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Law and the Mass Media in Kenya

by A. Okoth-Owiro

Abstract

This article describes and analyses the law affecting the mass media in Kenya. It poses and attempts to answer the questions: (a) who should define the role of the press? (b) how much control may the state exercise over the press? and (c) what accepted methods and instruments of control should the state adopt? It argues that state interest in the control of the press has been achieved through (a) determining how the press is to perform its role, and (b) by becoming part of the press (through ownership) and participating in defining its role. In Kenya, several legal and administrative instruments exist for controlling the press, which are to be found in public, private, criminal, commercial, and administrative legal processes. This state of affairs has not always permitted of smooth government-press relations irrespective of the legitimacy and justifiability of state action against the media. It suggests the establishment of a representative institution for canvassing various interests bearing on the performance and conduct of the press, granting and guaranteeing the right to a hearing before a tribunal before any curbs on the press are imposed, and the right of the press to appeal in the event of state action against it.

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La loi et les masses médias au Kénya

Résumé

Cet article décrit et analyse la loi touchant les masses médias au Kénya. C'est une tentative de trouver des réponses aux questions suivantes:

— Qui devrait définir le rôle de la presse?
— Jusqu'à quel point le gouvernement devrait-il contrôler la presse?
— Et quel sont les méthodes et instruments de contrôle l'Etat devrait-il adopter?

L'article fait remarquer que l'Etat a pu contrôler la presse

— En determinant comment la presse devrait jouer son rôle.
— En faisant partie de la presse (par achat des actions) et ainsi en participant dans la définition de son rôle.

Au Kénya, plusieurs instruments de contrôle de la presse existent, qu'ils soient judiciaires ou administratives, en l'occurence dans les secteurs publics, privés, judiciaires commerciaux et administratifs. Cet état de chose a fait que les relations entre l'Etat et la presse n'ont pas toujours été des meilleures, compte non tenu de la légitimité et la justification de l'action de l'Etat contre la presse. L'article propose la création d'une institution de représentation qui s'occuperait des intérêts divers ayant trait à la performance et conduite de la presse, qui offrirait et guarantirait le droit de la presse d'être entendu devant un tribunal avant que toute restriction lui soit imposée, ainsi que le droit de la presse d'interjeter appel en cas de poursuite judiciaire contre elle.

Introduction

This article describes and analyses the law affecting the mass media in Kenya. This is necessary for two reasons: first, information on the role of law in mass media regulation tends to be scarce and scattered and usually unavailable to those who need it, i.e. mass media professionals. Second, press freedom is an important human right the qualification of which should be restricted to the barest essentials. In this context, a discussion of the role of law in mass media regulation is a useful contribution to an important debate on constitutional rights in a democratic society.

State and the Press

Every state has a political interest in controlling the activities of the press within its jurisdiction. This interest is usually canvassed as a legitimate legal right arising from the idea of sovereignty. But this claim of the state has not been universally accepted, and there are those who would regard press freedom as a human right (Kinuthia and Kariuki 1989; Rudolph 1981). However, it is now generally accepted that the state can legitimately control the activities of the press, even though a requirement of 'reasonable' or 'minimal' control is sometimes insisted upon.

Several questions are raised by the assertion that the state can legitimately control the press, namely: (i) Who should define the role of the press? (ii) How much control may the state exercise? and, (iii) What accepted methods and instruments of control should the state adopt?

These questions do not lend themselves of easy answers. But some tentative positions have to be taken. On the first, it is acceptable to posit that the press itself should be primarily responsible for defining its role. The state can then participate in the process in two ways: first, by determining how the role of the press is to be performed and, secondly, by becoming a part of the press and thereby participating fully in defining its role.

All states in Africa have chosen to become part of the press through state-owned radio and television networks and ownership of newspapers (Mwaura 1980; Ugboajah 1980). In addition, it can be assumed that they participate most actively in determining how the role of the press should be executed. However, and very fortunately, it is still accepted all-round that the function of the press is to inform and to entertain (Elias 1969: 122). This is not just a convenience: many would insist that it is a human right — 'the right to know'.

