

A Return to Basics: Media Rights as Fundamental Human Rights

By Makumi Mwagiru

Abstract

This paper presents a challenging and radical contribution to the debate about media laws and politics in Kenya. The internationalist-universalist dimension is critical and eye-opening.

It is a lampoonery of the dichotomised 'them' against 'us' axis upon which the discourse on media legislation reforms revolves. Instead, the author recommends that the debaters should embrace an important trilogy: the state, the media and the citizen.

This, the author argues, will help in removing the debate away from the infrastructure of a free media as the only bone of contention, to include the 'spirit' of the media laws. The interest of the argument, therefore is to create a people-centered and responsive media. The people are integral stakeholders in the media industry, and as is, it is argued, must be as protected by the constitution as the media rights.

The foregoing premise logically lends itself to the conclusion that media rights are human rights. If so then the author insist that the debate about media reforms is ill-informed if it doesn't include constitutional reform. But he goes past this to embrace a universalistic approach to the review of media laws. This is consistent with the paradigm shift in the development and application of the modern human rights laws and international politics, which started with the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the Geneva Convention of 1949, the Convention of Refugees

(1951), the International Government on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). Within these internationally binding legal instruments, the author says, the media can find supportive articles for their demand for the inclusion of media rights as human rights.

In this new internationalist thinking, the nationalistic or territorial approach to human rights issues have been found to be wanting as concerned governments have repeatedly violated national laws with impunity. There is no guarantee that national media laws will not be derogated by the despotic regimes again.

Having traced the origins of the universalisation of human rights to the wartime atrocities of Nazi regime, the paper contends that the media today is an important international diplomatic player in conflict prevention, management and resolution to be left at the mercy of the draconian whims of an authoritarian government.

The author declares that freedom of expression is the first freedom. Therefore it ought not to be negotiable. The paper laments mistreatment of the Kenyan journalists and their institutions by the powers that be.

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Retour aux Eléments de Base: Droits des Médias et Droits de Base de l'Homme

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Résumé

Cet exposé discute les défis et la contribution profonde, au débat sur les lois et la politique des médias au Kenya. Selon l'auteur, il serait sensé d'oeuvrer vers une tendance internationale-universelle, car celle-ci permet de sensibiliser le public aux réalités impliqués.

Mwagiru soutient que la dichotomie "eux" contre "nous", qui caractérise le discours des médias, ne fait que freiner le progrès, en ce qui concerne la législation des réformes. Au contraire de cette stratégie, l'auteur préconise une approche trilogique: l'Etat, les médias et les citoyens.

La justification de cette approche est que cela permet de régler non seulement les problèmes relatifs à l'infrastructure des médias et la démocratie, mais aussi d'englober "l'esprit" des lois sur les médias. L'argument de base est qu'il faudrait concevoir des médias sensibles, qui s'adressent directement à la masse populaire. L'industrie des médias devrait appartenir à la population concernée. L'avis de Mwagiru est que cette population est à protéger aussi bien que les droits des médias.

On a tendance à donner l'impression qu'il n'y a pas de distinction entre les droits des médias et les droits de l'homme. Si cela était le cas, il aurait fallu y inclure aussi les réformes constitutionnelles. Cependant, cet exposé va plus loin, en préconisant une approche à tendance universelle, en ce qui concerne la revue des médias.

Ce qui s'accorde bien avec les changements du paradigme du développement et l'application des droits récents de l'homme et la politique internationale; qui commença avec la Déclaration Universelle des Droits de l'Homme (1948), la Convention du Génocide (1948), la Convention de Genève (1949), la Convention des Réfugiés (1951), le Gouvernement International des Droits Civils et Politiques (1966), la Convention Economique Internationale et les Droits Sociaux/Culturels (1966). L'auteur de cette communication est de l'avis qu'avec le soutien de ces corps de statut international, les médias pourraient réaliser le but recherché de figurer sur la liste des Droits de l'Homme.

Cette vision internationaliste est meilleure dans la mesure où elle dépasse le niveau des autorités nationales et territoriales, qui violent sans cesse et avec impunité les lois de leurs pays. Ce qui risque de se répéter si on se limite à ce niveau local.

