MEDIA SECTOR
LEGISLATIVE REVIEW

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AG	Attorney General
BBI	Building Bridges Initiative
CA	Communications Authority
CAJ	Commission on Administrative Justice
CBK	Central Bank of Kenya
CBO	Community-Based Organisations
CCK	Communications Commission of Kenya
CEO	Chief Executive Officer
CORD	Coalition for Reforms and Democracy
DIG	Deputy Inspector General
DPP	Director of Public Prosecutions
ICCPR	International Covenant on Social and Political Rights
ICJ	International Court of Justice
ICT	Information and Communication Technology
IG	Inspector General
KBC	Kenya Broadcasting Corporation
KDF	Kenya Defence Forces
KICA	Kenya Information and Communication Act
KFCB	Kenya Films Classification Board
KLR	Kenya Law Reform
KUJ	Kenya Union of Journalists
LSK	Law Society of Kenya
MCA	Member of County Assembly
MCC	Media Complaints Commission
MCK	Media Council of Kenya
NIS	National Intelligence Service
NPS	National Police Service

FOREWARD

The Constitution of Kenya, 2010, stands out as one of the most transformative constitutions around the world. The Constitution bears the greatest aspirations of the people of the Republic of Kenya, including an enhanced Bill of Rights. One of the key aspects of this transformative feature is the entrenchment of Media Freedom, Freedom of Expression and Right of Access to Information in Chapter 5 at Articles 34, 33 and 35, respectively.

Article 2 (4) provides that any law that is inconsistent with the Constitution is invalid to the extent of that inconsistency, while Schedule Six at Section 7 provides that all laws in force immediately before the effective date of the Constitution would continue to be in force and would be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution.

The purpose of the Media Sector Legislative Review was to map out the legislative and regulatory landscape affecting media freedom and the practice of journalism in Kenya with a view to making recommendations for reforms in the sector.

To this end, the review delved into the constitutional provisions as well as some 20 pieces of legislation with the most proximate and significant impact on freedom of expression and media practice within the country.

The review noted certain gaps, including the existence of colonial provisions whose aim had been to advance the pre-independence policy of suppression of dissidence from the colonised. The review has also noted that the democratic ideals in the Constitution notwithstanding, there have been attempts to reverse these gains through some new legislative provisions.

One of the notable recommendations emerging from the review is the need to urgently generate legislative proposals in the form of a bill or bills and engage Parliament for their enactment to address the numerous retrogressive provisions that still exist in the statute books. The implementation of the proposed reforms will go a long way in enhancing democracy and greater press freedom. As such, it is expected that the findings of this report and the recommendations herein shall not serve as shackles to any new ideas that might emerge during its implementation, but as a milestone on which greater ideas may be built.

ACKNOWLEDGEMENTS

The Media Council of Kenya (MCK) appreciates the support of the many stakeholders and partners that in several ways contributed to the completion of this Media Sector Legislations Review. It is a process that has taken the Council some time in any effort to ensure that the sector aligns the legal and policy regime to the demands of the Constitution of Kenya 2010. The analysis was done at the time the Council was pushing for the amendment of the Media Council Act, 2013 and the enactment of a national Media Policy.

This Review was made possible by the generous support of the American people through the United States Agency for International Development (USAID) and the main implementing agent of the Safeguarding Democratic Space in Kenya (SADES-K) project in Kenya, FHI 360.

The Council appreciates the Contribution of the Kenya Editors Guild (KEG), Association of Media Women in Kenya (AMWIK), the Kenya Union of Journalists (KUJ), Law Society of Kenya, Public Relations Society of Kenya and Internews, working together under the SADES-K project. This formed the basis for the in-depth analysis provided in this Review.

Our special thanks also go to the Kenya Media Sector Working Group for contributing to the first draft of the Review that was presented, as part of the larger recommendations for reforms in the media sector, to the Building Bridges Initiative (BBI) taskforce on March 10, 2020.

We acknowledge Internews, specifically Abraham Mariita for providing technical assistance, Victor Bwire and Leo Mutisya of the Media Council of Kenya for the conceptualization of the report and technical editing and quality control, MCK's regulatory affairs department for developing the introductory framework, Ibrahim Oduor of the Kenya Union of Journalists (KUJ) for legal input and Prof. George Nyabuga for copy editing.

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EXECUTIVE SUMMARY

The Media Council of Kenya (MCK) has been working on creating an enabling environment for the media sector. As the media regulator in Kenya, the Council believes that the country requires policy and legal regimes that strengthens the protection and promotion of media freedom and watchdog role, enhance independence, build the capacity of the media to speak and represent public interest agenda and a framework that cultivates professionalism accountability.

The media landscape in Kenya has gradually changed in Kenya since 1992, with the advent of mult-party politics in the country which also saw the opening of Kenya's media, especially the airwaves. With digital migration and expanded space, the media has never had a better opportunity to play its role in protecting civic space, civil education, and promoting good governance and accountability than today. But this cannot fully happen if some existing laws and administrative codes are not reviewed or removed from the statute books. Suffice to note that the Country does not have a comprehensive media policy anchored in the law that would have defined which media structure the country needs and including treating the investment and media fund to support the industry. Our media regulation was developed in a vacuum. Key documents like Vision 2030 do not mention media as a major player in national development discourse.

This is a review of legislations affecting the practice of journalism and media in Kenya. The analysis looks at 20 laws that, in one way or another, affect the performance of media in Kenya. While some of the laws are as old as Kenya's repealed Constitution, others were enacted under the Constitution of Kenya, 2010. The laws are analysed based on their strengths or weaknesses in promoting or impeding the realisation of the constitutional principles on freedom of expression, freedom of the media and the right of access to information.

The analysis begins with a brief background which sets out the context with regards to the practice of the media. In this regard, it is noted that the profession of journalism has evolved over time and is currently practised across print, broadcast and online platforms.

The second part offers a detailed analysis of the laws starting with the Constitution of Kenya, 2010, being the bedrock of protection of human rights through the Bill of Rights at Chapter 5 thereof as well as a framework for democratic governance. Thereafter, the Review looks at the various pieces of legislation and the import of their provisions in relation to media freedom. The laws examined include: the Media Council Act, No. 46 of 2013; Access to Information Act, No. 31 of 2016; the Kenya Information and Communications Act, No. 2 of 1998; the Books and Newspapers Act, Cap. 111; the Penal Code; the Preservation of Public Security Act; the Kenya Broadcasting Corporation Act,

Cap. 221; the Preservation of Public Security Act, Cap. 57; the National Police Service Act, No. 11A of 2011; the Prevention of Terrorism Act, No. 30 of 2012; the Official Secrets Act, Cap. 187; Public Archives and Documentation Act, Cap. 19; the Kenya Defence Forces Act, No. 25 of 2012; the National Intelligence Services Act, No. 28 of 2012; the Defamation Act, Cap. 36; Computer Misuse and Cybercrimes Act, No. 5 of 2018; the Data Protection Act, No. 24 of 2019; the Copyright Act, No. 12 of 2001; the Employment Act, No. 11 of 2007; and the Labour Relations Act, No. 14 of 2007.

A brief conclusion and recommendations for implementation moving forward are offered at sections 3.0 and 4.0 of this Review.

From this Review, it is evident that although some progress has been made towards substantive realisation of the rights guaranteed under Articles 33, 34 and 35 of the Constitution, there are still many legal provisions that undermine constitutional guarantees and principles. The enactment of the Access to information Act, though still a work in progress due to the absence of regulations, stands out as one of the most important milestones in the implementation of the rights under Articles 33, 34 and 35.

For the many legislations that bear offending clauses in view of the letter and spirit of the Constitution, various remedies have been proposed for each specific legislation. Some of the proposals made include:

1. With regard to the Media Council Act, 2013

(a) Amend section 2 of the Act to provide for the definition of media practitioner and media consumer.

(b) Expand the definition of a Journalist to include online content creators and bloggers. The definition should also be clear and unambiguous.

(c) Introduce a requirement that the overall head of a media house shall be a professional with a background in journalism.

(d) The amendments can be initiated vide a petition to Parliament singling out particular sections of the law to be amended.

(e) Amend the Act to enhance the independence of the Council from the government.

2. With regard to Access to Information Act, No. 31 of 2016

a. Stakeholders in the media sector to engage the Commission on Administrative Justice to come up with rules and regulations under the Access to Information Act.

b. Develop regulations to facilitate access to information by online content creators and freelance journalists.

c. Develop regulations to address the processes and procedures for accessing information from security agencies in light of the restrictions placed on access to information by legislations establishing the respective institutions.

3. With regard to the Kenya Information and Communication Act No. 2 of 1998

a. A constitutional petition seeking a declaration that various sections of the Act are unconstitutional has been lodged by KUJ and the MCK enjoined as an interested party.

b. In addition to the petition, the media sector stakeholders should engage Parliament through a petition to have the offending sections repealed.

4. On the Kenya Broadcasting Corporation Act, Cap 221, KUJ has lodged a petition seeking an overhaul of the whole statute. There is a need for follow up to ensure that Parliament does it. At the same time, the consortium needs to start the process of preparing a new legislation. This will enable the transformation of KBC from a state to a public broadcaster.

5. The Penal Code, Cap 63 has several unconstitutional provisions which, in many ways, offend the realisation of a free press. This analysis makes various proposals, key among them petitioning Parliament to amend the offending sections.

6. It is proposed that the **Books and Newspapers Act, Cap 111** be repealed.

7. On **Defamation Act, Cap 36, it is herein it is proposed as follows**:

a. Petition Parliament to amend the legislation by introducing a mandatory requirement that the process of Media Complaints Commission be invoked before any other law relating to media offences legislation, and only those matters that cannot be solved at that level be forwarded to the High Court for determination.

b. Petition Parliament to amend section 7(2) to confer an absolute privilege when covering or seeking information on news concerning decisions of associations and boards of societal associations.

c. Engage with the Judiciary to develop a bench book that brings out the progressive principles of defamation laws under international obligations. Globally, there are efforts aimed at decriminalising press offences.

8. The Computer Misuse and Cybercrimes Act, No.5 of 2018 is one of the new legislations seen as offending the Constitution. Other than participating in the ongoing case at the Court of Appeal, that is, ***Civil Appeal No. 197 of 2020: Bloggers Association of Kenya vs The Attorney General & Others***, it is proposed that stakeholders engage with Parliament to have the offending sections amended.

In addition to the comprehensive analysis, a tabular presentation, highlighting the offending legal provisions and proposed measures for reforms, have been annexed to this review, for ease of reference and tracking.

1.0 INTRODUCTION

The consistent, trusted and professional role the media has played in the constitutional making process in Kenya is well documented. Journalists in the country have played a significant role in the promotion and protection of the Constitution including the Constitution of Kenya, 2010. The media was a major stakeholder in the constitution-making process and, like it has done since the independence struggle, introduction of multi-party politics and defending the rule of law in the country. Once it became apparent that the country was ready for a new constitution, the media picked and made it a national issue, provided information, space for debate and comprehensive coverage that was necessary for its development. There is no gainsaying that through editorials and commentaries, the media supported the search for a new constitution in Kenya. What is more, the media has continued to defend the Constitution, calling out those violating it, demanding for the its full implementation before any amendments and carrying out its civic duty of educating Kenyans on their rights as provided.

In addition to the new Constitution, media was a major beneficiary as freedom of expression, media freedoms and right to access information were enshrined in the Constitution of Kenya. In other words, for the first time, we have, through articles 33, 34 and 35 providing constitutional protection to media freedoms in various forms, which freedoms have expanded space for information exchange, a key requirement in the democratisation process.

Media has been resolute, focused, and persistent in defending the Constitution because media freedom and diversity are among the key standards necessary in assessing a country's commitment to constitutionalism, human rights and good governance. In order to promote pluralism and diversity, it is imperative that the media is permitted to operate independently from government control as this is the best way to ensure the media plays its watchdog role and that the public has access to a wide range of information and opinions especially on matters of public interest.

The Kenyan media landscape has undergone significant changes since the enacting of legislation that operationalised articles 34 and 35 of the Constitution through the establishment of the Media Council of Kenya and passing of the Access to Information Act aimed at protecting media freedom, access to information and freedom of expression. This followed other key events in the history of the industry including the liberalisation of the airwaves in 1992 and the digital migration in 2016. This has seen an exponential growth in the sector, which currently has seen the country register 100 print publications,

92 TV stations and nearly 200 radio stations. This makes Kenya one of the best working environments for media in the region as envisaged under the Windhoek Declaration.

Acknowledging the importance of the media, the Building Bridges Initiative (BBI) notes that: "The media can build up or tear down. Kenyans need media that hold the powerful to account. Equally, Kenya needs media that uplift us through investing in quality local content. The media should build programming around Kenyan histories and showing us what is exceptional about ourselves." The BBI report recommend that we must "protect media freedom to expose corruption but ensure that false allegations and defamation do not frustrate service delivery to the people."

A number of laws still exist that frustrate media. These include the Penal Code, specifically sections 40 (1); 66; 66A; 67; 96; 194-200; and the Books and Newspapers Act, among others. There were attempts, under the Security Amendment Act 2014, the Prevention of Terrorism Act, the Parliamentary Powers and Privileges Bill, to limit media freedoms. A number of media houses and individual journalists have borne the brunt of corporate and individual decisions and excesses through, for example, withdrawal of advertisement because of editorial content or harassment or intimidation of journalists. Several companies and individuals have also filed cases in court in their attempts to gag the press. Some have been granted huge awards or fines. This has somewhat compromised independence of the media and forced some journalists out of their jobs. In addition, because of media ownership related issues, a number of independent minded journalists have been sacrificed.

Some media owners influence content publication or programming to increase sales. It is noteworthy that some of these owners do not care about the quality of the content. The fact that some owners are also politicians, preachers and presenters does not advance independent media. Some journalists have complained of media owners seeking to clear or validate editorial content, programme guests and related professional issues. A number of journalists have been harassed and targeted for attacks simply because of media enterprises they work for are owned by people whose political leanings are common knowledge. This creates two problems: self-censorship and, by extension, compromise on media independence. In addition to the external and internal interferences and challenges, there are also problems with professionalism (including unethical practices like corruption and the growth of 'brown envelope' journalism), integrity and credibility. Poor pay, mass lay-offs, and poor working conditions also undermine media independence and integrity as journalists are compromised. In this context, personal interest overrides public interest. This is not only perilous for media growth but also independence.

On average, one requires Ksh700,000 – 2.5 million (in addition to the costs of forming a community group and registering it) to start a community radio station, Ksh 3 million

for a small commercial station, which includes costs of registering a company, acquiring broadcasting equipment and hiring of staff. Setting up a television station requires at least Ksh10 million. The cost of, for example, content distribution for a national TV station with one channel is Ksh 300,000 per month. The cost of acquiring a licence is Ksh180,000 (down from Ksh300,000 previously). The cost of TV equipment installation is nearly Ksh5 million. For newspapers, in addition to the investment in equipment and staff, the Books and Newspaper Act requires that one deposits a bond. Furthermore, media enterprises have to pay other relevant national and county government fees and levies. This has clearly made the cost of establishing and running a media house very expensive.

The exposition above points to the fact that knowledge about sustainable business models is critical to the establishment and management of media houses and understanding of media development and sustainability. When media enterprises are self-sustaining – financially liberated from corruptive practices, government influence, or dependence on foreign non-governmental organisations – they will more likely assert and maintain their editorial freedom and independence.

We have attempted to elucidate legislations that are likely to have a direct and significant impact on the media environment.

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[1]These statistics are based on figures provided by various organisations and individuals, including the Communications Authority of Kenya, Media Council of Kenya, and the National Coordinator of Kenya Community Media Network

2.0 AN ANALYSIS OF LAWS AFFECTING MEDIA IN KENYA

2.1 The Constitution of Kenya, 2010

Like in any democracy, Kenya has a Constitution as the supreme law of the land. This forms the basis upon which all the other legislations are enacted, interpreted, and applied. It is a constitution that has been hailed as one of the most progressive and transformative in the world.

