.

43. Kictanet submitted as follows;

(i) Subsection (1) be deleted as it is unconstitutional to make it a requirement for bloggers to register as it threatens freedom of expression. Further, the Commission is given unfettered powers to determine the conditions necessary for licensing.

(ii) Sub sections (2) (3) and (4) be deleted as they threaten the freedom of expression and freedom of media as it allows the government to monitor all persons posting online. That punishing persons for failing to register as a blog is excessive and unnecessary.

44. BAKE submitted that requiring license for blogging was unnecessary limitation of free speech and people's freedom of thought. The committee agreed that this provision was unnecessary as its implementation may not be attainable.

45. CEWG stated that this provision violated Articles 33 and 34 of the Constitution which guarantees the freedom of expression and freedom of media. Journalism has freedom of operation guaranteed in the Constitution.

46. Lawyers hub submitted that the requirement to licence social media platforms and particularly requiring the incorporation of a physical office presents difficulties in enforceability. Further that registration with legal documents under this section in fringes on ones ability to be anonymous online and violates the right to privacy of persons living in Kenya.

#### **Clause 84I E – Bloggers code of conduct**

47. Amnesty International were strongly opposed to this clause citing that the fact the definition of blogger is defective meant that developing regulations on this basis will affect every Kenyan on social media platforms effectively developing a social media users code of conduct.

48. Kictanet disagreed with the proposal citing that controlling the bloggers was an attempt to control the news and by extension controlling the people.

49. Article 19 averred that the creation of a bloggers code of conduct was inimical to citizens freedom of expression. Crucially they stated that the activity of disseminating information which is in the public interest should not require adherence to an established code of conduct.

#### **Memorandum of Objects and Reasons**

50. Amnesty International stated that from the Bill's memorandum of objects and reasons, it limits freedoms of expression, right to information, freedom and independence of the media, and the rights to privacy & freedom of association under Article 33,35,34,31 and 36 of the Constitution.

51. CODE – IP and Google Kenya submitted that whereas, Bill's Memorandum of Objects and Reasons states that this Bill does not limit Fundamental Rights and Freedoms, the Bill's fundamental purpose is new "Part VIAA Regulation of Social Media" and thereunder - licensing of social media platforms, registration of bloggers, and the prescribing of government-written "Bloggers Code of Conduct" contradicts constitutional freedom of expression, criminalize online expression without first obtaining a license from the government.

52. BAKE submitted that the objective of the Bill is unreliably general as it does not provide the reasons necessitating the intended regulation. The Committee agreed with the stakeholders that much as in the memorandum it was noted that does not limit fundamental rights, it did limit the right to privacy and freedom of the media among others.

#### 4.0 COMMITTEE OBSERVATIONS

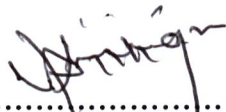
The Committee having analysed the Bill and representation from stakeholders made the following observations:

THAT;

53. The provision on regulating and licensing of social media platforms under Section 841A, would present challenges in implementation because it seeks to limit the provisions of Articles 31 and 34 of the Constitution of Kenya, 2010 on the freedom of the media and right to privacy without clarifying and specifying the right or freedom to be limited, the nature and extent of the limitation.
54. The recently enacted Data Protection Act, 2019 provides for the rights, responsibilities and duties of data subjects, data processors and controllers. This provision caters for the concerns raised in this Bill and in essence the provisions of the Bill have been overtaken by the already enacted Data Protection Act, 2019.
55. Section 841B which provides that a licensee may collect, use, preserve and share information of its user where it is reasonably necessary to respond to a legal process, is sufficiently catered for in the Data Protection Act, 2019. However, the provision as drafted contravenes Article 31 of the Constitution which provides for the right to privacy and it fails to clarify and specify the right or freedom to be limited, the nature and extent of the limitation.
56. Section 84 1C on social media user responsibilities, limits the freedom of expression under Article 33 of the Constitution of Kenya, 2010 without clarifying and specifying the right or freedom to be limited, the nature and extent of the limitation. The Data Protection Act, 2019 provides for the protection of the rights of the data subjects and puts obligations on data processors and controllers.
57. Section 84 1(C) on social media responsibility, is provided for in section 5B of the Kenya Information and Communications Act, 1998 which allows the Authority to develop regulations governing the ICT sector. Further, the provision is also catered for under the Computer Misuse and Cybercrimes Act, 2018.
58. Majority of social media platforms are registered and governed by laws of another Country, e.g. with Facebook having its head office in Menlo Park, California, United States and established for various purposes other than communication. Establishment of a social media platform entails the creation of a website which is a literary work governed under copyright law and managed by a domain name which is regulated under Kenic (in Kenya by anyone using the .ke domain).
59. It is imperative that the House should not pass laws that are unconstitutional or inconsistent with the Constitution, this is in a bid to avoid unnecessary litigation and suspension of certain aspects of the laws that are enacted in Parliament. A case in point is the Computer Misuse and Cybercrimes Act of 2018 that was passed by the House and cannot be implemented because the same is a subject of a court dispute.
60. All the stakeholders that appeared before the Committee including the Communications Authority of Kenya and all the written submission received opined that the Bill should not be enacted due to the unconstitutionality of all the provisions as contained in the Bill.

## 5.0 COMMITTEE RECOMMENDATIONS

In light of the written submissions, the oral representations by stakeholders and the Committee deliberations on the Bill, the Committee recommends that the **Bill should not be proceeded with**. The provisions of the Bill contravene Articles 31 and 34 of the Constitution of Kenya, 2010 on the right to privacy and the freedom of the media respectively as well as other data protection legislations enacted in the Country.

SIGNED..........DATE.....17/11/2019.....

THE HON. WILLIAM KISANG, MP

CHAIRPERSON

THE DEPARTMENTAL COMMITTEE ON COMMUNICATION,  
INFORMATION AND INNOVATION



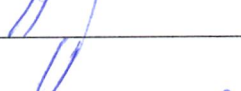
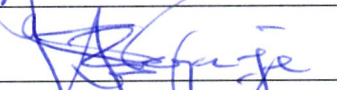


# **ANNEX 1      ADOPTION LIST**

**THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION**

**ADOPTION LIST**

**ADOPTION OF THE REPORT ON THE KENYA INFORMATION AND COMMUNICATION (Amendment) BILL, 2019**

DATE.....17/11/2019.....TIME.....4:40 P.m.....VENUE.....Great Rift Valley lodge

NO.	NAME	SIGNATURE
1.	Hon. Kisang, William Kipkemoi, M.P - <b>Chairperson</b>	
	Hon.George, Macharia Kariuki, M.P - <b>Vice – Chairperson</b>	
3.	Hon.Liza, Chelule Chepkorir, M.P.	
4.	Hon.Alfah, O. Miruka, M.P.	
5.	Hon. Annie Wanjiku Kibeh, M.P.	
6.	Hon. Joshua Kimilu, Kivinda, M.P.	
7.	Hon.Marwa Kitayama Maisori, M.P.	
8.	Hon.Mwambu Mabongah, M.P.	
9.	Hon.Maritim Sylvanus, M.P.	
10.	Hon.Mwangaza Kawira, M.P.	
11.	Hon. Jonah Mburu, M.P.	
12.	Hon. Gertrude Mbeyu Mwanyanje,M.P	
13.	Hon.Wamuchomba, Gathoni, M.P.	
14.	Hon.(Eng).Mark Nyamita Ogola,M.P	
15.	Hon. John Kiarie Waweru, M.P.	
16.	Hon. Erastus Nzioka Kivasu, M.P.	
17.	Hon. Godfrey Osotsi, Atieno , M.P.	
18.	Hon. Innocent Momanyi, Obiri, M.P.	
19.	Hon.Anthony, Tom Oluoch, M.P.	

**THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION  
AND INNOVATION**

# **ANNEX 2      MINUTES**

**MINUTES OF THE 48<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION & INNOVATION HELD IN TUCANA BOARDROOM AT GREAT RIFT VALLEY LODGE, NAIVASHA ON SATURDAY 17<sup>TH</sup> NOVEMBER, 2019 AT 2.30PM**

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**PRESENT**

1. Hon. William Kisang, M.P. -Chairperson
2. Hon. George Kariuki, M.P. -Vice- Chairperson
3. Hon. Annie Wanjiku, M.P.
4. Hon. Erastus Nzioka Kivasu, M.P.
5. Hon. Marwa Maisori, M.P.
6. Hon. Jonah Mburu, M.P.
7. Hon. Liza Chelule, M.P.
8. Hon. Innocent Momanyi M.P.
9. Hon. Gertrude Mbeyu, M.P.
10. Hon. Mwambu Mabongah, M.P.
11. Hon. Joshua Kimilu, M.P.

**APOLOGIES**

1. Hon. Anthony Oluoch, M.P.
2. Hon. John Kiarie Waweru, M.P.
3. Hon. (Eng.). Mark Nyamita, M.P.
4. Hon. Alfah O. Miruka, M.P.
5. Hon. Maritim Sylvanus, MP
6. Hon. Mwangaza Kawira, M.P.
7. Hon. Godfrey Osotsi Atieno, M.P.
8. Hon. Wamuchomba Gathoni, M.P.

