

LIMITATIONS ON MEDIA FREEDOM: ARE THE CURRENT  
MEDIA LAWS IN COMPLIANCE WITH THE CONSTITUTION OF  
KENYA?

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## DECLARATION

I, [ALI IKRAM], do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

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This dissertation has been submitted for examination with my approval as University Supervisor.

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## **DEDICATION**

This research project is dedicated to my mother, Adar Hussein and father, Ali Abdirahman Adan and to all my siblings, for their encouragement and understanding throughout the compilation of this study. To them, I am very grateful.

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## **ABBREVIATIONS**

KICA- Kenya Information and Communications Act

MCA- Media Council Act

MCK- Media Council of Kenya

UDHR- Universal Declaration of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ACHPR- African Charter on Human and People's Rights

CMAT- Communications and Multimedia Appeals Tribunal

CA- Communications Authority of Kenya

CCK- Communications Commission of Kenya

CIC- Commission for the Implementation of the Constitution

CS- Cabinet Secretary

# CHAPTER 1

## 1 LIMITATIONS ON MEDIA FREEDOM: ARE THE CURRENT MEDIA LAWS IN COMPLIANCE WITH THE CONSTITUTION OF KENYA?

### 1.1 BACKGROUND OF THE STUDY

Since independence, Kenya has undergone various situations that have led to Parliament enacting certain laws in monitoring what the media relays to the public. These factors include government censure of certain information, security issues such as terrorism and political issues.<sup>1</sup> In fact, a global media watchdog, Reporters without Borders, states that Parliament has played a major role in leading to a drastic drop of the Kenyan position on the World Press Freedom Index over the past few years, for example, there was a decrease from position 90 on the index in 2014 to position 100 in 2015.<sup>2</sup>

The Constitution of Kenya, 2010, recognises the importance of media freedom and in fact, upholds media freedom under Article 34. This article guarantees the freedom and independence of media.<sup>3</sup> Furthermore, with regards to independence, the Constitution provides that the State shall not interfere with the functioning of the media or penalize the media for opinions expressed.<sup>4</sup> However, all media freedoms under the Constitution are applicable with the caveat that the right does not extend to “propaganda for war, incitement to violence, hate speech or advocacy of hatred.”<sup>5</sup>

Moreover, the Constitution of Kenya, under Article 24, also provides for the general limitation clause regarding provisions under the Bill of Rights. Thus, for a right under the Constitution to be limited, the limitation has to be reasonable, justifiable and provided for in legislations.

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<sup>1</sup> Association on of Media Women in Kenya, *Laws Governing Media Practice in Kenya* (2014).

<sup>2</sup> Reporters without borders, 'World Press Freedom Index' (*Freedom of Information*, 2015) <[https://index.rsfb.org/#!/](https://index.rsfb.org/)> accessed 14 December 2015.

<sup>3</sup> Article 34 (1), *Constitution of Kenya* (2010).

<sup>4</sup> Article 34 (2), *Constitution of Kenya* (2010).

<sup>5</sup> Article 33 (2), *Constitution of Kenya* (2010).

Following the promulgation of the constitution in 2010, enactment of new laws to uphold the rights protected under the Bill of Rights was required by the 5<sup>th</sup> Schedule of the Constitution of Kenya. This included media laws to uphold the rights guaranteed under Article 34.

As a result, some media laws have recently been enacted to regulate the media. They include the Kenya Information and Communications Act,<sup>6</sup> (KICA) as well as the Media Council Act (MCA).<sup>7</sup> The Information and Communications Act created the Communications Authority of Kenya<sup>8</sup> (CA) that replaced the Communications Commission of Kenya (CCK) while the MCA established the Media Council of Kenya which sets media standards.<sup>9</sup>

However, there have been criticisms that these laws defeat the freedom of media instead of upholding their rights. These complaints have been seen through the institution of cases by media stakeholders at the courts with claims that the laws were unconstitutional,<sup>10</sup> reports by the Commission for the Implementation of the Constitution,<sup>11</sup> as well as by the analysis of the laws by non-governmental organisations, such as Article 19.<sup>12</sup>

In fact, the application of some provisions of these laws has been suspended by the Judiciary awaiting a hearing on the constitutionality of these laws.<sup>13</sup> More specifically, for example, in 2013, the Cabinet Secretary for Information and Communications was barred by the High Court from appointing a chairman and members to the Media Council and the Communications and Multimedia Appeals Tribunal as well as appointment of the Complaints Commission in order to uphold

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<sup>6</sup> Cap 411A, 2013.

<sup>7</sup> (Act No. 46 of 2013).

<sup>8</sup> Section 3, *Kenya Information and Communications (Amendment) Act* (2013).

<sup>9</sup> Section 6, *Media Council Act*, (2013).

<sup>10</sup> *Nation Media Group Limited & 6 others v Attorney General & 5 others* [2014] eKLR.

<sup>11</sup> Commission for the implementation of the constitution, 'Press Statement On The Kenya Information And Communications (Amendment) Bill' (*CIC*, 07 November 2013) <<http://www.cickenya.org/index.php/newsroom/press-releases/item/351-cic-press-statement-on-the-kenya-information-and-communications-ammendment-bill#.VrQ7YZN946U>>accessed 3 February 2016.

<sup>12</sup> Article 19, 'The Impact of Kenya's Legal and Institutional Frameworks on Media Freedom' (2014) p9.

<sup>13</sup> *Nation Media Group Limited & 6 others v Attorney General & 5 others* [2014] eKLR.

independence of the media as per the Constitution.<sup>14</sup> This case instituted by the various media stakeholders<sup>15</sup> was finally concluded and judgment given in 2016.<sup>16</sup> Therefore, the findings made by the court shall be referred to in the determination of the hypothesis presented herein.

More criticism was denoted when the Commission for Implementation of the Constitution analysed the Kenya Information and Communications Act and issued a press statement on the unconstitutionality of some of its provisions.<sup>17</sup> For example, the Kenya Information and Communications Act has been accused of interfering with independence of the media by enabling the Cabinet Secretary to have power over the appointment process of the leadership of the media regulatory bodies.

The CIC further criticised the MCA for unconstitutionally limiting media freedom through the enforcement of a statutory code of conduct, and the lack of independence in the selection panel of the Media Council and Complaints Commission being convened by the Cabinet Secretary for the Communications Ministry.<sup>18</sup>

Further, one might question whether the current media laws uphold the ingrained letter of the Constitution under Article 34<sup>19</sup> on freedom of the media. This can be illustrated by the fact that the Tribunal<sup>20</sup> formed under the Information and Communications Act has powers to impose punitive measures, which include what has been termed as “unproportionally hefty fines.”<sup>21</sup>

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<sup>14</sup> Nation Media Group Limited & 6 others v Attorney General & 5 others [2014] eKLR.

<sup>15</sup> These include the large media enterprises in Kenya, such as the Nation Media Group, Standard Limited as well as Royal Media Services and other bodies including [Kenya Editors Guild](#), the [Kenya Union of Journalists](#), and the [Kenya Correspondents Association](#).

<sup>16</sup> Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR.

<sup>17</sup> Commission for the implementation of the constitution, 'Press Statement On The Kenya Information And Communications (Amendment) Bill' (CIC, 07 November 2013) <<http://www.cickenya.org/index.php/newsroom/press-releases/item/351-cic-press-statement-on-the-kenya-information-and-communications-ammendment-bill#.VrQ7YZN946U>>accessed 3 February 2016

<sup>18</sup> Commission for the implementation of the constitution, 'Press Statement On The Kenya Information And Communications (Amendment) Bill' (CIC, 07 November 2013) <<http://www.cickenya.org/index.php/newsroom/press-releases/item/351-cic-press-statement-on-the-kenya-information-and-communications-ammendment-bill#.VrQ7YZN946U>>accessed 3 February 2016.

<sup>19</sup> Constitution of Kenya (2010).

<sup>20</sup> Section 102, Kenya Information and Communications (Amendment) Act (2013).

<sup>21</sup> Association on of Media Women in Kenya, *Laws Governing Media Practice in Kenya* ( 2014).

Article 19, a key non-governmental organisation player in the topic of freedom of the media has issued reports asserting that the newly enacted laws are contributing to diminishing media freedom.<sup>22</sup>

## 1.2 STATEMENT OF THE PROBLEM

The Kenya Information and Communications Act as well as the Media Council Act have been criticised for certain unconstitutional provisions. As justified below, the media is of utmost importance and plays a key role in a democracy. Accordingly, there is need to assess whether the current media laws<sup>23</sup> and the limitations stated therein comply with the threshold of the both the internal limitation clauses<sup>24</sup> as well as the external limitations<sup>25</sup> as outlined under the Constitution.

## 1.3 JUSTIFICATION OF THE STUDY

The media plays a fundamental role in today's society. A vibrant media, it has been said, is the backbone of a democracy.<sup>26</sup> It acts as a champion of democracy as well as a fountain of information for the public. Indeed, it is stated that the media reflects the democratic maturity in a country.<sup>27</sup>

The public access their information from the media and due to the choice of which news to air, the media has the role of shaping political reality which in turn translates to an agenda setting function.<sup>28</sup> This further enables public awareness in the activities of the government and ensures transparency<sup>29</sup> and the public interest being upheld.<sup>30</sup>

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<sup>22</sup> Article 19, 'The Impact of Kenya's Legal and Institutional Frameworks on Media Freedom' (2014) p9.

<sup>23</sup> Kenya Information and Communications Act and Media Council Act.

<sup>24</sup> Article 34 (1), *Constitution of Kenya*, (2010).

<sup>25</sup> Article 24, *Constitution of Kenya*, (2010).

<sup>26</sup> Karuti Kanyiga, *Kenya: Democracy and Political Participation in the Policy Process* 2014, 101.

<sup>27</sup> Jimmy Ocitti, *Media and Democracy in Africa- Mutual Political Bedfellows or Implacable Arch-foes*, Fellows Program Weatherhead Center for International Affairs Harvard University, 1999.

<sup>28</sup> McCombs E. Maxwell and Shaw L. Donald, 'The Agenda Setting Function of Mass Media' *The Public Opinion Quarterly* (1972), 176- 187.

<sup>29</sup> Puddephat A, 'The Importance of Self Regulation of the Media in Upholding Freedom of Expression' *UNESCO Series CI Debates N.9* (2011).

<sup>30</sup> Coronel, Sheila. "The Role of the Media in Deepening Democracy." *NGO Media Outreach* (2003).

In fact, as was rightly stated by Chacha Mwita and Luis Franceschi, *“The media is like a giant beast: Its teeth are persuasion, its eyes information, and its hands formation of public opinion. The media wins and loses elections. The media impeaches politicians and, on its own, the media watchdogs Government decisions and uncovers corrupt malpractices. The media is power we cannot and do not want to control; it is the neo-doctor of our current sick society. When the media watches, stake-holders tremble, suffer anxiety and run away if they can. But it is precisely that power that can save democracy.”*<sup>31</sup>

Therefore, it is of utmost importance to ensure that the media freedom in Kenya is not curtailed in any manner that is not provided for under Article 34 of the Constitution. This would require the enactment of legislations in conformity with the constitutionally guaranteed freedoms. It is therefore significant to ensure that the current media laws in place uphold the spirit and letter of the Constitution of Kenya, (the Constitution).

Thus, this study seeks to inform the amendments of the KICA and MCA to ensure they uphold media freedom in accordance with the Constitution.

#### **1.4 STATEMENT OF OBJECTIVES**

The objectives of this research study are:

- a) To evaluate the constitutional provisions on freedom of the media in Kenya and the limitations stated therein
- b) To analyse the limitations on media freedom under the Kenya Information and Communications Act as well as the Media Council Act
- c) To compare and contrast the limitations on media freedom in the Constitution vis a vis the limitations under the Kenya Information and Communications Act as well as the Media Council Act
- d) To determine the constitutionality of the Kenya Information and Communications Act and the Media Council Act

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<sup>31</sup> Franceschi L, Lumumba PLO, *The Constitution of Kenya 2010: A, Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 172.

## 1.5 HYPOTHESIS

The limitations of media freedom under the Kenya Information and Communications Act and the Media Council Act are not in conformity with the provisions of the Constitution on media freedom as well as the constitutional limitations on this right.

