Nation Media Group Limited & 6 others v Attorney General & 4 others; Consumer Federation of Kenya & 4 others (Interested Parties) (Petition 30 & 31 of 2014 (Consolidated)) [2016] KEHC 7689 (KLR) (Constitutional and Human Rights) (27 May 2016) (Judgment)

Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR

Neutral citation: [2016] KEHC 7689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 30 & 31 OF 2014 (CONSOLIDATED)

I LENAOLA, M NGUGI & WK KORIR, JJ

MAY 27, 2016

BETWEEN

NATION MEDIA GROUP LIMITED ..... 1ST PETITIONER

STANDARD GROUP LIMITED ..... 2ND PETITIONER

ROYAL MEDIA SERVICES LIMITED ..... 3RD PETITIONER

KENYA EDITORS GUILD ..... 4TH PETITIONER

KENYA UNION OF JOURNALISTS ..... 5TH PETITIONER

KENYA CORRESPONDENTS ASSOCIATION ..... 6TH PETITIONER

MEDIA COUNCIL OF KENYA ..... 7TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT

SPEAKER OF THE SENATE ..... 3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF INFORMATION COMMUNICATIONS AND TECHNOLOGY ..... 4TH RESPONDENT

COMMUNICATION AUTHORITY OF KENYA ..... 5TH RESPONDENT

AND

CONSUMER FEDERATION OF KENYA ..... INTERESTED PARTY

INFORMATION AND COMMUNICATION TECHNOLOGY CONSUMERS ASSOCIATION ..... INTERESTED PARTY

WRITERS ASSOCIATION OF KENYA ..... INTERESTED PARTY

UNIVERSITY JOURNALISM AND MEDIA SCHOOLS ASSOCIATION OF KENYA ..... INTERESTED PARTY

KENYA ASSOCIATION OF PHOTOGRAPHERS ILLUSTRATORS AND DESIGNERS ..... INTERESTED PARTY

High Court Declares the Media Council Act and the Kenya Information and Communications (Amendment) Act Constitutional

The case challenges the constitutionality of the Kenya Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013. The petitioners, including major media houses and journalist associations, argued that the laws were enacted in violation of the Constitution and infringe on freedom of expression and media independence under articles 33 and 34. The petitioners contended that the legislative process was flawed as the Senate was excluded from debate, and the President exceeded his authority by making recommendations before assenting to the Bills. They further challenged the establishment of regulatory bodies under the Acts, arguing that they imposed undue State control over the media. The High Court upheld the constitutionality of the laws, ruling that the enactment process was valid and the regulatory framework did not unlawfully restrict media freedoms. The decision reaffirmed Parliament's role in media regulation while balancing constitutional rights.

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Jurisdiction *- jurisdiction of the High Court - jurisdiction of the High Court to inquire into the constitutionality of acts done by any person or state organ - whether High court had jurisdiction to inquire into the acts of Parliament and the Executive - Constitution of Kenya, 2010 articles 159(2)(e), 165 (3)(d)(i), and 165 (3)(d)(ii).*

Constitutional Law *- constitutionality of statutes - constitutionality of the process of enactment of the Kenya Information and Communication (Amendment) Act and the Media Council Act – claim that the enactment process excluded the involvement of the Senate - whether the statutes dealt with matters concerning county governments or devolution for which the involvement of the Senate in their enactment was mandatory - Constitution of Kenya, 2010 article 110(3) and the Fourth Schedule to the Constitution.*

Constitutional Law *- legislative process - presidential assent - extent of the President's power to decline to assent to statutes and to express his reservations - where reservations were expressed by the President with respect to two Bills that culminated in the enactment of Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act 2013 - where a Memorandum of Refusal expressing reservations and the opinion of the President upon presentation of two Bills for presidential assent was tabled before Parliament and considered by Parliament - whether the making and consideration of the memorandum entailed a usurpation of the legislative powers of the National Assembly - Constitution of Kenya, 2010 article 115.*

