

Sources of Kenyan Bill of Rights (Art. 32-34) and Media advocacy for the Rights and Freedoms Guaranteed in the ConstitutionMichael M Ndonye¹, Vivian Nyaata²¹Kabarak University, Kenya²University of KwaZulu-Natal, South Africa***Corresponding author***Michael M Ndonye***Article History***Received: 28.10.2017**Accepted: 09.11.2017**Published: 30.11.2017***DOI:**

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Abstract: This paper is an analysis of articles 32 (freedom of conscience, religion, belief and opinion), articles 33 (freedom of expression) and article 34 (freedom of media) under Chapter 4 (Bill of Rights) of the Constitution of Kenya. The aim is to identify international human rights instruments from which these articles' provisions were borrowed and domesticated. The questions to be answered are: (1) Which international human rights instruments contain provisions similar to articles 32, 33 and 34 of the Constitution of Kenya? (2) What are the exceptions when trying to claim the right to these freedoms? (3) What is the role of media in entrenching these freedoms and provisions? In addition (4), what are some cases in Kenya that relate to these provisions or their violations and how has media handled them? This being an analytical paper, the data collection was based on archival records (of media reports and investigative documentaries) where the main document is the constitution of Kenya. The Inter-pretivist approach is used to get sense and meaning of the selected articles of the constitution of Kenya. The paper demonstrates that the Kenyan constitution is a hybrid of various IHR instruments making it among the best law of the land, especially on the bill of rights. Like any other bill of rights provisions, the KBR has limitations that individuals and institutions need to understand in order to enjoy the provisions of the analyzed articles. It was also demonstrated that the media has the highest obligation, as a cultural institution to not only inform and educate the populace about the constitution but more on advocating for the adherence of the provisions by state organs and other institutions in the land as demonstrated by especially investigative reports of human rights violations in Kenya.

Keywords: Hybrid of international legal instruments, Domesticated, IHR instruments

INTRODUCTION

The Constitution of Kenya, promulgated in 2010, was as a result of a long journey and quest for a Constitution since independence. Although the Constitution is domesticated with rich laws “of the soil”, it can be referred to as a hybrid of international legal instruments. The Constitution has been lauded for containing the most elaborate bill of rights, encased in its Chapter 4. Most, of the provisions in the bill of rights are either directly or indirectly borrowed from the international human rights instruments. This paper traces some of the articles (Articles 32, 33 and 34) in the bill of rights and their roots in the international legal instruments and shows the role of media in advocating for such rights and freedoms.

Comparative analysis of selected articles**Article 32**

In the Kenyan constitution article 32 assures Kenyans “Freedom of conscience, religion, belief and opinion” [1]. In summary, the clauses in the article summarize that in Kenya, a person is guaranteed the above-mentioned freedoms as their right collectively or individually, and such a right may be violated when denied or otherwise forced on such a person. The clauses summarize that:

- (1) *Every person has the right to freedom of conscience, religion, thought, belief and opinion.*
- (2) *Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.*
- (3) *A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.*
- (4) *A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion* [2].

Interestingly, such provisions are found in many other human rights instruments, and they existed before the Kenyan Constitution was compiled, passed and promulgated. Such instruments include the Universal Declaration of Human Rights (hereafter UDHR), which was adopted by the UN General Assembly on the 10 of December 1948. Article 18 of the UDHR invokes the freedom of thought, conscience and religion and declares that such rights should be enjoyed in groups or individually thus:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance [3].

The International Convention on Migrant Workers and its Committee of 2005, article 12 provides for the rights of migrant workers in any state member of the UN and declares that freedom of thought; conscience and religion are inherently undeniable to migrant workers and their families. In such assurances, the Convention has it that any coercion meant to impair the freedom is a breach of rights according to the convention. However, the freedom is limited where necessary to protect the public, maintain order, health, morals and the fundamental rights of others. The relevant clauses provide that:

(1) Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching. (2) Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice; (3) Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others; and (4) States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Another instrument with similar provisions as the Constitution of Kenya is the International Convention on the Elimination of all forms of Racial Discrimination (hereafter CERD) of 205, article 5. The instrument is against any racial discrimination when guaranteeing human rights among the members of the United Nations. The elimination of the supposed discrimination and guaranteeing of such rights in the laws of member states are invoked by clauses 297 and 298, of CERD, which state:

(297) Article 5 obliges States parties to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, without distinction as to race, color, or national or ethnic origin.

