

## Background Note

# The Media, Legal, Regulatory and Policy Environment in Kenya

## A Historical Briefing

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# **The Media, Legal, Regulatory and Policy Environment in Kenya**

## **A Historical Briefing**

### **Introduction**

The mass media and communication sector in Kenya remains vulnerable to system-wide pressures such as the recent post-election violence and the resulting ban on live broadcasting because of the weak, irresolute and inadequate legal, regulatory and policy framework inherited from the colonial era. The growth and development of the mass media and communication has been slow, stunted, haphazard and often inconsistent with public and investor expectations over the years because of the disabling legal and policy environment. Political, social, cultural, economic, globalization and technological forces influenced the legal, regulatory and policy environment throughout the history of Kenya.

Laws governing the media in Kenya are fragmented and exist in different sections of civil and criminal laws. The three sources of press law in Kenya include the Constitution of Kenya, the Statutory Law; and the Common Law. The Constitution of Kenya is the supreme law of Kenya and guarantees the right to freedom of expression: However, it does not mention freedom of press and other media specifically; provides limitations of the fundamental rights and freedoms under vague circumstances thus allowing for violations of same rights<sup>1</sup>.

The relevant sections of the Statutory Law of Kenya, some of which are controversial, that deal with media (mainstream media, vernacular media, community media and even new media such as SMS messages and blogs) include: The Defamation Act, Cap 36; The Penal Code, Cap 63; The Books and Newspapers Act, Cap 111; Copyright Act, Cap 130; Preservation of Public Security Act, Cap 57; Public Order Act, Cap 56; Film and Stage Plays Act, Cap 222 (1962); Chief's Authority Act, Cap 128; Official Secrets Act, Cap 187 of 1968; Police Act, Cap 84; Armed Forces Act, Cap 199; Communication Commission of Kenya Act of 1998; Kenya Broadcasting Act, Cap 221 of 1998, ICT Act of 2007 and the Media Act, 2007<sup>2</sup>. The key media regulators are the Ministry of Information and ICT, Communication Commission of Kenya, Media Council of Kenya, Kenya Film Commission among others. The key policy currently is the ICT policy and several other sessional papers.

### **Colonial Era (1895-1962)**

The legal, regulatory and policy framework governing media during the colonial era was closely tied to the political and economic interests of the colonial

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<sup>1</sup> See David Makali's *Media Law and Practice: The Kenyan Jurisprudence*, 2004

<sup>2</sup> See International Commission of Jurists-Kenya Section's *State of Freedom of Information in Kenya*, 1999.

government and white settler communities. The nationalist movement, the Mau Mau war, the 1952 Emergency and Her Majesty's government commitment to give Kenya independence also influenced colonial laws and policy towards media. The authoritarian colonial government's dominant perception of the Press was always that of an unnecessary evil that deserved close supervision and control<sup>3</sup>. Initially, the Press was merely a vehicle for disseminating government information to the citizenry especially the White settler communities. However, the colonial government adopted draconian laws such as the Newspapers' Ordinance (1906) to deal with harsh political realities of the time. As early as 1920s, nationalist movements and Press had started opposing paternalistic colonial policies such as forced alienation of land, forced labor and taxation and racial segregation. The colonial government feared a free and thriving nationalist press that acted as the mouthpiece for political independence. It enacted the Penal Code in 1930, the Emergency Order in Council in 1939, repealed The Newspaper Ordinance in 1950 to control alleged seditious nationalist publications such as *Sauti ya Mwafrika*, *Uhuru wa Mwafrika*, *African Leader*, *Inoororia Agikuyu* among others. The breakout of the Mau Mau war and the Declaration of Emergency in 1952 gave the colonial government the excuse to ban all indigenous publications and to intensify propaganda against the nationalist movement<sup>4</sup>.

However, the colonial government became conciliatory towards the media after the lifting of the emergency ban; and after it became clear that the commitment towards Kenyan independence was irreversible. For the first time colonial administration not only allowed publishing of district political association newspapers but also sponsored some district newspapers such as *Kihoto*, a Kikuyu weekly; *Thome* in Kamba, *Ramogi* in Dholuo. Unfortunately, they undid the gains achieved so far by enacting the Books and Newspapers Act in 1960 to control the proliferation of the nationalist press.