Constitutional Law *- fundamental rights and freedom - freedom of expression and freedom of the media - limitations placed on the enjoyment of the rights - whether it was justifiable to provide under section 3(2)(a) of the Media Council Act that the exercise of those freedoms would need to reflect the interests of society and to provide under section 6(2)(c) of the Media Council Act that the freedoms would be exercised subject to the requirement of ensuring the protection of protection of national security, public order, public health and public morals was safeguarded - whether such provisions were too broad in their tenor and constituted unjustifiable limitations placed on the enjoyment of the freedoms - Constitution of Kenya, 2010 articles 33 and 34; Media Council Act, 2013, sections 3(2)(a) and 6(2)(c).*

Constitutional Law *- fundamental rights and freedom - freedom of the media - independence of the media - powers granted to the Cabinet Secretary in charge of information and communication with respect to the media - whether it was speculative to question the existence of such powers before any guidelines were issued - Constitution of Kenya, 2010 articles 33 and 34.*

Constitutional Law *- fundamental rights and freedom - freedom of the media - independence of the media - the composition and selection of the Board of the Communication Authority of Kenya (the Board) under section 6 (1) of the Kenya Information and Communication (Amendment) Act - whether the process set out for the constitution of the Board and the entities involved in it undermined the independence of the media - Constitution of Kenya, 2010 article 34.*

Constitutional Law *- right to a fair hearing - overlap in the jurisdiction of the Multimedia and Communications Appeals Tribunal and the Complaints Commission under the Media Council Act and provision for the making of anonymous complaints under the Kenya Information and Communication Act - whether the overlap in jurisdictions and the anonymous complaints were a violation of the right to a fair hearing - Constitution of Kenya, 2010 article 50(2).*

Brief facts

The two petitions challenged the constitutionality of the Media Council Act 2013 and the Kenya Information and Communications (Amendment) Act 2013. The Petitioners alleged that the two legislations were enacted in a manner that was in violation of the Constitution and that their application would violate several of their rights guaranteed under the Constitution.

The petitions were consolidated with Judicial Review Miscellaneous Application No 31 of 2014 in which the applicant took the position that the Media Council Act, 2013 was unconstitutional. Further, that the actions of the Cabinet Secretary, Ministry of Information, Communications and Technology, in seeking to recruit members of the Media Council and the Media Complaints Commission were in violation of the statute.

The matters were consolidated in view of the fact that they raised substantially the same issues in relation to the constitutional guarantee to freedom of expression and of the media.

Issues

i. Whether High court had jurisdiction to enquire into the acts of Parliament and the Executive.

ii. Whether the process of enactment of the Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act 2013 was unconstitutional to the extent that it excluded the Senate.

iii. Whether the two bills (that culminated in the enactment of Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act 2013) were bills affecting the Counties and therefore should have been placed before the Senate.

iv. Whether recommendations made by a President in regard to Bills presented to him for assent were unconstitutional and a usurpation of the legislative powers of the National Assembly.

v. Whether provisions of the Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act 2013 violated the freedom of expression or of the media in that:

    a. section 5B(2) and (3) of the Kenya Information and Communications Act and section (2)(c) of the Media Council Act limit the freedom of expression in a manner not permitted by the Constitution.

    b. Constitutionality of section 3(2) of the Media Council Act read with section 4 as being overbroad and overreaching and if applied strictly would leave the press with 'no breathing space'.

vi. Whether the Regulatory Authority established under the Kenya Information and Communication (Amendment) Act 2013 was independent and autonomous.

vii. In respect of the two complaints mechanisms established under both the Media Council Act and the Kenya Information and Communication (Amendment) Act 2013

a. The jurisdiction of the Multi-media Appeals Tribunal under the Kenya Information and Communications (Amendment) Act and Complaints Commission under the Media Council Act.

b. Whether the existence of two disciplinary processes exposed the media practitioners to double jeopardy contrary to article 50(2)(o) of the Constitution.

c. Whether anonymous complaints posed a threat to the violation of a fair trial.

d. Whether the imposition of penalties was a violation of the petitioner's rights.

