

Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013

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Abstract

This paper examines the status of broadcast media in Kenya under the new information and communication law. Two objectives are used to develop the thesis of the paper; the operational status of broadcast media in Kenya over time; and the threats to media freedom by subsequent media laws and the new KICA 2013. The paper adapts a documentary review methodology in highlighting the framework of media regulation in Kenya. Online journals, books and unpublished papers as well as the Kenyan constitution are used to gather relevant literature to meet the set objectives. The paper agrees with reviewed works on the fact that media regulation in Kenya has its genesis in colonial era and the motive has since remained to curtail its freedom. The paper proposes a review of the new communications law failure to which freedom of the press which was hard earned will forever be curtailed.

Keywords: kenya, media regulation, MCK, CAK, Constitution of Kenya

1 Introduction

Broadcasting in Kenya traces back to 1927 with advent of the East African Broadcasting Corporation (EABC) which relayed BBC news to the colonies (Mbeke 2008). English Radio Broadcasting begun in 1928. The Broadcasts targeted white settlers who monitored news from their home and other parts of the world. First radio broadcasts targeting Africans came during the World War II to inform parents and relatives of African soldiers what was happening at the war front. English broadcasts continued until the beginning of the war when Asian and African programmes were introduced. In 1953, the first broadcast service was created for Africans. African Broadcasting Services (ABS) carried programmes in Swahili, Dholuo, Kikuyu, Kinandi, Kiluhya, Kikamba and Arabic.

In 1954 a commission was set up by the colonial government to look into the future of broadcasting in Kenya. As a result of the recommendations of that commission, Kenya Broadcasting Services (KBS) was established in 1959 and regional stations were set up in Mombasa (Sauti ya Mvita), Nyeri (Mount Kenya Station) and Kisumu Station in Nyanza (at the time comprising the current Western Province and Kericho Districts.)

In 1970 a new television station was opened in Mombasa to relay programmes and produce local dramas, music cultural and other programmes touching on coastal issues. In 1989, the Voice of Kenya reverted back to Kenya Broadcasting Corporation through an Act of Parliament.

The legal instruments governing the press in Kenya derive from every kind of legal process in every branch of law including public, private, criminal, commercial, and administrative. Although other methodological approaches to their analysis are not inconceivable, in the following pages the law on press control in Kenya will be analyzed from the standpoint of the rationale for the introduction of the various legal instruments. It is submitted that four separate but related reasons have been used to justify the introduction of laws which curtail press freedom. This paper therefore strives to establish the status of broadcast media regulation and control in Kenya.

1.1 Thesis

Almost everyone relies on the media for information, education, and entertainment among other needs. The media therefore has a central role to play in the freedom of information and freedom of expression. Governments often dislike influential alternative or critical voices. To contain these powerful sources of information, entertainment and education governments in place use regulation to capture, limit or control the media. In some countries worldwide, censorship and violent attacks on people trying to speak freely are a common practice. At the time of this study journalists from around the world had joined hands in condemning the Egyptian authority for arresting, detaining and later jailing four Aljazeera journalists who were then covering the Egyptian story dubbed 'Egypt in Turmoil'. Most governments including the Kenyan government are likely to control media operations by all means. Perhaps the concept of embedded journalism has emerged as a fair way of controlling media reporting in Kenya and the world over. The enactment of Kenya Information and Communication Act of 2013 forms the basis of this discourse. It raises questions on freedom of the press. The paper therefore attempts to establish the operational state of media over time, and threats posed by the new communication law on press freedom.

1.2 Methodology

To compile this paper documented literature was reviewed. Various published papers including *Kenya Media Legal Framework* by Oriare Mbeke, *Law and the Mass Media in Kenya* by A Okoth Owiro, *Media Status Report: Kenya* by Cain Onyango were reviewed. Some of the books reviewed included *Media Law and Practice: The Kenyan Jurisprudence* by David Makali and *Media Regulation, Public interest and the Law* by Mike Feintuck and Mike Varney.

1.3 The Purpose

This paper sought to establish the operational condition of broadcast media in Kenya over time with special emphasis on the Kenya Information and Communication Act of 2013. Equally the paper seeks to establish threats to media freedom by subsequent media laws.

