

# JOURNALISTS AND THE RULE OF LAW



LEVI OBONYO  
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The Kenyan Section  
of the International  
Commission of Jurists



 Konrad  
Adenauer  
Stiftung



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We trust that you will find this publication a useful resource.



**George Kegoro,**

**Executive Director**



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# Foreword

**J**ournalism is not so young a profession in this country as sometimes it does appear. Journalism in Kenya is probably as old as the history of the nation itself and precedes many of the professions in the country. Indeed there is a rich history of the media in the country. What has not kept pace with the development of the field is the equivalent development of resources to enable the field to be more effective. For instance, it was not until after independence, with the establishment of the Kenya Institute of Mass Communication that training of journalists started in Kenya in earnest. Even then, that training was terminated at the diploma level meaning that thought was still focused on producing mid-level industry personnel. It was a decade later when further training beyond the diploma qualification was offered in Kenya.

But even more challenging for the field is that while the training was being offered there was never a concurrent development of resources to facilitate the training and adapt it to the Kenyan context. Technical training was a turn key technology with buttons being pointed to trainees who often only knew how to switch on and off the equipment they operated. But even more serious was the lack of efforts by those in the field to contextualize training by producing training material relevant to the nation's needs. Textbooks were still imported with examples used in class remaining largely incidents that took place in far flung capitals like New York, London and Paris.

It has particularly been acute the failure to report national events and beats within context. As a media trainer, legal practitioner and consumer of media, I have found some of the reports in the mass media not only confusing but too often a display of lack of familiarity with context and subject of the events covered.

This is particularly so when they relate to court proceedings, parliamentary proceedings and debates on the rule of law. Journalists have often showed a lack of understanding of these fields. Their choice of words, use of quotations and reportage of court proceedings or parliamentary debates have often displayed a level of unfamiliarity not only with the procedures but a host of other issues including the rankings of the players in the field, the rules, and sometimes the implications of their work. It is also disturbing that some media reports are laced with citations of purported provisions of the law which are outrightly inaccurate and sometimes jumbled up.

This is, in my view, a pointer to legal journalism that either did not care to verify or did not have access to the citation referred to by the news source or that was completely unfamiliar with the field. Some write-ups, too, reveal a lack of basic knowledge of the laws that govern media practice. Journalists sometimes make silly mistakes which would have been avoided were they familiar with the laws and ethics that govern their practice. For instance, it should be that when

politicians, knowingly or unknowingly flout the law on hate speech, then journalists who are conversant with the provisions in the Constitution, the National Cohesion and Reconciliation Act and the Code of Conduct for the Practice of Journalists would not publish such content. Further, Politicians who quote nonexistent sections of the law in the hope that they will get away with murder because some journalists may not know where to find the law, would not have the last laugh.

But is the writer solely to blame for this sorry state? I do not think so. The media cannot be expected to clarify, simplify and interpret for the public issues in technical proceedings and related debates unless they have been adequately prepared and equipped. They must first be provided with the necessary tools. However, there is the challenge of relevant books which must be surmounted. Forty seven years after independence, journalists have operated without a one stop book where they can, in the shortest time possible, familiarise

themselves with the legal jargon that characterizes most proceedings and debates that are important and interesting to the readership, viewership and listenership. Further they have not had in a capsule, relevant laws that govern their practice. This handbook, the brainchild of two hands experienced both in the media industry and academia, would not have come at a better time.

The book is particularly commendable for providing a one-stop for relevant sections of media laws and for providing essential legal tips including explanations of various legal terms. Its treatment of ethical issues in media practice is a plus. The book strikes a commendable balance of Law and Ethics in its structure, devoting four chapters to each of these two areas.

**Prof Githu Muigai**

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# Introduction

Why is this handbook called “Journalists and the Rule of Law” when, in fact, the better part of the second half does not deal directly with law but rather with ethics? It is a question we wrestled with and was only settled when we looked at the unique situation of the Kenyan media. On the whole Kenyans ought to be proud of their media particularly when the media is viewed within the narrow sense of regional comparison. Through this limited grid this country has one of the liveliest and most competitive media in the region both in terms of media outlets and the shades of opinion expressed. In terms of content alone, the dynamism ranges from conservative religious content to some of the most liberal talk shows on air. There are few media markets where in a morning the entire breadth of TV and radio broadcasts are reduced to being near religious pulpits with some of the most dramatic displays of spiritual fervor. And yet on the same day, only later, the same stations would be advertising gambling games while the print media, in the classified ads section, could be advertising personal services. Both liberalism and conservatism, however, seem confined to cultural homilies and seldom go beyond political or even economic discourses. It may very well be that the reason Kenyan media content may be so structured has to do with the nature of Kenyan politics that is too often limited to personalities, their cultural backgrounds, ethnicity and the singular lack of intellectual adventure. The political and economic discourse has not matched the cultural ones in their diversity.

Further, the quality of programming in Kenya towers many in the region. The evening news at seven in Kiswahili and the English news at nine are lively, often hard hitting, stretching the boundaries of freedom beyond what many may be familiar with. The local soaps are equally refreshing covering many social issues and registering a dramatic improvement in their short lifespan.

But the other reasons for pride in this media market is due to the speed with which it adopts technology. Again, partly because of the cultural conservatism of the previous political class, Kenya, in the previous political dispensation, was slow in comparison with the region in adopting technology. For example Kenya was behind Uganda and Tanzania in accepting mobile telephony or even in liberalizing the airwaves in order to embrace greater numbers of radio broadcast. But that has completely changed. The media in Kenya, be they radio, TV, newspapers or magazines, employ some of the most sophisticated technology in their production.

Today, for example, nearly every major media house can mount live broadcasts from anywhere in the country or the region. In fact, in the South Sudan referendum in 2011, Kenyan media was able to cover the voting live from nearly every major hotspot in South Sudan. It was a similar case when Uganda went to the polls and Kenyan media were everywhere in Uganda bringing live broadcasts and interviews to the living rooms across the region. Kenyan media may have not covered Tanza-

nian elections in a similar manner but it was not for lack of capacity.

The third factor that characterizes this market is its human resource. The average Kenyan journalist is fairly well educated. While it is true that Kenya has no monopoly over educated media personnel in the region, but their sheer number in the newsrooms is impressive. There is no shortage, for instance, of media professionals with post graduate qualifications. While the foot soldiers may hold average level education it is not for the lack of people with higher qualifications. It is true that the average editor complains primarily of two things lacking in most current graduates: lack of mastery of grammar and lack of sophistication to analyze issues. In our view, both these complaints can be explained away rather easily. One may be our educational system that has been too often interfered with by the political class with the emphasis shifted unsuccessfully towards technical subjects, the emphasis on the exam scores, the large number of students enrolled in schools and commercialization of the education sector. This may not be the place to expand on the impact of these individual elements on our educational system. But the second element, the lack of capacity to analyze issues, may be related to a national culture and value system. It is rather excessive to expect journalists to be analytical when it is not the nature of the Kenyan society to be analytical. No where is this better explained than in our political discourse. The funeral and campaign rally discourses that politicians address are limited to insults, labeling others and name calling. Discourses in other fora are no different. But having said that it is important to note that there are occasional

flashes of brilliant young talent that emerge in our media houses who provide fair insight into issues. The complaint would be that such talent is in short supply and in defiance of national values.

The fourth characteristic is the educational institutions. While some countries in the region have hardly an institution to train journalists Kenya has a different problem: where to take its hoard of trained media personnel. Burundi, for example, as at 2010, did not have a school to train journalists. Rwanda had probably only one school. In Kenya the challenge is of maintaining quality and ranking the schools in order of their qualities. While Kenyan media training schools may, individually, still lag behind some of the best in the continent, collectively they offer a fairly different picture. Journalism training in Kenya has a strong tradition dating back to 1967 with the establishment of the Kenya Institute of Mass Communication. Besides KIMC, Daystar University and the former School of Journalism at the University of Nairobi have distinguished themselves as premier training institutions. There are a host of other emerging centers of excellent training.

The fifth characteristic of this media market is its economic strength. Some analysts rank the Kenyan economy the tenth strongest in the continent behind Tunisia, Libya, Angola, Sudan and other leading giant economies. As a regional hub both the service and the industrial sectors in Kenya are strong. To maintain competitive edge advertising is a big service sector in Kenya. It is noteworthy, for example, that one of the big media houses in the country devotes, not only a big section of its print edition to advertising but

equally a big segment of its programming to advertising. In one such station the program preceding the nightly 9:00 pm news ends typically at ten minutes before the hour. Then for the following ten minutes it is a barrage of commercials even if some of the commercials are in-house promotions. The overall impact of the economy can not be downplayed as it does provide a solid support and foundation for the media.

As a result of the combination of these and other factors the media market in Kenya provides a unique environment. In terms of regulation it is probably in Kenya that we have an independent Media Council that is also statutory. Elsewhere in the continent, the Media Council charged with the responsibility of settling disputes in the industry is either fully statutory and lacking independence as is the case in Rwanda, or is non statutory as in the case of Tanzania. Uganda is in a unique situation of having two Media Councils one statutory and the other non statutory. Prior to the current state, the Media Council in Kenya was non-statutory. However, this status attracted certain challenges that made it difficult for the Council to operate. Too often this Council was accused for lacking teeth while at the same time, the Council had challenges of raising sufficient resources to enable it function both independently and to its full potential. To address some of the challenges, parliament enacted the Media Act 2007 that established the statutory Council and gave it powers anchored in law. At the same time Parliament has since given the Council resources to enable it fulfill its mandate. However, the government does not sit in the Council, does not instruct the Council, and does not influence it. Largely the role of the government is lim-

ited to providing resources to the Council and the annual audit by the Office of the Auditor General to be sure that the resources allocated the Council have been used appropriately.

Most places that have a Media Council see the role of the Council as limited to dealing with issues relating to ethics in the media. That brings us back to the title of this book – why the title is silent on ethics while the content delves on that?

In the Media Act 2007 and in the current Media Bill 2010, the Code of Ethics is included in the law as the second schedule. The code of ethics in Media Act 2007 was not a government prescription to the media but rather an industry generated set of boundaries that the industry itself agreed it could not cross. This Code emerged following an exhaustive internal debate and largely the industry has lived with it since then. Obviously there are critiques that fault the document, particularly loopholes that those with intent to limit the freedom of the press may use.

However, the fact that the Code of ethics is a part of the Media Act schedule gives the document the force of law. The Act mandates the Council to set up a Complaints Commission with the powers to adjudicate issues that are brought before it. This Commission is made up of five people led by a chair who is a man or a woman with the credentials to serve as a Judge. The other members are equally respected individuals in society who should have long experience with the media and engagement in social issues including journalism, media policy, law, entertainment etc. The Commission once set up is independent, including of the Council itself. This independence makes it possible that if there is a dis-

pute between the Council and an individual or organization, that individual, organization or even the Council can bring the matter to the Commission for arbitration. The decision of the Commission, if not appealed within 30 days is “adopted and enforced as an order of the Court”.

Kenya thus has specific laws that relate to the media. Among these laws include the Constitution itself, the Books and Newspapers Act, The Kenya Information and Communication Act, and The Media Act. But the Code of ethics too, in the Kenyan context, has the force of law. If a media house violates the tenets of accuracy and fairness, of balance and impartiality, of independence and of integrity and of accountability such violations are not simply left to a media house’ conscience. It means that if a media house does not provide an individual or an organization with an opportunity to reply, that the individual so violated can demand redress, and it is not left to the media house only to decide whether to grant the right of reply but that the Commission can demand compliance if it finds the demand to be justified. The code of ethics stipulates to the media house how to deal with matters relating to unnamed sources, confidentiality, misrepresentation, obscen-

ity, taste and tone of reporting; whether to pay or not pay sources, matters of privacy, guidelines on interviews on whether or not they could be secretly recorded. In deed, the issues to which the code of ethics speak are many.

Indeed the Kenyan situation provides us with an opportunity to interrogate our special arrangement. What are the positives and otherwise of our arrangement? There is often an easy lapse into the argument that we have to conform to the best practices elsewhere. But such arguments fail to recognize the possibility that we could be the ones inventing the best practice that others need to borrow from. In a ruling in 2011, the Complain Commission asked a media house to apologize to a social elite following a damaging story carried on him about a year earlier. The media house complied in the process avoiding expensive avenues of redress, the long drawn wait for redress and the painful experience of reliving the event in public. It is thus appropriate to look at the Code of ethics in Kenya as law, even if loosely, and for journalists to be familiar with them. A book on media law in the Kenyan context must therefore pay attention to the issue of ethics as part of that law.

# Journalists and the rule of law

## WHO IS A JOURNALIST?

**I**n this era of new media, the definition of a journalist has become more encompassing making it more compelling than before to draw a distinction between professional journalism and amateur/citizen journalism.

Persons, who write an occasional article, contribute frequently or send in snippets of news to both traditional and new media platforms, are either freelance journalists (one who is not regularly employed but is a frequent contributor) or amateur/citizen journalists (those who pen their articles on own blog or blogs hoisted by others). These categories of journalists are different from professionals - those who have had training in particular fields and perhaps received certification from duly recognised institutions and work regularly for the scores of newspapers, magazines, journals and house organs, television and radio.

It is easier to pick out professional journalists: they are on the payroll of a journal or electronic media house; they report for their paper/radio/television station, or write features or editorials or edit, or shoot news pictures/photographs.

In media houses that have hired their services, they are known by different names:

reporter, writer, correspondent, special correspondent, feature writer, photo-journalist / photographer, sub-editor, chief sub-editor, process leader, assistant editor, sports editor, political editor, crime editor, courts editor, business editor, provincial news editor/bureau chief, city editor, deputy news editor, news editor, revise/rewrite editor, senior editor, associate editor, senior associate editor, managing editor, deputy managing editor, editorial director, editor in chief/chief editor.

Professional journalists may report on crime, law and order, political developments, the courts, the Executive, the Legislature, people, fashion, art, music, drama and literature...indeed, whatever makes news. They also edit

**Journalists have one of the most important jobs in any society. Their circumstances differ from country to country. But whatever the situation, all good journalists share a basic mission. They give people the information they need to understand the world around them and to make decisions about their lives**

what others write, comment and criticise and put together the news (Kamath, 1990).

It was true then and now that some journalists are born, others are made. However, born journalists would even be better if they attended a course in journalism. To be a good journalist, it is important to receive adequate and right training. However, thorough education and the finest training in some speciality may not make one an outstanding journalist unless they also have the necessary vitality to get on with the job (ibid.).

Be that as it may, in today's world, journalists should arm themselves with a good university degree. This presupposes that in their writing, they will observe rules of grammar, punctuation, spelling and sentence structure. This is essential because journalists deal with facts and these facts are expressed in words. Accuracy, honesty and sensitivity to news too are universal assets journalists should possess.

## ROLE OF A JOURNALIST

Journalists have one of the most important jobs in any society. Their circumstances differ from country to country. But whatever the situation, all good journalists share a basic mission. They give people the information that they need in order to understand the world around them and to make decisions about their lives (Hodson & Eng, 2001).

People depend on journalists for information about their community, the government, business, sports, health, etc. It is in pursuit of this information that they decide to watch TV, buy a newspaper or listen to

radio. The information they get from these media enable them decide what to eat, what automobile to buy, where to send their children to school, who to vote for in the next election, and so on.

Because many people read, watch or listen to their stories, journalists must be responsible. The first duty of a good journalist is to the people. This means that they must not file stories merely to please their employers or their sources (the people from whom they get information for their stories), including government officials. Instead, they should write information that is accurate, new and relevant to the lives of their readers and which too must be understood by the ordinary reader (ibid.).

## THE LAW

Law is the cement of society, an essential guarantee that sets out boundaries for society. Knowledge of law increases one's understanding of public affairs, as well as affording some understanding of social values (Smith, 2006, p.2). In Landry's (2010) view, "the history of law is the history of civilisation, and law itself is only the blessed tie that binds human society together. ... Our long armed and hairy ancestors had no idea of redress beyond vengeance, or of justice beyond mere individual reprisal. The law, like everything we do and like everything we say, is a heritage from the past".

There are two basic kinds of law: one is scientific or natural law; the other is a rule (or set of rules), apart from a natural law, which society prescribes for itself. Law has been variously defined. A general definition of law perceives



it as " recognised cause-effect (causal) link or principle whose violation must or should result in a penalty as failure, injury, loss, or pain" (Business Dictionary, 2010).

Scientific laws (natural laws) are descriptions of direct links between cause and effect of phenomena deduced from experiments and/or observations (ibid.). In other words, they are laws that are derivatively obtained by watching the orderly sequences of nature and applied to achieve a desired sequence of nature (Blu, 2010). Examples include laws of motion, of gravitation, of optics, or mechanics. It is the only standard by which any controversy whatever, between man and man, can be rightfully settled; being a principle whose protection every man demands for himself, whether he is willing to accord it to others, or not; being also an immutable principle, one that is always and everywhere the same, in all ages and nations; being self-evidently necessary in all times and places; being so entirely impartial and equitable towards all; so indispensable to the peace of mankind everywhere; so vital to the safety and welfare of every human being; being too, so easily learned, so generally known, and so easily maintained by such voluntary associations as all honest men can readily and rightfully form for that purpose (ibid).

Looked at from a legal point of view, law may be defined as "regimen of binding rules of conduct (whether written or not) meant to enforce justice and prescribed duty or obligation, and derived largely from custom or formal enactment by a ruler or legislature. These rules (laws), carry with them the power and authority of the enactor, and associated pen-

alties for failure or refusal to obey" (Business Dictionary, 2010).

A law is a rule which each of us, as a free and intelligent agent, will obey, because we fear the punishment that may come in the breaking of such law, and, by as much or more, because we fear the loss of respect from family and acquaintances (Blu, 2010). A rule is an authoritative statement of what to do or not to do in a specific situation, issued by an appropriate person or body. It clarifies, demarcates, or interprets a law or policy statement that establishes a principle or standard, and serves as a norm of guiding principle or mandating action or conduct (ibid.).

The law, however, is not just a list of 'do's and don'ts,' but a system of primary and secondary rules which derive their legitimacy ultimately from universally accepted principles such as the essential justness of the rules, or the sovereign power of a parliament to enact them (Business Dictionary, 2010).

## RULE OF LAW

Whatever system of law is applicable, whether it is the English common law, civil law or the law of other countries, the Rule of Law forms an essential foundation in any democratic system of governance. The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.

The maxim - Rule of Law - states that men should not be trusted to rule others unless their rule is tempered by fixed laws that prevent tyranny, laws that prevent individuals

from accumulating wealth by force, laws that prevent those in high office from exercising power over the populace without restraint, laws that prevent the majority from acting without due regard for the rights and well-being of individuals, laws that prevent the powerful from plundering the weak (Suite101Articles).

Rule of Law, simply put, is absolute predominance or supremacy of ordinary law of the land over all citizens, no matter how powerful.

### **It is based on three principles:**

- ordinary law and not official fiat, government decree, or wide discretionary power, is to determine legal duties and liability to punishment of all citizens;
- ordinary courts applying ordinary law will determine disputes between citizens and government officials;
- fundamental rights of the citizens are rooted in the natural law, and are not dependent on any abstract constitutional concept, declaration or guaranty.

Although there is a wide variety of jurisprudential thought on the complex concept of

the Rule of law, it is generally accepted that a society in which the rule of law prevails is one in which a climate of legality, observance of the law and an effective judiciary, are evident. It is a society in which no man is punishable, or can be made to suffer bodily or proprietary loss, except for a breach of the law as established by ordinary courts of the land.

It does not mean the protection of vested interests, or unfair exploitation in society. It means the emancipation of the spirit of humankind from coercive constraints of fear, inequality and want. It requires that everyone should be subject to the law equally, and that no one should be above the law; that law enforcement agencies and the courts enforce and apply the law impartially (Gubbay, 2009).

According to Barenholm and Nielsen (2007, p.11), fundamental principles of the Rule of law include: an independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client and; equality of all before the law.

**An independent judiciary and legal profession are critical elements of the rule of law. The bedrock of a constitutional democracy is an independent judiciary. A judiciary that is not independent from the executive and legislature renders the checks and balances inherent in the concept of separation of powers ineffective.**

Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable (ibid.).

An independent judiciary and legal profession are critical elements of the rule of law. The bedrock of a constitutional democracy is an independent judiciary. A judiciary that is not independent from the executive and legislature renders the checks and balances inherent in the concept of separation of powers ineffective.

Gubbay (2009) says the rule of law is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive. It is a celebration of individual rights and liberties, and all the values of a constitutional democracy, characterised by the absence of unregulated executive or legislative power.

In a society in which the rule of law is observed, Executive decisions and legislative enactments, outside the framework of the law are declared invalid through the mechanism of judicial review, thereby compelling both the executive and the legislature to submit to enjoyment, by the individual, of all rights and liberties guaranteed by the constitution. Journalists as the watchdog of society are expected to keep tabs on the executive, the legislature and the judiciary in their various roles in the Rule of Law in society.

That journalists play a critical role in society is a given. Many a media scholar subscribes to the notion that journalists play a watchdog role in society. It is critical first that there are guidelines that allow the media to go about its duties unhindered. Where the rule of law is observed, it means that it is the law that will provide the boundaries within which social players may act. To the extent that a social player does not cross the boundaries that the law has set, then such a social actor should be allowed to operate unhindered. In this case, it would allow the journalist to access the information that s/he may need to report accurately on an issue, it will allow the report to access the sources they may be essential to report on a story, there would be access to the important documents that may be necessary in the journalist's efforts to carry out their responsibility.

However, just as the law will provide a protective umbrella for the journalist to operate, setting boundaries and providing guidelines that define his or her area of operation, journalists must also seek to operate within the set guidelines; it is a two-way traffic. Simply because the role they play in society is so critical is no excuse for journalists to flout the law and engage in illegality. It is the principle of transparency that would guide the environment in which the journalists operate. The law should come to his defense when his or her rights are infringed upon.

# Laws that govern media practice

Just like in any other industry, it is critical that media industry practitioners, journalists in particular, know the domestic and international legal framework for the right of free inquiry that defines their work. In this section, we look at the pieces of legislation that the practitioners have to contend with as they go about their daily business of newsgathering, processing and publication. The debate rages on as to whether laws identified and presented hereafter create a conducive environment for media practice. First we look at domestic legislation.

## DOMESTIC LAWS

### The Constitution of Kenya

Journalists in Kenya draw their right to free inquiry from The Constitution of Kenya 2010 which was promulgated on August 27, 2010. Prior to the promulgation of the Constitution, the legal framework for freedom of expression in Kenya hinged on section 79 of the Lancaster Constitution. Section 79 stated:

...except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the information is for the public generally or to

any person or class of persons) and freedom from interference with his correspondence.

This provision on the Constitution was limiting as opposed to being facilitative. The provision is so ambiguous and wide that it makes a mockery of the rights provided in that section. It is notable that the section does not provide for freedom to seek information. This then raises a challenge to journalists who have to seek information in the course of their duties. The bigger part of a journalist's work is in seeking information that too often some official, whether of government or private sector, wants to hide. The hide and seek game with information that officials play with the media is one of the driving forces behind investigative journalism – often the only means of unravelling scandals in the government.

Section 79 borrows its wording from Article 19 of the International Covenant on Civil and Political Rights (1966):

“1. Everyone shall have the **right** to hold opinions without interference;

2. Everyone shall have the **right** to freedom of expression; this right shall include freedom **to seek**, receive and impart **information** and ideas of all kinds, regardless of frontiers, either orally, in **writing** or **in print**, **in the form of art**, or **through any media of his choice**”.

**Article 35(1) empowers every citizen to access information held by the State and information held by another person but which may be required for the exercise or protection of any right or fundamental freedom.**

But in Section 79, the drafters omitted the words in bold. This omission circumvents the right to freedom of expression. Further, there is no distinct statute in Kenya that gives the media freedom to access information from either government or private organisations. This remains true since independence. The closest the country has come to entrenching the right to seek information is through the drafting of the Freedom of Information Bill (1995). It is among the pending bills awaiting for deliberation at the August House. The Bill, if passed could operationalise the right to access information, a feature of the new Constitution.

But let us turn our attention to the Constitution of Kenya 2010 that came into force on August 27, 2010. This document heralds a new dawn to journalists and others in the field of communication. The article that specifically address the issues of those in the communication industry include Articles 33, 34, and 35. For the first time in Kenya's legal framework, the freedom to seek information is entrenched in Article 33 of the Constitution. Article 34, particularly, goes to the heart of a journalist's work. It guarantees freedom and independence of the media as an express right . The

state is also expressly barred from interfering or exercising control over communicators or penalising any person for any opinion or view or content of any dissemination. Under Article 35, the new laws provide the right of access to information held by government and private bodies as a right for all.

## **FREEDOM OF EXPRESSION**

Article 33 (1) provides that every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas. However, this right is not absolute. According to Article 33(2), this right does not extend to: "Propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth". Article 33(3), further states that in exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Right to privacy too is isolated from other individual rights and entrenched distinctly in the Constitution of Kenya 2010. It is clear from the reading of this constitutional provision, at Article 31, that freedom of expression, including freedom of the Press, must take into account the high stakes involved and therefore constantly weigh the right to privacy as against public interest before publishing or broadcasting information of a personal nature. Article 31 provides thus: "Every person has the right to privacy, which

includes the right not to have—their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.”

## FREEDOM OF THE MEDIA

Article 34 guarantees freedom and independence of both traditional (print, radio and television) and new media. This freedom too does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This section of the law provides that Parliament shall enact legislation for the establishment of a body, independent of control by government, political interests or commercial interests. The body is to be formed to set media standards, regulate and monitor compliance with those standards.

The State is prohibited from controlling or interfering with media business. It shall not penalise any person for any opinion or view or the content of any broadcast, publication or dissemination. Media have freedom of establishment subject only to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution; and are independent of control.

