

# **Freedom of Expression in Kenya and USA: A Comparison**

**By Faith W. Gathu**

## **Abstract**

The paper starts from the premise that freedom of expression is imperative for political, social, economic and personal development. It also notes, however, that the manner in which freedom is interpreted differs considerably from one region to another. The difference it points out, often manifests itself in the debate of complete government control of the mass media versus an independent press. The paper argues that the USA, which has a relatively longer history of political democracy spells out press freedom explicitly in the constitution as against the case in developing countries where freedom of press is not explicitly guaranteed by the constitution. It further argues that a country which has had a longer and relatively more stable form of government has a better chance of clarifying exactly what freedom of expression entails, and that freedom of expression is a dynamic process.

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# **Liberté d'Expression au Kenyan et aux Etats Unis d'Amérique: Une Comparaison**

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## **Résumé**

Cette communication est basée sur l'argument que la liberté de l'Expression est cruciale pour le développement politique, social, économique et personnel. Cependant, on remarque que l'interprétation de la liberté diffère d'une région à une autre. La différence se manifeste souvent dans la comparaison entre la masse média contrôlée par le gouvernement, et une presse libre. L'avis de Dr. Gathu est que si en Amérique on a beaucoup de liberté, c'est qu'elle connaît aussi une démocratie politique depuis longtemps. Cela au contraire des pays en voie de développement, où la liberté n'est pas explicitement reconnue ou garantie par la constitution. Cet exposé soutient qu'un pays qui connaît la stabilité politique pendant longtemps est mieux placé pour expliciter ce que c'est que la liberté de l'expression. Celle-ci se conçoit comme un processus dynamique, dans cette communication.

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## **Introduction**

Most countries and individuals believe that freedom of expression is important for political, social, economic, and personal development. The manner in which the concept of freedom is interpreted differs considerably from one region to another. This difference, which often manifests itself in the debate of complete government control of the mass media versus an independent press, will be the focus of this paper.

General comparisons will be made between the freedoms guaranteed by the American legal system and those offered by the newly independent countries of Africa. Using Kenya's political success as an example, it will be shown that:

- A country which has had a longer and relatively stable form of government has a better chance of clarifying exactly what freedom of expression entails and that
- Movement along the freedom of expression continuum is a dynamic process. The U.S. First Amendment and its counterpart Chapter V Section 79 (1) of the constitution of Kenya will be used as the basic reference point for this discussion.

## **Constitutional Background**

The legal foundation of American freedom of expression is embodied in the First Amendment which states that:

Congress shall make no law inhibiting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

According to Middleton and Chamberlain (1991) this categorical language embedded in the supreme law of the land gives Americans a broad right to speak and publish on matters of

conscience and consequence without fear of reprisal by the government.

The Constitution of Kenya Chapter V, Section 79(1) lays down the freedoms and rights that the citizens should expect:

Except with his own 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 communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The two statements mentioned above appear to advocate certain common freedoms but two institutions with which this paper concerns itself with—the press and the government—do not get special mention in the Kenyan case. This glaring difference has something to do with the historical and the political system within which each of the two nations operate.

### **A Brief Historical Background**

Historically, the development of the mass media in the Third World, particularly Sub-Sahara Africa, is substantially different from that of Western industrialized countries. According to Faringer (1991), the developing countries have not experienced mass media development in the context of booming economic growth or the rise of a powerful new class. In the Western industrialized countries the press emerged simultaneously with the rise of the middle class and accompanied the bourgeoisie's request for civil rights, such as freedom of speech and of the press.

In the U.S the wish of the people for individual freedoms was critical in the formulation of the legal statements of governance. In terms of ownership, the U.S. Radio Act of 1927 designated broadcasting a subject of federal control but left ownership to private, primarily local and commercial interests (Head, 1985, p.58). The broadcasters were required to renew their licences



periodically. This requirement served as a check and means of making broadcasters conform to the government's insistence to broadcast in the public's interest. The public interest regulation requires that those granted licences must ensure that views other than their own are presented, since the First Amendment right of the public to receive ideas is paramount. In what has become a media saturated society, the Act also provided government supervision of programming but prohibited censorship (Middleton and Chamberlain, 1991 p.550)

In contrast to this, according to Faringer (1991) the former attached great importance to the mass media as revolutionary tools in the liberation struggle. After independence, the media were regarded as a "nation-building" force. They were assumed to function as extensions of the governments and their objectives of social, economic, and cultural development. Most African governments intended to use the media as direct means to promote national development and integration, foster political stability, and educate. Essentially, the media were required to act as modernizing agents and the responsibility for what the media were to be, and to do, was placed squarely on the government's shoulders.