## 1.6 LITERATURE REVIEW

### 1.6.1 Rights of the media:

There is no doubt about the importance of press freedom in today's society. In fact, as John C. Merrill states, media freedom is essential in maintaining authentic journalism. This freedom ensures that the media system is creative and journalists become more self-assured in pursuing the truth. These characteristics of a media system are responsible for the media ensuring that they are responsible to the society.<sup>32</sup>

The Constitution guarantees the freedom and independence of all types of media.<sup>33</sup> Thus, the State is restricted from exercising control or interfering with the media or penalising any person in media for any opinion or content that is broadcast or disseminated.<sup>34</sup> State owned media has the responsibility of independently determining its editorial content, of being impartial and of affording fair opportunity for presentation of dissenting views or opinions.<sup>35</sup>

John Stuart Mill discussed on the importance of freedom of expression and by extension, freedom of the media. He states that freedom of opinion, and the freedom of expression of such opinion is at the core of the well being of mankind through the propagation of truth. Mill takes an extremely libertarian approach to freedom of speech as he emphasizes on the freedom to state and express one's opinion no matter how right or wrong, how moral or immoral it would be considered.<sup>36</sup>

In the Media Vulnerabilities Study Report, one of the points raised in the strategy towards the desired media in Kenya includes the need to enable efficient regulation of

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<sup>32</sup> Merrill C., Gade P., Blevens F., *Twilight of Press Freedom: The Rise of People's Journalism*, Routledge, 2001.

<sup>33</sup> Article 34 (1), *Constitution of Kenya* (2010).

<sup>34</sup> Article 34 (2), *Constitution of Kenya* (2010).

<sup>35</sup> Article 34 (4), *Constitution of Kenya* (2010).

<sup>36</sup> Mill, J.S., 1978. *On Liberty*, Indianapolis: Hackett Publishing, 11.

the media through building capacity of the Media Council of Kenya.<sup>37</sup> This can only be achieved if the legislations in place are amended and not left in legal limbo.

### **1.6.2 Limitations on media freedom:**

On the other hand, there are certain limitations on the rights of the media under Article 34. Thus, media freedom under the Constitution does not extend to:<sup>38</sup>

- (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).

Furthermore, Article 24 of the Constitution states that a freedom can be limited by law when that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Other factors to be considered when limiting a right include the nature of the freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure the enjoyment of rights by any individual does not limit the rights of other as well as whether there is a less restrictive way of achieving this purpose.<sup>39</sup>

As much as freedom of the media is acknowledged, so is the need for limitations upon media freedom deemed significant. William Blackstone argued that by no means was liberty of the press violated whereby criminal offences such as treason, sedition or scandalous libel were punishable by the law of the land.<sup>40</sup> What is essential in Blackstone's writings is the recognition that media freedom cannot be absolute.

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<sup>37</sup> Peter Mbeke, Wilson Ugangu, Rosemary Okello- Oriale, *The Media We Want- The Media Vulnerabilities Study Report*, Friedrich Ebert Stiftung, November 2010 p11.

<sup>38</sup> Article 33 (2), *Constitution of Kenya* (2010).

<sup>39</sup> Article 24 (1), *Constitution of Kenya* (2010).

<sup>40</sup> Blackstone W, *Commentaries on the Laws of England* Volume IV (1765-69) at 151-2. Quoted in Franklin M, *The First Amendment and the Fourth Estate*, Foundation Press, New York, 1981, 10.

John Stuart Mill recognised one essential limitation to the freedom of speech. He named it the *Harm Principle*, thus acknowledging that man had the right to state his opinion as long as it did not harm others within the political community.<sup>41</sup>

According to M Franklin,<sup>42</sup> contemporary restrictions on freedom of the press include;<sup>43</sup> the protection of the reputation of others through the law of defamation, protection of privacy, protection of creative activity, protection of the political process, protection of state secrets and preserving state security, protecting public welfare and protecting the marketplace.

### **1.6.3 Limitations of media freedom under the KICA and the MCA:**

In a report carried out on Media Control in Kenya,<sup>44</sup> it is put forward that the Kenya Information and Communication Act 2013 poses a severe threat to the functioning of the media.<sup>45</sup> The report states that there is restriction of press freedom and a breach of the constitutional protections through the ability of the Multimedia Tribunal to impose a fine of Kshs. 20 Million, which is termed as being *too high and unsustainable*. Thus, the Kenya Information and Communication Law should be amended, as freedom of broadcast media and of the press in general is capable of getting curtailed under this law.

A report by Committee to Protect Journalists discusses the new legislations introduced to uphold the constitution and states that these laws *undermine self-regulation and allow for harsh fines and even jail terms for journalists who commit perceived transgressions*. The Media Council Act is condemned for the imposition of a statutory code of conduct while the Kenya Information and Communications

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<sup>41</sup> Mill, J.S., *On Liberty*, Hackett Publishing, Indianapolis, 1978, 9.

<sup>42</sup> Franklin M, *The First Amendment and the Fourth Estate*, Foundation Press, New York, 1981.

<sup>43</sup> Kanjama C, 'Freedom of the Media and Kenyan Media Legislation,' in Franceschi L, Mwita C, (eds) *Media and the Common Good: Perspectives on Media, Democracy and Responsibility*, Law Africa Publishing Ltd, 2015, at 68- 70.

<sup>44</sup> *Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013*, *New Media and Mass Communication* Vol.33, 2015.

<sup>45</sup> Wanyama LL., *Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013*, *New Media and Mass Communication* Vol.33, 2015.

(Amendment) Act is criticised for undermining self-regulation through the government appointment Tribunal.<sup>46</sup>

Another issue that has been deemed to be capable of undermining independence of the media is in the Cabinet Secretary been granted the power to appoint and suspend the leaders of the media regulatory bodies including the Complaints Commission and the Communications and Multimedia Appeals Tribunal.

Thus, from the above literature review, the importance of media freedom has been stated coupled with the need for limitation on these rights. However, in Kenya, it has been contended that the limitations are becoming more and more restrictive to the freedom of the media.

## **1.7 INTERNATIONAL NORMATIVE FRAMEWORK**

This study is based on the freedom of the press as a right and focuses on the constitutionality of its limitations in Kenya. The constitutionality of such limitations in the KICA and MCA is analysed with the knowledge that the Constitution is the *grundnorm*; the supreme law of the land.

Article 2 (5) of the Constitution states that the general rules of international law and any treaty or convention ratified by Kenya forms part of the law of Kenya. Thus, an international normative framework on freedom of the media comes into application in Kenya.

This study will use this international normative framework as the baseline from which overall freedom of the media will be analysed. More specifically, the study will focus on the internal limitation provisions under Article 34 of the Constitution on Freedom of the Media as well as the external limitations provided under Article 24 of the Constitution. The international framework will also include the use of case studies from different jurisdictions relating to the controversial issues throughout the discussions in the following chapters.

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<sup>46</sup> Committee to Protect Journalists, *Broken Promises, How Kenya Is Failing To Uphold Its Commitment To A Free Press*, 2015.

With this in mind, this study will use the international legal framework as the underpinning factor in determining whether the laws on the media in Kenya are in line with the Constitution.

The Universal Declaration of Human Rights 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.*<sup>47</sup>

The International Covenant on Civil and Political Rights provides for the freedom of expression including the right to impart information and ideas of all kinds through any sort of media including print and orally. It also provides such limitations as the respect for rights and reputation of others and the protection of national security, public health and morals, whereas,<sup>48</sup> the African Charter on Human and People's Rights provides that everyone has the right to express and disseminate opinions within the bounds of the law.<sup>49</sup>

## **1.8 RESEARCH DESIGN & METHODOLOGY**

This research will use qualitative research. The research aims to discover the constitutionality of the KICA and MCA and because of this, it will use majorly use desk research. Primary sources entailing current media legislations, case law and constitutional provisions will be analysed. Secondary resources such as reports and articles will be used. The Internet will also be a major source of information, as various online resources such as Lexis Nexis and JStor will be utilised.

## **1.9 CHAPTER BREAKDOWN**

Chapter 1 will entail a general introduction to the topic of research. It entails the background to the study, statement of the problem, justification of the study, the research questions and objectives as well as the hypothesis on which the research

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<sup>47</sup> Article 19, Universal Declaration of Human Rights, 10 December 1948.

<sup>48</sup> Article 19, International Covenant on Civil and Political Rights, 16 December 1966.

<sup>49</sup> Article 9, African Charter on Human and People's Rights, June 27, 1981.

shall be based. It will also expound on the research methodology to be used in the course of the study and the international normative framework that will provide the lenses through which the study will be understood.

Chapter 2 will discuss the new media laws and their provisions. It will entail an analysis of the limitations under the current legislations. A thematic approach will be used in carrying out the analysis.

Chapter 3 will be on the constitutional test. It will discuss the constitutional provisions on media freedom and discuss each right in depth. It will further look at the limitations posed by the constitution, both internal and external limitations.

Chapter 4 will compare and contrast the limitations posed by both the media legislations and try to answer the question of whether they meet the constitutional standards or whether they fall short of the threshold set by the constitution.

Chapter 5 will conclude and give recommendations following the information obtained by the research.

## CHAPTER TWO

### 2 MEDIA FREEDOM AND ITS LIMITATIONS- MEDIA STATUTES IN KENYA

#### 2.1 Introduction

Chapter one introduced a background to this research study. It focused on highlighting the issue of media limitations under the Kenya Information and Communications (Amendment) Act (KICA) as well as the Media Council Act (MCA) and laid out the problem; analysing the media limitations in the media statutes vis a vis the constitution's internal and external limitations on the freedom of the media.

As highlighted in the previous chapter, there are several controversial provisions in the KICA and MCA. As such, there have been many complaints and criticisms by various stakeholders of the media.<sup>1</sup> These criticisms have culminated in the case of *Nation Media Group Limited & 6 others v Attorney General & 9 others*<sup>2</sup> being brought to court for analysis of the constitutionality of these provisions. In order for the constitutionality of these provisions to be discussed, the background to these two Acts will be given in this chapter and these provisions will be highlighted.

As these provisions have been particularly accused of infringing on the constitutional provision on the freedom of the media,<sup>3</sup> certain constitutional guarantees seem to be violated. For example, the question of the independence of the media and its regulators is questionable due to the fact that the membership of these bodies includes principal secretaries from three ministries who can be considered powerful government officials.<sup>4</sup> This issue will be discussed more in depth below.

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<sup>1</sup> We have seen criticisms by Committee to Protect Journalists, Article 19, and the Commission for the Implementation of the Constitution.

<sup>2</sup> [2016] eKLR.

<sup>3</sup> Article 34, *Constitution of Kenya (2010)*.

<sup>4</sup> Article 155, *Constitution of Kenya (2010)* which established this office provides that state departments shall be under the administration of principal secretaries. With the control of state departments, principal secretaries may indeed be termed as powerful individuals in the government.

Another issue brought to the fore is the multiplicity of the complaints mechanisms highlighted by the MCA which provides for a Complaints Commission<sup>5</sup> and the KICA which established the Communications and Multimedia Appeals Tribunal.<sup>6</sup> These two bodies seemingly possess similar jurisdictions<sup>7</sup> thus bringing into account the issue of multiplicity of these complaints mechanisms checking the conduct of journalists as undermining the freedom of the media.<sup>8</sup> Needless to say, this statement needs analysis and verification which shall be done in this chapter.

The final issue that will be discussed in this chapter will be the fines laid out under the KICA where the media enterprises can potentially be fined up to Kshs. 20 million and the individual journalists may be fined up to Kshs. 500, 000. Both these fines have been deemed to be excessive by various media stakeholders.<sup>9</sup> The effects that the imposition of such fines will have on the right to freedom of the media will also be discussed in this chapter.

However, this chapter will begin by laying out a brief introduction of the KICA and MCA to enable the reader to familiarize with specifically what each Act focuses on. Furthermore, it will entail a more in depth discussion of the limitations of media freedom under the Act as discussed above and thematically analyse the controversial provisions of the two statutes.

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<sup>5</sup> Section 27, *Media Council Act*, (Act No. 46 of 2013).

<sup>6</sup> Section 102, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>7</sup> Section 34, *Media Council Act*, (Act No. 46 of 2013) lays out the complaints that can be brought before the Complaints Commission whereas Section 102A, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013) lays out the complaints that can be brought before the Communications and Multimedia Tribunal. Both of these sections are identical in the mandates that the two complaints mechanisms possess.

<sup>8</sup> Various scholars have indicated that such multiplicity leads to administrative inefficiency (Connolly, C and Vaile, D, 'Communications Privacy Complaints: In Search of the Right Path,' *Australian Communications Consumer Action Network*, (2010) Sydney 25.) as well as jeopardizing of certain constitutional rights including the right to fair trial (Christos Rozakis, *The Right to a Fair Trial in Civil Cases*, Judicial Studies Institute Journal, (2004) p96.), which in Kenya, is guaranteed under Article 50 of the Constitution of Kenya (2010).

<sup>9</sup> They include the institution of a case in the Kenyan courts (*Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR) as well as article 19, <https://www.article19.org/resources.php/resource/37407/en/kenya:-new-laws-mark-major-setback-for-media-freedom>.