The protections of the U.S. Constitution meet this fundamental requirement. The policy and objectives of government at all levels are also consistent with its provisions; (298). Importantly, article 5 goes even further, requiring States Parties to guarantee equality and non-discrimination on this basis “notably in the enjoyment” of a list of specifically enumerated rights. Some of these enumerated rights, which may be characterized as economic, social and cultural rights, are not explicitly recognized as legally enforceable “rights” under U.S. Law. However, article 5 does not affirmatively require States Parties to provide or to ensure observance of each of the listed rights themselves, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by domestic law. In this respect, U.S. law fully complies with the requirements of the Convention. In many of the areas covered by this article, however, serious problems exist.

A similar guaranteeing of the rights of the freedom of thought, conscience and religion are contained in the 1990 United Nations Convention on the Rights of the Child (hereafter UNCRC) and African Charter on the Rights and Welfare of the Child (hereafter ACRWC) which in article 9 states: “*Every child has the right to freedom of thought, conscience and religion*” (Article 9). Kenya ratified the Convention on the Rights of the Child on July 31, 1990 UNCRC in 1990 and the ACRWC in 2000.

Article 18 of the International Covenant on Civil and Political Rights (hereafter ICCPR) article 18 that contain provisions gives direction on the way the rights and provisions contained in the United Nations Charter should be reported, assured and ensured through regular reports by the member states agencies. The article thus analyses:

Pursuant to its responsibilities under the charter of the United nations in the field of human rights and fundamental freedoms, the economic and social council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the

present covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementations adopted by their competent organs.

Articles 33

Article 33 of the Constitution of Kenya, “provides for the Freedom of expression” define the constituents of freedom of expression and declare the right to freedom of expression to Kenyan people and it also outlines the limitations to such freedom: This article provides that;

(1) Every person has the right to freedom of expression, which includes— (a) Freedom to seek, receive or impart information or ideas; (b) Freedom of artistic creativity; and (c) Academic freedom and freedom of scientific research. (2) The right to freedom of expression does not extend to— (a) Propaganda for war; (b) Incitement to violence; (c) Hate speech; or (d) Advocacy of hatred that— (i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) Is based on any ground of discrimination specified or contemplated in Article 27 (4). (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others (p.27-28).

As far as article 33 of the Constitution of Kenya is concerned, article 13 of the International Convention on Migrant Workers and its Committee of 2005, article 13, provide the following rights, possible cases of violation and their limitations:

(1) Migrant workers and members of their families shall have the right to hold opinions without interference; (2) Migrant workers and members of their families 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 their choice (3)

The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others; (b) For the protection of the national security of the States concerned or of public order (order public) or of public health or morals; (c) For the purpose of preventing any propaganda for war; (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The Universal Declaration of Human Rights (UDHR) Article 19 provides for the rights to the freedom of opinion and expression. During the exercise of such right, the instrument provides that there should be no interference of any kind. Therefore, the article states 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.

Moreover, the international covenant on civil and political rights (ICCPR) article 19 gives the economic and social council mandate to hand over reports to the commission on human rights from the UN member states as provided for by previous articles. The ICCPR article 19 thus analyses that:

The economic and social council may transmit to the commission on human rights for study and general recommendation or, as appropriate, for information, the reports concerning human rights submitted by states in accordance with articles 16, 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20 of the ICCPR goes further gives member state parties to the covenant a right to submit comments to the economic and social council regarding article 19 recommendations thus:

The states parties to the present covenant and the specialized agencies concerned may submit comments to the economic and social council on any general recommendations under article 19 or reference to such general recommendation in any report of the commission on human rights or any documentation referred to therein. The international convention on the elimination of all forms of racial discrimination (CERD) of 2005, article 5 also relates to article 33 of the Kenyan Constitution regarding racial discrimination when assuring human rights by the members of the United Nations. Clauses 297 and 298 of the convention prohibit discrimination when guaranteeing human rights in the laws of member states as earlier stated.