## ACCESS TO INFORMATION

Article 35(1) empowers every citizen to access information held by the State and information held by another person but which may be required for the exercise or protection of any right or fundamental freedom. The second part of that Article gives people power to demand correction or deletion of untrue or misleading information that affects them. The third part of the article makes it a requirement for the state to publish and publicise any important information affecting the nation. Prior to the promulgation of the Constitution of Kenya 2010, the country did not have a law on access to information.

## KENYA INFORMATION & COMMUNICATIONS ACT

The decade of the 1990s transformed Kenya’s media landscape in no small a manner. The close of the previous decade was characterised by political agitation in Kenya. Starting with 1982 when sections of Kenya’s military mutinied, the government started to systematically clamp down on the press. Many newspapers and magazines were shut down and several journalists found their way into prison and detention without trial, largely on account of their journalistic work. This systematic repression of the media was matched by a general clampdown on other freedoms particularly that of expression. Several politicians who demonstrated independence were either detained or put in jail. During this period, there was only one broadcasting station which too had been reduced to a state mouthpiece, nay, the president’s megaphone.

In the beginning of the 1990s there was a

greater call for allowing political expression but also space for the media to operate. Matching this were the calls for opening up of the airwaves to allow for other voices besides the then Kenya Broadcasting Corporation as the only broadcaster in the nation. But this time was further matched by changes in technology that brought about cell phones into Kenya. Because of the government's strong hold on frequencies, the opening of this space was slow to start. It is no wonder that at that time Kenya's neighbors had greater access to the mobile phone technology. But in order for the government to start opening up the airwaves, even if only slowly, there was need for legislation that would regulate this new arena of communication.

In 1998 parliament enacted chapter 411A laws of Kenya which was christened the Kenya Communications Act which later underwent major amendments in 2008 to align it with the changes then taking place in the field. The new law as amended was renamed Kenya Information and Communications Act. It is the parent law, Kenya Information and Communication Act through which the Communication Commission of Kenya, a body charged with overseeing the broadcast services, radio communications, electronic transactions and telecommunications was established. It is of interest to journalists and investors that the Act creates offences and prescribes penalties for some of their acts and omissions. For example, Section 46Q of the Act, provides that broadcast service licensees who violate the terms of their licence face a fine of up to one million shillings or imprisonment for a term not exceeding three years, or both. And at Section 46J, the CCK is empowered to revoke a licence to a broadcast where the licensee

is in breach of a term of the licensee including failing to use the assigned broadcasting frequencies within one year after assignment by the commission.

Further, Section 84D outlaws publishing or transmission of obscene information in electronic form. That is, publication of any material which is "lascivious or appeals to the prurient interest and its effect is such as to deprave and corrupt persons who are likely to read, see or hear" the matter (KI&C Act, 2009). Those convicted are liable to a maximum of two hundred thousand shillings' fine or imprisonment for a term not exceeding two years or both. The Act creates many other offences that relate to computer use and misuse. For example: Section 83D outlaws operating an electronic certification system outside the provisions of the licence. The penalty prescribed for such an offence is three hundred thousand or imprisonment for a term not exceeding three years, or both. And Section 83U proscribes unauthorised access to computer data. It prescribes a penalty of up to a maximum of two hundred thousand shillings' fine or imprisonment for a term not exceeding two years or both for those found guilty.

## BOOKS AND NEWSPAPERS ACT

There is a case to be made for stringent regulations regarding the electronic media. After all they occupy the natural resource that is the airwaves. But not only that, both television and radio have a greater influence on populations as they appeal to more than one sense of the audience. But print is the oldest medium and the first to be regulated. One of the oldest legislation in Kenya that is

applied to the print media is the Books and Newspapers Act Chapter 111 of the laws of Kenya. This Act of Parliament came into force on 19th July, 1960. It provides for the registration of books and newspapers, the deposit of books and newspapers and, the printing of books and newspapers. It also provides for the execution of bonds for those who wish to invest in the newspaper industry.

Sometimes laws are viewed more from the point of view of what they stop us from doing rather than what they empower the citizens to do. Take for example this law: Books and Newspapers Act and its requirement that publishers deposit every book and newspaper published in the country with the government. It is noteworthy that books are a nation's heritage – they are a storehouse of a nation's culture, its history and its collective memory. If appropriately executed, this law ensures there is a copy of every printed matter in the country. The benefit of this to future researchers and to coming generations is massive. It is unfortunate that the benefits of this law has not been sufficiently explained to citizens.

Specifically, this law empowers the minister for Information and Communication to appoint a Registrar of Books and Newspapers to perform the duties and exercise the powers imposed and conferred on the Registrar by this Act. Newspaper publishers are required to deliver or send by registered post 2 copies of the newspaper issue and 2 copies of everyday supplement to the registrar, every day upon which the newspaper is published, at their own expenses. Returns of the newspaper are also to be made to the registrar. The Act requires Book publishers to deliver a maxi-

imum of 3 books to the registrar, 14 days after publication. However, there are exceptions to this requirement: In- house newspapers / magazine/books and school newspapers do not deliver copies of their works.

Anyone who wants to start newspaper production business is expected to execute a bond of one million shillings as a prerequisite. Section 11 of the Act requires newspaper owners or publishers to execute a Bond of Ksh 1 million plus one or more sureties. Failure to comply constitutes an offence that attracts legal consequences. The penalty for not executing the Bond, if you are a first offender is a fine of up to a maximum Ksh 1 million or maximum three years imprisonment or both. The punitive nature of this law is obvious. Freedom of expression cannot be tied to financial resources. What this law says is that an individual who wants to exercise this right has to have enough money to put up the bond.

The consequence is that it limits speech. But it limits speech in other ways as well. For example it prescribes ill will towards publishers. The bond posted is supposed to be used to compensate liabilities incurred should the newspaper publish libel against any citizen. It is in bad faith for government to anticipate that the publisher is going to commit libel. There is no good reason why government should require an investor in the information market to put aside a hefty bond to simply lie in the government's accounts – a requirement that is not demanded of any other business. Violation of any of these requirements puts one at risk of five years imprisonment and the publisher too will be barred from printing or publishing in Kenya.



Failing to make returns constitutes an offence. Section 9 of the Act spells out penalties for not making returns or making false ones. The penalty could be a fine, a penalty, or both. The alternative, or an additional penalty could be to file the returns, or pay the registrar the retail price of those copies. In cases where a vendor offends the Act by selling publications whose publishers have violated the law, then they shall be fined Ksh 20,000 or sent to prison for six months.

At Section 19, the Police are empowered to seize certain books etc or to search premises with or without warrant. The section provides thus:

*...magistrate may by warrant authorise any police officer not below the rank of Assistant Inspector, with or without assistance, to enter and search any place where it is reasonably suspected that any books or newspapers printed or published in contravention of this Act are being kept and to seize any books and newspapers found therein which he reasonably suspects to have been so printed or published, together with any other evidence of the commission of an offence under this Act.*

A court of law can also order forfeiture or destruction of copies of newspapers, magazines or books.

## THE PENAL CODE (ACT)

This is Chapter 63 of the laws of Kenya. Of interest to journalists is the fact that it creates an offence that is likely to be committed by their acts and omissions even as they go about their responsibilities. The offence falls in the category of misdemeanors- minors of-

fences that attract a jail term of below three years.

Chiefly, the Act creates the offence of criminal libel. This is found at Section 194 of the Code. Here, libel is defined as unlawful publishing (by print, writing, painting or effigy) of any defamatory matter concerning another person with intention to defame that other person. The Code also defines defamatory matter at section 195 as matter likely to injure the reputation of any person by exposing them to hatred, contempt or ridicule, or likely to damage any person in their profession or trade by an injury to their reputation. It further states that it is immaterial whether at the time of the publication of the defamatory material the person concerning whom the matter is published is living or dead, provided no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General.

At Section 196, the definition of "publication" is provided:

*...a person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed to be so dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person known.*

And libel can either be expressly stated or implied.

It is not necessary for libel that a defamatory meaning should be directly or completely expressed; and it suffices if such meaning and

its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly by the one and partly by the other( s.196 (2)).

The publication of a matter cannot be unlawful if the matter is either true and for the public benefit that it should be published or that it is privileged. According to Section 198(1), the publication of defamatory matter is absolutely privileged in any of the following cases:

Publications by the President, Cabinet of Ministers (official document or proceedings), Members of Parliament (proceedings at the floor of the august house);

If the matter is published by the order of the President or by the order of the Cabinet of Ministers; or

Administrative measures to address the conduct of an officer subject to military or naval discipline and or court martial proceedings.

If the matter is published in the course of any judicial proceedings by a person taking part therein as a judge, magistrate, commissioner, advocate, assessor, witness or party thereto; or

If the matter published is in fact a fair report of anything said, done or published in the Cabinet of Ministers or in Parliament; or

If the person publishing the matter is legally bound to publish it.

To reinforce this privilege, the section is unequivocal that where a publication is absolutely privileged, it is immaterial whether the matter is true or false and whether it is or not

known or believed to be false and whether it is or not published in good faith. However, nothing in Section exempts any person from any liability to punishment under any other chapter of the Code or under any other law. Further, Section 199 provides that a journalist or any other communicator shall not be liable to punishment under the Code if they publish absolutely privileged matter in good faith provided the publication is:

A fair report of anything said, done or shown in a civil or criminal inquiry or proceeding before any court. However, publications in defiance of court orders prohibiting publication of anything said, done or shown before it, on the ground that it is seditious, immoral or blasphemous are not privileged.

A copy or reproduction, or in fact a fair abstract, of any matter which has been previously published, and the previous publication of it was or would have been privileged under Section198.

An expression of an opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his personal character so far as it appears in such conduct.

An expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct

An expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a public legal proceeding, whether civil or criminal, or as to the conduct of any person as a party, witness or otherwise

in any such proceeding, or as to the character of any person so far as it appears in any such conduct

An expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made or submitted by a person to the judgement of the public, or as to the character of the person so far as it appears therein

A censure passed by a person in good faith on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the other person, or on the character of the person so far as it appears in such conduct

A complaint or accusation made by a person in good faith against another person in respect of his conduct in any matter, or in respect of his character so far as it appears in such conduct, to any person having authority, by contract or otherwise, over that other person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter

Published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of some person in whom the person to whom it is published is interested.

- According to Section 200 there is no good faith in a publication that is found to be defamatory if the publication is based on:
- a matter that is untrue and that even the publisher did not believe to be true;

- a matter that is untrue and the publisher published it without having taken reasonable care to ascertain whether it was true or false

In publishing the matter, the publisher acted with intent to injure the person defamed in a far greater way than was reasonably necessary for the interest of the public. Section 67 outlaws defaming diplomats. In other words, communicators are put on notice that it is criminal printing or publishing material that has the effect of straining relations between diplomats and the host country. This is a misdemeanor.

## ALARMING PUBLICATIONS

Also of interest to journalists is Section 66, which outlaws publication of false statements, rumour or alarming reports. A writer who violates this provision does so to his or her grief. In July 2001, Asena Muyoma and David Matende, a publisher and editor of the “Weekly Citizen” respectively were charged with publishing unverified and alarmist information on purported political troubles between a police commissioner and a minister. Section 66(2) provides an accused with a possible defence to the offence of publishing false statements, rumours or alarming reports. An accused may get away with the charge if he or she demonstrates verification efforts.

## SANCTITY OF THE COURT

The Constitution also does spell out, in Article 121, offences relating to judicial proceedings. One may be charged with contempt of court if, within the premises of judicial pro-

ceedings, they show disrespect, in speech or behavior, to the presiding judge or magistrate. Other reasons why one may be charged with contempt of court include: defying summons to attend court to give evidence, attending court but refusing to be sworn or affirmed, or refusing, without lawful excuse, to answer a question or to produce a document. Such defiance results in criminal liability. But that is not all, it is still an offence to:

- interfere with or influence a witness in a judicial proceeding before or after they have given evidence
- cause any obstruction or disturbance in the course of a judicial proceeding. For instance filming or recording within court room without clearance from the presiding judge or magistrate
- commenting by way of speech or writing misrepresenting proceedings or capable of prejudicing any person in favour of or against any parties to the proceedings or calculated to lower the authority of the presiding judge or magistrate.
- publishing information obtained from confidential court documents;
- committing any other act of intentional disrespect to any judicial proceeding or the presiding judge or magistrate
- reporting on court proceedings in breach of a court order or reporting restriction;
- anticipating the course of a trial or predicting the outcome.

In cases of criminal contempt, it is the Attorney-General who charges the alleged contemnor as happened in the two famous Ken-

yan cases of Republic v. David Makali and 3 others, Court of Appeal Criminal Applications Nos. 4 & 5 of 1994 and Republic v. Tony Gachoka and Another, Court of Appeal Criminal Application No. 4 of 1999. In Republic versus David Makali and 3 others, the convicts found themselves on the wrong side of the law in the publication of an article " Court of Appeal Ruling on Dons case reeked of State Interference" in the People Weekly. According to the Court of Appeal, the article imputed an evil motive on the part of the Court, that is, it had lost its independence, become subservient to the executive and it was involved in lynching and blackmailing the dons so as to suit the executive ( ICJ, 2005).

(An in Republic Versus Tony Gachoka and another in issue was the post on Sunday , with the cover story " Judiciary in Panic" and a specific article headline , " Chesoni implicated in an orgy of anarchy and Kshs. 30 million bribe," that cast aspersions on the Chief Justice & some judges of the Court of Appeal in the handling of a case involving the Kenyan Duty Free Shops. The Court of Appeal slapped Gachoka with a six month jail sentence for contempt.

Are there instances where the Court may act on its own motion and initiate prosecution for contempt of court? The then Chief Justice, Evan Gicheru, had this to say in answer to the question:

I have no hesitation in holding that the Court can in a proper case issue summons, notice to show cause or even a warrant of arrest for the alleged contemnor to be brought to court to answer contempt charges ... It matters not that the contemnor is a senior government official or the lowest litigant, and it matters

not that the person is not a party to the present proceedings if his conduct or statement is likely to affect the due administration of justice generally. (Kenya Law Review, 10 [2007] Vol 1: 1).

In HCCC NO. 1278 of 2004 Chief Justice Gicheru summoned the Attorney-General to appear personally before him to explain why he had not attended court on a previous occasion whether by himself or representative despite having been served with a mention notice. The Attorney-General duly appeared in person together with counsel who should have appeared in court and the head of litigation department of the Attorney-General's Office and the issue of non-attendance was sorted out after the necessary purging of the contempt by profuse apology.

Civil or common law contempt targets any other action which is intended to interfere with the administration of justice, including interfering with pending or imminent court proceedings. Most of the time, it is the parties that move the Court for punishment for contempt of the Court.

## SUB JUDICE

The sub judice rule regulates the publication of matters which are under consideration by the court. Matters are considered to be sub judice (Latin for 'under judgment') once legal proceedings become active (Masons, 2009). This means that the publication of material which creates a substantial risk that the course of justice in the relevant proceedings would be seriously impeded or prejudiced is criminalised. Criminal proceedings are considered active once a person is arrested, a war-

rant for arrest has been issued, a summons has been issued or a person has been charged and remain active until conviction (ibid. 2009). Civil proceedings become active when the hearing date for the trial is arranged.

Publication of material which is sub judice comprises contempt of court. However, it is acceptable to publish material as part of a discussion of public affairs or as a contemporary report of the day's legal proceedings. Both statutory and common law contempt of court is concerned with the possibility that the court, witness or judge may be influenced by material which is published about active legal proceedings. If you are found guilty of other forms of contempt and or sub judice, you face jail for a term of up to a maximum of three years. If one commits contempt on the face of the court, the court may order for their detention in custody anytime before its rising that day, take cognisance of the offence and sentence the offender to a fine of Ksh 1,400 or in default of payment to imprisonment for a term not exceeding one month.

Contempt of court - civil or criminal contempt - , is a crime sui generis (of its own gender/genus or unique characteristics) which is prosecuted by summary process. The standard of proof is that applicable to criminal cases so that breach must be proved beyond all reasonable doubt.

## PORNOGRAPHY

Section 181 creates the offence of trafficking in obscene publications. Some of these offences include:

- (a) making, producing or possessing any one or more obscene writings, drawings,

prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals - for the purpose of or by way of trade or for the purpose of distribution or public exhibition

- (b) importing, conveying, exporting or circulating obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals.
- (c) Trading, distributing or exhibiting obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects
- (d) Advertising with a view to assisting the circulation of or traffic in obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects
- (e) Publicly exhibiting any indecent show or performance or any show or performance tending to corrupt morals.

Persons found guilty of offences under this section face up to two years in jail or seven thousand Kenya shillings in fine. A court, on convicting any person of an offence against this section, may order to be destroyed any matter or thing made, possessed or used for the purpose of that offence. A court may, on the application of the Attorney-General, the Solicitor-General, a State Counsel or a Superintendent of Police, order the destruc-

tion of any obscene matter or thing to which this section relates, whether any person may or may not have been convicted under this section in respect of the obscene matter or thing.

Section 96 of the Penal Act is on incitement to violence and disobedience of the law. It outlaws Uttering, Printing or Publishing material that incites others to violence or to disobey execution or enforcement of any written law. Anyone found guilty of the offence, is liable to imprisonment for a term not exceeding three years.

## OFFICIAL SECRETS ACT

This is Chapter 187 of the laws of Kenya and has been in effect since 1968. It deals with the preservation of State secrets and State security. It declares as unlawful the spread of information that might be deemed prejudicial to state security. Section 3(2) of the Act provides that "Any person who takes a photograph of a prohibited place or who takes a photograph in a prohibited place, without having first obtained the authority of the officer in charge of the prohibited place, shall be guilty of an offence." This is evident in places like military barracks and State House where it is clearly indicated in two languages that it is illegal to take photographs of these buildings. The Act provides that those found guilty risk jail up to a maximum of 14 years. This, to some extent is a limit on freedom of expression because photojournalists employ photography to make expressions.

The Act also says that, anybody who obtains, collects, records, publishes or communicates in whatever manner to any other person any

code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, shall be guilty of an offence. The Act therefore bars anybody from communicating to foreign powers information considered as state secrets. Those found guilty risk imprisonment of up to a maximum of 5 years. It also bars the release to the public of official government information that is still being investigated. For example, Kenya Anti-Corruption Commission was in March 2010 on the spot following the leakage of an incomplete report to the media about the purchase of a cemetery plot, linking the scandal to a high ranking government official. This, as Prof. Anyang Nyong'o put it, was against the Official Secrets Act. Other highlights of the Act include: protection of certain installations from trespass; and restricted improper use of uniforms of the disciplined forces and identity tools of government authorities. Those found guilty are liable to imprisonment of up to a maximum of five years.

The Act also allows the government to wire-tap on communication systems in certain circumstances. This is a prickly issue whether the government should, in the first place, be

allowed to monitor not only the communication, but also possibly the movement of its citizens. Wire tapping essentially means that the government is intruding into the privacy of citizens to listen on their conversations.

The rationale behind it may be very noble, as is usually the case at face value. But the big question usually is the extent to which the government may go once the permission is granted. But it also raises a lot of ethical questions. For instance who is it who will have the permission to wire tap? Who will listen to the tapped information? Where will the tapped information be stored? How many people will have access to it? What will they do with the information that they will have received? How long will the information be stored? And the questions could keep coming. When citizens know that they are being tapped will they still speak freely? Yet, if for whatever reasons a citizen feels compelled to monitor her/his communication then indeed their freedom of expression and communication will have been interfered with.

The Act has been criticised for restricting public access to public information. Whether it is the law that restricts public access to

**Section 38 of the Act outlaws contravention of any section of the Act including parts of it where no penalty is expressly provided. This includes flouting "don'ts" in the second schedule of the Act- the Code of Conduct for the practice of journalism, reproduced elsewhere in this chapter.**

public information or the public officials who invoke the Act to frustrate efforts to get government information that may not in any way threaten national interests and public safety, has been the subject of an inconclusive debate for years. The Constitution of Kenya 2010, in particular the provision on access to information (Article 35), is widely seen as an attempt to “repeal” this Act or suppress most of its excesses.

The Freedom of Information Bill, pending debate, is also seen as the last nail on the coffin, if it becomes law. However, what remains abundantly clear from the Constitution and the yet-to-be-enacted law on Freedom of Information, is that certain government information shall never be accessible to the general populace including the Press.

That certain pieces of information may not be accessible to the public is of particular interest to a journalist. To put it in a different way: is it necessary for the public and indeed for the journalist, to access any and all information that they may need? The obvious answer is in the negative. There are some pieces of information that certainly, for the security of the state, need to be kept away from the public.

Take for example military installations – do journalists need to access military installations? Obviously the answer is in the negative since the publication of such information could endanger the state. But care needs to be taken to clearly delineate the state secrets that need not be exposed to reporters. The challenge we have is that too often “state secret” is a blanket tag the government uses to put a lid on anything that it does not want anybody else to know or that would simply be embarrassing.

## **PRESERVATION OF PUBLIC SECURITY ACT**

This is chapter 57 of the laws of Kenya. It is a 1960 Act. It is concerned with the preservation of public security. The Act gives powers to the State to, among other things, censor publication of information and even prohibit the communication of any information and any means used to communicate such information in the event that the spread of such information is likely to hamper public security. This Act has been used here in Kenya by the government to limit freedom of expression. For example, during post election mayhem in 2007/2008, the media were banned from making live broadcasts in the name of “empowering the editors to control what went to press.” The decision was informed by government perception of some sections of the media to fuel the violence by making such live transmissions, especially vernacular radio stations.

In early 2006, the government used mercenaries to raid the Standard Media Group offices in Nairobi where they confiscated computers and other broadcast equipment after burning the following day’s newspapers. This was later justified by the then Internal Security Minister John Michuki who said The Standard Daily was about to publish information touching on the first family. He crowned it all by saying that “if you rattle a snake, you must be ready to be bitten by it.” To this day, it remains unclear what law informed the raid considering that Section 88 (now repealed) of the Kenya Communication Act, 1998 (now Kenya Information and Communications Act) also empowered the minister to raid the media if in his view national security was under threat.



## **PUBLIC ORDER ACT**

This Act of Parliament commenced on June 13, 1950 and is Chapter 56 of the laws of Kenya. It does provides for the maintenance of public order. Among other provisions, the Act permits the Commissioner of Police or a Provincial Commissioner to impose a curfew in a given part of the country to restrict movement of people for a given period of time so as to maintain public order. For instance, an order of curfew could be made in a situation of militia attacks like what was witnessed in 2008 in Mt. Elgon when the security forces were conducting operations to flush out the infamous Sabaot Land Defense Forces (SLDF). Those who defy the orders risk a fine of up to one thousand Kenya shillings, a jail term of up to a maximum of three months or both.

The Act also gives the Commissioner of Police authority to prohibit the holding or continuance of any race-meeting, sporting event or other entertainment of any description if he/she considers that serious public disorder is likely to arise at or on the occasion. This also includes the banning of demonstrations, political meetings and gatherings. Those who flout such order risk a fine of up to five thousand shillings, six months imprisonment or both. Therefore, it would appear the Act violates the right to freedom of expression since such gatherings, meetings and events are normally conducted for purposes of expression of affection or dissatisfaction to a cause.

## **MEDIA ACT NO. 3 OF 2007**

It establishes the Media Council of Kenya. The Act deals with the conduct and discipline of journalists and the media. It also caters for

self regulation of the media; for the conduct and discipline of journalists and the media; and for connected purposes. The Act spells out functions of the Media Council of Kenya. They include the following : mediate/arbitrate in disputes between the government; promote and protect freedom and independence of the media; promote high professional standards among journalists and in the media; enhance professional collaboration among media practitioners; promote ethical standards among journalists and in the media; ensure the protection of the rights and privileges of journalists in the performance of their duties; advise the government on matters pertaining to professionalism, education and training of journalists and other media practitioners; make recommendations on the employment criteria for journalists- degree holders; compile and maintain a register of journalists, media enterprises; annual review of performance and the general public opinion of the media.

Among the aforementioned roles bestowed upon the Media Council, two deserve different treatment here.

First is the Media Council of Kenya's function of upholding and maintaining the ethics and "discipline "of journalists as set out in the Act and any other relevant law. To actualise this function, Section 23 of the Act provides for the establishment of a Complaints Commission which consists of five persons appointed by the Council. The five are not to be members of the council. These are the chairperson, to be chosen from among judicial officers or advocates of the High Court of Kenya, and four other persons possessing experience and expertise in specified fields:

journalism, media policy and law, media regulation, business practice and finance, entertainment, education, advertising or related social issues. The Complaints Commission is empowered to discipline journalists and or media enterprises meaning, taking actions publicly reprimanding them or ordering them to publicly apologise to news subjects they may have offended through publication.

The Commission, under the chairpersonship of Nancy Barasa is on record in 2011 for ordering the Nation Media Group to publicly apologise to former internal security minister, Chris Murungaru for a misreport aired by Nation Television (NTV) NTV apologized on 22/03/2011. While this may be seen as a positive move by the Media Council, other stakeholders are of the view that the exercise of this disciplinary function is one way of limiting freedom of expression.

Second issue for highlighting is the Council's role of making recommendations on the employment criteria for journalists. The Act defines a journalist as any person who holds a diploma or a degree in mass communication from a recognised institution of higher learning and is recognised as such by the Council. Critics think this definition locks out persons with lesser qualification in journalism and those practicing citizen journalism (bloggers etcetra), effectively reducing the space for freedom of expression and the players. In the same vein, implementation of this function would appear a big challenge in the media industry where there are a large number of persons who hold lesser qualifications in Journalism or Mass Communication serving as interns and hopeful of securing employment some day.