Indeed, the Cownstitution explicitly makes this proclamation as to its supremacy at Article 2 (Supremacy of this Constitution) which states as follows:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorized under this Constitution.

(3)The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Article 2(5) and (6) imports the general rules of international law and the treaties ratified by Kenya. By dint of Article 2(5), the provisions of international instruments such as the International Covenant on Social and Political Rights (ICCPR) which provides for freedom of expression at Article 19, and the African Charter for Human and People's Rights (ACHPR) which provides at Article 9 for the right to receive and to disseminate information and opinions, are made part of Kenyan law with equal status as municipal law.

On its part, Article 2(6) mirrors the provisions of Article 38(1)c of the Statute of the International Court of Justice (ICJ), to wit those principles of law that, even where not necessarily codified, are recognised by civilised nations to form an integral part of the body of the law.

The substantive provisions of the Constitution that directly touch on media freedom are Articles 33, 34 and 35.

Article 33 guarantees freedom of expression subject to the limitations set out under sub-article 2 thereof. These limitations include propaganda for war; incitement to violence; hate speech; or advocacy of hatred that- constitutes ethnic incitement, vilification of others

or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27(4).

The said Article 27(4) provides thus:

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birt*h.

Looked at against Article 24 of the Constitution, the interpretation of the provision has in the recent past presented a conundrum. The High Court has variously interpreted the provision sometimes as if the limitations are exhaustive and sometimes as if it they are liable to expansion under Article 24 of the Constitution, which allows for limitation of the Constitutional Freedoms.

In *Petition No. 628 of 2014: Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR*, for example, the Court, while admonishing the Attorney General, appeared to suggest that the state should avoid the creation of offences that limit freedom of expression along with the limitations under Article 33(2).[3] The Court stated:

This new offence under the Penal Code that seeks to punish ***"insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace"*** *thus limits the freedom of expression to a level that the Constitution did not contemplate or permit, and in a manner that is so vague and imprecise that the citizen is likely to be in doubt as to what is prohibited.*

In the case of *Wanuri Kahiu & Another v CEO Kenya Film Classification Board Ezekiel Mutua & 4 Others [2020] eKLR*, a different bench of the High Court held that the provisions under Article 33(2) are not exhaustive as grounds of limitation of freedom of expression[4]

The matter needs urgent judicial settlement and should, therefore, be settled vide a constitutional petition where interpretation of Article 33(2) is a live issue. In 2020, an on-going matter was t*he Civil Appeal 197 of 2020, Bloggers Association of Kenya vs The Attorney General & Others* where institutions like the Kenya Union of Journalists and the Media Council of Kenya have sought to be enjoined. The suit is an appeal from the Judgement of the High Court (Hon, Justice James Makau) in Petition No. 206 of 2019: *The Bloggers Association of Kenya (BAKE) vs The Honourable Attorney General & Others.*[5]

Further, Article 34 contains the express provisions for media freedom. Article 34 on Freedom of the media explicitly states:

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[2] The provision was incorporated in the statute of ICJ to prevent a situation of non-liquet in determination of disputes brought before the Court. Kenya is, pursuant to Article 93(1) of the Charter of the United Nations, a party to the statute of ICJ by virtue of its membership to the United Nations.

(1) Freedom and independence of electronic, print and all other types of media are guaranteed, but do not extend to any expression specified in Article 33(2).

(2) The State shall not:

a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that:

a) are necessary to regulate the airwaves and other forms of signal distribution; and

b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall:

(1) be free to determine independently the editorial content of their broadcasts or other communications;

(2) be impartial; and

(3) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall:

a) be independent of control by government, political interests or commercial interests;

b) reflect the interests of all sections of the society; and

c) set media standards and regulate and monitor compliance with those standards.

The provisions of the Article are the basis for enactment of such legislation as the Media Council Act, No.46 of 2013, which established the Media Council of Kenya. Read together with sections 6 and 7 of the sixth Schedule, these provisions also form the basis of the Kenya Broadcasting Corporation (KBC) Act.

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[3]The petition, presented by the Coalition for Reforms and Democracy, the minority coalition in the 11th Parliament of the Republic of Kenya, challenged the constitutionality of the Security Laws (Amendment) Act 2014, a legislation whose enactment was punctuated by tremendous acrimony and chaos in the Assembly. The legislation had introduced up to 21 amendments to laws touching on national security.

[4]The mater concerned a decision by the Kenya Film Classification Board to ban the film "Rafiki" when it was submitted to the Board for classification. The Board recommended editing certain sections of the film but the Petitioners declined and requested that it be classified as it was. The Board proceeded to classify the film as restricted with the consequence that its exhibition within the Republic of Kenya was banned.

[5]The suit challenged the constitutionality of various sections including sections 22, 23, 24, 27, 28 d of the Computer Misuse and Cybercrimes Act. Vide a judgement delivered on 20th February 2020, the Judge dismissed the Petition, holding that the impugned provisions were constitutional.

Access to information is one of the most cardinal ingredients in the practice of media. Article 35 on the right of access to information is the operative provision in this regard. The Access to Information Act, No. 31 of 2016 has since been promulgated to operationalise the provision of the Constitution.

Other provisions of the Constitution that are closely linked to media practice include the provisions under Chapter 14 (Articles 238-247) which make provision for national security organs. This is because the national security organs, especially the National Police Service, are very essential in enforcing the legislative provisions which, as identified in this analysis, affect media freedom and, generally, the practice of journalism. Moreover, the police have often come across as one of the most reliable sources of information for journalists although, because of the obvious to sensitivity of their work, are subject to more stringent limitations.[7]

Further, Article 59 of the Constitution establishes the Kenya National Commission on Human Rights with the task of, *inter alia*, promoting the respect for human rights and developing a culture of human rights in the country. It is therefore an important institution of reference in advocating for observation of the Constitutional rights relating to media freedom.

During the presentation of its memorandum to the Building Bridges Initiative, the Media Sector Working Group submitted, with regards to media freedom, that although Article 34 provides for the establishment of MCK through legislation, it would be prudent that the institution is made a Constitutional Commission. To achieve this, it would be necessary to amend the provision to provide for recognition of MCK as a constitutional body. It would, therefore, be imperative that Parliament is lobbied through the Committee on Information and Communication Technology to push through the proposed amendment.

2.2 The Media Council Act, No. 46 of 2013

The legislation establishes the Media Council of Kenya and the Media Complaints Commission. As stated in the long title, the legislation is an act of Parliament to give effect to Article 34 (5) of the Constitution, which provides for establishment of a body which:

(a) [is] independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards.

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[6] *See the analysis of the legislation at item No.2.3 below.*

[7] *See the analysis at item 2.9, below.*

In the face of apparently overlapping mandate between the Media Council of Kenya and the Communications Authority of Kenya (CA), established under the Kenya Information and Communications Act, the Supreme Court took the opportunity in the case of ***Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR*** to provide clarification as to the body that the Constitution intended under the Article 34 (5) and affirmed unequivocally that it was the Media Council of Kenya.[10]

Being a legislation that is intended to operationalise Article 34(5) of the Constitution, its review must, inevitably, seek to answer the questions as to whether it has satisfied the provisions of Article 34(5), that is:

(a) Do the provisions of the legislation guarantee that the Council *is independent of control by the government, political interests or commercial interests?*

(b) Do the provisions of the legislation ensure that the composition of the Council reflects the interests of all sections of the society?

(c) Do the provisions of the legislation grant the Council the latitude and sufficient safeguards to set media standards, regulate, and monitor compliance with those standards?

The legislation is divided into seven parts. The first part deals with the preliminaries including the definitions and guiding principles on which the legislation is founded. The principles are captured in section 3 of the Act. These include the fact that:

"Journalism" is thus defined as the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, on the internet or any other manner as may be prescribed;

"Journalist" means any person who is recognised as such by the Council upon fulfilment of criteria set by the Council.

First, whereas the definition of *journalism* is commendably wide and all encompassing, thus affording protection to the non-traditional media including the online media, the narrow and discretionary definition of a *journalist* is a drawback. It fails to match the apparent legislative intention under the definition needs to be clear at onset and certain and wide enough to cover the media practitioners who use all the platforms or spaces including broadcast, print and online.

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[8] *See analysis at item 2.2, below.*

[9] *Act No.2 of 1998.*

[10] *Although the dispute concerned the mandate to license broadcasters, the Court, in a progressive juridical intervention, provided clarification as to the scope of the mandate of the Body under Article 34(5) vis-à-vis the licensing process under Article 34(3) of the Constitution.*

It is notable that for the scope of application of the legislation, section 4 provides that the Act applies to the media practitioners, namely: (a) media enterprises; (b) journalists; (c) media practitioners; (d) foreign journalist accredited under this Act; and (e) consumers of media services.

Of these categories of subjects of the legislation, media practitioners and consumers of media services are not defined. It is thus recommended that the definition section of the Act be amended to provide for the definition of media practitioners and consumers of media services.

The following definitions are suggested:

"Media Practitioner" to mean any person who practices their trade in media and includes, talk show hosts, continuity announcers, anchors, presenters, photojournalists, camerapersons, graphic designers, content producers, broadcasters under the Kenya Information and Communications Act, a publisher engaged in the publication and the manager or proprietor of a publication or broadcasting station.

"Consumers of media services" as including viewers, listeners, advertisers and any other person who uses media services.

Section 3 of the Act sets out the guiding principles under the legislation as including the national values and principles enshrined in the Constitution. Subsection 2 provides that in exercise of the right to freedom of expression, the persons specified under Section 4 shall:

a) *reflect the interests of all sections of society;*
b) *be accurate and fair;*
c) *be accountable and transparent;*
d) *respect the personal dignity and privacy of others;*
e) *demonstrate professionalism and respect for the rights of others; and*
f) *be guided by the national values and principles of governance set out under Article 10 of the Constitution.*

Although section 3 (2) is generally commendable, subsection 2(a) appears to be too wide and vague and puts onerous responsibility on the subjects of the legislation.

Indeed the subsection has since been declared unconstitutional in the case of *Nation Media Group & 6 Others v Attorney General & 9 others [2016] eKLR.* The subsection therefore ought to be deleted.

Section 5 of the Act establishes the Media Council of Kenya and sets out the procedure for choosing the Council's membership, which is by way of a selection panel. The selection

panel is comprised of representatives from a wide spectrum of civil society membership and government agencies.

The Council comprises nine members, being a chairperson, a nominee of the Cabinet Secretary and seven other members appointed through a competitive process overseen by the selection panel. Members of the Council serve on a part-time basis, each three-year term, which is renewable only once.

The functions of the Council are set out in section 6 of the Act and include *'to prescribe standards of journalists, media practitioners and media enterprises.'*

Section 6(2) mandates the Council to exercise its powers under the Act to ensure observance of the constitutionally permitted limitations to freedom of expression. The import of subsection (2) is to entrench within the statute the constitutionally permitted limitations of freedom of expression.

Subsection 2(c), however, just like section 3(2) (a), imposes an onerous responsibility upon the Council and was consequently declared unconstitutional in the case of ***Nation Media Group & 6 Others v Attorney General & 9 Others [2016] eKLR.*** As such, the Parliament ought to delete it from the statute books. Since deletion of unconstitutional and moribund sections of the law is a mere routine process requiring no debate, the same can be easily achieved by a simple miscellaneous amendment bill to delete such sections that have been declared unconstitutional.[11]

Section 6(3) empowers the Cabinet Secretary in consultation with the Council to make regulations to give further effect to subsection (2).

Part III of the legislation contains financial provisions for the Council. Section 23 states that among the Councils sources of funds include:

a. *Moneys allocated by the National Assembly;*
b. *Fees charged by the Council;*
c. *Accrued assets in the course of the Council's performance of its functions.*

Financial independence of the Council is critical and important to achieve the overall independence of the organisation. There is, therefore, need for the creation of a media council fund to be directly a charge upon the Consolidated Fund to be firmly entrenched either in the Constitution or in statute.

Part IV of the legislation establishes the Media Complaints Commission (MCC) as an Independent Dispute Resolution organ for the media industry.

The Commission comprises of the Chairperson and six other persons appointed through a competitive process.

The functions of the Commission as set out in section 31 of the Act include mediation or adjudication of disputes between the Government and the Media and between the Public and the Media and intra media industry on ethical issues.

Section 35 sets out the procedure for dispute resolution upon lodging of a complaint beginning with notification of the party against whom the complaint is made. Subsection 4 provides that the Commission may, after conducting a preliminary assessment of a complaint and being of the opinion that the complaint is devoid of merit or substance, dismiss such a complaint and give reasons thereto. Since Jurisdiction is one of the grounds for dismissal of a dispute, it is suggested that the same be included within the subsection, to state, inter alia, that where the Commission finds that it lacks jurisdiction, it may dismiss the suit.

Part V of the legislation contains miscellaneous provisions. Section 45 particularly entrenches the Code of Conduct for the Practice of Journalism, which is annexed as the Second Schedule to the Act. The Code comprises a set of agreed principles and rules which journalists are required to observe in the performance of their duties.

Turning back to the issues highlighted above, it is evident from the provisions that as currently provided under the legislation, the Council does not enjoy independence from the government, and by extension, therefore, political interests. Whereas section 11 of the Act makes a statement of principle that the council 'shall be independent of control of the government, political interests or commercial interests,' the operative sections of the Act have a contradictory effect. Under sections 6(3) and 50, for example, the ultimate responsibility for prescribing regulations lies with the Cabinet Secretary, with the Council acting as an advisory body. Further, the duty to amend schedule 2 of the Act, which sets out the code of conduct for journalists lies with the Cabinet Secretary on the recommendation of the Council. As such, decisions of the Council are directly subject to approval by the Cabinet Secretary.

Moreover, although section 23 provides for monies allocated by Parliament as the principal source of funds for the Council, the legislation does not confer on the Council any budget-making authority. The Council's budget, therefore, has to be presented to Parliament as a vote head in the Ministry's budget. This, certainly, defeats any claims as to the Council's independence.

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[11] *See Petition 3 of 2016: Law Society of Kenya vs Attorney General & Another[2016] eKLR*

Being an organisation whose mandate flows from the Constitution, and with the mandate to safeguard one of the most important foundations of a democratic society, to wit, protection and promotion of the freedom of expression and the media, the Council would function better if it enjoys protections similar to those enjoyed by Chapter 15 Commissions.

A practical process to achieve this would be to involve Parliament to either amend the legislation at section 5 and thereby grant the Council the status of Chapter 15 Commission and, contemporaneously, amend such provisions as sections 6(1)*j*, 6*(3*), 45(2), 46 and 50 to grant the Council unqualified mandate to administer provisions of the Act. Alternatively, within the ongoing discourse for Constitutional reforms, the sector players should vouch for amendment of Article 34(5) to expressly entrench the Council as a constitutional commission enjoying the protections and privileges under Chapter 15 of the Constitution.

On the question as to whether the Council reflects the interests of all sections of the society, it is notable that under section 7(3) of the Act, there is the participation of various media organisations and non-media organisations in the process of recruitment of the members of the council. Evidence from other parts of the world demonstrates that self-regulation is best achieved by organisations' direct participation in the running of a council through direct representation. This is because having a direct mandate of the organisations they represent means a clear articulation of the interests of the organisations they represent. This model of representation in a regulatory body, for example, is exemplified by the Judicial Service Commission where organisations such as the Law Society of Kenya and Judges and Magistrates Association elect their members directly to the Commission.

It is, therefore, proposed that the legislation should be amended to make provisions for direct representation of members of various media organisations to the membership of the Council, this is because the Council is a policy setting and decision-making organ for the media industry.

2.3 Access to Information Act, No. 31 of 2016

Access to information is one of the rights guaranteed under the Constitution, under Article 35. In the case of ***Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR,*** the Court noted that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. This is especially critical when it comes to exercise of media freedom, a constitutional right that is entirely information oriented.