The African Charter on the Rights and Welfare of the Child Article 7 also provides for the right of expression to any child provided he or she is capable of communication. It therefore states briefly “*Every child who is capable of communicating his or her own views should be allowed to express his or her opinions freely.*”

Articles 34

The constitution of Kenya Articles 34 “Freedom of the media” was vetted the most elaborate in Kenyan history. The article invokes the freedom and independence of the media. It outlines the boundaries for the state interference, broadcasting licensing procedure and hands the parliament the mandate to enact laws that affect media. It also Provides for the establishment of a body, which shall— (a) Be independent of control by government, political interests or commercial interests; (b) Reflect the interests of all sections of the society; and (c) Set media standards and regulate and monitor compliance with those standards. The Universal Declaration of Human Rights (thereafter UDHR) Article 19 is elaborate on the right of everyone to freedom of expression. Media is the channel through which all communication goes. Such media is print, electronic or otherwise are permitted under article 34 of the constitution of Kenya and this was already a provision in the UDHR 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.

The international covenant on civil and political rights (ICCPR) article 19 further provides an important part of article 34. The article on the economic and social council permission to give study recommendation reports from member states regarding human freedom to the commission on human rights. In this case, the reports on the freedom of media can be submitted thus helping to strengthen the provisions of articles 16 and 17 of the ICCPR and in accordance with article 18 of the ICCPR.

It is from these provisions that we now interrogate the role of media in Kenya in safeguarding these freedoms and rights for the good of the citizens.

Media role in advocating for the Guaranteed Rights and Freedoms

The society is strewn with mass media; from the radios we listen to, televisions we like watching, newspapers, magazines, billboards, pamphlets, and posters we meet and read; all bombard us with information and we cannot ignore them. According to Zgourides [4] “Mass media is communication—whether written, broadcast, or spoken—that reaches a large audience” [5]. Therefore, ignoring them will be at a cost because media unites society with its institutions such as the government, the law agencies and markets. We cannot isolate media from our culture without isolating ourselves from the rest of the world. Since it is a human right to be informed and educated, media ensures that we enjoy such right at the right time and in abundance. Nazli [6] argues that for the society to develop, people must be well informed.

Implementation of human rights liberates the society, and media has been called principally to advocate for this cause. There is no case of a society developing sustainably without information. Mass media is the only cultural institution capable of informing society objectively, sustainably and vigilantly when it is set free from control and intimidation. When people are not informed, they view the world in a nebular way, their impressions and expressions and conclusions are not informed. Media is best positioned to ensure people understand, appreciate and exercise all their human rights and freedoms.

It is through media that people can know their right to freedom of conscience, thought and religion [7]. For example, the media should not fail to inform without fear when state organs such as police among other security agencies violate the constitutional rights and freedoms for individual members of the society. On the other hand, the media has the mandate to teach and inform the society members and institutions on the need to protect and respect human rights and freedoms provided for in the law of the land. Media should not be sensational and emotive when reporting or handling cases of human rights otherwise, it will be drawn into inclinations and power struggles that compromise their role.

In Kenya, media is expected to assist in carrying out the mission of human rights activism through dissemination of information to “foster human rights, democratic values, human dignity and social justice” [8]. They should be objective and open-minded when giving information to ensure it is accurate and unbiased. As human right activists, journalists should ensure wide coverage of human rights issues and cases to entrench human security and promote social cohesiveness.

From 2008 through 2017, Kenyan media has been vigilant in reporting human rights violation issues. Against the general feeling that human rights apply to groups, human rights violation happens mostly at individual levels and to vulnerable persons and individuals who have no one to turn to. For example, cases of individuals being unable to settle hospital bills or getting funds for minor operations that when unattended, cost their lives may seem individual but media looks at them as significant with regard to individual’s right to basic health.

When media highlights such cases and well-wishers volunteer to help, the rights of such a person are secured. Sometimes, people's rights are violated because of their circumstances. However, through interventions by media there are always people willing to help. Some cases in point include a case of a bright student willing to be educated but lacking fees. A mother who has been confiscated by a local hospital for lack of treatment fee. A girl who is being married off young due to repugnant cultural gratification; a disabled child who is locked in the house for years because of stigma and so on. These are cases that journalists should develop a sharp nose for if they are to pass as fundamental human rights activists.

With the advent of mass media institutions, information access and gratification is instant. Journalists and people who work in media process and interpret information and then disseminate it to the members of society in comprehensible, understandable and consumable bits. Therefore, media should not give packages of facts and data that ordinary citizens cannot interpret; they make sure what they give makes sense to their listener, majority of whom are not highly educated.

