

A Critical Evaluation Of The Proposed Kenya's Film, Stage Plays And Publications Bill 2016

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Abstract: Debates about content regulation have been dominated by pro-censorship and anti-censorship arguments. More recently there has been emergence of repressive laws and rising attacks on creative artists. Increased fear of a robust and aggressive creative industry by government cannot also be ignored. Countries like Australia and South Africa have come out strongly in pushing for change to legislation and a review of the classification guidelines. In Kenya, the Film and Classification Boards proposed has sparked mixed reactions mainly from Social media bloggers, advertisers and artists. There have been attempts by religious groups to lobby KFCB to withdraw and review the bill. There have also been calls from the creative industry that the bill be trashed and the KFCBs CEO be removed from office. According to KFCB, the bill is meant to enhance adherence to the broadcast content regulations and preserve national values and morals. The proposed bill outlaws the airing of commercials relating to betting, contraceptive and alcoholic drinks between 5am and 10pm when children are deemed to be awake. Also, the bill requires police officers to be present during the shooting of a broadcast film and to stop any scene they feel contravenes the regulations. Social media users wishing to post videos online must seek clearance from KFCB. These contagious issues have led to industry players terming the bill as vague and open to abuse at the expense of artists. This article is premised on the argument that Kenyan film sector is still struggling and crippling it risks curtailing some very important bits of immaterial culture. We believe that no one can police morals, instead we argue for a paradigm shift towards a more policy-oriented approach in handling regulation and classification issues. As it stands, there is huge uncertainty as to whether the bill will be passed into law or whether it will be rejected by parliament. We recommend a proper assessment of the impact of passing the proposed bill. We also recommend enactment of friendly laws that will competitively position the Kenya's creative industry.

Keywords: Proposed Kenya's Film, Stage Plays and Publications Bill 2016 (KFSPP); The Film and Classification Board (KFCB); Communications Authority of Kenya (CA); Internet Service Providers (ISPs).

I. INTRODUCTION

KFCB is a state corporation that operates under the Government of Kenya whose mandate is to regulate the creation, broadcasting, possession, distribution and exhibition of films by rating them. The Board was founded in 1963 with the commencement of the laws outlined in the Films and Stage Plays Act of 1962 and has since involved itself in the rating and classification of films and television programs. KFCB has

come under sharp scrutiny because of fronting the proposed KFSPP bill 2016.

A few months back, it will be remembered that KFCB signed an MOU with its South African counterpart the Film and Publications Board. It was foreseen that this partnership would trigger an attempt by KFCB to seize even more regulatory space for itself beyond films and broadcast content. These fears have come to pass since the proposed bill seeks to grant KFCB far reaching powers to censor all forms of media.

According to Couvares (1996), Kenya's film censorship laws are the legacy of British colonialism. British colonial film policy in its African colonies began in the late 1920s. This was to ensure the spirit of freedom and independence was not transmitted to colonized audiences. Heins (1993) exposes that film censorship was just as important to British imperial ambitions as the suppression of African culture and the efficient penetration of education that was devoid of development centric knowledge and Christianity.

Couvares (1996) further posits that this racist and paternalistic attitude was best exemplified by Kenya's Select Committee on Film Censorship that advocated for segregation with regard to both exhibition and censorship of films. The Committee placed all Africans on a much lower mental category than European children. It also perceived the entire African population as extremely vulnerable, psychologically immature and without the mental capacity to consume certain films without corruption.

Based on the Committee's recommendations, the Theatres and Cinematographs Exhibition Ordinance was enacted. It provided for two separate Film Censorship Boards to regulate film exhibitions for Africans and non-African races. Albert and Shirley (2000) explain that in 1959, revisions to this policy were considered but questions as to the racial composition of these boards remained largely unanswered. The Mau Mau uprising and resultant State of Emergency between 1952 and 1960 heightened the anxieties of these censorship boards. In 1960, the board banned a film entitled *Freedom* because the film centered on the building of political unrest and civil disobedience with a particular stress on the evils of colonialism. The spirit of ideological control and paternalism underlying the British colonial film policy found itself a new home in the Films and Stage Plays Act that was enacted just before independence (Hull, 2000).