Held

1. Article 258 (1) and 22 of the Constitution had granted the Court jurisdiction to determine petitions alleging contravention or threat of contravention of the Constitution. In addition, article 165 (3) (d) (i) and (ii) had also granted the court the jurisdiction to inquire whether any act done by any person or state organ had been done in accordance with the Constitution. Therefore, the court in the present case had the jurisdiction to determine the issues raised in the petition.
2. Article 159(2) (e) of the Constitution mandated the court in exercising its judicial authority, to protect and promote the purpose and principles of the Constitution bearing in mind its provisions with respect to its position *vis a vis* other laws. The court was guided by various judicial pronouncements with respect to the interpretation of the Constitution which held that the provisions of the Constitution were to be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.
3. In interpreting the constitutionality of an impugned statute, the court was guided by the principle that there was a general presumption that every Act of Parliament was constitutional. The burden of proving the contrary rested upon any person who alleged otherwise. However, article 24 of the Constitution imposed an express duty on the state with respect to legislation that sought to limit fundamental rights and freedoms after the effective date. In determining the constitutionality of legislation, the court was to be guided by the object, purpose and effect of the impugned statute which could be discerned from the legislation itself.
4. A Bill concerning County Governments was one whose provisions affected the functions and powers of the County which were delineated in the Fourth Schedule of the Constitution and one whose provisions affected the election of Members of a County Assembly or a County Executive or one that affected the finances of County Governments.
5. While article 34 of the Constitution did not use the word Parliament, it was to be read purposively and with the intention of giving effect to the intent behind the constitutional provision. The legislation contemplated under article 34 of the Constitution was intended to regulate matters touching on the media in general. The Fourth Schedule of the Constitution which delineated the respective functions of the National and County Governments, transport and communications, including, in particular telecommunications and radio and television broadcasting, were vested in the National Government.
6. The legislation in question did not concern County Government functions, finances, or elections of County Assembly members or executives. It touched solely on regulation of the media, a function that was clearly vested by the Constitution in the National Government.
7. There was no violation of the Constitution in the non – involvement of the Senate in the enactment of the two Acts impugned in the Petition. Therefore, the process of enacting the two Acts was in accordance with the requirements of the Constitution.
8. The requirement contained in article 110(3) of the Constitution came into play when there was a question or doubt as to whether or not a Bill concerned counties. In such an event, the Speakers of the two Houses were required to consult and resolve whether or not the matter involved counties. In the present case, given the clear definition of what amounted to a Bill concerning counties, and

the clear demarcation of functions between the National and County Governments in the Fourth Schedule of the Constitution, it seemed that there was no doubt or question as to whether or not the Bills concerned counties.