Kenyan media played a significant role in helping Kenyans interpret their Constitution prior to the 2010 referendum. They interpreted the legal language in the document in a way that the laymen could get a picture of what they expected. This was vetted as the first Constitution in the world to be well understood by a people. Kenyan media has been at the forefront in interpreting information for its audience and this has given it a chance to be the most trusted institutions in the country.

Moreover, the media has a role to watchdog the powerful institutions in the society [9]. As they grapple for the latest and hottest news, they should tell people what the government is doing right; and what is doing that is not in the society's best interest. Media is the mouthpiece of the people and therefore, sometimes it has to work alongside civil rights activist to rebuke cases where the institutions that are not working in good faith. Kenyan media is always alongside civil rights activists when addressing issues of public interests such as when members of parliament are legislating in their own interests.

Examples are their determination of huge packs parks as salaries and allowances amidst straining wage bill, passing of bills that affect the welfare of the poor such as VAT Bill and so on. In these cases, media has the mandate as fourth estate to make sure members of the society make informed decisions at their work, lives, choices and even elections [10]. Indeed, the Media has the ability to effect change at local and international levels, individual and group levels, civil and public level and social and governmental levels.

Freedom of the media lies in its ability to perform its role in the society without external interference; whether from the government, other powerful and influential institution or an individual. The role of the media is to ensure accurate information is given at all times, to interpret such information objectively and guided by goodwill and to watchdog powerful institutions to check their excesses in the society. The freedom of the media comes with limitations and responsibilities. In this case, media should avoid violating some laws, or disseminating subjective content that may give institutions and individuals its watchdogs ammunition. This way, it will ensure its reputation and image remains to sustain society's loyalty and trust.

Sometimes, media finds itself in loggerheads with powerful institutions such as governments and corporate magnates when trying to perform such functions. In most cases, the media has to play smart and or force itself into some conflict to report the hidden truth to the society. As an institution media should always, treat government and other allied institutions as suspect because their aim is to ensure part of what they do be curtailed from the public domain especially whenever they act not for the best interest of the society. An institution will only feel insecure disclosing information that it has already analysed and found it is sensitive, inimical to its reputation and unfair to the society. Otherwise, no person, group of persons or institution can wills that its good acts be hidden from the public. However, institutions act sometimes on maxims that they wish should not become universal law, this makes them unethical, un-objective and exploitative, and the media comes in to ensure such information is brought to light. This way, media is able to force institutions to self-censure, to be extra vigilant when serving humanity, and to avoid violating human rights of whatever magnitude, dimension and measure.

Media Council Bill 2013

Kenyan media came together to advocate for the freedom of expression against the media council bill of 2013, which according to media analysts was defined in heavy terms as draconian, media gagging and intimidating. When the bill was passed in parliament, the opposition, the church and the human rights activists were all perturbed. The bill sought to have media be responsible for its content in case it misleads. Of great focus was that it would cost an individual

journalist up to 1 million Kenya shillings for misleading content and up to 20 million fines for a media house responsible for dissemination of misleading content (articles 35 (3) and (4) of the bill respectively). The clauses stated that:

(3) For any subsequent offence, the person shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding two years, or both. (4) Where any offence mentioned in subsection (1) is committed by a body corporate, the body corporate every principal officer or staff of the corporation directly responsible for the acts or omissions constituting the offence shall be liable to the fines and terms of imprisonment prescribed in subsections (2) and (3) (p. 24).

These charges are, according to the Bill, effective provided the accused is found guilty in a court of law. There was also a tussle regarding the communication and multimedia appeals tribunal whose powers were to include determining the content to be aired and to be left out by the media to the public. The contention was able to convince the president Uhuru Kenyatta who held the veto power to the bill to refer the Bill back to the parliament for amendments on November 11, 2013. He refused to sign the Bill on the account that it was contravening constitutional requirements and he sent it back to parliament for amendments. Section 37 of the Bill proposed the introduction of a new section 102 (3) and if communication and multimedia appeals tribunal be established.

According to the Bill, the membership of the selection panel is constituted from the government and media players only. While giving reasons as to why he returned the bill to parliament for amendment, he cited that the Bill as it was proposed and passed was non-independent of commercial, political and government interests. The clauses of the bill that were cited as contravening article 34 of the constitution include clauses 17, 37, 38 and clause 41. For example, clause 17 was aimed at amending section 461 of the act that sets the irreducible minimum of the local content in programming that a broadcaster should consider when airing on radio or television. Article 34 of the Constitution provides that media should be independent of the control by the commercial interests and external bodies such as the government and political players. The Bill was however discussed and passed with little of the proposed amendments on December 5, 2013.

