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**THE INSTITUTE FOR LAW AND ENVIRONMENTAL
GOVERNANCE**

MEMORANDUM OF VIEWS ON THE MEDIA BILL, 2007

PRESENTED TO

**THE DEPARTMENTAL COMMITTEE ON ENERGY,
COMMUNICATIONS AND PUBLIC WORKS OF THE
NATIONAL ASSEMBLY OF KENYA**

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**AT THE
SAROVA WHITESANDS BEACH RESORT**

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A. INTRODUCTION

1. The media does touch on many aspects of our lives. We, as the Institute for Law and Environmental Governance (ILEG), both in its individual capacity, as well as a member of the Freedom of Information Network (FOINET) wish to make our contribution using the prism of environmental governance and associated concerns.
2. For those of you who are coming in to contact with the Institute for Law and Environmental Governance (ILEG) for the first time, the Institute's main area of concern is on environmental governance and sustainability. In this regard ILEG does research on environmental policy and legal issues and makes suggestions on possible positive interventions. You will therefore appreciate that with this background the 'environment' may be a little too common in my remarks.

B. WHY WE MUST UPHOLD AND STRENGTHEN THE FREEDOM OF THE MEDIA

3. The environment is closely twined with the economy, livelihoods and politics, in this country, just as in other countries the world over. Evidence shows that over 70% of the people in this country live in the rural areas, deriving their livelihoods directly or indirectly from ecosystem goods and services. Indeed, natural resources (such as land, forests, water, minerals, etc) are central in defining socio-economic relations- both inter-agency on the one hand and with citizens on the other (both horizontally and vertically).
4. As a matter of fact, democracy and governance in Kenya can be assessed through the environmental lens. Executive excesses in this country have always reflected clearly in the exercise of authority and control over natural resources. And the media has always been at the centre of the disdain with which the public has responded to such excesses. A few examples will suffice. TV footages of a parceled out Karura forest precipitated a backlash against the government that has so far preserved Karura forest. The media coverage of the proposed titanium mining in Kwale district helped expose the exploitation that the citizens of this country were being subjected to on the watch of the government and sometimes with the government's tacit involvement. The debates over the controversial Dominion Foods project in the Yala Swamp have been made possible only because the media provided the eyes through which the public could scrutinize the decisions of concerned authorities. The alacrity with which the government moved to assure the residents of Lamu that oil, if found would not be exploited in a manner likely to harm them was a response to the media vigilance over the matter. In short, the executive excesses, or the paucity with which the government sought to deal with some of these major environmental issues would have passed had the media not spoken. In the process, many people- the government and concerned private companies have not been happy with the media. Given a chance, they would love to stop the media from making them uncomfortable- from pointing out that their actions, in environmental terms, amount to stealing food from the mouths of our children. This is a chance that we must never give them. We must not only protect the freedom of the press but also move to strengthen the media to be able to discharge its role effectively.

5. Free and responsible government by popular consent just can not exist without an informed public. The reality is this: democracy can not exist without an informed public. Principle 10 of the Rio Declaration (1992), to which our government adheres and which is part and parcel of our laws (see the Environmental Management and Co-ordination Act, Act No. 8 of 1992) requires governments to facilitate citizens access to information, access to justice and public participation in decision-making processes on environmental issues affecting or likely to affect them. Who will provide the information, if not the media or through the media? Thus we can say without qualification that it is not only the cause of journalism that is at stake here, but the very idea of Kenyan liberty, democracy and environmental sustainability. Increased reporting (both quantitative and qualitative) on environmental matters will increase the consciousness of people and make them demand more accountability and transparency on the part of their leaders.