The Access to Information Act thus comes in handy to provide a framework of access to information held by both public and private bodies. As stated in the long title, it is:

> *An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.*

The legislation sets out an administrative framework for purposes of enjoyment of the right to access to information. In this regard, it designates the Chief Executive Officer (CEO) of any entity as the Access to Information Officer for purposes of the Act. The CEOs are in the same breadth granted the discretion to delegate the role to any suitable person within their organisation.

The legislation mandates the Commission on Administrative Justice (CAJ) with the task of oversighting and enforcing implementation of the provisions of the Act. In this regard, section 14 of the Act empowers the Commission to review the decisions of public entities with regards to request for information.

Part III of the legislation sets out the procedure for seeking information from public and private entities and sets out definite timelines within which information sought ought to be released by the public entity. Section 8 provides that a request for information must be in writing, in either English or Kiswahili. Where the person seeking information is unable to write, then the information officer must reduce it into writing.

Section 9 introduces timelines within which a request for information must be processed. It requires that a decision on an application for access to information be made within twenty-one days. An additional fourteen days is allowable where the request involves a large amount of information or consultations are necessary in order to comply with the request.

In line with the provisions of Article 24, the legislation sets out, at section 6, the limits to enjoyment of the said right. These limits include where disclosure is likely to undermine national security, impede due process of law, and infringe professional confidentiality as recognised in law or by the rules of a registered association of a profession.

The limitation under section 6 (h), which is damage to a public entity's position in any actual or contemplated legal proceedings is, however, rather ambiguous and wide. It could be interpreted to mean that a public entity could withhold information where the use of the same against the entity in legal proceedings would lead to a judgement against them. This would run contrary to the principle of accountability of public bodies. The section may need an interpretive clarification. The Cabinet Secretary may also take advantage and

[12] *The Petitioner in the instant case was a publisher of a monthly magazine. It sought to enforce the right of access to information against the Respondent on grounds that it was a public entity. The Petition failed on a technicality, to wit, that the Petitioner, though having the Kenyan Nationality by virtue of having incorporated within the Republic of Kenya was not a Citizen as contemplated under Article 35, but a juristic person not capable of enjoying the rights enjoyed by natural persons.*

clarify the provision when prescribing the rules under the Act.

The centrality of the legislation in media practice is more apparent when other legislations such as the National Police Service Act, the Kenya Defence Forces Act, the National Intelligence Services Act, which naturally include limitations on freedom of expression and access to information, are considered. Section 48 of the National Police Service Act, for example, provides for limitation of freedom of expression, but subject, inter alia, to '[…]law enacted pursuant to Article 35 of the Constitution.'

It is only under this Act that rules can be made to delineate the kind of information that can be accessed under the statutes on national security and the process for the realization of such information. The process of coming up with the regulations relating to access to information, therefore, need to be widely consultative. Particularly, it would be very important for the regulations to strike a balance between the public security concerns and the right of the public to be informed and to hold discussion on public issues.

2.4 The Kenya Information and Communications Act, No. 2 of 1998

The Kenya Information and Communications Act (KICA) was enacted in 1998. It has been amended severally over the years. The first raft of major amendments was done vide the Kenya Information and Communications (Amendment) Act of 2009 which brought the broadcasting sector within the regulatory ambit of the then Communication Commission of Kenya (CCK, the precursor of the current Communication Authority of Kenya) and repealed some sections of the Kenya Broadcasting Corporation Act that had, until then, been the basis for regulation of the broadcasting subsector.

Contemporaneously, the Kenya Information and Communications Regulations, 2009 were promulgated. The legislation was further amended vide the Kenya Information and Communications Amendment Act, 2013 , which, inter alia, made the Board of the Communications Authority more independent. In a strange twist, however, the legislation was amended again in 2018 vide the Statute Law Miscellaneous (Amendment) Act, No.18 of 2018. Section 3 of the Act establishes the Communications Authority of Kenya as a Commission under the Act while section 5 sets out the object and purpose of the Authority which include licensing and regulating postal, information and communication services in accordance with the provisions of the Act.

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[13] *Article 10(2) (c) of the Constitution lists good governance, integrity, transparency and accountability as some of the national values and principles.*

[14] *See items 2.9, 2.13 and 2.14 below.*

[15] *No.1 of 2009.*

[16] *No.41A of 2013.*

Section 5A declares the independence of the Authority and states that it shall be free of control of the Government, political and commercial interests in the performance of its functions.

Section 6 sets out the composition of the Board of the Communications Authority. The Chairperson of the Board is appointed by the President. The other members of the board are the Principal Secretary responsible for the broadcast, electronic, print and all other types of media, the principal secretary for finance, the principal secretary for Internal Security and seven other persons appointed by the Cabinet Secretary for ICT.

The provision effectively places the Board under the control of the Government and political Interests as there is no guarantee that none of the appointees of the Cabinet Secretary will be appointed based on merit.

It is important to note that section 6 as currently framed follows an amendment effected in the year 2018. The amendment-repealed section 6B which had previously provided for competitive recruitment of board members, where a vacancy would be declared and the process to fill it be led by a selection panel comprising of representation from diverse organisations.

The framing of the provision should be used as a basis for seeking a Court's declaration that the Authority, as constituted, is not competent within the context of Article 34(5) to exercise control over the media. In the long term, however, an amendment ought to be moved to guarantee the Authority's independence so as to make it compliant with Article 34 of the Constitution.

Section 46A sets out the functions of the Authority in relation to the Broadcasting. At Paragraphs (j) and (k), the Authority is conferred the function of setting media standards and regulating and monitoring compliance with those standards.

The section looked at in light of the provisions of section 6 contravenes the provision of Article 35 which requires Parliament to enact legislation which provides for the establishment of a body, which shall:

> *Be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society and set media standards.*

It further contradicts the dictum of the Supreme Court of Kenya in Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR which declared that the CA was not the body contemplated under Article 35 of the Constitution.

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[17] *See Note 11, at page 14, above.*

The provision further clashes with section 6 of the Media Council Act, which confers the Media Council of Kenya jurisdiction to set standards for the media.

The two subsections should be repealed, through an amendment or otherwise be declared unconstitutional through legal action.

Section 46H empowers the Authority to prescribe a programming code, to review it and to provide a watershed period for the protection of children. The provision directly contradicts Articles 34(2) and 34 (5) of the Constitution.

It should, therefore, be amended to take away from the Authority the responsibility of prescribing a broadcasting code. Alternatively, it should be declared unconstitutional through a court action.

Section 46J gives the Authority the power to revoke the licence of a broadcaster and sets out the circumstances and conditions under which the Authority may revoke licences, which include being in breach of the provisions of the Act or regulations made thereunder.

The import of the provision is that the CA can revoke a broadcaster's licence if the broadcaster is in breach of the offending regulatory provisions, including provisions relating to media standards and programming code.

The section also needs an amendment of all the provisions that confer on the regulation of broadcasting programming to the CA to shift the jurisdiction to the Media Council of Kenya.

Section 46K mandates the Cabinet Secretary to make regulations in consultation with the Authority generally with respect to all broadcasting services. The provision excludes the MCK, which is the body mandated under the Constitution to monitor media standards.

The provision should be amended to include the MCK as one of the bodies that must be consulted.

Section 46L requires all broadcasters to establish and maintain a procedure by which persons aggrieved by any broadcast can lodge a complaint. 46L(2) requires broadcasters to submit the procedure to the Authority for approval. Sections 46L(3) and (5) respectively confer on the Authority and the Multimedia Appeals Tribunal successive appellate jurisdiction over complaints made to a broadcaster. Section 102 establishes the Communications and Multimedia Appeals Tribunal comprising of a chairperson and at least 4 persons possessing knowledge and experience in matters relating to the media. It also provides for the procedure for the appointment of the Chairperson and members of the Tribunal. The level of discretion given to the Cabinet Secretary on the appointment of the members of the tribunal whittles down the independence of the Tribunal.

Section 102A sets out the jurisdiction of the Tribunal and provides for the procedure for presenting complaints before the Tribunal. Paragraphs (a) and (b), specifically give the tribunal jurisdiction over journalists.

Section 46M requires broadcasters to be able to avail transcripts and/or documents to the Authority, Tribunal or complainant, whenever the same is needed for purposes of dispute resolution. The provision is a continuation of what is otherwise an unconstitutional interference by the Authority in the programming of the media.

The jurisdiction granted to the tribunal under section 102A conflicts with the jurisdiction granted to the Complaints Commission under the Media Council Act, which is to entertain complaints against media enterprises and journalists.

Section 102E sets out the remedial jurisdiction of the tribunal. Notably, this jurisdiction of the Tribunal focuses only on journalists and media enterprises, thus the provision runs contrary to the provisions of the Constitution and the Media Council Act. Also notable, is the hefty penalty prescribed under section 102 E(f).

The conferment of appellate jurisdiction upon the Authority and the Tribunal gives them jurisdiction over the supervision of media standards, something that is not contemplated under the Constitution.

Other provisions of concern include sections 84J and 102K. Section 84J, establishes the universal services fund and provides for the making of regulations by the Cabinet Secretary to govern the fund.

Section 102K establishes the Universal Services Advisory Council, whose mandate is to advise the Authority and provide strategic policy guidance for the administration and implementation of the Universal Services Fund.

Section 84 Establishes the National Communication Secretariat whose function is to advise the Government on the adoption of a communication policy.

The many bodies created under the act are a duplication of the duties of the Communications Authority. The duplications are not only unreasonable but are also confounding on the mandate of the Authority. The sections, in the absence of any justification, ought to be repealed.

Further to the provisions in the Act and pursuant to section 46K the Cabinet Secretary has promulgated regulations to generally manage the sector. Of interest to this analysis is

[18] Of concern is section 46J(a) because its implication is that the impugned provisions of the Act could be used as a ground for revocation of a broadcaster's licence.

the Kenya Information and Communication (Broadcasting) Regulations, 2009. As the title suggests, the regulations were promulgated in 2009 and their application is focused on the broadcasting sector.

Regulation 6(3)(c) requires broadcasters to adhere strictly to the Authority's or own subscribed programme code in the manner and time of programming schedules.

Regulation 37 empowers the Authority to prescribe a Programme Code that sets the standards for the time and manner of programmes to be broadcast by licensees.

Regulation 38 confers on the Authority the mandate of reviewing and accepting whatever programme codes developed by groups of broadcasters to which the broadcasters are supposed to subscribe.

Regulation 39(3) (h) specifically grants the Authority the mandate to prescribe matters that must be included in a broadcaster's complaint procedure.

Regulation 41 requires every broadcaster before the commencement of broadcasting services to submit its Complaint Handling procedure to the Authority for approval.

Regulation 42 grants the Authority appellate jurisdiction over broadcaster's complaint resolution mechanisms.

The above regulations purport to confer on the Authority, the jurisdiction over media programming, which is equivalent to setting media standards.

It is also important to note that the regulations were made in 2009. Under the Statutory Instruments Act, the said regulations are deemed to have automatically expired, and enactment of new regulations is therefore overdue. The enactment of the Media Council Act and establishment of the Council effectively rendered the regulations non-applicable. They should, therefore, be abandoned altogether.

There is currently a Petition by the Kenya Union of Journalists pending before the Constitutional Division of the High Court on this matter – ***Petition 501 Kenya Union of Journalists vs The Communications Authority & 2 Others [2019]***. The Petition seeks to have the cited sections declared unconstitutional.

The Sector has shared a Memorandum to the Communication Secretariat at the Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs for consideration and is engaging with Parliamentary Committee on ICT for consideration

2.5 The Books and Newspapers Act, Cap. 111

The legislation provides the framework for the registration and governance of newspapers. It is one of the surviving colonial laws having been enacted in 1960. The rules thereunder were also enacted in 1960 and have undergone only minimum review since. Generally, going by the wording of various sections, it is notable that the legislation was a colonial law. Its application was mostly suppressive. It can be argued that the legislation was calculated to allow government interference with the freedom of expression.

The first part of the Act (sections 5-9) makes provisions for deposit and registration of books and newspapers. Section 6 requires publisher of every book printed and published in the colony to deposit with the Registrar of Books and Newspapers a maximum of three copies. Similarly, under Section 7 of the Act, a publisher of newspapers is required to deliver two copies of every edition to the registrar at his own expense.

Section 8 requires publishers to submit returns of newspapers within 14 days of the first publication and subsequently in January of every year.

The provision is retrogressive and impracticable. Whereas the Cabinet Secretary has the discretion to determine the use of the copies of the books delivered to him, no regulations have ever been enacted to prescribe how the books received would be used. The provision gave the then Minister[19] (a Cabinet Secretary now) a blanket discretion to deal with the intellectual property of the author, including the right of distribution, without any checks. It is notable that to date, no rules have been published on how to handle the newspapers post-delivery by the publisher. Neither is the provision ever enforced.

The case of *Tony Gachoka v the Attorney General & Others [2013] eKLR*, where the Journalist was arrested, detained and arraigned in Court on charges of failing to deliver a copy of newspaper to the registrar, for example, shows how application of the said section by an oppressive state can be used to curtail individual liberties.[20]

Part III (Section 10-14) requires a bond to be executed by every publisher of a newspaper. Just like most other provisions, the section is couched in reference to a colony, meaning that more than 57 years since independence, the legislation has never been looked at with the objective of reforming it.

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[19]The title Minister was changed to Cabinet Secretary After the promulgation of the Constitution of Kenya, 2010. In this Review, the title Cabinet Secretary is used instead of Minister to reflect the current position.

[20]The instant case was a Constitutional Petition where the Petitioner sought compensation for torture and persecution by the State at the height of one-party dictatorship in the 1980s and 1990s.

Publishing a newspaper without executing a bond is consequently proscribed. Section 14 makes it an offence punishable by a jail term of up to three years or a fine of one million shillings to print or publish a newspaper in Kenya without executing a bond. Any subsequent similar offence attracts a jail term of up to five years and a ban with regards to printing or publishing within the country, which is otherwise referred to as a colony.

The bond is also restrictive, blocking small publishers from the market place as only the wealthy can afford it.

Part IV of the Act (Sections 15-23) is on general provisions. Most notably section 15 gives any person the right to inspect the register of books and newspapers and any newspaper kept under the register.

Section 18 requires every printer of a book or newspaper to keep a copy of the book or newspaper with the details of the client and to produce the same whenever required by the registrar or the courts.

Section 19 gives the police the power to seize any publications and to search any premises and seize publications with or without a warrant.

The requirement to deposit copies of books and newspapers with the registrar is idle, oppressive and achieves no purpose. The provisions are also increasingly meaningless and moribund in the new media landscape characterised by online publishing.

The provisions in section 19 giving the police the power to seize publications on mere suspicion are oppressive as they create an environment of anxiety among publishers. It creates a window of opportunity for the police to interfere with publishing.

The Penal Code

The Penal Code is one of the oldest legislations in the statutes. The legislation was enacted in 1930 just when the colonial government was getting entrenched following the declaration of Kenya as a British colony in 1920. It has overtime undergone several amendments, the latest being in 2014, vide the Security Laws (Amendment) Act, No. 19 of 2014.

The legislation contains a number of provisions that directly and indirectly impact on the exercise of the freedom of expression and the media.

Section 40(1) includes the definition of treason, the act of imagining the death or harm on a president. Paragraph(b) thereof outlaws publishing of such imaginations. To the extent that the provision outlaws imagination and publication of such imaginations, it violates the freedom of expression and is therefore unconstitutional.

Section 52 of the legislation empowers the Cabinet Secretary to prohibit certain publications from being imported into the country and to declare certain publications prohibited. To this end, the legislation establishes a board known as Prohibited Publications Review Board comprising of the Attorney General or his representative, the Director of Public Prosecutions or his representative, the Commissioner of Police (read the Inspector General [of Police]) or his representative, the Director of Medical Services or his representative, two persons from the religious community, and any other two persons of good standing, character and integrity to be appointed by the Cabinet Secretary.