Mwagiru trace l'origine et l'universalisation des Droits de l'Homme jusqu'à la guerre tragique du régime Nazi. Sa conclusion est que les médias constituent un acteur essentiel dans la prévention, la gestion et la résolution des conflits. De ce fait, ceux-ci ne devraient pas dépendre des intérêts des gouvernements autoritaires du niveau territorial.

La conclusion de la communication est que la liberté de l'expression est la liberté de base. Il faudrait donc la défendre à tout prix.

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Introduction

The review of the media laws in Kenya was one of the post-1992 packages of reviewing a broad spectrum of the laws of Kenya. In this context, it formed part of the wider debate on constitutional change. It was intended to form part of the infrastructure of the change from single party to multi-party politics. The primary task of collecting views and making recommendations about those aspects of media law that need revision, was entrusted to the Task Force on Press Laws appointed by the Attorney-General. The formation of various task forces to review different aspects of the laws of Kenya and the spectacle of their operations, masked fundamental philosophical and practical problems. Primary among these was whether the laws of Kenya could be reviewed effectively in the absence of a comprehensive overhaul of the Constitution itself.

This paper argues that attempting to review media laws before a review of the constitution amounts to putting the cart before the horse. Since the basic media rights should ideally be conceptualised within the context of constitutional rights and human rights, a review of the detail of media laws that is not founded on this platform is unlikely to provide the proper foundation for the operations of the media in Kenya. The debate about media rights has also, unfortunately, been steered within a peculiarly Kenyan context, thus robbing it of the power of an international —and even universal— dimension. The paper, therefore, pleads for a return to basics: and in this context the basics are fashioned irredeemably by making the primary case that media rights are basic human rights: indeed fundamental human rights. As such, they are not rights which are negotiable, or which require the state's consent to be enshrined within Kenyan media jurisprudence.

Polarisation of the Media Debate in Kenya

The debate about media laws in Kenya —their content, context and shape— has led eventually to two sets of polarised discourses. In these discourses, the state's control of the media has been ranged against the assertion by the media of its "rights" within Kenyan society. Notions of democracy have featured in this debate only to the extent that they bring it into the orbit of current (fashionable?) trends. In this debate, the state has emerged as the giver of certain rights to the media, and the media have emerged as supplicants, bargaining for certain rights with the state. From the outset of the debate, priorities have tended to be warped. No assertion has been made that media rights are fundamental human rights, and that, therefore, the debate should not be about what rights are to be accorded, but about how effective controls, necessary for the functioning of a democratic system, ought to be emplaced.

The arena of the discourse about media laws and their operation in Kenya ought to be widened considerably, and placed firmly within the social and international context in which the media operates. The debate therefore should not skirt important issues that should inform and surround it. On what basis will the new press laws be nested in a climate where the surrounding constitutional context is unclear? On what grounds will an ethical code for the media be founded in a political climate characterised by corruption? In any case, is the formal provision of a municipal legal environment sufficient to guarantee the freedoms of the media.¹

In any society, one of the media's fundamental role is to mediate social conflicts between different groups and social classes. Hence media laws ought not to be enacted within a social, human, and cultural vacuum. Unfortunately, the media discourse in Kenya has taken place within a "them" against "us" context. And yet, this debate should embrace the participation of an important trilogy: the state, the media and the citizen. In the current polarised atmosphere of the debate about media

laws and policy, the citizen has been trapped in the middle, and has been sidelined as an unimportant part of the crucial trilogy. This, in part, has resulted from the preoccupation of the interlocutors in this debate (both state and media) merely with the infrastructure of, rather than with the spirit of, a free media. Withal, serious structural fissures will still remain even after the enactment of the proposed media laws.