**THE SECRETARIAT**

1. Ms. Hellen Kina - Clerk Assistant II
2. Ms. Ella Kendi - Clerk Assistant II
3. Ms. Marlene Ayiro - Senior Legal Counsel
4. Mr. Abdirahaman Gorod - Fiscal Analyst II
5. Ms. Christine Maeri - Audio Officer
6. Mr. Wilson Angatangoria - Sergeant at arms

**MIN.NO/NA/CII/2019/208: PRELIMINARIES**

The Chairperson called the meeting to order at thirty two minutes past two o'clock followed by a word of prayer.

**MIN.NO/NA/CII/2019/209: ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE KENYA INFORMATION AND COMMUNICATION (AMENDMENT) BILL, 2019**

The Committee considered the report and adopted it with the following observations and recommendations having been proposed by Hon. Marwa Maisori, MP and seconded by Hon. Erastus Kivasu, MP.

## Committee Observations

The Committee having analysed the Bill and representation from stakeholders made the following observations:

THAT;

1. The provision on regulating and licensing of social media platforms under Section 841A, would present challenges in implementation because it seeks to limit the provisions of Articles 31 and 34 of the Constitution of Kenya, 2010 on the freedom of the media and right to privacy without clarifying and specifying the right or freedom to be limited, the nature and extent of the limitation.
2. The recently enacted Data Protection Act, 2019 provides for the rights, responsibilities and duties of data subjects, data processors and controllers. This provision caters for the concerns raised in this Bill and in essence the provisions of the Bill have been overtaken by the already enacted Data Protection Act, 2019.
3. Section 841B which provides that a licensee may collect, use, preserve and share information of its user where it is reasonably necessary to respond to a legal process, is sufficiently catered for in the Data Protection Act, 2019. However, the provision as drafted contravenes Article 31 of the Constitution which provides for the right to privacy and it fails to clarify and specify the right or freedom to be limited, the nature and extent of the limitation.
4. Section 84 1C on social media user responsibilities, limits the freedom of expression under Article 33 of the Constitution of Kenya, 2010 without clarifying and specifying the right or freedom to be limited, the nature and extent of the limitation. The Data Protection Act, 2019 provides for the protection of the rights of the data subjects and puts obligations on data processors and controllers.
5. Section 84 1(C) on social media responsibility, is provided for in section 5B of the Kenya Information and Communications Act, 1998 which allows the Authority to develop regulations governing the ICT sector. Further, the provision is also catered for under the Computer Misuse and Cybercrimes Act, 2018.
6. Majority of social media platforms are registered and governed by laws of another Country, e.g. with Facebook having its head office in Menlo Park, California, United States and established for various purposes other than communication. Establishment of a social media platform entails the creation of a website which is a literary work governed under copyright law and managed by a domain name which is regulated under Kenic (in Kenya by anyone using the .ke domain).
7. It is imperative that the House should not pass laws that are unconstitutional or inconsistent with the Constitution, this is in a bid to avoid unnecessary litigation and suspension of certain aspects of the laws that are enacted in Parliament. A case in point is the Computer Misuse and Cybercrimes Act of 2018 that was passed by the House and cannot be implemented because the same is a subject of a court dispute.
8. All the stakeholders that appeared before the Committee including the Communications Authority of Kenya and all the written submission received opined that the Bill should not be enacted due to the unconstitutionality of all the provisions as contained in the Bill.

**COMMITTEE RECOMMENDATIONS**

In light of the written submissions, the oral representations by stakeholders and the Committee deliberations on the Bill, the Committee recommends that the **Bill should not be proceeded with**. The provisions of the Bill contravene Articles 31 and 34 of the Constitution of Kenya, 2010 on the right to privacy and the freedom of the media respectively as well as other data protection legislations enacted in the Country.

**MIN.NO/NA/CII/2019/210: ADJOURNEMENT**

There being no other business, the meeting was adjourned at thirty two minutes past four o'clock

SIGNED..........DATE..........  
HON.WILLIAM KISANG, MP - CHAIRPERSON

# **ANNEX 3      ADVERTISEMENTS**

# Uhuru dismisses entire KFS board

...as Likoni tragedy victims family say they will sue the agency over Kighenda, Amanda deaths

by Reuben Mwambu and Bernard Gitau  
@reubenmwambu



## POSTMORTEM RESULTS

● Chief Government Pathologist Dr Johansen Oduor said postmortem conducted at Jocham Hospital on Wednesday revealed the two died of asphyxia-lack of oxygen in the body.

● Oduor said Kighenda and her daughter died around the same time. He, however, said it is difficult to tell how long they stayed alive underwater.

legal action against KFS," he said. Mbatu said John Wambua, the widower, had already recorded a statement at the Likoni Police Station. Chief Government Pathologist Dr Johansen Oduor said an autopsy conducted at

Ferry tragedy victims' family spokesman Luka Mbatu addresses the press at Jocham Hospital in Mombasa, yesterday. PD/ NDEGWA GATHUNGU

Jocham hospital on Wednesday revealed that the two died of asphyxia which connotes lack of oxygen in the body. "I can confirm to you that both of them died due to lack of oxygen. So we have done due diligence and now we will hand over the case to the Police so that they can continue with their investigation," the pathologist said after the exercise that took one-and-a-half hours. According to Oduor both, Kighenda and her daughter died around the same time. He, however, said following the long stay of the bodies in water, it is difficult to

tell how long they stayed alive underwater. "The longer they stay in water the more inaccurate it becomes. So it is difficult to tell how long they stayed before death," Oduor said.

Likoni DCI Charles Onyango said investigations onto the death of the two are still ongoing. "We have not questioned KFS managing director Bakari Gowa but we are planning to do so soon," he said.

Mbatu said burial arrangements have been ongoing and the deceased are scheduled to be laid to rest at Ngaamba area of Kilome, Makeni county on Saturday.

President Uhuru Kenyatta yesterday sent home the Kenya Ferry Services (KFS) board members in the wake of the Likoni channel tragedy that claimed the lives of a mother and her daughter.

The sacking comes six days after the bodies of Mariam Kighenda, 35, and Amanda Muthu, 4, were pulled from the Indian Ocean after their vehicle slipped off MV Harambee on September 29.

"In exercise of the powers conferred by section 7 (3) of the State Corporations Act, I, Uhuru Kenyatta, President and Commander-in-Chief of the Defence Forces for the Republic of Kenya revoke the appointments of Dan Mwazo, Duala Omar..." part of Gazette Notice dated October 17 read.

Uhuru's move comes as the family of Kighenda said it will sue KFS over their kin's deaths.

The decision follows the outcome of the autopsy which revealed that the duo died of suffocation because of drowning.

Spokesman Luka Mbatu said the family would seek justice for their departed kin. "We have seen the postmortem and as the doctor has indicated, they died as a result of suffocation because of drowning. From here we will continue with our plans for burial and we are definitely going to take



Kuco chair Peterson Wachira with treasurer Mary Boniface in Nairobi, yesterday. PD/ KENNA CLAUDE

## BRIEFLY

### Man handed 10 years for defiling daughter

A 55-year-old mason charged with defiling his 15-year-old daughter for six years was yesterday handed a 10-year sentence by a Nyeri court.

Edward Theuri was accused of committing incest on diverse dates between January 1, 2013 and February 23, 2019 at his home in Gitathiniini village in Nyeri county.

The court heard that one day his wife came back home unannounced and found Theuri in bed with their daughter.

In mitigation, the accused told the court that his daughter had framed him. He claimed when his wife walked in on the material day the daughter had brought him food.

However, while sentencing him, chief magistrate Wendy Kagendo said his defence was an afterthought, adding that the minor's evidence was water-tight.

—by Josphat Kinyua

## Clinical officers issue 14-day strike notice over CBA

by Alvin Mwangi  
@PeopleDailyKe

Healthcare providers under the Kenya Union of Clinical Officers (KUCO) have threatened to down tools citing frustrations in the Collective Bargaining Agreement (CBA) negotiations.

Issuing the strike notice in Nairobi yesterday, the union chair Peterson Wachira (pictured, left) accused both the County and National governments of deliberately mishandling the CBA signed in 2017.


He said negotiations started in December 2017 with a time line of up to Jan-

uary 31, 2018 but dragged to April last year when the government allegedly walked out of the talks.

"Since 2017, we have held talks with the government, but its said that the government has failed to honour the CBA," said Wachira.

He said they had even made efforts to meet the Senate health committee but their attempts to have their issue addressed hit a snag. KUCO issued a 14-day ultimatum even as it lamented inhuman treatment allegedly meted out on interns holding diploma certificates.

REPUBLIC OF KENYA



**THE NATIONAL ASSEMBLY**  
**TWELFTH PARLIAMENT – THIRD SESSION**

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In the Matter of consideration by the National Assembly –

1. The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 20)
2. The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 61)

SUBMISSION OF MEMORANDA

Article 118(1) (b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Standing Order 127 requires the Departmental Committee to which a Bill is committed to facilitate public participation and take into account views and recommendations of the public when the Committee makes its report to the House.

The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 20) seeks to amend the Kenya Information and Communications Act Cap.411A to enable persons operating a telecommunication system or providing a telecommunication service to engage in any other business and provide for the separation of such other businesses from the telecommunication business.

The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 61) main objective is to amend the Kenya Information and Communications Act to provide for regulation of use of social media platforms.