The purpose of the Board is to review and advise the Cabinet Secretary on any prohibited publications. The Cabinet Secretary is required under subsection 7 to forward to the Board within 21 days of prohibition a copy of the prohibited publication for consideration. He is bound to act in accordance with the advice given by the Board. The offence for being in possession or control of a prohibited publication is imprisonment for a term not exceeding three years. This provision is dangerous and inimical to the freedom of expression under Article 33. It violates the certainty principles of criminal law. It also is an affront of freedom of thought. Giving the Cabinet Secretary such wide powers and discretion breeds an environment for abuse of the said powers.

The provision should as such be repealed in its entirety for being non-compatible with the Constitution. To this end, the Parliament should be petitioned to repeal the said sections.

Alternatively, media sector stakeholders should petition the High Court to have the said section declared unconstitutional.

There are also discussions within media to present a miscellaneous/omnibus bill to Parliament to remove the offending provisions.

Section 66 of the Act creates the offence known as Alarming publications which states that any person who publishes any false statement, rumour or report which is likely to cause alarm to the public or disturb the peace is guilty of a misdemeanour. The provision is speculative and therefore goes against the principle of certainty that underlies the principles of criminality.

A petition should be lodged at the High Court to have the section declared unconstitutional for breaching the basic rule of certainty of criminal provisions.

Section 66A was introduced vide the Security Laws (Amendment) Act, No.19 of 2014. It attempts to outlaws publication of disturbing material such as injured or dead persons, where the same is likely to cause fear or alarm to the general public.

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[21] *See Note 4, at p.12 (above).*

The provision was found to be unconstitutional in Petition No. 628 of 2014: *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR*. It should, therefore, be deleted from the statute books.

Section 67 of the Act introduces the offence of defamation of foreign dignitaries and officials. The provision is overbroad and therefore an affront to freedom of expression.

Section 96 of the Act provides that any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated:

(a) to bring death or physical injury to any person or any class, community or body of persons; or

(b) to lead to the damage or destruction of any property; or

(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

The imposition of the burden of proof on the accused goes against the principles of fair process, which requires that the burden of proof should initially lie with the prosecution. The provision should be amended to impose the burden upon prosecution in any event.

Section 194 provides for the definition of libel and criminalises it. Sections 195-200 make further provisions with regards to what constitutes defamation in various circumstances. The section was declared unconstitutional in the case of *Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR* to the extent that it does not include the grounds prohibited under Article 33 *(2) (a-d) of the Constitution.*

On the whole, the above-highlighted provisions violate the basic tenets of freedom of expression and therefore need to be repealed and expunged from the statute books.

2.7 Kenya Broadcasting Corporation Act, Cap. 221

The legislation was enacted in 1989 to establish the **Kenya Broadcasting Corporation**. It, therefore, establishes the framework for the management of the State-owned media house, as per section 3 of the Act.

The Constitution at Article 34(4) envisages the establishment of a state-owned media, which enjoys editorial independence, is impartial and allows the airing of divergent views. By dint of Section 7 of the Sixth Schedule of the Constitution, it follows that the Kenya Broadcasting Corporation occupies the position of the broadcaster envisaged under Article 34(4).

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[22]*See Articles 47 and 50 of the Constitution on the right to fair administrative action and fair hearing, respectively*

The Corporation runs one free to air TV station offering its services in both the national languages and a number of radio stations broadcasting in both the national languages and various vernacular languages. It was the sole national broadcaster until the last decade of the 20th century. The broadcaster draws its funding from the Government.

Although section 8 of the legislation establishing the Corporation pronounces the independence and impartiality of the corporation, the provisions on its management structure and funding completely negate and undermine the said provisions.

Section 4 and 5 of the Act establishes a Board of Directors and provides for the appointment of a Managing Director respectively, all of them being discretionary political appointees. The Board is comprised of a Chairman appointed by the President, the Managing Director of the Corporation, the Permanent Secretary for the Ministry responsible for information and broadcasting, the Permanent Secretary in the Office of the President, the Permanent Secretary in the Ministry responsible for finance together with another seven members appointed by the Minister (now Cabinet Secretary).[23] The Cabinet Secretary appoints the Managing Director after consultation with the Board. By design, therefore, the legislation creates a Board and the office of the Managing Director comprising of political appointees who, by the nature of their appointment, are bound to be partisan and beholden to the interests of the appointing authorities.

Section 8 (1) sets out the functions of the Corporation. These include the provision of independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and such other languages as the Corporation may decide; providing; if the Minister so requires, an external broadcasting service for reception in countries outside Kenya, providing facilities for commercial advertising and for the production of commercial programmes at such fee or levy as the Corporation may determine.

Among the powers of the corporation as set out at section 8(2) include to produce, manufacture, purchase or otherwise dispose of communication equipment; to provide to and receive from other persons material to be broadcast; to make available to broadcasting organisations the use of its sound and television studios upon such terms as the corporation may determine for the purpose of preparing programmes for broadcasting and to carry on or operate such services, as are conducive to the exercise of its duties.

[23]*Of the Seven appointees, there should representation by way of specialisation of the following disciplines: radio communication and radio communication apparatus; radio or television programme production; print media and financial management and administration.*

[24]*See sections 5(1), 8(1)b, 8(2) n, 11(2)d, 13(1)b, 14(1), 38(1), 39(1), for instances where the Cabinet Secretary direct intervention in running the affairs of the corporation is required.*

Section 10 of the Act mandates the Board to set the standards for taste, impartiality and accuracy for the contents, including advertisements, of all programmes broadcast by the Corporation.

Section 11 sets out the functions of the Managing Director. Under subsection 1 thereof, the control and executive management of the corporation is vested in the Managing Director. Subsection 2 confers on the Managing Director the authority to, *inter alia,* plan, regulate and control the content and balance of all broadcasts by the corporation.

By dint of sections 10 and 11, it goes without saying that the Corporations editorial policy and strategic management vests on the Board and the Managing Director, all of whom are political appointees. It is noteworthy that the legislation neither sets out the desirable qualifications for the Managing Director nor provides for competitive recruitment.

Further, despite being a statutory body, the Cabinet Secretary wields a lot of control over the Corporation. For example, the broadcasting of external programmes under section 13 and the announcement of programmes of national importance under section 14 is subject to the control and direction of the Cabinet Secretary.[24] The corporation, therefore, suffers the perception that it is a mere mouthpiece for the ruling party and the Government of the day, which it has been unable to shake off for years even after the liberalisation of the broadcast media space.

Section 37 and 39 of the Act respectively provide for funding of the Corporation from grants issued at the exclusive discretion of the Government of the day and loans secured subject to the approval of the Cabinet Secretary responsible for of finance. Under section 37 of the Act, the Corporation's funding lies with grants from the Government while under section 39, the Corporation is conferred some borrowing powers subject to approval from the Cabinet Secretary responsible for finance.

Granted, the Government has over the years consistently failed to grant the Corporation sufficient funding to undertake meaningful programming. Furthermore, the loans procured in the name of the Corporation have not been put to good and productive use in a manner that can benefit it.

It is therefore obvious that the corporation's management framework under the Act is defective. Coupled with the unsustainability of its funding framework and its susceptibility to political interference, the Corporation struggles to meet the ideals envisaged under Article 34(4) of the Constitution.

In light of the foregoing, there is need for the media sector to scale up advocacy on having the KBC Act reviewed to enable it became a public broadcaster as per the requirements of Article 34(4) of the Constitution. This was included in the memo shared with the Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs. The Kenya Union of Journalists (KUJ) has since petitioned Parliament to have the legislation overhauled. To further support the KUJ initiative, it would be necessary that stakeholders begin discussions with the aim of drawing a draft bill for presentation to Parliament.

2.8 Preservation of Public Security Act, Cap. 57

Preservation of Public Security Act is one of the legislations that was inherited from the colonial regime. The legislation was enacted in 1960 at the height of agitation for Kenya's independence. By design, it was intended to provide a framework for suppression of rebellion and unrest. Just like many other colonial laws, the post-independence governments have managed to keep the legislation in the law books.

The Act grants sweeping powers to the President to rule by executive decree in the form of subsidiary legislation promulgated under the Act. Section 3 (1) and (2) of the Act provides that:

(a) If at any time it appears to the President that it is necessary for the preservation of public security to do so, he may by notice published in the Gazette declare that the provisions this Part of this Act shall come into operation in Kenya or any part thereof.

(b) Where a notice under subsection (1) of this section has been published, and so long as the notice is in force, it shall be lawful for the President, to the extent to which the provisions of this Act is brought into operation, and subject to the provisions of the Constitution, to make regulations for the preservation of public security.

The legislation is historically infamous, alongside the Public Order Act, for having been used as the instrument for the suppression of dissent during the one-party rule in Kenya. Under section 4 of the Act, among the items that the Regulations made by the President may touch include:

The censorship, control, or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports.

The sweeping powers conferred on the President is a threat to the freedoms of expression and the media, both directly and indirectly. The legislation provides a window for the President to circumvent Constitutional provisions and engage in unilateral law-making which could work to the detriment of journalists.

The legislation presents a potential opportunity for arbitrariness by the regime of the day. Moreover, granting the state discretionary censorship powers exposes media practitioners to interference by the State.

To safeguard the democratic space, the Memo shared with MOICT for the proposed review of legislation relating to the media sector requests Parliament to come up with clear guidelines for the exercise of emergency powers under Article 58 of the Constitution.

2.9 National Police Service Act, No. 11A of 2011

An understanding of the Police Service is critical for the media industry, as it not only acts as an agent of protection and enforcement of national security but also the rights to freedom of expression. The police, due to their role in society, particularly the detection and prevention of crime and maintenance of law and order, have and continue to be important sources of information for journalists.

The National Police Service is established under Article 243 of the Constitution and the National Police Service Act which was enacted in 2011. It sets out the composition, command structure and powers of the National Police Service. The legislation implements the provisions of Articles 243, 244 and 245 of the Constitution.

Parts I – VI of the legislation are concerned with setting out the structure and organisation of the Service as well as delineating the powers and functions of the various departments and units of the Service.

Under Part II of the legislation, the manner of appointment of the Inspector General (IG), and his/her two deputies, that is the Deputy Inspector General in charge of the Kenya Police Service and the Deputy Inspector General in Charge of the Administrative Police Service are spelt out.

Thus, Section 8 of the Act places the overall and independent command of the Service under the Inspector General, whose appointment is done in accordance with Article 245 of the Constitution. In this regard, the President nominates and, with the approval of the National Assembly, appoints the Inspector General. The Deputy Inspector General (DIG) is on the other hand appointed by the President upon recommendation by the National Police Service Commission.

The IG is expected under Section 8A(4) of the Constitution to execute a command on the service by issuing lawful orders, directions, or instructions through the Deputy Inspectors General.

For effective management of the service, a Service Board comprising of the Inspector General, the Deputy Inspector Generals, the Director of Criminal Investigations, and the head of human resource of the Service, is established. It acts as the consultation organ for the service.

Part III of the Act sets out the constitution, administration, functions, and powers of the Kenya Police Service. The functions are thus set out under section 24 of the Act and include the provision of assistance to the public when needed; maintenance of law and order; preservation of peace; protection of life and property; prevention and detection of crime.

The Kenya Police Service is headed by the Deputy Inspector General in charge of the Kenya Police Service. The Act also establishes the ranks for officers set out in the 1st Schedule of the Act. These ranks begin from the lowest which is a constable to the highest, the Inspector General.

Part IV of the Act is on the Constitution, Administration, Powers and Functions of the Administration Police Service. In addition to the general duties conferred on the Kenya Police Service, the Administration Police Service Officers are responsible for the protection of Government property, vital installations and strategic points, rendering support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties.

The Directorate of Criminal Investigations is established under Part V of the Act in section 28. The Directorate, which is headed by the Director of Criminal Investigations, operates under the direction, command, and control of the Inspector General. Its functions include to collect and provide criminal intelligence; conduct investigations on serious crime including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, and piracy, organised crime, cyber-crime among others. The Director of Criminal Investigations is appointed by the President on the recommendation of the National Police Service Commission.

Section 40 empowers the Inspector General by a notice in the *gazette* to designate a police station. The police stations so established are the units for service delivery. The Inspector General ensures that police stations are equitably distributed across the country.

The Act also establishes the County Policing Authority vide section 41. The Authority comprises of the Governor; a representative of the National Intelligence Service; heads of the National Police Service and the Directorate of Criminal Investigations at the County level; two MCAs; Chairperson of the County Security Committee; at least six members who are ordinarily resident in the county appointed by the Governor representing some of the

sectors in the county including the business community, community based organisations (CBOs), youths, persons with disabilities, religious organisations and women.

The general functions, powers, obligations, and rights of police officers in the Service are set out under Part VII of the Act (Sections 45-72). Highlighted below are some of the most notable sections that are relevant to the media practice.

Section 45 provides that an officer shall always be presumed to be on duty and shall as such perform the duties and exercise the powers granted to him under the Act.

Section 47 provides for the limitation of the rights and fundamental freedoms of police officers. It states that the rights and freedoms of police officers may be limited to, among others:

(a) *the protection of classified information.*

(b) *the maintenance and preservation of national security.*

(c) *the security and safety of officers of the Service;*

(d) *the independence and integrity of the Service;*

(e) *the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.*

Some of the rights thus limited include an officer's right to privacy, officer's freedom of expression to the extent of limiting the freedom to impart information to officers of the Service, freedom of the media, the right to access information to the extent of protecting the service from:

(i) *demands to furnish persons with information;*

(ii) *and publicising information affecting the nation, the freedom of association to the extent of limiting the right of officers of the Service from joining or participating in the activities of any kind of association other than those authorised under the Act.*

Section 48 of the Act sets out the extent to which the right of access to information may be limited under the Act. It provides as follows:

"Subject to Article 244 of the Constitution and any other law enacted pursuant to Article 35 of the Constitution, a limitation of a right shall be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and shall be limited only for purposes of ensuring:

(a) *the protection of classified information;*

(b) *the maintenance and preservation of national security;*

(c) *the security and safety of officers in the Service;*
(d) *the independence and integrity of the Service; and*
(e) *the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.*

Section 49 of the Act sets out the general powers of police officers. Pursuant to this provision, the police are empowered to exercise all the powers and perform duties and functions as are conferred or imposed by law and are allowed to use lawful discretion where such is allowed.

Subsection 5 thereof requires a police officer, where they are authorised, to use force in accordance with the set guidelines under the Sixth Schedule. The Sixth Schedule thus stands as the protocol for use of force. It requires officers to always try to not use any force. Whenever such force is used, the same must be justified to the superiors of the arresting officer.

Section 49(9) provides that matters of a personal nature and operational information in the possession of law enforcement officials shall be kept confidential unless the performance of duty or the needs of justice strictly require otherwise.

Section 49(13) provides that a police officer who abuses any powers conferred by the Act commits an offence and is liable to disciplinary or criminal action. Moreover, a person whose rights are violated by a police officer shall be entitled to redress and compensation upon the decision of a court, tribunal, or other authority.

Under section 50, the police officer in charge of a police station or other post, unit or formation shall keep a record in such a form as shall be directed by the IG in consultation with the DIGs. The same shall be used to record all complaints and charges preferred, the names of persons arrested and the offences with which they are charged.

The provision requires that a complaint against any police officer be recorded and reported to the Independent Policing Oversight Authority (IPOA). An officer who fails to record and report any complaint made under the section commits an offence.

Section 52 gives police the power to compel the attendance of witnesses at the police station and to comply with the criminal procedure code in taking evidence.

Section 53 gives the police the power to require a person to execute a bond for attendance of court and to exercise such powers in strict adherence to the criminal procedure code, Cap. 75.

Under section 56 of the Act, a police officer has the power to stop and detain any person who he or she witnesses doing any act or thing which is unlawful. However, it is an offence for the police to abuse any power donated under the section.

Whereas most of the provisions relate to the organisation, functions and powers of the National Police Service, the provisions that touch on the freedom of access to information, *to wit* sections 47 and 48 of the Act need to be subjected to regulations under the Access to Information Act. It is therefore imperative that in preparing regulations under the Access to Information Act, which are being spearheaded by the Commission on Administrative Justice, the same be taken into account. In this regard, the CAJ, the NPS and media industry practitioners ought to consult extensively to come up with an appropriate workable framework.