C. SHOULD THE MEDIA BE REGULATED?

6. In 1963, President Kennedy and Sen. Gaylord Nelson made a cross-country tour to alert Americans to the environmental crisis facing the country. In speech after speech Kennedy warned that water and air pollution, species and extinction, and pesticide poisoning were threats to the future of America. But as he later complained to Nelson, the press only asked about national defense or power politics and never mentioned environment in its stories (see CRIMES AGAINST NATURE by Robert F. Kennedy Jnr, Chapter 10). No doubt we have our versions of this scenario. If the President were today to speak about environmental crisis in this country and only in one sentence mention the 'Mungiki', would not the next press be all about 'Mungiki' not the environment? It is not that 'Mungiki' terror is not a serious and urgent issue. It certainly is. But believe it or not the world, and this country faces a more serious threat due to environmental degradation. The earth is warming up, the ice caps and glaciers are melting and sea levels are rising. Respiratory diseases are on the rise. Industrial pollution has made most of our waters unfit for human consumption. The world is now experiencing extinction of species at a rate that rivals the disappearance of the dinosaurs. Nearly 3 billion people lack sufficient fresh water for basic needs, and over 1 billion are threatened with starvation from desertification. Hundreds of people have been displaced by environmental disasters; the presence of these refugees puts added pressure on the local ecology, often leading to conflicts and further environmental degradation. Yet, it is hard to find much mention of this in the press. Why is the media barely covering such a vital public policy issue? Why is it not informing the public and providing Kenyans with the news they need in order to be effective citizens? To quote a famous American media commentator, Bill Moyes, "... **three powerful forces are undermining that very freedom, damming the streams of significant public interest news that irrigate and nourish the flowering of self-determination. The first of these is the centuries-old reluctance of governments – even elected governments – to operate in the sunshine of disclosure and criticism. The second is more subtle and more recent. It's the tendency of media giants, operating on big-business principles, to exalt commercial values at the expense of democratic value... In so doing they are squeezing out the journalism that tries to get as close as**

possible to the verifiable truth; they are isolating serious coverage of public affairs into ever-dwindling “news holes” or far from prime- time; and they are gobbling up small and independent publications competing for the attention of the American people’. The point is this, with power comes responsibility. Unchecked power is never always a good thing. Even a free press can do with some oversight. Some regulation of the media is necessary, if only to ensure that the issues that matter to the public are given their due prominence. In the words of the US Supreme Court when affirming the Fairness Doctrine in the Red Lion case in 1969, ‘it is the right of the viewers and listeners, not the right of the broadcasters which is paramount’

7. The second and related reason is that the airwaves are a part of the global commons. The media hold and use the airwaves therefore as a public trust asset. It must be used must be used in public trust. It must not be contaminated with the same dynamics that pollute our other public commons- water, forests, etc. And to check against such possible pollution, there is need for a regulator.

D. STATE-REGULATION OR SELF-REGULATION?

8. But what sort of regulation is necessary- state regulation or control or self-regulation? State regulation or control cannot work. It is the very anathema to media freedom. Why? Because the state quite often errs. And it seeks to hide its errors. Controlling the media will therefore be retrogressive. And the same goes for control or regulation by some other parties other than the media itself. Again for the same reason that such parties would also have their own agendas. In a nutshell, the best option is for media to regulate itself.
9. Be that as it may, critical questions still need to be asked: what aspects of the media to we want/need to be regulated? Answering this question would not only determine the framework of regulation, it would also determine who sits on the regulatory body. Additionally, should such regulation be pursuant to an Act of Parliament or totally outside of it. We take the view that such regulation be done pursuant to enacted legislation, in the same way that a lot of professions regulate themselves in this country. Indeed, Kenya would not necessarily be walking an unbeaten path in this regard.

E. SOME SPECIFIC COMMENTS ON THE MEDIA BILL, 2007

10. In view of the foregoing, we find that the proposed Media Bill, 2007 is faulty and should not be passed as it is. We will now point out some specific aspects:
 - i) **The Title:** considering the Preamble, the Memorandum of Objects and the specific clauses, the title is misleading. It gives the impression that the Bill tackles all aspects of the media, which is not true. We propose that the title be changed to read, ‘The Media Council of Kenya Bill’, in the same way that we have The Law Society of Kenya Act, Chapter 18 of the Laws of Kenya.