## 2.2 Background to the Kenya Information and Communications Act

The Kenya Information and Communication Act (KICA) is an Act of Parliament that was enacted to “*provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.*”<sup>10</sup> In particular, the Act was put in place to regulate and license the provision of telecommunication, broadcasting, radio and postal services. The CA was put in place to institutionalise the regulation of such service provision.

Following the amendment of the KICA in 2013, the Communications Commission of Kenya (CCK) was replaced by the CA.<sup>11</sup> The CA has the mandate to license and regulate postal, information and communication services.<sup>12</sup> The Amended Act provides that the CA shall be independent of government, commercial and political interests and shall comply with Article 34 of the Constitution in exercising its powers and performing its functions.<sup>13</sup>

In fact, during the unveiling of the CA in 2014, the highlight of the event was the emphasis placed on the CA as ensuring ‘a measure of regulatory independence and transparency.’<sup>14</sup> As has been remarked in a different context relating to the Independent Electoral Commission but nevertheless addressing the issue of independence, “...*the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...*”<sup>15</sup>

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<sup>10</sup> The long title, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>11</sup> Section 2 (1) (A), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>12</sup> Section 5, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>13</sup> Section 5A, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>14</sup> Communications Authority of Kenya, ‘A new dawn as Communications Authority of Kenya identity is unveiled’ (2014)

ac <http://www.ca.go.ke/index.php/what-we-do/94-news/259-a-new-dawn-as-communications-authority-of-kenya-identity-is-unveiled> on 18th January 2017.

<sup>15</sup> *Re the Matter of the Interim Independent Electoral Commission (IEBC)* [2011] eKLR.

Additionally, the KICA introduced new structures to media regulation. A Communications and Multimedia Appeals Tribunal was established<sup>16</sup> which has the authority to hear complaints<sup>17</sup> against journalists and media enterprises. The Tribunal can also hear cases alleging that a journalist or media enterprises' constitutional right of expression has been limited or interfered with.<sup>18</sup>

Following proceedings, the Tribunal can deliver decisions such as issuing a public reprimand against a journalist or media enterprise, publication of an apology by a media house or journalist, imposing fines on journalists or media houses found to have violated the Act's provisions, suspending or removing a journalist from the register, among other forms of sanctions.<sup>19</sup> Failure to adhere to the code of conduct by any journalist or media enterprise attracts a fine under the Act.<sup>20</sup>

Limitations corresponding to the provisions of the Constitution under Article 34 as well as Article 24 are also highlighted in the Amended Act.<sup>21</sup> With regard to limitations and restrictions, it has been argued that for regulation and restrictions to be legitimate, they must not put in jeopardy the right itself and that states may regulate the right but they must discharge that duty in a manner that does not impact or have the potential to impact on the freedom of speech and the media.<sup>22</sup>

### **2.3 Background to the Media Council Act**

The Media Council Act (MCA) is an Act of Parliament enacted and assented to in 2013. Its objective is *"to give effect to Article 34 (5) of the Constitution; to establish the Media Council of Kenya; to establish the Complaints Commission, and for connected purposes."* The Act applies to media enterprises, journalists, media

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<sup>16</sup> Section 102, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>17</sup> Section 102A (1) (a), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013) which includes complaints on any publication or conduct by a journalist.

<sup>18</sup> Section 102A (1) (b), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>19</sup> Section 102E, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>20</sup> Section 38, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>21</sup> Section 5B (3) *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013) states that media freedom shall be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

<sup>22</sup> Principles for the Regulation of Broadcasting Media, the Banjul Declaration of Principles on Freedom of Expression in Africa, the International Covenant on Civil and Political Rights, the New Zealand Law Commission Report, 2010, and the case of *Schneider v State*, 308, US 147 (1939).

practitioners, accredited foreign journalists as well as the consumers of media services.<sup>23</sup> The Act reinforces the provisions of the Constitution by providing that the values and guiding principles<sup>24</sup> enshrined in the constitution should be observed by the Cabinet Secretary of the Ministry of Information, Communication & Technology as well as the Council and Committees established under the Act.<sup>25</sup>

The Media Council of Kenya (MCK), is a co-regulatory body,<sup>26</sup> established<sup>27</sup> under the Act and which has the function of promoting and protecting media freedom and independence in Kenya as well as setting professional and ethical standards for journalists, media practitioners and media enterprises.<sup>28</sup> These standards are set out in the code of conduct found in the 2<sup>nd</sup> Schedule of the Media Council Act which includes principles such as accuracy, fairness, integrity, independence, confidentiality, privacy, among others.

One of the core issues to be discussed in this study is the multiplicity of the complaints mechanisms, that is the Communications and Multimedia Appeals Tribunal as well as the Complaints Commission. The Complaints Commission is established under the MCA.<sup>29</sup> The Commission is given the mandate to mediate or adjudicate disputes which are intra-media, between the media and the government or between the media and the public.<sup>30</sup> The Complaints Commission has indeed heard such cases. Additionally, the Commission has the responsibility to ensure adherence to the code of conduct for the practice of journalism as well as ensuring settlement of complaints against journalists and media enterprises.<sup>31</sup>

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<sup>23</sup> Section 4, *Media Council Act*, (Act No. 46 of 2013).

<sup>24</sup> Article 10 (2), *Constitution of Kenya* (2010) sets out these guiding principles to include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

<sup>25</sup> Section 3, *Media Council Act*, (Act No. 46 of 2013).

<sup>26</sup> A co-regulatory body meaning that this regulator is run by both the profession and the government jointly. This was introduced by the Media Act in 2007 to regulate appointment procedures of the MCK members.

<sup>27</sup> Section 5, *Media Council Act*, (Act No. 46 of 2013).

<sup>28</sup> Section 45, *Media Council Act*, (Act No. 46 of 2013).

<sup>29</sup> Section 27, *Media Council Act*, (Act No. 46 of 2013).

<sup>30</sup> Section 31, *Media Council Act*, (Act No. 46 of 2013).

<sup>31</sup> Section 31, *Media Council Act*, (Act No. 46 of 2013).

For example, *Francis Muthaura v The Standard Group and 2 Others* in which Ambassador Muthaura had complained that a story published by the Standard headlined “Kenya’s Secret plot against ICC” alleged that he was part of a secret “think tank” plotting to withdraw Kenya from the International Criminal Court (ICC). In a judgment delivered on 19th September 2011, the Commission established that no such think tank existed and ordered the Standard and the two reporters who wrote the story to apologize to Ambassador Muthaura and fined the newspaper Kshs. 250,000 for giving false information to the Commission and contravening the Code of Conduct for the Practice of Journalism in Kenya.<sup>32</sup>

In fulfilling its objective, the Commission is required to function independently of external influences. The Commission must adhere to the requirements of the exercise of judicial authority under Article 159 of the Constitution. Consequently, the Commission is expected to ensure that justice is delivered to all without delay and without undue regard to procedural technicalities whereas the use of alternative dispute resolution shall be promoted while upholding and preserving the purpose and principles of the Constitution.<sup>33</sup>

In addition to the above, the Act further sets out offences<sup>34</sup> and specifies the general penalties applicable.<sup>35</sup> However, following from the above, there are specific controversial provisions under the MCA as well as the KICA with regard to the principle of media freedom under the Constitution. They shall be discussed below.

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<sup>32</sup> Media Council of Kenya, ‘Complaints’ <http://www.mediacouncil.or.ke/en/mck/index.php/complaints-2> on 12th January 2017.

<sup>33</sup> Article 159, *Constitution of Kenya* (2010).

<sup>34</sup> Section 48, *Media Council Act*, (Act No. 46 of 2013) which states that 1) A person who—  
(a) without lawful justification fails or refuses to comply with the direction of the Council;  
(b) obstructs or hinders the Council in the exercise of its powers under this Act;  
(c) furnishes information or makes a statement to the Council which he or she knows to be false or misleading in any material particular; or  
(d) when appearing before the Council or any of its committees, for examination, makes a statement which he knows to be false or misleading in any material particular, commits an offence.

<sup>35</sup> Section 49, *Media Council Act*, (Act No. 46 of 2013) which states that an individual who has been convicted will be liable to pay a fine of Kshs 500, 000 or be imprisoned for a term not exceeding 6 months, or both, and if it is a corporation, it will be liable to a fine of Kshs. 20 million and its principal officer or staff directly responsible be imprisoned for a term not exceeding six months or both.

## 2.4 ISSUES OF CONCERN (controversial provisions)

### 2.4.1 Independence of the Regulatory Mechanisms

The need for independence of regulatory mechanisms, especially of the telecommunications sector, is achieved through independence from the government and political biases.<sup>36</sup> It has been argued that the degree of independence of a regulator should extend depending on the governance of the country; where a country's governance is weak, such as developing countries, there is need for more independence of regulators.<sup>37</sup> The media freedom is at stake if the government has any control in the regulator concerned, especially in countries with weaker democracy structures.<sup>38</sup>

Indeed, in order to understand whether or not the claim of non- independence of the media regulators is valid, the term '*independence*' must be understood. Independence can be said to be "the absence of pressures from political and industry interests," and its implementation "requires the adoption of a series of measures that will shelter the agencies against undue pressures"<sup>39</sup> which can be external or political pressures.

As was stated in the discussion above, in Kenya, independence clauses on Commissions as well as independent offices were put in place in order to safeguard against under influence on such commissions and offices by the members of the government. This is because such offices are meant to act as the 'people's watchdogs' and they must be independent in order to perform this role well.<sup>40</sup>

"Independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of

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<sup>36</sup> Ihala Walawwe Namal Bandaranayake, *Impact of the Regulator's Independence on the Telecommunications Industry* (2005).

<sup>37</sup> Samarajiva, R. (2002), Independence of multi-sector utility regulator, discussion forum, on World dialog on regulation for network economies, accessed at [www.regulateonline.org](http://www.regulateonline.org) on August 2016.

<sup>38</sup> Min, W., *Telecommunications regulations: Institutional structures and responsibilities, Working party of telecommunication and information service policies, Organization for Economic Cooperation and Development*, (2000) on [www.oecd.org](http://www.oecd.org).

<sup>39</sup> Magonette, P. "The Politics of Regulation in the European Union" in Geradin, D.; Muñoz, R.; Petit, N. (Eds.) *Regulation Through Agencies In The EU*, 2005.

<sup>40</sup> *Re the Matter of the Interim Independent Electoral Commission (IEBC)* [2011] eKLR.

orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance as such.<sup>41</sup>

The court laid down the safeguards that conjunctively work to attain such independence. It stated that this independence is first safeguarded by the fact that it is provided in the constitution. Other way include taking into consideration the procedures of appointing members to the said independence bodies, the composition of the board, that is, members who are appointed and other operational procedures of the body in question.<sup>42</sup>

If other jurisdictions are considered in line with the international normative framework that this study has adopted, case studies and principles from the European Union as well as the United States of America may be considered. In this regard, the significance of ‘independence of media supervisory authorities’ to enable ‘regulatory bodies to carry out their work transparently and independently’ is highlighted by the European Parliament.<sup>43</sup> The United States Federal Communications Commission,<sup>44</sup> when referring to independence of regulators stated that:

*“An effective regulator should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources.”*

In the Kenyan context, the KICA provides for the composition of the CA as well as the procedure of recruitment of board members of the CA whereas the MCA provides the same for the Media Council of Kenya. Nevertheless, such control and interference in independence can be seen from the presence of three Principal Secretaries, for the

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<sup>41</sup> Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

<sup>42</sup> Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

<sup>43</sup> European Parliament, *On the EU Charter: Standard Settings for Media Freedom across the EU*, the Resolution 2011/2246 (INI), Mar 25, 2013, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0117&language=EN> on August 31, 2016.

<sup>44</sup> US Federal Communications Commission, 1999.

ministries responsible for finance, information and communication as well as internal security in the Board of the CA. This composition is not much different from the un-independent CCK which was composed of 4 Principal Secretaries.

However, this leads to questioning of the independence of these entities as the procedure of selection as well as removal of members gives powers of appointment and suspension to the Executive, i.e. the President and the Cabinet Secretary for the Ministry of Information, Communications and Technology.<sup>45</sup> As per the legislations, appointment is done by a selection panel but the President appoints from the pool presented to him by the panel.<sup>46</sup> This does not seem to present any unconstitutional challenges. However, as regards suspension, the Cabinet Secretary may dismiss a member of the Board.<sup>47</sup>

One of the ways a regulator is deemed to independent is to maintain an *arms-length* relationship with other authorities which basically means distancing the commission from governmental influences.<sup>48</sup> However, it is questionable that the Board of the CA is composed of seven individuals, not being public officers, and 3 government officers of considerable influence, i.e. Principal Secretaries of several Ministries.<sup>49</sup> This affects the independence of the Boards as there is influence from major government players, that is, the Principal Secretaries. For a regulator to be effectively independent, it must be free from external political pressures, especially governmental pressure.<sup>50</sup> The fact that the Board is composed of 3 powerful governmental officers puts this principle in jeopardy.