The colonial government strictly controlled and censored radio programs since inception in 1927. The fairness doctrine meant nothing to the state sponsored radio station as it heightened propaganda against the Mau Mau in 1952, trivialized the nationalist ideas while closing their eyes to human rights abuses by the colonial state<sup>5</sup>.

The Colonial government's paternalistic broadcasting policy hindered the growth of a holistic national broadcasting system in Kenya. Originally, Cable Wire Limited, the radio operator, served only Whites and Asians. The Department of Information, formed in 1939, served the African Languages Broadcasting Service

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<sup>3</sup> See David Makali's *Media Law and Practice: The Kenyan Jurisprudence (2004)*

<sup>4</sup> In David Makali's *Media Law and Practice: The Kenyan Jurisprudence (2004)*

<sup>5</sup> See the Ministry of Tourism and Information's *Discussion Paper for A Broadcasting Policy, 2004*, Government of Kenya.

that transmitted programmes in eight languages only<sup>6</sup>. Its attempt to provide the country with a nation-wide broadcasting system failed in 1954 after rejection by White settler communities. The government set up the Kenya National Broadcasting Service (KBS) in 1959 following positive recommendation by the Pound Commission in 1959. It is ironic that the White settler communities endorsed radio and TV broadcasting only a few years before independence. The KBS, owned by foreign investors, was modeled along the line of BBC as an independent and autonomous public broadcaster because of colonial anxiety and tension regarding irreversible developments towards political independence. Therefore, colonial government did not put in place the foundation for a thriving home-grown indigenous broadcasting system.

### **Post-Independence Kenyatta Era (1962-1978)**

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

The independent government was intolerant towards the Press and enacted the Official Secrets' Act in 1968 to deal with a series of leaks that made the government vulnerable to political pressure. The political rivalry and fall out between President Kenyatta and Oginga Odinga, the Vice-President in 1969, played itself in the Press and set the tone for future government engagement with media at large. The government's ban of its own mouthpiece the *Pan African Magazine* because of fear of internal criticism<sup>7</sup> illustrates its intolerance towards media.

### **Moi Era (1978-2002)**

Daniel Arap Moi became President in October 1978. Several issues influenced his attitude towards the mass media, particularly the intense political rivalry between Kenyatta and Odinga, an attempted military coup in 1982 military coup, economic recession that led to International Monetary Fund's structural

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<sup>6</sup> The eight languages were Luo, Kikuyu, Kamba, Kipsigis, Nandi, Luhya, Kiswahili, Arabic broadcast from Nairobi, Nyeri, Kisumu and Mombasa.

<sup>7</sup> See Marcel Rutten, Allamin Mazrui and Francois Grignon's *Out For The Count: The 1997 General Elections and Prospects for Democracy in Kenya (2001)*.

adjustment programs, and popular agitation for economic and political liberalization and globalization. The eight-hour battle for the control of the microphone at KBC during the 1982 attempted coup especially hardened Moi's position towards the mass media.

The government restricted and limited political freedoms making Kenya a de Jure political state. Dissent was criminalized and open clampdown on critical press enhanced. The government harassed the media through sedition trials of the underground press and later banned independent and critical publications such as *Beyond* magazine in 1988; the *Financial Review* in 1989; *Financial Review* in 1989; *Development Agenda* and *Nairobi Law Monthly* in August 1989 September 1990 respectively. Between 1988 and 1990 about 20 publications were banned in Kenya<sup>8</sup>.

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

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

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 Acts.

Liberalization of the airwaves started in 1991 albeit unstructured and went on – somewhat grudgingly - over the years. The Attorney General set up the first Task Force on Press Law in 1993 to review and make recommendations on Press Law providing for a comprehensive legal framework for the exercise of freedom of the press and the development of dynamic and responsible print and electronic media.

Although the Hillary Ngweni Task Force worked well with the media in producing a report, the resulting bills failed to capture the spirit of the Task Force<sup>9</sup>. The

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<sup>8</sup> See Kenya Human Rights Commission reports, 1997.