The two Bills underwent First Reading as stipulated in the Standing Orders of the National Assembly and has been committed to the Departmental Committee on Communication, Information and Innovation for consideration and reporting to the House.

Pursuant to the provisions of Article 118(1) (b) of the Constitution of Kenya and Standing Order 127(3), the Committee invites the public to submit representations they may have on the said Bill.

The Committee will also be undertaking public hearings in the following counties.

COUNTY	VENUE/TOWNS	DATE
1. Kirinyaga	Baricho Sub County Hall	8 <sup>th</sup> November, 2019
2. Nairobi	County Hall, Parliament Buildings	11 <sup>th</sup> November, 2019

The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received not later than Thursday, 31<sup>st</sup> November, 2019 at 5.00pm. The Bill may be accessed on the Parliamentary website – [www.parliament.go.ke](http://www.parliament.go.ke)

**MICHAEL R. SIALAI, EBS**  
**CLERK OF THE NATIONAL ASSEMBLY**

MYSTERY DEEPENS

# Counties paid nothing for leased medical equipment, says CS Sicily

**JULIUS OTIENO/** The controversy over Sh63 billion leased Medical Equipment Scheme yesterday deepened further after the Health ministry said that counties have not been paying for it.

Health CS Sicily Kariuki told the Senate ad-hoc committee investigating the scheme that her ministry has been paying for the programme.

The CS said the scheme is budgeted for in her ministry as a development vote advanced to the devolved units as a conditional grant.

"No county has ever paid a coin for the equipment. You can ask individual counties to disclose in their budgets the money they have paid for this project," Sicily said.

She presented the committee with a letter from the National Treasury showing that the money had been a grant.

The submission, however, infuriated the committee with some members accusing her and the ministry of misleading the country.

"In every Division of Revenue Act and County Allocation of Revenue,

money for MES has always been captured as part of equitable shareable revenue," Bungoma Senator Moses Wetangula said.

Even if it was a grant, the money must go to the county revenue accounts. Grants are never deducted at source, Wetangula said.

Sicily dismissed claims by the Council of Governors that the county chiefs were coerced to sign the Memorandum of Understanding that facilitated the supply of the equipment.

CoG chairman Wycliffe Oparanya on Tuesday told the Isiolo Senator Fatuma Dullo-led committee that the governors signed the MoU under duress.

He said that they were never consulted nor participated in the procurement for the equipment.

But Sicily said that the ministry widely consulted the counties and held several meetings with governors and CECs before the supply of the equipment.

All the contract documents were also availed to the council, she added.

She said that the decision to procure the hi-tech equipment was informed by the 2013-14 health performance report and a resolution of the Senate in June 2013.



Health Cabinet Secretary Sicily Kariuki when she appeared before MPs in Parliament yesterday. **/EZEKIEL AMING'A**

The motion was sponsored by former Migori Senator Wilfred Machage.

"The report noted that most [existing] medical equipment used in

public facilities is more than 20 years old (some double their lifespan) and therefore characterised by frequent breakdowns," she said.

The Senate, she said, had resolved that the national government establishes level 5 and 4 hospitals in each of the 47 counties.

## DROWNED Family Kenya kin's d

**BRIAN OTIENO/** Kighenda has the Kenya F... gence over he daughter Ama Spokespers Wednesday e follow legal pr government o da and Amand

"It is obvious legal issues. W is definite," Mb

He spoke at after governm sen Oduor con the two bodies

"Right now, arrangements urday in Kilom county," Mbat

Oduor said r died due to asp

"The purpos to find out the we can allow t continue.

"Both of the asphyxia, whic in the body dur said. He said th the same time

REPUBLIC OF KENYA



NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

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MICHAEL R. SIALAI, EBS

REPUBLIC OF KENYA



TWELFTH PARLIAMENT  
THE SENATE

PUBLIC HEARINGS/ RECEIPT OF MEMORANDA

- The Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40)
- The Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2)
- The Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 1)
- The Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16)
- The Elections (Amendment) Bill (Sen. Bills No. 18 of 2019)
- The Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019)
- The Independent Electoral and Boundaries Commission (Amendment) Bill (Sen. Bills No. 19 of 2019)

The following Bills were read a First Time in the Senate on various dates and committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights.

- 1) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 40 of 2018);
- 2) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 2 of 2019)
- 3) the Statute Law (Miscellaneous Amendments) (No. 2) Bill (NA Bills No. 1 of 2019)
- 4) the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019)
- 5) the Elections (Amendment) Bill (Sen. Bills No. 18 of 2019);
- 6) the Alternative Dispute Resolution Bill (Sen. Bills No. 19 of 2019); and
- 7) the Independent Electoral and Boundaries Commission (Amendment) Bill (Sen. Bills No. 19 of 2019)

Pursuant to the provisions of Article 118 and standing order 140 (5) of the Senate, the Standing Committee on Justice, Legal Affairs and Human Rights invites interested members of the public to submit any representations that they may have on the said Bills. The representations may be made orally or by submission of written memoranda in the following manner -

1. Public Hearing for the Bills shall be held on **Thursday, 24th October, 2019, 1.00 pm at Shimba Hall, First Floor, KICC, Nairobi**; or
2. Written Memoranda may be forwarded to the Clerk of the Senate/ Secretary Service Commission, P.O. Box 41842-00100, Nairobi, hand-delivered to the Clerk of the Senate/ Secretary, Parliamentary Service Commission, Parliament Buildings, Nairobi or emailed to [senate@parliament.go.ke](mailto:senate@parliament.go.ke) on or before **Wednesday, 23rd October 2019 at 5.00 p.m.**

The Bills may be found on the Parliament website at <http://www.parliament.go.ke>

CLERK OF THE SENATE/ SECRETARY

# **ANNEX 4 WRITTEN SUBMISSIONS**

Tabled before the  
Committee on 11<sup>th</sup> Nov, 2019



The **Lawyers Hub** affirms its commitment to promoting Human Rights as enshrined under the Bill of Rights in Chapter Four of the Constitution of Kenya. We note that Social Media platforms and the internet have become a vital component of our lives today. Further, we realize the looming danger of misinformation and disinformation online and realize that both developed and developing states grapple with solving this problem. To this end, we appreciate the Government's effort to promote regulation on the use of Social Media Platforms. However, we are greatly concerned with the general restrictive nature of the proposed Bill to the Right to Online freedom of expression, association and access to information.

We submit the Bill as is currently drafted contains extremely vague definitions and provisions that limits fundamental rights particularly: Freedom of expression, association, access to information beyond permissible limitation under article 33 and 24 of the constitution.

### Freedom of Expression

The rules regarding the limitation of this right are clearly stated under article 24 of the constitution and re-stated in the CORD case where the court espoused a 3-part test to satisfy limitation of the right to freedom of expression. **First limitation must be legally prescribed by a statute and be clear on the prohibition. Second, objective of limitation must be clear and substantial and important to society and finally legislation must meet the test of proportionality. The question is whether they are less restrictive means to achieve the purpose and not arbitrary, unfair or based on irrational considerations.**

**Article 19(3) of the ICCPR** espouses condition in which freedom of expression may be limited which are in respect of the rights and reputation of others and protection of national security or of public order or public health or morals. In **General Comment 34**, the Committee re-states the 3part test. In addition, the committee states that laws limiting the right to freedom of expression "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

### Freedom of association

The term 'Every Person' as interpreted in the Eric Gitare case means, "An individual is a "person" for the purposes of the Constitution regardless of their gender or sexual orientation. (73) The Court is enjoined to apply the Constitution without prejudice, and must be able to distinguish between the right to assemble of those of a sexual orientation that is not socially accepted..."

This means the right as granted under article 36 is given to all individuals equally and doesn't require any prior approval. Therefore, every person within Kenya has a right to assemble and form online association without the need to approve the formation of a group.

**As such we urge the committee to consider and adopt the following recommendations in relation to the Bill:**

1. The Committee should re-define blogging under the Bill as it is not only limited to writing of news and news articles but also includes writing on observations, opinions, events, journals and personal interest and experiences. Similarly, the bill ought to properly define its scope and this is in relation to *micro-blogging* in order to adequately protect FOE over social Media Platforms.
2. Social media platform as described would see effectively everyone including companies and NGO's operating a blog on their website register for licensing. There is an obvious need to redefine this definition to enhance clarity and precision.
3. The requirement to license social media platforms and particularly requiring the incorporation of a physical office presents difficulties in enforceability. We recognize Parliament is the primary body granted power under Article 94 of the Constitution to make provisions having the force of law in Kenya. There is need for caution not to make laws that degrade the Powers of Parliament for lacking enforceability.
4. There are about 5 Million Kenyans facing discrimination in accessing Legal Citizenship Documents. To this end the requirement to use legal documents to register on social media platforms will deny these persons access to these platforms where they would exercise their rights. Therefore, this provision contravenes article 19 of the ICCPR and UDHR which guarantee FOE on every medium.
5. Further, registration with legal documents under Section 84 IA (2) infringes on one's ability to be anonymous online and serves to violate the right to privacy of persons living in Kenya.
6. Requirement for all social media users to be above the age of 18 prohibits children from accessing social media platforms. This contravenes their right to freedom of expression, association and right to information granted to everyone under the law. Lawyers Hub appreciates the need for online child protection in the digital age with # such as Nikita and ifikie wazazi. We recommend consultative engagement among civil society, regulators and promoters of child welfare to develop measures for child protection online.
7. We recognize further need to sensitize the public, particularly parents and guardians on the need for child protection online.
8. Though we disagree with the need for registration of social Media Platforms, we contend that the provisions under section 84 IA are vague, wide and arbitrary. It's uncertain which conditions a licensee ought to comply with thus failing the test of legality. Legality requires every law seeking to limit the right to FOE must be clear and precise. As such we recommend the deletion of this section.
9. The requirement under section 84 IB for licensees to keep subscriber's information and share it for any legal process offends the right to privacy. This provision is vague, wide and open to abuse. We restate the need to conform to the principle of legality having laws that are clear and precise. We re-affirm that every limitation must serve a clear legitimate purpose which is not described under this provision. We recommend that any requirement to obtain subscriber information must be done under proper judicial oversight as held in the CORD case.