9. There was no violation of the Constitution or of the Standing Orders of either House in the absence of consultation and a resolution between the two Speakers of the House on whether or not the two Bills concerned counties. In that regard, the process that led to the enactment of the Kenya Information and Communications (Amendment) Act and the Media Council Act was in accordance with the Constitution.
10. The Constitution had vested legislative authority on Parliament which comprised of the National Assembly and the Senate. With respect to National Legislation, legislative power was vested in the National Assembly. Further, in exercising legislative authority, Parliament was under an obligation to do so in accordance with the Constitution and in a manner that promoted democratic governance.
11. The Constitution had not defined the word reservations. However, the Concise Oxford English Dictionary, 12th Edition had defined reservation as a qualification or expression of doubt attached to a statement or claim. The petitioners had thus ascribed to a very narrow meaning to the term in their arguments, which did not accord with the Constitution.
12. The phrase 'reservations by the President' provided for under article 115 of the Constitution was to entail such recommendations and observations pertaining to specific provisions of the Bills presented to him for assent as he deemed to merit consideration by the National Assembly. To expect the President to simply state that he had reservations about the Bill without more, would be to leave the legislature guessing, casting about and trying to figure out what the President had reservations about. There would be nothing for the legislature to consider or accommodate or reject. In sum, there would be no point of article 115 of the Constitution.
13. Constitutional interpretation principles required that constitutional provisions be interpreted broadly so as to give effect to its provisions and to promote the purposes, values and principles of the Constitution. To give the provisions of article 115 a very narrow meaning would render its provisions meaningless. The reservations by the President under article 115 ought to entail such recommendations and observations pertaining to specific provisions of the Bills presented to him for assent as he deemed merited consideration by the National Assembly.
14. The President properly exercised his constitutional mandate as was vested in his office under article 115 of the Constitution. Furthermore, the National Assembly acted in accordance with the provisions of the said article by sending the Kenya Information and Communications (Amendment) Bill to the President for assent. The President considered it, expressed his reservations or doubts regarding certain provisions of the Bill, and then made various recommendations.
15. The Memorandum of Refusal was placed before the National Assembly as required under article 115 (1) (b) of the Constitution. Parliament had exercised its discretion as stipulated under article 115 (2) (a) and amended the Bill fully accommodating the President's reservations as provided for under article 115(3) of the Constitution. Thus, the President and the National Assembly did not violate the Constitution nor did the President in any way act in excess of his powers and usurp the legislative powers of the National Assembly.
16. The importance of the twin rights to freedom of expression and freedom of the media under article 34 of the Constitution could not be gainsaid and had been underscored in various decisions and other jurisdictions. It was however recognized that freedom of the media or free press carried with it great responsibilities, while the Constitution itself contained restrictions with regard to freedom of expression. It stated at article 33 that the right to freedom of expression did not extend to propaganda for war, incitement to violence, hate speech or advocacy to hatred that constituted ethnic incitement, vilification of others or incitement to cause harm, or that was based on the grounds of discrimination

enumerated in article 27, which included race, sex, ethnic origin or social status. Further, in exercise of freedom of expression, there was an obligation to respect the rights and reputation of others.

17. Article 24 of the Constitution required that a limitation should be reasonable and justifiable in an open and democratic society, taking into account the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by an individual did not prejudice the rights and fundamental freedoms of others, and the relationship between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.

18. Section 3(2) of the Media Council Act required that individuals ought to exercise their freedom of expression while taking into account various societal needs. It required that in exercising the right to freedom of the media, they ought to be accurate and fair, accountable and transparent, respect the personal dignity and privacy of others, demonstrate professionalism and respect for the rights of others, and be guided by the national values and principles of governance set out under article 10 of the Constitution. The provision of the Media Council Act thus set out what the media was under a constitutional duty to do.

19. There were different shades of beliefs and opinions as well as political expression. It was a limit of freedom of expression to require that in exercise of the right to freedom of expression, media enterprises, journalists, media practitioners and foreign journalists get accredited under the Act as well as consumers of media services to reflect the interests of all sections of the society.

20. Society being the way it was, it was impossible to expect the kind of uniformity in thought and opinion that would result in media practitioners reflecting the interests of all in society. To demand such uniformity of thought from media practitioners was to limit the right to freedom of expression. In the absence of a justification for the provision as required under article 24 of the Constitution, section 3(2)(a) of the Media Council Act, was an unjustifiable limitation of the right to freedom of expression to the extent that it required that the persons specified would have to reflect the interests of all sections of society, and was therefore unconstitutional.

21. It was reasonable to expect that there would be compliance with the requirement that the provisions of article 33(2) of the Constitution would be safeguarded, and that the freedom and independence of the media was exercised in a manner that respected the rights and reputations of others. It was also reasonable to expect that compliance with any other written law would be adhered to. However, the same could not be said of the requirement with respect to ensuring that the protection of national security, public order, public health and public morals was safeguarded. Thus, section 6(2)(c) of the Media Council Act was overbroad, vague and prone to subjective interpretation that could not be reasonably justifiable in a democratic society.