For this reason and also because of insufficient investment capital in the private sector to launch media institutions, most governments own and control the media. The Kenya government, for example, owns and controls almost all of the broadcasting media and most of the print media which reach only a fraction of the society— one radio set to every 12 persons, one TV set to every 120, one telephone per every 70 persons and daily newspaper circulation of 16 per 1000 of population, persons—mainly in the urban areas (World Almanac, 1992).

The stated role of the media in Africa differs considerably from the Western concept where freedom of the press is the main objective and where the press's most important function is to report objectively on the political development independent of government ideologies. In the U.S., for instance, "Congress was to make no law..." but as we shall see later, the government does

limit some freedoms of expression for some individuals in some instances.

John Merrill (1978), writing on the state of world media, notes that, press freedom is an ideal which no country has achieved. He also comments on the fact that in the 1980s, in a world wide context, press laws were proliferating, sanctions of many kinds were hindering the free workings of the press and press councils and other groups were moving to guide activities of the press (p.4). It can then be concluded that expressions and definitions of freedom are dependent on the type of political, economic and cultural climate in place at any given time. Further argues Ochieng (1992), freedom "is first and foremost, an an ideoecono-technological question and only secondarily and ideo-constitutional one" (p.2).

After Kenya's independence from Britain in 1963, the government officials who drew up the plans for media development were, like their contemporaries on the continent, more concerned about influencing people than imparting information. Kenyan editor, Hilary Ng'weno (1978) comments on the type of thinking about information and truth that guided policy making:

Information is not information until its probable impact on select audiences is ascertained. There is good information or information fit for human consumption, and there is bad information-that which must not be fed to the public. The truth or untruth of the information is of secondary importance and sometimes the greater the truth the greater the desire on the part of the government functionary to delay its dissemination, especially if the truth happens to be unpalatable (p. 130).

In the last decade, Kenya has experienced different forms of censorship and a serious lack of flow of information about key issues, for example vital population statistics, political candidates position on issues, and even more important for a democracy, the expression of opposing viewpoints. Foreign and local press has periodically gone through censorship in the form of election from the country or detention of journalists and confiscation of publication. After the attempted coup of 1982, for



example, parliamentary debates were heavily restricted as the government sought to ban discussions of certain topics most notably voting procedures (Widner, 1992, p.166). This type of control over the flow of information and a lack of effort in seeking the truth have both historical political and cultural underpinnings.

The roots of techniques of control exercised by the Kenya Government can be traced back to the repressive colonial era, a period during which political critics of the white settler regimes were summarily imprisoned, (Abuoga and Mutere, 1988). Many of the laws established during that period, including the one which makes it legal to detain government critics without trial, are still in the books. Moreover, they constitute the legal and customary foundation for the systems of controls which the government uses to manage the performance of the press and other forms of public and private discourse (Terrell, 1985).

On the other hand, in the Western world, protection of free speech has been philosophically advocated for several centuries. Three general justifications are advanced to explain the value of free speech: first, that free speech leads to the discovery of truth; second, that free speech is a basic individual liberty worthy of protection; and third, that free speech is essential to the operation of democracy (Paw, 1988 p.28). Banning of publications, licensing of journalists, and directly muzzling the press, and propagation of an opinion press cannot survive in a country that adheres to such principles.

### **Freedom and the Democratic Process**

The final justification for free speech that of perpetuating a democratic society will be used to highlight a few more contrasts between the American and the Kenyan contexts. Democracy like freedom is not an easy concept to define. There are, in the minds of most African leaders different, but equally viable, types of democracy. Kenya describes itself as practising a multi-party guided democracy which somehow has not permitted broad

participation. Conversely, the US prides itself as the model of true democracy.