2.10 Prevention of Terrorism Act, No.30 of 2012

The legislation was enacted in 2012 at the height of Kenya's war against Al-Shabab. The legislation prescribes terrorism-related offences and their corresponding penalties; makes provisions for enabling investigation and prosecution of terrorism and terrorism-related offences.

The legislation contains a number of provisions that significantly impact on the freedom of expression and the media.

Section 12 creates the offence known as radicalisation and states that a person who promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change commits an offence and is liable on conviction to imprisonment for a term not exceeding 30 years.

Section 19 of the Act provides that:

A person who, knowing or having reasonable cause to suspect that an officer is conducting an investigation under this Act:

(*a*) *discloses to another person anything which is likely to prejudice the investigation; or*

(*b*) *interferes with material which is relevant to the investigation, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty year*s.

Section 26 of the Act outlaws terrorism-related hoaxes. It provides that:

> *A person who issues any information that a terrorist act has been or is likely to be committed, knowing that the information is false, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.*

Section 27 outlaws terrorism-related incitement. It provides that:

> *A person who publishes, distributes or otherwise avails information intending to directly or indirectly incite another person or a group of persons to carry out a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.*

Section 30 outlaws possession of an article connected with an offence under the Act. It provides that:

> *A person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparing to commit or committing a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding twenty years.*

The challenge with sections 19, 26 27 and 30 is that the criminal aspect is based on subjective and speculative thinking. This goes against the principle of criminal law which requires certainty and application of the objective test in prescribing a crime. Thus, in the manner couched, the provisions provide a window for gagging legitimate discussions and reporting relating to terrorism.

> *The Remarks of Antoine Garapon, as aptly quoted in the Terrorism and the Media, a Handbook for Journalists, perfectly captures the catch-22 situation when it comes to reporting of terrorism thus:*
>
> *On the one hand, the media echo is likely to make victims the unintentional messengers of their executioners' search for glory; on the other, self-censorship could be interpreted as a capitulation. Fear can lead to the reclamation of hard-won freedoms and eventually reduce the difference between democratic states and authoritarian regimes, precisely what terrorists seek.*

In the case of *Coalition for Reforms and Democracy (CORD)*,[26] the High Court, while making a determination on the constitutionality of sections 30A and 30F of the act, took the occasion to advise as follows:

> *… a properly functioning self-regulatory media mechanism such as is contemplated under the Media Act, 2013 ought to have and demand strict adherence to clear guidelines on how the media reports on terrorism to avoid giving those engaged in it the coverage that they thrive on, to the detriment of society.*

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[25] *Jean-Paul Marthoz, Terrorism and the Media, a Handbook for Journalists, UNESCO, Paris, 2017 at page 10, available at https://en.unesco.org/news/terrorism-and-media-handbook-journalists, quoting Antoine Garapon, «Que nous est-il arrivé? », Esprit, February 2015, Paris, p. 6.*

[26] *See Note 3, above.*

[27] *Note 3, above, at Para 171 . Read further for analysis of sections 30A & 30F.*

As already stated, the provisions, in the manner in which they are couched, present a danger to freedoms of the media and expression. A practical step to remedying the situation would be to have the Media Council of Kenya come up with appropriate regulations as implicitly advised by the Court, for coverage of terrorist-related news, and to petition the Parliament to amend the provisions to incorporate a recognition of regulations so prescribed.

The Security Laws (Amendment) Act, No. 19 of 2014 introduced, *inter alia*, section 30A and 30F into the Prevention of Terrorism Act, No.30 of 2012.

Section 30A partly reads

> *(1) A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.*

In the constitutional petition that followed the enactment of the said Security Laws (Amendment) Act, to which *Petition 628 of 2014: Coalition For Reforms and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR,*[28] the Court declared the provision to be unconstitutional for being overbroad in its restriction of freedom of expression and therefore not tenable in a free and democratic society.

Vide the same Amendment Act, Parliament introduced section 30 F which provides that:

> *(1) Any person who, without authorisation from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.*
>
> *(2) A person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and the victim commits an offence and is liable on conviction to a term of imprisonment for a period not exceed three years or to a fine of five million shillings or both.*

The section was similarly declared unconstitutional vide the above-mentioned petition. To reform the legislation in accordance with the dictates of a democratic society, and provide clarity in light of the Court's decision, sections 30A and 30F need to be deleted from the legislation. Section 35 of the Act sets out the circumstances and extent to which rights and fundamental freedoms may be limited which include for purposes of ensuring investigation of a terrorist act; detection and prevention of a terrorist act; or the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.

28See Note 3, above.

Sections 36 and 36A give security organs the power to intercept communications for purposes of detecting, disrupting, and deterring terrorism. Under section 36, the interception should follow a procedure, which involves obtaining a warrant.

Under section 36A, however, interception is to be carried out in accordance with the procedure set out in regulations made by the Cabinet Secretary with the approval of Parliament. Considering that sections 35 and 36 already so elaborately address the issues of interception of communication, the intention of the legislature in enacting the provision is not clear. It is difficult to tell whether the same was meant to complement or supplant the procedure set out in section 36.

The High Court, however, in the case of *Coalition for Reforms & Democracy* while finding that the provision did not constitute an infringement of the right to privacy held that the section cannot be looked at in isolation. It must be read with sections 35 and 36. It can, therefore, be legitimately expected that in prescribing the regulations contemplated under section 36A(1) & (2), it will take into account the Court's judgement and incorporate the provisions of sections 35 and 36 in the regulations. To this end, relevant State and non-state actors ought to proactively engage with the Ministry of Interior and Coordination of National Government to press for a review.

Stakeholders also need to engage with the Parliament more to move amendments to provisions such as sections 19, 26 and 27 to introduce an element of certainty. This is because they are presently excessively broad and therefore carry the risk of being applied to the detriment of innocent persons.

2.11 The Official Secrets Act, Cap. 187

The Official Secrets Act was enacted in 1968. It aims at preserving State secrets and State security.

With regard to media practice, the most relevant part of the legislation is section 3 of the Act which delineates a number of offences likely to touch on media practice. The offences relate to obtaining, recording or having information relating to a prohibited place, or having official documents without authority.

The relevant subsections read as follows:

1) *Any person who, for any purpose prejudicial to the safety or interests of the Republic:*

   (a) approaches inspect, passes over, is in the neighbourhood of or enters a prohibited place; ...

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[29] *See Note 3, above at Para 305 of the judgement.*

[30] *A cursory look at the subsidiary legislations under the Act reveals that no such rules are in existence, nearly six years since the enactment of the provision.*

; or (c) obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, shall be guilty of an offence.

2) *Any person who takes a photograph of a prohibited place or who takes a photograph in a prohibited place, without having first obtained the authority of the officer in charge of the prohibited place, shall be guilty of an offence.*

3) *Any person who has in his possession or under his control any code word, plan, article, document or information which:*

   (a) *relates to or is used in a prohibited place or anything in a prohibited place; or*

   (b) *has been made or obtained in contravention of this Act; or*

4) *Any person who, having in his possession or under his control any plan, article, document or information that relates to munitions of war, communicates it directly or indirectly to any foreign power, or any other person for any purpose or in any manner prejudicial to the safety or interests of the Republic, shall be guilty of an offence.*

5) *Any person who receives any code word, plan, article, document or information, knowing or having reasonable grounds for believing at the time when he receives it, that the code word, plan, article, document or information is communicated to him in contravention of this Act, shall be guilty of an offence, unless he proves that the communication to him of the code word, plan, article, document or information was contrary to his wishes.*

6) *Any person who has in his possession or under his control any code word, plan, article, document or information of a kind or in the circumstances mentioned in paragraphs (a) to (d) inclusive of subsection (3) of this section, and who:*

   (a) *communicates the code word, plan, article, document or information to any person, other than a person to whom he is authorised to communicate it or to whom it is his duty to communicate it; or*

   (b) *retains the plan, article or document in his possession or under his control when he has no right so to retain it or when it is contrary to his duty so to retain it, or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof … shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.*

Subsection 8 provides that the section shall apply subject to Article 35 and the law relating to access to information.

Section 10 of the Act requires the consent of the Attorney General to be sought before prosecution under the Act. Under the present Constitution, this would mean the Director of Public Prosecutions.

2.12 Public Archives and Documentation Act, Cap. 19

The Public Archives and Documentation Services Act establishes the Kenya National Archives and Documentation Services. It also provides a framework for the collection of public records and archives and for availing the same to the public.

Of interest to the media industry are parts of section 6 of the Act which provides as follow:

6. Public access to public archives

(1) Subject to any written law prohibiting or restricting the disclosure of information obtained from members of the public and to the provisions of this section, public archives which have been in existence for a period of not less than thirty years may be made available for public inspection, and it shall be the duty of the Director to provide reasonable facilities at such times, and on the payment of the prescribed fees, for members of the public to inspect or obtain copies of, or extracts from, such public archives.

(4) Nothing in this section shall:

(a) limit any right of inspection of any public archives or any category thereof to which members of the public had access before their transfer to the national archives; or

(b) preclude the Director from permitting any person authorised by him in writing to have access to any public archives or any category thereof which are specified in such written authorisation, save to the extent provided by any such written law as is referred to in subsection (1) and, in the case of public archives obtained otherwise than by transfer under section 5, subject to the terms and conditions on which such public archives were obtained.

2.13 The Kenya Defence Forces Act, No. 25 of 2012

The legislation, in accordance with Articles 239(1) and 241, makes provisions for the functions, organisation and administration of the Kenya Defence Forces pursuant to Article 232 and 239(6) of the Constitution.

The legislation also contains provisions relating to the exercise of freedom of expression and the media at sections 45 and 49. Particularly, the effect of the provisions is to set out the delimitations for limitation of freedom of expression. The restriction mainly relates to the ability of members of the Defence Forces to share information. The provisions are *as follows:*

(1) The right to freedom of expression set out in Article 33 of the Constitution shall be subject to limitation in respect of a person to whom this Act applies only under the conditions set out in subsection (2).

(2) The limitation to freedom of expression shall be to the extent that it is done:

(a) in the interests of national defence, national security, public safety, public order, public morality or public health;

(b) *for the purpose of protecting the reputations, rights and freedoms of other persons or the private persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts martial or regulating the technical administration or the technical operation of telecommunication, posts, wireless broadcasting, communication, internet, satellite communication or television;*

(c) *to impose restrictions upon military personnel or upon persons in the service of the Defence Forces, 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 the military; or*

(d) *for secu*rity and protection of information within the Defence Forces.

Section 49 provides as follows:

49. Limitation of right to access to information

1) *The right of access to information set out in Article 35(1) and (3) of the Constitution shall be subject to limitation in respect of classified information or information under the custody of the Defence Forces only under the circumstances set out under subsection (2).*

2) *The limitation referred to under subsection (1) shall be in respect of the right of access to information held by the Defence Forces to the extent of protecting the Defence Forces from:*

   (a) *demands to furnish persons with classified information;*

   (b) *disclosing and publicising information relating to covert operations of the Defence Forces; or*

   (c) *disclosing and publicising information, the disclosure or publication of which would be prejudicial to national security.*

3) *For purposes of this section "**classified information**" means any information whose unauthorised disclosure would prejudice national security and includes information on the strategy, doctrine, capability, capacity, and deployment.*

4) *The Cabinet Secretary may by regulations determine the categories of security classification.*

5) *Categories of classified information may include:*

   (a) ***"top secret"** which means information whose unauthorised disclosure would cause exceptionally grave damage to national security;*

   (b) ***"secret"** which means information whose unauthorised disclosure would cause serious injury to national security;*

   (c) ***"confidential"** which means information whose unauthorised disclosure would be prejudicial to the interest of the State;*

   (d) ***"restricted"** which means information which requires security protection other than that determined to be top secret, secret or confidential.*

2.14 The National Intelligence Services Act, No. 28 of 2012

The legislation sets out the functions, organisation and administration of the National Intelligence Service. Just like the Kenya Defence Forces Act and the National Police Service Act, it also contains provisions that limit the freedom of expression, access to information and the media at sections 33, 37 and 72 of the Act. The provisions are, almost identical to the provisions under the Kenya Defence Forces Act. They provide in part as follows:

33. Limitation of freedom of expression

(1) The freedom of expression set out under Article 33 of the Constitution may be limited in respect of a member of the Service under the conditions set out in subsection (2).

(2) Limitation of the freedom of expression shall be to the extent that it is done:

(a) in the interest of national security, public safety, public order, public morality, or public health;

(b) for the purpose of protecting the integrity of Service operations;

(c) for the purpose of protecting the reputation, rights and freedoms of the members or private persons concerned in legal proceedings;

(d) for the purpose of preventing the disclosure of information received in confidence;

(e) for the purpose of regulating the technical administration or the technical operation of telecommunication, wireless broadcasting, communication, internet, satellite communication or television; or

(f) for the security and protection of information within the Service.

Section 37 provides:

37. Limitation of the right to access information

(1) The right of access to information set out in Article 35(1) and (3) of the Constitution may be limited in respect of classified information or information under the custody of the Service under the circumstances set out under subsection (2).

(2) Subject to subsection (1) the Service shall not:

(a) comply with a request to furnish a person with classified information;

(b) disclose or publicize information relating to sources of information, intelligence collection methods and covert operations of the Service; or

(c) disclose or publicise information, the disclosure or publication of which would be prejudicial to national security.

(3) The Cabinet Secretary may by regulations determine the categories of security classification.

(4) The categories of classified information referred to under subsection (3) may include:

(a) ***"top secret"*** *which means information whose unauthorized disclosure would cause exceptionally grave damage to the interests of the State;*

(b) ***"secret"*** *which means information whose unauthorized disclosure would cause serious injury to the interests of the State;*

(c) ***"confidential"*** *which means information whose unauthorized disclosure would be prejudicial to the interests of the State; and*

(d) ***"restricted"*** *which means information whose unauthorized disclosure would be undesirable in the interests of the State.*

Section 72 of the Act provides as follows:

"72. Protection of classified information, records, etc.

Subject to Article 35 of the Constitution and any other written law, the Cabinet Secretary shall, in consultation with the Director-General, by regulations prescribe procedures for the classification, declassification, protection, and destruction of classified information and other records held by the Service.

2.15 Defamation Act, Cap. 36

Defamation Act is essentially a codification of common law principles on the torts of defamation, namely libel and slander. It sets out the exceptions to some principles and constitutive elements of the law on the tort of defamation. It also sets out the available defences to the said tort.

Sections 3-5 of the legislation set out some types of slander and excludes the requirement for the need to prove special damage in a claim. These are slander affecting official, professional or business reputation; slander of women especially with regard to their chastity; and slander of titles, goods or other malicious falsehoods.

Section 6 and 7(1) touch on the absolute privilege accorded to certain reports including those of judicial proceedings of legislative bodies, international organisations and inquiries.

In looking at the Defamation Act, it has to be borne in mind that defamation law is composed mostly of common law principles that have changed over time and continue to evolve. Save, therefore, for explicit introductions such as the minimum sentence for libel as set out under section 16A of the Act, the contribution of the legislature to the establishment of defamation law has been rather minimal. Legislation can, however, be used to check excesses that can arise out of its application and curtail freedom of expression.

Section 7(2) grants conditional privilege on certain reports including those concerning a fair and accurate report on the findings or decisions of such various associations such as those for promoting arts and sciences; for safeguarding interests of any trade, business, industry or profession; for promoting or safeguarding the interests of any game, sport or pastime; and, reports of public meetings.

Section 7(2) states that the provision of the section shall not be a defence where it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to the circumstances.

Forcing a newspaper to publish a response, whether denial or reply is an onerous requirement as newspapers do not have control over the proceedings to which they are not active participants. The protection is, as such, inadequate.

Section 7A provides for a right of reply in the same newspaper that is accused of publishing a defamatory story, to be published within the next possible edition, provided that the right of reply is not sought for after six months of the publication. The clause provides an opportunity for feedback but would work for the benefit of both the media and the offended persons if made a mandatory pre-defamation procedure.