The Universalisation of Human Rights

The route back to the basics in this discourse begins with the affirmation that media rights are fundamental human rights. This approach places media rights firmly within the wider discourses about human rights. In order to place the Kenyan debate in its proper context, freedom of the media, as a concept and a practice, must be embedded conceptually within the notion of fundamental human rights. In this context, the point needs to be emphasised that media rights and freedoms are inextricably a part of general human rights. This would constitute an important conceptual shift in the trend and tenor of the current debate. It would also remove the debate from its municipal, national and territorial moorings, and anchor it firmly within the doctrinal context of modern international and universalist thought in international law and politics.

The development of modern international human rights law has been characterised by a shift from national and territorial perspectives to a universalist appreciation of human rights, and especially fundamental human rights. In the period before the Second World War, human rights were conceptualised firmly within a territorial framework. This was in keeping with the notion of the exclusive jurisdiction of the state on all matters within its territory.² Thus, abuses and violations of human rights that happened within the jurisdiction of the state were not considered to be the business of any other state, which could neither interfere, nor even properly comment on such denials of human rights. However, the Nazi atrocities in Germany gave rise

to the question whether states within the international system should keep silent, even in the face of gross violations of human rights, including those amounting to genocide. The firm rejection of such a proposition led to the internationalisation of human rights. This process led to a golden age of international human rights law, during which, beginning with the Universal Declaration of Human Rights (1948), there was a flowering of international treaties on human rights: for example, the Genocide Convention (1948),³ the Geneva Conventions of 1949,⁴ the Convention of Refugees (1951),⁵ and later the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). The 1948 Declaration and the 1966 Covenants embody the International Bill of Human Rights.⁶ This internationalisation of human rights was held together by a body of international law. However, it gave rise to the problem that, in international law, treaties are binding only on those states which have expressed consent to be bound by them. Hence it was possible for states to escape from the structures of international human rights law by refraining from being parties to the relevant human rights treaties. This problem was cured through the device of the universalisation of human rights.

The process of the universalisation of human rights developed along various planes. Firstly, developments in international society led to the understanding that there were certain problems that were not amenable to the actions of individual states, and which needed international action to resolve, for example environmental problems. Secondly, hand in hand with these developments in the environmental context, were doctrinal developments in other areas of international law, for example the re-affirmation of the principles of 'common heritage'. These led to the development of the notion of 'common concerns' and in the field of human rights, violations of human rights in one state came to be considered a matter of the common concern of all members of the international system. The import of this was that any state within the system had a duty to express concern

over the violation of human rights anywhere.

This universalisation of human rights was also a part of the trend in international law of a return to natural law doctrines. In natural law thinking, human rights are enjoyed by human beings because they are human beings, and they are enshrined in a higher law, and hence are not privileges accorded by governments. Clearly, however, the burgeoning of diverse human rights within the last two decades or so does not sit comfortably with the notion of universal application.⁷ Hence it has come to be recognised that the rights which primarily lend themselves to universal application are fundamental human rights: those rights without which other rights cannot be enjoyed. Amongst these are the rights enshrined in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

The Impact of Universalisation of Human Rights

The universalist application of fundamental human rights had important consequences for state practice, within the international framework, states should argue that they were not bound by treaties that they were not a party to, including human rights treaties. The meaning of this was not that the norms and laws about human rights were only applicable to those states which consented to be bound by them. This was in keeping with the positivist orientation of international law, but tended to defeat the whole idea of creating an international human rights regime. And yet, the challenge was to make the observance of and respect for fundamental human rights compulsory for all members of the international system.

Universalisation of human rights harkened back to natural law conceptions of law. The universalist doctrine argues that there are some human rights which are so fundamental, that their observance is called for by laws higher than those which states create, either municipally or internationally. The argument that fundamental human rights are binding on all states,

whether or not they are parties to particular treaties on human rights, has placed fundamental human rights firmly within a universalist discourse. It means in effect, that fundamental human rights are not things which citizens negotiate with states but which they enjoy inherently. States on the other hand are bound by these norms, whether they wish to be bound or not. In other words, observance of fundamental human rights norms is one of the basic requirements of membership in the international community: there is no opting out.