For a regulator to be efficient and to perform its duties as required, the opportunities for undue influence to be exerted by other parties should be reduced by reducing potential of undue influence from government members. The key requirements of a

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<sup>45</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

<sup>46</sup> Section 6B, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>47</sup> Section 6D, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>48</sup> Mark A. Jamison, *Leadership and the Independent Regulator*, Public Utility Research Center University of Florida  
[http://warrington.ufl.edu/centers/purc/purcdocs/papers/0410\\_jamison\\_leadership\\_and\\_the.pdf](http://warrington.ufl.edu/centers/purc/purcdocs/papers/0410_jamison_leadership_and_the.pdf)  
on 15<sup>th</sup> September 2016.

<sup>49</sup> Section 6 (1), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>50</sup> US Federal Communications Commission 1991.

‘model’ for effective autonomous regulatory institutions are incentives,<sup>51</sup> managerial freedom, political autonomy and accountability, and checks and balances.<sup>52</sup> These means ensure that there is little reliance on the government in fulfilling the duties of the CA.

Nevertheless, it must be acknowledged that the regulator is not separate from the government. Independence, in this case, means that the media regulators should have the freedom to implement their policies and make decisions without undue influence from political or industry stakeholders.<sup>53</sup> The pressure is what is sought to be avoided to uphold independence of the media as enshrined in the Constitution.

#### **2.4.2 Multiplicity of Regulatory Mechanisms**

Two regulatory bodies are established under the different Acts; the Complaints Commission under the MCA, and the Communications and Multimedia Appeals Tribunal under the KICA. The two bodies both regulate broadcasting standards, monitoring compliance and punishment of journalists for any opinion, views, or content of any broadcast or publication.<sup>54</sup>

Nevertheless, the presence of two disciplinary mechanisms for journalists could lead to a potential situation whereby there is institution of a similar case in both the tribunal and the commission. It is clear that the right against double jeopardy may be possibly violated. However, there is a question as to whether the sanctions in the Acts are civil or criminal. It is important to consider this as the principle of *autrefois acquit/ convict* or double jeopardy would kick in in criminal sanctions whereas *res judicata* would be applicable in civil sanctions.

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<sup>51</sup> The need for adequate incentives will not be discussed in this paper.

<sup>52</sup> JL Guasch and Pablo T Spiller, *Managing the Regulatory Process : Design, Concepts, Issues and the Latin America and Caribbean story* (1st edn), World Bank, 1999, 70.

<sup>53</sup> Melody, W. H., (1997). On the Meaning and Importance of Independence in Telecom reform, *Telecommunications Policy*, 21(3), 195-199,

[www.sciencedirect.com](http://www.sciencedirect.com) on 10 August 2016.

<sup>54</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

Firstly, due to the identical and concurrent jurisdictions under the two Acts, this question arises. This was argued in the case of *Nation Media Group Limited & 6 others v Attorney General & 9 others*<sup>55</sup> where double jeopardy was argued by counsel. The court reasoned by acknowledging that there was an overlapping mandate in these two institutions and that this could lead to simultaneous institution of cases before both bodies. It highlighted the need for clarity in the law by specifying what jurisdiction and mandate each body possessed. However, the court did not see any threat or potential violation of the right against double jeopardy.<sup>56</sup>

If the fines laid out under both Acts were considered criminal sanctions, double jeopardy would be applicable. According to a report by Article 19, the fines laid out under the Acts, especially the KICA, for professional breaches are equated with criminal offences.<sup>57</sup> In the case of *Harry Lee Wee v Law Society of Singapore*, the threat of double jeopardy was considered and it was held that; “No one would dispute that the doctrine of *autrefois convict and acquit* is applicable to disciplinary proceedings under a statutory code by which any profession is governed.”<sup>58</sup>

Even if they were to be considered as civil financial sanctions,<sup>59</sup> the principle of *res judicata* would kick in. The case of *Connelly v Director of Public Prosecutions*<sup>60</sup> confirmed that the *res judicata* occupies the same position in civil cases as double jeopardy does in criminal cases.

Secondly, the right to fair trial must be considered. Indeed, the right to fair trial<sup>61</sup> is applicable in civil cases as much as in criminal cases.<sup>62</sup> In fact, the case of *Judicial Service Commission v Mbalu Mutava & another* acknowledged the possibility of double jeopardy if the Judicial Service Commission and the Presidential Tribunal both

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<sup>55</sup> [2016] eKLR.

<sup>56</sup> Article 50 (2) (o), *Constitution of Kenya* (2010).

<sup>57</sup> Article 19, ‘The Impact of Kenya’s Legal and Institutional Frameworks on Media Freedom’ (2014).

<sup>58</sup> [1985] 1 WLR 362.

<sup>59</sup> Law Reform Commission of Ireland, ‘Issue Paper “Regulatory Enforcement and Corporate Offences’ (2013)

<http://www.lawreform.ie/fileupload/PROJECT%201%20ISSUES%20PAPER%20FINAL%20rev5%20mess%20reply%20v1%20boxes.pdf> on 1 September 2016.

<sup>60</sup> (1964) AC 1254 at p 1356.

<sup>61</sup> Article 50, *Constitution of Kenya* (2010).

<sup>62</sup> Christos Rozakis, *The Right to a Fair Trial in Civil Cases*, *Judicial Studies Institute Journal*, (2004) 96.

heard on the same matter.<sup>63</sup> Judge Ouko further stated that the presence of two bodies hearing the same matter would be redundant.<sup>64</sup> Expound on this to make it clear as possible

Thus, it would only be prudent to acknowledge the overlap of jurisdictions of the two bodies and the issues such as fear of journalists reporting due to the two complaints mechanisms as well as the potential conflicts in jurisdiction resulting from this. Foreseeing such a complication, which could be considered as unconstitutionally limiting media freedom, and taking steps to prevent it, should be considered as this would prevent any potential infringement of constitutional rights.

### **2.4.3 Excessive Fines:**

The fines which are imposed<sup>65</sup> on media enterprises are at Kshs. 20, 000, 000 whereas the fine on individual journalists is set at Kshs. 500, 000. The Tribunal has the authorization to seize property as well as other assets to cover these fines if need be.<sup>66</sup>

These terms have been deemed to be excessive by certain players in the media profession and such professional breaches being regarded as criminal offences has raised questions.<sup>67</sup> In fact, such fines which have the capability to cripple media enterprises or individual journalists from performing their business has been termed as disproportionate.<sup>68</sup> The rationale for this assertion has been the fact that the effect of the fines on the businesses would lead to bankruptcy and thereafter closure of such businesses. Thus, the media sector would lack in pluralism<sup>69</sup> as the small media houses and minority newspapers would not be able to keep up. Because of the potential of these excessive fines being imposed, there is need to challenge the constitutionality.

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<sup>63</sup> [2015] eKLR.

<sup>64</sup> *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR.

<sup>65</sup> Section 102E, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>66</sup> International Press Institute, 'Kenyan Parliament urged to reverse new media law' at <http://www.freemedia.at/newssview/article/kenyanparliament-urged-to-reverse-new-media-law.html> on 20th November 2016.

<sup>67</sup> Article 19, 'The Impact of Kenya's Legal and Institutional Frameworks on Media Freedom' (2014).

<sup>68</sup> Article 24, *Constitution of Kenya* (2010).

<sup>69</sup> Helberger N, 'Media Diversity from the User's Perspective' 1 *Journal of Information Policy* (2011), 242.

## **2.5 Conclusion**

This chapter set out to introduce the statutes that are the focus of this study, that is, KICA and MCA. The controversial provisions of the statutes relating to independence of regulatory mechanisms, the multiplicity of complaints mechanisms and the excessive fines have been put forward.

The research question being answered in this chapter was whether the above provisions relating to the composition of the board of the CA, the ‘excessiveness’ of the fines and the overlapping mandate were indeed controversial and capable of being labeled unconstitutional.

As has been illustrated above, the answers to the above questions have all been in the affirmative. This means that the constitutionality of these provisions is indeed pulled into question. The constitutional provisions that are of importance in this study are found in Article 33 and 34 on media freedoms and its internal limitations, as well as article 24 on external limitations placed on human rights capable of being limited under the constitution.

Therefore, the next chapter will focus on constitutional provisions and the intentions of the drafters of the constitution. This will assist and set the stage for the analysis of the constitutionality of these provisions. Indeed, the above three issues have been most controversial as regards the media laws that were enacted in 2013. They indeed provide problems that must be analysed vis a vis the Constitution to determine their constitutionality. With this in mind, the next chapter will focus on the provisions of the Constitution relating to media freedom and its limitations.

## CHAPTER 3

### 3 WHY IS FREEDOM OF THE MEDIA PROTECTED IN THE CONSTITUTION OF KENYA?

#### 3.1 Background

In order to consider the constitutional provisions on the media and their significance in Kenya today, the history of media freedom must be discussed. The media in Kenya, was introduced by the colonialists who used it as a tool for their own dissemination of information and to maintain the status quo. As such, it did not do much to serve the indigenous people in the country.<sup>1</sup> Following this, the post- colonial era followed much in the footsteps of the colonial predecessors as the media was still fully controlled by the government, for example, the Minister for Information and Broadcasting was appointed by the President and the Ministry had a broadcasting station, Kenya Broadcasting Corporation (KBC) as a department.<sup>2</sup>

By 1993, very little had changed regarding the freedom and independence of the press as the government still had a major stake in the media houses as can be seen by the ruling party which owned a daily newspaper, the Kenya Times, as well as a television station.<sup>3</sup> Nevertheless, by this time, there were some smaller privately owned newspapers such as the Nation Newspaper and the Standard, but they had no protection from government interference.<sup>4</sup> However, as time progressed the privately owned dailies and media houses increased in power and became more successful than the government stations.<sup>5</sup> This was a positive step but it was apparent that there was need for promotion of media freedom and protection of the independence of the media from government interference. This was due to the fact that although newspapers such as the Daily Nation and East African Standard were privately

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<sup>1</sup> J. Omolo Ochilo Polycarp, Vol. 7 'Press Freedom and the Role of the Media in Kenya,' *African Media Review*, (1993), 21.

<sup>2</sup> J. Omolo Ochilo Polycarp, Vol. 7 'Press Freedom and the Role of the Media in Kenya,' 24.

<sup>3</sup> J. Omolo Ochilo Polycarp, Vol. 7 'Press Freedom and the Role of the Media in Kenya,' 24.

<sup>4</sup> J. Omolo Ochilo Polycarp, Vol. 7 'Press Freedom and the Role of the Media in Kenya,' 24.

<sup>5</sup> Odero M, 'Press in Kenya: an overview' in Odero M, Kamweru E (eds), *Media Culture and Performance in Kenya*, Eastern Africa Media Institute, 2000, 12.

owned, there were levels of direct and indirect control by the government as most of the advertising revenue came from the state, the largest advertiser at the time.<sup>6</sup>

This government interference clearly diminished the watchdog role that the media was capable of playing.<sup>7</sup> There was an unmistakable need to bring about media protection laws and this finally led to the culmination of a specific provision on the media in the Constitution.<sup>8</sup> This was a well-defined pointer of the rejection of Kenya's authoritarian history and a step taken in the direction of true democracy.<sup>9</sup>

The history of media freedom is essential in pointing out the problems encountered by the media that necessitated its eventual protection under the 2010 Constitution. It therefore, pinpoints the problems intended to be solved by this provision and the purpose behind the inclusion of this freedom under the Constitution. Further, the purpose and intention of this provision will be shown through the works of the Constitution of Kenya Review Commission (CKRC) as well as the Committee of Experts in finally guaranteeing this right.

Thus the research objective in this chapter is to analyse the provisions of the constitution on media freedom, the reasons behind such provisions and the limitations proscribed by the Constitution. By understanding the purpose and intention of this provisions, the stage is set for analysis of the constitutionality of the controversial provisions of the media statutes in Chapter four.

### **3.2 THE BILL OF RIGHTS IN THE PREVIOUS CONSTITUTION**

Under the previous constitution, the freedom of the media was apparently protected under the provision on freedom of expression.<sup>10</sup> This section stated that "*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*

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<sup>6</sup> Ogola, G 'The political economy of the media in Kenya: from Kenyatta's Nation Building Press to Kibaki's local-Language FM radio' *Africa Today* 57 (3) (2011) 81.