10. Requirement not to use speech that intimidates or degrades another user under section 84 IC imposes a wider limitation than that envisaged by article 33 and 24 of the constitution and art 19 (3) of the ICCPR. We strongly recommend the deletion of this provision as its vague and open to abuse.
11. The requirement to issue a notification to form a group is extremely tedious and likely to lead to wastage of resources and inhibits the right to associate. It's our recommendation that it ought to be dispensed with.
12. Further requirement to impute an obligation on administrators to regulate speech is unfair and an undue burden on a citizen and has the chilling effect of lowering association and free speech online. There are sufficient laws to hold every individual accountable for their speech if it amounts to prohibited speech under the law regardless of medium. Our recommendation is to dispense with this provision.
13. The offence under section 84IC offends principle of legality as one is guilty in the absence of Mens rea. The result is to violate the freedom and security of the person and thus should be dispensed with.
14. The requirements for registration under Section 84 ID are vague and open to abuse. We restate the need to protect free speech by having clearer provisions that satisfy the 3-part test.

The Lawyers Hub recognizes the growing trend of misinformation and disinformation online in Kenya. We contend there is a growing need to adopt appropriate regulatory legislations and measures to deal with the same. Nevertheless, laws must not serve to arbitrarily deprive persons of their rights as granted under the constitution and International law. We therefore call for multi-stakeholder approach among regulators, this committee especially, social media platforms, civil society and other relevant actors in the development of these laws and policies.

**Prepared by Catherine Muya  
Lawyers Hub Kenya ACK Garden House, 1st Ngong  
Avenue, Bishops Road.  
P.O. Box 2468 - 00621.  
Nairobi, Kenya  
info@lawyershub.ke  
+254784840228**

Tabled before the  
Committee on 21<sup>st</sup> Nov, 2019.

KENYA

AMNESTY  
INTERNATIONAL



MEMORANDUM ON KENYA INFORMATION AND COMMUNICATION (AMENDMENT)  
BILL 2019 (NATIONAL ASSEMBLY BILLS NO.61) PRESENTED TO THE NATIONAL  
ASSEMBLY OF KENYA DEPARTMENTAL COMMITTEE ON COMMUNICATION,  
INFORMATION AND INNOVATION  
11 November 2019

Upon carefully analysing the constitutional and human rights implications of the Kenya Information and Communication Act (Amendment) 2019 Bill No.2. Amnesty International Kenya strongly opposes this amendment Bill and calls upon the National Assembly to unreservedly reject this retrogressive Bill. This Bill fails to consider the importance of freedom of expression in a democracy, and the great strides that Kenya has made towards freedom of expression.

### 1. Definitions

The proposed amendments to Section 2 of the Bill define blogging to include *collecting, writing, editing, and presenting of news or news articles in social media platforms or on the internet*. By operation of this definition, everyone on a social media platform is a blogger because we all engage in the collection, writing, and presenting these 'news articles' on WhatsApp, Facebook, Twitter, YouTube and various websites.

The Bill goes further to define a social media platform to include online publishing and discussion, media sharing, social networking, document and data sharing repositories, social media applications, social bookmarking and widgets. On the contrary, social media platforms are in fact **'websites and applications that enable users to create and share content or to participate in social networking'**.

Puzzlingly, the Bill fails to define a "blog" which it also seeks to regulate. In effect the Bill presupposes that blogs are social media platforms going by the definition of social media platforms provided for in the Bill. In our opinion, this Bill shoots into the dark as it fails to differentiate between a blog and a social media platform.

It is noteworthy that social media, is a medium of freedom of expression that is largely being appreciated as a means of disruptive and non-disruptive political participation, articulation, assembly, petition, dissent and protest. These are the ingredients for a healthy democracy.

### 2. Does the Bill limit fundamental rights and freedoms?

The Bill in its memorandum of objects and reasons states that it does not limit fundamental rights and freedoms. This statement is not true as the Bill indeed proposes to limit the freedom of expression, right to information, freedom and independence of the

media, and the rights to privacy and freedom of association under Articles 33, 35, 34, 31 and 36 of the Constitution respectively.

The Bill infringes on fundamental right and freedoms in the following ways: -

1. Invents its own overly broad and vague limitation to freedom of expression outside the Constitutional provisions under Article 33(2)
2. Requires all social media platforms in Kenya to register with the Communications Authority of Kenya;
2. Places heavy and unjustifiable responsibilities on social media users and social media group administrators outside the requirements of the Constitution;
3. Requires all bloggers register with CAK, which may prescribe a fee/tax;
4. Gives the CAK, a member of the executive branch of government, the mandate to develop a code of conduct for bloggers.

**Article 19 (1)** of the constitution states that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies. **Clause 3** states that the rights and fundamental freedoms in the Bill of Rights (a) *belong to each individual and are not granted by the state*; and (c) *are subject only to the limitations contemplated in the constitution*.

**Article 24** of the Constitution requires that any limitation to fundamental rights and freedoms must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

By law, any limitation to fundamental rights including privacy must be **a) clear and concise** (clearly provided in written law); **b) necessary and proportionate**; and, **c) pursue a legitimate aim**. The same is echoed under Article 19 (3) of the International Covenant on Civil and Political Rights, which Kenya is party to, and thus forms part of Kenyan law under Article 2 (5) and (6) of the Constitution.

### 3. Regulation of Social Media Platforms

Clause 84IA proposes the licensing of social media platforms operating in Kenya, subject to fulfilling conditions set by the Commission. Clause 84IA uses the words "as the Commission may think fit", Amnesty International is concerned that this gives Commission, a government body under the Ministry of ICT, the power to decide what amounts to acceptable speech. In fact, the constitution under Article 33(2) prescribes the kind of speech where freedom of expression does not extend to. It provides that: -

*"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)."*

Based on the above, it is our opinion that that the Bill invents its own limitations that are outside what was contemplated/permissible under Article 33(2) of the Constitution.

Amnesty is alarmed by the proposal in Clause 84IA 2(b) that will require social media platforms to keep all the data of their users and submit the same data when required to the Commission. Article 31 provides that every person has the right to privacy which includes the right not to have (c) **information relating to their families or private affairs unnecessarily revealed** or (d) **the privacy of their communications infringed**. The Clause further provides that a social media platform could have its licence revoked where it is in breach of the terms and conditions set out by the Commission.

Clause 84IB further proposes that a licensee may collect, use, preserve and share information where necessary to respond to a legal process. This proposal does not define a legal process and as such a requirement of this nature is in breach of privacy and data protection regulations.

Amnesty is concerned that these proposed unconstitutional proposals will muzzle freedom of expression online.

#### **Social Media Users Responsibilities**

Clause 84IC sneaks back criminal defamation into the statute books despite it being struck off the statute books in the *Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR*, which found of criminal sanctions (the prospect of arrest, hiring a lawyer, application bail and bond and prison term) was an unjustifiable limitation to freedom of expression.

The Bill proposes that social media users shall ensure that any content published, written or shared through a social media platform does not “*degrade or intimidate a recipient, is not prejudicial against a person or a group of people based on their race, gender, ethnicity, nationality, religion, political affiliation, language, ability or appearance*”. Under Article 24 of the Constitution and Article 19 (3) of the ICCPR, any limitation to freedom of expression must be clear and concise. We submit that the wording above is not clear nor concise.

The High Court in the *Geoffrey Andare vs Attorney General* struck off/invalidated Section 29 of the same act the Bill seeks to amend on the same grounds. In Paragraph 77 of the Judgment, the Judge pronounced itself that: -

*“I have considered the words used in the section. I note that there is no definition in the Act of the words used. Thus, the question arises: what amounts to a message that is ‘grossly offensive’, ‘indecent’ obscene’ or ‘menacing character’? Similarly, who determines which message causes ‘annoyance’, ‘inconvenience’, ‘needless ‘anxiety’? Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their*

*meaning will depend on the subjective interpretation of each judicial officer seized of a matter”*

Further, In Paragraph 97 of the Judgment, the Court pronounced itself that: -

*“the state is entitled to impose limitations on the right to freedom of expression. However, such limitations must be on grounds which are permitted in the Constitution, which under Article 33(2) are propaganda for war, incitement to violence, hate speech, or advocacy of hatred”*

Social media users will also be required to ensure that all that is shared is **fair, accurate and unbiased**. Similarly, this is is vague, overly broad and unclear and subjective and thus unconstitutional under Article 24 of the Constitution which requires laws to be clear and concise. It invents its own vague and subjective limitations outside the orbit of limitations permitted by the constitution under Article 33 (2).

