

FREEDOM OF THE MEDIA IN KENYA: AN ESTRANGED CONCEPT?

SIGEI RONNIE KIPNG'ETICH

REG: 072480

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STUDENT'S NAME:

Ronnie Sigei

STUDENT'S REGISTRATION NUMBER:

072480

SIGNATURE OF SUPERVISOR:

Isaac Rutebera

DATE:

12/4/2016

STRATHMORE UNIVERSITY LAW SCHOOL

NAME OF SUPERVISOR:

Isaac Rutebera

SIGNATURE OF SUPERVISOR:

Isaac Rutebera



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Table of Contents

CHAPTER ONE: INTRODUCTION	1
BACKGROUND	1
STATEMENT OF THE PROBLEM	5
JUSTIFICATION OF THE STUDY	5
OBJECTIVES OF THE RESEARCH	6
RESEARCH QUESTIONS	6
RESEARCH DESIGN AND METHODOLOGY	6
Research Design	6
LIMITATIONS	7
CHAPTER BREAKDOWN	7
CHAPTER TWO: THEORETICAL FRAMEWORK	9
AUTHORITARIAN THEORY	10
SOVIET-COMMUNIST THEORY	11
SOCIAL-RESPONSIBILITY THEORY	13
LIBERTARIAN THEORY	14
CHAPTER THREE: LEGAL FRAMEWORK GOVERNING THE MEDIA IN KENYA	17
STATUS OF MEDIA REGULATION IN KENYA	18
HISTORY	18
LEGAL FRAMEWORK OF MEDIA LAW IN KENYA	23
MEDIA COUNCIL ACT, 2013	24
THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) ACT, (KICA) 2013 (No. 41 A of 2013)	27
CONCLUSION	28
CHAPTER FOUR: COMPARATIVE ANALYSIS	30
SOUTH AFRICA	30
Media Regulation	31
CHINA	35
Media Regulation	35



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Law School
CONCLUSION.....

36

CHAPTER FIVE: CONCLUSION.....

38

BIBLIOGRAPHY

42



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Law School

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DISSERTATION DECLARATION FORM

I confirm that:

- This dissertation represents my own work;
- This dissertation, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text
- The contribution of any supervisors and others to the research and to the dissertation was consistent with normal supervisory practice.

Candidate

S.R. K. [Signature]

Date

12/4/2016



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ABSTRACT

The media in Kenya has gone through a variety of changes to its legislative structure; from the pre-colonial times, to the colonial times to the post-colonial era. Each period has shaped perspective on media freedom. The underlying notion is that the media should be protected with only constitutional caveats to its restriction. However, recent trends by the legislature indicate restricting media freedom further than what the Constitution provides. Acts of Parliament being legislated and amendments to existing laws stalling media development have turned the idea of media freedom into an estranged theoretical concept that is not practiced, a known concept that is *unknown practically*. The purpose of this paper is therefore to introduce the concept of media freedom with reference to theories upon which the foundations of media freedom are built. Furthermore, the paper will try to answer whether media freedom is practiced in Kenya and whether it has been infringed upon by the law. A comparative study of South Africa and China will attempt to highlight media freedom in those countries and aspects upon which Kenya might assimilate into its existing media freedom framework. The conclusion will answer whether media freedom is indeed an estranged concept in Kenya.



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LIST OF ABBREVIATIONS

MCK – Media Council of Kenya

KICA – Kenya Information and Communications Act

CCK – Communications Commission of Kenya

MCA – Media Council Act

CA – Communications Authority of Kenya

MDDA – Media Development and Diversity Agency

ICASA – Independent Commission Authority of South Africa

BCCSA – Broadcasting Complaints Commission of South Africa

NAB – National Association of Broadcasters

SABC – South Africa Broadcasting Corporation

CCP – Communist Party of China

CPD – Central Propaganda Department

KBC – Kenya Broadcasting Corporation

NMG – Nation Media Group

KTN – Kenya Television Network



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LIST OF CASES

Francis Muthaura vs The Standard Group, Ben Agina and Beuttah Omanga – Complaint 1/2011

Chris Murungaru vs Nation Media Group



CHAPTER ONE: INTRODUCTION

BACKGROUND

Freedom of expression – precisely freedom of the media- is a well espoused principle in the doctrines of human rights as well as international law. While one can understand the concept itself, the legal ramifications can prove contentious. It is a concept that has evolved over time, with awareness for a free press gaining momentum throughout the years. Laws restricting press freedom have been criticized by human rights, specifically media enthusiasts, due to their unconstitutionality, especially in a modern age where information and its dissemination is important.

John Stuart Mill dedicated a whole chapter¹ on the freedom of expression and the free press. He argued that ‘liberty of action’ was at the core tenant of the freedom of expression and the media as it encompassed the freedom to think and publish as a free mind would do. Hence, it provides a platform where honest truths are shared; this creates an environment for which the whole nation can prosper and not a few individuals who limit the press and therefore limit their expression. Indeed, as Bernard Williams pointed out in the commentary to Mill, that such a liberalistic view was centered on the individual right and political good, since the whole argument was aimed at ensuring that the truth can be discovered.

Dworkin also links the freedom of expression to “the freedom of human beings to develop in society”². This enables the person to have autonomy in that he/she is not dependent on someone saying something so as to form an opinion; rather as they have the freedom of expression, they are not limited to unwarranted restrictions by the government. A free media is independent, enabling it to disseminate information without the fear of being targeted by the government.

Bernard Williams³ argues that with limits to the free media, one would not be able to answer the question “What is actually going on?” Masking the media with restrictions creates a blanket over the truth, therefore the truth of the information being disseminated is questionable.

¹ In his book *On Liberty*.

² Dworkin *Taking Rights Seriously* 1978 (page 272).

³ Bernard Williams – *In the Beginning was the Deed* (Princeton University Press, 2005).



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Regardless of the purposes for which restrictions are being placed, limiting the role of the media leads to “truth darkness”. It is darkness that must be avoided at all costs.

The government of Kenya on December 10th 2014 published a **Security Bill** which sought to consolidate various laws relating to security in Kenya. This was due to the rising number of insecurity cases which were happening all over Kenya, with the perceived notion that the government needed to harden up on security laws in the country so as to prevent further bloodshed.

Terrorist attacks, especially through the Al-Qaeda linked Al-Shabaab terrorist group, had risen up in Kenya during the three years since the Kenya Defence Forces pitched camp in Somalia under the auspices of the African Union initiative of a free Somalia.

The government then sought to curb such rising cases of terrorism against its people. The Bill proposed amendments to 22 laws related to security. The Acts which are being amended are: Public Order Act (Cap 56), Extradition (continuous and foreign countries) Act (Cap 76), Penal Code (Cap 63), Criminal Procedure Code (Cap 75), Prevention of Terrorism Act (2012), Sexual Offenses Act (2006), Registration of Persons Act (Cap 107), Evidence Act (Cap 80), Prisons Act (Cap 90), Firearms Act (Cap 114), Radiation protection Act (Cap 243), Rent Restriction Act (Cap 296), Kenya Airport Authority Act (Cap 395), Traffic Act (Cap 403), Investment Promotion Act (Cap 485), Labour Institutions Act (2012), National Transport Safety Authority Act (2012), Refugee Act (2006), National Intelligence Service Act (2012), Kenya Citizenship and Immigration Act (2011), National Police Service Act (2011) and Civil Aviation Act (2013), Public Benefits Organizations Act, 2013.

On 18th December 2014, during a chaotic session in parliament in which legislators came to blows in the parliamentary sitting while discussing the bill, parliament passed the bill. The following day, December 19th 2014, the President of the Republic of Kenya, **President Uhuru Muigai Kenyatta**, signed the bill into law.

"Its intent is one, just one: to protect the lives and property of all the citizens of this republic," he said.



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Kenya's political opposition and civil society advocates denounced the new laws as an affront to human rights, worrying that it will lead to an abuse of power by the state.