It was the understanding of most African political leadership, including the current Kenyan President, that their young countries which have fragile political structures could not withstand endless scrutiny by the news media of the shortcomings of those in power or the failures of economic and social programs (Ng'weno, p.178). The media in such a situation ended up disseminating distorted information that was not particularly helpful for the formation of public opinion and for participation in the democratic process. At the same time the judicial system has also been weakened by party infiltration that it no longer has the "teeth" to act as a watchdog of the process and to develop constitutional means of protecting communicators. (Rukwaro 1992; Ochilo, 1993)

In contrast several, American judicial decisions have recognized the importance of free speech to democracy. One of the most famous statements of this principle came in Justice Brandeis dissent in *Whitney vs California* (1927):

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; and the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental of American government.

Additionally, the influential scholar, Meiklejohn believed that the First Amendment was designed to assist democratic citizens in making enlightened decisions by providing access to relevant information on issues. Paw (1988) notes that this political philosopher also believed that "... the citizens of the United States will be fit to govern themselves under their own constitution only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can



be said against them (p.31).

In the US where modernization and national unity were assumed to have taken place, there was greater faith and responsibility placed on the populace. Individuals were allowed or guaranteed freedom of action including the possibility of making mistakes. Instead of the media being used to harness the society's resources for some common goal, the assertion of rights for liberty, life, and pursuit of happiness were open to contemplation and debate. George Reedy (1984, p. 58) put it this way:

There are unquestionably many elements in American society that would prefer responsible press or a constructive press...meaning newspapers, magazines, and telecasts that would seek to promote "socially useful" goals. It is even possible that a majority of the people feel that way. What saves the free press under such circumstances is the inability of the majority to agree consistently on the goals that should be pursued.

The discussion has thus far shown that freedom of expression is determined to a great extent by the goals the freedom is supposed to achieve. In the African context we see the government's direct and over guidance of media use, while in the U.S. we see less government control. In light of current political developments in Kenya, political access will be used as an example to illustrate the possibility of a shift in the freedom continuum in which there might be more freedom of expression in the more participatory democracy currently being practised.

### **Political Access in the Two Systems**

Politicians and political parties have recognized the power the media possess to bring ideas, messages and propaganda to the citizens in general and to the voters in particular. In most African countries, leaders enjoy unlimited access to the media. When leaders monopolize access, they often deny it to their opponents. Head's (1985) description aptly describes the Kenyan picture: leaders exploit broadcasting to create personality cults not

content to be subject of the lead story in every newscast, they virtually mobilize entire broadcasting units to cover every movement of the head of state whether or not what they participate in would be regarded as newsworthy or not (p.10).

Since independence, Kenya has virtually been a single party state. This means that the question of politicians access to the media has not been debated in the courts. The ruling party, Kenya African National Union (KANU) and the members of parliament in senior government positions have routinely used the administrative machinery, including the media, to campaign for political positions. The launching of a party newspaper in 1989 assured favorable publicity for those in leadership. The privately owned newspapers (where opposition candidates could buy space) experienced decreased circulation as the government deprived them of vital advertising revenue (Faringer, 1991, p. 67). Purchase of broadcasting airtime was not an option for opposition candidates or supporters and obviously the state-run services have nothing to lose if airtime is not bought.

With the advent of multiparty politics in December 1991, and the possibility of national pluralistic elections the scene has changed. Opposition parties and pressure groups have been legalized and they are making demands for more freedom of expression. For example, according to *The Weekly Review* the then chairman of one of the opposition parties, FORD-Kenya Mr Jaramogi Oginga Odinga, filed a suit in the High Court against the government-owned Kenya Broadcasting Corporation (KBC). In his suit, Mr Odinga pointed to the unfair advantage that the incumbent administration was having over the other parties: the ruling party's annual delegates conference was broadcast live on KBC radio, yet FORD's annual delegates conference was given a total blackout (October, 23, 1992).