Amnesty International reiterates that the right to receive and impart information and ideas is a core value of any democratic society deserving of the utmost legal protection.

#### **4. Group Administrator Responsibilities.**

Clause 84IC (2) proposes a list of responsibilities of a social media group administrator, it proposes that it is the administrator’s duty to notify the licensee of the social media platform of the intention to form a group. It is also their duty to approve members of the group besides also approving content to be published on the platform while controlling undesirable content.

Kenyans form Facebook or WhatsApp groups for diverse purposes such as fundraising for funerals, the sickly, weddings or engagement parties; organizing events; for sports teams and other issues ranging from the mundane, serious, political or social. In all these groups, ‘news’ which is not defined under the Bill is shared from time to time thus putting them under the ambit of the Bill.

It is unrealistic to place responsibility on administrators to police content online under the pain of criminal sanctions. The operation of such a law might be defeated where every person on a group is a group administrator.

Amnesty also urges the National Assembly to consider the fact that social media groups are formed and equally disbanded on need basis for various social needs. The process of notifying the licensee each time a group is formed is an impractical, unrealistic and time-consuming exercise that will serve no purpose.

The clause also uses the word “undesired content” which is not defined anywhere in the Bill and as such open to ambiguity which is in reach of Article 24 of the Constitution.

## **5. Registration of Bloggers**

Clause 84ID proposes that the Commission shall establish a register of bloggers in Kenya and grant licence authorizing a person to blog. The Bill proposes that the licence be pegged on "such conditions as it may deem necessary" which is again leeway for the Commission to decide criteria without limitations, a blatant violation of the Constitution of Kenya.

Licensing hence connotes that bloggers will have to obtain permission from the government to blog while registration thus means that bloggers will be required to use their real names online or their blogs attributed to their real names.

Amnesty notes that such requirements exist in countries such as Iran, Saudi Arabia, Sri Lanka and Tanzania where free thought and speech is being criminalised. Such laws target journalists, bloggers, academics, comics and opposition leaders to devastating effect.

Amnesty believes that there is no justifiable reason as to why members of the general public should be licensed to express themselves online which is the current platform of expression globally. The imposition of conditions prior to licensing will allow the government to control who is blogging and what is blogged in the country (what is said and who is saying it). It will create fear as a loss of licence is likely to occur where the government does not agree with blogs.

## **6. Bloggers Code of Conduct**

Amnesty International strongly opposes the development of a Bloggers Code of Conduct as proposed by Clause 84IE. The fact that the definition of bloggers in this Bill is defective means that developing regulations on this basis will affect every Kenyan on social media platforms effectively developing a social media users code of conduct.

Tabled before the  
Committee ~~by~~ on 11<sup>th</sup> Nov, 2019.

**MEMORANDUM ON KENYA INFORMATION AND COMMUNICATION  
AMENDMENT BILL 2019.**

Presented on behalf of:

1. The Kenya Union of Journalists
2. The Bloggers Association of Kenya (BAKE).



**Kenya Union of Journalists**

Affiliated to the Central Organization Of Trade Unions (COTU) and the International Federation Of Journalists (IFJ)



**Bloggers  
Association  
of Kenya**

# MEMORANDUM ON KENYA INFORMATION AND COMMUNICATION AMENDMENT BILL 2019.

*Date: 11th November 2019*

## 1. Introduction

The Kenya Information and Communication Amendment Bill (*hereinafter referred to as KICA Amendment Bill*), sponsored by Honourable M.M. Injendi was published in September 2019. The Memorandum of Objects and Reasons Bill states that the Bill's object is to regulate the use of social media platforms. From the text of the Bill, it is evident that the intended regulation introduction of a licensing and registration regime for social media and of blogs. The regime is supposed to be entrenched through new sections 841A to 841D to be introduced into the Kenya Information and Communication Act, through Amendments.

This analysis looks at the bill in light of Constitutional, Jurisprudential and philosophical principles underpinning Freedom of Expression. Reference is also made to historical experience as well as comparative international experience with a focus on International best practice

Ultimately, the question that this analysis attempts to answer is as to whether the proposed legislation meets Constitutional Justification in free and Democratic Society that is envisaged under Article 10 of the Constitution.

## 2. The Nature of Social Media and Blogs and their Role in Advancing Democracy and Freedom of expression.

The human desire to exchange information and ideas is as old as civilization itself. Indeed the growth of the democratic space is as old as the invention of the printing press. Communication and public debate on social, political and economic affairs has therefore always been some of the biggest beneficiaries of technological growth. In the eighteenth Century, the printing press helped in the expansion of the democratic space. In the 20<sup>th</sup> Century, the TV and the Radio expanded the space further. In the late 20<sup>th</sup> Century and now the 21<sup>st</sup> Century, the invention and proliferation of the Internet has helped the world grow the democratic space further. Today due to technological advancements and the internet, one is able to participate in and shape the global discourse by means of a mere tweet from the comfort of one's house, through the social media.

To effectively determine whether legal intervention in the social media is necessary, or even reasonable, it is important to understand its conventional definition or understanding.

As a result, of internet, social media conversation takes place within the cyberspace. The cyberspace is the virtual environment created by the worldwide network of computers and/or telecommunication gadgets.

Different Authors have proffered various definitions for what constitutes Social media. *Boyd & Ellison, 2008*, for example, define social media as “websites which allow profile creation and visibility of relationships between users” while *Kietzmann et al., 2011*, have defined it as “web-based applications which provide functionality for sharing, relationships, group, conversation, and profiles”. In some instances, blogs have been categorized as being a type of social media, but blogs generally are Independent Content posted on line. Blogs are not as interactive as the traditional social media, in that in blogs, the communication is one way while in social media the communication is interactive. What is, however, common to both social media and blogs are that:

- i. Both are based in the cyber space
- ii. Both are concerned with public debate on social, economic spheres
- iii. Access to them, unlike traditional Broadcast media is absolutely based on demand as executed through the computer or communication gadget.
- iv. Engagement in social media and blog is voluntary.

### **3. Whether there is justification in regulating social media the social media be regulated in the manner proposed?**

#### **3.1.Critique of the overall Objective of the Act.**

##### **3.1.1. The Acceptable Limitations under the Constitution.**

Under the Memorandum of Objects and Reasons, it is stated that the objective of the bill is to regulate the use of social media in Kenya. The statement is unreliably general, as it does not provide the reasons necessitating the intended regulation, which ideally ought to be the content of such a memorandum.

Nonetheless, we take guidance from the Court’s dictum in *Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR* where it was stated: “...*The object and purpose can be discerned from the legislation itself...*”

As pointed out earlier it is evident from the provisions of the Bill that the intended regulation is to introduce registration and licensing regime for social media platforms and blogs. Further, the state seeks to collect and remit data from the users of the platforms to the state whenever so required by the state.

As also already pointed out, social media platforms and blogs are civilian public debate forums within the cyberspace. They are interactive and access to them is voluntary and indeed only available only on request/demand.

As such in the 21<sup>st</sup> Century, any attempt at interference with the social media goes to the heart of freedom of expression. Any regulation of the social media and the blogosphere therefore must comply with the Constitution, and consideration must be borne that freedom of expression goes to the heart of Democracy, good governance and Human Rights.

Article 19 (3) of the Constitution recognizes that the Rights and Fundamental Freedoms are not granted by the state. This follows that the state does not have the right to interfere with or issue a prescription as to how a right should be enjoyed. This is not to say that the state cannot to regulate dangerous speech. The extent, to which the state can intervene, however, must be only as contemplated by the Constitution. About freedom of expression, the justifiable limits are provided at Article 33(2), which provides

- (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).*

Further Article 24 of the Constitution provides for the criteria for limitation of fundamental rights and freedoms: The criteria includes: The limitation must be by law and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right or fundamental freedom;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

In light of the above provisions, the objects of the Bill as stated in the accompanying memorandum and as discernible from its provisions are untenable as

- i. The objects are vague and do not clearly spell the mischief that the bill seeks to cure if enacted into a legislation. There is no statement of public good that the bill seeks to advance or remedy if the legislation is enacted.
- ii. Introduction of licensing as a precondition for participating in online public debate through blogs and social media limits freedom of expression beyond what is contemplated under Article 33 (2).

### **3.1.2. The Nature of Cyberspace Relationship**

The emergence of internet and subsequently social media and blogging sites has been an engine of public debate and interaction to unprecedented levels, breaking down not only office walls but also international borders. Indeed the social media platforms have been instrumental in shaping public debate on a day-to-day basis.

It is further notable that largely, Civilians control the infrastructure for Social Media, with only the exception of Internet Protocol. The gadgets used, the web applications, and civilians control the servers from end to end. Almost, if not all the Social Media Platforms have Terms of Community and Service which the Users electronically accept before enjoying the services of social media, whether in the conventional sense or in the manner defined by the Bill.