Besides the functions of the Media council, the Media Act creates certain offences and prescribes penalties:

At Section 37, refusal to comply with requirements by the Complaints Commission attracts a fine of KSh 50,000 or three months imprisonment or both; if you are a repeat offender; a fine of KSh 1,000 per day during which offences continues, is prescribed. If you deliberately mislead the Complaints Commission, and obstruct and hinder its operations, you risk a fine of Ksh. 50, 000, three months imprisonment or both; And for repeat offenders, a fine of Kshs 1000 per day during which offence continues, is provided.

Section 38 of the Act outlaws contravention of any section of the Act including parts of it where no penalty is expressly provided. This includes flouting "don'ts" in the second schedule of the Act- the Code of Conduct for the practice of journalism, reproduced elsewhere in this chapter. It is instructive that unlike codes of conduct for the practice of journalism in use in most countries, which are merely house keeping rules that do not attract legal consequences in case of default, the code of conduct in Kenya has the force of law. A penalty of KSh 200,000, six months in jail or both is provided for those found guilty.

The Media Act reinforces the media's duty to provide information to the public in satisfaction of the public's right to know. At Section 35 (1): The media shall, in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases.

And at Section 35(2), the Act provides: “The media shall keep and maintain high professional and ethical standards and shall, at all times, have due regard to the Code of Conduct set out in the Second Schedule to this Act. And here below is reproduced the Code of Conduct for the practice of journalism:

## **SECOND SCHEDULE (s. 35 (2))**

### **CODE OF CONDUCT FOR THE PRACTICE OF JOURNALISM**

#### **1. ACCURACY AND FAIRNESS**

- (a) The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.
  - (b) Whenever it is recognised that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly. Corrections should present the correct information and should not restate the error except when clarity demands.
  - (c) An apology shall be published or broadcast whenever appropriate in such manner as the Council may specify.
  - (d) When stories fall short on accuracy and fairness, they should not be published. Journalists, while free to be partisan, should distinguish clearly in their reports between comment, conjecture and fact.
  - (e) In general, provocative and alarming headlines should be avoided. Headings should reflect and justify the matter printed under them. Headings containing allegations made in statements should either identify the body or the source making them or at least carry quotation marks.
- (f) Journalists should present news fairly and impartially, placing primary value on significance and relevance.
  - (g) Journalists should treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy.
  - (h) Journalists should seek to understand the diversity of their community and inform the public without bias or stereotype and present a diversity of expressions, opinions and ideas in context.
  - (i) Journalists and other media practitioners should present analytical reporting based on professional perspective, not personal bias.

#### **2. INDEPENDENCE**

Journalists should defend the independence of all journalists from those seeking influence or control over news content. They should:

- (a) gather and report news without fear or favour, and vigorously resist undue influence from any outside forces, including advertisers, sources, story subjects, powerful individuals and special interest groups.
- (b) resist those who would buy or politically influence news content or who would seek to intimidate those who gather and disseminate news.

- (c) determine news content solely through editorial judgement and not the result of outside influence.
- (d) resist any self-interest or peer pressure that might erode journalistic duty and service to the public.
- (e) recognise that sponsorship of the news should not be used in any way to determine, restrict or manipulate content.
- (f) refuse to allow the interests of ownership or management to influence news judgement and content inappropriately.

### 3. INTEGRITY

Journalists should present news with integrity and decency, avoiding real or perceived conflicts of interest, and respect the dignity and intelligence of the audience as well as the subjects of news. They should:

- (a) identify sources whenever possible. Confidential sources should be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed;
- (b) clearly label opinion and commentary;
- (c) use technological tools with skill and thoughtfulness, avoiding techniques that skew facts, distort reality, or sensationalise events;
- (d) use surreptitious news gathering techniques including hidden cameras or microphones, only if there is no other way of obtaining stories of significant public importance, and if the technique is explained to the audience.

### Journalists should never:

- (a) pay news sources who have vested interest in a story;
- (b) accept gifts, favours or compensation from those who might seek to influence coverage;
- (c) engage in activities that may compromise their integrity or independence

### 4. ACCOUNTABILITY

Journalists and all media practitioners should recognise that they are accountable for their actions to the public, the profession and themselves. They should:

- (a) actively encourage adherence to these standards by all journalists and media practitioners;
- (b) respond to public concerns, investigate complaints and correct errors promptly;
- (c) recognise that they are duty-bound to conduct themselves ethically.

### 5. OPPORTUNITY TO REPLY

A fair opportunity to reply to inaccuracies should be given to individuals or organisations when reasonably called for. If the request to correct inaccuracies in a story is in the form of a letter, the editor has the discretion to publish it in full or in its abridged and edited version, particularly when it is too long, but the remainder should be an effective reply to the allegations.

## 6. UNNAMED SOURCES

Unnamed sources should not be used unless the pursuit of the truth will best be served by not naming the source who should be known by the editor and reporter. When material is used in a report from sources other than the reporter's, these sources should be indicated in the story.

## 7. CONFIDENTIALLY

In general, journalists have a professional obligation to protect confidential sources of information.

## 8. MISREPRESENTATION

Journalists should generally identify themselves and not obtain or seek to obtain information or pictures through misrepresentation or subterfuge. Subterfuge can be justified only in the public interest and only when material cannot be obtained by an other means.

## 9. OBSCENITY, TASTE AND TONE IN REPORTING

- (a) In general, journalists should avoid publishing obscene, vulgar or offensive material unless such material contains a news value which is necessary in the public interest.
- (b) In the same vein, publication of photographs showing mutilated bodies, bloody incidents and abhorrent scenes should be avoided unless the publication or broadcast of such photographs will serve the public interest.

## 10. PAYING FOR NEWS AND ARTICLES

When money is paid for information, serious questions can be raised about the credibility of that information and the motives of the buyer and the seller. Therefore, in principle, journalists should not receive any money as an incentive to publish any information.

## 11. COVERING ETHNIC, RELIGIOUS AND SECTARIAN CONFLICT

- (a) News, views or comments on ethnic, religious or sectarian dispute should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.
- (b) Provocative and alarming headlines should be avoided.
- (c) News reports or commentaries should not be written or broadcast in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.

## 12. RECORDING INTERVIEWS AND TELEPHONE CONVERSATIONS

- (a) Except in justifiable cases, journalists should not tape or record anyone without the person's knowledge. An exception may be made only if the recording is necessary to protect the journalist in a

legal action or for some other compelling reason. In this context these standards also apply to electronic media.

- (b) Before recording a telephone conversation for broadcast, or broadcasting a telephone conversation live, a station should inform any party to the call of its intention to broadcast the conversation. This, however, does not apply to conversation whose broadcast can reasonably be presumed, for example, telephone calls to programmes where the station customarily broadcasts calls.

### 13. PRIVACY

- (a) The public's right to know should be weighed against the privacy rights of people in the news.
- (b) Journalists should stick to the issues.
- (c) Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

### 14. INTRUSION INTO GRIEF AND SHOCK

- (a) In cases involving personal grief or shock, inquiries should be made with sensitivity and discretion.

- (b) In hospitals, journalists should identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

### 15. SEX DISCRIMINATION

Women and men should be treated equally as news subjects and news sources.

### 16. FINANCIAL JOURNALISM

- (a) Journalists should not use financial information they receive in advance for their own benefit, and should not pass the information to others.
- (b) Journalists should not write or broadcast about shares, securities and other market instruments in whose performance they know they or their close families have a significant financial interest, without disclosing the interest to the editor,
- (c) Journalists should not buy or sell directly or through nominees or agents, shares or securities and other market instruments about which they intend to write in the near future.

### 17. LETTERS TO THE EDITOR

An editor who decides to open a column on a controversial subject is not obliged to publish all the letters received in regard to that subject. The editor may select and publish only some of them either in their entirety or the gist thereof. However, in exercising this right, the editor should make an honest attempt to ensure that what is published is

not one-sided but presents a fair balance between the pros and the cons of the principal issue. The editor shall have the discretion to decide at which point to end the debate in the event of a rejoinder upon rejoinder by two or more parties on a controversial subject.

## **18. PROTECTION OF CHILDREN**

Children should not be identified in cases concerning sexual offences, whether as victims, witnesses or defendants. Except in matters of public interest, for example, cases of child abuse or abandonment, journalists should not normally interview or photograph children on subjects involving their personal welfare in the absence, or without the consent, of a parent or other adult who is responsible for the children. Children should not be approached or photographed while at school and other formal institutions without the permission of school authorities.

In adhering to this principle, a journalist should always take into account specific cases of children in difficult circumstances.

## **19. VICTIMS OF SEXUAL OFFENCES**

The media should not identify victims of sexual assault or publish material likely to contribute to such identification. Such publications do not serve any legitimate journalistic or public need and may bring social opprobrium to the victims and social embarrassment to their relations, family, friends, community, religious order and to the institutions to which they belong.

## **20. USE OF PICTURES AND NAMES**

As a general rule, the media should apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned. Manipulation of pictures in a manner that distorts reality should be avoided. Pictures of grief, disaster and those that embarrass and promote sexism should be discouraged.

## **21. INNOCENT RELATIVES AND FRIENDS**

The media should generally avoid identifying relatives or friends convicted or accused of crime unless the reference to them is necessary for the full, fair and accurate reporting of the crime or legal proceedings.

## **22. ACTS OF VIOLENCE**

The media should avoid presenting acts of violence, armed robberies, banditry and terrorist activities in a manner that glorifies such anti-social conduct. Also, newspapers should not allow their columns to be used for writings which tend to encourage or glorify social evils, warlike activities, ethnic, racial or religious hostilities.

## **23. EDITORIAL RESPONSIBILITIES**

The editor shall assume the responsibility for all content, including advertisements, published in a newspaper. If responsibility is disclaimed, this shall be explicitly stated before hand.

## 24. ADVERTISEMENTS

The editor should not allow any advertisement which is contrary to any aspect of this Code of Conduct. In this regard, and to the extent applicable, the editor should be guided by the Advertiser's Code of Conduct.

## 25. HATE SPEECH

Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.

And Subject to subsection (2), the Council shall not seek to control or direct journalists in the execution of their professional duties.

### Copyright Act

Any creative work belongs to the creator, who holds copyright on the work. Owner of copyright can do anything to copy: sell it, loan it, rent it or keep it for posterity. The Copyright Act enacted in 2001 but in effect from 2003, is Chapter 130 laws of Kenya and governs copyright law in the country. Copyright laws protect the following: Literary works (novels, stories, poetic works, plays, stage directory, film sceneries, treatises, histories, biographies, essays and articles, encyclopedias and dictionaries; letters, reports, memoranda, lecturers, addresses and sermons, charts and tables, and computer programs) - does not include written law or judicial decision;

musical works; artistic works (artifacts and paintings); audio visual works, and; sound recording and broadcasts (after they have been broadcast; copyright in a TV broadcast shall include right to control the taking of still photographs therefrom).

It provides the right to control or profit from a literary, artistic or intellectual production. Section 26 of the Act gives the creator exclusive right to control the doing in Kenya of reproduction, distribution (sale, rental, lease, hire loan, communication to public and broadcasting).

In preventing material from being copied without permission of the copyright owner, copyright law both protects and restricts mass media. In other words, news people cannot just pick up other people's work and incorporate it as their own. However, there are exceptions to this general rule. These are where the mass media has based their decision on the following: 'fair use' of copyrighted material, copyrighted material is used in the 'public interest', and where originally copyrighted material is now in the public domain.

Facts and ideas cannot be copyrighted: No person or news organisation can own facts concerning a newsworthy story or the idea of covering a particular subject. But the manner of expression used to tell the story or discuss the idea the specific patterns of words and pictures, can be copyrighted and thus protected from infringement from others. It is instructive to note that copying of off-the-air television shows for non-commercial use is "time shifting" for the convenience of viewers rather than copyright infringement. A copyright in literary, musical or artistic work lasts for Life plus 50 years. In photographs



and audio-visual work, it lasts 50 years from the date of their creation.

## **Infringement**

The following acts are considered infringement of copyright and appropriate penalties have been prescribed by law: possession of infringing copy and selling or letting for hire infringing copy. One who commits these offenses is liable in an infringement lawsuit, the court is free to fine them KSh100,000 or sentence them to a maximum jail term of two years or both.

If you import into Kenya infringing copy for sale, make infringing copy for sale, or distribute infringing copies then you risk a fine of Ksh 400, 000 or a jail term up to a maximum of 10 years or both. If you make copies of sound recording without payment of royalty, if found guilty, you face a fine KSh 200,000 or 4 years in jail or both.

A defence against copyright infringement is fair use. The defence allows publications to use brief quotations or small excerpts from copyrighted work for the purpose of critical reviews or scholarly work. Key ideas behind the fair use is that one who copies must add substantial independent work and that such copying should be in the public interest. No formula exists for determining how much copying is permissible under the fair use doctrine. Copy editors should give careful scrutiny to stories that contain verbatim passages from copyrighted material. Several paragraphs may be acceptable in certain circumstances, whereas a single line from a poem or song may be ground for a successful infringement lawsuit. Much depends on the

amount and nature of the material that the copier adds to the original work.

Factors that courts consider when deciding whether copyrighted material has been used fairly include: the purpose and character of the use, including whether such use is of a commercial nature or is for not-for-profit educational purposes (A key idea here is that the secondary use must add to or transform the original to qualify as fair use); the nature of copyrighted work; the amount and substantiality of the proportion used in relation to the copyrighted work as a whole, and; the effect of the use on the potential market or value of the copyrighted work.

Section 26 of the Copyright Act provides instances of fair use: fair dealing for purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of source; reproduction and distribution of copies or inclusion in a film or broadcast, of an artistic work situated in a place where it can be viewed by the public; incidental inclusion of artistic work in a film or broadcast; Inclusion in a collection of literary or musical works of not more than two short passages from the work in question if the collection is designed for use in a school registered under the Education Act or University established by an Act as long as there is acknowledgement of the title and author and; broadcasting if broadcast is intended to be used for purposes of systematic instructional activities in Public libraries, non commercial document centre and scientific institutions and; reproduction in the public interest and where no profit is derived provided copyright owner receives fair compensation determined by competent authority.

## Defamation Act

This is Chapter 36 of the laws of Kenya. It is the statute that provides for protection of right to reputations even as the media and other communicators exercise right to freedom of expression, freedom and independence of the media, and the public right to know. The Act also provides legal defences media defendants may raise in defamation lawsuits. They include: Justification/truth (s.14), qualified privilege of newspapers (s.7), fair comment (s.15), and limitation of actions (s.20).

Justification/truth means that the person making the remarks reasonably believed they were true. Justification/truth is a complete defence; the fact that the allegedly defamatory communication is essentially true is usually an absolute defence. The defendant need not verify every detail of the communication, as long as its substance can be established.

Fair comment ensures that people cannot be accused of slander or libel for stating their honest opinion on a matter of Public interest. This means that the statement was a reasonable position expressed about a matter of interest to the public, such as politics. Fair comment is useful for critics and others who are asked to comment on performances. It is also useful to comedians, and cartoonists. A four-point test for fair comment and criticism has been suggested and may be used as guide: it is an opinion; it relates to an action, not an individual; the reader can see the factual basis for the comment and draw his own conclusions; it relates to a matter of public interest.

Privilege/fair report privilege protects statements made in a court of law, or statements

made to a doctor, attorney, spouse or other person whose relationship with the speaker is protected by special laws. Judicial, legislative and government (executive communications within the scope of official duties (gossip does not count) proceedings enjoy absolute privilege; absolute privilege confers immunity on defendants who are directly involved in the furtherance of the public's business- members of parliament, lawyers litigating in court and parties to a law suit, and government officials. Newspaper reports of those proceedings or utterances enjoy qualified privilege. In other words, their privilege is subject to fair, balanced and accurate reports.

Limitation of Actions: The Act has put a ceiling on the filing of lawsuits. A suit should be filed within 12 months from the date the alleged defamatory material was published. The media defendants can claim the suit is time barred if it is brought outside the statutory period. At section 16A, the Act also sets the minimum amounts of compensation that courts of law may award against defendants who are found liable. A minimum of Ksh400,000 as been prescribed for defamation based on allegations of less serious offences and KSh100,000,000 for defamation hinged on allegations of offences that attract a death penalty. However, the Act has not set the maximum awards in damages, leaving courts of law with wide discretion.

The Act also spells out the media's obligation to a person mentioned adversely in a publication. Section 7A provides that such person has a right of reply to allegations made against them. The Act also looks at Defamation as spread of information likely to injure one's reputation. Defamation is classified into

two categories: slander and libel. Libel refers to publishing or broadcasting words that injure one's reputation or name. On the other hand, slander refers to defamatory words, not necessarily published.

This Act limits freedom of expression, especially among the press where many journalists and their media organisations have been dragged to court for writing, publishing or broadcasting material that injure the reputation of others.

## **Privacy Laws**

Privacy is the right to be left alone, the right to be free from unwarranted publicity.

Privacy laws do not protect reputational interests. Instead, they are meant to give legal redress for mental anguish and suffering caused by an invasion of personal privacy. Bowles and Borden (2006) have identified four Legal wrongs under the broad heading of invasion to privacy:

### **Intrusion upon physical solitude**

This refers to trespassing upon private property using hidden cameras or microphone to eavesdrop on private conversations. If the defendant observes the plaintiff in an embarrassing situation in public, no intrusion has occurred. However, where the defendant invades the plaintiff's "zone of privacy", "either physically or with mechanical or electronic device", that shows intent of intrusion. It will be legally permissible to photograph or report a public official engaged in adulterous behavior in a public place, but it would be intrusion to hide in a bedroom closet or to use hidden

cameras to gather information about the public official's behavior in a private residence. Courts in the US have held that property owners have a legal right to request that journalists leave public places such as restaurants when journalists' purpose does not coincide with the primary purpose of the public place - to dine, for example. Publication is not a prerequisite for an intrusion lawsuit. The act of trespassing constitutes the legal wrong. Consent, explicit or implied, is the only legal defense for trespass. One who allows a reporter to enter private property or who does not object to the presence of visible cameras or recorders, for example, has consented. For commercial use, rather than for news, consent should be written.

### **Publication of private information**

This involves publicising a private matter that would be highly offensive to a reasonable person and one that is not of legitimate concern to the public. For it to constitute a legal wrong, the information so published must be private, not public. Published information that is embarrassing or upsetting to a plaintiff is not sufficient to support a privacy claim; the information must be highly offensive to a reasonable person in the community. Community mores may be considered in determining whether the information was highly offensive or lacking in newsworthiness.

However, if the information that is embarrassing and highly offensive becomes a matter of public record, then a privacy action will not succeed. For instance, if you publish that a person with good standing in society served a prison sentence years ago, that is usually not actionable if it based on infor-

mation available in public records. Unlike in defamation, the truth is not a defense here if the offensive information is indeed private and not newsworthy. A defendant can argue newsworthiness and claim that the published material is not highly offensive to a reasonable person.

**False light**, as a legal wrong under privacy law is akin to defamation in the sense that it involves falsity and requires showing the publisher's knowledge of falsity or reckless disregard for truth if the matter is of public concern. However, no damage to reputation is required to be demonstrated by a plaintiff. Picture captions and file photographs used to illustrate stories can be particularly troublesome because they comprise the common source of invasion to privacy. Bowles and Borden (2006) discuss a couple in the US who filed a false light privacy suit against a magazine that published a picture showing their child being hit by a car. The magazine used the picture to illustrate a story titled "They Ask to Be Killed," which concerned careless or negligent actions through which people cause themselves harm. Because the accident had involved no carelessness or negligence on the part of the child or the parents, the family won the lawsuit. The use of the picture in the newsworthy context of an accident would have been permissible if the caption had been accurate. Like in libel, Truth and Privilege are defenses in this aspect of privacy. If the two fail, the defendant can try to establish that the falsity was not published with actual malice.

Appropriation as a legal wrong refers to unauthorised use of a person's name or likeness for commercial gain. Using someone's name or

picture in an advertisement without permission is an example of appropriation (Bowles and Borden, 2006). The arguments here are that: A right to publicity is involved and that unauthorized use deprives people of the right to decide how their name or picture will be used and the right to profit from such use. Such use causes the plaintiff mental anguish. However, use of copy or pictures that ran in earlier issues of the publication, even when used to solicit subscriptions, is not considered appropriation. So long as the advertorial does not imply that the person named or pictured is endorsing the publication, such an advertisement is considered a sample of the contents. Note that permission is not needed to use a person's name or picture for news purposes, assuming that no illegal newsgathering techniques were used. Written consent should be obtained from people whose name or picture is used for advertising purposes. Consent is the defense available to a defendant to a claim hinged on appropriation.

In the Kenyan set up, the Constitution of Kenya 2010 is categorical that every person has a right to privacy. At Article 31 of the Constitutions of Kenya 2010, the right includes a right not to search the person, home or their property and; right not to seize possessions of individuals. The right also extends to the person's right not to have information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communication infringed.

The Media Act 2007, at the second schedule, too raises the red flag: intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. The Act

is unequivocal that the public interest here should itself be legitimate and not merely prurient or morbid curiosity.

The Act gets categorical: Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public. And as a parting shot to journalists, the Act asks them to stick to the issues and, reminds them too, that the public's right to know should be weighed against the privacy rights of people in the news.

### **National Cohesion and Reconciliation Act**

This Act became part of the laws of Kenya following the post-election violence of 2007-2008 and is a reaction to tame persons spreading hatred especially in the areas of race, colour and ethnic origins. It is Act number 12 of 2008. At Sections 13, 62 and 63, use of threatening, abusive or insulting words or behavior that is intended to stir ethnic hatred or has the effect of stirring ethnic hatred, is outlawed. Publication or distribution of written material laced with hate messages is an offence under this Act, so are shows, plays or recording of visual images of the same nature. Also outlawed is presentation or directed public performance of a play intended to stir ethnic hatred or one that has the potential for stirring up ethnic hatred.

'Ethnic hatred' is defined at section 13(3) of the Act as "hatred against a group of persons defined by reference to colour race, nationality (including citizenship) or ethnic or national origins." Both the person who uses threatening, abusive or insulting

words and the media enterprise (newspaper, radio, television) that publishes the utterances face the full force of the law if they are found guilty at trial by a competent court or tribunal. Section 13(2) provides that any person who commits any of the offences prescribed in the Act shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both and; for a newspaper, radio station or other media enterprise that publishes outlawed utterances of persons, commit an offence and shall be liable on conviction to a fine not exceeding one million shillings.

### **International Laws**

The legal requirement that one has to take cognisance of the existence of an individual's right to reputation even as they exercise the fundamental freedom of expression is not confined to Kenya. It resonates worldwide and is a major global concern.

### **Universal Declaration of Human Rights (1948)**

Top on the list of international instruments that provide the legal framework for these two aforementioned competing rights is The UN Universal Declaration of Human Rights (1948). At Article 12 it provides that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". And at Article 19, it states thus: "Everyone has the right to freedom of opinion and expression; this right includes freedom

to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

### **International Covenant on Civil & Political Rights (1966)**

The UN International Covenant on Political and Civil Rights (1966) too trains its eyes on these rights. At Article 17, it provides thus: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

And at Article 19, it stipulates: 1. everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. However, it makes it unequivocal that the exercises of the rights aforementioned carry with them special duties and responsibilities and may therefore be subject to certain restrictions. But these restrictions” shall only be such as are provided by law and are necessary: For respect of the rights or reputations of others and; for the protection of national security or of public order (order public), or of public health or morals”.

### **African Charter on Human People’s Rights (1986)**

The African Charter on Human and Peoples’ Rights (1986) too adds its voice. At Article nine, it provides that every individual shall have the right to receive information and the right to express and disseminate his opinions within the law. And at Article 4, it states that” Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. Further, at Article 27(2) it stipulates: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”.

The aforementioned international instruments bind the State parties that are signatory and have ratified them. Kenya is among many countries in the world that have ratified these international instruments. Individual countries outside of Kenya have also domesticated these international instruments.

# Essential Legal Tips for Journalists

Journalists are aware of news media consumers' expectation that media exist to provide them with all the information they need to understand the world and make decisions about their lives. Most of the media practitioners are alive to the fact that their work must respect the law of the land and in particular the rights of others. However, it is one thing to be aware of what is expected of a professional and another to be familiar with the nitty-gritty of what you may be aware of, hence the legal wisdom, 'ignorance of the law is not a defence'. In this chapter we discuss the essential legal knowledge journalists require to report, write and publish from a position of strength; the parameters of the freedom to express themselves, the right to reputation enjoyed by their sources and subjects of news and; how to avoid trouble from those sources and subjects of their stories.

## SOURCES OF LAW IN KENYA

Most media houses today have legal departments to which a journalist can turn when s/he needs to clarify a story in progress. However, there are times when such legal advice may not be readily available – when a reporter is filing a story in the field or the legal team is engaged elsewhere. It is thus useful for a journalist to have some basic understanding of the law and to know where to look for legal resources or information. In any case it is

important for the law to be demystified to the journalist. As a practicing journalist, one requires the primary document to cross-check what a professional may be giving them in an interview. The following are the sources of law in Kenya:

**The Constitution of Kenya, 2010:** It is the supreme law of the land, taking precedence over all other forms of law, written or unwritten. If any law is inconsistent with it, the Constitution prevails, and the other law, to the extent of its inconsistency, is void.

**Acts of Parliament-Kenya:** These are passed by Parliament and also include subsidiary legislation (laws made under the authority of an Act of Parliament). In book form, the law of Kenya comprises over 500 individual Acts of Parliament and a host of rules and regulations (subsidiary legislation).

**Specific Acts of Parliament of the UK (England, Wales, Scotland & Northern Ireland):** These Acts are cited in the second schedule of the Judicature Act chapter 8 of the Laws of Kenya. Some of these laws include Admiralty offences Act, 1849, Foreign Law Ascertainment Act and Conveyancing (Scotland) Act, 1874.

