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REPUBLIC OF KENYA




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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. Williams Kibet Chairperson
CLERK-AT THE TABLE:	Lemuel Mosey.

DIRECTORATE OF COMMITTEE SERVICES

CLERK'S CHAMBERS

PARLIAMENT BUILDINGS

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 2nd 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 18th October, 2019 inviting the public to submit their views on the Bill on or before 1st 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 **2nd 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

Hon. Alfah O. Miruka, MP
M.P for Bomachoge Chache Constituency

Kenya National Congress

Hon. Annie Wanjiku Kibeh, MP
MP for Gatundu North Constituency

Jubilee Party

Hon. Joshua Kimilu, Kivinda, MP
MP for Kaiti Constituency

Wiper Democratic Party

Hon. Marwa Kitayama Maisori, MP
MP for Kuria East Constituency

Jubilee Party

Hon. Mwambu Mabongah, MP
MP for Bumula Constituency

Independent

Hon. Maritim Sylvanus, MP
MP for Ainamoi Constituency

Jubilee Party

Hon. Mwangaza Kawira, MP
MP for Meru County

Independent

Hon. Jonah Mburu, MP
MP for Lari Constituency

Jubilee Party

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

Hon. Wamuchomba, Gathoni, MP
MP for Kiambu County

Jubilee Party

Hon. (Eng.) Mark Nyamita Ogola, MP
MP for Uriri Constituency

Orange Democratic Party

Hon. John Kiarie Waweru, MP
MP for Dagoretti South

Jubilee Party

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

Hon. Innocent Momanyi Obiri, MP
Bobasi Constituency

People's Democratic Party

Hon. Godfrey Osotsi Atieno, MP
Nominated

African National Congress

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 18th October 2019 inviting the public to submit their views to the Clerk of the National Assembly on or 1st 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 sated 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 in 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