The Supreme Court of America in *Reno vs ACLU*, while giving its opinion in the context of Communications Decency Act of 1996, where some sections made provisions requiring owners of websites with obscene material to take steps to ensure that children do not access such material, the Supreme struck down the provisions for violating the First Amendment provisions which bar the state from enacting any legislation abridging Freedom of Expression. The Courts reasoning was that the media could only be accessible on demand and there were ways through which parents could stop their children from accessing the obscene content.

In light of the technological nature of the social media and blogs, the proposed regulations are evidently further untenable as:

- i. Participation in social media platforms are voluntary civilian arrangements between consenting adults, with the choice to end the relationship available at any time.
- ii. Access to Social Media Content is usually only on demand by the person seeking it.

The attempt to regulate social media is essentially equivalent to attempt to regulate the people's freedom of thought.

It does not set out what mischief it seeks to solve in setting up licensing requirements for the

- Have affected internet resources. See the case of *CA vs Royal Media Services*.

### **3.2.Critique of Specific Provisions**

#### **3.2.1. Licensing of Social media under Proposed Section 841A**

The Proposed section 841A requires one to obtain a license from the Commission to establish a Social Media Platform. The Commission

- a. *The establishment of a physical office in the country;*
- b. *The registration of all users of the social media platform using legal documents;*
- c. *A requirement that the licensee shall keep all the data of the users of its platform and shall submit the same to the Commission when required; and*
- d. *A requirement that the licensee shall carry out due diligence to ensure that all its users, if natural persons are of age of majority.*

*This proposal is untenable because*

The requirement under the proposed section 841A that one registers with the Commission before establishment of the items captured in the definition of social media is unnecessary fetter upon freedom of expression for the following reasons:

- i. It directly contravenes requirements of Article 34 (2) (a). The internet in the 21<sup>st</sup> Century is a basic requirement that by default people have access to through their private devices, which are bought purposeful for that.
- ii. Requirement for people to be registered with the CA in order to use their day-to-day basic business is unreasonable and disproportionate. There is no justifiable reason for requiring people to register with the Commission before they can use their phones. The requirement violates not only the freedom of expression but also the freedom of association and freedom of assembly.
- iii. Setting up private virtual e virtual communication networks do not affect the people who are not in those networks, hence there is no reason to require a license
- iv. Some Social media communities are as temporary as to last only a few days. Having an office would serve no purpose, as they are not meant to transact business.
- v. Registration of all users using legal documents is contrary to the nature of social media, which is an informal interaction.
- vi. A requirement to keep data and submit- is a gross violation of privacy of the users of social media.

- vii. It purports to give the Commission duties that are ultra vires its Constitutional mandate. The Commission does not have the powers to regulate human interaction and expression in any way, except only to the extent that is necessary for equitable use of the finite resources. It has not been demonstrated that the cyberspace is about to fill up to require licensing in order to post articles, videos and comments over the internet.

### **3.2.2. Section 841B : Sharing of Information**

THE proposal under Article 841B that an administrator collects data and shares it is a derogation of the right to privacy and human dignity and to have that dignity respected. It is in fact contrary to the data privacy legislations across the world. It would be a breach of the doctrine of privity of contracts.

### **3.2.3. Section 841C: (1) (c): Unbiased information.**

THE requirement under Article 841C (1) (c) that information shared be unbiased is a derogation of freedom of opinion and of conscience. Social media is not a news media and lots of its content is mostly commentary, which if made in the context of support of a cause will mostly be biased. In the case of *Nation Media (above)*, the Court ruled that it would be unreasonable to expect people in exercising their freedom of expression to reflect the interests of the whole society.

841 (C) (2) (c) places an onerous duty on the administrator of the group and negates the essence of a social media platform which is to merely give participants a space to express themselves.

841C (1) (3) is broad and vague as it prescribes a penalty without declaring an offence. And is as such unconstitutional.

### **3.2.4. 841D: Licensing and Registration of Bloggers!**

The proposed 841D requiring license for blogging is an unnecessary limitation of free speech. There is no public interest inconvenience that has been stated to be occasioned by bloggers that need intervention. It is to be noted that the art of blogging is as good as keeping and publishing a personal diary or memoir, which most people do for its aesthetic value.

To require bloggers to be registered is to interfere would thus be an unnecessary interference with people's freedom of thought, something that is so innate and inherent in every human.

As was remarked by Burry, "*... it is unsatisfactory and even painful to [a] thinker himself, if he is not permitted to communicate his thoughts to others...*"

What is worse in this case, to require a license to make your thoughts known.

#### **4. Conclusion.**

In light of the above analysis it is hereby submitted that the entire KICA Amendment Bill is Unconstitutional and untenable. Parliament should reject it in its entirety as it makes nonsense of the long struggle for democracy that the Country has gone through. It also makes it difficult for people to enjoy the fruits of advancement of technology. Ultimately, it makes the life of technology users sad and cumbersome.

In his essay, "*On Liberty*," written back in 1859 *John Stuart Mill* remarked,

*"The time, it is to be hoped, is gone by, when any defence would be necessary of the "liberty of the press" as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear."*

The same words ring true today, and in light of the proposed bill, deserve echoing from the Chambers of Parliament to the streets down the lowliest of neighborhood in opposition of the said bill.

Tabled before the  
Committee on 11<sup>th</sup>, Nov 2019



## Executive Summary

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The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bill Number 61) should be withdrawn. It is unconstitutional and will have devastating ramifications on the Sovereignty of the People, the Supremacy of the Constitution and democracy.

### **Recommendation:**

The Bill should be withdrawn entirely. Its premise is unconstitutional because regulating bloggers equals regulating the news, people's views and free speech and invading their privacy.

It goes against the Constitution of Kenya, 2010 under article 31 which guarantees the right to privacy, article 32 which guarantees the freedom of belief and opinion, article 33 that guarantees the freedom of expression, article 34 that gives the people freedom of the media and lastly article 35 that guarantees us the access to information.

Furthermore, the regulation of bloggers and social media in general creates a chilling effect on free speech and freedom of the media in the country. These freedoms go to the root of our democracy. Once the government is allowed to chip away at these freedoms, we will quickly cease to become a democratic state.

Clause	Provision	Proposal	Justification
Section 2	<p>Amends Section 2 of the Kenya Information and Communications Act to include definitions of:</p> <p><b>"blogger"</b> means any person who is registered as such by the Commission under section 84D;</p>	<p>We recommend that this section should be deleted.</p> <p>This section should be deleted .</p>	<p>The definition of blogger here insists that for one to be a blogger they must be licensed to do so. It is not constitutionally sound to insist that for one to share news online they require to be registered first. It goes against everything that Article 33 and Article 34 stand for. The freedom of expression and the media respectively are pillars of our democracy. The definition of blogging fails to articulate the definitions of some of the terms used</p>
	<p><b>"blogging"</b> means collecting, writing, editing and presenting of news or news articles in social media platforms or in the internet;</p>		<p>such as 'news or news articles'. It leaves too much room for misinterpretation by law enforcement.</p> <p>Also, this definition leaves out an entire group of persons who run blogs that are informative but not news or newsworthy for that matter.</p>

<p>Section 84IA</p>	<p>This is among the new sections introduced into the Act to regulate social media platforms</p> <p>1) The Commission may on application in a prescribed manner and upon payment of a prescribed fee, grant a licence authorising any person to establish a social media platform for purposes of communication</p>	<p>We propose that this section be deleted .</p> <p>We recommend that this section be deleted .</p>	<p>It is unclear whether the section means that the social media platform users will require licenses or the platforms will require licenses to operate in Kenya.</p> <p>The words 'for communication' insinuate that persons using social media platforms will need licenses to communicate with persons in their lives.</p>
	<p>(2) A licence granted under this Part may be issued by an applicant subject to such terms and conditions as the Commission may think fit, and may include—</p> <p>(a) the establishment of a physical office in the country;</p>	<p>This section needs to be deleted.</p>	<p>Having this section as is, gives the Commission unchecked discretionary power to determine what a company or an individual is required to do to be licensed.</p>
	<p>(b) the registration of all users of the social media platform using legal documents;</p>	<p>This section should be deleted .</p>	<p>It is impractical to require that every social media user in the country be registered. It would result in a number of absurdities and waste of resources. It is also a veiled attempt at muzzling Freedom of Expression.</p>

	(c) a requirement that the licensee shall keep all the data of the users of its platform and shall submit the same to the Commission when require		<p>This is a threat to the Right to Privacy enshrined in Article 31(c) of the Constitution of Kenya that guarantees citizens the right not to have their information unnecessarily required or revealed.</p> <p>The users of the platform should be guaranteed the right to be forgotten and not have their data retained by any person.</p>
Section 841B	A licensee may collect, use, preserve, and share information of its user where it is reasonably necessary to respond to a legal process	This section should be deleted .	It is a dangerous threat to the Right to Privacy. There is no definition of the word 'reasonably'
Section 841C	<p>(1) A social media user shall ensure that any content published, written or shared through the social media platform--</p> <p>(a) does not degrade or intimidate a recipient of the content;</p> <p>(b) is not prejudicial against a person or group of people based on their race, gender, ethnicity, nationality, religion, political affiliation, language, ability or appearance; and</p> <p>(c) is fair, accurate and unbiased</p>	This section should be deleted .	<p>It is impractical to task users of social media platforms who only have control over what they post to 'ensure' that only appropriate content is posted on the platforms they are a part of.</p> <p>This threatens Freedom of Expression because the criterion of the expression that is being restricted is vague and subjective from person to person.</p>