On the second question of how much control the state should exercise, the definitive limitations are less clear. It can be stated unequivocally that the controls should not strike at the root of the role of the press itself, i.e. on the duties to inform and to entertain. But controls geared at ensuring accurate and balanced information, clean entertainment and 'patriotism'

would be acceptable. A somewhat generalized way of stating all this is to say that the state may exercise such controls as are necessary in the interests of fair government and in consistency with the ideals of constitutionalism, democracy and a free press.

Now, the state cannot be trusted to exercise restraint at all times in the performance of its functions. The ideals of democracy, constitutionalism and a free press cannot be left to state discretion. In practice they are usually ingrained in the law as constitutional rights (Terrou and Solal 1972). If this is done, the confines of state actions are easier to delineate and predict.

On the third question of the accepted methods and instruments of control, the law is the legitimately recognized and accepted method of control. This is not to suggest that states have not used other methods and instruments. It is merely to emphasize that when law is used as an instrument of control, the action of states and their agents are scrutable in public debate, legal action and legitimate complaint. It is in the interest of all concerned that only law should be used as an instrument of press control.

In practice, the limits of press freedom are defined in legislation or other legal instruments as legal obligations of the press and the individual. These legal obligations are usually a qualification of the constitutional and human rights of the press and the individual. It may be suggested in this context, that the law does three separate but related things with respect to the press. These are that:

(i) It creates rights and duties of citizens, the press and the state;
(ii) It limits boundaries for the exercise of freedoms; and
(iii) It creates a framework for control and regulation of the press and its activities.

The idea of 'control' in the context in which it is used here implies at least four limitations to freedom of the press, namely:

(i) Qualification of right of access to information, especially from official governmental sources;
(ii) Placing limits on freedom to disseminate information;
(iii) Regulation and/or control of the form of dissemination; and
(iv) Privileged and prior access to information material by the state or its agents.

The law plays two roles within the broad framework of control of the press:

(i) The law plays a legitimate role of ensuring accurate information and clean entertainment; and
(ii) The law plays a political role of ensuring that activities of the press conform with what the state considers desirable.

Freedom of Expression in Kenya

Chapter five of the Constitution of Kenya contains an extensive range of provisions aimed at guaranteeing and protecting the fundamental rights and freedoms of the individual. One of these rights and freedoms is freedom of expression, which is detailed in Section 79 of the Constitution. According to this provision, no person is to be hindered in the enjoyment of his freedom of expression, except as provided for in the Constitution. Freedom of expression as protected in the Constitution, refers to four separate rights, namely:

(i) Freedom to hold opinions without interference;
(ii) Freedom to receive ideas and information without interference;
(iii) Freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and;
(iv) Freedom from interference with private correspondence.

The Constitution of Kenya not only protects freedom of expression in the classical sense, but also places great emphasis on free flow of information, unhindered communication channels and freedom of press enterprise.

However, like all the other rights and freedoms, freedom of expression is qualified. Thus, it is perfectly legitimate and constitutional to introduce laws which restrict freedom of expression if such laws make provisions: (a) that are reasonably required in the interests of defence, public safety, public order, public morality or public health; and (b) that are reasonably required for the purpose of: (i) protecting the reputations, rights and freedoms of other persons; or (ii) protecting the private lives of persons concerned in legal proceedings; (iii) preventing the disclosure of information received in confidence; (iv) maintaining the authority and independence of the courts; (v) regulating the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; and (c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, as long as these restrictions are reasonably justified in a democratic society.

The point of the law on freedom of expression appears to be in the exceptions, rather than the rule. Be that as it may, the constitutional provisions relating to the restriction on freedom of expression have formed a basis for a great many enactments specifying qualifications to freedom of expression in given circumstances. This body of legislation forms the law which is used to control the press in Kenya.

Control of the Press

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 analysed 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. These are:

(i) The interests of the state, especially its security;
(ii) The interests of the society, especially public health and morals;
(iii) The interests of justice; and
(iv) The interests of the individual, especially his privacy.

(i) The interests of the state

Although the state has not proffered a definition of its interests in politics or legislation, the concept has been actively used as a basis for very far reaching measures in public life. As regards press control, there are at least four measures that have been taken or may be taken.