<sup>7</sup> P J Ochilo, 'Press Freedom and the Role of the Media in Kenya' *African Media Review* 7 (1993).

<sup>8</sup> 2010.

<sup>9</sup> Christina Murray, member of the Committee of Experts, Kenya's 2010 Constitution, 2013.

<sup>10</sup> Section 79 (1), *Constitution of Kenya* (1963).

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.” This was the nearest provision seen as protecting the media in Kenya. For example, the case of *Nation Media Group v Attorney General*,<sup>11</sup> which focused on assessing the limitation of the Films and Stage Plays Act indicated the application of Section 79 on freedom of expression specifically to the media. In this case, the court held that the limitation was unconstitutional and upheld media freedom.

However, section 79 also put in place extensive claw back clauses by stating that nothing in that the right could be held inconsistent or in contravention with any law reasonably enacted for defence, public safety and health, for purpose of protecting others etc.<sup>12</sup> As there were many caveats to this vague provision, the media was not considered as protected by this feeble section,<sup>13</sup> especially when contrasted with the 2010 constitution which puts in place succinct limitations that do not overly infringe on the provision on freedom of the media.

In fact, with the citizens’ agitation for democracy in Kenya, especially after the repeal of Section 2A of the previous Constitution, media reform and freedom came into focus. Thus, the government appointed various task forces with a specific one for the media, known as The Task Force on Press Laws,<sup>14</sup> which presented its first report in 1998. Its mandate was to review the then existing laws and to create a comprehensive framework to regulate a free, independent and responsible press.<sup>15</sup>

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<sup>11</sup> [2007] eKLR.

<sup>12</sup> Section 79 (2), *Constitution of Kenya*, (1963) which states thus “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision— (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or (c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

<sup>13</sup> Murugu L, ‘Media policy in Kenya’ in Odero M, Kamweru E (eds), *Media Culture and Performance in Kenya*, Eastern Africa Media Institute, 2000, 143.

<sup>14</sup> The Task Force on Press was set up by the AG through Kenya Gazette legal notice No. 6889 of December 24<sup>th</sup> 1993.

<sup>15</sup> Murugu L, ‘Media policy in Kenya’ in Odero M, Kamweru E (eds), *Media Culture and Performance in Kenya*, Eastern Africa Media Institute, 2000, 148.

In the course of the Task Force's work, various stakeholders were consulted including media practitioners, journalists, media owners, consumers and special interest lobbies such as community broadcasters as well as religious organisations.<sup>16</sup> Numerous issues concerning media freedom were raised by the stakeholders comprising the inclusion of the stakeholders in the media law making process, the need for recognition of the media specifically in the Constitution, the harmonisation of the media laws,<sup>17</sup> the repeal of laws which restrict media freedoms, the need for the basis of the law to be regulation rather than control as well as the need for laws to accord strong protection to media practitioners and their sources.<sup>18</sup> Other matters to be considered by the task force included professional standards, training of journalists, ownership of the media and the formation of a Press Council.<sup>19</sup>

In 2005, the CKRC published a report highlighting the importance of media freedom in Kenya. The CKRC highlighted that many rights in the previous constitution were not sufficient to ensure that the rights granted could be protected and enforced. For example, the Commission highlighted that the rights granted to the media were narrowly defined and the scope was limited. Thus, the CKRC made the recommendation that the rights of the media could be clearer and more effective if they were more detailed<sup>20</sup> to ensure general protection of the media, especially from interference by the government.<sup>21</sup>

Thus, seeing as these works can be considered as the *travaux preparatoires* of the constitution,<sup>22</sup> their requirements should indicate what the drafters of the constitution

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<sup>16</sup> Murugu L, 'Media policy in Kenya' in Odero M, Kamweru E (eds), *Media Culture and Performance in Kenya*, Eastern Africa Media Institute, 2000, 149.

<sup>17</sup> Many laws governed the media at the time including the Penal Code, Cap 63; Official Secrets Act; Defamation Act, Cap 36; The Books and Newspapers Act, Cap 111; Copyright Act, Cap 130; Preservation of Public Security Act, Cap 57; Public Order Act, Cap 56; Police Act, Cap 84 and Armed Forces Act, Cap 199.

<sup>18</sup> Report on Kenya Union of Journalists Press Bills Nairobi Workshop, held at the Professional Centre Nairobi, November 15- 16 1996.

<sup>19</sup> Murugu L, 'Media policy in Kenya' in Odero M, Kamweru E (eds), *Media Culture and Performance in Kenya*, Eastern Africa Media Institute, 2000, p148.

<sup>20</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 110.

<sup>21</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 330.

<sup>22</sup> As seen in Duranti F, 'New Models of Constitutional Review' 2014 and AS Sweet 'The Politics of Constitutional Review in France and Europe' 2007, the review documents leading up to the drafting of the constitution are indeed the *travaux preparatoires* of the Constitution.

intended to be the purpose and effect of the constitutional provisions on media freedom.<sup>23</sup>

### **3.3 DISCUSSIONS LEADING UP TO ARTICLE 34**

The drafters of the constitution incorporated article 34 into the 2010 Constitution to strengthen media rights in the country. In addition to the basic provision on the freedom of expression, which is normally interpreted to include the freedom of the press, Kenya went beyond to have a particular provision as a guarantee of media freedom.

In fact, in the constitution drafting process, the importance of media for the country was clear in the establishment of a Media Advisory Committee by the National Constitutional Conference Procedure Regulations.<sup>24</sup> The Committee's function included the accreditation of the media covering the conferences and to grant them access to records, the public sittings as well as broadcasting facilities. Consequently, the media was tasked with the major role of disseminating the information and the progress of constitution making as discussed by the CKRC,<sup>25</sup> for example through publication of the Commission's reports in both electronic and print media<sup>26</sup> and reporting the daily media briefings by the Conference's Chairperson, Vice Chairperson and members of the Media Advisory Committee.<sup>27</sup>

With regard to ensuring the democracy and independence of the media, as well as taking into account opinions from public participation, the CKRC concluded that the government should ensure liberalization of operations of print and economic media with the view that manipulation of the media, especially by political parties, would be curbed.<sup>28</sup> Yash Pal Ghai, the chairperson of the CKRC, indicates the importance of

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<sup>23</sup> M J. Bossuy, *Guide to the 'Travaux Préparatoires' of the ICCPR* (1987).

<sup>24</sup> Section 53, The Constitution of Kenya Review Act (Cap. 3A), The Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations (2003) and Legal Notice No. 42 of 2003.

<sup>25</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 363.

<sup>26</sup> Section 22 (2) (a), Constitution of Kenya Review Act (Act No. 2 of 2001).

<sup>27</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 362.

<sup>28</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 362.

the media in expressing views on public issues to maintaining a strong democracy in the country.<sup>29</sup>

Similarly, the Committee of Experts on Constitutional Review included public information and media as part of its programme in fulfilling its mandate. Through this programme which incorporated media engagement, the Committee was able to disseminate accurate information to the public on its activities<sup>30</sup> and to conduct civic education and public awareness to the members of the public, including media professionals.<sup>31</sup>

Further, there was a recommendation by the Committee of Experts put forward that a regulatory body for the media, headed by professionals from media services should be established.<sup>32</sup> This was an indicator that there would be a move towards self-regulation and giving the profession the capability to discipline its own members. This led to the establishment of the Media Council of Kenya,<sup>33</sup> although currently, Kenya can be considered as having in place a co- regulation mechanism.<sup>34</sup> Furthermore, it was also recommended that statutory restrictions on the media should be removed. However, this has not yet been achieved and its manifestation in the statutory code of conduct is highly controversial.

The above requirements all show the CKRC as highlighting the importance of media freedom of Kenya. It was geared towards putting in place provisions in the constitution that would guarantee this right. All the discussion found fulfillment in

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<sup>29</sup> Yash Pal Ghai: Analysis of Kenya's Proposed 2010 Constitution,' 35 accessed at <http://katibainstitute.org/Archives/images/banners/Ghai-%20Analysis%20of%20Kenya%E2%80%99s%202010%20proposed%20constitution.pdf> on 14<sup>th</sup> November 2016.

<sup>30</sup> The Committee of Experts on Constitutional Review, The Preliminary Report issued on the publication of the harmonized constitution, 2009, 25. And The Committee of Experts on Constitutional Review, *Report* issued on the submission of the harmonized draft constitution to the parliamentary select committee, 2010, 6.

<sup>31</sup> The Committee of Experts on Constitutional Review, The Preliminary Report issued on the publication of the harmonized constitution, 2009, 23.

<sup>32</sup> The Committee of Experts on Constitutional Review, The Preliminary Report issued on the publication of the harmonized constitution, 2009, 23.

<sup>33</sup> The Media Council of Kenya was established in 2004 as a self- regulatory body but this changed to a co- regulatory structure with the introduction of the Media Act of Kenya (2007) (repealed).

<sup>34</sup> Lohner J, Banjac S, Neverla I, 'Kenya's Media Landscape - Everyday Constraints and Structural Challenges' in Christoph Schmidt, J Deselaers (eds), *Kenya's Media Landscape: A Success Story with Serious Structural Challenges*, VISTAS Verlag, 2016, 18.

what is article 34 of the Constitution which guarantees freedom of the media as a constitutional right. The inclusion of this article in the Kenyan constitution was hailed as a turning point for the Kenyan media, through protection of the freedom of expression and freedom of the media “in a way the country has not seen before.”<sup>35</sup>

This article in the constitution requires that there should be no control or penalization over a person engaged in media services for their views and opinions as well as independence and impartiality of state owned media is ensured.<sup>36</sup> Regarding the provision restricting the State from penalizing media persons, the National Assembly unsuccessfully sought to amend this provision<sup>37</sup> when the Constitution was tabled before them.<sup>38</sup> This indicates the voice of the people to keep this article in place in order to ensure independence of the media. However, in a case before the courts, *Kwacha Group of Companies & Another v Tom Mshindi & Others*,<sup>39</sup> counsel tried to oust the jurisdiction of the court by arguing that this provision restricted the state from punishing media and the court was part of the state as defined by the Constitution.<sup>40</sup> The court rejected this argument. On the other hand, this provision can indeed be interpreted to prevent other arms of the government, including the Executive and the National Assembly, from interfering with the media.

Additionally, a body independent from government, political or commercial interests and which reflects the interests of all in society was to be established to set media standards and ensure compliance to those standards.<sup>41</sup> This has been visible under the Media Council Act (2013) which established the Media Council of Kenya and the Complaints Commission set to enforce those standards.

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<sup>35</sup> Lohner J, Banjac S, Neverla I, ‘Kenya’s Media Landscape - Everyday Constraints and Structural Challenges’, 2016, 15.

<sup>36</sup> Article 34 (1), *Constitution of Kenya* (2010).

<sup>37</sup> Article 34 (2) (b), *Constitution of Kenya* (2010).

<sup>38</sup> Committee of Experts on Constitutional Review, Final Report, 2010, 140.

<sup>39</sup> *Kwacha Group of Companies & Another v Tom Mshindi & Others*, Civil Suit 319 of 2005 [2011] eKLR.

<sup>40</sup> Article 260, *Constitution of Kenya* (2010).

<sup>41</sup> Article 34, *Constitution of Kenya* (2010).

Moreover, the Constitution provides for the application of international law, including general rules of international law<sup>42</sup> as well as treaties and conventions ratified by Kenya.<sup>43</sup> Thus, the provisions on freedom of expression in the Universal Declaration on Human Rights,<sup>44</sup> International Covenant on Civil and Political Rights<sup>45</sup> and the African Charter on Human and People's Rights would all be applicable in Kenya. They also contain limitations.<sup>46</sup> The Kenyan constitution specifically put in place a provision on media freedom, but in most countries of the world as well as in international conventions and treaties, press freedom would fall under freedom of expression, which would also be accompanied by limitations.<sup>47</sup> Thus, the relationship between freedom of expression and freedom of the media are clearly intertwined and aim for the same purpose.<sup>48</sup> However, the move to put in a specific provision on freedom of the media in the constitution has been deemed one of the strongest guarantees of its kind in sub-Saharan Africa.<sup>49</sup>

### 3.4 COMPARATIVE ANALYSIS IN THE DRAFTING OF A BILL OF RIGHTS

In deciding on the rights to be included in the Bill of Rights in the Constitution, the CKRC did a lot of comparative analysis to take into account best practices by other jurisdictions. Thus, in providing for an expanded bill of rights to include more rights

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<sup>42</sup> Article 2 (5), *Constitution of Kenya* (2010).

<sup>43</sup> Article 2 (6), *Constitution of Kenya* (2010).