Foestel (1994) insinuates that the Film Censorship Board was useful to post-independence regimes in curtailing free speech and preventing any ideas of dissent through plays and films. Even as a section of legislators decried the country's moral decay fuelled by television, no proper legislative mechanism was ever devised to deal with the issue. In 2001, government in the interests of safeguarding public morality attempted to extend the KFCB's mandate to include regulating all content transmitted by broadcast networks through a Gazette Notice.

Kajilwa (2015) reveals that the Nation Media Group promptly contested the notice in court, sparking a six year court battle that would provide a precedent on the KFCB's mandate and the executives' powers to expand its mandate. Later in 2009, Section 15 of the Act was amended to extend the KFCB's functions to regulating the broadcasting, possession, distribution and exhibition of films. Ironically, no corresponding changes to the Act's preamble were made. Section 11A was added, providing for the board's composition, but failed to include experts from the broadcasting industry. This strongly indicated that the legislative intention of the amendments was to still restrict the KFCB to regulating films.

Mahr (2016) says that the Kenya Communications Act was overhauled in 2009, transforming into the Kenya Information and Communications Act (KICA) with provisions

touching on the KFCB. Section 46I of KICA prohibits broadcasters from broadcasting films whose approval for exhibition has been denied by the KFCB. That is the only role envisioned for the KFCB by KICA. However, a complication to this rather straightforward role was created by the Communications Authority of Kenya. The CA developed and published a Programming Code in 2015 with controversial provisions concerning the KFCB. The Code prescribed a watershed period during which content meant for adults was not to be aired.

Green (1999) argues that the Code gave KFCB the responsibility of classifying each and every form of content to be transmitted by broadcasters including TV programmes, commercials, programme promotions, community service announcements and station identifications. Later a presumption emerged which made KFCB responsible for classification and rating of all content. During president Jomo Kenyatta's and Daniel Arap Moi's rule, CAP 222 of the laws of Kenya was used stamp down and to control both film and theatrical productions.

Consequently, Karimi (2015) explains that the law required film makers to submit scripts to the then Kenya censorship board for approval. The government through the board muzzled its critics leading to arrests and indefinite detention of creative artists. For instance, the Kamirithu theatres Ngugi Wa Thiongo's arrest and eventual exile for allegedly using art for civic education. In 1997, the clause requiring that scripts for theatrical productions be submitted for approval was amended. This helped give birth to the many theatre groups. For example the Redykyulass cracked the facade with their imitation of President Moi.

Chege (2016) intimates that the extended role of KFCB was mischievously packaged as an exercise involving cross jurisdictional responsibilities between CA and KFCB. The publishing of the Programming Code in December 2015 coincided with the appointment of Ezekiel Mutua as the new KFCB's CEO. Mutua has been seen by many as trying to bring back dictatorial laws. His recent activities have been seen as a plan to extend KFCB's mandate beyond film and theatre to cover advertisements, billboards, internet and publications. The proposed bill gives the CEO broad powers to censor, stop and sue anyone or any theatrical or film production that he thinks does not conform to or is not reflective of national values and aspirations of the people of Kenya.

II. MANDATE OF KFCB

According to Mangera (2014), the KFCB board was established by the Films and Stage Plays act of 1962 which came into force in 1963. It was mainly to regulate the creation, broadcasting, possession, distribution and exhibition of films by examining them for content, imposing age restrictions and giving consumer advice about various films. The Act gives the board the power to approve or refuse to approve films and posters. The Act also states that approval is not to be granted to films that in the board's opinion, prejudice offend decency or are undesirable in the public interest.

In addition, the Kenya Information and Communications Amendment Act of 2013 gives the board the mandate to monitor television stations in order to ensure content meant for adult audiences is not aired during watershed period of 5am to 10pm. The board also classifies and rates films by examining them and giving them a certificate of approval along with its rating of 0 to 4. This scale indicates the impact of the film: "low", "mild", "moderate" or "strong". This then corresponds to the general rating of the film: GE (general exhibition), PG (parental guidance recommended), 16 (not suitable for persons under the age of 16) and 18 (not suitable for persons under the age of 18).