**Certain Acts of Parliament of India:** The Transfer of Property Act, 1882. It contains the procedural law applicable where three of Kenya's land registration regimes - Registra-

tion of Titles Act, the Land Titles Act and the Government Lands Act - are applied.

**English Statutes of General Application in force in England on the twelfth of August 1897:** (the date when they were received in Kenya). They are applicable in Kenya unless repealed by a Kenyan statute.

**The substance of common law and doctrines of equity:** These are applicable in Kenya in so far as the circumstances of Kenya permit.

**African customary Law:** It is applicable only in civil cases where one or more of the parties is subject to or affected by it, in so far as it is applicable and is not repugnant to justice and morality or inconsistent with any other law. African customary law differs from ethnic group to ethnic group.

**Islamic Law:** It is a limited source of law. It is applied in the Kadhi's court when all parties profess Islam, but only as to the question of Muslim law relating to personal status, marriage, divorce and inheritance issues.

**International Law:** The government of Kenya is a party to a number of international instruments that embody international law. Kenyans can use these as an additional source for the advancement of their rights. However, international laws are enforceable in Kenya after they have been incorporated into our domestic legal system by implementing legislation.

Decisions of the courts. This is judge-made law. Decisions made by higher courts are binding on the courts below them. Decisions by judges made so far are contained in East African Law Reports and Kenya Law Reports.

**Text Books:** Some scholars and legal practitioners have published law books which are a source of law in Kenya.

## FREEDOM OF EXPRESSION

Freedom of expression is often regarded as a foundation right as its existence helps guarantee other human rights and freedoms. For instance, without it social justice will not be obtainable and good governance seriously hindered. Within international conceptions of human rights, the term freedom of expression refers to verbal speech and much more - any act of seeking, receiving and imparting information or ideas, regardless of the medium used (Glossary: Freedom of Expression Project, 2010).

The Universal Declaration of Human rights, the founding document of the modern human rights movement states thus:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Universal Declaration of Human Rights, Paris 1948, art. 19).*

The term freedom of expression embraces cultural expression both the arts and political speech. It envisages the exchange of opinion, ideas, and information both in private discourse and more importantly in the public sphere. Freedom of expression therefore encompasses freedom of speech, freedom of the press and freedom of thought. And the words of Conor Gearty (Makali, 2003, p.13) captures this meaning aptly: "To think is to



speak. If freedom of thought is the cornerstone of liberal democratic government, then the individual's entitlement to express those thoughts is a vital emanation of that right".

Freedom of the press refers to the liberty to print or to otherwise disseminate information, as in print, by broadcasting, or through electronic media, without prior restraints such as licensing requirements or content review and without subsequent punishment for what is said (The Columbia Encyclopedia, Sixth Edition, 2008). Freedom of the press, which has been limited not only by governments but at times by churches and media owners, is absolute in no country. In modern democracies, it is rarely attacked by overt forms of censorship but is often compromised by governments' ability to withhold information, by self-censorship in reaction to various pressures, by selective government leaking of information or disinformation and by other factors.

Perhaps media's key function in society is to disseminate information on matters that are important or interesting to a large number of people. Both government and private media have a responsibility to provide opportunity for expression (Makali, 2003). Some scholars have suggested that when the media carries out this role with minimal restrictions, it preserves democracy in society.

Morant Blake (2004) says that "a true democracy conjures images of a society in which each member enjoys an equal right to "life, liberty (includes expressive freedom which he says is a cornerstone of democracy), and the pursuit of happiness". He opines that "freedom of speech and press theoretically lead to an informed and educated citizenry that

seeks to maximise individual goals and desires". In his view, it is an ethical responsibility of press to feed the diverse populace with full and fair reports of events and activities, including government proceedings. According to Blake (2004) the "fulfillment of this equitable duty (disseminate fully important societal matters) would presuppose the inclusion of multiple viewpoints on issues of societal importance" while exercising refrain from defamation.

Glanville & Heawood, (2009) on their part posit that, "Journalists have an important role to play in society, and as long as they exercise that role responsibly, the public interest is served better by a liberal regime that allows occasional mistakes, than by a stricter regime that curtails media freedom". The right to free speech or free expression, though fundamental in modern society, is not absolute. In most jurisdictions, interests of national security, public order, and the rights and reputations of others may occasionally justify constraints on the right to freedom of expression.

## RIGHT TO REPUTATION

A person's reputation is the estimate in which others hold him, not the good opinion which he has of himself. Every person in modern society has an inviolate right to the preservation of his reputation as against the world. He is entitled to his good name and to the esteem in which he is held by others and has the right to claim that his reputation will not be disparaged by defamatory statements made about him to a third person without lawful justification or excuse (Lawtech, 2008). Over the years, constant effort has

been made to protect the individual through his reputation, in person and property. To man, his good repute is the greatest asset he possesses, greater in value than his wealth or property. An injury to reputation is thus as much, as or in many cases, more damaging and disturbing than loss of wealth or property (Lawtech, 2008, p. 5).

The primary aim of the law of defamation is accordingly twofold: to prevent a person from indulging in unnecessary or unwarranted or false criticism rising possibly out of malice or personal vendetta or merely as past time and thereby laying down standards of speech and writing and; at the same time, to encourage and maintain honest, legitimate and true criticism for the benefit of society (ibid. p.6).

The central problem which has however confronted Courts is the manner in which reconciliation between (a) protection of individual reputation in society where freedom of speech is being given increasing importance and (b) public interest is to be achieved (ibid. p.6). The balancing act has been between the right of a person to preserve his reputation and the interest, which every person has, in freedom of speech. The wrong of defamation protects reputation and defenses to the wrong (privilege and truth) protect freedom of speech.

With the invention of new, speedy and dynamic methods of dissemination like the print media, electronic broadcasting, and now the internet, the law of defamation has assumed great importance and vigor. The European Convention on Human Rights says it is the responsibility of the State to find an appropriate balance between free speech and the protection of reputation. But in the same breath

it quickly throws a caution: “reputation is a potential constraint on the fundamental right to free speech”. In Europe, restraints on free speech are to be employed if they are necessary in a democratic society and proportionate to the threat posed. And they are also subject to legal certainty- in other words the law must be clear and consistent (European Convention of Human Rights).

There are many factors that influence media content; however, “the first thing a commonwealth media lawyer might mention is defamation law” (Kenyon, 2010). It is instructive to note that in legal literature it is widely acknowledged that defamation law can “chill speech. In other words some individuals who would ordinarily comment on controversial issues are reluctant to do so for fear of being taken to court for what they would have uttered. It also means that the media too is reluctant to provide a forum for debate on controversial issues for fear of libel suit in their capacity as vehicles for ferrying what is potentially defamatory material. The long and short of this is that sentiments of individuals are removed from the market place of ideas and therefore effectively killing freedom of speech and its attendant benefits to society. The law of defamation was crafted principally to ensure that in the process of discharging their duties, journalists do not sacrifice truth at the altar of expediency and sensationalism (Makali, 2003, p.244). Defamation law seeks to regulate the publication of material harmful to reputation through balancing two public interests – the protection of reputation and of free speech (Majoribanks & Kenyon, 2004).

## PROTECTING SOURCES

Source confidentiality is an important tool in contemporary newsgathering and reporting but one that has also drawn mixed signals from both the practitioners and the law courts. Often the guarantee of anonymity is necessary to get information but it is debatable whether this is fair to those commented on by these nameless, faceless news makers who the media refer variously: unnamed sources, sources who wish to remain anonymous, inside sources, impeccable sources, reliable sources etc. Without confidentiality, employees could not report the misdeeds of their employers for fear of being fired; people would not tell what they know of a crime for fear of retribution from the offenders or unwanted police attention.

However, the question that remains unanswered to date in Kenya is why courts of law continue to demand that journalists disclose sources to published stories that later turn out to be contentious. There are many instances where reporters have been summoned to do that. For example, on July 28, 2006, a Nairobi resident magistrate, Felix Kombo summoned The Standard newspaper court reporter, Evelyn Kwamboka to reveal the source of her story on the “Deya Miracle babies.” And in July 2009, The Star Newspaper was pressurised by the Kenya Police to reveal its sources over a published story headlined “Police lose vital files on Al-Qaeda”. It was alleged the Kenya Police were using contempt of court charge to force the Star to reveal the sources of a story which reported that two files on a top Kenyan Al-Qaeda operative had been ‘lost’. Journalists Andrew Teyie and Maina Kamore were later summoned to a Mombasa court for trial

on a contempt of court charge. The Star had publicly stated that the sources for the story were impeccable. If their identities were exposed, it would not just be a blow for press freedom; it would be a victory for Al-Qaeda.

Even as journalists strive to remain true to their practice of keeping secret names of people who provide them with information, the stark reality is that unlike most states in the United States of America, most democracies, Kenya included, do not have a shield law that expressly protects reporters’ rights to maintain sources’ confidentiality in courts of law or court precedent upholding that right. The closest reference to legal protection of confidentiality in Kenya is to be found in the second schedule to the Media Act 2007. At clause 7, it states: in general, journalists have a professional obligation to protect confidential sources of information. Ironically, even the Constitution of Kenya 2010 has not cushioned journalists. In its bid to provide right to all to access information, something that has been kept under wraps for a long time, the Constitution allows the citizenry to demand of journalists, whistle blowers and other fellow citizens the identity of confidential sources to defend themselves in court or to clear untrue or misleading information.

Article 35 provides that every citizen has a right of access to information held by the State; information held by another person (journalists and whistleblowers included - emphasis in brackets is the author’s) and required for the exercise or protection of any right or fundamental freedom. In light of this how far then should reporters go in protecting a source’s confidentiality? Should reporters go to jail rather than divulge a

name? According to Peter Mwaura a Daily Nation columnist: "The public's right to receive information will be obstructed if journalists are forced to reveal their sources. The protection of journalists not to disclose sources is central to press freedom. Unless journalists can honour confidences, sources of sensitive or confidential information easily dry up. The loser is the public (all.Africa.com, 2009)."

## CRIMES AND CIVIL WRONGS

Journalists need to know the distinction between crimes and civil wrongs not only for purposes of reporting accurately but also because at one time or another, their acts or omission may expose them to criminal or civil liability. For instance, criminal libel and civil libel always rear their ugly heads waiting for journalists who either deliberately scheme to tarnish people's reputation or inadvertently do so. Libel is a false statement that exposes people to hatred, ridicule or contempt, lowers them in the esteem of their colleagues, causes them to be shunned or injures them in the business or profession (Bowles & Borden 2006, p 175). According to Columbia Encyclopedia (Sixth Edition), permanent forms of defamation such as the written or pictorial are called libel, while the spoken or gestured forms are called slander. The personal injury concept of defamation involves harm to a person's reputation. Libel and slander are two forms of defamation. Libel typically refers to defamation that is written or published, while slander is usually limited to oral defamation. The term defamation of character is often used to describe accusations of slander, libel or both. Slander involves verbal derogatory statements, while libel involves written

ones. In a court of law, the plaintiff pursuing the lawsuit would charge defamation of character to cover any form of false or damaging allegations.

The true distinction between a crime and a civil wrong does not reside in the nature of the wrongful act itself but in the legal consequences that follow it (Smith, 2006). Wrongful acts or omissions capable of being followed by criminal proceedings are regarded as crimes or considered offenses. If it is capable of being followed by civil proceedings then it is a civil wrong. If it is capable of being followed by both, it is both a crime and a civil wrong.

An illustration of this dual personality may be in order. If one was to entrust say, their laptop to a person working in the luggage section of a supermarket, and that person then runs off with it, he or she commits a crime of theft and also two civil wrongs- the tort of interference with goods and a breach of contract with the owner of the laptop to keep the laptop safe. The result is that two sorts of legal proceedings can be taken: a prosecution for a crime, and a civil action for the tort and for the breach of contract (Smith, 2006).

## TECHNIQUES FOR AVOIDING LAWSUITS

Journalists who know they are free to report, write and publish what they need to publish as long as it is done within all corners of the law, are a greater asset to their media houses, to democracy and society's well being than those who are in the converse. The following time-tested steps most of which have been stated by Bowles and Borden (2006, p. 189)

are useful to either category if they are to report, write and publish with a 'clear conscience':

1. Publish the story because it has no legal problems.
2. Kill the story because it is libelous, invades privacy or infringes on copyright.
3. Skillfully edit the story to remove offending passages. Be cautious when editing to ensure that the story does not convey information that is indefensible because of a hasty rewrite.
4. Expect a law suit, but publish the story because "we will win if we are sued." The decision to publish a dangerous-but-defensible story must be made by rightly and must not be made one person-the chain of command by sometimes lawyers at the publication will have to be part of the decision-making process.
5. Confront subject with defamatory material and provide them with an opportunity to comment
6. Do not fool around with vicious lies; do not be a conveyor belt; check factual allegations contained in information from sources; check sources thoroughly, get independent corroboration wherever possible; just because someone else said it does not mean that a news organization cannot be sued for republishing it. This includes letters to the editor.
7. If you are covering beats that enjoy privilege- courthouse, parliament and government operations (including police operations) - be careful to restate accurately any information obtained; ensure balance and fairness.
8. Do not use "loaded" words: be sensitive about using words that connote dishonest behavior, immorality or other undesirable traits, whether in your published story or the marginal comments in your notes.

Number 8 above deserves special treatment as hereunder: In the words of Bruce Sanford, general counsel to the Society of Professional Journalists, the largest and oldest organization of journalists in the United States, "the chief cause of libel suits is plain old unromantic carelessness." That assertion can hardly be argued with. Four potential paths to libel are certain explosive words, certain categories of words, defamation by implication and quotations (Itule & Anderson, 2007). Reporters and editors therefore, when handling sensitive stories, should be alive to potentially libelous statements. Itule & Anderson (2007) specifically urges journalists to be alert to the following four categories:

Words imputing the commission of a criminal offence; Avoid statements such as this: Tom Cholmondley has been arrested for murdering ranger Samson ole Sisina on Wednesday night. Cholmondley is not guilty of murder until a competent court of law says that he is. It would be better to write: Tom Cholmondley has been arrested in connection with (or in the investigation of) the Wednesday night slaying of ranger Samson ole Sisina.

Words imputing infection with a loathsome communicable disease of any kind that would tend to exclude one from society. Do not write: Otieno ole Kenta, who successfully moved a bill for the legalisation of *cannabis sativa* (bhang), was treated last month for a venereal disease, the Media Lawyer has learned.

Words imputing inability to perform, or want of integrity in the discharge of duties of office or employment. For example do not write: Justice Karisa Kamau is unfit by temperament and intelligence to adequately perform his duties. sources who spoke on condition of anonymity said yesterday.

Words that prejudice a particular person in his or her profession or trade. Do not write: Lawyer Mbeko Ondieki, who will represent the widow in the embezzlement case, is the most incompetent counsel in town, according to court observers.

Sanford, in his book, 'Libel and Privacy' refers the words in the four categories aforementioned as 'red flag'. Itule & Anderson (2007) ask reporters and editors to handle these words carefully. Journalists can steer clear of many libel suits by scrutinizing the meaning of words and the sentences they write. A warning bell should sound any time a reporter writes a story that contains any of the red flag words. On red flag words these authors warn: "potentially they are legally explosive and could lead to libel litigation because harm to reputation is apparent" (ibid.)

Here is a list of some of Sanford's red flag words: Addict, adulteration of products, adultery, AIDS, alcoholic, altered records, atheist, bad moral character, bankrupt, bigamist, blackmail, blacklisted, bribery, brothel, buys votes, cheats, child abuse, collusion, con artist, corruption, crook, defaulter, divorced, drug abuser, drunkard, embezzle, ex-convict, fraud, gambling den, gangster, gay, graft, hit man, hypocrite, illegitimate, illicit relations, incompetent, infidelity, informer, insider trading, intemperate, intimate, kept woman, perjurer, plagiarist, pockets public funds,

prostitute, rapist, smuggler, stuffed the ballot box, swindle, thief, unprofessional, unmarried mother, unworthy of credit, unsound mind, unethical, villain.

Too often journalists would be in a position to pick these danger words out easily. But the challenge lies in the speed of activity in the newsroom that could easily affect a journalist's attention. But a journalist does well to take time to understand the danger zones and then raise their guard so that they are not caught in the web. It is a costly experience to be caught.

# Effective Court Reporting:

Society the world over is interested in what is going on in the courts of law. This is because justice is at the core of a peaceful society. If there are persons who have committed wrongs (civil or criminal) against others, anxiety is high to see that justice is not only done but also seen to have been done. And here, the media becomes the eyes of the people in the courts. The judiciary too would want its activities made public so that they are not unduly accused of always having something to hide. The media therefore strives to bring out the information that society needs while safe guarding the individual's right to a fair trial.

## COURT REPORTING

Reporting the courthouse is the most demanding assignment a reporter can receive. The biggest challenge in court reporting is getting a grasp of the court system. It is also difficult to develop an understanding of legal procedures and jargon. The journalist too must strive diligently not to exaggerate or to underplay the importance of any happening. For effective court reporting, Itule and Anderson (2007) recommend the following checklist:

One must learn the judicial system i.e. master the intricacies of the court system.

Learn the record-keeping system i.e. how to ferret information depends on knowledge of the systems that inform the two court registries- criminal and civil.

Double check the facts - names, ages, addresses, designations and specific changes should always be verified. The stakes are high.

Use complete names and addresses or occupations. To avoid confusion – and to head off potential lawsuits the reporter should list full names with middle initials, ages, addresses and occupations of persons charged with crimes.

Provide sufficient background for the reader. This should include explanations on how the case started, the progress made so far and the various stages that the case has gone through.

Develop a reliable network of sources – strive to be on first-names basis with judges, lawyers, secretaries, bailiffs, court public information officers, clerks and record - keeping personnel.

## COURT SYSTEMS

There are two broad categories of legal wrongs that dictate the processes that inform the court system. These are criminal and civil, hence reference to criminal and civil court systems.

The criminal process is initiated by a complaint a citizen makes to the police who, after an arrest of the suspect, subsequently prepares a charge sheet if they are satisfied that a crime has been committed. Once a complaint is registered, the State takes over the prosecution of the case on behalf of the complainant/citizen whose role is thereafter reduced to that of a prosecution witness. The suspect is then hurled to a court of law, presided over by a magistrate or judge, to answer the charge or charges. The suspect, while at the dock for the first time to answer the charge(s), has the following options: to plead guilty, to plead not guilty, to keep quiet, or to raise issue with the nature of the charge. The options of keeping quiet or raising issues with the charge(s) are rarely exercised by suspects. Be that as it may, the trial magistrate or judge will record a plea of not guilty in either case to give the suspect a chance to tell their side of the story.

If a suspect pleads guilty, the duration of the criminal trial process is reduced significantly. The magistrate or judge will immediately proceed to record the plea of guilty, convict him/her on own plea and proceed to sentence the accused to fine, imprisonment or both. If a suspect pleads not guilty, the trial court will set a date for hearing of the criminal case on the merits. In the meantime, the court will direct that the accused be either remanded in prison custody or released on reasonable bail terms. Article 49(h) of the Constitution of Kenya 2010 is categorical: "An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. "

The accused person shall be subjected to trial where the prosecution shall go first and the participation of the accused in that stage of the proceedings is limited to asking questions with a view to poking holes in the prosecution case. After hearing the prosecution's case, the trial court is to determine whether, on the basis of one-sided evidence, the matter should proceed to full trial on the merits. If the finding of the court is that the prosecution has demonstrated a case worthy of a full trial, it shall declare that the accused has a case to answer and proceed to put the accused on his/her defense. This is the first time the accused has a chance to say his/her side of the story and is at liberty to call witnesses to buttress his/her claims.

After the defence hearing, both the prosecution and the defence shall be called upon to put in their submissions. The court will make a ruling on whether the accused is guilty. If there is no finding of guilt, the accused shall be freed but if there is a finding of guilt; the court shall enter a conviction against the accused. This is followed by a chance accorded to the accused to say anything to mitigate the ultimate sentence before it is finally passed in a judgement of the court. Sentence in criminal cases can take the shape of a fine, a jail term or both. The individual decision on which of the punishments to mete out is informed by the penalty prescribed by law for the offence, the gravity of the offence and the discretion of the presiding judge.

In the civil court system, litigation is commenced by way of a claim filed at the civil registry. An individual may file the claim in person or through counsel.

There are many ways of approaching the court



in civil matters among them by filing a plaint, petition, or reference. At the first instance, a party that approaches the court first may obtain orders *ex parte* (in the absence of the other party) to be served upon other parties pertinent to the claim. In other instances, the court may require the claimant to serve the claim on other relevant parties before any hearing takes place or any orders are issued. Depending on the nature of the claim, after the court hears a civil claim, it may issue many types of orders among them, monetary compensation (damages), specific performance and barring orders. It is instructive to note that unlike the fine, imposed in criminal cases that go to public coffers, damages are for the benefit of the claimant.

In the civil court system, the defendant may be asked to compensate the claimant the costs they incurred in instituting and prosecuting the claim. In the same vein the claimant, if unsuccessful in the claim, may be ordered to compensate the defendant the costs they may have incurred in successfully defending the claim against them. In the civil court system, there is provision for civil jail for defendants who are unable to meet their financial obligations pursuant to a court order. Unlike jail for criminals, it is the successful claimant in a civil case that pays for the food and other necessities to be consumed by civil jail defendants. Criminals in jail as a result of criminal trial are guests of the State and therefore sustained by public coffers while in prison custody.

## COURT HIERARCHY

Kenya boasts of the superior courts and subordinate courts. The Supreme Court of Kenya,

the highest court in the land (Article 162 of the Constitution of Kenya 2010). It comprises the Chief Justice, Deputy Chief Justice and at least five other judges. One of the main functions of this court is to hear and determine disputes relating to election of a president. It shall also hear appeals from the court of appeal regarding the interpretation of the constitution or in any other matter of general public importance.

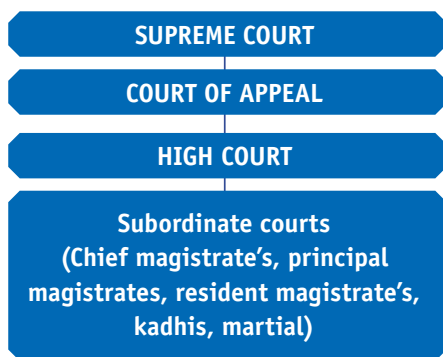
Other superior courts of record are the High Court and the Court of Appeal. The High Court has unlimited original jurisdiction to hear and determine all civil and criminal cases. By original it means that any kind of dispute may be taken to the high court for its resolution in the first instance. Unlike the High Court, the Court of Appeal on its part largely hears appeals from the High Court. In other words, the court of appeal does not usually hear matters that come up in court for the first time. It deals with appeals from persons who are dissatisfied with the High Court's decisions.

The Court of Appeal comprises judges technically referred to as appellate judges whereas the High Court consists of judges technically referred to as puisne judges. Both the Court of Appeal and the High Court have a principal judge who effectively is the able assistant of the Chief Justice. Judges in the superior courts are addressed variously factoring in sexual orientation: "My Lord, your lordship" for male judges and, "my lady, your ladyship", for female judges.

Under the Constitution of Kenya 2010, retirement age for judges is 70 years of age down from 74 years of age but a judge may opt to retire of his/her own after attaining the age of 65 years.

The subordinate courts/lower courts are magistrate's courts of different classes- from the district magistrate to the chief magistrate levels, the Court Martial for armed forces and the Kadhi Courts for Islamic personal disputes. The judicial officers who preside over magistrate's courts are referred to as magistrates (chief magistrate, senior principal magistrate, principal magistrate, senior resident magistrate, resident magistrate and district magistrate) and addressed as "your honour". And for the Kadhi Courts, they are presided over by a Kadhi and or Chief Kadhi. The Court Martial handles disciplinary cases of the officers of the Armed Forces/ military and is presided over by senior military officers assisted by a judge/advocate who is a judicial officer of the rank of a magistrate. Generally appeals from the magistrate's courts and other subordinate courts and tribunals will be taken to the High Court.

## FIG. 1. THE COURT HIERARCHY IN KENYA



## COURT LANGUAGE

For a reporter detailed to cover the courthouse for the first time, the language used by officers of the court might be confusing and

sometimes outrightly disturbing. Here below are some common terms you are expected to be familiar with in order to report court proceedings effectively. These words have specific meanings and you had better find alot about me by looking them up in a legal dictionary. Here below are some of the words commonly used in court proceedings:

**Case/Suit:** Action or other criminal/civil proceeding against a person

**Petition:** This is a process by which a person draws the attention of the court to an issue for determination other than through a claim. Proceedings for bankruptcy, insolvency or an application for the relief from unfair prejudice are commenced by way of petition

**Application:** The process by which a person in civil proceedings applies for a court order. An application may be made where court proceedings have already been commenced or the proceedings may be commenced by means of the application.

**Reference:** An application seeking declarations on contested or violated rights e.g. Constitutional reference.

**Chamber summons:** The process by which civil matters to be heard in rooms attached to the courts in which sit the judges, are commenced.

**Lawyer:** A person who has successfully completed degree studies in law but not qualified to plead the cause of another in a court of law or tribunal.

**Advocate:** A law degree holder who has passed bar exams and been admitted to practice law in the High court. He/She is author-

ized to plead the cause of another in a court or tribunal.