<sup>44</sup> Article 19 UDHR (1948)- *'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.'*

<sup>45</sup> Article 19 (2), UDHR, (1948) *'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.'*

<sup>46</sup> Article 30, UDHR (1948)- *'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'*

Article 19 (3), ICCPR (1976)- *'The exercise of the rights provided for in paragraph 2 of this 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 reputations of others;*

*(b) For the protection of national security or of public order (ordre public), or of public health or morals.'*

<sup>47</sup> Article 9, African Charter (1998), freedom of expression is stated in these words: *'every individual shall have the right to express and disseminate his opinions within the law.'*

<sup>48</sup> Limpitlaw J, *Media Law Handbook for Southern Africa*, Volume 1, Konrad Adenauer Stiftung, 2012.

<sup>49</sup> Maina, H. O. "Constitutive": Enacting Media Laws That May Undo Constitutional Gains in Kenya? (2015).

than civil and political rights as found in pre- 1966 constitution, the rights to freedom of the media was included. The CKRC acknowledged that most jurisdictions do not give special recognition to the media. However, the Commission took into account the significance of the media in modern life, being the promotion of freedom of expression as well as the promotion of democracy. This would therefore prompt governments to unnecessarily interfere in the media's functions. With this in mind and the essential requirement of the 'liberation of airwaves' being taken into account, the CKRC decided that the media did in fact deserve special protection under the new Constitution.<sup>50</sup> Further, the CKRC highlighted the importance of this freedom being hand in hand with the concept of responsibility of the press, later to be embodied in limitation provisions in the Constitution.

### **3.5 PROVISIONS ON LIMITATION OF MEDIA FREEDOM**

However, the provisions on the rights of the media were not absolute.<sup>51</sup> No democracy has ever created any institution which is granted the power of unrestricted debate.<sup>52</sup> It was clearly discussed that media freedom should be limited within reasonable boundaries. This focus on putting in place limitations was demonstrable in the report whereby the public explicitly stated that such restrictions should be put in place. For example, the media should be prevented from showing what was termed as *immoral programs*, the advertisements of alcohol and cigarettes must be seized, that there should be impartial coverage of political campaigns and that there should be restriction on unfair or impartial reporting by media houses.<sup>53</sup>

As much as the above demands by the public may be questionable from the professional point of view, they nevertheless indicate the necessity on limitations of the right to media freedom.<sup>54</sup> An analysis of the proposed constitution highlighted that

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<sup>50</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 118.

<sup>51</sup> C Kanjama, 'Brief Outline of the Issues Circumscribing the Freedom of the Media,' in *Media and the Common Good: Perspectives on media, democracy and responsibility* (eds- Chacha Mwita, Franceschi L) 2015 68.

<sup>52</sup> Githu M, Wachira M, *In Search of a Constitutional Test for Reconciling the Contempt Power with the Freedom of Expression*.

<sup>53</sup> Constitution of Kenya Review Commission Report, *Final draft*, 2005, 307.

it would be unreasonable for people to have absolute rights and that there can be restrictions put in place by law as long as they were reasonable and justifiable.<sup>55</sup>

The Constitution provides for rights that can't be limited including the freedom from torture, cruel, inhuman, or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial, and the right to an order of habeas corpus;<sup>56</sup> freedom of the media is not one of them. It requires this right to be limited in order to protect the rights of others,<sup>57</sup> for example, through defamation and privacy laws. As per article 33 (2) of the 2010 Constitution, limitations were indeed put in place to restrict propaganda for war, incitement to violence, hate speech, and advocacy of hatred, which includes discrimination or ethnic incitement, or incitement to cause harm.

However, any limitations placed by the government would also fall under the purview of article 24 of the Constitution which provides the extent to which any right contained in the Bill of Rights can be limited. This includes the requirement that the limitation must be reasonable and justifiable in an open and democratic society and based on human dignity, equality and freedom.<sup>58</sup>

### **3.5.1 Reasonable or justifiable in an open and democratic society?**

One of the requirements on imposing external limitation on rights under Article 24 of the Constitution is where such a limitation is reasonable or justifiable in an open and democratic society. It is important to determine what this means. It has been argued that a reasonable limitation would be one that has an objective of sufficient importance, is rationally connected to the objective; and which should limit the right as little as possible, and whose effect on limitation of rights is proportional to the

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<sup>55</sup> Yash Pal Ghai: Analysis of Kenya's Proposed 2010 Constitution,' 35 accessed at <http://katibainstitute.org/Archives/images/banners/Ghai-%20Analysis%20of%20Kenya%E2%80%99s%202010%20proposed%20constitution.pdf> on 14<sup>th</sup> November 2016.

<sup>56</sup> Article 25, *Constitution of Kenya* (2010).

<sup>57</sup> Waruguru K, *Constitution of Kenya*, Kenya Country Report, Institute of International and Comparative Law, 2012,15 [http://www.icla.up.ac.za/images/country\\_reports/kenya\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf) on 14 November 2016.

<sup>58</sup> Article 24, *Constitution of Kenya* (2010).

objective to be attained.<sup>59</sup> Regarding proportionality as a way to measure justifiability or reasonableness, the nature of the proportionality test would vary depending on the circumstances.<sup>60</sup> Both in stating the standard of proof and in looking at the requirements of proportionality, the Court is careful to avoid rigid and inflexible standards.<sup>61</sup> In considering proportionality, there must be substantive proportionality<sup>62</sup> as well as procedural proportionality.<sup>63</sup>

To establish that a limitation is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom.’<sup>64</sup>

In many cases, it has been stated that what is ‘reasonable required in a democratic society’ cannot be easily determined.<sup>65</sup> However in the case of *NTN PTL LTD AND NBN LTD v Tehstate*,<sup>66</sup> the Supreme Court of Papua New Guinea stated thus: “... *the elusive concept of what was reasonably ‘justifiable in a democratic society’ could not be precisely defined by Courts, but regard had to be given to a ‘proper respect for the rights and dignity of mankind. The proper test was an objective one and, taking into account the interests of everyone in a democratic society...’*”

A common way of determining whether the limitation of right is through asking whether the law is proportionate.<sup>67</sup> It is important to highlight what the proportionality

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<sup>59</sup> *R. v. Chaulk* [1990] 3 S.C.R. 1303.

<sup>60</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>61</sup> Chaskalson et al, *Constitutional Law of South Africa*, Juta, 1996, 769.

<sup>62</sup> The limit must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. Can only be considered of sufficient importance if it relates to concerns which are substantive and pressing in a free and democratic society- *R v Oakes* [1986] 1 SCR 103, 69-70.

<sup>63</sup> ‘Firstly, the means to limit the law must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’- *R v Oakes* SCR 103, 69-70

<sup>64</sup> *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR quoting *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295.

<sup>65</sup> *Nation Media Group v Attorney General* [2007] eKLR.

<sup>66</sup> [1998] LRC.

<sup>67</sup> Australian Law Reform Commission, ‘Justifying Limits on Rights and Freedoms’ at <https://www.alrc.gov.au/publications/justifying-limits-rights-and-freedoms> on 12 January 2017.

test is. The accepted standard of the proportionality test is composed of four sub-components which include:<sup>68</sup>

1. Does the legislation limiting the right pursue a legitimate objective which is sufficiently warrants limitation?
2. Are the means being used suitable to the objective?
3. Are there alternative means of achieving the same objective?
4. Do the benefits from the limitation outweigh the detrimental effects of the limitation; i.e. is there a balance between the public interest and private rights?

If all the questions above are answered in the affirmative, a limitation of a constitutional right will be constitutionally permissible.<sup>69</sup> In fact, in the case of *Nation Media Group v Attorney General*,<sup>70</sup> the court used the proportionality test to determine whether the Gazette Notice faulted for an unconstitutional limitation was valid. The court held that the notice was arbitrary and did not satisfy the principle of proportionality, therefore being held unconstitutional. Hence, a limitation of a constitutional right is permissible only if;

- ‘(i) it is designated for a proper purpose;
- (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
- (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
- (iv) there needs to be a proper relation (“proportionality *stricto sensu*” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.’<sup>71</sup>

Indeed, in the South African case of *S. Makuangane and another*,<sup>72</sup> it was held that the limitations of constitutional rights should be for a purpose that is necessary in a

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<sup>68</sup> G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, 2014.

<sup>69</sup> G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, 2014.

<sup>70</sup> [2007] eKLR.

<sup>71</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012, 3.

democratic society with this being determined by weighing up of competing values and ultimately an assessment based on proportionality. Therefore, the limitations on freedom of the media in Kenya, shall be analysed from the perspective and application of the constitutional, scholarly and judicial requirements discussed above.

### **3.6 Conclusion**

As has been indicated above, media freedom in Kenya has come a long way. From unlimited government intervention and interference to a specific guarantee on media freedom in the constitution, the right to freedom of the media has been deemed extremely significant in a democracy.

The research objective of this chapter was to highlight the media freedom provisions, the intention behind these provisions in the Constitution and the limitations on the right set therein. The discussion by the CKRC as well as the Committee of Experts prior to the addition of the provision to the constitution has shown that the media stakeholders as well as the general public find that this right must be put in place to ensure democracy is upheld. The media would also ensure that the public is aware of what the government is doing therefore promoting access to information.

However, at the same time, the need for limitations to be placed on the freedom of the media was not overlooked by the CKRC and Committee of Experts determinations. This found culmination in the Constitution which places internal limitations on the freedom of media against hate speech, propaganda for war, advocacy of hatred or incitement to violence. Indeed, the freedom of the media was finally guaranteed under the constitution but the limits placed upon it for responsible journalism must also not be overlooked.

As has been pointed out, the external limitations placed on the right must be reasonable and justifiable in an open and democratic society. This means that the limitation must be compliant with the constitution and would pass the proportionality test if it were for a legitimate objective and the means used are suitable to attain the

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<sup>72</sup> [1995] 6 BCLR 665.

objective. There must not be alternative means of achieving this objective and the benefits from the limitation must outweigh any detrimental effects that it has.

Therefore, in the analysis and consideration of the constitutionality of any media laws in the following chapters, the provisions of the constitution as well as the permissible limitations, both internal and external, must be taken into account vis a vis the provisions in the concerned media law. In the next chapter, the media limitations will be looked at and subjected to the proportionality test to determine the validity and constitutionality of the limitations.

## CHAPTER 4

# 4 ANALYSIS ON CONSTITUTIONALTY OF THE CONTROVERSIAL PROVISIONS IN THE MEDIA STATUES

### 4.1 Introduction

With the 2010 Constitution, there were guarantees of media freedom given that were not in existence before. However, these have been de facto repealed due to the media legislations that are the subject of this study as the KICA and MCA have given the executive power to regulate the media and to impose huge fines.<sup>1</sup> These provisions have been termed as “an antithesis to freedom of media”<sup>2</sup> and the enactment of such legislations have been referred to as ‘constitutive.’<sup>3</sup>

The previous chapters touched on the two main tenets concerning the notion of limitation of media freedom in Kenya. The media laws have been discussed in detail outlining the various provisions that are deemed questionable. On the other hand, the grundnorm, being the Constitution has been looked at with a focus on articles concerning the internal and external limitations on media freedom. These limitations are what will be used as a benchmark in questioning the constitutionality of the media provisions as highlighted in both the Kenya Information and Communications (Amendment) Act (KICA) as well as the Media Council Act (MCA).

As has been mentioned in Chapter 1 of this study, the High Court made deliberations on the constitutionality of some of the provisions which will be discussed herein. This was in the case of *Nation Media Group Limited & 6 others v Attorney General & 9*

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<sup>1</sup> Lohner J, Banjac S, Neverla I, ‘Kenya’s Media Landscape - Everyday Constraints and Structural Challenges’ Mapping structural conditions of journalism in Kenya, 2016, Media, Conflict and Democratisation (MeCoDEM).

<sup>2</sup> Simiyu, Tome F, ‘Media Ownership and the Coverage of the 2013 General Election in Kenya’ *Global Media Journal: African Edition* 8 (1), (2014) 127.

<sup>3</sup> Maina, Henry O. (2015): “Constitutive”: Enacting Media Laws That May Undo Constitutional Gains in Kenya? in Christoph Schmidt (Ed.): *Kenya's Media Landscape: A Success Story with Serious Structural Challenges*. Leipzig: VISTAS Verlag, 28–45.

*others*.<sup>4</sup> In the analysis presented below, this decision by the High Court will be taken into account.

Therefore, the research question that this chapter seeks to answer is ‘are the controversial provisions in KICA and MCA indeed constitutional?’ Thus, the constitutional provisions on media freedom and the acceptable limitations will be considered vis a vis the laws in place to check the conduct of the media.

