KENYA'S E-LEGISLATION COMPLIANCE: An Evaluation of the Kenya Communications (Amendment) Bill, 2008

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Principal Objective

- To make certain amendments to the Kenya Communications Act of 1998 to:
  - help streamline and introduce stronger regulatory provisions in electronic transactions and broadcasting.
  - transform and empower the Communications Commission of Kenya into a fully fledged information and communications technology sector regulator.

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Policy Objectives

- create regulatory, advisory and dispute resolution bodies to support the implementation of the national information and communications technology policy;
- provide a new regulatory framework for broadcasting stations and services;
- provide for the licensing of certification service providers and country code top level domain administrators; and
- provide for electronic transactions-related offences including cyber-crime and reprogramming of mobile telephones.

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BROADCASTING

- CCK to

- licence and regulate broadcasting services
- allocate frequencies
- promote the development of local content
- to set standards for the manner, time and type of progammes to be broadcast
- set up mechanisms for handling complaints by the public against broadcasters.

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ELECTRONIC TRANSACTIONS

- Legal recognition of electronic records and electronic signatures
- Promoting e-government and e-commerce
- New offences with respect to electronic records and transactions
- Admissibility of electronic records as evidence in court proceedings
- Universal Service Obligation
- Universal Service Fund to promote ICT services in rural and other underserved areas.
- CCK empowered to ensure fair competition in the sector

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ACTS TO BE AMENDED

- The Penal Code (Cap. 63)
- The Kenya Broadcasting Corporation Act (Cap. 221)
- Evidence Act (Cap. 80).

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Merger of telecommunications +

- Computers + Broadcasting + radio-communications
- Shift in regulatory paradigm
  - from media to content
  - From "licensing and regulating postal, radio-communication and telecommunications services" to licensing regulating "postal, information and communications services"
- Merger of regulators (super-regulator)

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CCK's Functions > Electronic Transactions +

Facilitate electronic transactions by

- Ensuring the reliability of electronic records;
- Eliminating barriers to electronic commerce e.g. those arising from uncertainties over writing and signature requirements;
- Promoting public confidence in the integrity and reliability of electronic records and transactions;
- Fostering the use of electronic signatures to lend authenticity and integrity to electronic correspondence;
- Promoting efficient delivery of public sector services using reliable electronic records; and
- Minimizing forgery and fraud in electronic records and transactions.

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Exemption of certain documents from the Act +/-

- the creation or execution of a will
- negotiable instruments
- documents of title

+/- These documents may only legally exist in paper form

- The Minister may add or remove any class of transactions from the list – Discretion too wide? Need to consult with CCK?
- Are we foreclosing on projected developments in electronic cash/bit currency?

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E-GOVERNMENT +/-

"*public services provided electronically by a Ministry or Government department, local authority, or any body established by or under any law or controlled or funded by the Government*".

+ Use of electronic records and electronic signatures in GOK given legal recognition

Need to rethink e-government?

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THE GOALS OF E-GOVERNMENT

- Effective delivery of public goods, services;
- Improving quality of life for disadvantaged communities;
- Strengthening good governance and public participation (Digital Democracy);
- Create a better business environment;
- Improving productivity and efficiency of government departments.

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THE FEDERAL SUPREME COURT OF ETHIOPIA

- A locally developed application
- It is a multilingual solution
- Simplified storage and retrieval of data
- Is based on a colour coded filing system
- versions (CRS, CMS, CCMS)
- Gives specific (case number, name etc) as well as general info., (adjournment, pending disposition, statistics, average duration time etc)
- Contains performance measurements (clearance rate, congestion rate, etc) of judges, benches and courts
- Generates more than 150 reports

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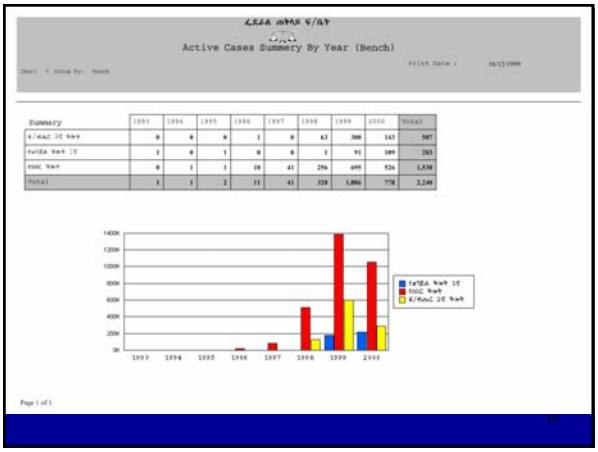

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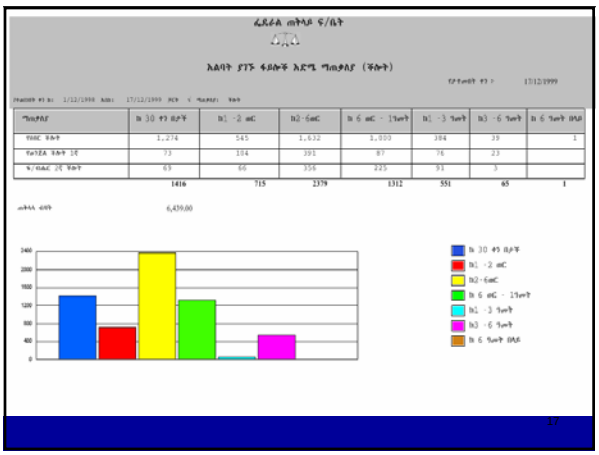