Section 16A confers on the Court the discretion to assess the damages payable in defamation cases, with a cap on a minimum of Ksh1 million where the offence to which the libel relates is one punishable by death and Ksh400,000 in respect of offences punishable by a term of not less than three years imprisonment.

This discretion has consistently been used in a very oppressive manner, with the Courts awarding damages on a scale that threatens to bring down media houses. Since the award of the High Court in *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000] eKLR,* the courts have increasingly made hefty awards running into several million as damages against the media and journalists.

On the whole, the Act needs to be reviewed. A number of reform options are possible. One, a clause recognising the processes at the media Complaints Commission needs to be recognised and be introduced as an incentive for media houses to subject themselves to the process of the Complaints Commission. Stakeholder engagements to this effect have started already and need to be scaled up. Efforts are already in place to convince the Judiciary to nominate a focal point for safety and protection of journalists who will also be a member of the national mechanism for safety and protection of journalists under the Media Sector Working Group have commenced.

Secondly, the legislation should prescribe that, on the part of public officers, one can succeed only on condition that the officer is able to prove actual malice on the part of the author of defamatory material. This would align Kenya to some countries, for example the United States, where this is prevailing position based on current jurisprudence.

2.16 Computer Misuse and Cybercrimes Act, No. 5 of 2018

The Computer Misuse and Cybercrimes Act was enacted in 2018. The legislation prescribes offences relating to computer systems and a framework to enable timely and effective detection, prohibition, prevention, response, investigation, and prosecution of computer and cyber-related crimes.

Coming at a time when the practice of the media is rapidly migrating into cyberspace, the enactment of the legislation should have come as a great relief to many media practitioners to offer the necessary protection to those whose content is largely cyber-based. It should have had facilitative provisions in light of Article 33, 34 and 35 of the Constitution. The opposite is, however, what came out. Almost all the provisions of the legislation touching on the media are skewed against media freedom and freedom of expression.

Section 4 of the legislation establishes the National Computer and Cybercrimes Coordination Committee. The composition of the committee as set out under section 5 of the Act includes the Principal Secretary for Internal Security or his representative; Principal Secretary for ICT or his representative; the Attorney General or his representative; the Chief of KDF or his representative; the IG or his representative; the Director-General of NIS or his representative; the Director-General of CA or his representative; the DPP or his representative; the Governor of CBK or his representative and a director who shall be the secretary to the committee. The Committee, which is responsible for, inter alia, developing a framework for training on prevention, detection, and mitigation of computer and cybercrimes and matters connected thereto, is composed only of regulators. It lacks representation from very key stakeholders, which include online publishers. This gap means that the committee cannot adequately address emerging issues and concerns of the actual stakeholders and participants within the industry.

Section 22 of the Act creates the crime of false publication. It states:

(1) *A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.*

(2) Pursuant to Article 24 of the Constitution, the freedom of expression under Article 33 of the Constitution shall be limited in respect of the intentional publication of false, misleading or fictitious data or misinformation that:

(a) is likely to:

(i) propagate war; or

(ii) incite persons to violence;

(b) constitutes hate speech;

(c) advocates 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) of the Constitution; or

(d) negatively affects the rights or reputations of others.

Section 23 of the Act creates the offence of the publication of false information. Under the section:

> *A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.*

The section should be removed and the recommendation has been included in the memo to the Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs.

Section 27 of the Act creates the offence of cyber harassment and states that:

(1) A person who, individually or with other persons, wilfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct:

(a) is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or

(b) Detrimentally affects that person; or

(c) is in whole or part, of an indecent or grossly offensive nature and affects the person

(2) A person who commits an offence under subsection (1) is liable, on conviction, to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding ten years, or to both.

The provision at subsection 3 enables a person who is a victim of such harassment to seek orders against a person who is charged to refrain from any further harassment.

The constitutionality of the Act has been the subject of litigation before the High Court in ***Constitutional Petition No.206 of 2019: Bloggers Association of Kenya vs Attorney General & 5 others [2019].***

Although the petition was dismissed by the High Court, it has since been appealed and is currently before the Court of Appeal. Besides, media stakeholders need to request Parliament for a review of the legislation.

2.17 The Data Protection Act, No. 24 of 2019

The profession of journalism by its nature fundamentally involves handling of data. Any regulation of handling of data automatically, therefore, impacts on the conduct of journalism. The Act, therefore, applies to the media industry as a whole. The legislation seeks to protect people's personal information or data. These include information related to their families, health and private affairs. The Act gives effect to Article 31 (c) of the Constitution.

Section 5 of the Act establishes the office of the Data Protection Commissioner whose roles are set out in section 6 of the Act. The Data Commissioner is supposed to enforce the Act. In the performance of his/her functions, the Data Commissioner has the powers to conduct investigations on his/her initiative on the basis of a complaint made by a data subject or a third party.

Section 18 of the Act provides for mandatory registration of data controllers and data processors, on the basis of a criterion to be set by the Data Commissioner. The Act defines a data controller as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data. A data processor is on the other hand defined as a natural or legal person, public authority, agency or other body, which processes personal data on behalf of the data controller.

The Act also requires every data controller to have a designated data protection officer whose mandate includes advising the data controller or data processor and other employees on data processing requirements provided under the Act or any other law and ensure on behalf of the data controller that the legislation is complied with.

The principles of data protection are: lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality (security); and accountability. However, the principles, which run throughout the legislation, are not only expressly entrenched in the Act under section 25 even though they form the basis upon which the substantive provisions are modelled.

The Act, for example, under section 26 sets out the rights of data subjects, i.e. an identified or identifiable natural person who is the subject of personal data. These rights include the right to be informed of the use to which their data is to be put, to access their data in the custody of the data controller or processor.

Other provisions of the Act include the duty to notify the data subjects on the rights of the data subject and purpose of the collection, the right of a data subject to object to commercial use of its data as well as the right of rectification and erasure.

The Act makes provisions for exemptions with regards to journalists. Section 52 ***on Journalism, literature and art*** provides as follows:

(1) *The principles of processing personal data shall not apply where:*

- (a) *processing is undertaken by a person for the publication of a literary or artistic material;*
- (b) *data controller reasonably believes that publication would be in the public interest; and*
- (c) *data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes.*

(2) *Subsection (1)(b) shall only apply where it can be demonstrated that the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question.*

This exception is highly welcome and underscores the premium placed on the industry practice codes. The Data Protection Act is one of the legislations which if faithfully and diligently implemented holds the potential of protecting and enabling the realisation of fundamental human rights in this era of information technology.

2.18 Copyright Act, No.12 of 2001

The operative output of journalism cannot be gainsaid, it is largely based on intellectual output. At the same time, journalists also have to rely on other people's intellectual property in the course of their work. It is this interplay of Journalistic interest in intellectual property, especially copyright, that brings copyright law to the centre of media practice, for the purposes of not only protecting media practitioners' intellectual output but also restricting the industry from abuse of others' copyright.

The legislation was enacted to govern copyright. The nature of protection for copyright afforded under the act is stipulated under section 26 as follows:

(1) *Copyright in a literary, musical, artistic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts:*

(a) *the reproduction in any material form of the original work;*

(b) *the translation or adaptation of the work;*

(c) the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;

(d) the communication to the public of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original;

(e) the making available of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original; and

(f) the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original.

Subsection 3 read with the 2nd schedule of the Act provides for limitations to the exclusive rights protected under subsection 1. These limitations include fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events. The limitations are, however, subject to acknowledgement of the authors.

The term of each category of copyright is set out under section 23 as follows: For literary, musical, dramatic or artistic works other than photographs it is 50 years after the end of the year in which the author dies. For audio-visual works and photographs, 50 years from the end of the year in which the work was either made, first made available to the public or first published, whichever is latest; for broadcasts, it is 50 years after the end of the year in which the broadcast took place.

The question of ownership of copyright is a very important one, especially in the media industry where authors are employees of media houses. Section 31 of the act provides the clearest and unambiguous answer thus:

Section 31 of the Act provides:

(1) Copyright conferred by sections 23 and 24 shall vest initially in the author:

Provided that where a work:

(a) is commissioned by a person who is not the author's employer under a contract of service; or

(b) not having been so commissioned, is made in the course of the author's employment under a contract of service, the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer.

(2) Copyright conferred by section 25 shall vest initially in the Government or such international bodies or other governmental organisations as may be prescribed, and not in the author.

(3) In this section ***"owner of copyright":***

(a) where the economic rights are vested in the author, means the author;

(b) where the economic rights are originally vested in a physical person other than the author or in a legal entity, means that person or entity;

(c) where the ownership of the economic rights has been transferred to a physical person or legal entity, means that person or entity.

The Act, however, also recognises and protects the inalienability of the actual authors (physical persons) moral rights. It thus protects them by providing as follows:

32. Moral rights of an author

(1) Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to:

(a) claim the authorship of the work; and

(b) object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation.

(2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author but the right to exercise any of the said rights shall be transmissible by testamentary disposition or by operation of the law following the demise of the author.

(3) The author has the right to seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, where such work would be or is prejudicial to his honour or reputation.

For purposes of dispute resolution, the legislation establishes the Copyright Tribunal under section 48 of the Act. The Tribunal's jurisdiction, in addition to the power to grant Anton piller orders under section 37, includes the jurisdiction to determine a dispute over registration of copyright and hear appeals over the Kenya Copyright Board's refusal to grant a certificate of registration to a collective management organisation among others.

2.19 Employment Act, No.11 of 2007 and Labour Relations Act, No. 14 of 2007

Whereas there is a sizable proportion of journalists who work on freelance basis, the majority of journalists still work under employment of media houses. As such, the work environment for journalists is heavily influenced/affected by the employment laws. Key among these are the Employment Act and Labour Relations Act. The Employment Act sets out the minimum legal requirements for an employment contract within Kenya. It requires any employment for a period exceeding three months to be made in writing. It also requires employers to have an anti-sexual harassment policy where there are more than 20 employees.

The Labour Relations Act on the other hand provides a framework for the formation and registration of trade unions and employers associations and collective bargaining between

employees and employers. The Act at section 54 provides that an employer shall recognise a trade union for the purpose of collective bargaining if the trade union represents a simple majority of unionisable employees. Section 57 of the Act states that:

> *An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.*

2.20. Films and Stage Plays Act, Cap. 222

The Films and Stage Plays Act was enacted in 1962. It reads at its long title that it is an Act of Parliament that provides for controlling the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith.

In Misc Civ Application 821 of 2002, Nation Media Group Limited v Attorney-General [2007] e KLR the High Court held that the legislation was meant to regulate the exhibition of films in cinema halls, theatres, stages and any other enclosed area or rooms … ."

Vide the Licensing Laws (Repeal and Amendment) Act. No.5 of 2007, however, the provisions relating to stage plays, were all repealed. By further amendments brought vide the Statute Law (Miscellaneous Amendments) No. 6 of 2009, the legislation was further amended to change the name of the Kenya Film Censorship Board to Kenya Film Classification Board. It also firmed up its powers, and this time round, sneaked in a mention of broadcasting at sections 12 and 15 of the Act. It also brought in the classification of posters for outdoor exhibitions within the classification mandate of KFCB.

The legislation currently mainly regulates the filming industry and aspects of posters. It also affects broadcasting to the extent that it exerts control over production of films broadcast on TV. The legislation requires, at sections 4 and 5, one to obtain a filming licence from a licensing officer appointed by the Cabinet Secretary. An application for the filming licence, it is required, must be accompanied by a script of the film to be made. Section 6 of the Act grants the Licensing Officer the absolute discretion to grant, refuse or grant subject to conditions a filming licence. He/she also has the discretion to demand execution of a bond, to secure compliance by the applicant with the conditions in the licence and the details of the script.

Section 7 of the legislation provides that should the applicant amend or alter the script, they must apply again to the licensing officer for permission to film on the basis of the amended script. Section 9 of the Act grants the licensing officer power to appoint a police officer to be present at making of a film and such police have the authority and discretion

to intervene and stop making of a scene which in his or her view endangers the safety of any person or property.

Subsequent to making of the film, the legislation at sections 12 (2) and 14 of the Act requires one to apply to the Kenya Films Classification Board for classification and approval for exhibition and/or broadcasting. The application must be accompanied by the entire film to which the application relates.

Section 13 of the Act also requires one to obtain approval of the Board before displaying a poster in a public place. By the wording of section 14(2) of the Act, it is presumable that the posters referred to under section 13 of the Act are posters relating to films.

Section 16(4) provides that the Board shall not approve any film or poster which in its opinion tends to prejudice the maintenance of public order or offend decency or the public exhibition or display of which would in its opinion for any other reason be undesirable in the public interest.

Section 17 makes provisions for the protection of children. It provides that where a film is unsuitable for general exhibition, the Board shall record its ruling indicating either of the three forms i.e., for adults only; unsuitable for children under the age of sixteen years; and, unsuitable for children under the age of ten years. Whereas regulation of speech for purposes of protection of children is no doubt desirable, most of the provisions of the legislation run contrary to the Constitution. Sections 6, 9 and 13(2), for example, grant public officials unbridled discretion in controlling the process. The licensing officer has the absolute discretion to accept or refuse a licence under section 6. The police officer has absolute discretion to stop the making of a film. Section 13(2) gives the licensing officer the discretion to order the removal of a poster. Further, section 16(4) gives the Board the open check to withhold approval for sentimental or subjective reasons.

In the case of Nation Media Group (Note 14, above), the Court remarked as follows in respect of the provision:

> *There ought to be objective standards to be applied in the determination of an Application for a certificate of approval from the Licensing officer and the Film censorship board. In the absence of such criteria, the two bodies are likely to act arbitrarily and they might abuse the power. In modern*

[31]The case was instituted by Nation Media Group following a gazette Notice by the Minister (now Cabinet Secretary) for Information, Transport and Communication requiring broadcasting networks, cinema theatres, production houses etc. to obtain a certificate of approval from a Film Licensing Officer and the Kenya Film Censorship Board *(Now known as the Kenya Film Classification Board) before exhibiting any films, including Television Commercials, Television Dramas, Comics etc. Part of the Courts holding was that it could never have been meant to apply to media houses*

era, it is highly unacceptable that a body should be entrusted with arbitrary powers in determining the fate of a right constitutionally conferred to a subject.

In the 2007 Judgement, the High Court in a two-Judge bench found most of the provisions of the legislation, including the two-part approval process, to be unconstitutional. In the same Judgement, the Court found section 29 of the legislation, which confers on the Cabinet Secretary the appellate jurisdiction over the decisions of the Board and the Licensing Officer to be unconstitutional. The Court stated:

If pursuant to the legal Notice, the Applicant is denied Certificate of approval of the film and he is compelled to appeal to the same Minister. Can it, in all fairness be said that he will be accorded fair treatment by the Minister. We have our own doubts. Indeed, it is very possible that the Minister will be like a referee and or Judge in his own cause.

The requirements for the acquisition of a filming licence before one can make a film is unnecessary interference with the freedom of artistic expression and makes the whole process of film production tedious, laborious, and unnecessarily bureaucratic. In the case of Nation Media Group (Note 14, above) the Court wondered why a film producer would need two approvals from two bodies established under the same law for the same work and towards the same goal. The Court wondered what happens when one body grants approval and another one declines.

The Court's findings in Nation Media Group resonate with the recommendations of **Farida Shaheed,** the UN Special Rapporteur in the field of cultural rights. Her report to the Twenty third session of the UN Human Rights Council **– The right to freedom of artistic expression and creativity** – recommends, inter alia, as follows:

Classification bodies or procedures may be resorted to for the sole purpose of informing parents and regulating unsupervised access by children to particular content, and only in the areas of artistic creation where this is strictly necessary due in particular to easy access by children. States shall ensure that, (a) classification bodies are independent; (b) their membership includes representatives of the arts field; (c) their terms of reference, rules of procedure and activities are made public; and (d) effective appeal mechanisms are established. Particular attention should be paid to ensuring that the regulation of access by children does not result in prohibiting or disproportionately restricting access for adults.