The international legal normative framework will also be considered in addition to the Constitution and the relevant domestic legal framework. The three main issues of consideration, being concerned with the independence of the regulatory mechanisms, the multiplicity of regulatory mechanisms concerned with the media and the excessive fines postulated by the media statutes will be analysed vis a vis the Constitution and accepted international custom. As such, case studies from various jurisdictions which have nevertheless ratified similar international instruments to Kenya, will be utilized. These cases will be instrumental as the Constitution puts forward that any international laws which Kenya has ratified will form part of the laws of Kenya.<sup>5</sup>

## **4.2 Constitutional Interpretation**

Before delving into the core of this chapter, it must be highlighted that this study has highly, and rightly, adopted the broad interpretation of the Constitution. Hence, in the analysis of the constitutionality of the statutory provisions in question, the liberal approach to interpreting the constitution, as laid down in the case of *Timothy Njoya v Attorney General*<sup>6</sup> is used. In this case, the court was held that the constitution is not similar to an Act of Parliament and therefore, should be given a broad and purposive interpretation as opposed to a literal interpretation. The reason advanced by the court was that this liberal interpretation gave effect to the fundamental values and principles found in the constitution. In fact, Lady Justice Kasango stated thus: “*I therefore reject the contention that the constitution of Kenya is to be construed in the same way as*

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<sup>4</sup> [2016] eKLR.

<sup>5</sup> Article 2 (5), Constitution of Kenya (2010).

<sup>6</sup> *Timothy Njoya and 6 others V the Attorney General and 4 Others*, Nairobi High Court Miscellaneous Civil Application Number 82 [2004] eKLR.

*any other legislative enactment. In this judgement I shall proceed to apply the rule of construction of the constitution of Kenya in a broad and liberal manner.”*

Therefore, in considering the freedom of the media and the acceptable limitations contained in the constitution, the liberal approach to interpretation will be most useful in ensuring that this right is protected and indeed, not limited excessively.

### **4.3 DO THE MEDIA PROVISIONS AND THEIR LIMITATIONS COINCIDE WITH THE CONSTITUTION OF KENYA?**

#### **A. INDEPENDENCE OF REGULATORY MECHANISMS**

As highlighted earlier, in Chapter 2, the need for independence of regulatory mechanisms from outside pressures, specifically from governmental or political biases, is very significant. In fact, article 34 (5) of the Constitution states that a body should be established which is independent of control by government, political interests or commercial interests. Indeed, the Constitution mandates the independence of the body regulating the media.

Furthermore, Article 7 of the Banjul Declaration of Principles on Freedom of Expression In Africa,<sup>7</sup> states the following:

- 1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.*
- 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.*

The KICA provides for a fairly inclusive procedure of selecting members to the Board of the CA, which is one of the bodies charged with regulating certain aspects of the

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<sup>7</sup> African Commission on Human and People's Rights (2002) <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html> on 2 January 2017.

media.<sup>8</sup> The appointment process is spearheaded by a selection panel composed of many media stakeholders as well as some members of the government.<sup>9</sup> Thereafter, the names are submitted to the President and Cabinet Secretary who shall select, shortlist and appoint the chairperson and members of the Board.<sup>10</sup>

In addition to the appointment procedure, the KICA also provides for the suspension procedure. It states that after receiving a complaint under the Act, the President may suspend the chairperson or member of the board pending the outcome of the complaint.<sup>11</sup> The issue presented here is that there is too much power given to the executive as the President and Cabinet Secretary can dismiss a member of the Board. This can be deemed to be in contravention to the provision of independence of the regulatory body found in article 34 (5) under the Constitution.

However, concern arises as the board is consisted, among others, of three Principal Secretaries from different ministries.<sup>12</sup> These are members of the Executive who bore considerable power and the fact that there are three in the CA Board regulating the media, it is clear that the question of independence can be raised.

In both the issues raised above regarding the suspension of members to the Board of the CA as well as the Principal Secretaries who are members of the Board, the Court found that none of these provisions go against the provision of the Constitution on media freedom.<sup>13</sup>

In regulation, particularly in a democratic country, the aim should be to regulate the media in a way that fully promotes the media freedom, does not stifle freedom of expression from which media freedom derives as well as in a way that prevents political agendas from being imposed.<sup>14</sup>

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<sup>8</sup> Communications Authority of Kenya, <http://www.ca.go.ke/index.php/what-we-do> on 2 January 2017.

<sup>9</sup> Section 6B, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>10</sup> Section 6B (10), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>11</sup> Section 6D (4), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>12</sup> Section 6 (1), *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>13</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

<sup>14</sup> Irion K, 'Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory' in (W. Schulz, P. Valcke & K. Irion) *The Independence of the Media and Its Regulatory Agencies. Shedding New Light on Formal and Actual Independence Against*

Regulatory intervention is seen as being the most effective when there are no such distractions or impositions resulting from political calculation as this has the capability to erode the functions of the regulatory mechanisms, in this case, the media regulators.<sup>15</sup> It has been accepted as best practice in throughout the world to put in place an independent regulatory system to regulate the media, including licensing and overseeing the broadcasting sector.<sup>16</sup>

Thus, the suspension procedure, in particular, indicates undue influence that may be exercised over the members of the CA Board. On the other hand, regarding the membership of the Principal Secretaries, it would be regarded as undue influence especially due to the fact that the Executive has three representatives of considerable power forming part of the Board and being able to influence any such decisions made by the board.

Due to the above reasons Article 34 (5)<sup>17</sup> making a provision for an independent regulatory body can be said to have been infringed upon. Furthermore, nothing in Article 24 of the Constitution<sup>18</sup> can be used to justify or reasonably explain any such imposition by the Executive in the regulation of the media sector in Kenya.

## **B. MULTIPLICITY OF COMPLAINTS MECHANISMS**

It is well acknowledged in both the international and domestic sphere, that freedom of expression and by extension, freedom of the media is of utmost significance. According to David Feldman,<sup>19</sup> there are several justifications for this freedom including the fact that self- expression is a significant instrument of freedom of conscience and self- fulfillment and that it enables people to contribute to debated on

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*the National Context*, Bristol UK/ Chicago USA, Intellect, 2013, 15-54, <http://www.ivir.nl/publicaties/download/1136> on 13 December 2016.

<sup>15</sup> Irion K, 'Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory' in (W. Schulz, P. Valcke & K. Irion) *The Independence of the Media and Its Regulatory Agencies. Shedding New Light on Formal and Actual Independence Against the National Context*, Bristol UK/ Chicago USA, Intellect, 2013, 15-54, <http://www.ivir.nl/publicaties/download/1136> on 13 December 2016, 19.

<sup>16</sup> Salomon E, *Guidelines for Broadcasting Regulation*, 2nd ed., London: CBA (2006).

<sup>17</sup> Constitution of Kenya (2010).

<sup>18</sup> (2010).

<sup>19</sup> Feldman D, *Civil Liberties & Human Rights in England and Wales*, Oxford University Press, 2002.

social and moral values. It also allows for political discourse, which is necessary for democracy and for academic endeavours.<sup>20</sup>

However, in as much as there is significance placed on this freedom, there are also limits placed on it, specifically, the need to regulate this freedom. In a case in Germany,<sup>21</sup> the Constitutional court put forward that regulation was indeed necessary to guarantee pluralism and programme variety, especially where broadcasting is concerned. For this idea to function, in our Kenyan society, there is significant need to set up a regulatory agency which fulfills its functions efficiently. This requirement should similarly apply to any mechanisms put in place to deal with complaints against media practitioners.

The media laws in Kenya provide for procedures to handle complaints against media enterprises or individual journalists, both in the KICA as well as in the MCA. The KICA states that any person with a complaint may make a written complaint to the Communications and Multimedia Appeals Tribunal (CMAT) setting out the grounds for the complaint, the nature of the injury and the remedy sought.<sup>22</sup>

On the other hand, the MCA provides for a separate mechanism that has a similar and concurrent jurisdiction to the CMAT. It states that any person aggrieved by the conduct of a journalist or media enterprise in relation to the Act, may make a written complaint to the Complaints Commission setting out the grounds for the complaint, the nature of the injury and the remedy sought.<sup>23</sup>

It is palpable at a first reading of these two sections that the jurisdiction granted to these two bodies, the CMAT and the Complaints Commission, are identical. It is following this that in the case of *Nation Media Group Group Limited & 6 others v Attorney General & 9 others*,<sup>24</sup> that various media stakeholders presented this issue to court. They claimed that these provisions violated the Constitution as they established

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<sup>20</sup> Feldman D, *Civil Liberties & Human Rights in England and Wales*.

<sup>21</sup> Third Television Case BVerfGE 57, 295 (1981).

<sup>22</sup> Section 102A, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>23</sup> Section 34, *Media Council Act*, (Act No. 46 of 2013).

<sup>24</sup> [2016] eKLR.

two different bodies to monitor the media thus being capable of subjecting the journalists to double jeopardy.

The court ruled that the overlapping mandate may indeed lead to simultaneous institution of complaints in both these bodies. However, the judgment stated that in as much as there was an overlapping mandate, that “*institutions have a way of drawing their boundaries once they begin working.*”<sup>25</sup> Thus, it was held that in the view of the Court, the establishment of two bodies with similar jurisdiction did not violate the constitution.

However, it is a very inconsistent argument made by the court that does not take into account the problems laid down by the media houses. It seems highly inadequate to rely on the fact that institutions will draw boundaries while working. This ignores the issue that still exists which is the overlapping mandate as there has been no step by either body to ‘draw boundaries’ as such.

In fact, putting more emphasis on the need for a singular body to regulate the media, Article 34 (5) states that *Parliament shall enact legislation that provides for the establishment of a body, which shall set media standards, and regulate and monitor compliance with those standards.*” Following this, it can be emphasized that the constitution provides for a singular body and not multiple bodies to regulate and monitor compliance in the same sector. In fact, it can be deemed a limitation of the freedom of the media, as the presence of two regulatory mechanisms has the potential of subjecting media enterprises and individuals to institution of a complaint in more than one body. Even if the hearing of a case in one body would rule out the other body from hearing the matter, there should be no justifiable opportunity given to such an inconsistency and overlap in the law.

Thus, the existence of two regulatory mechanisms of the media contravenes and violates the freedom of the media guaranteed by the Constitution, specifically due to the fact that existence of two complaints mechanisms is not a reasonable and justifiable limitation under Article 24 of the Constitution. Moreover, due to the fear of

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<sup>25</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

the two complaints mechanisms checking the conduct of the media there is no freedom for the media to report news stories as explicitly as they would which can be considered silencing of the media. This negatively affects the public interest as the watchdog function of the media is undermined.

Furthermore, as a matter of operating efficiency, the fact that two complaints bodies exist does not appear to be an effective mode of functioning. Firstly, it can be put forward that such an overlapping mandate will confuse the plaintiffs as to which path to take which is a clear indicator of inefficient operations. Secondly, due to the existence of two bodies with similar mandates, the institution of cases happens in both mechanisms, meaning jurisdiction is cut by half thereby leading to less work for each mechanism, which is clearly inefficient means of operating.

Similarly, in the United Kingdom, there was an overlap of jurisdiction between the Local Government Ombudsman, Parliamentary and Health Service Ombudsman as well as the Housing Ombudsman to whom complaints could be forwarded to.<sup>26</sup> However, it was agreed that problems arise because of overlapping mechanisms for complaint as they both unnecessarily duplicate processes and can be confusing for the people they are designed to assist in their complaints.<sup>27</sup>

Thirdly, and very importantly, from an administrative point of view, two bodies regulating the same matters, indicates that precious governmental resources are being wasted due to the double budgetary requirements thus putting a strain on the money in this regulatory sector. In fact, in the arguments presented by counsel Kiragu Kimani and Issa Mansur before the court in the case of *Nation Media Group Limited & 6 others v Attorney General & 9 others*,<sup>28</sup> it was stated that "The bodies are identical and it would be a waste of tax payers' money if the two are left to operate."<sup>29</sup> It cannot

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<sup>26</sup> UK Parliament House of Commons, *Public Administration Select Committee- Complaints: Do they Make a Difference?* (2014) 28.

<sup>27</sup> UK Parliament House of Commons, *Public Administration Select Committee- Complaints: Do they Make a Difference?* (2014) 51.

<sup>28</sup> [2016] eKLR.

<sup>29</sup> Kamau Muthoni, 'Kenyan Media rejects proposed complaints tribunal' <https://www.standardmedia.co.ke/article/2000191283/kenyan-media-rejects-proposed-complaints-tribunal> on 12 January 2017.

be disputed that the operation of two complaints bodies with similar mandates is an inefficient way of utilizing tax payers' money.