It was felt that the passed provisions, especially the fines would intimidate journalists and media houses and ensure they do not report suspect information that institutions hide tangible evidence but whose circumstantial evidence is substantial. These are the cases with investigative reporting where questions are just posed and the listener is made to make conclusions. Passing of such a law would limit investigative reporting especially where tangible evidence remains the only way of winning a case. For example, a Westgate CCTV take would show Kenya Defense Forces KDF carrying paper bags. The authorities claimed that the bags were for carrying water but not looting from the mall; while common sense shows that no one can load paper bags with water; the owners of the shops in the mall had substantive evidence that their gold and other items of high value were missing.

The 2015 Digital Switch

The implementation of digital migration was set to be effected on December 13, 2013. Media fought with the Communications Authority of Kenya (CAK) on the deadlines. The CAK had reported that it would implement the switch order from analogue to digital broadcasting in phases. The aim was that by June 14, 2014 all parts of Kenya would have migrated to digital, a migration that will be ahead of the global deadline of June 17, 2015. However, the switch from analogue to digital was estimated to disadvantage over 500,000 households in Nairobi town only thus denying Kenyans access to information, which is their basic right [11].

Kenya has been rallying for all media houses to switch from analog transmission to digital transmission. The media houses were given a notice to have purchased digital systems, but on the expiry of the deadline, three leading media houses; NMG, STG, and RMG went to court to seek redress of the deadline [12]. These leading houses claimed that the shift is too costly for them and that most Kenyans did not have digital devices needed to have them connected to watch the content. The court dismissed their claim. On December 24, the three TV stations went off air for until around 6 PM when they signed a deal to have the switch off start on 26 December. The media houses argued that by switching to digital broadcasting the government will deny most Kenyans their right to information and thus violating their constitutionally founded rights and freedom of expression [13]. The communications commission of Kenya had pay TV firms to sell set top boxes that can decode digital signals that are broadcast on digital systems. As the deadline for digital switch neared, the government threatened to repossess all television broadcast frequencies owned by the Standard group, Royal Media Services and Nation Media group. On December 24, midnight the CCK disabled all analogue signals for the three media houses. The cabinet secretary for information, Fred Matiangi directed the CCK to write to the three media houses requesting them to provide good reasons as to why their frequencies should be retained.

In response to this, the media houses maintained that if government is allowed to decide who is entitled to broadcasting licenses and frequency, article 34 of the Constitution is contravened. Media freedom is so critical in a

democracy that most instruments of human rights have recognized this freedom as a right but not as a privilege to be granted by the government or any other institution or person [14]. They also argued that the purchase of set boxes and monthly subscription would be too expensive for Kenyans whose right of information is a constitutional right. This was construed because if effected, information will be a preserve of the rich and able in the society.

Later, the three media houses argued for their case and three appeal judges granted Kenyan viewers an extension of 45 days, until February 6. The court was not convinced as to why the government switched off the three main television transmitters on 24 December. The judgment was because the Constitution does not permit a state to interfere with any licensed broadcaster as they did with the analogue switch off.

Their main winning argument score was that very few of such devices were on supply and they were not enough. They also argued that their freedom of media as provided for in article 34 of the Constitution was being compromised given that a competitor media house was given the contract to ensure transmission of their content thus giving it an upper hand in determining what to give to the society and what not to give.

CONCLUSION

In conclusion, the Constitution of Kenya as promulgates in 2010 contains a Bill of rights, which is a hybrid of international instruments of human rights. This paper has identified and compared the provisions of some international instruments of human rights with articles 32, 33 and 34 of chapter 4 of the Constitution of Kenya. As in the Kenyan Bill of rights, there are also exceptions and limitations provided for in the other instruments of human rights because every right and freedom comes with responsibility. The paper has also demonstrated the role that media plays in entrenching these rights and to freedoms. More than that, and an argument has been developed on how the media analyses and presents issues objectively has analysed and how it can analyse the issues better. Finally, some cases in Kenya that have been seen to violate the rights to freedoms as provided for in the bill of rights have been identified and discussed. The way media has handles them has also been assessed. In the analysis, recourse has been made to historical facts and relatively recent issues that were considered at the time of writing the paper.

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