In a bizarre twist of jurisprudence, however, the High Court in Petition 313 of 2018, *Wanuri Kahiu & Another vs CEO Kenya Film Classification Board Ezekiel Mutua & 4 Others [2020] e*

[32]*Note 14 (above).*

KLR, declared the same provisions constitutional. This decision amounted to a setback in jurisprudence touching on human rights and democratic governance.

Since the decision is a recent one, there needs to be a follow up with the parties to the suit to establish whether an appeal was actually preferred against the decision, MCK and KUJ. There could then follow-up on a mechanism for participation in the suit. The information available so far is that a notice of appeal was lodged.

Secondly, it is obvious that the decision in the film Rafiki did not have the participation of most of the sector players. A lot of critical issues that concern the industry players were therefore never addressed. The circumstances, therefore, call for the institution of a fresh petition to thrash out the areas that were not addressed. Importantly, sector players need to invoke the provisions of Article 165(4) of the Constitution to have the issue determined by a three-judge bench since it raises substantial questions of law.

Lastly, a petition by the sector players to Parliament with legislative proposals is the surest way to get the problematic provisions dealt with. In this regard, there is a need for stakeholder consultations geared towards preparing legislative proposals for presentation to Parliament.

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[33]*See Para 89 (c). Doc A/hrc/23/34. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed dated 14th March 2013, submitted at the Human Rights Council Twenty-third session.*

[34]*Following the Classification by the KFCB of the film Rafiki as restricted and banning its exhibition within the Republic of Kenya, the petitioner lodged a petition to the High Court where, inter alia, he challenged the constitutionality of sections 4,6,7, 8,9,12,13,16,30 and 35 of the Films and Stage Plays Act.*

3.0 CONCLUSION AND RECOMMENDATIONS

In addition to the Constitution, this review has looked at 20 pieces of legislation with provisions that directly affect the day-to-day practice of journalism, or whose application has a proximate and significant impact on the rights of journalists and media practitioners.

From this analysis, it is evident that the constitutional vision for an open society, based on democratic values, and more particularly a free press, is clear and unambiguous. Substantive realisation of the same, however, in light of the content of so many vitiating legal provisions, remains a distant cry. This is because, save for the enactment of the Access to information Act (whose implementation cannot yet be fully achieved, due to absence of necessary supporting regulations) and attempts to comply with Article 24(2) a in new legislations, most of pre-constitution 2010 legislations still retain their draconian texts and, shockingly, some new legislations also adopt the same trend of harbouring retrogressive provisions. The Courts, however, have to be appreciated for, in most opportune instances, advancing the course of articles 33, 34 and 35 of the Constitution by making decisions based on progressive interpretation in line with the provisions of section 7 of Schedule Six of the Constitution. Repeal and/or deletion of sections declared unconstitutional by the courts have been proposed.

On the other offending provisions, a mixture of measures have been proposed. This include petitioning the Courts to have offending provisions declared unconstitutional and petitioning the Parliament to amend or repeal the offending provisions. With regard to legislations whose existence is necessary for advancement of Article 34, such as the Kenya Broadcasting Act, but are nonetheless plagued with numerous offending provisions running to the core of the legislation, due to retrogressive values of the past, a legislative overhaul has been proposed. In this category, include the Kenya Broadcasting Corporation Act, and the Kenya Films and Stage Plays Act.

For legislations whose intent, evidently, was to control freedom of expression and the media, and to that extent, only harbour provisions that undermine every single aspect of freedom of the media and expression, such as the Books and Newspapers Act, a wholesome repeal of the legislation has been proposed.

Several recommendations for the review of legislations offending freedom of expression and the media have been made. The legislations include the Computer Misuse and Cybercrimes Act, Prevention of Terrorism Act, the Penal Code, the Kenya Information and Communications Act, and the Defamation Act. The recommendations have been shared with the Building Bridges Initiative (BBI) and the Communication Secretariat at

the Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs.

The annexed table provides highlights of the suggested reforms. The same can be adopted and customised as a tracking tool for the purposes of monitoring progress of the reform process.

Finally, whereas this work is comprehensive and focuses on media freedom, it is not lost that media practice does not occur in a vacuum. Accordingly, it is further indirectly affected by many other legislations that do not necessarily target the media or freedom of expression. It is, as such, recommended that this work be updated from time to time to record the progress of reforms and incorporate new ideas.

ANNEX: ACTIONABLE AREAS FOR REFORM

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
Kenya Information and Communications Act, No. 2 Of 1998			
3-5	Section 3 establishes the Communications Authority of Kenya as a Commission under the Act, while section 5 sets out the Object and purpose of the Authority, which include to licence and regulate postal, information and communication services in accordance with the provisions of this Act.	Section 5 is broadly worded, with the effect that it creates room for regulation of all forms of communication by the Authority.	Amendments should be moved to exclude the Authority from the regulation of the media, setting of media standards, and regulating the programming code for broadcast media on account of lack of independence of the CA Board by dint of section 6 of the Act.
6	Sets out the composition of the Board of the Communications Authority. The Chairperson of the Board is appointed by the President. The other members of the board are the Principal Secretary responsible for the Broadcast, electronic, print, and all other types of media; the Principal Secretary for Finance; the Principal Secretary for Internal Security, and seven other persons appointed by the Cabinet Secretary for ICT.	The provision effectively places the Board under the control of the Government and by extension political interests as there is no guarantee that none of the appointees of the Cabinet Secretary will be appointed based on of merit. It is important to note that section 6 as currently framed follows an amendment effected in the year 2018. The amendment repealed section 6B which had previously provided for competitive recruitment of board members, where a vacancy would be declared and the process is led by a selection panel comprising of representation from diverse organisations.	The framing of the provision should be used as a basis for seeking a Court's declaration that the Authority as constituted is not competent within the context of Article 34(5) to exercise control over the media. In the long term, however, an amendment ought to be moved to guarantee the Commissions Independence so as to make it compliant with Article 34.
46A	Sets out the functions of the Commission in relation to Broadcasting. At Paragraphs (j) and (k), the Authority is conferred the function of setting media standards and regulating and monitoring compliance with those standards.	In light of the provisions of section 6, the section contravenes the provision of Article 35 which requires Parliament to enact legislation for the establishment of a body, which shall: *Be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society and set media standards.*	The two subsections should be repealed, through an amendment ***(as suggested in the first item herein)*** otherwise be declared unconstitutional through legal action.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
46A		It further contradicts the dictum of the Supreme Court of Kenya in CCK [now CA] vs Royal Media Services which declared that the CA was not the body contemplated under Article 35 of the Constitution. The provision further clashes with section 6 of the Media Council Act, which confers the Media Council of Kenya jurisdiction to set standards for the media.	
46 H	Grants CA the mandate to prescribe a programming code for broadcasters.	The provision directly contradicts Articles 34(2) and 34 (5) of the Constitution.	The provision should be amended to take away from the Commission the responsibility of prescribing a broadcasting code, otherwise, it should be declared unconstitutional through a Court Action.
46J	Paragraph (a) gives the Authority the power to revoke the licence of a broadcaster if the licensee is in breach of the provisions of the Act or regulations made thereunder. Sets out circumstances and conditions under which the Commission may revoke licences, which include being in breach of the provisions of the Act or regulations made thereunder.	The import of the provision is that the CA can revoke a broadcaster's licence if the broadcaster is in breach of the offending regulatory provisions, including provisions relating to media standards and programming code.	Amendment of all the provisions that confer the regulation of broadcasting programming to the CA to shift the jurisdiction to the Media Council of Kenya.
46K	Mandates the Cabinet Secretary to make regulations in consultation with the Commission generally with respect to all broadcasting services.	The provision excludes the MCK, which is the body mandated under the Constitution to monitor media standards.	The provision should be amended to include the MCK as one of the bodies that must be consulted.
46L	Requires all Broadcasters to establish and maintain a procedure for complaints relating to Broadcasts. Where one is dissatisfied with the outcome of the internal complaints mechanism, they can appeal to the commission and thereafter to the Multimedia Appeals Tribunal.	The conferment of Appellate jurisdiction upon the Authority and the Tribunal gives them jurisdiction over supervision of media standards, thus effectively usurping the mandate of MCK, contrary to what the Constitution contemplates.	Amend to grant the Media Complaints Commission the Appellate jurisdiction

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
46M	Requires broadcasters to be able to avail transcripts and/or documents to the Commission, tribunal or complainant whenever the same is needed for purposes of dispute resolution.	The provision continues the otherwise unconstitutional interference by the Commission in the programming of the media.	Amend to transfer the role to MCK.
102 and 102A	Section 102 establishes the Communications and Multimedia Appeals Tribunal comprising of a Chairperson and at least four (4) persons possessing knowledge and experience in matters relating to the media. It also provides for the procedure for appointment of the Chairperson and members of the Tribunal. Section 102A sets out the jurisdiction of the Tribunal and provides for the procedure for presenting complaints before the Tribunal. Paragraph(a) and (b), specifically gives the tribunal jurisdiction over journalists	The level of discretion given to the Cabinet Secretary on the appointment of the members of the Tribunal whittles down the independence of the Tribunal. The jurisdiction granted to the tribunal under section 102A conflicts with the jurisdiction granted to the Complaints Commission, which is to entertain complaints against media enterprises and journalists. The wide remedial jurisdiction given to the Tribunal.	Amend to transfer jurisdiction regarding broadcast and media to the Media Complaints Commission.
102E	Sets out the remedial jurisdiction of the tribunal.	The remedial jurisdiction of the tribunal focuses only on journalists and media enterprises. This lends credence to the argument that the Tribunal unnecessarily and unconstitutionally usurps the functions of the Media Complaints Commission.	The section should be repealed alongside section 102 (a) and (b) of the Act. Otherwise, it should be declared unconstitutional
Other provisions of concern. 84J, 84 and 102 K.	Section 84J establishes the universal services fund and provides for the making of regulations by the Cabinet Secretary to govern the fund. Section 102K Establishes the Universal Services Advisory Council, whose mandate is to advise the Authority and provide	The many bodies created under the Act are a duplication of the duties of the Communications Authority. The duplication is not only unreasonable but are also confounding on the mandate of the Authority.	The sections, in the absence of any justification, ought to be repealed. **Recommended Practical Step** 1. In addition to the already existing petition challenging the constitutionality of these provisions, amendments should be included in an omnibus amendment bill.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
	strategic policy guidance for the administration and implementation of the Universal Service Fund. Section 84 Establishes the National Communication Secretariat whose function is to advise the Government on the adoption of a communication policy.		2. With regards to regulations, pending the parliamentary process, the media sector organisations should proactively engage the Cabinet Secretary, Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs, to prescribe new regulations to shift the matters relating to Broadcasting to the Media Council of Kenya
Kenya Information and Communications (Broadcasting) Regulations 2009			
Regulation 6 (3) *(c)*	Requires broadcasters to adhere strictly to the Commission's or own subscribed programme code in the manner and time of programming schedules.	The regulation purports to confer on the Authority the jurisdiction over media programming which is equivalent to setting media standards.	It is notable that the regulations were gazetted in 2009 and have, therefore, expired by now. New regulations, therefore, ought to be drafted. Regulations touching on broadcasting should be placed under MCK. **Recommended Practical Step** 1. In addition to the already existing petition challenging the constitutionality of these provisions, amendments should be included in an omnibus amendment bill. 2. With regards to regulations, pending the parliamentary process, the media sector organisations should proactively engage the Cabinet Secretary, Ministry of Information, Communications and Telecommunication, Innovation and Youth Affairs, to prescribe new regulations to shift the matters relating to Broadcasting to the Media Council of Kenya
Regulation 37	Empowers the Commission to prescribe a programme code that sets the standards for the time and manner of programmes to be broadcast by licensees.	See comment under regulation 6 (3) *(c)*.	
Regulation 38	Confers on the Authority the mandate of reviewing and accepting whatever programme codes developed by groups of broadcasters to which the broadcasters are supposed to subscribe.	See comment under regulation 6 (3) *(c)*.	
Regulation 39	Regulation 39 (3) (h) specifically grants the commission the mandate to prescribe matters that must be included in a broadcaster's complaint procedure.	See comment under regulation 6 (3) *(c)*.	
Regulation 41	Requires every broadcaster prior to the commencement of broadcasting services to submit its complaint handling procedure to the Commission for approval.	See comment under regulation 6 (3) *(c)*.	
Regulation 42	Grants the Commission Appellate jurisdiction over broadcaster's complaint resolution mechanisms.	See comment under regulation 6 (3) *(c)*.	

Kenya Information and Communications (Dispute Resolution) Regulations, 2010			
	The regulations under this part provide for the procedure for dispute resolution under the auspices of the CA and provide at regulation 8(6) for appeals of the Authority's decisions to the Tribunal	The regulation purports to confer on the Authority the jurisdiction over media programming which is equivalent to setting media standards.	*Amend the regulations to Broadcasting component under regulations to be placed under jurisdiction of MCK*
Media Council Act, No. 46 of 2013			
Section 5-22: **(Establishment and functions of the Media Council of Kenya).**	Section 5 of the legislation establishes the Media Council of Kenya. It sets out the procedure for choosing the Council's membership, which is by way of a selection panel. The selection panel is comprised of representatives from a wide spectrum of the civil society membership. The council comprises of 9 people, being a Chairperson, a nominee of the Cabinet Secretary and seven other members appointed following a competitive process. Members of the Council serve on a part-time basis, each three-year term, which is renewable only once. The functions of the council are set out at section 6 of the Act and include to prescribe standards of journalists, media practitioners and media enterprises. Section 6(3), empowers the Cabinet Secretary in consultation with the Council to make regulations to give further effect to subsection (2). The import of subsection (2) is to entrench within the statute the Constitutionally permitted limitations to freedom of expression.	Lack of representation of actual players in the activities of the Council. International best practice requires practising journalists to sit in the Council so that actual players are represented. The lack of representation defeats the whole essence of self-regulation. The scope of who constitutes a journalist is vague as it is left for the Council to decide. Section 6(b) inter alia, of the Act, read against section 46A (j) and (k) presents a conflict, in that it subjects journalists to regulation by two institutions. According to the Judgement in ***CCK & Others vs Royal Media Services & Others,*** the appropriate institution is the Media Council of Kenya. The provisions of section 6(2) and (3) provide a perfect opportunity for the Council to seize their mandate by having the Cabinet Secretary to promulgate regulations granting them the exclusive mandate of setting media standards in line with the provisions of section 6(2)	The Act should be amended to recognise mechanisms for internal self-regulation within the media houses and media related organisations. Media organisations should come up with a draft bill and petition Parliament through the Clerk's office or a private members for it to be moved through Parliament. The Media Council, with the support of the Media Sector Organisations should petition the Cabinet Secretary to pass the regulations contemplated under section 6(3) to explicitly cover the necessary regulations for broadcast media enterprises. This, alongside the amendments to repeal the offending sections under the KICA Act, should bring the entirety of the media industry within the regulatory control of MCK. **Recommended Practical Step** Include the proposed amendments in the suggested omnibus media laws amendment bill.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
Sections 27-44: **(The Complaints Commission)**	Part IV of the legislation establishes mechanisms for dispute resolution involving the media and the public. The Media Complaints Commission is established under section 27 of the Act. It comprises of a Chairperson and six other members. The membership to the Commission is done through a competitive process. The functions of the Complaints Commission, which are set out at section 31 of the Act include mediation or adjudication of disputes between the Government and the Media and between the Public and the Media and intra media on ethical issues.	The Complaints Commission has no pre-complaint procedure. The legislation does not provide for a means of execution of the Commissions orders and consequences of non-compliance with the directive of the Council.	
Miscellaneous: Sections 45-49	Section 45 entrenches the code of conduct for journalists and media enterprises, which is set out at schedule 2 of the Act.	The schedule appears to be more focused on news media, and quite lean on non-news media. This could have been due to the fact that at the time when the legislation was first enacted, the focus was largely on print media.	There is need to address non-news programming so as to address the concerns of effects of programming on children. This could be achieved by prescribing special regulations focusing on children.
Sections 6(1 *j*, 6*(3)*, 45(2), 46 and 50	The provisions variously subject the operations of the Council to the concurrence or approval of the Cabinet Secretary.	Subjecting duties of the Council to the authority of the Cabinet Secretary negates the expected independence of the Council.	The sections should be amended to grant the Council the exclusive mandate over carrying out of the provisions of the Act
Section 23 (a)	It provides for sources of the Council's funds, being allocations by the National Assembly.	Fails to give the Council independence in making its budget, thus leaving under the budgetary dependence on the government	Amend to grant the Council budgetary autonomy.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
Books and Newspapers Act. Cap. 111			
General Comment	The legislation provides a framework for registration and governance of Newspapers. It is one of the surviving colonial legislations having been enacted in 1960. The rules thereunder were enacted in 1960 and have undergone only minimum review. Generally, going by the wording of various sections, it is notable that the legislation was a colonial law. Its application was mostly suppressive and it can be argued that legislation was calculated to permit government interference on freedom of expression.		Courts should be petitioned to declare the entire legislation unconstitutional under the provisions of the Constitution of Kenya, 2010
PART II: Sections 5-9	Section 6 requires publishers of every book printed and published in the "Col-ony" to be deposited with the Registrar of books and newspapers a maximum of three copies. Section 7 requires a publisher of newspapers to deliver two copies to the Registrar. Section 8 requires publishers to submit returns of newspapers within 14 days of the first publication and, subsequently, in January of every year	The provision is retrogressive and impracticable. Whereas the Cabinet Secretary has the discretion to de-termine the use of the copies of the books deliv-ered to him, no regula-tions have ever been enacted to prescribe how the books so received would be used. The provision gave the Minister (now Cabinet Secre-tary) a blanket discretion to deal with the intellectual property of the author, namely the right of distribu-tion, without any checks. It is notable that to date, no rules have been pub-lished on how to handle the newspapers post-deliv-ery by the publisher, not to mention that the rule is never enforced. The case of Tony Gachoka vs the Attorney General & Others, for example, shows how application of the said law, by an oppressive state can be used to curtail liberties of the individual.	Media organisations should peti-tion parliament to repeal the legis-lation in its entirety. The provision is unconstitutional and should be repealed alongside other sections of the legislation. **Recommended Practical Step** Include a repealing clause in the omnibus Bill.
Part III – sections 10-14	Requires execution of bonds by pub-lishers and printers of newspapers. Just like most other provisions, the section is couched in reference to a colony.	The provisions are outdated and oppressive. The requirement for execution of bond goes against the presumption of innocence until one is proven guilty. Publishing a newspaper without executing bond is consequently proscribed. The requirement for bond also has the effect of locking out small publishers from the market space as it ensures that only the wealthy can get into the business of publishing.	