A case study of Australia may be considered, where the privacy complaints in the communication sector can be forwarded to three different bodies which have overlapping jurisdiction; Office of the Privacy Commissioner, Telecommunications Industry Ombudsman, Australian Communications and Media Authority. Due to this, there is a disparity of number of cases filed with each regulator and the outcomes gotten vary and are often inconsistent with what would've been gotten in the other complaints bodies. Therefore, following an analysis of this situation, scholars have stated that *"This situation is unacceptable and is not delivering efficient or effective regulation of privacy complaints in the sector. It is not the result of a careful or planned policy decision to treat communications privacy complaints in this way."*<sup>30</sup>

It is clear that the existence of various bodies fulfilling the same mandate brings about many challenges. Another counsel in the Nation Media Group case<sup>31</sup> stated that Concurrent existence of two distinct bodies dealing with same subject but establishing different oversight mechanisms and two different sets of media standards and punishments, is unconstitutional." Therefore, there is a need to rethink the two bodies and to spell out clearly their respective mandates and jurisdiction. For complaints to be handled well, there must be fairness, accountability, transparency as well as effectiveness. Only in this manner will such regulation and handling of complaints against the media sector be in line with the Constitution.

### **C. EXCESSIVE FINES**

Section 102E of the KICA<sup>32</sup> provides that the Tribunal may impose a fine of not more than Kshs. 20 million on a media enterprise and a fine of not more than Kshs. 500, 000 on an individual journalist, if the Act is violated. Section 38 of the MCA<sup>33</sup> provides that the Complaints Commission may impose a fine of not more than Kshs.

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<sup>30</sup> Connolly, C and Vaile, D, 'Communications Privacy Complaints: In Search of the Right Path,' *Australian Communications Consumer Action Network*, (2010) Sydney 25.

<sup>31</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR.*

<sup>32</sup> Section 102E, *Kenya Information and Communications (Amendment) Act* (Act No. 41A of 2013).

<sup>33</sup> *Media Council Act*, (Act No. 46 of 2013).

500, 000 to a media enterprise and Kshs. 100, 000 on an individual journalist, if the Act is violated.

The imposition of penalties under the KICA is brought into question due to the colossal figure<sup>34</sup> to be paid both by the enterprise and the individual. In the court decision,<sup>35</sup> it was held that the imposition of the penalty did not violate the Constitution, as the party in question was heard and given the opportunity to present the case.

However, it is clear that in as much as penalties can be imposed on wrongdoers, the excessiveness of a penalty can indeed violate the Constitution. In many cases, it has been put forward by journalists that this amount of money would be capable of bankrupting such media enterprises or even put individual journalists out of business.<sup>36</sup> This is not good for media freedom as the fundamental need for media in a democracy will be curtailed due to lack of media pluralism as only the large media enterprises may survive. Pluralism is clearly important as it enables divergent views to be expressed<sup>37</sup> for example, through the presence of diverse media outlets in a country.<sup>38</sup>

In fact, in several cases in Greece, two newspapers, were found guilty of a violation of statute and were convicted to paying a fine.<sup>39</sup> Thus, it was deemed by various NGOs<sup>40</sup> and human rights lawyers, that these fines would lead to bankruptcy and subsequent closure of both newspapers as the amounts were well above their annual incomes. Indeed, the court decision that gave these fines was widely criticized. A regular report by the Representative on Freedom of the Media to the Organization for Security and Co- Operation in Europe, Dunja Mijatović, stressed the importance of

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<sup>34</sup> LL Wanyama, *Media Control in Kenya: The State of Broadcasting under the New Kenya Information and Communication Act of 2013, New Media and Mass Communication* Vol.33, 2015.

<sup>35</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

<sup>36</sup> *Hara Nikopoulou v. Millet* (2010); *Hara Nikopoulou v. Gündem* (2010).

<sup>37</sup> Hitchens L, *Broadcasting Pluralism and Diversity – A Comparative Study of Policy and Regulation*, Oxford and Portland, Oregon: Hart Publishing, 2006, 65.

<sup>38</sup> Maud De Boer-Buquicchio, Deputy Secretary General of the Council of Europe, “Concentration of media ownership and its impact on media freedom and pluralism” Regional conference for South-East European and new EU member countries, Bled, Slovenia, 11-12 June 2004.

<sup>39</sup> *Hara Nikopoulou v. Millet* (2010); *Hara Nikopoulou v. Gündem* (2010).

<sup>40</sup> Such as, ABTTF, Vienna-based South East Europe Media Organisation (SEEMO), an affiliate of the International Press Institute (IPI).

capping such fines at an amount not capable of leading to bankruptcy and eventually weakening the media pluralism in the country.<sup>41</sup>

In fact, in a written statement<sup>42</sup> by the Federation of Western Thrace Turks<sup>43</sup> in Europe, submitted to the United Nations Human Rights Council 17<sup>th</sup> Session, it was stated while quoting article 19 of UDHR<sup>44</sup> on freedom of expression,<sup>45</sup> that “*any compensation should not be a vehicle for censorship and other restrictive measures, but rather it should compensate the moral loss of the plaintiff.*” Thus, it is clear that any fine capable of adversely affecting the existence or operation of a media enterprise as well as any individual journalist, would be regarded as an excessive and restrictive measure capable of censorship of the media.

It can be put forward that, granted, misconduct is deserving of a penalty,<sup>46</sup> but this punishment should not be so severe as to put journalists out of business. Such penalties should be proportionate to the wrong done. Article 24 of the Constitution<sup>47</sup> provides that there can be limitation of laws, in this case, the imposition of the fines, but that such limitations, specifically, should be acceptable in a democratic society and reasonable and justifiable or proportionate.

Nevertheless, there is nothing proportionate about excessive fines. This is because the punishment given, that is the effect of the fines of Kshs. 20 million and Kshs. 500, 000, can be extremely damaging to media practitioners, thus limiting the right to freedom of the media under the Constitution as the weaker media houses could be effectively closed following such imposition of excessive fines.

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<sup>41</sup> Mijatović , *Regular Report to the Permanent Council* FOM.GAL/1/11/Rev.1, (2011) 8 accessed at <http://www.osce.org/fom/76158?download=true> on December 2 2016 .

<sup>42</sup> Circulated in accordance with Economic and Social Council resolution 1996/31.

<sup>43</sup> A non-governmental organization in special consultative status.

<sup>44</sup> “*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*”.

<sup>45</sup> “*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*”.

<sup>46</sup> Article 33 (b), *Constitution of Kenya* (2010).

<sup>47</sup> (2010).

Therefore such a provision would be in clear violation of article 24 (1) which states that any limitations of rights by laws should be reasonable and justifiable in an open and democratic society.<sup>48</sup> It is not a matter of question that wrongdoers should be punished in one way or another but it is, and must be, a concern that such penalties are proportionate to the wrong done. Thus, there is need to revise the provisions in the KICA to ensure that the amount of the fine is not excessive to the wrong committed.

#### **4.4 Conclusion**

As has been highlighted in the above question, the research question was answered in the negative. This is because the controversial media provisions are indeed unconstitutional when subjected to the tests of broad interpretation of article 34 on media freedom as well as article 24 on the acceptable limitation on laws.

Following the above discussion, it has been indicated the various ways in which the provisions in the two media statutes can be said to have infringed on the Constitution. The independence of the media has been pulled into jeopardy whereas the journalists are not guaranteed freedom to practice their trade due to the fear of the two complaints mechanisms looking into their conduct as well as the risk of their business shutting down due to excessive fines. Due to this, reasonable steps must be taken to correct this problem and such recommendations shall be highlighted in the following concluding chapter.

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<sup>48</sup> *Constitution of Kenya* (2010).

## CHAPTER 5

### 5 CONCLUSION & RECOMMENDATIONS

#### 5.1 Introduction:

The media, being the focus of this study, is absolutely significant in a democratic society. Thus, it requires protection and the Constitution has given such a provision to protect media freedom in the country. Media has an important role in society as it acts as a watchdog of the government and it promotes democracy in a nation. Following this significance, any limits placed upon this sector must be in conformity with the provisions of the constitution.

#### 5.2 Restating the Initial Problem:

Taking into account the importance placed on freedom of the media under the Constitution, the KICA as well as the MCA were enacted. However, in more than one instance, they have been criticised for certain unconstitutional provisions. These provisions included the composition of the Board of the CA which is comprised of powerful government members such as 3 principal secretaries thus leading to the question of constitutionality on the ground independence of the media. The complaints mechanisms set out in KICA and MCA have overlapping mandates which are identical thus being considered unconstitutional for threatening the constitutional media freedom right on expressing opinions without fear. Furthermore, there was a constitutionality issue raised on the fines provided in the KICA which are excessive as has been found in the study thus limiting the freedom of the media to practice their journalism businesses.

Accordingly, there was a need to assess whether the current media laws and the limitations stated therein comply with the threshold of the both the internal limitation clauses as well as the external limitations as outlined under the Constitution.

### **5.3 Findings of the Study:**

As has been found in this study, media freedom has been compromised under the two media statutes. The three major issues found to be unconstitutional by this study are restated below:

#### **5.3.1 Independence of the Media Regulators**

The regulator of the media in Kenya is the CA which is composed of 4 principal secretaries and 7 non- governmental members. However, the composition of the board of the regulator, the CA has garnered quite a lot of concern with regards to its independence. The study has found that the body cannot be considered aptly independent due to the threat of imposition of governmental and political biases due to the membership of three influential Principal Secretaries. Furthermore, the influence that the President and Cabinet Secretary have upon the suspension procedures has also been called into question with a focus on its impact on independence of the regulator. Due to such concerns, this study has found that article 34 (5) of the Constitution which provides for an independent regulator of the media has been found to be violated.

#### **5.3.2 Multiplicity of Complaints Mechanisms**

The multiplicity of the complaints mechanisms is a factor that should not be taken lightly. The presence of two bodies with an overlapping mandate as well as concurrent jurisdiction on receiving complaints against journalists has been proven as not being constitutional. Indeed, it is clear that the procedure is not effective nor is it efficient from an administrative point of view. Concerns have also been raised regarding the effect of the multiplicity of this mechanism on the right to fair trial as guaranteed under the Constitution. As the research has demonstrated, this is not constitutional because the existence of two complaints mechanisms is not a reasonable and justifiable limitation under Article 24 of the Constitution. This negatively affects the public interest as the watchdog function of the media is undermined.

### **5.3.3 The 'Excessive' Fines**

Finally, the term 'unproportionally hefty fines' as used in various reports in reference to the excessive nature of the fines provided under the Statutes has been proven as being unconstitutional. This is due to the limits it places upon media freedom with its capability of limiting media pluralism and censoring the smaller media businesses. Therefore such provisions are in clear violation of article 24 (1) of the Constitution which states that any limitations of rights by laws should be reasonable and justifiable in an open and democratic society.

### **5.4 Recommendations:**

It has been demonstrated in the above study that the hypothesis of this research has indeed been in the affirmative. Therefore, 'the limitations of media freedom under the KICA and the MCA are not in conformity with the provisions of the Constitution on media freedom as well as the constitutional limitations on this right.' However, it is this study's recommendation that the freedom of the media has to be upheld in accordance with the Constitution. The following are the recommendations made by this study:

- There is need to ensure that independence is maintained and indeed encouraged. The Statutes should be amended to correct the influence from the suspension procedures as well as the membership of the three Principal Secretaries. If indeed it is necessary to have membership from the government, as stakeholders, the numbers of these representatives should be lowered. Furthermore, it would be better to implement the constitution by adding individuals who represent 'all interests of society' in this Board, including, a representative of the ordinary citizen.
- The existence of the multiple complaints mechanisms monitoring the media; that is, the Communications and Multimedia Appeals Tribunal as well as the Complaints Commission has to be addressed. The statutes have need of revision in order to bring them in line with the Constitution by unifying the complaints mechanisms or to separate the overlapping mandate. The objective of this will be to ensure efficiency in the hearing of complaints against journalists. Moreover, this would not threaten the journalists in carrying out their business and would prevent the possibility of two cases being instituted on the same matter at the different complaints mechanisms.

- The fines imposed on the media under the KICA specifically has been found by this study as excessive. It is recommended that the penalties imposed on the media should be reasonable and proportionate to the wrong committed in order to uphold media freedom. This cannot be emphasized enough. Thus, any such fines should be in compliance with Article 24 of the Constitution by being reasonable and justifiable to the objective sought.

At this juncture, it would be prudent to conclude by taking into account the wise words of Thomas Jefferson when he proclaimed thus to John Jay in 1786; “*Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it.*”<sup>1</sup>

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<sup>1</sup> A Comprehensive Collection of the Views of Thomas Jefferson, (eds. John Foley, 1900) Letter of Thomas Jefferson to John Jay (1786) 436.

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