Mureithi (2016) adds that the board also issues the certificate of approval. The board's other activities include licensing film distributors in the country by granting film regulatory licenses to the distributors and checking for violation of the terms of the license, including license expiry, sale of unrated movies, sale and showing of restricted movies and misuse of classification labels. Vourlias (2014) reveals that KFCB is currently restricted to only regulating films for exhibition and broadcasting and neither the executive nor CA has the powers to extend the mandate of the KFCB. It is interesting to mention that KFCB has proceeded to carve out more regulatory territory for itself beyond the solid foundation of the Films and Stage Plays Act. Clearly this is not within the law.

Gathara (2016) intimates that the KFCB's regulatory overreach began by its targeting of YouTube and Netflix. The board was not alive to the reality that efforts to regulate such would be an exercise in futility. The board also went after the organizers of Project X party, a case that should have been the preserve of the police. The board based its involvement on an unsubstantiated claim that an international pornography ring planned to use the party to shoot pornographic films and promote homosexuality. KFCB proceeded to proclaim a ban on the advertising of alcohol, contraceptives and betting on television during the watershed hours. The board even forcefully made Coca-Cola to edit a TV advert and declared war on immoral billboards and other forms of outdoor advertising. KFCB proceeded to draft and prescribe classification guidelines for advertising, essentially muscling out established self-regulating mechanisms within the industry such as the Advertising Standards Board and Code of Advertising Practice.

The apparent lack of actual resistance from its targets has seen KFCB hunt down any source of immorality irrespective of legal or Constitutional basis. The boards' latest extra-legal assault on the local advertising industry may be the triggers that initiate a process confirming that the regulator has bitten off more than it can chew.

III. CRITICISMS OF THE BILL

Critics have accused KFCB of often being used by bureaucrats and politicians to pursue agendas that could enable them appeal to masses. The latest being its attempts to assert its authority by banning *The Wolf of Wall Street*, Blaqy's Music video, The NEST's Stories of Our Lives and

Fifty Shades of Grey. Unfortunately it all failed to resonate with the masses.

Sharma (2016) discloses that continued mounting pressure from stakeholders has forced KFCB to reveal that this proposed bill is a review of the current Films and Stage Plays Act (Cap 222) and not a proposed draft for a new law. However, the proposed bill states clearly in Section 87 that one of its intentions is the repeal of Cap 222. Ordinarily, extensive amendments to statutes are made either through an amendment bill with the same title as the original statute while minor alterations are made through a miscellaneous amendments bill. This proposed draft bill is neither of those. It is a proposed brand new law.

The proposed bill requires that all media content to reflect national values and aspirations of the people of Kenya, two extremely vague principles not present in Cap 222 and undefined by this proposed bill. This provision seeks to legitimize the regulatory overreach that the board has vigorously undertaken since late last year to provide a stronger basis for the wrongful expansion of its mandate through the Programming Code.

While the proposed bill promises a superficial improvement in the composition of its board by factoring in constitutional gender, special groups and diversity requirements, it is silent on the specific checklist of expertise or stakeholder representation that the five non-public officer members are supposed to possess. This gap leaves room for the appointment of members who will likely neither add value to the board nor perform their functions independently.

Odongo (2015) discloses that the proposed bill grants the CEO powers to unilaterally perform certain functions that would have required the input of the entire board. According to the proposed bill, the CEO makes decisions on applications for filming certificates; issues filming certificates; imposes alterations and additions to films; approves or rejects the alterations and additions and approves film posters. These functions are supposed to be carried out by the board as a whole. Instead, the language of the proposed bill sets up the CEO as the overall man, leading to more questions than answers.

Why would all these core functions and powers of the board be vested in a single ex-official member? These provisions are probably among the most controversial legislative drafting Kenya has witnessed in a long time. While the search and seizure exercises carried out by the KFCB certainly require police assistance, one would have thought that the proposed bill would do away with the Section 9 of Cap 222 which provides for the monitoring and controlling of film production by the police. This proposed bill retains this remnant of colonial era film censorship practice where a police officer approved films for exhibition.

The proposed bill suggests that after a film has been classified, a filmmaker may only apply for re-classification of the film to a less restrictive rating after three years. This provision does not achieve the objective of re-classification where the board is supposed to provide information on the cuts or alterations that could be made to the film for a more favorable rating. Once the cuts are made, the film should be

re-classified immediately. A three year waiting period serves no useful purpose.

