Kenya: Killing two birds with one stone

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Online content and censorship in Kenya

In Africa, the argument goes, the information and communications technology (ICT) market has not grown as fast as it could have because of the lack of a conducive policy and regulatory environment. According to the United Nations Economic Commission for Africa (UNECA), by 2007 only 34 African countries had ICT policies, 12 were in the process of drafting one, while seven had not even launched the policy development process.

Kenya is a notable exception: it has been amongst the front-runners in fast-tracking ICT policy development on the continent. By 1998 the country's policy debates had led to the Kenya Communications Act, in line with groundbreaking telecommunications policy processes in a number of African countries during the 1990s, including middle-income ones such as South Africa and Egypt.

Yet, only a decade later, many of these watershed policy moments have weathered badly, battered by rapid technological change, or by the inability of governments to implement them properly and transparently.

Broadband throws policy gaps into relief

The launch of the USD130-million East African Marine Cable (TEAMS) system in Kenya in June was as much a symbolic as practical event. It was symbolic on a number of levels, most obviously when Kenyan President Mwai Kibaki referred to it as a "nation-building" tool, a statement suggesting more than economic development following the country's bloody election clashes last year. But it is also symbolic because it heralds the real dawn of 21st century connectivity; the beginning of a new converged communications landscape that the now outdated policy and legislative developments of the1990s have struggled to keep up with.

And convergence, Kenya shows, is bringing some uncomfortable policy challenges into focus.

Online content on the back burner

There has long been the sense that the issue of online content has been on the back burner in ICT policy-making circles in Africa. One reason is no doubt that the issue can be complex. Just where to draw the line on things like freedom of expression, state security, and privacy is not settled, and how to police the relative freedom of online publishing where the user is also the creator of content tricky; as are issues of copyright and piracy.

Online content is also a political hot potato. To mess with the idea of internet freedoms in many ways is to be seen to be a state censor of the worst kind, and liable to draw collective criticism from across the globe, as countries like China have found.

But one of the main reasons is that in the face of the infrastructural development needs in Africa, online content has been considered a 'soft' issue – as seen in the largely techno-centric approaches to e-government roll-out.

Lumping the new with the old

But Kenya's amended Communications Act (2008) is showing that this lack of attention may prove a bigger problem than anticipated. What has emerged in the Act is little more than a cut and paste approach that lumps media responsibilities with the sometimes more ephemeral responsibilities of online communication. And the choke chain at the media's throat is said to apply automatically to the internet.

In some ways this may be justified. During the 2007 post-election skirmishes in Kenya, the internet played a major role in the violence. It was used by Kenyans in the diaspora to send text messages and e-mails that were potentially more harmful to state security than any print or broadcast news outlet.

At the same time, traditional media outlets did their dirty work. The pro opposition KASS FM, for instance, was alleged to have aired inflammatory broadcasts during the post election violence, yet nothing was done. Other media houses like Royal Media Services, which owns Citizen TV and several vernacular stations, openly supported Kibaki's Party of National Unity.

The government has justified the new regulatory mechanisms under the Act pointing precisely to this kind of behaviour; behaviour, that it felt, was the result of weak legislation and a lack of self-regulatory mechanisms.

Minister gets new powers

One of the most controversial sections of the Act is known as Section 88 which gives the minister of communication powers to unilaterally, without recourse to parliament or the courts, enter and search broadcasting stations and seize communication equipment. The minister is also given powers to intercept and to disclose communications between people, and to intercept postal articles. At the level of enforcement, the regulator, the Communications Commission of Kenya (CCK), has been given the power to revoke licences and impose fines.

The media for its part has argued that self-regulation is the preferred option. Self-regulation, media owners say, should apply to programming generally, such as the decision on what to air when. While it has come under fire for broadcasting so-called 'adult content' during morning shows, or family TV time, it argues that this should be left to market forces and editorial policies.

Strictly speaking, the already established Media Council should do this job. The Council is comprised of government and media representatives and is expected to receive public complaints and conduct hearings. It is supposed to play the role of arbiter as envisaged under the Media Act (2007), but has structural weaknesses, mainly the ability to enforce the penalties and to make its decisions binding.

Much of its ineffectiveness is the result of a lack of funding, from either the government or the media owners themselves.

In pursuing their editorial policies – whether right or wrong – the media have always pointed to the freedom of expression which is guaranteed under the constitution. It says the measures taken in the Act are reminiscent of the regime of Daniel Arap Moi, when newspapers, perceived to have crossed the lines of acceptable journalism, were banned, and journalists arrested and detained without trial.

Their fears may be well founded. More recently, on 2 March 2006, hooded police officers raided The Standard newspaper offices, destroying property and burning newspapers, in a swoop that was carried out as a "state security measure" against a crime the newspaper was thought to be committing.

The issues are not the same

The exact implications of the Communications Amendment Act for online content are not yet clear, and are not spelled out. But is it far fetched to imagine a day when police officers storm an internet service provider's cold room, seizing servers – and subscribers personal data with them? And just how the new legislation will affect broadband and everything that can be piped down fibre, include television, has not been spelled out.

What is clear is that technological progress in Kenya has brought increased levels of complexity to a relatively stable licensing scheme, and policy has to respond to these new challenges. The Kenyan case shows that policy approaches to traditional media and new media are being tested by convergence, and a one-size-fits-all approach is unlikely to work. Instead, the greater number and variety and mix of channels and services that will become available seem to be opening up the field for more reliance on self-regulation – on 'lighter touch' regulation.

It also suggests that ICT activists had equal cause for protest in December last year. The mistake many made was to think of the stand-off as an age-old one between media and government – one not without precedent in a country like Kenya – when, in fact, a new content territory is at play.

This article was written as a part of APC's [Communication for influence in Central, East and West Africa](#) project, which is meant to promote [advocacy](#) for the affordable access to [ICTs](#) for all. CICEWA seeks to identify the political obstacles to extending affordable access to [ICT](#) infrastructure in Africa and to advocate for their removal in order to create a sound platform for sub-regional connectivity in East, West and Central Africa.

Read the full report [Kenya Communications Amendment Act (2009): Progressive or retrogressive?](#)

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