22. There was nothing unconstitutional in granting the Cabinet Secretary in charge of information and communication the power to issue policy guidelines of a general nature in respect of matters that were within his Cabinet docket. Since such power was to be exercised, in the case of the Media Council Act, in consultation with the Council, the issuance of guidelines that were likely to limit media freedom was to that extent limited.

23. It had not been demonstrated that that there was anything unconstitutional in the grant of policy making powers *per se*. As was the case with the making of regulations for instance under the Statutory Instruments Act, Parliament enacted the legislation but vested the power for the making of regulations or issuance of guidelines for the operationalization of the legislation to the Cabinet Secretary in charge of the docket in question.

24. Obviously, someone had to make regulations and issue policy guidelines. Policy matters fell within the purview of the executive. In respect to matters related to information and communication, such powers could only be vested in the Cabinet Secretary responsible for information and communication.

There were constitutional and statutory guidelines such as were found in the Statutory Instrument Act, which demanded consultation of stakeholders and public participation.

25. While the provisions of section 6(2)(c) of the Media Council Act were so vague and broad as to unjustifiably limit media freedom and freedom of expression and therefore the Cabinet Secretary could not properly issue guidelines in furtherance thereof, no speculation could be done with respect to the constitutionality or otherwise of any guidelines that could be issued to put into effect the provisions of the rest of the section which accorded with the Constitution and the exercise of freedom of expression or with respect to the operations of the Authority established under the Kenya Information and Communications (Amendment) Act. Section 6 (2)(c) was unconstitutional for being couched in a manner that was vague and broad and that was likely to limit the freedom of expression.

26. Section 5B (2) and (3) of the Kenya Information and Communication (Amendment) Act merely reproduced the provisions of article 33 (2) of the Constitution. It could not be said that a statute was unconstitutional merely because the legislature, in enacting it, engaged in the clearly superfluous business of reproducing what was already set out in the Constitution. To hold the provisions of section 5B of the Act unconstitutional was to say that the provisions of the Constitution which it was an echo of were unconstitutional which was an absurdity.

27. The body contemplated under article 34 of the Constitution was one that was free from Government, political and commercial interests and was to enjoy autonomy in terms of its functioning and decision making, free from influence from any quarter.

28. The process for the appointment of the chairman and members of the Board was set out clearly in the Act as being under the control of a selection panel which comprised of representatives from various civil society organizations, including the Media Council of Kenya. It also had representation from Government which was represented by a person drawn from the Ministry for the time being responsible for matters relating to media.

29. The selection panel was mandated to select three persons qualified to be appointed as chairperson and two persons in relation to each vacancy, qualified to be appointed as members of the Board and to forward the names to the President and the Cabinet Secretary as the case may be. The President and the Cabinet Secretary were given a timeline of fourteen days within which they were to appoint the chairman and members respectively upon receipt of the names from the selection panel. According to the provisions of the Act, the selection panel was required to perform its functions in accordance with constitutional principles with regard to appointments to public offices.

30. Section 6B of the Media Council Act had provided a process of appointment that in all fairness could not be challenged on the lack of independence. It was conducted by a body comprising a large number of persons drawn from various sectors of society including the media, with the Government providing only one of the members of the selection panel. The Act clearly set out the principles to be followed in the selection processes which were all based on the Constitution. Therefore, the petitioners' complaints with regard to the appointment of members of the Board of the Authority were patently without any basis.

31. There was a problem with the provisions of section 6B as it seemed to suggest that the President and the Cabinet Secretary would be selecting, shortlisting and appointing the chairperson and members of the Board. The provision was in conflict with the preceding sections which clearly gave the mandate of the selection and shortlisting to the selection panel. The role of the President and the Cabinet secretary was to appoint the chairman and members of the Board from the names presented to them by the selection panel.