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
PART IV Sections 15- 23: General provisions	Section 15 gives any person the right to inspect the register of books and newspapers and any newspaper kept under the register. Section 18 requires every printer of a book or newspaper to keep a copy of the book or newspaper with the details of the client and to produce the same whenever required by the Registrar or the courts. Section 19 gives the police the power to seize any publications, and to search any premises and seize publications whether with or without a warrant.	The provisions are oppressive and achieve no purpose. The provisions of section 19 allowing police the power to seize publications on mere suspicion is oppressive as they create an environment of anxiety among publishers. It creates a window of opportunity for the police to interfere with publishers' businesses	
Defamation Act, Cap. 36			
General observations and explication	The legislation was enacted in 1970 and is a codification of common law principles on the torts of defamation i.e. libel and slander. It sets out the exceptions to some principles and constitutive elements of the law on defamation. It also sets out the available defenses to the said tort. Sections 3-5 of the legislation set out some types of slander and exclude the requirement for the need to prove special damage in a claim. These are slander affecting official, professional or business reputation; slander of women especially with regards to their chastity; and slander of titles, goods or other malicious falsehoods. Section 6 and 7 (1) touch on the absolute privilege accorded to certain reports including reports of judicial proceedings of legislative bodies, international organisations and inquiries. While the provisions of the Act are generally okay, the provisions of section 7 (2) are not. In looking at the Defamation Act, it has to be borne in mind that defamation law is composed mostly of common law principles that have changed over time and continues to evolve. Save, therefore, for explicit introductions such as the minimum sentence for libel as set out under section 16A of the Act, the contribution of the legislature to the establishment of defamation law has been rather minimal. Legislation can, however, be used to check excesses that can arise out of its application and curtail freedom of expression.		The legislation needs to be reviewed. One, the clause recognising the processes at the Media Complaints Commission need to be recognised and be used as an incentive for media houses to subject themselves to the process of the Complaints Commission. Legislation should prescribe that on the part of public officers can succeed only on conditions that the officer is able to prove actual malice on the part of the author. Media sector organisations should seek to partner with JSC to develop a bench book with guidelines on the principles to be applied in defamation cases as well as pre-publication bans. **Recommended Practical Step** Petition Parliament to make necessary amendments.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
7 (2)	Section 7(2) grants conditional privilege on certain reports including reports concerning a fair and accurate report on the findings or decisions of such various associations such as those for promoting arts and sciences; for safeguarding interests of any trade, business, industry or profession; for promoting or safeguarding the interests of any game, sport or pastime; reports of public meetings. The subsection states that the provision of the section shall not be a defense where it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to the circumstances	Forcing a newspaper to publish a response, whether denial or reply, is an onerous requirement as newspapers do not have control over the proceedings to which	An amendment to make all the conditions named to be unqualified privilege would be the best remedy
7A	Provides for an opportunity for a reply as a matter of right where a factual inaccuracy has been published against them.	The clause provides an opportunity for feedback, but would work for the benefit of both the media and the offended persons if made a mandatory pre-defamation suit procedure.	A clause should be introduced requiring that a claimant who wishes to benefit from this clause must demonstrate that they sufficiently made attempts to have their right of reply effected, and that it would be a key consideration in assessing damages in the case of a journalist.
12 and 13	Sets out the conditions that must be met by a defendant to benefit from the defences of publication without malice and unintentional defamation. In both cases the defendant is required to provide proof of apology and offer to make amends.		The section needs to be amended to balance/even out the burden between a plaintiff and a defendant, and to remove the near-strict liability nature of its framing.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
16A	Confers on the Court the discretion to assess the damages payable in defamation cases, with a cap on a minimum of Ksh1 million where the offence to which the libel relates is one punishable by death and Ksh400,000 in respect of offences punishable by a term of not less than three years imprisonmen	The duties imposed upon a defendant under 13(5) are too stringent and shift unnecessary burden to authors, which burden is almost equivalent to the burden under criminal proceedings. This discretion has since the award of the High Court in *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000]* eKLR been used in a very oppressive manner, with the Courts awarding damages in a scale that threatens to bring down media houses	A requirement should be imposed on judges to consider attempts at getting remedies directly from the author/publisher or through the Complaints Commission in making the awards. The findings of the Complaints Commission should particularly be given high regard in making an award of damages against journalists.
Penal Code, Cap. 63			
General Comment	The legislation was enacted in 1930 and has undergone several amendments, the latest being done in 2014, vide the Security Laws Amendment Act		**Recommended Practical Steps** Petition Parliament to amend accordingly.
40 (1)	Includes in the definition of treason, the act of imagining the death or harm on a President. Paragraph b outlaws publishing of such imaginations.	To the extent that the provision outlaws imagination and publication of such imaginations, it violates the freedom of expression and is therefore unconstitutional.	Media sector organisations should petition the High Court to declare the provision unconstitutional for violating the freedom of thought and conscience, which are vital to the exercise of freedom of expression.
66	It states that any person who publishes any false statement, rumour or report which is likely to cause alarm to the public or disturb peace is guilty of a misdemeanor.	The provision is speculative and, therefore, goes against the principle of certainty that underlies the principles of criminality.	A petition should be lodged at the High Court to have the section declared unconstitutional for breaching the basic rule of certainty.
66A	Outlaws publication of disturbing material such as injured or dead persons, where the same is likely to cause fear or alarm to the general public.=	The provision was found to be unconstitutional in Petition No. 628 of 2014: *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR.*	The provision should be deleted from the law books.

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
67	Provides that any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated: (a) to bring death or physical injury to any person or to any class,community or body of persons; or (b) to lead to the damage or destruction of any property; or (c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority,is guilty of an offence and is liable to imprisonment for a term not exceeding five years.	The imposition of the burden of proof to the accused goes against the principles of fair process which requires that the burden of proof should initially lie with the prosecution.	The section should be challenged through a constitutional petition. Alternatively, media sector organisations should petition Parliament to repeal the provision
194 -200	Section 194 provides for definition of libel and criminalizes it. Sections 95 -200 make further provisions with regards to what constitutes defamation in various circumstances.	The section has been declared unconstitutional to the extent that it does not include the grounds prohibited under Article 33 (2) *a-d of the Constitution.*	The section needs to be amended to expressly exclude defamation cases.
Computer Misuse and Cybercrimes Act			
5	Provides for composition of the National Computer and Cybercrimes Coordination Committee which includes Principal Secretary for internal security or his representative; Principal Secretary for ICT or his representative; the Attorney General or his representative; the Chief of KDF or his representative; the IG or his representative; the Director General of NIS or his representative; the Director General of CA or his representative; the DPP or his representative; the Governor of CBK or his representative and a director who shall be the secretary to the committee.	The provision excludes the actual day-to-day users of the platform from what is supposed to be a coordination organ. This means that the concerns of the players within the platforms cannot be adequately addressed	Amend the section to provide for representation of the industry players in the committee. **Recommended Practical Steps** Include the amendments in the omnibus amendments bill

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
22 & 23	Creates the offence of false publication and publication of false information	The sections are couched in terms that are too broad and, therefore, avails the legislation for abuse by an oppressive state. The provision re-turns through the backdoor the offence of criminal defamation.	Petition Parliament to repeal this section.
27.	(1)Creates the offence of cyber-harassment and the section expressly states that: a: person who, individually or with other persons, wilfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct: (d) is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or (e) Detrimentally affects that person; or is in whole or part, of an indecent or grossly offensive nature and affects the person	The provision is too broad and speculative thus availing it for abuse by an oppressive state.	Petition Parliament to amend the legislation with a view to making it more precise.
Kenya Broadcasting Corporation Act, Cap. 221			
General CommenT	The legislation establishes the framework for management of the State-owned media house as per section 3 of the Act. The Constitution at Article 34(4) envisages establishment of a State-owned media house which enjoys editorial independence, is impartial and allows airing of divergent views. By dint of Section 7 of the Sixth Schedule of the Constitution, it follows that the Kenya Broadcasting Corporation, 1989, fills up the position of the Broadcaster envisaged under Article 34(4).		Overhaul the legislation **Recommended Practical Steps** A petition has been prepared by KUJ to have the legislation overhauled. A draft bill, however, needs to be prepared to support the petition
4&5	Section 4 and 5 of the Act establishes a Board of Directors and provides for appointment of a Managing Director respectively, all of them being discretionary political appointees.	The legislation creates the latitude for the Board and the office of the Managing Director to be occupied of political appointees who, by the nature of their appointment, are bound to be partisan and beholden to the interests of the appointing authorities.	

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
		Further, lack of professionalisation of the Board and the office of the Managing Director has impacted on the quality of leadership and general direction and performance of the corporation.	
37 & 39	Section 37 mandates the Government to make discretionary grants to the Corporation. Section 39 gives the Corporation the power to borrow money subject to approval from the Cabinet Secretary responsible for Finance.	These provisions coupled with the management structure places the Corporation entirely within the hands of the Government. The Corporation thus operates as a department of the Executive.	
Sections 5(1), 8(1) b, 8 (2) n, 11(2) d, 13(1)b, 14(1), 38(1), 39(1),	These provisions give the Cabinet Secretary an extensive role over the running of the Corporation.	The provisions are an impediment to Corporations editorial and managerial independence.	
Prevention of Terrorism Act, No. 30 of 2012			
19	Outlaws disclosure of information or interference with material which is likely to prejudice investigation under the A	The criminal aspect in these provisions are based on subjective, speculative determination. This goes against the principle of criminality, which requires certainty and the application of the objective test in prescribing a crime. In the manner couched, the provisions provide a window for gaging legitimate discussion and reporting relating to terrorism	First, MCK in consultation with industry players should prescribe guidelines for coverage of terrorist related incidences. Thereafter, Parliament to be peti-tioned to give recognition to those guidelines as the baseline for determination of any alleged offences touching on sections 19, 26, 27 and 30 of Prevention of Terrorism Act. **Recommended Practical Steps** MCK & sector players to prepare draft proposed amendments to be included in the proposed omnibus amendment bill.
26	Criminalises issuing of information that a terrorist act has been committed or is likely to be committed, where the person knows that the information is false.		
27	Criminalises publishing, distribution or availing information intending to directly or indirectly incite a person or group of people to commit a terrorist act.		

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
30	Prohibits having possession of an article or any information on behalf of a person for use in instigating the commission of or preparation to commit a terrorist act.		
Employment Act, No.11 of 2007			
42(1)	Excludes employees on probationary contracts from the protections afforded under section 41, that is the right to a hearing before termination.	The provision exposes professionals to arbitrary termination.	The provision needs to be amended **Recommended Practical Steps** Include a proposed amendment in the omnibus amendment bill.
Films and Stage Plays Act, Cap. 222			
4 & 5	Makes acquisition of a filming licence a prerequisite to making or exhibition of a film within the Republic of Kenya	This is an unnecessary restraint to people's freedom of thought and expression. Imposing licensing as a precondi-tion for one to express their mind is an affront to personal integrity	The entire legislation needs to be overhauled to remove the draconian and new legislation that focuses solely on the protection of children enacted. The provisions that mention broadcasting to be excised. **Recommended Practical Steps** Stakeholders to lead in preparation of the bill. Include in the omnibus amendment bill proposals to exclude broadcasting services from the legislation.
6 (1) & (2	6(1) Grants the licensing officer the discretion to issue or refuse to issue a filming licence. 6(2) Grants the licensing officer the discretion to require an Applicant to enter into a bond, with or without sureties for purposes of securing that the films are made in accordance with the conditions contained in the licence	The unlimited discretion under the provision is a sure catalyst for arbitrariness.	
7	Requires that where it is desired to make a material alteration to an approved script, an application has to be made to the Licensing Officer outlining the desired alterations.	This requirement makes the process of film making bureaucratic and tedious. It also infringes on the right to Ar-tistic expression which is dependent on creativity, a phenomenon that is by its very nature perpetually fluid.	

LEGISLATION/ SECTION	DESCRIPTION	IMPLICATION	RECOMMENDED ACTION
9	Provides that a filming licence where granted on conditions that a policer would be present, that police officer has the discretion to intervene and stop making of the film.	Such kind of intervention is a breach of the filmmaker's personal autonomy and it is an unnecessary interference with the freedom of speech.	
12 (2)	Provides that a film cannot be distributed, exhibited or broadcasted unless the same is examined and a certificate of approval issued by the Board.	This is an absolute restriction of freedom of speech. It is notable that the same is not based on any set criteria other than the gut feeling of the Board members.	
16	16 (1) *b & c*, (2) *b &* c and (4) empowers the Board to refuse approval or to alter some parts of the film submitted to them for approval.	This broad discretion to interfere with an artist's output is an interference with the freedom of expression.	
29	Confers the Cabinet Secretary the appellate jurisdiction over decisions of the Board and the Licensing Officer	The provision defies the requirements of fair administrative procedure. The Board and the Licensing Officer work under the direction and supervision of the Cabinet Secretary. It follows that there are very slim chances that appeals to the Cabinet Secretary would be handled with due impartiality.	
30	Confers the Cabinet Secretary the power to revoke any approval or permission issued the Act.	The power is so absolute and is as such, open to abuse.	
31	Gives the police the power to enter into a place where an exhibition is being made to ascertain whether the provisions of the Act, regulations or the terms and conditions of any certificate of approval are being observed	The provision exposes any would be such exhibitors to harassment, intimidation and/or extortion by the police.	

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