2.0 Status of Media Regulation in Kenya

This section attempts to review the status of media regulation in Kenya during the pre-colonial, colonial and post-colonial periods.

2.1 Formal regulation

Mbeke (2008) asserts that laws governing the media in Kenya are fragmented and exist in different sections of civil and criminal laws. The three sources of press law in Kenya include the Constitution of Kenya, the Statutory Law; and the Common Law. The Constitution of Kenya formally promulgated in 2010 is the supreme law of Kenya and guarantees the right to freedom of expression: the law does not however mention freedom of press and other media specifically; provides limitations of the fundamental rights and freedoms under vague circumstances thus allowing for violations of same rights (Mbeke 2008).

The relevant sections of the Statutory Law of Kenya, some of which are controversial, that deal with media include: The Defamation Act, Cap 36; The Penal Code, Cap 63; The Books and Newspapers Act, Cap 11; Copyright Act, Cap 130; Preservation of Public Security Act, Cap 57; Public Order Act, Cap 56; Film and Stage Plays Act, Cap 222 (1962); Chief's Authority Act, Cap 128; Official Secrets Act, Cap 187 of 1968; Police Act, Cap 84; Armed Forces Act, Cap 199; Communication Commission of Kenya Act of 1998; Kenya Broadcasting Act, Cap 221 of 1998, ICT Act of 2007 and the Media Act, 20072. The key media regulators are the Ministry of Information and ICT, Communication Authority of Kenya, Media Council of Kenya, Kenya Film Commission among others. There exist a communication policy – the ICT policy and several other sessional papers that provide regulation framework (Makali 2004).

2.2 The Colonial Era (1895-1962)

Politics and economic interests by the colonial government and white settlers provided a legal and policy framework for the media. The nationalist movement, the Mau Mau war, the 1952 Emergency and Her Majesty's government commitment to give Kenya independence also influenced colonial laws and policy towards media. The authoritarian colonial government's dominant perception of the Press was always that of an unnecessary evil that deserved close supervision and control (Makali 2004). Initially, the Press was merely a vehicle for disseminating government information to the citizenry especially the White settler communities. However, the colonial government adopted draconian laws such as the Newspapers' Ordinance (1906) to deal with harsh political realities of the time. As early as 1920s, nationalist movements and Press had started opposing paternalistic colonial policies such as forced alienation of land, forced labor and taxation and racial segregation. The colonial government feared a free and thriving nationalist press that acted as the mouthpiece for political independence. It enacted the Penal Code in 1930, the Emergency Order in Council in 1939, repealed The Newspaper Ordinance in 1950 to control alleged seditious nationalist publications such as *Sauti ya Mwafrika*, *Uhuru was Mwafrika*, *African Leader*, *Inooro ria Agikuyu* among others. The breakout of the Mau Mau war and the Declaration of Emergency in 1952 gave the colonial government the excuse to ban all indigenous publications and to intensify propaganda against the nationalist movement (Makali 2004).

However, the colonial government became conciliatory towards the media after the lifting of the emergency ban; and after it became clear that the commitment towards Kenyan independence was irreversible. For the first time colonial administration not only allowed publishing of district political association newspapers but also sponsored some district newspapers such as *Kihoto*, a Kikuyu weekly; *Thome* in Kamba, *Ramogi* in Dholuo. Unfortunately, they undid the gains achieved so far by enacting the Books and Newspapers Act in 1960 to control the proliferation of the nationalist press. The colonial government strictly controlled and censored radio programs since inception in 1927. The fairness doctrine meant nothing to the state sponsored radio station as it heightened propaganda against the Mau Mau in 1952, trivialized the nationalist ideas while closing their eyes to human rights abuses by the colonial state.