32. There was considerable Government involvement in appointments to bodies that regulated the media. However, the impugned legislation in Kenya provided a process that was highly participatory, had limited representation from Government, was bound to conduct its proceedings in accordance with the Constitution and was clearly not one that could be said to be under the influence of any one

sector of the society. Therefore, the regulatory authority in respect of whose appointment provision was made under section 6B of the Kenya Information and Communications (Amendment) Act was constitutional and did not breach article 34(5) of the Constitution.

33. The Communications and Multimedia Appeals Tribunal was given jurisdiction with respect not just to decisions of the media council but to decisions of the authority or the person licensed under the Act.

34. There was a clear overlap in the jurisdiction of the Multimedia and Communications Appeals Tribunal and the Complaints Commission under the Media Council Act. While section 34 appeared to cover complaints in relation to matters under the Act and the jurisdiction of the Tribunal was wider, it could not be disputed that there was bound to be confusion in the making of complaints with respect to which was the appropriate body to lodge a complaint to.

35. The two provisions in the two Acts demonstrated muddled thinking and drafting in respect of the powers and mandates of the two disputes resolution mechanisms. However, they did not pose any threat to the right guaranteed under article 50(2) (o) and there was nothing that demonstrated a violation or threat of violation of the right against double jeopardy.

36. It could be true that the overlapping mandate could lead to the simultaneous institution of complaints or processes in both bodies. It could also be true that the institutions had a way of drawing their boundaries once they began working. However, there was need for clarity in the law. The AG could not blithely ask that the confusion or concurrence in mandate and jurisdiction be allowed to play itself out and reach a resolution in time. There was need to rethink the two bodies and to clearly spell out the respective mandates and jurisdiction. The establishment of the two bodies, given the wider jurisdiction of the Multimedia and Communications Appeals Tribunal, did not violate the provisions of article 34(5) of the Constitution.

37. The provisions of the Witness Protection Act, 2006 [Revised 2012] demonstrated the need to take measures for the protection of witnesses, which included the need to keep their identity confidential. The rationale for allowing anonymous complaints was to enable citizens to raise issues of public interest without the fear that their identity would be disclosed and their safety compromised.

38. Circumstances under which anonymous complaints were entertained in respect of complaints under the Kenya Information and Communication Act were reasonably circumscribed that they did not pose a threat of violation of fair trial guarantees. The provisions did not constitute a violation or threat to the fair hearing provisions of article 50(2) of the Constitution.

39. There ought to be penalties for media malpractices. In principle, the imposition of penalties under the two impugned legislation was not, of itself, a violation of any of the Petitioners' rights. The Complaints Commission and the Communications and Multimedia Appeals Tribunal, after hearing complaints against the media lodged before them, had been mandated to impose various remedies, which included fines up to a maximum of Kshs 500,000 against a journalist and Kshs 20,000,000 against a media enterprise.

40. Where the penalty was imposed for acts which were in breach of the law, after the party in question had been heard and given an opportunity to present its case, then the imposition of the penalty could not be said to violate the Constitution. Journalists and the media enterprises that they work for were not angels. They could do things that they ought not to do, either deliberately, inadvertently or negligently and therefore had to be prepared to face consequences which were in accord with the law. The provisions of section 38 (1) (f) and (h) of the Media Council Act and Sections 102E (1) (f) and (h) of the Kenya Information and Communications (Amendment) Act were therefore not in violation of the Constitution.

Petition partly allowed, parties to bear their own costs.