**Prosecutor:** A person who commences criminal proceedings on behalf of the Republic. It may be the Attorney General or the Director of Public prosecutions

**The Prosecution:** The person(s) who commence criminal proceeding on behalf of the Republic

**The Defence:** The Accused who answer in court to the criminal allegations leveled against them by State

**Defence counsel:** An attorney/advocate who represents an accused person in a criminal case

**Defence hearing:** The accused person's day in court when they respond to the State's accusations against them

**Case to answer:** A preliminary finding by a criminal trial court that the accused person is culpable. The finding is based on the trial court's appreciation of the case against the accused as presented by the prosecution. The court then proceeds to give the accused a chance to defend themselves against the allegations

**State Counsel:** This is an advocate of the High Court employed by the State to prosecute persons charged with various offences or defend the state in civil claims against it.

**Senior Counsel:** This is a state commendation the head of state confers on advocates of the High Court who have rendered exemplary services to the country

**State Law office:** This refers to the office of

the attorney general, the principal legal adviser of government

**Puisne Judge:** This refers to a judge of the High Court

**Magistrate:** This refers to a judicial officer who presides over criminal and civil matters in the subordinate courts

**Bar:** Advocates of the High Court in private legal practice.

**Bench:** Advocates of the High Court employed as judicial officers to preside over court sessions. Judges and magistrates are members of the bench

**Mention date:** The day in open court when the magistrate or judge satisfies himself or herself as to the presence of an accused person in court after taking of plea and before trial begins.

**Hearing date:** The date the trial of an accused person is conducted

**Adjournment:** The court decision to put off a matter to resume at a specified future date

**Stood Over Generally (SOG):** The court's action of postponing a court matter indefinitely

**Accused:** A person against whom charges have been framed and have responded to them

**Acquitted:** An accused person who has been set free by a court of law after trial

**Discharged:** An accused who has been set free by a court of law due to technical hitches in the prosecution's case but who may be re-arrested to face a full trial for the same offence.

**Convict:** An accused person who a court of law has found guilty of an offence after a trial.

**Conviction:** The finding of a person guilty of an offence after trial

**Suspect:** A person suspected by police of involvement in a criminal activity. The person may be arrested for questioning and later discharged or later arraigned.

**Case dismissed:** A court of law may throw out a case on account of technical flaws and may re-admit it if the flaws are curable or have been addressed.

**Case struck out:** In civil proceedings the court may order the whole or part of a statement of case to be struck out - where it appears to the court that the case discloses no reasonable grounds for bringing or defending the claim. It may do so on its own motion or when asked to do by parties to the suit.

**Application dismissed:** This refers to a preliminary plea in a case/ suit which has been thrown out by a court of law

**Abuse of process:** Going contrary to the procedural provisions that govern the pursuit for justice or the processes of seeking justice in the courts of law.

**Sentence:** The judgement of a court, particularly in a criminal cause

**Sentences to run concurrently:** When the convict is convicted of several offences at the same trial, the court may order that the sentences be served together or at the same time.

**Sentences to run consecutively:** This refers to where in a court of law intends that the convict serves several sentences in the same trial, one upon the other.

**Affidavit:** A written sworn statement of evidence

**Deponent:** The person making the sworn statement of evidence

**Alias:** Otherwise called or a false name. This refers to other names the accused person may be identified with. Simply, "also known as". Also used in instances where the accused is well known by more than the names he may have given at the police record office.

**Surety:** A person of good standing who guarantees the appearance in court of an accused person when they are required.

**Security for costs:** This refers to the conditional valuable(s) one surrenders to court in civil proceedings or promises to provide in the event they lose the suit they have filed against a party.

**Damages:** Monetary compensation for physical, psychological, time injuries suffered by a party in civil proceedings.

**Fine:** A monetary penalty a court orders an accused to pay to the State.

**Alibi:** It means elsewhere. It refers to a defence where an accused alleges that at the time when the offence with which he/she is charged was committed he was elsewhere.

**Amicus curiae:** It means a friend of the court; one who calls the attention of the court to

some point of law or fact which would appear to have been overlooked; usually a member of the Bar

**Amendment:** The correction of some error or omission, or the curing of some defect in judicial proceedings, or recommended changes to court documents or the law

**Pleadings:** Documents filed in court by the parties to a suit/ case

**Plea:** Reply/response to a claim or allegation

**Annul:** Vitiates or declares as null and void

**Make amends:** Propose to lessen the pangs of injury

**Enter appearance:** First formal indication to the court that the defendant or their counsel intends to contest the claim

**Arraign:** First time reading out of the criminal charges to the accused when a court is in session

**Bail/Bond:** The release from the custody of law enforcers or the court of an accused or convicted person, who undertakes to subsequently surrender to custody.

**Award:** The finding or decision of an arbitrator or compensation awarded in respect of legal liability

**Damages:** Compensation or indemnity for a loss suffered by a person following a tort or a breach of contract or breach of some statutory duty

**Ruling:** A decision of a court on an application with a suit/case

**Judgement:** A decision of the court that finally determines a case/ suit.

**Consent judgement:** A decision of a court derived from an agreement of the parties on how the matter between them is to be determined.

**In camera proceedings:** Proceedings away from public scrutiny.

**Charge:** The State's claim against a suspect in a criminal

**Charge sheet:** The document that details the State's claim against a suspect facing trial in a subordinate court

**Information:** The document that details the state's claim against a suspect facing trial in the High Court

**Prejudicial:** Harming or likely to harm a party to a dispute

**Applicant:** The person who commences an application in court

**Defendant:** The person who opposes a claim in court

**Appeal:** A request by an aggrieved to a higher court for a second opinion on a matter before court

**Review:** A request to the same court that has determined a matter for a second look at its decision with a view to reviewing it.

**Judicial review:** A request to a court of law to re-examine an act of commission or omission of an administrative organ or person, with a view to making a finding on whether due process was followed.

**Inquest:** A court inquiry into the death of a person with a view to establishing whether an offence was committed and recommending prosecution.

**Adverse possession:** Acquiring rights to a landed property by virtue of uninterrupted occupation of land belonging to someone else.

**Move the court:** This refers to drawing the court's to a matter by commencing a suit

**Leave:** Permission of the court granted to an applicant

**Stay:** A court's direction to a party not to interfere with the state of affairs at the time until a dispute is determined on the merits

**Injunction:** An order of court compelling a party to a suit/case to do or refrain from doing a particular thing. Injunctions are positive or negative, interim or permanent.

**Parties:** The disputants in a legal matter

**Ex-parte:** In the presence of one party

**Inter partes:** In the presence of more than one party or in the presence of all parties

**Status quo:** As things were at the time of the court order or decree

**Res judicata:** An issue on which a court of law has already made a finding.

**Sub judice:** It means "in course of trial". It includes commenting on the merits or demerits of matter that is pending trial. This is regarded as disrespect for the court or due process.

**Court order:** Decree of a court

**Court directions:** Guidance by a court on how a matter should proceed before it or in another tribunal

**Court summons:** The manner in which a court requests for the attendance of a person to its processes

**Court martial:** A court of law convened to try an offence against military officers

**Judge/Advocate:** A judicial officer of the rank of magistrate selected to provide legal advice to uniformed officers presiding over a court martial.

**Tribunal:** An inferior court of law

The Industrial court: A tribunal that handles unionisable employee-employer disputes and other trade disputes. It is presided over by a judicial officer of the rank of a high court judge, assisted by lay persons

**Constitutional court:** A court of law constituted to determine violation or otherwise of fundamental rights of an individual or interpret the constitutional provisions.

**Commercial court:** A court of law constituted to determine commercial disputes

**Matter of fact:** Factual issues or assertions based on an account of events and or activities

**Matter of law:** Legal questions or assertions hinged on existing legislations

**Close of pleadings:** When parties to a dispute have completed filing their claims for and against positions taken by either party.

**Limitation of actions:** Maximum duration set by various legislations to govern the times

within which an action can be commenced e.g in defamation suits, action must be commenced within 12 months of the publication of the alleged offending words.

**Misdemeanor:** A minor offence or a criminal offence that carries a penalty of two years and below if one is convicted.

**Felony:** A serious offence or a criminal offence that carries a penalty of three years and beyond

**Rape:** Having unconsented carnal knowledge of a female of majority age ( 18 years and above)

**Defilement:** Having carnal knowledge of a female human being of tender age( 17 years and below

**Murder:** Intentional killing. It attracts a death penalty

**Manslaughter:** Unintentional killing. If found guilty, one risks a jail term of a day to life imprisonment.

**Burglary:** Breaking into a house during the night with intentions of stealing

**Housebreaking:** Breaking into a house (with intentions of stealing) during the day

**Robbery:** A person is guilty of robbery if he steals, and immediately before or at the time of stealing, he uses force on any person or threatens to use force

**Robbery with violence:** A person is guilty of robbery with violence if he steals, and immediately before or at the time of stealing, he is in a group and armed with a weapon, he uses the weapon or threatens to use the weapon.

# Ethics and Integrity

## INTRODUCTION

However one may look at it, few jobs are as demanding and pose as many ethical challenges as that of a journalist. There are many competing interests a journalist balances in the course of his or her work. On the one hand are audiences who sometimes hang on a journalist's every word. On the other are sources that provide the journalist with the content.

Sources want as minimum interference as possible with the content and if they would have their way, they would eliminate the journalist altogether so that they would have unfettered access to the public. There are enough examples of men and women who want to talk directly to the people without the inconvenience of a journalist's mediation. Thirdly, are the owners of the medium who are equally interested in what a journalist says.

The owners' interests often boil down to the profit to be made publishing the story. Not too long ago, in Nairobi, a senior editor lost his job because he had spiked a story, which for whatever reasons, he felt did not warrant to be splashed. His competitors splashed the same story and his bosses wondered why their paper did not have the same story. The editor lost his position.

## JOURNALISM'S ETHICAL CONUNDRUM

The journalist is often in the dilemma where he/she is blamed if anything goes wrong, and sometimes receives little credit if all is well. In this middle space, media professionals have to constantly make quick decisions, some with guidebooks to fall back on, but guidebooks that may have not been internalised, while others have nothing at all to fall back on. Some media houses have clear ethical guidelines setting boundaries of how stories may be covered. In Kenya, this guideline can also be found in Schedule Two of the Media Act 2007. But beyond that, every individual has a script that they follow. It may not be called the code of ethics or the code of conduct, but a conscience that they consult at every decision point, which then informs the decisions that they make. In some cases, because of precedent, it is easy to know what to do. But some decisions may have no precedents and the editor has to tumble along. This chapter seeks to look at possible ground rules that may help a journalist make these critical decisions.

Few have expressed as much disappointment with African journalism as has the late Zambian media scholar Francis Kasoma. In one of his better known articles, *The foundation of African ethics (Afriethics) and the professional practice of journalism: the case for society-*



*centred media morality*, Kasoma is unforgiving of African journalists who he says as having imitated the West, swallowing the Western dogma wholesale. Of African journalism he (Kasoma, 1996, p. 95) writes:

*Driven by selfish motive of profit maximization or political expediency, the African press has increasingly become the accuser, the jury and the judge all rolled up in one as it pounces on one victim after another in the name of press freedom and democracy. The unbelieving African society watches in awe as the largely incorrigible press literarily maims and murders those it covers to fulfill its not so hidden agenda of self-enrichment and self aggrandizement and refuses to be held to account for the harm it causes to society both individually and collectively. In its haste to clean up society of its scum, the African press and indeed the world press, has often forgotten or simply ignored the fact that it also badly needs cleansing.*

Kasoma's views would be music to most African politicians who, for too long, have felt wronged by the African journalist. In Kenya, journalists, both local and international, have been blamed for many of the nation's ills. There is no shortage of politicians and technocrats who believe that the media were singularly to blame for their role in fanning the post-election violence in 2007. These people believe that journalists actively engaged in sending hate messages that caused communities to rise against one another. International media are blamed for showing pictures depicting violence. For quite a few in the political class, the global media's showing scenes of violence portrayed the country badly hurting tourism and the image of the country in the process, and was therefore unethical. It

is critical, from a democratic point of view, that media provide an enabling environment for the multiplicity of voices to be heard in order to enhance democracy. Decisions that media houses make should singularly be with the purpose of opening the market to as many voices as possible to air the views they hold.

The task of the media may appear fairly simple: to provide a forum where all manner of voices can be accessed. This is particularly important in a democracy where the public has a responsibility to make decisions with regard to how they are going to be governed. In order to appropriately make decisions, they have to access relevant information. Democracy is not possible where the electorate are uninformed or where they make decisions out of ignorance. Once voters have put people in power, media is the only potent tool that citizens have to monitor how those in power are steering the ship of state. It is therefore important that the press be as objective as possible in providing information. In a democracy, the other tasks of the press are subservient to these.

There are complaints galore that sources, particularly politicians, level against media and journalists. Top on the list is the accusation of bias. Part of the accusations heard against the media and journalists is that some journalists are in the pay of politicians, that journalists do not adhere to ethical standards that require them to give both sides of the story equal hearing, that journalists do not understand the subjects they cover and therefore do not provide accurate coverage or that their coverage misrepresents the facts, that journalists take a portion of a speech and use it but out of context thereby distort-

ing the stories. These are besides the charges of corruption in the newsrooms, brown envelope journalism, and bias influenced by ethnic frames of reference. It is not only the African politician who is feeling wronged by the media; the corporate sector has its equal litany of complaints against journalists. Many business executives believe that the journalistic rank is packed by lazy individuals who abscond from the responsibility of giving a hard look to a story, and instead resort to the easy path of using the copy submitted by the corporate affairs divisions of organisations. Some believe that the average journalist does not understand finance, economics and business, and therefore does not know what to do when covering a business beat. Professional journalism has been seen as the gangling together of sometimes rather unschooled characters without the capacity to grasp the intricate details of rather complicated or nuanced arguments or concepts of a discipline. Even the average individual sometimes feels that journalism is a calling for the heartless who seldom demonstrate feelings or are simply incapable of doing that.

The hurt expressed by Kasoma is the more pointed given that he was a journalist himself and taught journalism for many years. But what is it in journalists that rubs off society so badly leading to the suspicion of an entire profession? The history of journalism may have something to do with it. This is a skill that emerged, in its modern form, from idle conversations by seafarers in stuffed coffee shops of Europe. Later, these coffee shop talks found expression in daily newspapers often not run by social elites but rather by society's rouble rousers. In their trade, they deferred to no one and probably derived

greatest delight from rubbing officialdom the wrong way. Later successors in the trade did not try to clean it up either. Instead, they delighted in their history and continued on the path cleared by their early fathers. But of course that image is changing. Journalistic practice has been invaded by commercial and business interest whose overall goals have shifted from dissemination of information to profit making. Too many of the ideals with which journalism was founded are now set aside for the unbridled appetite of the chief accountant. And so on top of a rugged genesis that played second fiddle to none, journalism has meshed with the unquenched thirst of the capitalist god.

If journalism has a general poor review, the African one is even more so. It is a young trade, in Kenya, just about a century old. Too often, a search for the dynamic equivalent to journalism in the African tradition results in tortured equivalents. It is not that Africans are only trying to understand this discipline, as indeed they are trying to understand many others, but they have no history to draw from. Then because of the commercialisation of the trade it has drawn its members from a variety of backgrounds most of who have learned the ropes in the trade. In too many instances journalism is only being professionalised now.

Professionalisation of journalism is important and at the heart of it is the necessity to adhere to a stricter diet of ethics. That is because, as Clampitt (Clampitt, 2010) has offered, we live in a society whose moral default is to be unethical. Every second CV, studies suggest, contains at least an inaccuracy. Many of the people who lie do so because they believe they will benefit from

the lie. But society does expect better from others. Employers look for that in the people they want to hire and that is the reason why, increasingly, potential employers look for potential employees among the educated with the belief that ethics is acquired in training. But we also know that most of the information we gather in school, and more so in the case of Africa, is accumulated largely for the purpose of passing an exam. It is no wonder that Kasoma calls for a return to the African roots for African journalists arguing that within it are gems of integrity that would improve the trade.

## TOWARDS A CALIBRATION OF VALUES

Our integrity is built on our value system. Kasoma has argued that the overriding African value system is communal. Banda has ably summarized Kasoma's thoughts which Kasoma himself called the foundations of African ethics or Afriethics. These foundations are:

- The critical place of the community in everyday life.
- Perception of decisions from the point of view that they fulfill societal obligations. To this extent journalistic decisions would be guided not so much by an individual framework but rather a societal one.
- A dialogue between the practice of journalism and African culture. What this will mean is that journalists would recognize that their trade has been founded on a western concept but that journalism should dialogue with the African culture internalizing gems from it.

- Journalism should be a collective seeing the ills of one segment as soiling the whole.
- Individual decisions should be measured on their impact on the larger whole, the whole here being the fraternity of journalists.
- The family of journalists should take it upon themselves to counsel their erring brothers

Through this, the erring ones will learn to be responsible for fear that their individual acts of indiscretion will hurt the wider network (Banda, 2009).

Kasoma's effort is appreciable. The question of African ethics has been discussed by many African philosophers and ethicists but there are few African journalists, or journalism scholars, who have attempted to address the issue purely from the industry's point of view. But it has strong inbuilt weaknesses suggesting that one looks elsewhere. Indeed, Banda's critique of Kasoma is in order (Banda, 2009). Banda has argued that Kasoma's thesis is "based more on a romantic reconstruction of the pre-colonial situation and a frozen view of the harmony in rural Africa". In fact it is not only Banda that has faulted Kasoma's construction on this basis. Other scholars among them Christians (2004) have critiqued this approach faulting the tendency among some Africans or African apologists for painting a glorious picture of Africa that was as if it is today. As Banda points out, "there is little evidence of its impact on life in contemporary Africa where major decisions are taken by cultural hybrids or creoles in the cities who are more in tune with western influences than

mainstream Africa". Banda faults Kasoma on three other scores: the question of cultural relativity, a lack of a theoretical grounding and the fact that Afriethics is not practical.

If Kasoma's Afriethics framework does not provide a satisfying basis of making ethical decisions then what are the other options? Closer home the Media Act 2007 outlined a code of practice that journalists should abide by. The critical question about journalistic integrity has to do with, among others, the ethical foundation on the practices of journalists. Ethics has been, generally, defined as the standard by which acts or decisions are evaluated as to their rightness or wrongness, i.e. whether they are moral. It is broadly about the moral principles that lead us to consider a decision good or bad. In considering moral principles, there are some decisions that pose little ethical challenges irrespective of the cultures involved. For example it is a broadly agreed principle in many cultures that people should not intentionally deceive others. The meaning of this to a journalist would be that they would not receive information under false pretences, knowingly publish wrong information or make claims that to their minds are simply not true.

## SOME PRACTICAL CONSIDERATIONS

Journalism is business and sometimes, too often, it is the end that justifies the means. As a competitive business, who gets to press first with the story and hits the market or the airwaves with it carries the day. The more often they do that the likelihood to attract audience and by extension the advertising shilling – the thing that matters to shareholders most. Sometimes it is who gets to the

market with the most shocking story. In the early stages of the development of journalism, some publishers competed on the basis of who could create the most horrific of stories – all of it fiction but presented as fact. How then do you get your story first: deceive, pay the source not to speak to other media outlets or employ whatever tactic necessary to keep the story in your corner? Take the example of the underwear bomber in the US<sup>1</sup>. For example, when the underwear bomber attempted to blow a plane destined for the US in 2009, a passenger who was seated next to him wrestled him down. Initially, the passenger hardly gave interviews but eventually a major media conglomerate got him to agree to an interview. The interview had a \$10,000 price tag binding the subject not talk to any other media house. It was as uncouth as it was immoral. There is a further example from South Africa where a media house rushed to break a story about the death of a celebrity. The media house erroneously reported that the deceased had died in a road accident. It turned out that the deceased had actually committed suicide.

When journalists are collecting, processing and disseminating information, they must be careful not to harm others. Too often journalism, whether investigative or otherwise, may expose people to too much harm. Care has to be exercised in instances where covering a story could end up exposing those covered to ridicule. Many a journalist would use the explanation that the public has the right to know. A simple non-scientific test would

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*1 This was the story of the radical Nigerian who attempted to blow up an American bound plane by strapping explosives in his underwear. As the plane approached the airport he attempted to blow himself up but the attempt was unsuccessful.*

raise some questions about this. Ask any group of people to recollect the lead story on TV the previous night and you will be met with blank faces. Very few remember whether they watched news or not, and too often cannot agree on what story was on what channel and the order of those stories. The point is that they would have forgotten the story the following day. But that is with the exception of the person who was covered. Take for example the picture of a woman taken at a public park may be with her dress blown up by the wind. For the next 24 hours, that picture will be on the pages of a newspaper for all to see. Most of the people who see it will soon forget as soon as more important issues detain their attention. There is primarily one person who will not forget about that picture: the subject and probably those close to her. While journalists do things in the name of the public's right to know too often, that public has such a short attention span it does not remember the event in question. It is the subject that is left with scars for a long time to come and sometimes recovery is not easy. The harm that an individual might be caused may not be physical, but social and sometimes psychological.

Similarly, journalism should not treat sources or the audience unfairly. Over time, journalism has become class conscious. Maybe this was always the case only that initially those who practiced journalism did not come from the aristocracy. Three years ago, a Kenya Airways plane flying back to Nairobi from West Africa crashed in the forests in Cameroon. It was indeed a sad story, the plane lost all on board. The airline did a marvellous public relations job informing the relatives of the process of retrieving the bodies and set up a

briefing centre in one of the leading hotels. Here, the relatives could wait for information in a dignified fashion; more often than not, they were addressed by the Airways' CEO. It is a far cry from how the relatives of road accident victims are treated. Victims of road accidents are often shown wailing, ruffled and haggard. Grief knows no class but journalism is very alive to class. The hapless lower class is packaged as such. It is no wonder white collar thieves have special nouns assigned to them such as "pilfers" – soft titles that almost reduce the impact of the crime in spite of the fact that their criminal activities are probably the most hurtful to society.

## THE CODE OF CONDUCT FOR JOURNALISTS

The Media Act 2007 provides fairly well laid out provisions for the practice of journalism. The second schedule that spells out what journalists should and should not do is a product of the media industry's own think tank. It is not a perfect document but it offers a beginning point for Kenyan journalists. The first provision is that a journalist must be accurate and fair. It is a loaded phrase that is explained in the Act in detail. A journalist must "write a fair, accurate and an unbiased story on matters of public interest". Fairness presupposes a consideration of the source of the story that they are presented in the light consistent with the story. Media are not a forum to condemn others without giving them a chance for a right of reply. If Farmer A has accused Farmer B of stealing her cow, we cannot go to press with that story without confirming with Farmer B. It may very well be that Farmer B will deny. That does not justify go-

ing to bed with the story that Farmer A yesterday accused Farmer B of stealing her cow but when contacted for comment Farmer B denied. Then spend the immediate paragraphs explaining the accusations of Farmer A. Of course the reader expects Farmer B to deny but still believes Farmer A since the reporter carried an elaborate accusation. Although we have carried Farmer B's denial, we have not been fair to him or her.

Journalists must not only be fair, they must be accurate. Accuracy is absolutely critical in journalism. It is no small matter to omit a zero and report that they harvested 200 bags of maize when in fact it was 2000. It is important to be fair, to be accurate, and to be objective. Some such mistakes may be products of carelessness, speed, or even ignorance. But no media person should be accused of carelessness, of ignorance or of sacrificing facts at the altar of deadlines.

Sometimes journalists take all the precautions but still find that they have made a mistake. To err is human. But as soon as the error is recognised, or the attention of the journalist is drawn to it, immediate corrective measures of sufficient prominence should be undertaken. Too often, there is a price to be paid for errors.

A media house that keeps carrying a catalogue of corrections risks losing credibility, and by extension, advertising revenue. It is expected of such a media house to carry a correction without necessarily referring to the initial error unless the initial error was essential for placing the correction in context. Such apology should be carried with the intent of correcting the error that was made initially.

My journalism professor was fond of giving an example of an apology carried in a paper he had been associated with. Apparently, the paper had carried a story that the mayor of the city was having an affair with his secretary. The mayor of course denied the story. The paper did its own investigations and established that there were no facts in the allegations. So it promptly carried an apology to that effect. But the mayor was not satisfied. He said the apology did not go far enough. An editor carried another apology in the following edition that they had investigated and established that there was absolutely nothing between the mayor and his secretary, then cheekily added, not even a sheet. It is obvious which was worse.

Copy desks can be very vulnerable with headlines. Headlines sell stories, advertise the newspaper, break the grey matter and perform many other functions. In a competitive world such as ours a copy editor may succumb to the temptation to embellish the headline just a little bit so as to catch an extra eye. In the process, the headline may very well communicate something that was not intended. Several years ago, a prominent and respected minister of the church lost his wife through rather unfortunate circumstances – she committed suicide. At the time of the wife's death the minister was not at home, he had travelled on a church related mission. It turned out that prior to his departure he had had a spat with his wife. A prominent paper in town, days later, flashed the story as its lead with a headline along the lines of "Priest rapped wife". The kicker headline had given the context of the story. Broadly speaking, the editor was correct. The problem is that the word rap is not widely used in Kenya,

rape is. Majority of the people who saw the paper understood that the priest had actually raped the wife, only to buy the paper and find that the intended meaning was different. But the editor's goal of increasing circulation had been achieved at the expense of the unfortunate priest.