<sup>9</sup> See *Broadcasting Pluralism and Community Broadcasting in Eastern Africa: A Survey*, Panos Institute, 1998.

government published without consultations The Kenya Mass Media Commission Bill (1995) to regulate the operations of the mass media; and The Press Council of Kenya Bill (1995) for the registration of the Press Council of Kenya to regulate the conduct and discipline of journalists and the mass media<sup>10</sup>. The media, civil society and opposition parties rejected the bills because they were considered to be in bad taste, draconian, failed to protect the right to information, failed to protect journalists, publishers and broadcasters and gave government unfair representation in proposed regulatory body<sup>11</sup>.

The government tactfully shelved the two bills and reconstitution of a Task Force in 1996 with Horace Awori, former chairman of Foreign Correspondence Association, as the chairman. Although the process was participatory and broad ranging, the final report presented to government in May 1998 failed to reflect the main concerns of media. The Awori Task Force report was in this sense similar to the 1995 rejected bills.

The media rebelled against government led review processes and instead endorsed a Kenya Union of Journalists' led media review task force. The Kenya Union of Journalists prepared the Media Bill 1998: Framework for Free and Independent Press for the Task Force on Press and Media Law in April 1998. It made recommendations for the establishment of an Independent Mass Media Commission and the Media Council of Kenya and the repeal of section 79 of the Constitution of Kenya and replacement with a new provision that would guarantee freedom of the media, protection of journalists, publishers, broadcasters and right of access to information<sup>12</sup>. The government ignored it.

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<sup>13</sup>.

Throughout the attempts to review media laws, there was a general lack of linkage between task forces and bills on media law and telecommunication law<sup>14</sup>. Telecommunication services, characterized by political interference, excessive controls, low universal access to information, low internet connectivity, low quality and high prices, had been neglected for a long time and were limited to major towns to the exclusion of rural communities. Internal, regional and global market demands as well as the economic promises of privatization forced the government to half-heartedly review the Kenya Post and Telecommunication Act.

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<sup>10</sup> See Kenya Gazette Supplement No. 64 (Acts No. 3, 1998, Nairobi, November 1998).

<sup>11</sup> See Kenya Union of Journalists' *Media Bill 1998: Framework for Free and Independent Press (1998)*

<sup>12</sup> See Kenya Union of Journalists' *Media Bill 1998: Framework for Free and Independent Press (1998)*

<sup>13</sup> See Marcel Rutten, Alamin Mazrui and Francois Grignon's *Out For The Count: The 1997 General Elections and Prospects for Democracy in Kenya (2001)*

<sup>14</sup> See Ministry of Tourism and Information's *Discussion Paper for Broadcasting Policy, March 2004*, Government of Kenya.

Initially the government split KP&TC into two in March 1997 through the Kenya Communication Bill (1997) and the Postal Corporation Bill (April, 1997<sup>15</sup>). Unfortunately, the government did not liberalize the sector fully when it took the bill to Parliament in 1998. It finally dismantled KP&TC into the Communication Commission of Kenya, TelKom Kenya Limited and Postal Corporation of Kenya. This was a case of half-hearted liberalization motivated by political and economic interests to create a mechanism to continue control practices in the sector.

### **Kibaki Era (2003-2008)**

President Kibaki came to power on the promise of change in the 2002 Presidential Elections. His government was largely seen as a reformist one that would decisively address the legal, regulatory and policy flaws that had undermined governance and crippled social-economic development in Kenya<sup>16</sup>. He took power when the country was in recession and the economy recording negative growth. His priority was to deliver a new constitution within 100 days and part of that package contained progressive laws on media.

Indeed, the Chapter six on the Bill of Rights Part two Sections 48, 49, 50 and 51 of the proposed constitution<sup>17</sup> stipulated the rights to freedoms of religion, belief and opinion; freedom of expression; freedom of the media; and freedom of access to information respectively.

Unfortunately, the new constitution was never implemented by the Kibaki administration despite approval during the 2005 Referendum on the new constitution. The media laws would form the subject of another constitutional review according to the National Accord and Reconciliation Act 2008.