Section 12 of the Act amends **the Penal Code(under section 66A)** to create the offence of publishing or causing to be published or distributed obscene, gory or offensive material which is likely to cause fear and alarm to the general public or disturb public peace. The offence created is a felony and if committed by an individual the penalty is a fine not exceeding 1 million and imprisonment for a term not exceeding 3 years. If committed by a media enterprise a fine not exceeding 5 million shillings.

Similarly, amendments to the **Prevention of Terrorism Act**, highlight a grave future of media freedom in Kenya. The relevant amendment, under **section 30F** of the Prevention of Terrorism Act, provides that a person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or a imprisonment for a term not exceeding three years, or both. While it is clear that impeding investigations is a criminal act, the provisions of section 30F seem to be conferring absolute discretion on the National Police Service to decide whether publications, either by journalists or media houses, undermine their investigations.

On 22nd February 2015, **a five-judge bench of the High Court** ruled that section 12 of the Security(Amendment) Act of 2014 introducing section 66A to the Penal Code was **unconstitutional** as it was an unjustifiable limitation on the freedom of the media in conformity with the limitations specified under article 33(2) of the Constitution of Kenya, 2010.

Regarding section 64 of the Security (Amendment) Act introducing section 30F of the Prevention of Terrorism Act, the court ruled that it was unconstitutional for limiting the rights guaranteed under Article 34(1) and (2). The court reasoned that the State had not met the test set in Article 24 of the Constitution of Kenya 2010 which outlines when a limitation to a right protected under the Constitution. The court opined,



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“It has not demonstrated the rational nexus between the limitation and its purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation; and the limitation contemplated is so far reaching as to derogate from the core or essential content of the right guaranteed under Article 34”.

The ruling of the Court, regarding this two particular contentious aspects of the law, is instrumental in the fight for the freedom of the media. This step taken by the judiciary should act as precursor to future laws, regarding the media, that the media should not be curtailed except by requirements set out by Article 24 of the Constitution of Kenya 2010.

Before the President of Kenya took back to Parliament the **Kenya Information and Communications Act** to be revised, one controversial section of the law was the creation of the Communications and Media Appeals Tribunal.

The mandate of this tribunal was to determine disputes against journalists or media houses and in so doing, to impose hefty fines on media houses and journalists, recommend de-registration of journalists and make any order on freedom of expression.⁴ This tribunal would consist predominantly of members of the newly revamped Communication Authority of Kenya, which is government-owned.

Presently, under section 102 (1) (b) of the Act, it provides that members of the tribunal shall not consist of members under the employment of the Government or the Communications Authority. While this can be considered as a victory towards media freedom, it still begs the question as to why legislators would pass an Act impeding the freedom of the media yet it is a right which is not only protected by the Constitution but by legal instruments to which Kenya is a party to.

⁴ <http://www.article19.org/resources.php/resource/37407/en/kenya:-new-laws-mark-major-setback-for-media-freedom>.



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STATEMENT OF THE PROBLEM

The Constitution of Kenya, 2010 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. There is nothing wrong with the state monitoring the media. It is not only a requirement, but also a need. When media houses publish information which is misleading, there is an obvious case of the need to exercise control over the media. However, this power should not be exercised in excess of authority granted to it by the Constitution of Kenya, which the ultimate governing body of the land.

The media is an important tool in the dissemination of information in Kenya. Without a free media, the government could easily spread propaganda in the name of the truth. This tends to feed the masses, and in doing so, creates a utopian world where the government, in the eyes of its people blinded by the propaganda, can do no wrong to the country.

The lack of care towards protecting journalists and media houses, through the passing or even the creation of laws limiting the free press, is worrying may lead to further restrictions on freedom of the media.

The road that Kenya is heading towards, regarding freedom of the media, is one that needs to be questioned. Laws, though declared unconstitutional and amended, have placed gauges on the media which should not be there if indeed Kenya is a state which protects media freedom. Is media freedom a protected freedom in Kenya?

JUSTIFICATION OF THE STUDY

The understanding and implementation in Kenya of freedom of the media breeds uncertainty as to the future of media freedom as well as the future of rights such as freedom of expression and access to information.

This research is aimed at identifying whether media freedom is protected in Kenya and to establish, if any, the lacuna in the laws of Kenya which touch on media freedom. It is believed that this dissertation will assist in understanding the concept of the freedom of the media as well



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as the need to protect it so as to maintain integrity in journalists as well as media houses in their dissemination of information.

OBJECTIVES OF THE RESEARCH

The objectives of the research are:

- a) To evaluate the concept that is freedom of the media, its implementation in the legal environment in Kenya and whether it is an independent arm that is to assess whether it is free from governmental control.
- b) To argue for the protection of media freedom

RESEARCH QUESTIONS

The questions the research wishes to address are:-

- a) Is there freedom of the media in Kenya?
- b) If there is freedom of the media in Kenya, has it been infringed upon by the government?

RESEARCH DESIGN AND METHODOLOGY

Research Design

The main aim of this research topic is to analyze freedom of the media in Kenya. The strategy I intend on using is to analyze freedom of the media in general at first before bringing the issue closer home and analyzing the situation in Kenya; whether freedom of the media is an estranged concept and if so, how best to remedy the situation.

I will further look at other jurisdictions and see whether countries have developed, either through limitation on freedom of the media or through giving the media a distinguishing role in the country.



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Research Methodology

I intend to use various databases in collecting material for my research. The databases include Lexis Nexis, JSTOR, Social Sciences Research Network (SSRN) and Kenya Law Reports (kenyalaw.org/)

This research shall be founded on qualitative data obtained from primary sources such as the Constitution of Kenya 2010, statutes such as Security (Amendment) Act 2014 and Kenya Information and Communications Act 2013. Furthermore, I intend on conducting interviews with proponents of media freedom who argue for its protection regardless of security and also those who argue for limitations on media freedom on the basis of security. Secondary sources I intend to use include journals and articles on freedom of the media.

I will be guided by my research questions in looking for material to use in my research.

LIMITATIONS

Data collection methods such as conducting interviews with top security organs, government officials and media houses may prove difficult as scheduling an appointment with them may prove procedurally difficult. This limitation ties in with the aspect of time. There may be time constraints as dates for submission of the dissertation may conflict with dates of scheduled interviews.

CHAPTER BREAKDOWN

Chapter 1: Introduction

This chapter will contain the structure and contents of the research. It introduces the problem and the purpose of the study, the research questions as well as the scope and limitations of the study. The chapter poses the question whether freedom of the media is an established freedom in Kenya.

Chapter 2: Theoretical Framework



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This chapter articulates the theoretical assumptions of the research study so as to address questions of why and how press freedom is an important construct of society. It permits the researcher to intellectually transition from simply describing a phenomenon observed to generalizing about various aspects of that phenomenon, the phenomenon here being media freedom.

Chapter 3: Legal Framework Governing The Media in Kenya

This chapter will look at the various laws on the media and to see whether their aim is to protect the media or curtail it.

Chapter 4: Comparative Analysis

This chapter will analyse the practise of media freedom in other jurisdictions and to see how it compares with Kenya

Chapter 5: Conclusion



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CHAPTER TWO: THEORETICAL FRAMEWORK

The “marketplace of ideas” and the “watchdog press” are two of the defining metaphors of our thinking about freedom of speech and of the press.⁵ Taking these two metaphors into perspective, we see that the media is central to the dissemination of information and an important constitutive element of public life. Not only does the media relay information to the public regarding the day to day happenings of the world, but also serves, in its watchdog capacity, to ensure that the government of the day does not go against the interests of its citizens. As Imanyara (1992) has noted,

“Generally, the role of the press in democratization has been that of an independent forum and mouthpiece of crusaders of change. The openness of the alternative press to the public and its bold approach to sensitive and critical political issues has had the cumulative effect of inciting the general public to wake up to their democratic rights and demand change” (1992:21)⁶

In order to understand the theories relating to media freedom, there are two basic things to understand:⁷

- 1) Mass media always takes on the form and coloration of the social and political structures within which the media operate.
- 2) We understand governments -- and the people who live within those governments -- by understanding media.