The first is the requirement of registration and execution of a bond under the provisions of *The Books and Newspapers Act* (Chapter III, Laws of Kenya). Every publisher of a newspaper is required to send daily returns of the registrar (Section 7), and also to submit returns of vital information regarding publication and circulation annually (Section 8). In addition, it is a requirement of the Act that no newspaper is to be printed or published without a bond of Ksh. 10,000 having been executed, registered and delivered to the Registrar of Newspapers by the proprietor (Section 11). The purpose of the bond is security towards the payment of any monetary penalty which may be adjudged against the paper.

The second is the power to prohibit a publication. This power is contained in Section 52 of the *Penal Code* (Kenya 1969) which defines a publication to include newspapers or periodicals. The power can be used to prohibit both the importation and the local publication of a newspaper. Two conditions must be fulfilled before the power can be invoked: (1) it must appear to the minister (in charge of home affairs) that the prohibition is reasonably required in the interests of defence, public safety, public order, public morality and public health; and (2) the measure must be reasonably justifiable in a democratic society.

No objective test for determining the presence of the two conditions is provided in the law, but when they are present, the minister may, by order in the *Kenya Gazette,* declare any publication to be a prohibited publication. It then becomes a criminal offence punishable by upto three years imprisonment to print, make, import, publish, sell, supply, distribute, reproduce, or possess the prohibited publication.

The third is the felony of sedition. This offence is pegged on the idea of

a seditious intention which is defined in Section 56 of the *Penal Code*. According to this section, a seditious intention is an intention: (a) to overthrow by unlawful means the Government of Kenya as by law established; or (b) to bring into hatred or contempt or to excite disaffection against the person of the President or the Government of Kenya as by law established; or (c) to excite the inhabitants of Kenya to attempt to procure the alteration, otherwise than by lawful means, of any matter or thing in Kenya as by law established; or (d) to bring into hatred or contempt or to excite disaffection against the administration of justice in Kenya; or (e) to rouse discontent or disaffection amongst the inabitants of Kenya; or (f) to promote feelings of ill-will or hostility between different sections or classes of the population of Kenya.

The section goes on to explain that a seditious publication is a publication containing any word, sign or visible presentation expressive of a seditious intention.

Section 57 then defines the precise nature of the offence. It provides that any person who: (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or (b) utters any words with a seditious intention; or (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or (d) imports any seditious publication, is guilty of an offence and is liable to imprisonment for upto 10 years. Similarly, any person who has a seditious publication in his possession is guilty of an offence. In addition to imprisonment for a seditious offence, a number of other measures could be taken against the guilty party, including forfeiture of printing machines, and the prohibition of any further publication of a newspaper.

The fourth is the operation of the provisions of the *Official Secrets Act* (Kenya 1969). Modelled on an English statute of similar name, the mischief which the statute aims to assault is the possibility of information getting into the hands of alien enemies (Smith 1978: 149-156). By the Act, it is an offence to approach or enter any 'prohibited place' — a term referring to places which are likely to contain security information — or to make any sketch or note or take any photograph which might be useful to an enemy (Section 3). It is also an offence for any person in government service, or who holds or has held a government contract, to communicate any information which he has obtained owing to the position he has or the contract he holds, to a person to whom he is not authorized to communicate it. Similarly, it is an offence for a person to receive such information, or to incite or attempt to procure another person to commit an offence under the act (Section 3). The penalty for these offences is upto 14 years imprisonment.

(ii) **Interests of society**

The state has made itself the guardian of the interests of society. There are thus a number of executive and legislative actions which the state can undertake in pursuit of the protection of these interests. In the area of press freedom, the legal instrument which the state uses to protect the interests of society are the same as those used to protect its own security. What is more, the state will often not even proffer an explanation as to the immediate justification for its actions. It is thus left to the public to infer the possible focus of protection, that is, whether state security or interests of the state form the specific context of the action taken.

However, at least two examples may be cited where the state may take action on the justification of protection of the interests of society. The first is the prohibition of publications, which is done in the interests of, *inter alia,* 'public morality or public health' (Kenya 1969; SS. 194-200). The second is the offence of criminal libel (Kenya 1969: SS. 194-200).