Media Rights as Fundamental Human Rights

Within this context, media rights should clearly be pleaded — and emerge — as fundamental human rights. The Universal Declaration contains certain provisions that even on the face of them enshrine what might be conceived of as the foundation of media rights: the right to life, liberty and the security of person (article 3); the right to effective remedy against violation of rights (article 9); the freedom from arbitrary arrest, detention or exile (article 12); freedom of movement (article 13); freedom of thought, conscience and religion (article 18); freedom of opinion and expression, and the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers (article 19); and the right to peaceful assembly and association (article 20).

These rights and freedoms are reproduced substantially in Part 3 of the International Covenant on Civil and Political Rights (1966). These international instruments form the bulk of the International bill of Rights. They also reflect the substance of universal human rights. These are rights which every state is bound to accord to citizens. They are not negotiable rights. They are also the fundamental basis of media rights, to the extent that no media practitioner can operate effectively without the guarantee of these rights. There may be debates about which of these are fundamental to the others. It has been argued, for example, that the freedom of expression is the “first freedom”.⁸

In truth, these rights and freedoms co-exist, and the media would not be able to operate effectively if any one of them was denied. These rights and freedoms are not for governments to give, or bargain about.

In the Kenyan context, journalists have, for example suffered at the hands of government officials and other agents. They have been arrested, detained, beaten up, had their tools of trade such as cameras broken up, and films exposed, had printing presses destroyed by agents of the state, and newspapers and magazines have been confiscated. Their dignity has also been affronted, both verbally and otherwise; they have, for example, been labelled 'bastards', and nothing has been done to protect them from these abuses and denials of their fundamental human rights, and the right to practice their trade without harassment.

Clearly, these things happen where the state believes that it is the grantor of the fundamental rights of journalists. It is this mentality that needs to be reconceptualised, such that the point is driven home that these rights exist outside the will of governments. In negotiating and discussing media laws therefore, there should be no suggestion that these rights and freedoms are up for bargaining. This means too that the legal framework within which these rights are rendered functional is also not up for negotiation. What could be up for negotiation is whether the laws being put in place are effective safeguards for these rights and freedoms. That such safeguards must exist is neither negotiable nor even a matter for bargaining.

In this context, discussing the tenor of the legal framework for the operations of the media in Kenya or elsewhere in the absence of the constitutional context, is not a sensible approach. It is the Constitution that must guarantee the framework for the operation of media rights and freedoms in Kenya. It is through the Constitution that international law can most effectively be applied locally. Hence the Constitution is the logical beginning point for laying down the operational framework of media rights. But the Constitution does not grant the rights themselves. These are granted in international law. The resort to the

argument that media rights are universal human rights is the firmest ground from which to debate about media laws and policy in Kenya. The universalist approach, and its surrounding international legal instruments which provide for universal norms, does not, unlike national constitutions, shift with changing political and other trends. The universal norms are also beyond the reach of the legal instrumentalism that so many African regimes are so fond of. The universalist—and internationalist—trend is a powerful tool to resort to in claiming and asserting media rights as fundamental human rights, rather than seeking merely to negotiate a disembodied legal framework as has happened during the debate on media legislation in Kenya.

Media in the Internationalisation of Politics

This approach to media rights also reflects current trends within the international political and diplomatic system. The notion of the state as a closed system is one that has been on the wane within the last two decades. In the last decade or so, indeed, many states have disappeared, and new ones have been formed. This has been prompted, among others, by internal conflicts.⁹ What has been most evident in the international political scene, is the fact that there are few developments within states that can be said to be truly 'internal' affairs. Domestic politics have transcended territorial borders, and thus become internationalised. On the other hand, as national borders have thus shifted, the role of the state has decreased universally.¹⁰ This is the broader political context in which media law and policy should be seen.

The media has been an important agent in the internationalisation of domestic politics.¹¹ The operations of the media transcends territorial borders. Media reporting of events means that developments which were originally thought to be "internal" become internationalised. This is the substance of the operation, for example of the "CNN factor".¹² In recent times for example, the media has internationalised even what appeared to

be internal political matters, for example the conflict in Zaire has led to the ousting of President Mobutu. Events such as political riots in Kenya are covered in the media, both at home and abroad, and this has the effect of enabling sympathisers of various political actors in Kenya to exert pressure and influence.