The concept of freedom of the media is what this chapter seeks to demystify. In 1956 three professors of communication-**Fred S. Siebert, Theodore Peterson and Wilbur Schramm**-brought out their Four Theories of the Press which went a long way in establishing a typology in the minds of journalism educators and students. This researcher contends that the **Four Theories of the Press** are of great importance in not only seeking to define the research problem and answering the research questions but also in providing an understanding of the concept of media freedom – and indeed whether it is an estranged concept in Kenya.

⁵ FREEDOM OF THE PRESS IN THE TWENTY-FIRST CENTURY: AN AGENDA FOR THOUGHT AND ACTION - A Report from a Summit on Freedom of the Press in the Twenty-First Century, University of Oregon, April 12, 2013 at 11.

⁶ <http://wiredspace.wits.ac.za/jspui/bitstream/10539/1789/5/02Chapter2.pdf>.

⁷ <http://www.class.uh.edu/comm/classes/comm4303/section1/fourtheories.html>.



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Law School AUTHORITARIAN THEORY

This theory proposes that the state, as the highest expression of institutionalized structure, supersedes the individual and makes it possible for the individual to acquire and develop a stable and harmonious life. Mass communication, then, supports the state and the government in power so that total society may advance and the state may be viable and attain its objectives.⁸

The State directs the citizenry, which is not considered competent and interested enough to make critical political decisions. In such a situation, the government, as the leader of the society, controls the media, which is seen as a vital component of man's society. Ownership of printing remains mostly in private hands, but broadcasting and cinema usually remain in the hands of government. The form of control the government exercises over media in authoritarian countries is the same as the control it has over the people who live there. The concepts are inseparable. That is, one follows the other.⁹ Relating this to Kenya, proponents of the authoritarian press theory argue that the National Assembly, by passing certain bills regarding the media, be it to promote it or curtail it, and the President assenting to the Bill to become law, both state actors are acting within their mandate to ensure the interests of the citizens are upheld.

The Authoritarian Theory describes the situation where states view the mass media as an instrument at all times. The role of the media is to mainly educate citizens, and acts as a propaganda tool for the ruling party.

An example of an authoritarian press theory in practice is Germany under the regime of Adolph Hitler. After the National Socialists "seized" power on January 30, 1933, a tight system of control encompassing all media gradually emerged which was unprecedented in Germany. Although preventative censorship was not even introduced, other measures had the same effect. For example, the communist and social democratic newspapers were eliminated by means of emergency decrees. Hitler controlled the press ensuring that what the media aired was in

⁸ Fred Siebert, *Four Theories of the Press*, 1956, 9.

⁹ <http://www.class.uh.edu/comm/classes/comm4303/section1/fourtheories.html>.



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accordance to what he wanted the citizens to hear. He employed **propaganda**¹⁰ to appeal to German citizens and was a way to control the people. By using the media as a tool, he was achieving his end of removing, out of Germany, those he thought were not worthy of German citizenship. In Italy, the fascist “seizure of power” under Benito Mussolini brought about suppressed freedom of opinion and of the press.¹¹ They followed the lead of Hitler’s Germany and used propaganda to corrupt the people to ensure only the government’s interest were being put forward.

SOVIET-COMMUNIST THEORY

The communist theory of the press arose, along with the theory of communism itself, in the first quarter of the present century. Karl Marx was its father, drawing heavily on the ideas of his fellow German, George W. F. Hegel. The mass media in a communist society, said Marx, were to function basically to perpetuate and expand the socialist system.

Transmission of social policy, not searching for the truth, was to be the main rationale for existence of a communist media system.¹²

Mass media, under this theory, are instruments of government and integral parts of the State. They are owned and operated by the State and directed by the Communist Party or its agencies. Criticism is permitted in the media (i.e. criticism of failure to achieve goals), but criticism of basic ideology is forbidden. Communist theory, like that of authoritarianism, is based on the premise that the masses are too fickle and too ignorant and unconcerned with government to be entrusted with governmental responsibilities.¹³

The media operates as a tool of the ruling power and if it acts in contravention of the rules set forth by the government, it violates the law. Basically, the virtues of individual liberty are

¹⁰ It's shading the news and information to fit a preconceived conclusion on what the information should mean and on how people should interpret it – definition found at <http://www.class.uh.edu/comm/classes/comm4303/section1/fourtheories.html>.

¹¹ Wilke, Jürgen: Censorship and Freedom of the Press, in: European History Online (EGO), published by the Leibniz Institute of European History (IEG), Mainz 2013-05-08.

¹² Praveen Karthik, *What are the Four Theories of the Press*, found at <http://www.preservearticles.com/what-are-the-four-theories-of-the-press.html>.

¹³ Praveen Karthik, *What are the Four Theories of the Press*, found at <http://www.preservearticles.com/what-are-the-four-theories-of-the-press.html>.



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subordinate to those of the party and the state.¹⁴ The role of the media in countries applying the Soviet-Communist Theory is to act as an instrument of the ruling party to unite people of the state, and to carry out plans of the party and state, bringing about societal change.

Under the Soviet-Communist system, the media reports less on the bad things that happen under communism, and emphasizes the bad things that happen in democratic areas.¹⁵ For example, when the Russian's media was still under the Soviet-Communist system, the official communist paper "Pravda" portrayed the ideology that "Communist is good" by praising Stalin's non-aggression pact with Hitler, and avoided reporting about the Chernobyl disaster as it may raise concerns about the safety of Soviet nuclear plant. Pravda reported about the incident only two days later after constant urging from Sweden.¹⁶

The government justifies its limitations on media freedom by relying on the Soviet Communist theory, arguing that it is the interest of the state for the media to be limited, on the basis of for example security, so as to bring about societal change, which in Kenya's context can range from preventing terrorism and protecting the security of Kenya to ensuring that public order is maintained.

The main difference between the Authoritarian theory and the Soviet-Communist Theory is that while the former allows both private and public media ownership, the latter allows strictly only public media ownership.

Another difference is that while the Authoritarian media are mainly used to maintain societal status quo, a Soviet-Communist media is often used to bring about societal changes.¹⁷

¹⁴ Polycarp J. Omolo Ochilo, *Press Freedom and the Role of the Media in Kenya*.

¹⁵ David McHam, *Four Theories of the Press*, Retrieved from <http://www.class.uh.edu/comm/classes/comm4303/section1/introquotes.html>.

¹⁶ Tiffany Gabbay, *Media or Propaganda Arm? Beck Compares Soviet Media with the American MSM*. The Blaze. Retrieved from <http://www.theblaze.com/stories/media-or-propaganda-arm-beck-compares-soviet-media-with-the-american-msm/>.

¹⁷ Krishnamurthy Sriramesh, *The Mass Media and Public Relations*, Retrieved from <http://globalpr.bledcom.com/uploads/files/Chapter4.pdf>.



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The Social-responsibility theory was born when large and powerful publishers in America were unpopular with the public, and when the public had a high degree of suspicions about the motivations and objectives of the press. Thus, the **Commission on Freedom of the Press** (commonly known as **Hutchins Commission**) was tasked with the responsibility of inquiring into the proper function of the media in a modern democracy. The Commission concluded in 1947 that the press plays an important role in the development and stability of modern society and, as such, it is imperative that a commitment of social responsibility be imposed on mass media. Hence, the Social-responsibility theory was thrust into the sphere of media theories.