(iii) **The interests of justice**

Curbs on freedom of the press in the interests of justice are usually introduced via the legal instrument of contempt of court, which has been discussed in great detail by Smith (1978). The law of contempt is based on the court's inherent and constitutional power to act on conduct which might obstruct, prejudice or distort the administration of justice. The law recognizes two categories of contempt: civil and criminal.

Civil contempt occurs when a party disobeys an order of the court, for example an injunction not to publish a particular article.

Smith (1978: 94) has classified criminal contempt according to three general types of conduct: (1) publishing matter which may prejudice a pending trial; (2) scandalizing the court; or (3) interfering with judicial proceedings or refusing to reveal sources of information to a competent court or tribunal.

Only one aspect of criminal contempt requires detailed comment. This is refusal to reveal sources of information. There are certain categories of information and communication which the law recognizes as privileged (Kenya 1963). These categories include conduct of judicial officers, communications during marriage, official records and communications, bankers' books, and communciation between an advocate and his client. In respect of such communication, the court cannot compel disclosure. Unfortunately, journalists are not covered by the privilege. They cannot therefore claim any privilege recognized by law to refuse to answer questions without being in contempt of court (Cripps 1984).

There must be occasions when the journalist's professional duty never to reveal his sources will conflict with the court's power to compel an answer. If no answer is forthcoming, the court may punish the journalist.

Fortunately, no such case has been reported in Kenya so far. But numerous examples have been reported in Britain, including the famous case of *Attorney-General v. Mulholland and Foster* (1963 2QB.477).

(iv) **The interests of the individual**

There are at least two important interests of the individual which press law seeks to protect. These are the individual's reputation and his property.

The reputation of the individual is protected by the law on libel, which is to be found in the *Defamation Act* (Kenya 1969) and the *Penal Code* (Kenya 1969). The burden of this law is that any person whose reputation has been injured by a published statement may seek redress in the courts (Nylander 1969). If he can satisfy the court that he has been defamed, he will be awarded an appropriate sum in money as compensation. In addition to this arrangement, the *Penal Code* criminalizes the publication of defamatory matter thus: (S. 197) 'Any publication of defamatory matter concerning a person is unlawful . . . unless (a) the matter is true and it was for the public benefit that it should be published; or (b) it is privileged....'

A newspaper that publishes defamatory information runs the risk of paying damages, and also being prosecuted.

The class of private property protected by the aspects of law applicable to journalism is intellectual property, which is protected by the *Copyright Act* (Kenya 1966). By this Act, if an individual wishes to gain copyright protection, he must reduce his idea to a material form. The moment the words are written, or the melody transcribed, copyright comes into existence. The Act protects, among other things, literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasting, and programme-carrying signals.

If any substantial part of a copyright work is reproduced without the permission of the copyright owner, infringement has occurred. The remedies for infringement are damages, a criminal prosecution, an injunction, and an account for profits.

Copyright law restricts the journalist by enjoining him not to publish information which falls within the realm of private property unless he has obtained prior permission for so doing.

Other forms of control

The discussion of the various justifications for press control above may create the impression that this is the full range of legal and executive measures for press control in Kenya. Such an impression would be misleading. Other forms of control, perhaps even more portent, are also in operation. A number of the more obvious ones are mentioned.

(a) *Parliamentary censorship.* The Constitution of Kenya provides for the regulation of procedure in the National Assembly. Says the Constitution: [S. 56(1)] 'subject to this constitution, the National Assembly may (a) make standing orders regulating the procedure of the assembly (including in particular orders for the orderly conduct of proceedings)'

This power has been used to make Standing Order (Kenya 1983) 170 which provides as follows:

> Any newspaper whose representative infringes these Standing Orders or any rules made by the Speaker for the regulation of the admittance of strangers, or persistently misreports the proceedings of the House or refuses on request from the clerk to correct any wrong report thereof to the satisfaction of Mr. Speaker, may be excluded from representation in the press gallery for such term as the House shall direct.

It is not entirely clear how a newspaper could infringe some of these provisions. But Parliament can use this power to exclude a newspaper from coverage of its proceedings and thereby compromise important aspects of freedom of expression. This power was recently invoked against the *Daily Nation,* of course, amidst opposition and objections from the media fraternity *(Finance* 1989).