	<p>(2) Where a social media platform is created for a group of persons, it shall be the responsibility of the group administrator to—</p> <p>(c) approve the content to be published in the platform; and</p> <p>(d) control undesirable content and discussion.</p>	<p>This section should be deleted .</p>	<p>This section is unclear as to who the administrator is. It creates an absurdity because some groups can have more than one administrator, does the task then fall on each of them. In addition, the section is unclear as to what 'undesirable' content and discussion is. It gives the administrator (s) unchecked powers to determine what it is people can talk about which is a threat to the Freedom of Expression.</p>
	<p>(3) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding two hundred thousand shillings, or to an imprisonment of a term not exceeding one year</p>	<p>This section should be deleted .</p>	<p>The crime is not clear. There is no clarity as to what crime is being punished or why.</p>
<p>Section 841D</p>	<p>(1) The Commission may upon application in a prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person to blogs.</p>	<p>This section should be deleted .</p> <p>This section should be deleted .</p>	<p>It is unconstitutional to make it a requirement for persons to register to post news online. It is a threat to Freedom of Expression and a means to muzzle free speech. In addition, this section gives the Commission unfettered powers to determine the conditions necessary for licensing</p>

	<p>(2) The Commission shall keep a register of bloggers in a prescribed manner.</p> <p>(3) Any person who blogs without a licence is guilty of an offence.</p>	<p>This section should be deleted .</p>	<p>This section is a threat to the Freedom of Expression and Freedom of the Media. It will allow the government to monitor all persons posting news and commenting on news items.</p> <p>Punishing persons for failing to register as a blog is excessive and unnecessary as well as being a threat to Freedom of Expression.</p>
	<p>(4) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings, or to an imprisonment of a term not exceeding two years.</p>		
Section 841E	<p>1) The Commission shall develop a bloggers code of conduct</p>	<p>This section should be deleted .</p>	<p>Controlling the 'conduct' of bloggers is an attempt to control the news and by extension controlling the people.</p>



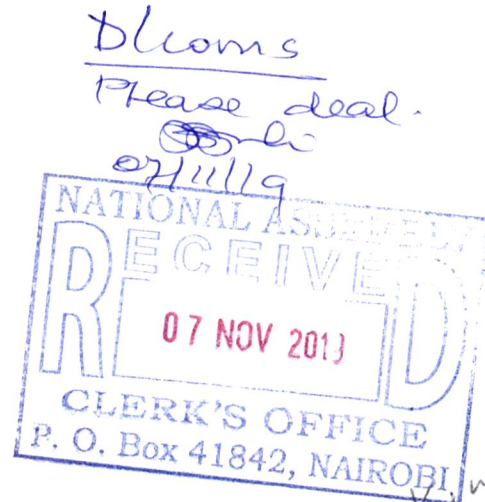
**COMMUNICATIONS  
AUTHORITY OF KENYA**

**Our Ref:** CA/LS/MIN/050/019 (769)

**Your Ref:** TBA

6<sup>th</sup> November 2019

**Mr. Michael Sialai, EBS,**  
The Clerk of the National Assembly  
National Assembly  
Clerk's Chambers  
Parliament Buildings  
P.O. Box 41842-00100  
**NAIROBI**



Dear Sir,

**RE: COMMENTS ON THE KENYA INFORMATION AND  
COMMUNICATION (AMENDMENT) BILLS 2019**

Reference is made to the above-mentioned subject matter.

We enclose herewith the following comments on the Kenya Information and Communication (amendment) bills 2019 for your consideration during the stakeholder participation scheduled for 11<sup>th</sup> November 2019: -

1. Comments on National Assembly bill No 20; and
2. Comments on National Assembly bill No. 61.

Kindly acknowledge receipt.

Yours Sincerely,

Matano Ndaro

**FOR: DIRECTOR GENERAL**

Cc: **Hon. Kisang William Kipkemoi**  
Chairman  
Parliamentary Committee for ICT and Innovation  
P.O Box 41842-00100  
**NAIROBI**

Cc: **Mr. Joe Mucheru, EGH**  
Cabinet Secretary  
Ministry of Information, Communication and Technology  
Teleposta Towers, Kenyatta Avenue  
P.O. Box 30025-00100  
**NAIROBI**

Cc: **Mr. Jerome Ochieng**  
Principal Secretary  
Ministry of Information, Communications and Technology  
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**NAIROBI**



**COMMUNICATIONS  
AUTHORITY OF KENYA**

**COMMENTS ON THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019**

**Executive summary**

The Kenya Information and Communications Act is an Act of Parliament legislated to provide for the establishment of the Communications Authority of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Authority, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.

Social media platforms and a wider digital communications technologies have changed our society in innumerable ways. With the recent developments in the ICT sector there is no doubt for the need of regulation in relation to services offered over the internet.

However as the collective influence has grown, these platforms deserve increased scrutiny. The proposals in the Bill though tenable are better placed in the realm of other laws such as the Computer Misuses and Cybercrimes Act of 2018, the proposed Data Protection Bill 2019 and regulation as espoused in section 5B on the Freedom of the Media. The Authority may make regulations for the better carrying out of the provisions of this section.

In developing laws and regulations to govern the ICT sector, legislators are cautioned against legislating on the technical aspects of technology and are encouraged to focus on technologically neutral laws, given the dynamic nature of the ICT sector. Effective regulation

will automatically result to greater economic growth, increased investment, lower prices, and better quality of service, higher penetration and more rapid technological innovation in the ICT sector.

Outlined below are our comments on the proposed amendments of the law and key recommendations that we hope will guide in the progressive and sustainable regulation of the social media platforms and applications.

<b>No.</b>	<b>Section</b>	<b>Provision</b>	<b>Justification</b>	<b>Proposal</b>
1	<b>Section 2</b> Social Platforms	“Social Media Platforms” includes online publishing and discussions, media sharing, blogging, social networking, document and data sharing repositories, social media applications, social bookmarking and widgets.	The development of specific legislation targeting social media platforms predicates that there are specific rules applicable only to such platforms on the assumptions that they are somehow unique, special or different from other forms of media offered over the internet, which is hard to distinguish. The definition provided doesn't distinguish	Delete the definition

			<p>between social media and the rest of the internet. The reasonable approach would be one that seeks to regulate services offered over the internet.</p>	
<p>2. <b>Section 84 IA</b> Licensing of social media platforms</p>		<p>(1) The Commission may on application in a prescribed manner and upon payment of a prescribed fee, grant a licence authorising any person to establish a social media platform for purposes of communication. (2) A licence granted under this part may be issued to an applicant</p>	<p>This section falls short of Articles 31 on the right to privacy and 34 on the freedom of the media of the Constitution of Kenya. It is important to note that a majority of social media platforms are registered and governed by laws of another country, e.g. with Facebook having its head office in <i>Menlo Park, California, United States</i>, and established for various purposes other than communication. Establishment of a social</p>	<p>Proposed deletion of the amendment</p>

		<p>subject to such terms and conditions as the Commission may think fit, and may include</p> <p>—</p> <p>a. The establishment of a physical office in the country.</p> <p>b. The registration of all users of the social media platform using legal documents.</p> <p>c. A requirement that the licensee shall</p>	<p>media platform entails the creation of a website which is a literary work governed under copyright law and managed by a domain name which is regulated under Kenic (<i>in Kenya by anyone using the .ke domain</i>) and KIPi (Trademark).</p> <p>It is important to note that the social media platform will have no way or format of authenticating the legality of the documents used by the users to register.</p> <p>Further, the proposal to have the licensees keep all the data of the users on its' platform and submit the same to the</p>
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		<p>keep all the data of the users of its platform and shall submit the same to the Commission when required; and</p> <p>d. A requirement that the licensee shall carry out due diligence to ensure that all its users, if natural persons are of age of majority. (3) The commission</p>	<p>Commission when required goes against the principle of data protection (<i>Catered for under the Data Protection Bill 2019</i>).</p> <p>This will lead to a conflict of laws as the issue has already been addresses in the proposed draft law.</p> <p>It is also important to know that the Data Protection Bill 2019 seeks to cure all the aspects the proposed amendments want to address.</p> <p>On the issue of registration, the Data Protection Bill 2019 provides that, any individual or company (including social media companies) that will be</p>	
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		<p>may revoke a licence granted under this section where the licensee is in breach of its terms and conditions provided under subsection (2)</p>	<p>processing personal data will be required to register with the Office of the Data Commissioner and observe the data protection principles.</p> <p>Many of the issues anticipated to be caused by social media platforms may be seen as infringements to basic human rights and freedoms. However the Data Protection Bill 2019, requires anyone the social media platforms to carry out data protection impact assessments and to take all reasonable measures to mitigate any anticipated risks and make the data more secure.</p>	
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3	<p><b>Section 84 IB</b> Sharing information</p>	<p>of A licensee may collect, use, preserve and share information of its users where it is reasonably necessary to respond to a legal process.</p>	<p>The proposed provision on the sharing of user information by the licensee where is <i>reasonably necessary</i> to respond to a legal claim is both ambiguous and contravenes Article 31 on the right to privacy. The Article requires that people shall have the right not to have information relating to their family or private affairs unnecessarily required or revealed. If the draft bill seeks to limit the right to privacy as guaranteed under Article 31 it should limit the same in line with Article 24 of the Constitution on the Limitations of Fundamental Rights and Freedoms.</p>	<p>Deletion of the proposed amendment.</p>
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			<p>It is important to note that the proposed amendment has been captured under the Data Protection bill 2019 within the limitations provided for under Article 24 of the Constitution of Kenya.</p>	
4.	<p><b>Section 84 IC</b> Social Media user responsibility</p>	<p>(1) A social media user shall ensure that any content published, written or shared through the social media platform</p> <p>a) Does not degrade or intimidate a recipient of the content.</p> <p>b) Is not</p>	<p>This section seeks to limit the freedom of expression under Article 33 of the Constitution beyond the limitations set out.</p> <p>The issue being addressed under this section is best catered for under section 5B of the parent law that allows the Authority to develop regulations governing the ICT sector.</p> <p>The provision is also well</p>	<p>Delete the proposed amendment.</p>