According to Makali (2004), the Colonial government's paternalistic broadcasting policy hindered the

growth of a holistic national broadcasting system in Kenya. Originally, Cable Wire Limited, the radio operator, served only Whites and Asians. The Department of Information, formed in 1939, served the African Languages Broadcasting Service that transmitted programmes in eight languages only. Its attempt to provide the country with a nation-wide broadcasting system failed in 1954 after rejection by White settler communities. The government set up the Kenya National Broadcasting Service (KBS) in 1959 following positive recommendation by the Pound Commission in 1959. It is ironic that the White settler communities endorsed radio and TV broadcasting only a few years before independence. The KBS, owned by foreign investors, was modeled along the line of BBC as an independent and autonomous public broadcaster because of colonial anxiety and tension regarding irreversible developments towards political independence. Therefore, colonial government did not put in place the foundation for a thriving home-grown indigenous broadcasting system.

2.3 The Kenyatta Era (1962-1978)

The first President of Kenya, Jomo Kenyatta and his nationalist colleagues who took power upon independence knew the power of the Press. They set out to manipulate and control the media for propaganda purposes (Mbeke 2008). The factors that shaped media law and policy during the Kenyatta era included the urgent need for national unity and development, political rivalry and ideological issues surrounding media ownership. The Kenyatta government preferred a co-opted media that would contribute to nation building and development. The government was opposed to an independent and foreign owned media playing a watchdog role that could cause disillusionment towards the young government. While the independent government nationalized KBS in 1964 and named it Voice of Kenya (VOK), its intentions for the print media were still born.

The newly enacted government was intolerant towards the Press and enacted the Official Secrets' Act in 1968 to deal with a series of leaks that made the government vulnerable to political pressure. The political rivalry and fall out between President Kenyatta and Oginga Odinga, the Vice-President in 1969, played itself in the Press and set the tone for future government engagement with media at large. The government's ban of its own mouthpiece the *Pan African Magazine* because of fear of internal criticism illustrated its intolerance towards media.

2.4 The Moi Era (1978-2002)

The second president of Kenya, Daniel Arap Moi, ascended to power in October 1978 following the death of Jomo Kenyatta. According to Mbeke (2008), several issues influenced Moi's attitude towards the mass media, particularly the intense political rivalry between Kenyatta and Odinga, an attempted military coup in 1982 military coup, economic recession that led to International Monetary Fund's adjustment programs, and popular agitation for economic and political liberalization and globalization. The eight-hour battle for the control of the microphone at KBC during the 1982 attempted coup especially hardened Moi's position towards the mass media. The government took a dictatorial approach by restricting and limiting political freedoms making Kenya a *de Jure* political state. Opposition was criminalized and open clampdown on critical press enhanced. The government harassed the media through sedition trials of the underground press and later banned independent and critical publications such as *Beyond* magazine in 1988; the *Financial Review* in 1989; *Development Agenda* and *Nairobi Law Monthly* in August 1989 September 1990 respectively. Between 1988 and 1990 about 20 publications were banned in Kenya (Mbeke 2008).

The government also targeted the foreign press. It ordered local media to stop publishing news by foreign wire services for allegedly misinforming the world about events in Kenya and deported a British Journalist in December 1988 following the queue-voting fiasco. The Voice of Kenya was not spared either and was renamed Kenya Broadcasting Corporation, designated as a parastatal and mouthpiece of the government in 1989.

The repeal of section 2A of the constitution in 1991 – which had until then ensured one party rule - not only ushered in plural politics but also precipitated the liberalization of media and communication sector. The introduction of multiparty politics in 1991 widened the scope of political and press freedom and led to the proliferation of independent newspapers and magazines such as *Economic Review and Finance* (Mbeke 2008).

The proliferation of mass media, economic demands and pressure from donors and civil society forced the government to review the laws governing the media with a view to liberalizing the airwaves, abolishing of restrictive media laws, and harmonization of Kenya Post and Telecommunication and Kenya Broadcasting Acts. Liberalization of the airwaves started in 1991 albeit unstructured and went on over the years. The Attorney General set up the first Task Force on Press Law in 1993 to review and make recommendations on Press Law providing for a comprehensive legal framework for the exercise of freedom of the press and the development of dynamic and responsible print and electronic media.