- ii) **The Preamble:** the emphasis is more on the creation of bodies than on a fundamental issue of self-regulation. Self-regulation as a principle has not been given its prominence. We propose that the preamble be widened to extol the virtues of freedom of information as well as a free, independent and responsible media.
- iii) **Definitions:** A number of crucial terms are not defined, e.g. Committee, Publication (see s. 31 (a)), Media Enterprise (see s.31 (a), (b)), etc
- iv) **The Media Council:**
 - a) Rather than "Functions" we propose the term 'Objects': 'the Objects for which the Council is established'. This way, such matters such as the acquisition of property that is referred to later (s.25) are brought on board.
 - b) The Bill does not specify what powers the Council may exercise.
 - c) The composition of the Council: there are too high a number of non-media people; the basis for this is not very clear. What is clear is that this can be used as an avenue for state control or other control by other forces.
 - d) S. 8: there are quite a lot of people especially in the media who do not possess a degree as envisioned but who truly are an asset to the profession of journalism.
 - e) Chairperson: the members should elect their own and not be appointed by the Minister.
 - f) S.11 (a) can be used to weed out members seen to be unco-operative; (d) and (e)- it is not clear why the two criminal offences are separated; (g) it is not clear what can make someone unfit or unable (other than those mentioned above), in addition, who determines that the member is so unfit or unable? This brings into focus the question of security of tenure.
 - g) S.11 (2): it is not clear why it should be left to the Board to pick one out of two names.
 - h) S.12: Financial control is always the greatest form of control. What is proposed here is dangerous. Why the Minister for finance? What if he does not approve any expenses? What if he/she approves them so low as to hamstring the Council?
- v) **The Media Advisory Board:**
 - a) If the principal function is to 'advise' the Council, then it is totally unnecessary- can only lead to further emasculation of the Council;
 - b) It is also curious that it is the Board that appoints the Council.
- vi) **Financial Provisions**
 - a) Dichotomy of Functions: whereas the Minister for Finance approves expenses, it is hereby declared that the Minister for Information approves annual estimates. This needs to be interrogated further.
 - b) If the Council is not a public body or body exercising public functions, it is not clear why the audit is being done by the Controller and Auditor General.
- vii) **Complaints and Dispute Resolution-** generally weakly and ambiguously drafted.

- a) S.29- the maximum is not given; how is the 'member of the public' to be picked? What qualifications ought this person have? There is also need to guide the Council on the other members. Most importantly, however, should the Council really appoint these members given that under s.36 appeals from the Committee lie to it?
- b) There is need to clarify the functions and powers of the Committee- can it award damages for example?
- c) S.30- why the Chairperson to appoint and not the whole Committee via a process of consultation among themselves?
- d) S.31- There is no reason why the complaint must first be sent to the council. Have direct access to the committee.
- e) S.32- provide for sieving of complaints- weed out frivolous ones so as not to clog the system; make provision for personal attendance with or without representation; proceedings should generally be in public unless there is reason to have it in private and not the other way round;
- f) S.32 (4) the requirement of approval by the council takes away the independence of the committee.
- g) How should the Committee conduct its proceedings? Given the remedies it can give, should it play by the rules of evidence or not?, etc
- h) Give room for the Committee to make additional rules of procedure as it may deem appropriate;
- i) Within what period should the Council hear the appeal from the committee?
- j) S. 37- what of decisions that have been appealed from but the High Court has subsequently dismissed the appeal ostensibly affirming the decision of the committee and/or council respectively?

viii) Miscellaneous

- a) S.38: These are substantive provisions that should be expanded and brought forward as some of the principles underpinning the Bill (Act).
- b) S. 39:- this provision is shallow considering other operating laws such as those regarding labour and international practice on accreditation of foreign journalists. In the history of Kenya, foreign media houses, such as the BBC played a big role in the fight for democracy at a time that the local media was not equally strong or facilitated. This space must be seriously protected.
- c) S.40- rules should be made by the Council itself.

ix) Schedules

- a) A lot of substantive material is put in these schedules. It is imperative therefore that this should be preceded by debates among stakeholders so that they may all own them. A study of other jurisdictions has shown that introducing regulations without the support of the target group can only lead to early death of such proposals. See for example the history of the Federal Communications Commission of the USA created under the Communications Act, 1934.

F. WAY FORWARD

In view of the foregoing, it is our humble view that the Bill should be withdrawn to allow for more consultations. At the very least it should not be passed in its present form. Among the things that need urgent attention are the structure and tightening of language of the Bill. Also include a section (s) on 'Offences'.