This concept, a product of mid-twentieth century America, is said by its proponents to have its roots in libertarian theory. But it goes beyond the libertarian theory, in that it places more emphasis on the press's responsibility to society than on the press's freedom. It is seen as a higher level, theoretically, than libertarianism—a kind of moral and intellectual evolutionary trip from discredited old, libertarianism to a new or perfected libertarianism where things are forced to work as they really should have worked under libertarian theory.¹⁸

This theory requires the media to adhere to professional standards and codes of conduct when exercising their editorial freedom. Under the Social-responsibility Theory, ownership of media is mostly private and practice self-regulation according to standards, codes and guiding principles. The media is relatively free of arbitrary government controls.

Under a Social-Responsible media system, the role of the media is to serve the public, and in order to do so, should remain free of government interference. The idea of this theory is that the media has a moral obligation to provide adequate information for citizens to make informed decisions.¹⁹ However, the different media can retain a liberal notion of healthy public disclosure. The media is also expected to represent the diversity of cultures they represent, and should have high standards for professionalism, truth, and accuracy.

¹⁸ Praveen Karthik, *What are the Four Theories of the Press*, found at <http://www.preservearticles.com/what-are-the-the-four-theories-of-the-press.html>.

¹⁹ Jennifer Ostini, *Beyond the Four Theories of the Press: A New Model of National Media Systems*, Retrieved from http://courses.essex.ac.uk/gv/gv905/W06%20Readings/ostini_beyond_four_theories.pdf.



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LIBERTARIAN THEORY

The Libertarian Theory originally came from liberal thought in Europe from the 16th Century. The Libertarian Theory describes societies that provide media with unrestrained freedom, especially from government control, so that they are free to report a variety of views.²⁰ There is no control or censorship. Under a libertarian media system, ownership of media is mainly private.

Under the Libertarian Theory, the media's purpose is to inform, entertain, sell, and serve as a "watchdog", keeping the government in check. Libertarian Theory involves some innate distrust of the role of the government and the state²¹ and a belief that everybody has rights to information. The theory also sees people as rational enough to decide what is good or bad and hence the press should not restrict anything. Even negative contents may provide audiences with knowledge. Libertarian thoughts are exactly the opposite of the Authoritarian Theory.

In theory, a libertarian press functions to present the truth, however splintered it may be in a pluralism of voices. It is impossible to do this if it is controlled by some authority outside itself. Through the years many new ideas were grafted on to early press libertarianism: One of these, for example, was the general acceptance of a kind of obligation to keep the public abreast of governmental activities, or being a kind of fourth branch of government supplementing the executive, legislative and judicial branches.²²

John Keane²³ identified three concepts underpinning the call for press freedom:

- i. Theological - a forum allowing man to deduce between good and evil. (John Milton)

²⁰ Krishnamurthy Sriramesh, *The Mass Media and Public Relations*, Retrieved from <http://globalpr.bledcom.com/uploads/files/Chapter4.pdf>.

²¹ Jennifer Ostini, *Beyond the Four Theories of the Press: A New Model of National Media Systems*, Retrieved from http://courses.essex.ac.uk/gv/gv905/W06%20Readings/ostini_beyond_four_theories.pdf.

²² Praveen Karthik, *What are the Four Theories of the Press*, found at <http://www.preservearticles.com/what-are-the-four-theories-of-the-press.html>.

²³ John Keane, *The Media and Democracy*, 1991.



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- ii. Individual rights - Press freedom guaranteed liberty from the political elite (John Locke)
- iii. Attaining truth - An argument that falsehoods must be countered, censorship opposed. All notions must be challenged or they will turn into dogma. (John Stuart Mill, On Liberty).

One of the earliest known and most famous defenses of liberty of the press was **John Milton's** speech to the English Parliament in 1644. In this speech, known as *Areopagitica*, Milton attacked the Licensing Order of 14 June 1643. In his speech, he argued against the use of censorship on the grounds that man is provided with reason and talents to choose between good and evil. He also used strong arguments against the institution of censorship and prohibition of the press and insisted that restrictions of the right to print should be considered evil.²⁴

Areopagitica, according to Negrine²⁵, was intended as a reply to those who maintained that granting the press its freedom would pose threats to the stability of the state. It was part of the arguments against the powers of the state over what could be published and what ideas would be tolerated. Milton's views in favor of freeing the press from state or any other forms of control were based on the idea that censorship and control of ideas inevitably resulted in a loss of an element of truth. He found free debate essential to religious truth. Individuals could only choose between truth and falsehood if they had access to both.²⁶ He also affirmed that free and human government results only from "free writing and free speaking".²⁷ Milton was however not in favor of full freedom of the press from state regulation.

Other theorists such as **Jeremy Bentham** similarly argued that "liberty of the press has its inconveniences, but the evil which may result from it is not to be compared to the evil of censorship".²⁸ In his *Two Treatises on Government*²⁹, **John Locke** drew attention to the

²⁴ John Milton, "Areopagitica," in Complete English Poems, Of Education, Areopagitica, ed. Gordon Campbell London: J.M. Dent & Sons Ltd 1990 – First Published in 1644.

²⁵ Ralph Negrine, *Politics and the Mass Media in Britain*, London: Routledge, 1989, 24.

²⁶ Abul Mansur Ahmed: Communication and Culture York University-Freedom of the Press and its Constraints: A Study of Press Regulations in Bangladesh found at <http://cjms.fims.uwo.ca/issues/01-01/ahmed.pdf>.

²⁷ John Keane, *The Media and Democracy*, London: Polity Press, 1991, 12.

²⁸ Ralph Negrine, *Politics and the Mass Media in Britain*, London: Routledge, 1989, 26.

²⁹ 1690.



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Law School

advantages of making political decisions in an atmosphere of public disagreement. The philosophy behind Locke was the public debate rationale for press freedom.³⁰

John Stuart Mill's famous treatise *On Liberty*³¹ also continued with the classical liberal arguments on the benefits of freedom of speech and the press on the discovery of truth.³² Mill expanded the liberal tradition found in Milton and Locke into a broader concept of freedom of the press. Freedom of the press derived from his concept of individual liberty when he described 'liberty of thought, from which it is impossible to separate the cognate liberty of speaking and writing'.³³

In the footnote at the beginning of **Chapter II** of *On Liberty*, Mill makes a statement:

"If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. (1978, 15)"

He argues therefore that any liberty should be applied irrespective of its immoral nature. Applying the same to the current research problem, freedom of the media comes with the liberty to protect the media regardless of whether protecting it will go against laws that have been legislated. This, as earlier argued, goes against the common good of the people and thus such a law should not be followed.

³⁰ John Locke, *Two Treatises of Government*, London: Dent, 1986. First published 1690.

³¹ 1859.

³² Abul Mansur Ahmed: Communication and Culture York University-Freedom of the Press and its Constraints: A Study of Press Regulations in Bangladesh found at <http://cjms.fims.uwo.ca/issues/01-01/ahmed.pdf>.

³³ Timothy Gleason, *The Watchdog Concept: the Press and the Courts in Nineteenth Century America*, Iowa: Iowa State University Press, 1990, 36.



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CHAPTER THREE: LEGAL FRAMEWORK GOVERNING THE MEDIA IN KENYA

Media refers to the means of mass communication, especially the press, radio and television, but also including film and recorded music, as well as a number of distributions by way of cable, satellite, discs, tapes.³⁴

Media freedom has always been tied to responsibilities which journalists are expected to carry for the realization of societal common good. The emergence of new forms of journalism as a consequence of technological development and appropriations has engendered serious debate about media freedom and the practice of journalism around the world.³⁵ This means in the globalization of the media, laws have to be flexible to accommodate changes in how media law is understood in order to keep up with changes in the sector. However, laws regulating journalism should not impede freedom of media and expression which is guaranteed by the Constitution of Kenya 2010 alongside Acts of Parliament and International law.

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.³⁶

Regulation refers to the whole process of control or guidance, by established rules and procedures, applied by governments and other political and administrative authorities to all kinds of media activities. Thus regulation is always a potential intervention in ongoing activities,

³⁴ Okore J, 'Regulation Of Media: Comparative Analysis Of Regulation Of Broadcasting Services In Kenya' Thesis, University of Nairobi, 11th November 2014.