Kenya, as a multiethnic nation, poses some challenges to journalists in terms of how they represent these ethnic groups in the press. A study that is now rather dated found that not every community was represented in Kenyan newsrooms. There is a tendency in Kenya to view reality through an ethnic prism. The study found that most political news sources felt comfortable breaking latest information to a journalist from their community. During the last general elections, newsrooms sent reporters from specific ethnic communities to cover the election in those areas. Senior Luo speaking reporters were sent to cover Nyanza while seasoned Kikuyu speaking journalists covered central province meaning that if your community was not represented in the newsroom then you either had no dedicated reporters covering your region or you had parachute reporters on your beat. The reporters develop affinity with news makers from their community. Reporters spending long moments with sources internalise their sources challenges and could begin to see reality through the lenses of their sources. It makes it hard for them to be objective. More dangerously, it increases the potential that the communities represented in the newsroom may get favourable coverage at the expense of those not represented. For example, the semi-arid regions of the country are not as heavily represented in the newsrooms as are Nyanza, Western, and Central. At the time

of the study, there was no Masai journalist in any of the newsrooms – that situation has now changed. In a country where ethnicity is a factor in the way people view reality it is important for journalists to make conscious efforts. It is even more important that at the institutional level media houses put in place structures that do not encourage biased reporting but rather make it easier for reporters to be objective. Banda faults Kasoma in this area because if, as Kasoma suggests, the community – however that community is defined – becomes a critical prism through which individuals view themselves then Afriethics sows seeds of bias.

Early journalism was decidedly partisan. Newspapers proprietors wrote about their friends, demeaned their opponents, and treated their papers as personal institutions. Later, as the field developed, journalism favored the local audience. Developments in technology, particularly the emergence of wire services, started to bring objectivity to journalism. Difficult as it is to be objective but every respectable media institution aims at it and does everything possible so to be. According to the code of conduct for Kenyan journalists, a journalist should “gather and report news without fear or favour, and vigorously resist undue influence from any outside forces, including advertisers, sources, story objects, powerful individuals and special interest groups”. Journalists should “determine news content solely through editorial judgment and not the result of outside influence, resist any self-interest or peer pressure that might erode journalistic duty and service to the public, recognise that sponsorship of the news should not be used in any way to determine, restrict or manipulate content, [and]

refuse to allow the interests of ownership or management to influence news' judgment and content inappropriately".

Obviously, these are not simple demands on journalists given that advertisers, sources and special interest groups have vested interests in seeing their stories covered their way. Today, most news sources have in place media savvy communication departments, some manned by former journalists who understand the psychology of the newsroom. Unlike the more youthful individuals manning newsrooms, some who are still awed by power, those manning communication units know exactly what to do to exploit the news processing system. Many PR agencies every year set aside substantial budget lines solely targeting influencing the media. These sources are not interested in objective but rather positive coverage. The White House under George Bush, for example, was so keen that the gate keeping process did not interfere with the way their administration was portrayed that they mastered the art of releasing important information at a time that did not allow media houses to dissect it but rather to simply carry it. Today, American presidents have mastered the art of addressing the nation, not early in the day, but with just a few hours or sometimes minutes to go before prime time news hour. That way journalists will not have time to dissect the story being released and will carry it wholesale. Some news sources now want to speak directly to the people. Journalism, in order to maintain its integrity, must find ways of resisting and overcoming this manipulation.

It is important for journalists to demonstrate integrity. This could be in the manner

in which they handle sources, differentiate between editorial content as opposed to opinions, infomercials and commentary, and their policy in the use of hidden cameras and microphones and distortion of images for effect. Even more critical, in these days of serious competition it is the question of whether journalists could pay sources, or whether they could receive pay to give a story favourable coverage. The African society is hierarchical and some sources are more important than others. What the president of a country says carries more weight, has greater impact on the nation than say, what a trade unionist says. However, the dignity of an individual is not derived from the office they hold but rather from the fact of their being consequently every individual ought to be treated with respect, and dignity, because they are human beings. It means that the respect that is applied when questioning the president would be the same kind of respect in display when asking an alternative social actor, say a prominent cobbler, a question.

Journalism should clearly differentiate between opinion and hard fact. Opinion should not be treated as hard news and should clearly be labeled as such to enable the audience differentiate the two. It also means that reporters must work hard to keep their opinions off news stories. There are instances where reporters may add their comments to the story making the opinion appear as fact.

Due to converging media ownership and the web of corporate ownership, it often is not easy to tell who some of the media corporate shareholders are and their interests. Some simply want to use their influence to push through friendly content. The motives



of most corporate owners could be diverse: to leverage their power, to protect their interests, and to be used against those opposed to them. The sum however is that sometimes the corporate ownership, as Bagdikian has so demonstrated in his work, is not good for democracy (Bagdikian, 2004). Corporate ownership tends to reduce the overall number of voices in the public sphere as they cut down the budget, buy off small competition, reduce staff and too closely marry media to the corporate sector and to the political class. It shuts critical voices and particularly those that may identify with the working class, the unions, and any voices that may not be sympathetic to capitalism.

There are certain domains that should be no go areas for journalists. There is the question whether it is appropriate to use hidden cameras and microphones to bust particularly corrupt individuals. I would think not. In some countries, there are laws that inform these practices. But even if there is no law our conscience should be a guide. Would we want to be treated the same way? A smart student once argued that she would not behave in a base manner and so somebody who behaves in a corrupt manner deserves whatever comes their way. But should there not be a difference between how decent citizens behave from how dishonourable citizens behave? If the way a journalist goes about gathering information offends the law and may not be admissible as evidence in a trial, then by all means that would be equally unethical.

Should journalists accept gifts from sources? Most media houses have broad guidelines informing the treatment of gifts. For example, some put a ceiling on the value of a gift that

a reporter can receive and keep. All other gifts must be surrendered to the common pool to guard against influencing reporters. But even this may be tricky. What happens to a reporter who receives a branded pen but whose value falls below the threshold? Does the use of that pen remind her of the generosity of the company? Some media houses have a policy that gifts, all gifts, must be surrendered irrespective of their value. Such rules also include prohibiting a source from paying for a reporter's lunch. All reporters should be issued with a company credit card and must charge meals to the company card to guard against any undue influence. But the Kenyan media market presents a challenging scenario. More than half who gather news are not full time employees of the media houses and as such are not completely covered by such rules. Secondly, they may not be sufficiently paid to enable them resist the temptation to accept lunch, a lift, or small favours of having a cousin who has finished college hired through the influence of the other. Essentially, any material which may influence a reporter to favor one side or the other of the story should be shied away from. Broadly though, media houses have a big role to play in creating the ground that allows reporters to know how to respond in every given situation. It must be understood that what is expected of a reporter must also be expected of the editors and the management; in fact, the standards must be higher for the latter.

Lippman opined nearly a century ago that media are instrumental in creating public opinion. In *Public Opinion*, Lippmann argued that the press contributed to the formation of the images in the mind of the public (Lippmann, 1922). The media do this through the selective

gate keeping process, a theory popularised by Kurt Lewin (Lewin, 1947) and David Manning White (White, 1950) when they sought to explain the process editors go through in deciding what to include and what to leave out of the pages of the newspaper and other media. In making these decisions, journalists have the burden of fairly representing both the source and the audience. But on the other hand reporters have a duty to the audience to provide them with the most accurate rendition of the day's occurrences. This places a special burden on the journalist. There are choices a reporter has to make whether to cover or not cover the story. As usual every decision a reporter makes has consequences. Should journalists choose not to cover a story then the audience will have been deprived of the chance of accessing the thinking of the source. It fails Wright's surveillance test by failing to provide the audience with what is going on in the market place (Wright, 1960). But once the decision to cover a story has been made then follows the critical decision on how to cover it. Although the reporter has the responsibility to cover the story, and the editor the task of letting it through the gate, what are the considerations that they need to take into account as they cover the story? It is obvious that both the reporter, and the editor owe the audience some responsibility. Among these responsibilities is not to offend the sensitivities of the audience. For example, it is not enough to expose audience to offensive content simply because the content occurred in the market place. It is the responsibility of the reporter to be protective of the audience from such dangerous content. To that extent, the reporter has to exercise some caution.

## FRAMEWORKS FOR ETHICS

Every journalist operates within an ethics framework that should be brought to bear in the making of such decisions. In making ethical decisions, Prof Potter suggested four critical tests that should inform the process (Christians, Fackler, McKee, Kreshel, & Robert H. Woods, 2009). But prior to exploring Potter's box, suffice it to recognise that there are many frameworks of approaching ethical decision-making, we have already referred to one by Kasoma. However, Christians and his colleagues explored several other frameworks among them Confucius' golden mean, Kant's categorical imperative, Mill's utilitarianism, Rawls's veil of ignorance among others. Let us explore these approaches very briefly.

Aristotle had argued for a mean. He argued that there is a comfortable middle ground that is determined by practical wisdom. Faced with two constituencies – the source and the audience, and probably the owner as well, what position should a journalist take? Aristotle would argue that a journalist would take that position that offends none of these constituencies. The journalist would not hurt self, the source, the owner or the audience. Confucius, golden mean is not too far from Aristotle's. He would argue that an ethical decision would be one that adopts a middle ground between two extremes. If a minister has been caught with his hand in the till should a journalist publish the story? If you publish the story the minister would be fired and if you do not publish the story then the minister will get away with the loot. An ethical decision would be one that is neither of the two extremes.

Kant's categorical imperative argues that there is one ethical position and this is the universal law. The test of an ethical decision is whether it can be universalised. For example there are some things, Kant would argue, that are always wrong. For example, stealing is wrong irrespective of who is involved. A reporter would have to think through a decision carefully and come up with a position that can be applied again and again. It is a case of setting a precedent which is then followed by the rest of the fraternity. If it is wrong to publish pictures of the dead then it remains unethical not mattering who is involved or where the deaths may have taken place.

This is unlike Mills' utilitarianism which seeks the greatest happiness for the greatest number of people. According to Mills, what is ethical is what will bring happiness to the greatest number of people. It assumes that everybody wants to be happy. If a reporter stumbles upon nude pictures and is confronted with a decision on whether to carry them or not, the critical question that the reporter would need to deal with is whether publishing the pictures will bring happiness to many people. Should the answer be yes, then for the reporter the decision is made and the story will be carried.

But we return to Prof Potter's box. In using this model a reporter would analyse a situation from four points of view. The first would be the situation that the editor or the journalist was dealing with. Secondly would be the values of the journalists involved. Thirdly would be the principles that journalists hold and lastly would be the constituencies to which the journalist is loyal. A

brief examination of these principles may be helpful.


Take a situation where a reporter is dealing with a speech that is considered hateful. The journalist would examine the context in which the speech was given. What were the surroundings both physically, and contextually? How does the speech contribute to democracy? Is the entire speech hateful or just some portions of it? Is the hate intentional or incidental to the speech? The second question the journalist would need to deal with is the values that the journalists in the media house hold. These are lifelong beliefs internalised by individuals. Simiyu Wandibba suggests that Kenyans value "marriage, respect for human life, morality, respect for people's property, and good leadership" (Wandibba, Issue 19). If we take Wandibba at face value then are these the same values that the journalist and the media house have internalised? A story would then be rated in the light of the values that the media house and the journalist have internalised.

The third element to deal with would be principle. These would be general rules that media houses and individual journalists have constructed to guide their practice. Media houses have house styles that guide their practice and individuals too have certain lines they have drawn in the sand that they would not cross. Journalists need to interrogate where these lines are. It may not matter what the competition is doing, for them they would agree to go only so far. But for there to be such lines the media house, as an institution, would have considered that and communicated the same to their host of reporters and editors.

Lastly, Prof Potter argues that journalists have constituencies to which they are loyal. For example, a journalist is loyal to himself, to his family, to her friends, to her profession, and to the employer among others. How would the story offend or be perceived by these constituencies? There is a wise man who said that after the day has ended a reporter would retreat to his or her own den. Would you be comfortable with the decision you made and be comfortable in your sleep? Or is it possible that you would not want to meet any of these constituencies because of the act? If there would be discomfort then that is probably not the most ethical decision that one could take.

We have only attempted to think through some of the considerations that jour-

nalists need to take into account when making decisions on whether to carry a story as well as how to carry it. Some decisions are obvious and easy to make. Those are probably not the ones that are going to offer a challenge to a journalist. It is more the subtle questions, some of the acts that appear harmless but which are intended to influence the reporter. Our goal here was to simply raise some of these issues and let the journalist wrestle with them. At the end of the day it is the individual journalist to make the decisions and hopefully the decisions they will make will be for the good of their organisation and of society.



**The Media Act 2007 provides fairly well laid out provisions for the practice of journalism. The second schedule that spells out what journalists should and should not do is a product of the media industry's own think tank. It is not a perfect document but it offers a beginning point for Kenyan journalists.**

# Media freedom and independence of the media

## MEASURING MEDIA FREEDOM

**P**hilip Ochieng's (1992) *I Accuse The Press* has not received the attention commensurate with its critical analysis of the concept of press freedom particularly given that this is one of the few voices that have critiqued that concept from both an African and a Kenyan point of view. It may very well be that the reason Ochieng receives such little attention is his critical stance that faults not only how his own profession has conducted itself but questions the overall Western predisposition towards both the African media and Africa. The importance of *I Accuse The Press* lies both in the frankness and passion of the author and the person of the author – a player who has been at the center of the development and practice of media both here in his native Kenya but whose experience have spread way beyond Kenya's borders. Too often, the analysis of media freedom assumes a western paradigm that firmly situates it in that Western context – and of course finds it wanting.

The critique of the African media often assumes Western indicators to measure African media freedom. The difficulty Ochieng finds with this approach is that it fails to ground itself on African reality, instead mapping the

African media infrastructure on a western canvas. This brief discussion will not delve into that African reality in detail. Instead we look at the genesis of the concept of press freedom and as it may be applied to the traditional media in Kenya, and then the emerging media. In the last part we track the history of media in Kenya to analyse how this concept has played out in the country. There are other sources, at least some beginning work, reviewing the performance of media in the continent. Barrat and Berger's (2007) review of journalism in Africa in the last half-century beginning with the independence of the first African country is one such work. They find a sorry tale of brutality that has been meted out to media in the continent. Barrat and Berger are not lonely commentators since there is no shortage of discourses, both anecdotal and even detailed empirical analysis, of road blocks that are placed on media's path by a plethora of factors the sum of which inhibits its ability to operate freely.

## THE CONCEPT OF MEDIA FREEDOM AND INDEPENDENCE

The importance of media and its freedom is beyond the interest of the media industry alone. There is a consensus that media play a critical role in social development. Social

development does go beyond its other scholarly synonyms such as modernisation and westernisation which appear to be hostages of western cultural prisms. However, social development is firmly anchored in the notion of improving the lifestyles of citizens of the referent geographical localities. Development communication thinkers see free press and freedom of the media not only as indicators of social development itself but also as a prerequisite for social development.

The notion of media freedom is as old as the art of printing. Early printers fought for the right to be left alone to print particularly by royalty and monarchy. The monarchy saw the rise of media as a threat to their dominance over their subjects, and the authority of the church and its princes. While initially priests had monopoly of access and interpretation of scriptures the increase in the availability of bibles, of the printed word, and of literacy, meant that laity could access the scripture uninhibited. It thus became imperative to limit access of who could own a printing shop. Most of those given access to ownership of printing shops were people who would not rock the boat by printing material adversarial to the monarchy and those associated with them. The fight for the right to print uninhibited claimed many individual freedoms.

What these pioneers in the fight for media freedom were engaged in was termed as freedom of the press. For then the field that has today expanded to include a myriad of media was limited only to the printing shop. That shop, then often associated with the post master general, often then a lackey of the monarchy grew into two types of shops: one

run by the printers associated with officialdom and others associated with individuals who did not align themselves to officialdom or who were out rightly critical of officialdom. It is the later category that started the good fight for the freedom of the press. But today the press is not limited to the printing industry alone. For a start, the printing industry has itself been so transformed as to lose that earlier identity given the changes in technology. Print products have diversified to include books, newspapers, magazines and all forms of printed pamphlets.

Broadly, the field of mass media studies recognises, beside print, other forms of media that form the stable. These include electronic and the internet based ones. Without being exhaustive electronic media includes radio, television, film and other recorded forms of content including music. Online platforms have blurred any clear distinctions between these media. Today much of the content that was the domain of one carrier can now be delivered on multiple platforms.

The modern day concept of media freedom is derived from the right to freedom of information that was adopted by the United Nations General Assembly on December 14, 1946. This resolution recognised that “Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters” and considered it as “an essential factor in any serious effort to promote the peace and progress of the world”. The charter then called for a conference to be attended by “persons actually engaged or experienced in press, radio, motion pictures and other media for the dissemination of infor-

mation” to “formulate ... views concerning the rights, obligations and practices which should be included in the concept of freedom of information”. It is important to note the rationale for the formulation of this freedom: “to promote peace and progress in the world” and because “Understanding and co-operation among nations are impossible without an alert and sound world opinion which, in turn, is wholly dependent upon freedom of information”.

Too often, the discourse around media freedom fails to take into account the rationale for the concept as envisioned by the UN General assembly. The oft-repeated functions of the media are to “inform, entertain, and educate”. Obviously, more serious thinkers go beyond these. Certainly media do inform, they interpret news, provide service to readers and then they entertain. Other functions include “surveillance of the environment, correlation of the parts of society in responding to the environment, transmission of social heritage from one generation to another” (Wright, 1960) and “conformity, status conferral and narcotizing (dys)function” (Larzasfeld & Merton, 1948) plus a watchdog function, a civic forum function and agenda setting function (Norris, 2002). But at the core of the media freedom as envisaged by the UN General assembly is the pursuit of peace, social development and cooperation among nations, and one could add among people. There is no shortage of media scholars today who would consider the peace role as journalistic activism and therefore not necessary. But that is a discourse for a different forum.

Closely intertwined with this UN charter in pursuance of media freedom is the Universal

Declaration on Human Rights. Through efforts championed by then US First Lady Eleanor Roosevelt the UN on December 10, 1948 proclaimed and adopted Rights that included freedom and dignity of all human beings. Articles 12, 18, 19, 20 refer to freedom of the media in a variety of ways. Article 12 deals with individual right to “privacy ... correspondence, nor attacks upon his honor and reputation”. Article 18 declares “the right to freedom of thought, conscience...” But it is article 19 that is more famous. It declares that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

If Africa has a claim to make in contributing to a major global charter, then setting up of the World Press Freedom day is truly an African contribution. The World Press Freedom Day, celebrated on May 3, is an African child; it is a child of the meeting in the Namibian capital, Windhoek, from April 29 to May 3, 1991 at which some of the more renowned Kenyan editors participated. The Windhoek Declaration condemns censorship; encourages freedom of expression; repudiates murder, arrest, detention, censorship, economic and political pressures of journalists; encourages constitutional guarantees of freedom of the press and association and calls for cooperation among African journalists and African media.

## **ELEMENTS OF MEDIA FREEDOM AND INDEPENDENCE**

But what are the fundamentals essential for the exercise of these freedoms? For, as

Ochieng would argue, it is essential to have the wherewithal for these freedoms not only to be enjoyed but also to be exercised. There is a general agreement that included in the prerequisites for freedom of the media is: independent and pluralistic media, legal environment, political environment and economic environment. Guseva et al (2008, p. 14) argue that:

In order to be free, the press has to be independent and pluralistic: independent of government, political or economic control or of control of materials essential for its production and dissemination, and pluralistic through the absence of media monopolies and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community. To that end it is necessary for States to ensure transparency and accessibility of information, for the media to develop within an independent, viable, pluralistic and professional environment and for legal guarantees of which the public is aware to ensure right of access to information.

It is these indicators that the international media watchdogs take into account in rating the freedom of the press in a country. While there are several ratings of media freedom, for purposes of illustration, Freedom House Index could be considered a good international indicator as any other. But the question is what their index really means. In their 2009 report, the latest available, Freedom House considers the media environment in Kenya as only partly free. According to this New York based organisation even if the Kenyan media is considered free it is however leaning dangerously on the not free door. Freedom House' index

scores usually range from 0 to 100. Countries that fall within the 0 to 30 range are considered free, 31 – 60, are considered only partly free while 61 and above are considered not free. Thus in 2009 Kenya, who scored 60, was just a point better than the bad guys. This poor rating, the report says, was influenced by the issuance of a ban on live broadcasts by the government. The media, the report says, "faced a difficult period following the post election violence in early 2008, including a wave of threats and self censorship ... several cases of intimidation of journalists ... community stations were accused of stoking ethnic hatred. A ban on radio and television news broadcasts lasted from December 30, 2007 to February 4, 2008. Two journalists were injured in the period around the election. Several journalists and civil society activists, including the morning crew of the radio station Kiss FM, were arrested in Nairobi on December 12 at a demonstration protesting the passage of the Communications Act amendments ...the government controlled public broadcaster, Kenya Broadcasting Corporation (KBC), remains dominant outside the major urban centers and its coverage tends to favor the ruling party".

If these indicators truly form the basis of Freedom House's score sheet, then these indicators are worth interrogating. For example, it is questionable whether KBC is still dominant outside the major urban centers? Most recent data by research companies suggest otherwise and a simple drive outside Nairobi would indicate that there are other radio stations that are more influential. As to the question of the broadcaster's coverage tending to favor the ruling party – it would be worth recognising that few broadcasters are



truly objective and they tend to lean towards one subject or the other. Would Kenya's rating be better if KBC leaned towards the opposition party? Several of the other indicators are just as questionable. For instance the Kiss FM morning crew, when arrested, was actually protesting the refusal by Kenyan legislators to pay taxes, at least that is what the T-shirts they wore said. Which brings us round to the argument presented in *I Accuse The Press* that too often the western indicators may not be very realistic measurements of our state of press freedom since they may very well be anchored on false premises.

An African understanding of freedom of the media must therefore have, as its departure point, a domesticated consideration of the characteristics and fundamentals that inform free operation of the media i.e. free access to information, to holding information or an opinion, and to disseminating that opinion or ideas among other considerations. These certainly include the legal environment, but it is more than just the legal environment. The environment may make it absolutely free, or as free as it can be, to carry out these journalistic activities; but the other consideration is whether journalists would be equipped with the requisite wherewithal to gather, process and disseminate information. Kenyan journalists' preparedness should, of necessity, consider several factors. For example it should take into account the training background both academically and socially to deal with the issues that journalists have to cover. According to the Media Council Act (2007), a journalist should, at the very minimum, be a holder of diploma certificate or practices journalism as a habit by the date of coming into effect of that act. But that in itself

raises fundamental questions read against the UN declarations. The right to express ideas can not be conditioned on academic qualifications but on the very fact of somebody holding an opinion. If media provide the market place where ideas compete for attention then every individual must have the right to express themselves irrespective of their qualifications. It is on this basis, however, that questions arise: what to do when, for the good of society, the one expressing idea would do society good by at least not expressing their ideas particularly when, again for the good of society, they do not have the necessary wherewithal that would do society good if they expressed the idea?

One can understand the dilemma of the legislators. If journalism does require a certain degree of respectability then it cannot be an open forum where everybody can do as they please. There must be some sort of gate to separate journalists from others. But maybe this is where a compromise may be necessary by limiting the practice of journalism as a trade to those with the requisite qualification. When we look at journalism as a profession then it becomes easy to separate the discipline from the art. The art is accessible to all with an opinion and the capacity to express it while the profession could be limited to those who have specialised in it. The question that this would raise then is whether we should then have different standards: one for the professionals and the other for the artists? This may not be an idle question but one in which the changes in the media environment influenced by changes in technology, that has seen the emergence of the prominence of social media and citizen journalism, will continue to deal with. Social media blurs

the boundaries of journalism and a reconstitution in the modern context of village charter. Should the two be separated, be merged together, or be left as loose continuum with the purist standing at the one extreme and the students of inclusivism on the other?

In looking at the Windhoek document Declaration 12 is worth noting and examining in detail: "To assist in preservation of the freedoms ... the establishment of truly independent, representative associations, syndicates of trade unions of journalists and associations of editors and publishers is a matter of priority in all the countries of Africa where such bodies right now do not exist." This places responsibility on all engaged in the media industry to ensure the right of journalists to form associations freely and to collectively bargain for their entitlements. Too often though Kenya journalists are not guaranteed this right. The interference with journalists' right of association usually emanated from managers who fear that unionised journalists form a threat to their profit margins.

Freedom of the press must be firmly anchored, as the Windhoek declaration envisages, in the capacity of journalists to unionise. Unionisation of journalists has manifold purposes – not only to allow journalists to collectively bargain but further to enable them protect the boundaries of their trade. As such journalism is threatened when much of the information gathering is conducted by poorly paid correspondents and journalists who have no bargaining power as is the practice of journalists in many African countries, including to a greater degree, Kenya although the Kenyan situation has to be understood in context. While in principle Kenya has a union for

journalists, in practice, most journalists have shunned away from the union. To that extent then the spirit of the Windhoek Declaration is somewhat violated. Focusing on the Kenyan scene, it is notable that the task of gathering information in Kenya, particularly from the far-flung regions and which happens to be the larger part of the country is largely conducted by correspondents. These correspondents are, generally, poorly paid and poorly provided for. While Kenya has an association for correspondents it is not clear its capacity to collectively bargain for the welfare of this critical segment of the media practice. To the extent that correspondents may not be well represented, cannot collectively bargain, and have challenges carrying out their activities, then their condition is a threat to the freedom of the press.

The other element of the freedom of the press has to do with the nation's capacity to build the capacity of journalists to practice their trade. Does Kenya have the capacity to train journalists? The simple answer is yes, Kenya has that capacity. There is manpower and facilities and indeed Kenya has helped younger nations build the capacity of their nascent journalism profession. The problem lies elsewhere. Kenya today teems with training institutions. Nearly every university – and there is nearly 40 of them both private and public – has a program of some sort on media training. While as a country the nation has the capacity in terms of resources and personnel, the challenge is the way those resources and personnel have been deployed. What is not clear is whether these training institutions are doing a good job at it. A few of these institutions have some qualified personnel and equipment so that overall, these resources

are thinly distributed to the extent that the return may not be great. One may find a few qualified staff in a few of these institutions, with some of them lacking staff with even the most basic qualification. As such, only a few institutions may have the capacity to train journalists appropriately.