The Professional Committee for Democratic Change (PCDC) also issued a notice threatening to sue the corporation unless it changed its ways. The move by Odinga and PCDC was based on the legal requirement that the corporation provide independent and impartial broadcasting services. The PCDC said that after



monitoring KBC news it found that while a disproportionate amount of airtime went to reporting favorably about KANU, the little time spared for the Opposition was used in portraying them in bad light. (*Weekly Review*, October 23, 1992).

The incidents cited above may be the beginning of the ushering of an era in which court judgements can be used to produce precedents for political speech and media regulations. What has been written in the constitution concerning freedom of expression has an opportunity of moving from being abstract formulations to workable concepts. If the High Court goes through with these and more recent suits, communication scholars and future media practitioners will be afforded the means to better defining what the concept of freedom encompasses for the emerging Kenyan society.

A decade and a half ago, Peter Mwaura (1980) writing on the *Communication Policies of Kenya*, noted that communication policies can be moribund unless they are responsive to the fast-changing demands and needs of a society (p.94). The society, whose literacy level has increased to 50 per cent attending primary school seems ready to ask and answer questions about access to the media, such as the role of campaign groups, funding for candidates, and access of the media to political candidates.

Kenya is approaching a moment of testing the truth of a real democratic process that allows the press and the court system to play a crucial role in the nation's total development strategy. Terrell's (1985) observations concur with the current Kenyan situation: that when people become convinced that the press is a little more than a "sidekick" of the government or so severely circumscribed that it cannot be expected to present information unacceptable to government leaders, they invariably begin to distrust the press and the government (p.6). The opposition and pressure groups are striving to restore some semblance of trust that has slowly been eroded in these institutions, in the recent past.

According to Head (1985), in more democratic systems, like



the US, elected leaders are not above exploiting broadcasting for their own ends. Instead of simply ordering coverage by government-controlled media, however, they must use the arts of public relations to contrive voluntary coverage. Those running for office, having far less clout with the media than incumbents count on regulations to assure them fair access (p.102).

In the many decades that the Supreme Court has been in existence, it has stressed the importance of getting vital information to the public to facilitate the political decision-making process. It has developed tests doctrines, theories, and an Act that make it possible for all parties concerned to receive "fair" treatment and reasonable access. The public interest clause, for instance, requires that parties and their nominees be provided a chance to put their manifesto and arguments before the public.

The American system, according to Paw (1988) does not, however, approach the self-fulfilment principle of allowing free expression for all citizens. Access provisions of the Communications Act apply only to candidates. In *CBS vs Democratic National Committee* (1973), it was shown that a general right of access to anyone with a political idea has been specifically rejected. Also, if a candidate is not running for federal office, access may be cut off entirely if a station refuses to give access to any candidate (p.37). In this case, the court said that there was no First Amendment right to purchase time on the broadcast media.

Corporations supporting a public issue associated with a political candidate have, however, been allowed to express their support without violating the federal regulation that barred corporations from taking a position on issues associated with candidates in election. Citing *Bucky vs Valeo*, the court ruled that corporations may be prohibited from "express advocacy" of a candidate running for office but not from taking a position on issues in a campaign (Middleton and Chamberlain, 1992. p. 20).

Paw (1988) concludes that the American system is thus a compromise between competing interests with strong influence from the democratic free speech principle. The system is sensi-



tive to the needs of the broadcasters, the public and the candidates. No one part of this tri-part system has an absolute right, but each element is granted the maximum freedom for the system (p.39).

## **Conclusion**

From the beginning, in the US, the nature of freedom of expression and of the press was based on a culturally literate society within an independent economic structure. By contrast, the growth of the media in Kenya was in many instances a direct response to the presence of a new government in a dependent continent. In both nations, the role of the media as a formal opposition and the role of the media as a leader of government policy in uniting the country to work for democratic and social progress has served as the focal point of tension. In the U S the tension has routinely been worked out in the courts while in Kenya the process is just budding.

In Terrell's words, it is too soon to determine whether Kenya's leaders will prove capable of striking a functional balance between the proper exercise of state authority and the evolving concepts of free speech and constructive criticism. Nonetheless, it is already apparent that the government's openness regarding this extremely complex matter which is tied to its larger objective of winning support from the public for its development strategy will require the implementing of policies designed to permit greater freedom of the press.

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