³⁵ Bosire J, 'An Investigation On Cyber Journalism Regulation In Relation To Media Freedom In Kenya' Doctorate Thesis, University of Nairobi, November 2013.

³⁶ Wanyama L, '*Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013*', New Media and Mass Communication
www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.



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usually for some stated “public interest” goal but also to serve the needs of the market like supporting competition or for reasons of technical efficiency.³⁷

Although we see media freedom being guaranteed by the Constitution, the supreme law of the land, Kenya’s media history suggests that constitutional media freedom is likely to be compromised.³⁸

STATUS OF MEDIA REGULATION IN KENYA

HISTORY

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

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.³⁹The authoritarian colonial government’s dominant perception of the Press was always that of an unnecessary evil that deserved close supervision and control.⁴⁰ 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

³⁷ Okore J, ‘Regulation Of Media: Comparative Analysis Of Regulation Of Broadcasting Services In Kenya’ Thesis, University of Nairobi, 11th November 2014.

³⁸ Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014 <http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.

³⁹ Wanyama L, ‘Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013’, *New Media and Mass Communication* www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁴⁰ Makali D., ‘Media Law and Practice: The Kenyan Jurisprudence’, 2004.



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taxation and racial segregation. The colonial government feared a free and thriving nationalist press that acted as the mouthpiece for political independence.⁴¹

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.⁴² However, once the state of emergency was lifted, the 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.⁴³ 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.

Post-colonial Era

The Kenyatta Regime (1962-1978)

The political transition from British colony to independent country was mirrored by changes in the mass media in Kenya. In 1963 when Kenya became independent the vast majority of broadcasts on government-owned radio and television stations were imported British and American programmes, but this was set to change. Kenyan culture was promoted via the mass media under the presidency of the late *Mzee* Jomo Kenyatta as more programmes were broadcast in Swahili and there was a focus on African music and dance. Likewise, newspapers covered more African traditions and culture.⁴⁴ 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.⁴⁵ The Kenyatta government preferred a co-opted media that would contribute to nation building and development. The newly enacted government was intolerant towards the Press and enacted the **Official Secrets' Act in 1968** to deal with a

⁴¹ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁴² Makali D., 'Media Law and Practice: The Kenyan Jurisprudence', 2004.

⁴³ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication, www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁴⁴ Collender G, 'The media in Kenya'.

⁴⁵ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.



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series of leaks that made the government vulnerable to political pressure. The government's ban of its own mouthpiece the *Pan African Magazine* because of fear of internal criticism illustrated its intolerance towards media.⁴⁶

The Moi Regime (1978-2002)

Media law under retired President Daniel Toroitich arap Moi was influenced by the attempted military coup in 1982 military coup, 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.⁴⁷

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.⁴⁸

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**.

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

⁴⁶ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication
www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁴⁷ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication
www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁴⁸ Mbeke P, 'The Media, Legal, Regulatory and Policy Environment in Kenya: A Historical Briefing'.



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journalists and the mass media. The media as well as the civil society rejected the bill as it was considered to be unjust procedurally and favored the government in that it gave the government undue representation in the proposed regulatory body. 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.⁴⁹ 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.⁵⁰

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.⁵¹

The Kibaki Regime (2003-2013)

After the 2002 ousting of the long-ruling independence party (the so-called Kenya National African Union regime), the era of the National Alliance Rainbow Coalition (NARC)

⁴⁹ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication
www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁵⁰ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication
www.iiste.org ISSN 2224-3267 (Paper) ISSN 2224-3275 (Online) Vol.33, 2015.

⁵¹ Wanyama L, 'Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013', New Media and Mass Communication
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government, under retired President Mwai Kibaki, saw various liberating legislative and institutional reforms.

2004 saw the establishment of the self-regulating **Media Council of Kenya** (MCK) which was legislated for via the Media Act 2007. The Kenya Information and Communication Act of 1998 (KICA) was reviewed two years later, giving the **Communications Commission of Kenya** (CCK) a mandate to “exercise its (oversight) functions independent of any person or body (emphasis added).”⁵²

In time, however, the NARC government grew increasingly intolerant of media freedom, as evidenced by the 2006 raid of the Standard Group headquarters where newspapers were burnt, property destroyed under the guise of national security threats.

While activism aimed at achieving a free media prevailed into the last days of president Kibaki’s regime, the implementation of the legislative and institutional reforms continued to face great challenges. For example, the regime perpetuated the punitive financial obligations imposed on the print media, limiting any opportunity for indigenous small investors whilst also making life precarious for small and independent media workers.⁵³

The Uhuru Regime (2013- Date)

As a result of the Fifth Schedule to the Constitution, the media environment anticipated extensive enabling legislative reforms within the three-year timeframe leading up to August 2013, which Parliament extended to December 2013. Instead, the opposite has happened with the passage of two controversial media laws in January 2014 under the presidency of Uhuru Kenyatta: the **Kenya Information Communications (Amendment) Act 2013 (KICA 2013)**, and the **Media Council Act 2013 (MCA)**. These laws give the state a measure of control over the governing bodies they institute, and do not consequently meet their own threshold of being “free from Government, political and commercial interests”. The laws also compromise the

⁵² Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014 <http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.

⁵³ Okore J, ‘Regulation Of Media: Comparative Analysis Of Regulation Of Broadcasting Services In Kenya’ Thesis, University of Nairobi, 11th November 2014.



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independence of frameworks for appointments to, and removals from, office, and provide no safeguards for state funding while creating avenues for controlling the media bodies they establish. Additionally, they provide disproportionate penalties and fail to provide safeguards for the proportional application of sanctions, and also provide excessively broad functions and/or powers that will hamper the free and independent operation of media bodies.⁵⁴

Additionally, Kenyan media laws ignore international and regional standards of media freedom, and restrict or threaten freedom of expression in some way. Such laws allow the banning of publications, the arrest of vendors, and the arrest and detention of journalists on the grounds of 'compromising public safety, public order, morality or internal defence'. Besides the financial and penal punishments mentioned above, they also provide powers to search media establishments, and seize equipment.⁵⁵

LEGAL FRAMEWORK OF MEDIA LAW IN KENYA

THE CONSTITUTION

The New Constitution of Kenya 2010 specifically guarantees for freedom of expression and association, access to information and media freedom.⁵⁶ Freedom of the press has no limitation save those contained in the text of the constitution: war propaganda, incitement to violence, hate speech and ethnic intimidation and violence.⁵⁷ Further, the constitution disallows any form of government control over independent media and guarantees that published thoughts opinions and ideas may not be penalized, regardless of content.⁵⁸

⁵⁴ Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014 <http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.

⁵⁵ Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014 <http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.

⁵⁶ Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.

⁵⁷ Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.

⁵⁸ Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.



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The two laws guiding media operations in Kenya; the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 were passed by the Kenya National Assembly on 5 December 2013.⁵⁹

The Kenya Information and Communications (Amendment) Act, 2013 was assented to by the President of the Republic of Kenya H. E. Uhuru Kenyatta on 11 December 2013 and came into effect on 2 January 2014, following the amendment of the Kenya Information and Communications Act, 1998. The Act created the Communications Authority of Kenya to replace the Communications Commission of Kenya.

The Media Council Act, 2013 was assented to by the President on 24 December 2013 and came into force on 10 January 2014 following the repeal of the Media Act, 2007 which established the Media Council of Kenya.

MEDIA COUNCIL ACT, 2013

The Media Council Act 2013 is an Act of Parliament that gives effect to Article 34 (5) of the Constitution.⁶⁰ It establishes the Media Council of Kenya as the body that sets media standards and regulates and monitors compliance with those standards.

Application of the Act⁶¹

In exercising the right to freedom of expression, media enterprises, journalists, media practitioners, foreign journalists and consumers of media services shall;

- a) Reflect the interests of all sections of society;
- b) Be accurate and fair;
- c) Be accountable and transparent;

⁵⁹ Association of Media Women in Kenya, *'Laws Governing Media Practice in Kenya: A Journalists' Handbook'*, 2014.