In addition, the proposed bill imposes a raft of penalties for various offences, some of which are unreasonably excessive. The maximum penalty under Cap 222 is Kshs. 100,000 and/or between 2 months – 5 years' imprisonment. Also, distributing or exhibiting an unclassified film or visual media earns a maximum penalty of Kshs. 2 million and/or 5 years' imprisonment. The corresponding offence under the Copyright Act like distributing unauthorized copies of a work imposes a maximum fine of Kshs. 400,000 and/or 2 years' imprisonment. In other words, a filmmaker could pay heavier fines and be confined to prison longer than those selling pirated copies of his/her films.

Muthomi (2016) adds that the proposed bill imposes duty upon ISPs to ensure that the online content on their platforms is provided by registered exhibitors and distributors and is compliant with KFCB guidelines. ISPs are also required to prevent the hosting of objectionable content and to report offenders. In our view, the proposed bill does not define the limits of online content leading to an assumption that everything online is to be censored. Secondly, the proposed bill does not define who an internet service provider is therefore leading to an assumption that the term means all ISPs from mobile service providers like Safaricom and website hosts to platforms for user-generated content like YouTube and Twitter.

It goes without saying that this provisions generates more questions than answers. Does it mean all internet users could at some point be regarded as exhibitors or distributors and therefore have to be registered by KFCB? Doesn't this provision require ISPs to put in place surveillance mechanisms to monitor the activities of their users? How that is supposed to work without any tangible data protection and privacy laws in place? How can ISPs feasibly monitor and assess content generated by the millions every hour? Are ISPs expected to bear the costs associated with this monitoring and reporting? Doesn't this provide a dangerous opportunity for the curtailing of fundamental and constitutional freedoms?

Under the proposed bill, KFCB is granted extended powers to classify printed publications as either objectionable or not objectionable. Without a definition of the term "publication" the assumption is that the term will apply to every form of printed material that is published. A publication could be restricted for containing two parts/passages depicting objectionable themes such as sex, horror, drug use in a manner deemed to be threatening to the public. KFCB also intends to put border control measures to prevent the importation and distribution of objectionable publications. This is a step away from the classification that the board claims to do for the protection of children towards absolute censorship and control over the content adults choose to create or consume (*Vidija, 2016*).

According to Gathara (2016) the proposed bill will create new costs for filmmakers, complicate business practices, raise fines, regulate the creation of art, safeguard KFCB from prosecution and also police what content Kenyan adults can consume. Consequently, KFCB argues that the proposed bill is a step in the right direction since it came about from the spirit of changing the current law Cap 222 in order to lower costs of

rating film content which stands at Ksh. 100 after a petition from Kenyan film producers. KFCB claims that there were other sections of the law that are now outdated that sought to be changed and that the drafting of the proposed bill had involved film associations. Chongoti (2016) has registered her objection with this saying that film associations never took part in coming up with the bill, also public participation was ignored in the drafting of the proposed bill.

The proposed bill has caused panic with many arguing that the bill will kill innovation. There are concerns that the proposed bill will stifle Kenya's nascent television, film and technologies industries. Stakeholders have been attempting to stimulate growth in this sector through various projects and policy initiatives. It is argued that the sector has the potential to contribute significantly to the economy. Sharma (2016) points out that the Kenya's film industry is estimated to be worth about Sh7 billion. However, nearly 33% of this comes from the informal sector. On the other hand, film makers have been pushing government to offer incentives to businesses and to adopt regulatory stances that promote growth. Already, government has passed regulations requiring that by June 2018, 60 % of all content aired on television should be locally produced.

Industry players have termed the proposed bill as dictatorial and accused KFCB of overstepping his mandate. The new guidelines that have irked the advertisers outlaw the airing of commercials relating to betting, contraceptive products and alcoholic drinks in the watershed period between 5am and 10pm a time when children are not yet asleep. Additionally, the new raft of regulations states that advertisements shall not feature semi-nude or nude men and women. Content touching on betting, condoms or advertisements with sexual innuendos will not be aired during this period. Commercials on alcoholic drinks will also be classified as unsuitable.