Although the Hillary Ngweni Task Force worked well with the media in producing a report, the resulting bills failed to capture the spirit of the Task Force⁹. The government published without consultations The Kenya Mass Media Commission Bill (1995) to regulate the operations of the mass media; and The Press

Council of Kenya Bill (1995) for the registration of the Press Council of Kenya to regulate the conduct and discipline of journalists and the mass media. The media, civil society and opposition parties rejected the bills because they were considered to be in bad taste, draconian, failed to protect the right to information, failed to protect journalists, publishers and broadcasters and gave government unfair representation in proposed regulatory body (Mbeke 2008). The government tactfully shelved the two bills and reconstitution of a Task Force in 1996 with Horace Awori, former chairman of Foreign Correspondence Association, as the chairman. Although the process was participatory and broad ranging, the final report presented to government in May 1998 failed to reflect the main concerns of media. The Awori Task Force report was in this sense similar to the 1995 rejected bills.

The media rebelled against government led review processes and instead endorsed a Kenya Union of Journalists' led media review task force. The Kenya Union of Journalists prepared the Media Bill 1998: Framework for Free and Independent Press for the Task Force on Press and Media Law in April 1998. It made recommendations for the establishment of an Independent Mass Media Commission and the Media Council of Kenya and the repeal of section 79 of the Constitution of Kenya and replacement with a new provision that would guarantee freedom of the media, protection of journalists, publishers, broadcasters and right of access to information. The government ignored all the proposals. The pressure to review media laws increased and Moi reluctantly caved in to pressure during the 1997 Inter Party Parliamentary Group talks to repeal sections 52, 53, 54, 57, 58, 66, 67 and 121 of the State Law that hindered freedom of expression, assembly and which criminalized the free flow of published documented information in Kenya.

Throughout the attempts to review media laws, there was a general lack of linkage between task forces and bills on media law and telecommunication law.

Telecommunication services, characterized by political interference, excessive controls, low universal access to information, low internet connectivity, low quality and high prices, had been neglected for a long time and were limited to major towns to the exclusion of rural communities. Internal, regional and global market demands as well as the economic promises of privatization forced the government to half-heartedly review the Kenya Post and Telecommunication Act.

2.5 The Kibaki Era (2003-2012)

President Kibaki came to power on the promise of change in the 2002 Presidential Elections. His government was largely seen as a reformist one that would decisively address the legal, regulatory and policy flaws that had undermined governance and crippled social-economic development in Kenya. He took power when the country was in recession and the economy recording negative growth. His priority was to deliver a new constitution within 100 days and part of that package contained progressive laws on media. Indeed, the Chapter six on the Bill of Rights Part two; Sections 48, 49, 50 and 51 of the proposed constitution stipulated the rights to freedoms of religion, belief and opinion; freedom of expression; freedom of the media; and freedom of access to information respectively (Mbeke 2008).

Unfortunately, the new constitution was never implemented by the Kibaki administration despite approval during the 2005 Referendum on the new constitution. The media laws would form the subject of another constitutional review according to the National Accord and Reconciliation Act 2008. The Kibaki administration created the Office of Public Communication in 2004 that addressed the media on critical policy issues weekly. Despite that it had difficult relationship with an independent, assertive and watchful media in Kenya. Following media exposures of the Anglo Leasing Scandal and protracted media stand offs, armed police raided the Standard Group headquarters in 2004, beat journalists, burnt newspapers, destroyed property and illegally dismantled and confiscated equipment under the guise of national security threats. This move action was widely condemned by the opposition led by Raila Odinga, son of the first vice president of Kenya.

Following a humiliating defeat during the 2005 Referendum and confronted with formidable Orange Democratic Movement opposition, low public rating and hostile media, the Kibaki administration changed tack towards the media. It created the Media Council of Kenya (MCK) in 2007, for the conduct and discipline of journalists and the media, and as a mechanism to provide self-regulation of the media. Unfortunately, it also created a mechanism for control through financing and appointments for MCK. The attitude of the administration towards media came to head when in the middle of announcing of flawed election results in December 2007, it banned live broadcasting, and later formed a task force to investigate the conduct of media in elections and post-election violence and threatened to withdraw its support for the Media Council of Kenya. This move received criticism both locally and internationally. The Kibaki administration also prepared the Freedom of Information Bill (2007) that would deal a death blow to the Official Secret's Act and improve access to official information and governance. Kibaki's contributions to free media space seems to slowly getting watered down by the current regime under the leadership of Uhuru Kenyatta.