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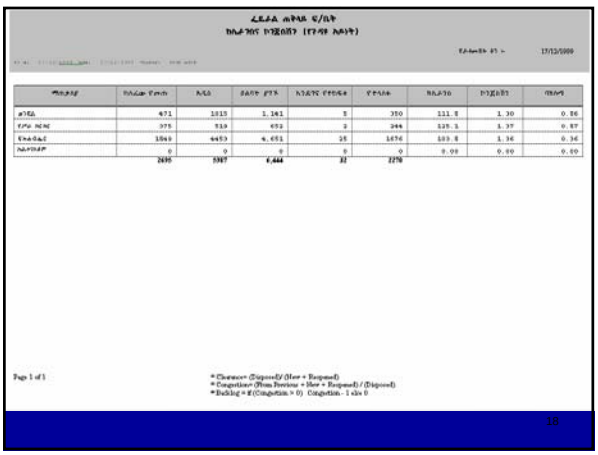

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Won the TIGA Award

PRIVACY AND DATA PROTECTION -

- Privacy a broad constitutional norm;

- Right to privacy not expressly legislated – Kenya guided by English Common Law;

- No provisions in the Bill for protection of individuals from illegal collection and use of personal information;

- Right to information privacy a foundational principle of privacy and constitutional law in USA, EU;

- Dedicated data privacy laws in Australia, Canada, USA, EU

- EU citizens may be punished for circumventing EU privacy laws if they transact with countries with no/lax privacy laws – "Safe harbour"

- Poor privacy advocacy in the international ICT agenda –WSIS, WGIT – privacy wrongly bundled with broader security issues

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PRIVACY AND DATA PROTECTION -

Excerpt from the UNCTAD E-Commerce Dvp't Report, 2004

Another example can be found in Kenyan practice. Ms. Mugure Mugo, the founder of PrecissPatrol, a Kenyan outsourcing enterprise dealing with IT services, has already received requests from European-based clients specifically wanting to know the enterprise's policy on the collection and security of collected data.[7] She recognizes that the fact that Kenya does not have specific data protection laws may constitute a barrier to the development of the country's e-business.

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IMMUNITY OF NON-INTERFERING ISPs FROM LIABILITY FOR HARMFUL/PROPRIETARY CONTENT -

- Appreciation of the importance of ISPs in ICT penetration
- Need to eliminate two operational risks for the ISP business model:
  - Civil liability for © infringement
  - Civil liability for defamation
  - Criminal liability for crude, vulgar, offensive matter
- ISPs should not be placed under any general obligation to monitor traffic unless notified or otherwise become aware of illegal content
- ISPs more like post offices - Absolute statutory immunity for content streamed through their infrastructure – cacheing, hosting, transmitting
- ISPs nevertheless free to contractually assume an obligation to monitor and intercept harmful traffic

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CYBERCRIME +/-

New computer offences

- Unauthorized access to computer data (Kshs. 200k,2 years)
- Access with intent to commit offence(")
- Unauthorized access to/interception of computer service ("). If the act also impairs the operation of the computer system, punishment = (")
- Unauthorized modification of computer material ("). If the act also causes damage to the computer system, punishment = (")
- Damaging or denying access to a computer system (")

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CYBERCRIME +/-

New computer offences (cont'd)

- Unauthorized disclosure of password for wrongful gain/prejudice (Kshs. 200k,2 years)
- Unlawful possession of devices for committing these offences (")
- Electronic fraud – fraudulently causing loss of property by interfering with data/computer system with intent to procure an advantage (") Too lenient? – Under the Penal Code, obtaining by false pretences punishable by up to 3 yrs jail
- Publishing obscene information in electronic form (")

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CYBERCRIME +/-

New computer offences (cont'd)

- Tampering with source code which is preserved by law (Kshs. 300k; 3 yrs)
- Publishing electronic signature certificate for a fraudulent purposes (Kshs. 1M;5 yrs)
- Unauthorized access to protected systems (Kshs. 1M; 5 yrs)
- Unauthorized alteration of mobile phone equipment identity/interfering with its operation (Kshs. 300k; 3 yrs) Possession or supply of equipment for committing this offence (Kshs. 1 M; or 5 yrs)

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CYBERJURISDICTION +/-

(Separate legislation?)

- How may Kenya's courts exercise their jurisdiction over foreign cyber-criminals
- Building the country's capacity in electronic forensics
- Mutually beneficial regional/international partnerships for cross-border law enforcement – Kenya's position in Interpol working group on e-crime
- Reciprocity and mutual assistance between nations on extradition of cyber-criminals
- Kenya's voice in the international debate on internet governance

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Take it to your MP!

THANK YOU

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