(b) *Exclusion from meetings.* Although statistics are difficult to come by, exclusion of the press from meetings of local authorities, political party branches, co-operative societies and other institutions deliberating public affairs is a common occurrence in Kenya. The executive has usually assumed that there is an inherent power to take such measures against the press, and could even cite higher state security justifications. But on whatever justification, the result of such exclusion is that the citizen is denied information on matters about which he is entitled to information. In the meantime, press freedom is seriously curtailed.

(c) *'Harassment' and economic strangulation.* Elias (1969: 131) observes that sometimes, a government, instead of coming out openly with an institution to censor the press, adopts the subtle and indirect pressure of withholding its advertisements from allegedly hostile newspapers, as well as other forms of patronage. In an economy where government advertisement is a significant fraction of the newspaper's income, this can have very substantial impact on the newspaper's ability to be independent. If one adds the possibility of reward for rival newspapers and the harassing environment of being condemned for lack of patriotism, this can be a very portent tool of press censorship. It is our suspicion that this situation may be obtaining in contemporary Kenya *(Finance* 1989).

(d) *The use of monolithic executive powers.* There are areas of public life in Kenya in which the executive is conferred with very broad powers to punish and take other measures to ensure public order. Of paramount interest here are powers which are usable to maintain public order like the

Public Order Act (Kenya 1963) and the *Penal Code*, and powers usable in the area of public security like the *Preservation of Public Security Act* (Kenya 1966). These statutes grant very wide discretionary powers which can be used to punish or threaten to ensure compliance with executive whims. It is submitted that an atmosphere like this is incompatible with the spirit of press freedom.

Press Control: Some Comments

The main purpose which law serves in relation to the press 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 quarrelled with in principle; but why it is done, and how it is done deserves serious discussion and comment. A few comments on how it is done in Kenya are preferred. These comments endeavour to raise two issues. One is that there is need for an objectively articulated policy on press control in Kenya. The other is that the institutional framework for implementing the control should be streamlined and rationalized.

At the moment, press control through the use of the law proceeds on the basis of the constitutional provisions qualifying the right to freedom of expression. These constitutional provisions are rather vague, and the ensuing law confers unfettered discretion on executive officials to implement the controls. For example, althoug both the Constitution and the *Penal Code* recognize that the press can be controlled in the interests of public morality and public health, these important concepts are not defined in legislation. The interests of certainty and clarity would be greatly enhanced if these terms could be defined in a policy document.

At the same time, it appears that more than three institutions of the state can impose very independent controls on the press. Apart from a court of competent jurisdiction, the minister in charge of home affairs and Parliament can impose very strigent controls on sections of the press without recourse to any courts. It is submitted that the rights of all concerned as well as of objectivity could be better protected if changes are introduced in this area. Three important changes should be:

(i) The introduction of a representative institution like a press council to monitor the press and impose any controls. If the institution is representative enough, then controls are likely to be more rational.

(ii) The granting and guaranteeing of a right to a hearing before a tribunal before any curbs are introduced. The media is a profession to some people and an investment to others. Careers and private property should not be lightly treated without an opportunity to be

be heard on the issue. This will force the authorities concerned to reveal and justify the reasons behind their executive decisions to restrict freedom of expression. Surely natural justice demands that a hearing should be an automatic right to anybody about whom a prejudicial decision is about to be taken.

(iii) The provision of a right to appeal to the courts. At the moment, there is a possibility that persons adversely affected by the imposition of control by the minister and Parliament might wish to appeal against these decisions. Yet, while access to court and guarantee of protection by the law is a constitutional right, they cannot appeal against these decisions.

Conclusion

Many issues still remain which should be raised and debated. In particular, the rather ready acceptance of the thesis that the state has a right to control the press should be debated. This should delineate the outer reaches of state discretion in press control. There is also need to discuss the theoretical premises upon which the assumption that law is a 'natural' regulatory mechanism are based.

However, to the extent that the article ends at the beginning of the need for institutional and policy adjustments, it is hoped that an agenda for further debate and recommendation has been enjoined.

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