2.6 The Uhuru Era (2013 - Date)

Uhuru Kenyatta ascended to power following a closely contested election held in March 2013. After assuming office, Uhuru appeared to switch from the traditional policies to what is popularly termed as progressive ones. Kenyatta switched from the West and tended towards the East for economic interests. Traditionally the relationship between the Kenyan press and the state has in the past been cold, and suspicious. A few months after ascending to power, Kenyatta invited media stakeholders including editors and senior journalists to statehouse for breakfast. To many analysts this presented a reformed face of government – a government ready to work with the media. This glory did not, however, last for long. Barely a few weeks later, journalists were thrown out of parliament citing misrepresentation of facts. This marked the beginning of a fresh row between a freshly elected government and the press.

Tension heightened when senior investigative journalists from the standard group compiled and aired an in-depth story about the developments that were otherwise never told about the Westgate mall attack in 2013. It came out clearly that the government was not pleased with the story. In reaction to it, the two journalists, John Allan Namu and Muhamed Ali were summoned to the CID headquarters to record a statement. Subsequently, parliament drafted a bill – The Kenya Information and Communication Amendments Bill 2013, – discussed it and was taken to the president for his ascend. The president initially declined to sign it into law proposing that contentious clauses be rectified. He later signed it into law.

The tension was also witnessed during the 2014 *Saba Saba* celebrations at Uhuru Park when opposition leader Raila Odinga led supporters in pushing for radical changes in Kenya by the Uhuru government. Media houses enjoy the freedom of press, and have the need to report impartially. However, this freedom of the media appeared curtailed when a directive came from the CAK instructing all broadcasters to desist from live coverage of the *Saba Saba* rally. This move was disguised as a security measure but political analysts then argued that the move was to deny the opposition leader a platform to make a strong statement for the government. Media were vulnerable given the directive and a subsequent press statement by CAK.

2.7 KICA 2013 – Threats

The controversial communication amendment bill was signed into law by President Uhuru Kenyatta on December 4, 2013. This law severely restricts press freedom and breaches the constitutional protections granted journalists. The controversial law removed the Complaints Commission from the Media Council of Kenya (MCK) and assigned those powers to the Communication Authority of Kenya (CAK), which is the rebranded body that took over the functions of Communications Commission of Kenya (CCK).

Under the Multimedia Tribunal, the best practice model of co-regulation was dealt a big blow. While issues of content, ethics and professional standards would be enforced under MCK the functions of licensing, frequency spectrum and allocation, courier and postal licences would be performed by CAK.

Under the new law, fines imposed by the tribunal are too high and unsustainable. It does not matter whether it is a giant media House like the Nation Media Group, Standard Group, Royal Media Services, Radio Africa Group, Capital Group or the State owned Kenya Broadcasting Corporation. Going by the rate of frequent demand letters from lawyers sent to media houses this could imply an average of Sh100 million each month or within each quota. Going by public results of listed companies it means a recipe for disaster and closure of these media enterprises and job losses.

With the introduction of county governments the emerging County focused radio stations will literally shut operations because none can survive a fine of Sh20 million. Insurance cost for media personnel will go up triple fold. The worst hit will be correspondents and lower cadre journalists whose remuneration is less than Sh10, 000 a month. It means they will work for 100 months to save one million just in case they are fined. The regulations here mean media now lose their watchdog role against corruption and cannot hold leaders accountable for their actions.

From the onset four separate but related reasons have been used to justify the introduction of laws which curtail press freedom. They include interests of the state, especially its security; the interests of the society, especially public health and morals; the interests of justice; and the interests of the individual, especially individual privacy.

3.0 Conclusion

The main purpose which law serves in relation to the broadcast media in Kenya is the function of control. This is neither unexpected nor is it unique to Kenya. After all, control of social institutions is a popular focus of all states; and quite obviously, some of this control serves the purpose of securing the common good of society. The idea of press control cannot be quarreled with in principle; but why it is done, and how it is done deserves serious discussion and comment. The new Kenya Information and Communication law perhaps should be amended. This paper strongly holds the belief that freedom of broadcast media and of the press in general is likely to be curtailed under the new law.

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