		<p>prejudicial against a person or group of people based on their race, gender, ethnicity, nationality, religion, political affiliation, language, ability or appearance; and,</p> <p>c) Is fair, accurate and unbiased.</p> <p>(2) Where a social media platform is created for a group of</p>	<p>catered for under the Computer Misuse and Cybercrimes Act of 2018.</p> <p>The enforcement of such a provision will prove challenging and to some extent impracticable due to the intricate nature of this area.</p> <p>A majority of the social media platforms such as WhatsApp are setup with the confidentiality as the key component and exercising oversight over this will be challenging.</p>	
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		<p>persons, it shall be the responsibility of the group administrator to —</p> <ol style="list-style-type: none"> <li>a) Notify the licensee of the social media platform of his or her intentions to form a group platform</li> <li>b) Approve the members of the group.</li> <li>c) Approve the content to be published in the platform</li> <li>d) Control</li> </ol>		
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		<p>(3) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding two hundred thousand shillings, or to an imprisonment of a term not exceeding one year</p>		
5.	<b>Section 84ID</b> Registration of Bloggers	1. The Commission may upon application in a	The proposed amendments seek to regulate the administration of websites,	Deletion of the proposed amendment

	<p>prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person to blogs.</p> <p>2. The Commission shall keep a register of bloggers in a prescribed manner.</p> <p>3. Any person who blogs without a licence is guilty of an offence.</p> <p>(4) Any person who contravenes the provision of this section commits an offence and shall be</p>	<p>which mandate rests with the Kenya Network Information Centre (Kenic).</p> <p>With Kenic required to report on a regular basis to the Authority and audited annually by the Authority on the activities conducted.</p> <p>The proposed requirement of registration of bloggers isn't tenable as it presupposes that all bloggers are within the jurisdiction of Kenyan law and are hosted with Kenyan domains.</p>	
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	shall be the responsibility of the group administrator to—		association. This would not be practical in the African reality where people form groups for all sorts of purposes eg wedding committees
	(a) notify the licensee of the social media platform of his or her intentions to form a group platform; (b) approve the members of the group; (c) approve the content to be published in the platform; and (d) control undesirable content and discussion.		
	(3) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding two hundred thousand shillings, or to an imprisonment of a term not exceeding one year.		
	<b>841D.(1)</b> The Commission may upon application in a prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person to blogs.		
	(2) The Commission shall keep a register of bloggers in a prescribed manner.		
	(3) Any person who blogs without a licence is guilty of an offence.		
	(4) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings, or to an imprisonment of a term not exceeding two years.		
	<b>841E. (1)</b> The Commission shall develop a bloggers code of conduct.		

			media from regulation by the government.
	(a) the establishment of a physical office in the country;		Ignores current realities of online and remote working. Also ignores the fact that many bloggers create content for non-commercial purposes
	(b) the registration of all users of the social media platform using legal documents;		
	(c) a requirement that the licensee shall keep all the data of the users of its platform and shall submit the same to the Commission when required; and		
	(d) a requirement that the licensee shall carry out due diligence to ensure that all its users, if natural persons are of age of majority.		
	(3) The Commission may revoke a licence granted under this section where the licensee is in breach of its terms and conditions provided under subsection (2).		
	841B. A licensee may collect, use, preserve, and share information of its user where it is reasonably necessary to respond to a legal process.		Offends Article 31 on the right to privacy of the users, since clause does not provide mechanisms for protection of users
	841C. (1) A social media user shall ensure that any content published, written or shared through the social media platform--		These standards are subjective and open to multiple interpretations
	(a) does not degrade or intimidate a recipient of the content;		
	(b) is not prejudicial against a person or group of people based on their race, gender, ethnicity, nationality, religion, political affiliation, language, ability or appearance; and		Already covered by the National Cohesion and Integration Act
	(c) is fair, accurate and unbiased.		
	(2) Where a social media platform is created for a group of persons, it		Offends Article 36 on freedom of

National Assembly Bill No. 61 of 2019

Clause	Bill Provision	Proposal	Justification
2	2. The Kenya Information and Communications Act (hereinafter referred to as "the Principal Act") is amended in section 2 by inserting the following new definitions in the proper alphabetical sequence —	Delete entire clause	This definition creates a limitation to freedom of expression by requiring people who regularly comment on topical issues to seek licenses prior to speech
	"blogger" means any person who is registered as such by the Commission under section 84D;		
	"blogging" means collecting, writing, editing and presenting of news or news articles in social media platforms or in the internet;		
	"social media platforms" includes online publishing and discussion, media sharing, blogging, social networking, document and data sharing repositories, social media applications, social bookmarking and widgets;		
	"widgets" means an application, or a component of an interface, that enables a user to access a service.		
3	The Principal Act is amended by inserting the following new Part immediately after Part VIA. <b>PART VIAA — REGULATION OF SOCIAL MEDIA</b>		
	84IA. (1) The Commission may on application in a prescribed manner and upon payment of a prescribed fee, grant a licence authorising any person to establish a social media platform for purposes of communication.	Delete entire clause	Licensing of bloggers as envisaged in this clause limits freedom of expression that is guaranteed in Article 33.
	(2) A licence granted under this Part may be issued by an applicant subject to such terms and conditions as the Commission may think fit, and may include--		Even if bloggers were to be thought of as media, which are not, this provision goes against Article 34 which protects

You may contact CIPIT at [cipit@strathmore.edu](mailto:cipit@strathmore.edu) or +254 0703 034 612.

Yours Sincerely,  
CIPIT, Strathmore Law School

**(Attachment:** CIPIT's memorandum on KICA Amendment Bill (National Assembly Bill No. 61 of 2019)

13 Nov 2019

The Clerk Kenya National Assembly,  
Parliament Buildings,  
P.O. Box, 41842-00100,  
Nairobi, Kenya.

Attn: Departmental Committee on Communication, Information and Innovation Committee

Dear Mr. Michael R. Sialai-EBS,

**RE: Memorandum Submission-KICA Amendment Bill (National Assembly Bill No. 61 of 2019)**

Greetings from the Centre for Intellectual Property and Information Technology law (CIPIT) at Strathmore Law School. CIPIT is a Think Tank established under Strathmore Law School. CIPIT was launched in 2012, and the scope of our work includes evidence-based research and training in intellectual property, information technology law and policy, especially as they contribute to African law and human rights.

In response to your call for memoranda, we wish to submit our views on the Kenya Information and Communications Amendment (National Assembly Bill No. 61 of 2019).

Attached please find our memorandum outlining our input to the Bill. It is our considered view that the Bill should be withdrawn in its entirety as it offends several provisions of the Constitution, key among them:

- The Bill proposes a licensing regime for bloggers and social media users. While it is understandable that the Sponsor could be trying to address the challenges brought about by social media, the bill violates Article 31 of the Constitution which guarantees freedom of expression. It is instructive to note that Kenya has one of the most elaborate provisions for this freedom, extending to the freedom to receive or impart ideas; freedom of artistic creativity as well as academic freedom.
- The Bill conceptualizes bloggers as professionals who should be regulated. By so doing, it ignores the reality of blogging and social media use which includes non-commercial and personal uses. Indeed, there are many public officers and institutions that use social media for public relations, and they would be subjected to redundant licensing were the Bill to pass.
- Even if bloggers were to be considered part of media, which they are not, the Constitution in Article 34 guarantees freedom of the media and protects media from state interference.

Social media has brought about many opportunities and challenges. The challenges cannot all be solved solely through the law. CIPIT therefore urges Parliament to consider other means of dealing with content issues.



		liable upon conviction to a fine not exceeding five hundred thousand shillings, or to an imprisonment of a term not exceeding two years.	
6.	<b>Section 84IE</b> Bloggers code of Conduct.	(1) The Commission shall develop a bloggers code of conduct.	
<b>Conclusion-</b> So-called OTT applications and services are the most visible part of the Internet for ordinary users. The rules and liability that are created for these applications and services impact freedom of expression, net neutrality, consumer rights and innovation. Therefore, discussions and rules on OTT regulation is at its core a debate about how the Internet should be regulated. Recognizing the global nature of online platforms, the International Telecommunications Union (ITU) has stepped in to explore global multilateral framework for OTT services and applications.			