The Outdoor Advertisers Association of Kenya has dismissed the proposed bill, saying the board and its CEO were only seeking public attention. The Bloggers Association of Kenya has termed the proposed bill as irrelevant. Odongo (2016) points out that the regulation of outdoor advertising lies under Physical Planning Act Cap 286 and that the Urban Areas and Cities Act of 2011 regulate advertisements in Urban Areas. However, Mutua has maintained that KFCB is the enforcer and it is within its jurisdiction to regulate content.

Okande (2016) discloses that there have been calls for immediate disbandment of the KFCB board and removal from office of the boards CEO for failing to push for a bill that puts structures together for the creative industry and instead concentrating on the side shows. Truth be told, Kenya's film industry cannot be likened to Nigerians Nollywood and South Africa whose creative industries have actually made remarkable presence on the global platform. It goes without saying that the creative sector in the country is pitiable. How much is it worth? How much is its potential? Gathara (2016) says that it is cheaper to fly your crew to another country for a shoot than it is getting a scene on Kenyatta Avenue in Nairobi.

We think KFCB has lost touch with the situation on the ground. Therefore it should start by getting in touch with filmmakers and other creatives in the country. It's unfortunate that filmmakers are opting to just shoot elsewhere instead of

having to play this back and forth game with KFCB that ends up taking more than half the budget the filmmakers had set aside for the production. We also believe that no one can police morals. If pornography is the ball of contention here, then we think that this is a legal issue. But if KFCB wants to ban films because people kiss in the stories or chat while in bed then they have missed the point. The point here is that somehow, kids will see kissing, smoking and drinking alcohol on TV.

Mellinger (2015) exposes that KFCB signed an MOU with South Africa's film and video content regulator in order to identify: define activities for mutual benefit of both countries, develop mechanisms for regulation in the wake of new technologies, promote compliance within legislative frameworks applicable in respective jurisdictions and promote outreach activities between the two boards. While the actual fine print and deeper implications of the MOU are yet to be fully established, this event could mark the beginning of positive and negative developments affecting not just stakeholders in the film industry but all everyday users of the internet and social media as well.

On the other hand, Okande (2016) affirms that this partnership has brought to the table its own share of bad and potentially damaging policies especially with regard to the regulation of content on the internet. It will be remembered that SA published and presented for public consultation a Draft Online Regulation Policy with the objective of regulating online content. The document sparked widespread condemnation among the public and experts alike. It was called Africa's worst new Internet censorship law for its dangerously ambiguous provisions that could give the regulator draconian powers over every facet of online content including the everyday activities on social media such as posting status updates, tweets on Facebook and Twitter or posting videos on YouTube. Mureithi (2016) insinuates that the discovery that significant portions of the policy were lifted from an Australian Law Reform Commission report has contradicted the board's assertion that the policy reflected South African cultural values.

What has followed this partnership has been emergence of KFCB from its shell as a quiet regulator and is now the subject of controversy and outrage in equal measure fuelled by highly publicized declarations and activities. To say the least, KFCB has maintained a track record of not providing sufficient avenues for public engagement and has made very little efforts for awareness creation. The board has also banned campaigns aimed at empowering the very children they seek to protect as well as undertaking little research to provide empirical basis to their claims, some of which come off as completely absurd.

IV. CONCLUSION

This article is built on the premise that the Kenyan film sector is still struggling and crippling it risks curtailing some very important bits of immaterial culture. In Summary, the proposed bill 2016 has been criticized on the following reasons: It attempts to broadly regulate the creation, uploading and viewership of online content; It undermines freedom of expression by insinuating that all videos and pictures recorded

on smart phones should be approved before being uploaded online; It takes away the right of authors to own their creations and to edit them at will. It also jeopardizes the principles of copyright creation through independent creation and nullifies the concept of authorship by insinuating that authors do not have authority over their own intellectual works;

The proposed bill criminalizes any person who uses a camera to take photographs or videos without a pre-issued KFCB license; It renders plays and skits in churches, weddings, public and family gatherings illegal if they are not licensed before performance; It requires police officers to be present during the staging of plays and gives them the power to stop or alter the recording of acts which they deem to contravene the terms of the licensing. This is itself creating avenues for possible future harassment and extortion by corrupt officers on the basis of unapproved possession of cameras or video content. The proposed bill also compels ISPs to monitor the media content uploaded or downloaded by users and to block access to users who lack KFCB licenses to create or upload media content; It introduces unnecessary production costs and bureaucratic delays in movie production; It indirectly legitimizes piracy by making legal production and publishing of movies difficult while licensing any person who distributes movies without questioning their relationship with the lawful copyright holders.