In broader terms, the media has also been an important actor in international events that have shaped the international and regional diplomatic framework. The media's exposure of famine in Ethiopia for example, or the genocide in Rwanda in 1994, led to concerted international efforts to address these catastrophes. The media is, therefore, inherently not a domestic player; it is an important international player, even when its preoccupations might at first sight appear local. In discussing the framework within which media law and policy ought to be nested therefore, this aspect needs to be borne in mind. Because its operations, and certainly its effects, transcend national borders, the media cannot, properly be purely regulated by domestic legal and policy frameworks. In negotiating and devising a national legal framework for the media, this point needs to be emphasised.

Media Rights and Structural Conflict

The perception of media rights as fundamental human rights (and hence rights of universal application) which do not operate by the consent of the state brings up two sets of conflicts. the first is an overt conflict, in which states —and especially states with authoritarian tendencies— protect against any framework through which their powers appear to be diminished. Such conflicts between the state and the media are common place, especially in Africa and the Third World generally. States response to such conflicts is to be repressive, and to muzzle the media even more through oppressive laws providing for the state's control of the media. Or, as is the case currently in Kenya, the state rejects applications for licences to operate media business such as radio¹³ and television. To the extent that the law requires the state's permission to be given before some

media operations like running radio stations can proceed, the law is a source of serious conflicts between the media and the state. The danger is that if the media believe that this state power must be so, then its negotiations with the state about media laws, is unlikely to be gravely flawed. It will be based on the assumption that the state gives media rights, and hence even a little relaxation of harsh laws will come to be seen as a victory for the media. This danger will remain until the media asserts its rights as fundamental rights, whose existence does not rely on the state.

The greater danger that exists, however, is that although the media legislation might be discussed and even agreed upon, the structural basis on which the media operates will not have changed at all. Hence, while beautiful media laws might be promulgated, there will still exist serious structural conflicts, on which such laws will be nested. Structural conflict is based on the whole structure on which relationships within society are embedded, and it gives rise to structural violence.¹⁴ Structural violence is complex, especially because its is not covert. It is also possible to persuade people that they are not in any state of violence, by offering bread crumbs to the supplicants: thus in such a case, the media and citizens might end up being happy slaves, unaware of the structural burden which they carry.

Where the structure is conflict generating, the legal superstructure will not yield peaceful relations between the actors involved. Hence, it is much of the essence in considering media law and policy, to address also the problem of structural conflicts which exist. The basis of these conflicts is the refusal to see media rights as human rights, and more so, as fundamental human rights. Once it is accepted that they are such, the structure on which any legislation will be founded will be firmer. And not only the more overt conflicts will be removed, but also the structural ones, which are probably more harmful.

Media Law and Policy in Kenya: Some Proposals

Media law and policy in Kenya needs to be reconceptualised along the lines argued in this paper. This reconceptualisation is fundamental to the defining of a more rational relationship between the media and the state. The basis of this new relationship is that media and the state are partners, and as such the media ought not to be seen as a supplicant. The basis of media legislation is the universal recognition of fundamental human rights, of which media rights are an important component.

The pillars of media law and policy in Kenya, as elsewhere, are defined by the relationship between the state, the media, and the citizen. Without this trilogy working in cooperation, any media law will be empty, and media policy mere rhetoric. In this trilogy, the state empowers the media in terms of political and social infrastructure, and the media in turn services the citizens, by empowering them to participate more effectively in national and international life. In being enabled to achieve its full potential, the media will in turn enable citizens to attain their potential, and to participate more effectively in national life.

An example from Kenyan experience illustrates how this trilogy has been broken up, even as task forces are busy defining media laws and policy. During the presentation of the budget in Parliament in Kenya in June 1997, opposition politicians disrupted the presentation by raising numerous points of order, and heckling the Minister for Finance. The proceedings were shown live on National Television. After about an hour, the live coverage was discontinued, presumably on higher orders. In that case, the fundamental relationships that should inform the state-media-citizen trilogy were all ignored. The media clearly considered it a duty to air the proceedings; the Government on the other hand considered it manifestly improper that citizens should see and listen to what their representatives do in Parliament. The media's rights, in this case, were abused and sacrificed at the alter of polarised party politics; the citizens' rights were completely ignored. The Government acted, in this

case, as if it is the giver of media rights, and acted as a censor of what citizens can see and hear. Negotiations within such a context are unlikely to yield much. This case illustrates how important it is for the whole discourse about the media in Kenya to return to the basics.