Institutional specialisation would have been helpful for Kenyan higher education. If universities would have concentrated in their areas of specialty it would have made it possible to consolidate resources and offer quality education. Unfortunately, most institutions have approached mass media training only as a cash cow to save departments that have not been attracting students. In some of these schools the libraries are weak, the teaching staff profiles are wanting while some do not have the requisite training equipment and facilities. Urban centers are teaming with media schools whose menu of courses includes anything that could attract the extra student. While the Media Council of Kenya is in the process of developing a regulatory mechanism to ensure quality training at this middle level, that process is still a long way off.

The foregoing discussion does not mean to suggest that all Kenyan media personnel are not up to the job. Indeed Kenya boasts some of the finest journalists in the continent as demonstrated in their frequent bringing home coveted journalistic awards from around the region. Kenyan media are still some of the best in the region in terms of professionalism and liveliness. Some of the local J-schools are among the best in the continent. But there is still the case of journalists who are at sea with the most mundane tasks that a journal-

ist could be called upon to perform. It is safe to suggest that as long as our journalists are not sufficiently equipped to gather and disseminate information, they will not know what to do with freedom of the media that is due to them.

Journalists must, further, be provided with adequate equipment, both physical such as body protection, transport to cover riots and also be provided with appropriate insurance in case they are harmed in the course of duty. A recent scene covering post election violence is illustrative. A local journalist was standing side by side with a correspondent for CNN, covering some disturbance following the bungled elections results when riot police lobbed a tear gas canister at them. The canister hit the CNN journalist. She was, at the time, wearing a bulletproof vest, while her Kenyan counterpart was wearing a T-shirt. If the teargas canister was a bullet, in all probability the CNN correspondent would have survived, but if it had hit the Kenyan, chances are that he would have had no chance to survive. Journalists must be protected, not just from the harm that come their way in a physical manner but also from harm that may come with exposure to stressful scenes. Again, drawing from the post election violence, too many journalists, particularly correspondents, were exposed to horrible scenes of violence, but without adequate counseling services to enable them deal with the trauma.

From a legislative point of view, Kenya today has one of the most progressive laws regarding the media the discussion of which may be found elsewhere in this volume.

## THREATS TO THE FREEDOM AND INDEPENDENCE OF THE PRESS

But it may very well be that the biggest threat to press freedom and democracy may not be the traditional suspects i.e. the state through legal stranglehold. The real danger to media today may be economic and from economic sources that lurks from big business and institutional regulatory systems often driven by advertisers, vested interests and influence peddlers. These threats which present themselves as angels of mercy speak the language of freedom but without any interest in freedom. Media ownership structure is both converging and increasingly no longer the preserve of idealists whose interest is limited to the craft of journalism. In the process media are losing their space contravening the second Windhoek Declaration: "By an independent press, we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals." But advertisers have spread an elaborate network to monitor content spending their money only in media houses that do their bidding. This may mean killing stories that although newsworthy are not to the liking of the advertisers.

While media ownership concentration in this globalised world may make good business sense it certainly does not make good journalistic sense. There are many

instances where it can be demonstrated that corporate interest could override journalistic principles. Readers of one of Kenya's more recent media products are familiar with the instance where once a month they receive free the copy of that day's newspaper paid for by a business enterprise. The question it raises is whether it is possible for that media house to cover that business outfit with a sense of objectivity. Once objectivity is compromised then the cause of journalism is lost.

The third Windhoek Declaration reads: "By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community." There is always need to have a level playing field for all those in the media industry but also for the industry to provide an equal opportunity for those who may seek to access it to do so. The state would facilitate this through creating an environment that permits those who want to enter the industry to do so. The saying 'the more the merrier' certainly applies here. It appears that this component of freedom of the media is increasingly under threat often from the media industry itself. Established major media players are willing to buy out small industry players in the process increasing the size of their market but unfortunately then limiting the media space by reducing the available

outlets. It may also be possible for large media players to create an environment that makes it impossible for new players to enter the market. They would have the resources to do so. A good case in point was when recently a new media player was entering the market but an established player raced to establish a media product targeting the market that the new player was going to aim at. The new product by the established player was priced so low as to make the new player's product less competitive. There also have been other instances where players with sufficient social connection use their networks to frustrate the efforts of others.

If the international community rates Kenya rather low with respect to the traditional media the situation is different in terms of online presence. Kenya is one of the countries in the continent that is fast adopting social media. It is estimated that by 2009 about 10 per cent of the Kenyan population had access to media

and that population is doubling every so often. Access to this media is broadly uninhibited by state agencies. However, the other factors of economy and literacy are limiting this access. There is little knowledge of ICT in Kenya which makes it hard for citizens to put the technology to greater use. At the same time the cost of access has remained high. But social sites provide one of the truly appropriate media for society to access any manner of information without the inhibitions of the corporate influence or legal strictures.

It is noteworthy, however, that the limitations aside, Kenya's is one of the more vibrant media in the region. It does not only have some of the most qualified staff in the region but some of the best equipment. The legal environment has greatly improved. In terms of press freedom there are objective indications that Kenya's press may be one of the freest in the world going by the content.

# Factors limiting independence of journalists

## INTRODUCTION

This chapter briefly explains the concept of independence as applied to the media, explores sources of influence that seek to impede the independence of media, discusses whether it is in fact possible for media to be independent before concluding with some general observations. But we start with examples of some recent experiences, even if some of those experiences may have not taken place in Kenya.

The intention of this chapter was to introduce young journalists to some of the sources of the threat and to remind the older ones of these threats. Obviously the older ones know these threats to their independence and this chapter may only serve as a reminder.

## CONCEPT OF INDEPENDENCE AS APPLIED TO THE MEDIA

Sample this. Rick had just written a book and was traveling the news circuits to promote it. In one of the media outlets where he had stopped for a promotional interview, the host posed a question on the attacks earlier directed at Rick by some of his colleague journalists and by comedians. In an

earlier interview, Rick had referred to a leading comedian as a “bigot”. The comedian hit back during his own shows. The attacks that followed Rick, in some cases, had taken the form of ridicule. Rick felt that the media industry, in which he had worked for several years, had throughout his career, not treated him fairly on account of his race. He hailed from a minority group. His responses to the host’s questions suggested that the media was, largely, controlled by other ethnic communities, particularly Jews, and it was only Jews, or those who had Jewish support, that thrived in the industry. By the time the interview was over, Rick, who worked for one of the top globally reputed media houses had lost his job. His employer put out a statement simply stating “Rick ... is no longer with the company. We thank Rick for his years of service and wish him well”. Those who owned the media, Rick felt, favoured their kind, and those who came from the mainstream population had an easier path in rising to favored job positions.

Did Rick get the sack because he expressed his opinion? If he had not expressed his opinion would he still have been sacked? Do reporters have the right to be independent and express personal opinions? It is a question

that bedevils not only reporters but workers in general. Can individual employees maintain a separate identity independent from the corporation they represent or work for? When do employees cease being individuals with personal and independent opinions to assume those of the corporation? When individuals assume official positions do they cede individual liberties and assume establishment profiles? Do some positions come with greater representative responsibility than others? For instance, when managers represent their organisations in various fora to what extent are their identity intertwined with that of the organisation relative to those who are not in management? The question is complicated in today's media world where conglomerations have created an interconnected web of media ownership. When a media house is owned by a myriad other interests then the position of any senior official becomes difficult to define and the loyalty could be spread across several institutions.

## THE NATURE OF THE MEDIA ENTERPRISE

Media companies cannot be compared with other commercial interests. First, media companies do not trade in tangible products like other companies, and secondly, because segments of the media occupy so important a natural resource – the airwaves – which is collectively owned by the public. That media houses do not trade in tangible products may need some explaining here. While it is true that the print media has a tangible newspaper to show in the morning, or a magazine to show at the end of the lifespan of the previous issue whether that span be a week, two weeks

or a month; the real product of the print media, or any other media for that matter, is the content. The audience do not so much relate with the physical product, even though it may appear as such, as much as they relate to the philosophical leaning of the content – its breadth, depth, persuasiveness, ideology, and the extent to which that content aligns itself to the audience's everyday expectations. The same applies to the electronic media. Much as the attachment may appear to be with the TV station and the signature tune that welcomes viewers, the true product of the station is the content. This content has an ideological leaning and it is to this leaning that the audience relate.

The obligation of media houses to their audience is to provide content the audience can relate to. Many an audience wants to relate to the content in a personal way. It is no wonder the popularity of local content that research consistently finds rates better than imported content in any given media market. The local content may be poorly packaged and of low quality but still has greater resonance with the public. Local audience can identify with local content both at an ideological level but also in terms of the characters featured, the scenes depicted and the themes of the stories. An example here may suffice. Radio has a near 95 per cent penetration rate in Kenya (Maina, 2006). The spread and popularity of radio is aided by the increasing proliferation of local language stations majority of which are slicing away the listenership from the national language broadcasts. There are two types of these local language stations. First are the local language stations that broadcast back into the villages, but from a broadcast sta-

tion, which for the benefit of economies of scale, is centralised in the nation's capital. The second type approach to broadcasting is where the station is based right in the community itself. In the first approach, reporters gather national news and give them a local angle. The news sources for these stations tend to be national, and most of the events covered are national in nature. The locally-based stations are likely to be local in every way. While they may cover national issues the interpretation given to the national issues however would assume a fairly provincial orientation more closely matching the tastes of the locals. The reporters for these stations live and interact with the community who in return often know who the reporters are and can trace their backgrounds. This leads to a closer following of these stations.

To illustrate the point using a recent case - a reporter with one of the vernacular stations went to cover some local events and was confronted by the elders of the community who did not like the word the station chose to refer to death. As far as these elders were concerned, the word used by this station trivialised death. They suggested a different word. People who have more than a casual and passing interest in the station, and seemed to suggest a certain sense of ownership and pride in the station often provide such feedback. The use of the offending word was corrected.

If it was not for the connection that these reporters had with the villagers that feedback would have not been forthcoming and in a world where the audience have choices the choice to switch to another station would not

be difficult for them. But such an opportunity for closer interaction with a station would not be possible in situations where reporters parachute to the village to cover some breaking event and then retreat to the comfort of their city bases.

## MEDIA AND ITS OBLIGATIONS

Obviously commercial enterprises have obligations. These obligations are to clear constituencies, which include shareholders, customers, and staff among others. To each of these constituencies the task is very clear. Shareholders expect profits, customers expect satisfaction that the products supplied will be true to their promise and satisfy the customer needs and that the company kept its word as promised in the product. To the staff the obligations include fair compensation among others. But media companies have these constituencies and much more. Like in any other commercial enterprise the shareholders expect a check at the end of the financial year. But the biggest challenge that a media house faces is its obligation to society which does not look at it simply as a commercial enterprise but from a social responsibility role point of view – roles that include education, entertainment, surveillance, information, socialisation, cultural preservation and managing culture's process of dynamism as cultural practices evolve.

Media history in Kenya is, by many standards, still relatively short. *Taveta Chronicle*, probably the first newspaper in Kenya was set up by a church minister in about 1896 (Abuoga & Mutere, 1988). It had a simple mission: to produce literature for new converts. The purpose of this new literature was to distract



these new converts from remaining engaged with the past from which the new faith was seeking to take them away from. The subsequent media that followed were more commercial in nature – but not entirely. When the precursor to today’s East African Standard was established in 1902, the mission was more than just mere journalism, but rather the establishment of a rival business enterprise that would leverage the cut throat competition for the right to supply the civil service in the then emerging economy (Scotton, 1972). The newspaper was simply an icing on the cake that would serve to check that the other interests were not hurt. As a result the structure still remained simple reflecting a trend that had been witnessed elsewhere in the world.

But that is an age that is long gone past in journalism. Today’s media, too often, is part of an intricate network that brings together a web of owners, so much so that an average journalist may not know the full list of the shareholders for her media house (Bagdikian, 2004). The media house then has to be very ginger to avoid stepping too hard on too many toes lest one of the toes stepped on happens to belong to one of the media owners. Globally today, for instance, none of the six leading media owners started out as a media company. Some started as water companies, as entertainment industries, as manufacturing outfits specialising in such products as aircrafts and refrigerators. But in the web of investments and ownerships some of them have ended becoming major players in the media industry.

Matters would be easier if information on the investments were always open. But too often,

the trend of the investments is stark in deep secrecy the sum of which is that the average employee in any one of the companies may have little idea of who other shareholders may be. This is not just a global trend. In our own media market, however small it may be, there is no telling with accuracy the multiplicity and overlapping interests that lay claim to ownership and whose interests the media has to protect.

Until fairly recently, the ownership of one of the oldest media houses in Kenya was shrouded in so much secrecy. While today the main shareholders are an open secret, it is not clear what the full list of shareholders may be and the portions of their shareholding. But it is not just the ownership of media houses that is shrouded in secrecy and bear challenge to those who represent these organizations. The nature of the media business is such that the cover price or subscription fee alone is not sufficient to shoulder the cost of the publication and of the programs. The backbone of a media outlet’s survival is advertising revenue.

A Nairobi media house based Chief Executive is reported to have once remarked to his staff, in defining journalism, that journalism was whatever was used to fill the pages of the newspaper after the advertisements had taken their slots. The statement may have been made in cynicism of journalism however its reality is startling. Journalism increasingly has to play second fiddle to commercial interest in media houses. What does that mean? It means that a journalist on beat has to be cautious and weigh the interest of the story and the commercial interests of the newspaper.

## THE CONCEPT OF FREE AND INDEPENDENT MEDIA

It is a critical question whether individuals who work in the media should be free and independent and if so, why? There is hardly a segment of society, from politicians to civil social activists, who do not agree that an independent and free media is the ideal. Where consensus may be lacking is specifically on what is meant by free and independent media. There are advantages to an independent media top of which is that it provides a wide range of information and ideas. These ideas are useful in sustaining society as society is informed and are the better off for it. The underlying assumption that informs this notion holds that to the extent that the public can access a variety of ideas then it will be able to draw from these ideas and apply to everyday activity, resulting in social improvement. But not only that, an independent media will lead in critiquing the government, pointing out both its strengths and the areas where the government may be letting the electorate down. It is generally agreed that the average individual is too busy going about daily responsibilities and has somehow delegated to the media the task of keeping an eye on the government. This the media does on behalf of the people. This is the notion that informs the concept of media as fourth estate. Those in government, it is suspected, do have selfish interest and would pursue those interests rather than national or public ones. The knowledge that some agency is watching them could keep them in check. Further, there must be a way for the public to be able to access information of interest to the public – information on public affairs. There is no other agency that facilitates the task of

making this information available compared to the media.

Global agencies and civil society do believe that it would be impossible to achieve the democratic project without the active participation of the media. Democracy envisages the involvement of the people in governance. It presupposes participation, that citizens will have a chance to express their views on how they should be governed. While there are fora where such opinions may be expressed, for example through village barazas, in churches and mosques, such fora are not as well suited as the media. The structure of most such fora is authoritarian and less receptive to the ideas from the ground. For example, church leadership is hierarchical as is the village baraza thus not facilitating uninhibited flow of information. The media, on the other hand, is flat and should be accessible by all. But media will also serve as a school for democracy. To the extent that citizens can express themselves on the pages of the press and on airwaves it inculcates a culture of self-expression that would be beneficial to the democracy project. For these reasons a free and independent media is critical. Students of the media are, on the whole, unanimous that, whatever it is, an independent media is better received by the audience rather than one that is viewed to be beholden to sectoral interests.

Every segment of society is desirous of an independent and free media. In expositions on the normative theories of the media be they authoritative, libertarian, social responsibility, market oriented, or whatever conceptualisation they may assume, these traditions claim that media under their systems are free

and independent (Siebert, Peterson, & Schramm, 1956). Those championing one conceptualisation are usually quick to point that it is only media under other systems that are not independent. Media under the authoritative system believe that they are free and fair, rather it is the media under the market oriented system that are beholden to capitalist interest that interfere with their content. On the other hand, western oriented media believe that their version of the media is free as since market forces guide it, and it is the one under the authoritarian system that is captive to state machinations and party organs. To be fair to the traditions they end up crafting a definition that in fact supports their position. For example media under the authoritarian systems are independent and free to report the party position. To the extent that the party is satisfied with the ideologues within the system they will be left to carry on with press responsibilities under the circumstances undisturbed. At a UNESCO meeting in Nairobi in the mid 1970s, and during the height of the cold war, the global body itself then dominated by western influence did set up a commission that eventually came up with the McBride Report that defined an independent and free media as one that was in service of economic development. Obviously the perception here was that economic development is in service of the population and if the media were rallying behind such a cause then such media must be free indeed. But too often economic development tends to be defined rather narrowly limiting it to western capitalism with the result that within that definition is already built in western value systems. But 11 years later, and in a world with then changing ideological landscape

with the influence of the eastern political block fading, UNESCO appears to have revised that definition. In the Windhoek declaration in 1991, the transnational body said that by independent it meant a press that was independent from government, political or economic control.

The UNESCO resolution does not appear to solve out problem of definition. The dilemma of defining what free and independent media means is whether a medium truly independent of such encumbrances does in fact exist. By virtue of being corporate citizens media operate in an environment that is regulated by the state and too often the regulations that the state put in place impact the media one way or the other, and sometimes are in the best interest of the media. For example, electronic media have to share the limited frequencies, which are a public resource. It is impossible to fathom a situation where a way of sharing these resources has not been devised. Some agency must regulate these resources otherwise they become a free for all with the strong getting everything they want. Once the regulations have been put in place they must be enforced otherwise the strong will still find ways of running roughshod over others. It is possible for a strong player to influence the state to pass regulations that favour it. It is also possible for a strong player to arm-twist the state into looking the other side allowing it to have its way. Indeed, such circumstances have been witnessed in Kenya where some of the more influential media players may lean on the state to put in place regulations that favour them or they may use their muscles to edge others out of play. In circumstances such as this it is an independent government that is

required, or some independent agency that would put in place the essential regulations to guide the management of these resources. Further, media is dependent on the commercial sector for economic support through advertisement. As such an independent and free media is a contradiction.

However, there is a principle that is at the base of this concept. It is that by independent and free media, the agencies on which the media industry depend, i.e. the government, the commercial sector, among others, do not unduly influence the institution to the detriment of the overall goal and purpose of the media. Broadly, that these agencies will not interfere with the concept of free market of ideas but will promote it through the presentation of competing thoughts in the media for the purposes of enhancing democracy and good governance. The overall principle is not so much that media are independent of these agencies but that these agencies do not unduly interfere with the media.

## POTENTIAL SOURCES OF THREAT

At the heart of the freedom of the press is the question of unfettered free flow of information, the free market idea, and the presence of competing thoughts in the media. Proponents of this notion posit that for that to happen then no one particular constituency ought to influence the kind of information that flows to the market place. It presupposes that those who manage the media institutions are themselves egalitarians open to accommodating the ideas, all ideas that come their way. But it also assumes that they have been allowed to carry out their tasks without hindrance. However, too often such ideal

situations do not exist, as there are sufficient sources of pressure that seek to exert influence on the media. It impossible for media to carry out their duties if they are, at the same time, controlled by sectorial interests. Yet, in reality there is no shortage of agencies that would want to gain favorable coverage.

One such institution is the government. There is hardly a government, its governing philosophy notwithstanding, which is not interested in the media within and without its jurisdiction. Authoritarian governments that do not hold elections are still interested in the media not so much for electoral purposes but rather as institutions, systems and structures that could be applied to control the people. Such governments would want to control what information the public is able to access fully aware that information is power and the powerful ones are those who control the flow of information. It is not just authoritarian governments, however, who are interested in controlling media, even democratic governments are just as obsessed with what goes on in the media. They too are interested in influencing the information that flows to the public. But they are interested in more than that since they have to win power on a democratic platform. To continue in power they need to project a positive image that they are doing what they were elected to do and doing it well. Because of this interest there are things a sitting government would not desire to be revealed. For example, no government wants the incidents of corruption, infighting and malpractices within it to be highlighted, or the failures of the system to come up. If the government had its way it would be all rosy and sunny.

To take an example, President Daniel arap Moi's government had arguably one of the worst human rights records in Kenya's history and arguably one of the poorer state media relations. Under it individuals were arbitrarily detained and the judicial process was often times abused. There are many cases during the former president's reign that courts met outside their normal meeting hours to deliver judgments. These often pointed to a hand outside the system controlling it. But no government wants that image to come out. A government would do everything it can to suppress that information – the more people are kept uninformed the better. However, whether it is the worst or the best side of the government it does not serve the cause of the press for anybody to influence any type of information to be made known. It should not be perceived as the responsibility of the media to make public the good that governments do. Governments who are doing good cannot, in the interest of a free media, lean on the media to bring that to the public. The argument to be made is that the government should keep its hands off and let the media independently come to an understanding of what the government is doing and highlight it as appropriate. That does not mean that the government cannot, like any other voice in the market place, call attention to what it is doing. What must be guarded against is the case where the state uses its resources and influences to direct the direction and tone of the coverage. That the state and government can make their case and leave it to the media to decide how the case is to be represented is in order.

Too often, there are instruments that the government can employ to ensure that its

coverage is favourable. For example, it is said that in George W. Bush's White House, very subtle approaches were in play that ensured favourable coverage. For example, there was a ceiling on the number of passes to the White House Press conferences. Once all the invitation cards had been issued, that would be it for security and safety reasons. But what the White House operatives would do is issue the invitations selectively to friendly media including bloggers. By the time media considered hostile to the White House arrived, and these would often be left leaning media, all the cards would have been issued and it would be a legitimate way of blocking these media from accessing the information, asking questions, and only allowing them to access the information but through the lenses of friendly media. In other instances, the White House would bypass the national media and issue information directly to the local media sometimes without the capacity to process the information. But the White House would have packaged such information to their taste, in the format in which they would want the information to go on air. These are arts that have been perfected by PR agencies that dupe lazy journalists into simply adding their by-lines to the stories. At the end of the day the direction that the stories take will have been influenced by the source that packaged them.

Other subtle ways include sending invitations to friendly media houses and leaving out the hostile ones, providing favors in whatever form to friendly media, directing flattering comments to friendly media and unflattering comments to unfriendly media, finding space in press cabins for friendly media in cases where sources have to travel with the press.

Authoritarian governments are not limited to these subtle ways of influencing the media – they can resort to the use of brutal force. There have been complaints by members of the press in the recent past that journalists had been denied access to functions the president attended. Such complaints have been countered by arguments that the functions were private. It may very well be that the functions were private although what is then not clear is the differentiation of presidential functions that are official and those that are private, and whether that decision is left to the president's team to make. We have also witnessed in the past instances where goons hired by the government, acting on the behest of the government, or simply visiting mayhem on journalist while police stand by unleash violence against journalists. The cause of the free flow of information is hindered. However, the more structured system of impeding the independence of the press has been through legislation. These could include the passage of legislation that tilts coverage in favour of the government or puts too many roadblocks on the path of journalists. Such legislation may be driven, at times, by government fear that the media will actively play a watchdog role and scrutinise what the government is doing – too often what they find there could end up embarrassing the government.

Over the years, students of the media have focused attention on the role government plays in impeding the independence of the press, and failed to pay attention to other institutions with equal and sometimes unhindered capacity to interrupt the free flow of information. One such institution is the organised gang usually of criminal nature but who do not want their criminal activities brought to

light for fear of antagonising the public, or simply exposing them to police investigators. We have had a fair share of criminal elements organised into gangs but the best examples of the impact of these gangs on the media come from South America where drug cartels would terrorise media houses they consider to report on the activities of the gang, or information that exposes them or even reportage that is considered to be pro state. Journalists in some cases fear the criminal gangs more than the organised state, and to the extent that these gangs drive fear into journalists then the cause of free flow of information is hindered.

Kenya has had its fair share of gangs, and they run into hundreds. Probably the most well known is the Mungiki, but there are a myriad other gangs. Most of these gangs have been declared illegal but that does not mean that they do not operate across the country with a potential of inhibiting the free flow of information to the media.

Political parties and politicians are just as interested in influencing the information that gets into the media nearly for the same reasons that the government is interested. If the government wants to retain power then politicians and political parties either want to retain their positions, or gain power. To this end they do whatever they can. There are many ways that politicians use to seek to influence the information that gets into the press. Some of these methods may be orthodox such as manipulating the time of the release of information, choice in what information to release and the package of the information that is being released. But there are also unorthodox means of control-

ling the media including manipulating journalists, and outright bribery. While there is no empirical study providing data one way or the other, there is good indication through anecdotal data that a significant number of Kenyan journalists may be susceptible to receiving bribes or be in the pay of some news sources. Good media houses must be on the watch out so that politicians and political parties do not manipulate their staffs.

We recall a story from not too long ago in Nairobi. There was a by-election in the then Mathare constituency. Mathare is a vast constituency by any standards and the fact that a major part of it is densely populated area, with no access roads, where what passes for houses are shanties that are only separated by a thin sheet, does not help matters much. One of the candidates was holding a campaign rally in the middle of the slum area – a place that is ordinarily difficult to access with simple salon cars at the best of time. Most media houses managed to somehow drop their reporters to the campaign scene but because of the limited resources could not get the vehicles there on time to bring the reporters back to the office to file their stories. All rallies must, by law, end before 6:00pm. As the rally came to a close, the crowd started dispersing and only reporters were left on the scene. Mathare can be an unforgiving area and the local thugs could easily tell the visitors from the residents. In any case, reporters were easily exposed by virtue of the equipment they carried. They had to be concerned about their own security leave alone beating the deadline for filing the stories. As the politician was preparing to depart, he asked whether the journalists needed any help. They agreed that they needed to file their stories before the

deadline otherwise the story would be too late for the following day's newspapers. The politician, himself interested in the story being covered, provided a vehicle to take the reporters back to the office. Most were relieved by the offer. But it is obvious the impact of an incident such as this on the partiality or independence of the journalist.