The Kibaki administration remains ambivalent towards media. It created the Office of Public Communication in 2004 that addresses the media on critical policy issues weekly<sup>18</sup>. Despite that it has had difficult relationship with an independent, assertive and watchful media in Kenya. Following media exposures of the Anglo Leasing Scandal<sup>19</sup> and protracted media stand offs, armed police raided the Standard Group headquarters in 2004, beat journalists, burnt newspapers, destroyed property and illegally dismantled and confiscated equipment under the guise of national security threats.

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<sup>15</sup> See *The Kenya Gazette Supplement Bills, 1997*, Nairobi, 14<sup>th</sup> March, 1997.

<sup>16</sup> See the Annual Progress Report 2004-2005: Economic Recovery Strategy, Monitoring and Evaluation Directorate and the Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007.

<sup>17</sup> See the *The Kenya Gazette Supplement No. 63, 2005: the Proposed New Constitution of Kenya*

<sup>18</sup> See The Office of Public Communication's website at [www.communication.go.ke](http://www.communication.go.ke)

<sup>19</sup> The scandal centred around a multimillion dollar fraud – reported by anti corruption Czar, John Githongo – for a major contract for provision of passport printing systems in 2002. The media were instrumental in making details of the fraud public.

Following a humiliating defeat during the 2005 Referendum and confronted with formidable ODM opposition, low public rating and hostile media, the Kibaki administration changed tack towards the media. It created the Media Council of Kenya in 2007<sup>20</sup> for the conduct and discipline of journalists and the media, and as a mechanism to provide self-regulation of the media. Unfortunately, it also created a mechanism for control through financing and appointments for MCK.

The attitude of the administration towards media came to head when in the middle of announcing of flawed election results, it banned live broadcasting, and later formed a task force to investigate the conduct of media in elections and post-election violence and threatened to withdraw its support for the Media Council of Kenya.

The government has put in place the ICT Act<sup>21</sup>, policy and strategy. These ICT instruments were motivated by the quest to improve governance, create jobs and improve the economy in a globalizing world. Unfortunately, the ICT Act 2007 is inadequate in policing and regulating the mass media and communication sector. Although it addresses the establishment of ICT villages and ICT centres at the grassroots, it does not address the development of community media and broadcasting in vernacular languages. For a long time the government has not supported community media because its fear of empowering the citizenry in ways that would challenge its hold on power and demand good governance. Media owners have not been keen to see this sub-sector develop as they consider them competitors that would undermine their reach.

The Kibaki administration has also prepared the Freedom of Information Bill (2007) that would deal a death blow to the Official Secret's Act and improve access to official information and governance.

### *Conclusion and Way Forward*

The mass media and communication sector in Kenya remains vulnerable to system-wide pressures. The recent post-election violence and the resulting ban on live broadcasting are just two recent examples of this. The causes of this are weak, irresolute and inadequate legal, regulatory and policy framework inherited from the colonial era. The growth and development of the mass media and communication has been slow, stunted, haphazard and often inconsistent with public and investor expectations over the years because of a disempowering legal and policy environment. Political, social, cultural, economic, globalization and technological forces influenced the legal, regulatory and policy environment throughout the history of Kenya.

The legal, regulatory and policy environment is still hostile to media and communication development but there is hope that it will get better if a better

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<sup>20</sup> See *The Media Act, 2007 in the Kenya Gazette Supplement, Acts, 2007*, Nairobi, October, 2007

<sup>21</sup> See Ministry of Information and ICT's website: [www.information.go.ke](http://www.information.go.ke)

constitution is enacted, draconian laws repealed and new policies put in place. Progressive laws governing media and communications in Kenya need to be firmly entrenched in the proposed Constitution to provide impetus for steady growth of the sector.

The government urgently needs a language policy that deals with the use of hate speech in media and during elections in particular. The proposed Ethnic Relations Commission would champion this. The broadcasting policy need to integrate community media, public and private commercial broadcasting principles and regulatory framework. A comprehensive communication policy that addresses such important issues as media ownership and control, programming and local content, education and training, capacity building for community media among other issues is urgent.