⁶⁰ Article 34 (5) of the Constitution which provides for Freedom of the Media states that: Parliament shall enact legislation that provides for the establishment of a body, which shall—

- a) Be independent of control by government, political interests or commercial interests;
- b) Reflect the interests of all sections of the society; and
- c) Set media standards and regulate and monitor compliance with those standards

⁶¹ Association of Media Women in Kenya, *'Laws Governing Media Practice in Kenya: A Journalists' Handbook'*, 2014.



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- d) Respect the personal dignity and privacy of others;
- e) Demonstrate professionalism and respect for the rights of others; and
- f) Be guided by the national values and principles of governance set out under Article 10 of the Constitution.

The Media Council of Kenya

The Media Council Act, 2013 established the Media Council of Kenya as the lead agency in the setting of media standards and ensuring compliance with those standards. The Council draws its mandate and authority from the Media Council Act, 2013.

*Functions of the Council*⁶²

- a) Promote and protect the freedom and independence of the media;
- b) Prescribe standards of journalists, media practitioners and media enterprises;
- c) Ensure the protection of the rights and privileges of journalists in the performance of their duties;
- d) Promote and enhance ethical and professional standards amongst journalists and media enterprises;
- e) Advise the government or the relevant regulatory authority on matters relating to professional, education and the training of journalists and other media practitioners;
- f) Set standards, in consultation with the relevant training institutions, for professional education and training of journalists;
- g) Develop and regulate ethical and disciplinary standards for journalists, media practitioners and media enterprises;
- h) Accredite local and foreign journalists by certifying their competence, authority or credibility against

⁶² Association of Media Women in Kenya, 'Laws Governing Media Practice in Kenya: A Journalists' Handbook', 2014.



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The Media Complaints Commission

The Media Council Act, 2013 under **Section 27** establishes a **Complaints Commission** independent from the Council to enforce media standards set the by the Council, and whose mandate is to arbitrate in disputes between;

- a) Public and the Media
- b) Government and media
- c) Within the media (Intramedia).

The Complaints Commission consists of Seven (7) members appointed through a competitive and industry driven process. The seven members include a chairperson who has held a judicial position or is an advocate of the High Court of Kenya of not less than 10 years standing and six other persons possessing experience and expertise in journalism and related fields.

The services of the Commission are free and independent of the Media and Government. In general, complaints must constitute a breach of the Code of Conduct for the Practice of Journalism in Kenya found in the Second Schedule of the Media Council Act, 2013.

Examples of cases in which the CC has been able to adjudicate successfully include **Francis Muthaura vs. The Standard Group, Ben Agina and Beuttah Omanga – Complaint 1/2011 and 2/2011**, where it was ruled that The Standard Group was at fault and that the two reporters retract story and offer an apology to Muthaura of equal prominence in paper as well as The Standard Group pay Kshs 50,000 fine to MCK or 3 months in prison for false/misleading information to CC and that The Standard Group pay Kshs 250,000 to MCK, or 3 months in prison for violating item 4 of the Accuracy and Fairness provisions of the Code.⁶³

In addition, in the case of **Chris Murungaru vs. the Nation Media Group** regarding Murungaru's alleged Anglo Leasing connections, NTV was ordered to retract story and apologise to Mr Murungaru.

⁶³ Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014
<http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.



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THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) ACT, (KICA) 2013 (No. 41 A of 2013)

Parliament enacted the Kenya Information and Communication (Amendment) Act, 2013 to address the regulation challenges posed by the need to give effect to article 34 of the Constitution of Kenya. The new Act amended the Kenya Communication and Information Act 1998 (that was previously amended by the Kenya Information and Communication (Amendment) Act 2009) to align the Act to the Constitutional thresholds on Independence of the media as set out in Article 34 of the Constitution of Kenya. The Act created the Communications Authority of Kenya to replace the Communications Commission of Kenya.

Communications Authority of Kenya (CA)

KICA provides that the Communications Authority of Kenya shall be guided by the Constitution which guarantees the freedom and independence of the media and bars the state from exercising any control or interference with media as well as from penalising any person for any opinion or for the content of any broadcast or publication.

CAK's mandate is broad and includes licensing and regulating postal, information and communications services in accordance with the provision of KICA and so anyone who wishes to operate a broadcasting station applies for same from CAK.

The CAK is charged with the duty of ensuring that each local broadcaster airs the amount of local content in its license, ensure that the broadcasters include news and information in their programming as well as discussions of national importance and ensuring that the broadcasters adheres strictly to the subscribed or authorities subscribing code. The CAK is also charged with the responsibility of prescribing a programme code that sets the standards for the time and manner of programmes to be broadcast by the broadcasting stations. The CAK also has a duty of resolving disputes between consumers and a service provider and a service provide provider through it tribunal.

Some provisions under KICA have been challenged in court for their unconstitutionality. For example, the Communications and Multimedia Tribunal established under the KICA have the



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power to impose heavy penalties under section 102 which may result in journalists operating in fear of such drastic penal laws. Also, the Communications Authority established under KICA would comprise in its line up four Permanent Secretaries which clearly denotes government involvement.⁶⁴

CONCLUSION

This chapter sought to highlight the historical underpinnings of the media in Kenya and how it has developed from the pre-colonial era to the post-colonial era, with different laws during the tenure of the four Presidents of the Republic of Kenya. It is important to understand the history of media regulation so as to understand where as a country we have come from and the extent of development from the media's perspective. Furthermore, a historical perspective charts the way forward and enables us to look at the future knowing that media freedom will be protected.

The chapter also introduced the laws that regulate the media. Despite advances in media freedom and development and a New Constitution, the media in Kenya remains hostage to institutional, economic, and political pressures.⁶⁵ As noted, Kenya's unique history of colonialism, post-independence political competitions, authoritarianism, and subsequent political and economic liberalization has had a deleterious effect on both the pace and depth of media development.⁶⁶

The legal infrastructure by which Kenya relies upon for media regulation has achieved a lot, but it is still punctured by government interference. The concept of a free press is premised on zero government interference on information disseminated, but where Parliament passes laws to gag the media, we see aspects of government control.

The raid at the Standard Group offices in 2006, a Citizen weekly journalist being brutally murdered in 2009 while the suspected killers (who are police officers) not being charged, NTV journalists being attacked in 2011 by prison guards in 2011 highlight how journalists, despite

⁶⁴ Article 19, *The Impact Of Kenya's Legal And Institutional Frameworks On Media Freedom*, 2014 <http://www.article19.org/data/files/medialibrary/37750/Kenya_research_report_A5_ALL_v2.pdf> accessed 8th December 2015.

⁶⁵ Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.

⁶⁶ Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.



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media laws, are harassed for coverage of the news. Crimes against journalists are common and serve as a strong deterrent to investigative reporting. This is buttressed by an atmosphere of impunity in which violence, harassment and intimidation against journalists is the norm. However, this should be seen as a dark chapter in Kenya's fights against journalism intimidation and we should rise up against fear created by such attacks. Recent developments where TV stations broadcast *exposés* (such as *Jicho Pevu* by KTN) highlighting impunity by government officials should be encouraged and should be praised. Such boldness from the press is what we need.



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CHAPTER FOUR: COMPARATIVE ANALYSIS

This chapter discusses regulation of the media in South Africa and China comparatively and seeks to find out whether media freedom is being promoted or is just a concept that is known theoretically and curtailed practically. The comparative analysis also seeks to find best practices that can be recommended for Kenya taking into account the history of Kenya and its current media culture. These two countries represent a diversity in approach to media regulation through their regulatory regimes and also by their political regimes, bringing the debate to capitalist regime vs communist regime in so far as freedom of the media is protected.