These pressure points provide sources of concern for journalistic integrity and independence. But they are not the only ones. Other sources of journalistic pressure include owners more directly, even if we have referred to them somewhat, and from management, from sources, and from the institution itself. In most cases there is little separation between owners and management as the later report to the former and actually carry out their instructions. In the early history of magazines, the owner was most often also the writer and the magazine carried what the owner, or what the owner=publisher wanted published. Even if most owners have ceded control over their media houses few journalists will be sufficiently insensitive to the owner's thought trends. For example, Kenya's Daily Nation, the independence of the newspaper notwithstanding, is not going to carry any content that will be insensitive to the sensibilities of its majority shareholder who also happens to subscribe to the Islamic faith. During the 2008 campaign for the referendum in Kenya, for example, Hope FM, owned by the Christ is the Answer Ministries in Nairobi was fully behind the NO side. The media house knew which side its bread was buttered and thus no journalist was going to jeopardise their jobs.

Media managers too exert pressure on media houses. It is the management that develops

the policies that inform the operations in a media house and when they are setting up these policies they are designed with certain purposes in mind. There are two types of policies that may be of interest to us: the editorial ones and the general management guidelines. The editorial ones are designed to streamline and standardise the operations in a media house. For example, the editorial policies ensure that there is a standard way of starting stories and of spelling words. It also ensures the quality of the work done. But not only that, editorial guidelines provide the parameters within which journalists work to ensure, for example, that the work carried in the media house' outlets are of a certain standard of good taste. Any media risk losing its audience if, for example, there is a trend towards lack of identity or the presence of chaos in the publication or broadcast. But by setting these guidelines media houses invariably straitjacket their staff into a uniform way of doing things thus compromising creativity and an independent way of doing things.

Journalists and media house staff are creatures of a system. First they are born within families, communities and society that inform their perception of reality. It is within these structures that the frames they use to construct their values and to judge their reality are formed. Families form the units within which journalists are socialised and are taught what is right and what is wrong – this is where social norms are learnt. These social norms are reinforced in religious setting and later on formally through the school system. It is fairly difficult once these norms have been formed to go against them without upsetting these frameworks in a major way. It is to these frames, as anthropologists tell us,

that individuals fall back on whenever they are confronted with decisions that they must make. When individuals join the craft of journalism they are immediately introduced to the ways of doing things: the values of news, the structure of news among other things. Upon graduation when they join newsrooms these lessons are reinforced through observation and are enforced through instructions and a system of rewards and punishment. A new graduate who files the story as instructed by the editor gets rewarded with more assignments, less supervision, more by-lines etc. Those who do not fit in get punished with fewer assignments; stricter supervision and knowing disapproval that inform them that theirs is not the way of doing things. By and by those who joined the newsroom with creative ideas soon learn that they have to gain the confidence of the old hands first before they can hope to be sufficiently trusted and allowed to experiment. But if the journalists are not careful by the time they have gained sufficient trust they may have been thoroughly inducted that they have forgotten how to be creative and how to be independent.

By and large, the war to remain independent is one that a journalist engages in every day they step out to go to work. The sources of pressure confront them right from their doorsteps to the moment when the story is turned over to be laid. While the war is an everyday experience, each journalist engages in the battle for independence every day and with every story. They win some and they lose some. The challenge is sometimes with the frequency with which they win or lose. At the beginning they probably lose more than they win. But hopefully, with increasing experience, they soon begin to win more than they lose.



# The role of media during the electioneering process

## MEDIA AS CORPORATE INDIVIDUALS

It is a critical question worth debating: what is the role of the media in elections? Should the media stand askance as a disinterested party in elections, or should it plunge right in the process and engage in the debate like any other interested party and citizen? It is a question that goes deep into the heart of the democratic process; democracy involves a process of a choice made on the basis of sound decisions informed by solid facts.

At the heart of this question lies our perception of the institution of the media. Are media, on the one hand, corporate citizens with rights, privileges, obligations and responsibilities equal to individual citizens; or are they only public spheres providing a forum for public debate? When perceived as corporate individuals media houses have identity with the right to sue and be sued. They have responsibilities and obligations to society that besides being good corporate citizens includes paying taxes. As taxpaying citizens they are owed duty by the government including providing an appropriate environment for business operations. For instance, the government of the day has a responsibility to media and other enterprises. The government

has to provide services such as security and other amenities so that business can thrive. As such, it is in the interest of the media, as business enterprises, that a responsive government is put in place. This will guarantee appropriate returns for the investment. Their corporate identity aside, audiences relate to media in a fairly personal way and not in a detached and dispassionate corporate approach. The human faces in the media represent, to the audience, their first contact with this institution. They do get to interact with the industry in a variety of ways. There is, in first place, the passive arm chair approach where the audience is at the receiving end, assumes to be familiar with the presenters but really the relationship does not go beyond that.

But there are other forms, for example, where the audience would write to the editors, call media desks to air their opinions and sometimes share fairly personal information with media audience. In most of such cases where audiences communicate to the media, they may not be thinking about the public, but rather the relationship with the media house almost as if the media house was an individual. Audiences, to a great extent, trust the media in a manner that is fairly personal. For example, conservative America has a largely

personal relationship with Rupert Murdoch's Fox, and may see it as their mouthpiece. To some extent, it is the kind of relationship that people have with friends, confidants and consultants.

What the media expect from government is thus not vastly different from what ordinary citizens expect from the same government. Ordinary citizens, as well, expect a government they have elected to deliver the same obligations the media expects. For instance, citizens expect security, social amenities, and other public services. However, unlike ordinary citizens, corporate citizens cannot and do not vote. To the extent that they cannot vote then media and other corporate citizens cannot be perceived in the same light as flesh and blood citizens. They are not physical beings that can march to a polling booth to cast votes.

But media differ substantially both from citizens and other corporate organisations. First, it is important to explore, in passing, some of those differences between media and other corporate organisations. While business enterprises have nearly the same expectations as the media they do not have the same influence as the media on the electoral process. Businesses influence elections and governments more indirectly rather than directly. While businesses may lobby those in power, the media can both lobby those in power but also appeal and speak directly to power and to the rank and file citizens. By directly speaking to ordinary people who have the power to vote, the media can intervene in the political process more directly. The mass following of the media is immense and, more than any other institution, they can reach the mass audience more directly and passionately.

## THE KENYAN MEDIA SCENE

Today, Kenya has at least four daily newspapers, more than ten TV stations majority of which have a national reach and fairly influential. Further, the presence of Kenyans on social media records a near daily increase. According to CCK (Communications Commission of Kenya) there were more than 3.1 internet subscriptions in the country in June 2010. However, the number of internet users was just about eight million. About 20 per cent, most of who fall under the 15-64 age brackets, had internet access. It is assumed that a majority of the people who use internet also have a presence on social sites such as Face book, twitter and do actively blog. These people are discovering new ways of interacting with each other and of socialising. The reach of the traditional media in Kenya is, for the most part, conjectural as most of them are not members of the Audit Bureau of Circulations. Of the four daily newspapers at least two have a national reach. Collectively, the most influential two have just about 250,000 print runs every day except Sunday when the number goes up. It is estimated that the pass along rate of the print media in Kenya is as high as 10 to 15 readers per copy. On the basis of that assumption, it could very well be that the print media alone reaches about 2.5 million people on a daily basis. That, in a nation of nearly 40m, according to the 2010 national census, is a telling spread of the print media. In a study, now somewhat dated, conducted by the BBC WorldTrust on media trends in Kenya, the print media is estimated to have a population reach of about 57 per cent. Overall, it does appear there is some disconnect between what appears to be the reality and

what this study found out with respect to the spread of the print media. The last data may be questionable on the basis of at least one ground. The print media in Kenya cost at least half a dollar a day. When it is taken into account that about half the population live on a dollar a day, it is hard to see how the same people could spare a dollar to spend on what could be considered luxury. In any case, it is assumed that most people do not use their budgeted money, but rather their spare change to consume media products.

But the two daily papers are not the only print media in the market. There are two other minor dailies whose influence is hard to estimate as there is little clear data on their circulations. Kenya has remained a punishing market for the magazine industry. The one magazine, *Parents*, that has been in the market for about four decades has a social issues focus. On average, Kenya's magazine industry has a high mortality rate, a trend that has remained steady for a long time. There is no indication that this is may change soon.

Its visual power aside, TV has remained a middle class obsession with a limited reach. As observed elsewhere, several factors see to this including the local terrain, the initial cost of acquisition, and the requirement for electricity to power the receivers at home. But there is no gainsaying the visual power of the TV. Again, according to the BBC World Trust study, the spread of the TV is just about 37 per cent of the population. The mainstay of the media influence however is the radio. It reaches, according to the same study, nearly 95 per cent of the population, and in the case of Kenya, it does reach the big chunk of this population via their vernacular language.

Indeed, radio has always been the modern media for Africa.

Studies have estimated that the influence of the media is not uniform. That is because various media deliver their content via different forms and people who consume media content relate to these forms differently. For instance, due to its capacity to combine visuals, motion and sound, the television is not just hugely influential, but also emotional. Audiences are able to relate to the content in an emotional way than they would other media. On the other hand audiences relate with the print media differently. It is a more intellectual medium, particularly the high market one. The medium has the capacity to package long and sophisticated discourses that appeal to the highbrow society. While most of these readers are the social elites exerting an inordinate amount of influence on society, they are, at the same time few, and tend to be detached from society; most considered to be so high minded that they hardly turn out to vote. This is particularly so in the case of Africa where voter turnout is massive and involves a long wait in lines and sometimes with the election results already predetermined by the ruling class. It seems to make little sense to this category of audience to turn out to vote.

Kenya is yet to experience the impact of social media on its politics. In the 2007 elections, public officials tended to be persuaded that mobile media, particularly the cell phone's SMS platform, was widely used to spread fear, contributing somewhat to the violence the country experienced. There is at present no real hard evidence to support this claim one way or the other. The idea that hate message

sent via cell phones made the recipients rise up against their neighbours requires further study. But it is important to note that the electronic media's potential to impact the electoral process has been noted elsewhere and particularly the US elections in 2008 that brought Barack Obama to power.

However, in the recent past, there has been increasing debate regarding the role of social media to influence the popular uprising in the Arab world. Technology fans have praised the role of facebook, twitter, and other social media in playing a role in the spread of the protest. But it may very well be that that there is a rather loud protestation without appropriate data to back up this media's role. It seems that the uprisings were ignited when the public saw the agony of an ordinary Tunisian as he protested the perceived injustice meted out to him. But these images were transmitted via traditional media – TV. TV has the capacity to so powerfully transmit such emotional information. It may very well be that it is after this initial stirring of the emotions that social media took over in terms of organising a means to channel this anger. People could then easily contact each other, share the outrage, and make arrangements on how they were going to express their outrage. As society evolves the more it reaches to its past for lessons and shared experiences. Marshall McLuhan peeped into this world many years ago when, in his examination of the galaxy, he noted the import of technology in the change in society. He considered the invention of the printing press as the most important discovery that changed human life dramatically. It heralded the birth of the capitalist class but equally resulted in

the emergence of the global village. It seems that people tend to use new technology in very old ways even as they claim that technology is changing their lives. In traditional society, word of mouth was king. That has not changed much, society still is depending on word of mouth, only that now that word of mouth is transmitted differently – through Facebook, twitter, Hi5, and other forms of social media. The more society changes, it does appear, the more it remains the same.

## INFLUENCE OF THE MEDIA

Collectively, media do have a huge influence. No agency can muster the huge numbers that the media can collectively, and even individually as media houses, reach. But besides reaching the huge audience media houses have a following and influence over their audience, again, that few other agencies can master. A substantial number of people do purchase media products in spite of their content, largely on the basis of their masthead. Many people who buy Kenya's two largest circulating newspapers do so, too often, not on the basis of the stories that the papers feature, but rather on the basis of loyalty to the papers. This loyalty is translated into a relationship of trust. By extension, the individuals who trust these media will, in all probability, believe whatever the content of the publication. It means that these media would have a great influence over these individuals and will influence too their thinking. However, the above statement must be moderated by our understanding of audience' social behaviour. As noted elsewhere in this book, the concept of audience obstinacy moderates the

notion of a powerful media to which the audience is helpless.

The reference we note here with respect to the influence of media is fairly powerful in some cases. There are, in this country, some people whose radio receivers are forever tuned to the same station. Too often such stations broadcast in any one of the ethnic languages: Luo, Kikuyu, Kalenjin, Luhya, Kamba, Meru etc. When such individuals tune to the same station day in and day out they are fed with the same content, from the same people who hold, on average, the same philosophical orientation, it is safe to assume that such people lack diversity. It is impossible to discuss broadly with such individuals or to hope that they could hold any other worldview when all they are exposed to is the same world. These individuals are no different than the traditional community set up where some individuals were locked up in their village, had the world defined through the prism of their village, interacted only with their village mates and so their worldview did not extend beyond their local community. Just as these individuals were then prisoners of their local community, it is not hard to find individuals who today, in spite the explosion of media, are still, out of choice captives of their little Kameme village, Ramogi village or Kass village for that matter. The extent of their exposure is limited to the extent to which their popular radio personalities are exposed.

If large media have got influence over audience there is a fundamental question relating to the internal democracy within the media and the extent to which divergent views may be represented in the media itself. Students of the media who adopt a political econo-

my angle, and those who use a neo-Marxist framework to analyse the media, consider a variety of influences over the industry that may have a bearing over the nature of their democracy and contribution to democracy. For a start, the ownership of a majority of the media is in fact converging reducing the number of media players. Ben Bagdikian has observed, for example, that overall there is a reduction of the number of media owners in the world following take overs, mergers, or consolidations. Bagdikian observes in his book, *The Media Monopoly*, that there are about five major global media players in the world today. This is down from about 50 major owners only 25 years ago. This evolution has taken place quietly, after all, it is in the interest of the media conglomerates that the public attention is not raised to this lest the public be informed, or worse begin to raise questions. That the media is one of the most undemocratic institutions probably goes without saying. One simply has to look at the decision-making processes within individual media houses, how choices over stories to be carried are made, and the reluctance, nay, vigorous opposition to unionisation of journalists in the industry. For example, it is commonly thought that media outfits do not make profit, but that is until one begins to scrutinise the balance sheets of media houses most of which rank among the most profitable enterprises in their markets.

The trend towards consolidation of media is not just global but reflected at the local media markets as well. It is not that too long ago in Kenya that *The Standard* and *KTN* were owned by different investors. Now they are run from the same boardroom. The same apply to some other media houses in Kenya that

only recently were owned by different interests for example *The People*, K24, STV among others. There is a unique phenomenon in Kenya where media owners have converged to form their own association. The impact of that on democracy is likely to be great. Few individuals blacklisted in one media house can end up working in another media house when owners happen to be members of the same association. Thoughts banished in one media outfit may as well be banished in all media outfits.

It has to be appreciated, for example, that Kenya's is a free market where those with capital should not be inhibited from investing their capital in whatever business they please. However, the trend in Kenya is towards ownership of media broadly by investors of near similar extraction orientation. Whether this is by default or design is neither here nor there. However, given the nature of Kenyan politics that is inordinately loyal to ethnic uniformity the trend has a potential to pose a serious challenge to the nation's democracy. The potential of a uniformity of thought designed to propagate a single position is likely to obtain in this market for a while yet to be. It does not make the process and the matters any easier given too that captains of industry that are in the lead of making advertising decisions assume a similar profile trend.

Whether in the local or at the global level, there appears to be a near uniform ignorance of media ownership structures and the increasing concentration and consolidation of ownership, the kind that stirs Bagdikian's ire. The average student of the media has no idea who the critical media players are, the influ-

ence of the global trends on the local ones, and their overall impact on democracy. An average student of the media still believes that CNN, Al Jazeera, BBC etc are the main players. However, these are only pawns in the hands of the real industry movers. Presently, the main big industry players include Time Warner in the first position, Walt Disney in the second position, Bertelsmann in the third position, Viacom in the fourth position, NewsCorp in the fifth position and Vivendi in the sixth position. Find a media student who will appreciate the fact that General Electric, known for the production of some of the finest machines, is also a major player in the media industry and you will have found yourself a potentially good student of journalism. Each of the enterprises referred to previously bring together a host of media houses surprising in their diversity and the range of interests they hold. For example, GE is probably better known for their work in manufacturing aeroplane engines. But they also happen to be major players in the media industry with interests in a variety of media types. Few, for example, understand that Bertelsmann is probably the world's biggest publisher. It is the biggest broadcaster in Europe, the biggest magazine publisher, the biggest trade books publisher, the largest music and book club and employs a massive nearly 103,000 staff member. It has about 500 subdivisions and makes profit in the range of 15000 billion Euros. It is indeed a global player. But at number three it is not the leading media player. That position belongs to Time Warner.

Time Warner is a colossal company. It is associated with several firsts including the global magazine brand of Time and film production's Warner bros. Today it is a huge outfit with

footprints in over 20 book brands, over 30 magazines including Time and Fortune, Theme Parks, Film studios, online media, record labels, sports teams, about 30 TV operations, and many more. Time Warner owns among other establishments: New Line Cinema, Time Inc., HBO, Turner Broadcasting Systems, The CW TV Network, The WB.com, Warner Bros., Kids' WB, Cartoon Network, Boomerang, Adult Swim, CNN, DC Comics, Castle Rock Entertainment and the list goes on. Each of these enterprises is a mammoth outfit on its own right. That CNN is simply a member of this family may be lost to many. This list does not include their interest in online media, book publishing, the full range of magazines. It is a huge operation. Due to the fluid nature of the business market companies do not hold the premier business position for long. Some media scholars even dispute between Time Warner and Disney, as to which one is the biggest.

What is the implication of this on democracy? The first implication of the media merger is that, overall, it limits the voices available in the market place. With 50 media outlets, there are 50 public places with a possibility of airing a multiplicity of voices and opinions. The reduced space, for that is what mergers do, limit the voices that can be heard, the shades of opinions that can be voiced, and increases uniformity while limiting competition. Given the associations that are formed and to which the media owners belong, it means that dissent within their ranks is further reduced. Broadly, this reduction in the public space is not good for democracy.

This shrinking of space has equally been witnessed in Kenyan media. Segments of Kenyan

media have expanded massively while others have only expanded modestly. For example, 20 years ago there were just about the same number of newspapers in the market as there are today. Limiting our attention to only the local press, excluding such regional others as The East African, there were the Nation, Standard, Kenya Times and the People was a weekly. Twenty years later apart from the addition of the Star, the situation has not changed much. Instead, Kenya Times has folded while the People is in the middle of a transition to a different owner which will definitely have a bearing on its circulation and its opinion shade. The voices available in the print media market have not changed much even if the industry has increased in vibrancy.

However, there has been a massive and dramatic change in the broadcast industry. From a single TV channel that did not run the whole day there are more than ten national stations at least five of which are commanding attention during the regular news hour. Other stations broadcast a variety of programs with varying following. The variety in content is a sea of change. Kenya is far from the country where the president would condemn aerobics on air, and the program would then be effectively banned, to today where morning drive radio talk shows have heavy sex content. It is however in this field of radio industry that a sea change has occurred. From a single radio station twenty years ago, again where the president in one single public baraza would ban a song from being played on air, there are more than one hundred stations now broadcasting a variety of programs in a variety of languages. The influence of these stations is massive.

## DEMOCRACY AND THE MEDIA

Democracy is perceived to be delegated governance where power to govern is derived from the governed. Through their own free will the governed delegate the task to officials freely elected by the people. But in order for citizens to exercise their free will in the elections it is critical that they access as much information as possible to aid the decision making process. The media is the free forum where the governed can access the critical information on the choices before them in order to make the necessary decisions. When citizens are not informed then they will not be able to constructively participate and engage with the democratic process.

Gurevitch and Blumler, in their oft-quoted article “Political communication systems and democratic values”, have suggested that the media perform and provide a number of functions including surveillance of the socio-political environment, setting agenda for political discourse, providing platform for intelligible political and illuminating discourse, enabling dialogue for a range of views, holding officials to account, and educating the citizens on the options before them. But this presupposes a certain degree of political maturity on the part of citizens and an ideal media. Voters need information in order to make choices and the media are the best placed institutions to provide that information to the voters.

As we observe above, what is the implication of the current media structure, be it global or simply within the Kenyan context to meet the goals that Gurevitch and Blumler propose? The ideals they suggest presuppose a perfect media environment not encumbered with the

biases of ownership and tilted playing fields. It presupposes that all those involved will seek to provide a fair playing field where all voices that seek presence in the market place will have access. Media as businesses have interests in championing the voice of business and so while ideally providing a free market place, in fact, may have those voices tilted in favour of select positions. There are other factors that limit the media’s capacity in a democracy. While they are supposed to act on behalf of the citizenry they often act on behalf of the business owners and social elites. Due to the converging interests particularly between the governing class and those in media ownership it is possible for the eventual voice that gets heard not being that of the people but of the special interests and of the middle class.

Secondly, because of the converged ownership, the media are increasingly withdrawn from the people. It is thus difficult for them to be able to appropriately represent the people. But, further, given the increasing size of the companies, the inner workings of the media tend to remain opaque and sealed from public scrutiny. Democracy on the other hand expects openness. Lost to the average citizen is the question over how decisions are made in the newsrooms. The news processing machinery, with its values and culture, are not open to public questioning. For example, during political debates media do invite commentators to lead discussions. What the audience has access to are these opinion leaders. But media are silent on how the opinion leaders were chosen, how they were selected, who did the selection and why? It would be important for these opinion leaders to state, for example, some of their own influences. If



all the intervening factors were to be stated upfront – that would be critical to the listener. These opinion leaders are asked questions, but left out is the process of deciding on what questions to ask and why, and how to ask them. The hosts involved in the process of asking these questions are equally left out. Some of these information would help as a guide for media to be unbiased contributor to the decision making process, and to the process of democracy. The contribution then that the media can make to democracy could be limited.

The media presupposes that the people will be engaged in the democratic process. But look at the fact that the media turn out to be the people. It is first and foremost entertainment. Too often it is this entertainment that sets the mood for the content. The mood that the entertainment sets up is largely of leisure, not very conducive for the kind of decision making that democracy demands. Fortunately for Africa, the public is still fairly engaged with issues in spite of the leisure fare dished out by the media. Unfortunately, if Kenya is any example, there is such a heavy bias towards personality coverage instead of an issues focussed discourse. Indications are that Africa is still one of the few continents where voters turn out in large numbers and bear the tropical sun as they wait patiently to vote. That is not the case in western societies. It takes the public a while before they engage with social issues and the voter turnout is increasingly decreasing. Australia provide an interesting case study where voting has been made compulsory through legislation. Elections are considered so important that voters are compelled to vote by law. Yet on the other hand it is safe to say that voters

are so lethargic towards elections that they have to be compelled by the force of law to run out to vote.

But in spite of all that, democracy would be near impossible without the engagement of the media. The influences already mentioned aside, the media are still the largest single baraza bringing together various shades of thought to compete for attention in this market place. This could be in the range of news covered, the various shades of content – whether hard news, opinion, columns or guests and the sheer background from which these individuals come – whether from the right or the left of the political divide. But beside that, it is the press that still has the capacity to bridge the gap between the people and their leaders. This is even more so on the African continent where some regions still lie in difficult, largely un-navigated terrain. Some of these regions are impossible to reach with a daily paper, would be too expensive to cover by TV, but radio can easily penetrate, particularly the magic of FM stations. Increasingly in Kenya, this is more so given the wide use of vernacular broadcasts. The challenge that these media houses have is to reach the public with as objective information as possible – information that is void of partisan biases. This takes professionalism that increasingly needs to be projected into journalism, in cases where it is lacking. But we must also be aware that the media is a highly inefficient way of reaching the public with information. The media has a tendency to simplify information and reduce serious public debate into simple sound bites. The sound bites can trivialise a serious debate. The simplistic nature of media packaging means that, for example, politics

tends to be reduced to a mere competition between two people regardless of the number of issues that may arise. In the case of Kenya any visitor would imagine that there are only two political parties: PNU and ODM ignoring the other serious political players. Capturing these serious political players would complicate media content and may not be good for the market.

We need to address ourselves to the question over the extent to which the employ of the war like language in the media impacts society negatively. The warlike language attends every aspect of media content ranging from hard news to sports. In the Kenya Football League a quick look at the headlines easily reveals this warlike content. The league champions, Ulinzi Stars, a military outfit, had declared total “war” on their opponents. Political opponents are always “challenging” each other, “declaring war” on others, “Plotting” their next action etc. rather than project the image of family and cooperation in the nation. This media approach functions to heighten the mood in the country particularly in our context where politics is viewed from a tribal prism and one leader declaring war on the other could very well be read as one community declaring war on the other community.

It would be helpful if the Kenyan media anticipated political duels by preparing their journalists for this kind of context. If journalists understood their political responsibilities then they could be more careful and approach political journalism with circumspection and greater degree of objectivity. Looking back on Kenya’s immediate last election, it is now obvious that many of the journalists approached

the elections with a lot of selfish interests. This is not a fact peculiar to Kenyan journalists. Western journalism is just as immersed in political interest. Many of the officials that end up working for political candidates may have been journalists in their previous lives, although in some cases the reverse is true. In the case of many African countries, however, the challenge is that many of the democratic institutions are still in their infancy. Political leaders in Japan, for example, are capable of being so thoroughly embarrassed by their public gaffes that they would do something about it in the public interest. That is seldom the case in Africa where leaders would seem to spread the guilt around and seek to frame individual tribulations as if they were communal tribulations.

All in all, media is an important fora for democracy. However, its potential has to be appropriately harnessed to avoid abuse occasioned by the current trend and other negative factors that may be introduced by virtue of the context. But just as media influence society, society too must watch out for some of these influences and exert its authority in moderating the role that media should play in a democracy.

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