The heart of the trilogy of the state, media and citizens is the notion that all actors have certain rights, which are fundamental and universal. States and their governments are partners, and not the prime movers in the enshrining of these rights. This is the essence that the proposed media laws and attendant policies should endeavour to capture. If this is done, then the discourse on media law and policy will have been put firmly back on track.

Conclusions

This paper has attempted to define the conceptual and practical bases on which the discourse on media laws and policy in Kenya should be grounded. It has argued that, given the current state of the polarisation of the debate about media law and policy, there is urgent need for a return to the basics. Such a return can be defined by recognising and beginning to make the case for media rights as human rights, and especially as fundamental human rights.

The paper has argued that such a return to the basics entails perceiving the whole discourse within an internationalist and universalist framework, which transcends the power of states. Without this perspective being brought into play, there are bound to be many conflicts between the media and the state. Worse, the structural conflicts, which the current framework engenders will remain unattended, with severe consequences for the rights and freedoms of the media. In the current debates, the interlocutors are not able to see the woods for the trees. A return to basics will provide a broader canvass, on which the true picture of the media in Kenya can be more accurately painted.

References

- ¹These issues are raised briefly in Aidan White, "Confronting the Age Old Problem". *The Courier*, No. 158, July-August 1996, pp. 40-41:41.
- ²Indeed, one of the cornerstones of the modern state is the notion of territoriality and independence: see F.H. Hinsley. *Power and the Pursuit of Peace* (Cambridge: Cambridge University Press, 1967)
- ³Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- ⁴Comprising a set of four conventions, all of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
- ⁵Convention relating to the status of of refugees (28 July 1951).
- ⁶See J. Donnelly, *International Human Rights* (Boulder, CO: Westview Press, 1990)
- ⁷See an argument for limiting emerging human rights in P. Iston, "Conjuring Up New Human Rights: A Proposal for Quality Control", *American Journal of International Law*, Vol. 78 (1984) pp. 607-621.
- ⁸See for example Frances d'Souza, "Freedom of Expression: The First Freedom?" *The Courier*, No. 158, July-August 1996, pp. 42-43.
- ⁹See a discussion of the internationalisation of domestic conflict in John Burton. *Global Conflict: The Domestic Sources of International Crisis* (Brighton: Wheatsheaf Books, 1984)

- ¹⁰ There is no dispute about the process of globalisation: see Richard Falk, "State of Siege: Will Globalisation Win Out?" *International Affairs*, Vol. 73 (1997) pp. 123-136; but it is also argued that the power of the state has not diminished, except to the extent that states have allowed: see Eli Lauterpacht, "Sovereignty: Myth or Reality?" *International Affairs*, Vol. 73, No. 1 (1997) pp. 137-150.
- ¹¹ See various discussions of this process in Simon Serfaty (ed). *The Media and Foreign Policy* (London: Macmillan, 1990).
- ¹² See Edward Newman, "The Realpolitik and the CNN Factor of Humanitarian Intervention", *Paradigms*, Vol. 8, No. 2 (1994), pp. 71-91; see also David Gergen, "Diplomacy in a Television Age: The Dangers of a Teledemocracy" in S. Serfaty (ed). *The Media and Foreign Policy*, op. cit., pp. 47-63.
- ¹³ For example, while indigeneous entrepreneurs have been denied licences to operate radio and television statios, the BBC was allowed more frequencies, by none other than the President: see *Daily Nation*, 1 July 1997, p.1.
- ¹⁴ On structural conflict and structural violence, see Keith Webb, "Structural Violence and the Definition of Conflict". *World Encyclopaedia of Peace*, Vol. 2 (Pergamon Press, 1986).