SOUTH AFRICA

The media history of South Africa can be divided into two phases: the apartheid era and the post-apartheid era. These two categories define the fundamental changes that have reshaped the country and its media laws in particular. During apartheid, the media operated in a minefield of laws designed to make it almost impossible to publish any information without authorization from the government especially on political and national security issues.⁶⁷ Heavy scrutiny was placed on print media to ensure that they were not promoting anti-apartheid. At the end of apartheid, South Africa adopted a new Constitution which protects freedom of expression and the press and enacted new media laws in order to ensure freedom of the press. These laws have been heavily influenced by the country's history of apartheid. The challenge that faced the new legal regime was how liberalization of the media could be made consistent with promotion of nation-building, reconciliation, democratisation and cultural diversity.⁶⁸

After the apartheid era, the print media sector developed a regulatory system which was self-regulating, which meant that they were in charge of monitoring themselves and ensuring that a pluralistic and independent media sector is maintained.⁶⁹ The Constitution of South Africa which was passed in 1996 also confirmed freedom of the press. Other pieces of legislation were

⁶⁷ Itumeleng P, 'Who Is Watching Who? Regulation Of Media And Freedom Of Expression In Uganda: A Critical Analysis Of The Press And Journalists Act 1995' Thesis, Makerere University Uganda, 1st November 2008.

⁶⁸ C Barnette 'The limits of media democratization in South Africa: politics, privatization and regulation', 1999.

⁶⁹ Vilakati, S. and Mavindidze, Z, 'Occasional Paper Series: A comparative study of legislation and regulations establishing ownership ceilings, audience size, market share and geographic markets in the South African print media sector', 2014, Freedom of Expression Institute, Johannesburg.



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promulgated to ensure an independent and pluralistic media industry which accurately reflected the diverse society in which the country was living in. The country also ratified a number of international declarations which promote and call for a media sector which is independent of the state and which reflects the views of all society, one of which is the UN/UNESCO Windhoek Declaration.⁷⁰

Media Regulation

Freedom of speech, freedom of expression, access to information and free media are all entrenched in the **Constitution of South Africa**, provided for in the Bill of Rights. The state is duty-bound to respect, protect, promote and fulfill these freedoms. Giving effect to the Constitution is the legislative framework: the Media Development and Diversity Agency Act of 2002 encouraging media diversity and access to media by all; the Independent Communications Authority of South Africa Act of 2000; the Electronic Communications Act of 2005; the Broadcasting Act of 1999; the Access to Information Act of 2000; the Promotion of Administrative Justice Act of 2000; and Chapter 9 of the Constitution which sets up institutions to support democracy.⁷¹

The Promotion of Access to Information Act of 2000 is in practice used extensively by the media, by individuals and by other interest groups to gain information for a number of purposes. This has enhanced investigative journalism in South Africa, fostering a transparent society.

The Media Development and Diversity Agency (MDDA), was established by the MDDA Act No. 14 of 2002, to create, in partnership with the print and broadcast media industry, an enabling environment for media development and diversity that is conducive to public discourse and which reflects the needs and aspirations of South Africans.. The objectives of the MDDA Act arise, inter alia, from the **Constitution of South Africa**, which provides, in **Sections 16 and 32 of the Bill of Rights:**⁷²

⁷⁰ Declarations of Windhoek. 'Declarations on Promoting Independent and Pluralistic Media' 03/05/1995.

⁷¹ Mtimde L, 'Media accountability mechanisms: Self-regulation, Independent and Statutory Regulation'.

⁷² Mtimde L, 'Media accountability mechanisms: Self-regulation, Independent and Statutory Regulation'.



1. Everyone has the right to freedom of expression, which includes:

- a) freedom of the press and other media;
- b) freedom to receive or impart information or ideas;
- c) freedom of artistic creativity; and
- d) academic freedom and freedom of scientific research.

32. Access to information

1. Everyone has the right of access to:

- a) any information held by the state; and
- b) any information that is held by another person and that is required for the exercise or protection of any rights

Section 192 of the Constitution establishes an Independent Communications Authority (ICASA) to regulate broadcasting, telecommunication and posts in the public interest. The broadcasting statutory framework is independent and is complemented by a self-regulatory institution, the Broadcasting Complaints Commission of South Africa (BCCSA) an independent judicial tribunal that acts without fear or favour and which was established by the National Association of Broadcasters (NAB) in 1993. It adjudicates complaints from the public about the broadcasters, which are members of the NAB.⁷³

Print media is not statutorily regulated in South Africa. It is self-regulated under the **press ombudsman** and the Press Council's South African press code, procedures and constitution. The press code is a tool for governing ethical behaviour among journalists, which has to prevail, as the print media is a powerful communication tool. The Press Ombudsman is tasked with settling disputes between members of the public and the journalists or publications that are members of the PSCA. In the event of a complaint against any publication which is not a member, the Ombudsman may attempt to approach that publication and enquire whether it accepts jurisdiction

⁷³ Mtimde L, 'Media accountability mechanisms: Self-regulation, Independent and Statutory Regulation'.



CHINA

China is home to one of the world's most restrictive media environments. The Chinese government has long kept tight reins on both traditional and new media to avoid potential subversion of its authority. Its tactics often entail strict media controls using monitoring systems and firewalls, shuttering publications or websites, and jailing dissident journalists, bloggers, and activists.⁸⁴ Media freedom has suffered severe setbacks since 2004 with prosecution and imprisonment of editors, forced restructuring in media houses and suspension of liberal papers.⁸⁵

Media Regulation

Article 35 of the Chinese Constitution guarantees freedoms of speech, assembly, association, and publication, but such rights are subordinated to the discretion of the CCP and its status as the ruling power. **Article 41** states that 'Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary.' China's Constitution affords its citizens freedom of speech and press, but the opacity of Chinese media regulations allows authorities to crack down on news stories by claiming that they expose state secrets and endanger the country. The definition of state secrets in China remains vague, facilitating censorship of any information that authorities deem harmful to their political or economic interests.⁸⁶ Moreover, the Constitution cannot, in most cases, be invoked in court as a legal basis for asserting individual rights. Judges are appointed by the CCP and generally follow its directives, particularly in politically sensitive cases. There is no press law that governs the protection of journalists or the punishment of their attackers. Instead, vaguely worded provisions in the penal code and state secrets legislation are routinely used to imprison Chinese citizens for the peaceful expression of views that the CCP considers objectionable. Criminal defamation provisions are also occasionally used to similar effect.⁸⁷

⁸⁴ <http://www.cfr.org/china/media-censorship-china/p11515>.

⁸⁵ Public Opinion Supervision - A Case Study of Media Freedom in China, accessed at <http://law.bepress.com/cgi/viewcontent.cgi?article=8080&context=expresso>.

⁸⁶ <http://www.cfr.org/china/media-censorship-china/p11515>.

⁸⁷ <https://freedomhouse.org/report/freedom-press/2015/china>.



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According to the New York-based Committee to Protect Journalists (CPJ), at least 44 journalists were behind bars in China as of December 2014, the largest national total in the world. Journalists are normally sentenced to prison for organizing peaceful protests against restrictions of human dignity placed upon them by the government, all under the name of “disrupting public order”. They are subsequently denied access to a lawyer and right to appeal.

The CCP maintains direct control over news coverage through its Central Propaganda Department (CPD) and corresponding branches at lower administrative levels that determine the boundaries of permissible reporting. More than a dozen government bodies review and enforce laws related to information flow within, into, and out from China and it is the CPD which coordinates with General Administration of Press and Publication and State Administration of Radio, Film, and Television to ensure content promotes party doctrine.⁸⁸ CCP leaders use control of the media to propagate positive views of the party and government, while vilifying those deemed to be their enemies. Journalists who attempted to investigate or report on controversial issues, question CCP rule, or present a perspective that conflicted with state propaganda directives faced harassment, dismissal, and abuse.⁸⁹

The Internet in China is subject to government control. The systematic control and censorship on the Internet in China conducted by the government hinders Chinese citizens from fully practicing their right to freedom of expression online.⁹⁰ Hence, while media freedom and freedom of expression are guaranteed by the Constitution of the People’s Republic of China, practice has it that such freedoms operate under a tight lease of the government.