The proposed bill gives the poster and billboard approval duties to KFCB despite these functions being of county governments. What is most worrying is that the proposed bill appears intent on frustrating start-up movie, music and graphics producers, bloggers and youth entrepreneurs through registration fees and arbitrary registration requirements. The bill also gives the KFCB powers that conflict with the economic objectives of bodies such as the Communications Authority of Kenya and the Media Council of Kenya.

Hooton (2016) concludes that if the bill is implemented, it will suffocate the local industry and prevent that attainment of 60% local video and music broadcast content as envisioned in the national music and media policies. The proposed bill also tramples on democratic rights by requiring the media arms of political parties and election contestants to seek government approval before producing or running media campaigns. On the other side, Chongoti (2016), affirms that the legal basis for expanding KFCBs composition and mandate via the Programming Code is unacceptably far from what was anticipated by the legislature as it enacted and amended the Films and Stage Plays Act.

Even if this expanded mandate was beyond reproach, KFCBs well documented willingness to operate outside the rule of law in the name of safeguarding values and morality leaves a lot to be desired. Left to their own, KFCB could soon be asserting its control on every conceivable aspect of life beyond media, a phenomenon only experienced in oppressive, totalitarian and religious fundamentalist regimes. We believe that if there is no obvious demand for the board's protection services, then it can go out of its way to create that demand by propagating an atmosphere of fear or insecurity. It's likely that the board will commercialize its services by charging its customers for the services.

It is a worrying indication to see KFCB metamorphose from a regulator of films and stage plays to a controversial

body attempting to secure far-reaching censorship powers over all audio and visual media on every platform, including the internet. We concede that the bill is vague and open to abuse at the expense of artists. This is in contrast to the 2010 constitution which prioritizes the right of every Kenya to a freedom of expression. Mureithi (2016) concludes that Kenya's film industry has seen a revival and was worth 2 billion US dollars in 2016 up from 600 million in 2007. Therefore KFCBs attempt to sneak in irrelevant laws to the industry will scare away local and international investors, sentiments that we also share.

V. RECOMMENDATIONS

Kenya's 2010 constitution has been widely praised for expanding freedoms of expression, specifically by prohibiting the state from interfering with people's independence to speak freely. The constitution also binds Kenya to a series of international and regional legal instruments governing free expression, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Additionally, the 2010 constitution does contain potential curbs on press freedom with regard to privacy, incitement, hate speech and antigovernment propaganda in times of war. The study recommends enactment of friendly laws and formation of a more robust Communication and Multimedia Appeals Tribunal with the power to hear complaints and appeals on complaints and determine them.

Kenya is the leader in internet usage in East Africa and boasts of a thriving online community, including a number of prominent and critical blogs. However, restrictive new legislation continues to pose a threat to freedom of speech. In the recent past, aggressive bloggers have faced an environment of increased intimidation and pressure from the authorities. Bloggers have been arrested under the Kenya Information and Communication Act (KICA) that criminalizes the transmission of offensive or menacing messages over telecommunications networks. It's important that government stops this culture of impunity and intolerance and give democracy a chance.

The centralization of regulation powers to one body is a step in the wrong direction and has caused concerns about economic pressure on the creative industry. There is huge uncertainty whether the bill will be passed into law or whether it will be rejected by parliament. We recommend a proper socio-impact assessment of the impact of passing the proposed bill. We also recommend that the proposed bill be withdrawn and inclusion of views of all stakeholders and the public in drafting of bills be prioritized in the future. Gathara (2016) recommends that the proposed bill be shredded and that KFCB starts from scratch with more stakeholder participation. This recommendation is in tandem with Chongoti (2016) view that the proposed bill be hinged on a policy framework. We concede that the country needs policies that encourage development of the arts industry and not censorship. Kenyans of goodwill are encouraged to reject this bill in its entirety since art is a mirror to society and we cannot afford to leave

the decisions concerning such a crucial sector to rest on one person or institution.

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