CONCLUSION

Media regulation in the two countries has been influenced by each country’s history and political regime. One aspect to be borrowed from the regulatory regime in South Africa is that there is absence of government control in the media regulatory practices. This is reflected in the composition of such bodies and the mode of appointment of their members. In South Africa the

⁸⁸ <http://www.cfr.org/china/media-censorship-china/p11515>.

⁸⁹ <https://freedomhouse.org/report/freedom-press/2015/china>.

⁹⁰ Zhang Y, ‘The Right To Freedom Of Expression Versus Media Censorship In China: Chinese Citizens And The Internet’ Thesis, 26th May 2010, accessed at <http://munin.uit.no/bitstream/handle/10037/2873/thesis.pdf?sequence=2>.



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ICASA's members are appointed by a Minister on recommendation by parliament and after a public interview of such members. This process does therefore guarantee transparency. While some argue that there is a direct correlation between freedoms and economic prosperity, China can attest that the correlation is just but a mentality. As depicted, China really does not guarantee the freedom of the media, yet it is one of the most economically stable countries in the world. They can look at Kenya and give that statistic and tell us the ball is in our court. Food for thought, perhaps.



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CHAPTER FIVE: CONCLUSION

The media in Kenya has been lauded for its courage and neutral reporting in an age where journalists are faced with intimidation, threats and even cases of journalists being killed merely for doing their job. Since Kenya gained independence, there have been a myriad of changes to the media sector, and while some have meant to curtail the media, it is an agreed notion that most have improved the media as a whole, hence improving the country. There is a renewed optimism around the notion of media freedom, with the New Constitution of Kenya, passed on the 27th of August 2010, expanding the freedoms of expression and press. In an age where information and the dissemination of information is proving crucial as a way of living, any laws meant to oppress the freedom of expression and press are being fraught upon. The Constitution binds Kenya to a series of international and regional legal instruments regarding free expression, including the Universal Declaration of Human Rights and the African Charter on Human and People's Rights and therefore *theoretically* media freedom is a concept well versed in the Kenyan legal environment. However, the question is whether *practically* media freedom is just but a concept or a concept being practiced by the State.

While the New Constitution of Kenya 2010 guaranteed the freedom of the media, legislations passed then have questioned the legislator's drive for media freedom. The proposed Security Laws (Amendment) Bill, the Kenya Information and Communications Act (KICA) offer an insight as to how legislators deemed media freedom as an inferior concept as opposed to interest such as national security. These laws gave the State a measure of control over the governing bodies they instituted, and never met the constitutional threshold of being "free from government, political and commercial interests". Reports pointing to a possible collapse of the Media Council of Kenya (MCK) risk putting the future of our robust Press in jeopardy.⁹¹ Kenya is ranked number 100 on the world press freedom index⁹² published by Reporters Without Borders and while its ranking has improved over time, there is room for more improvement so as to make Kenya a safe place for the media to report transparently and still remain accountable for

⁹¹ Read at: http://www.standardmedia.co.ke/article/2000181726/media-freedom-in-kenya-at-risk-over-legal-deadlock?articleID=2000181726&story_title=media-freedom-in-kenya-at-risk-over-legal-deadlock&pageNo=1

⁹² <https://index.rsf.org/#!/>.



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its journalism. The Press Freedom Index that *Reporters Without Borders* publishes every year measures the level of freedom of information in nearly 180 countries.⁹³ It reflects the degree of freedom that journalists, news organizations and netizens enjoy in each country, and the efforts made by the authorities to respect and ensure respect for this freedom.⁹⁴ It is based partly on a questionnaire that is sent to partner organizations (18 freedom of expression NGOs located in all five continents), to a network of 150 correspondents, and to journalists, researchers, jurists and human rights activists.⁹⁵ The 179 countries ranked are those for which *Reporters Without Borders* received completed questionnaires from various sources.⁹⁶

The growing concern over press freedom in Kenya was highlighted by an Al Jazeera article titled “On eve of Obama visit, Kenyans warn of waning press freedom”.⁹⁷ The article referenced a robbery that took place in Eldoret, where one John Kituyi, a journalist working for *The Mirror Weekly* in Eldoret, was bludgeoned steps from his home, yet the attackers only took his phone while leaving his cash and wristwatch untouched.⁹⁸

According to a report released by the *Committee to Protect Journalists*, threats to press freedom in Kenya are on the rise.⁹⁹ This is due to increased harassment of journalists as well as powerful government and corporate sponsors using their financial muscle to exert influence over newsrooms.¹⁰⁰ A 2013 survey by the *Kenya Media Programme* polled nearly 300 journalists from across the country and found that more than 90 percent had been threatened because of

⁹³ <http://knoema.com/GSPFI2015/world-press-freedom-index-2015?country=1000850-kenya>, accessed on 21st January 2016.

⁹⁴ <http://knoema.com/GSPFI2015/world-press-freedom-index-2015?country=1000850-kenya>, accessed on 21st January 2016.

⁹⁵ <http://knoema.com/GSPFI2015/world-press-freedom-index-2015?country=1000850-kenya>, accessed on 21st January 2016.

⁹⁶ <http://knoema.com/GSPFI2015/world-press-freedom-index-2015?country=1000850-kenya>, accessed on 21st January 2016.

⁹⁷ <http://america.aljazeera.com/articles/2015/7/24/kenya-waning-press-freedom-under-the-spotlight.html>, accessed on 21st January 2016.

⁹⁸ <http://america.aljazeera.com/articles/2015/7/24/kenya-waning-press-freedom-under-the-spotlight.html>, accessed on 21st January 2016.

⁹⁹ <http://america.aljazeera.com/articles/2015/7/24/kenya-waning-press-freedom-under-the-spotlight.html>, accessed on 21st January 2016.

¹⁰⁰ <http://america.aljazeera.com/articles/2015/7/24/kenya-waning-press-freedom-under-the-spotlight.html>, accessed on 21st January 2016.



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their reporting, most often for stories related to politics, corruption and the divisive conflicts over land.¹⁰¹

Media ownership has led some to question the authenticity of media houses and their reporting. This is because whoever owns the media house has, in some extent, discretionary powers over what is to be reported to the masses. This creates a problem as information maybe be presented in such a way as favouring one party rather than an objective approach to news coverage.

Government-owned Kenya Broadcasting Corporation (KBC) runs the widest radio and TV network in the country with more than 100 frequencies.¹⁰² KBC is the oldest and largest public service radio provider, with 17 regional radio stations, three commercial radio stations and three TV broadcast services.¹⁰³ KBC, not surprisingly, broadcasts in line with the government's views.¹⁰⁴ Notwithstanding this fact, the more liberal politics of recent years have seen the station take a less conservative approach.¹⁰⁵ This is likely in part because state funds have decreased, forcing the KBC to rely more on advertising dollars.¹⁰⁶ This commercially-oriented shift, therefore, erodes its commitment to public programming.¹⁰⁷ In fact, KBC has seen a decline in educative and community-oriented programming.¹⁰⁸

The Nation Media Group (NMG) has outlets in radio, TV, newspapers, magazines and publishing.¹⁰⁹ It consists of Nation Newspapers Limited, Nation Carriers Limited, Nation

¹⁰¹ <http://america.aljazeera.com/articles/2015/7/24/kenya-waning-press-freedom-under-the-spotlight.html>, accessed on 21st January 2016.

¹⁰² Allen K & Gagliardone, "Case Study Snapshot of Donor Support to ICTs and Media", The Media Map Project Kenya, 2011.

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¹⁰⁸ Mshindi, T. and Mbeke, P, "Kenya media sector analysis report", A Research Report prepared by the Canadian International Development Agency (CIDA), Quebec, 2008.S

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