Citations

Cases

1. 2002 (11) BCLR 1164 (CC)

2. 2013 (11) BCLR 1259 (CC)
3. Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011
4. Trusted Society of Human Rights Alliance vs The Attorney General and Others, Civil Appeal No. 290 of 2012

Statutes

1. Constitution of Kenya, 2010
2. Defamation Act
3. Kenya Information And Communications Act
4. Media Council Act
5. Statutory Instruments Act
6. Witness Protection Act

Advocates

None mentioned

JUDGMENT

Introduction

1. The two petitions consolidated in this matter challenge the constitutionality of the Kenya Media Council Act 2013 and the Kenya Information and Communications (Amendment) Act 2013. The petitioners allege that the two legislation were enacted in a manner that was in violation of the Constitution, and their application will violate several of their rights guaranteed under the Constitution.

2. These petitions were consolidated with Judicial Review Miscellaneous Application No 31 of 2014. While the applicant in that matter took the position that the Media Council Act, 2013 is constitutional, it took the position that the actions of the Cabinet Secretary, Ministry of Information, Communications and Technology, in seeking to recruit members of the Media Council and the Media Complaints Commission were in violation of the statute.

3. The matters were consolidated on the 28th of January, 2014 in view of the fact that they raised substantially the same issues in relation to the constitutional guarantee to freedom of expression and of the media. It is in respect of these three matters as consolidated that this judgment pertains.

The Parties

4. Nation Media Group Limited, the Standard Group Limited and Royal Media Services Limited, the 1st, 2nd and 3rd petitioners, (also referred to as the media houses collectively), are limited liability companies engaged in the provision of broadcasting and media services throughout the Republic of Kenya. The 4th petitioner, the Editor's Guild, is an association of editors working within the media in Kenya, while the 5th petitioner, the Kenya Union of Journalists, is a trade union registered under the Trade Unions Act Cap 233, Laws of Kenya, to represent the interests of persons working in the media industry in Kenya. The 6th petitioner, the Kenya Correspondents Association, is an association of correspondents in Kenya whose membership comprises of various journalists and media practitioners.

5. The respondents are the Attorney General (hereafter AG) of Kenya as the 1st respondent, while the 2nd and 3rd respondents are the Speakers of the National Assembly and Senate respectively.

6. The 4th respondent is the Cabinet Secretary in the Ministry of Information Communications and Technology, while the 5th respondent, the Communications Authority of Kenya, is a corporate body established under the Kenya Information and Communications (Amendment) Act, 2013.

7. The interested parties, who represent various interests concerned with media freedom in Kenya, were joined to the proceedings pursuant to a consent order on 5th May, 2014. They did not, however, file any pleadings or submissions or participate in the matter thereafter.

8. Similarly, the 7th petitioner, the Media Council of Kenya, which was the applicant in Judicial Review Miscellaneous Application No. 30 of 2014, did not participate in the proceedings. It had been given leave to file its substantive motion in its application, but it appears from the record that this was not done. Nor were there submissions on the Court record filed on its behalf.

Background

9. On 22nd July, 2013, the Media Council Bill, 2013 and the Kenya Information and Communications (Amendment) Bill, 2013 were published in Kenya Gazette supplement No. 105 (National Assembly Bills No. 19). On 30th October, 2013, the National Assembly passed the Kenya Information and Communications (Amendment) Bill, 2013 to amend the Kenya Information and Communications Act, 1998. On 26th November, 2013, the National Assembly presented the said Bill to the President for assent pursuant to Article 115 of the Constitution. In exercise of the powers conferred on him under Article 115 (b) of the Constitution, the President declined to assent to the Bill and on 28th November, 2013, he issued a Memorandum detailing the reasons for his refusal to assent to the Bill and made various proposals and recommendations for its amendment.

10. On 5th December, 2013, the Media Council Bill, 2013 and the Kenya Information and Communication (Amendment) Bill, 2013, were debated in the National Assembly. The National Assembly approved the two Bills, including the recommendations made by the President in respect of the Kenya Information and Communications (Amendment) Bill, 2013, and passed the two Bills. The President then assented to the Kenya Information and Communications (Amendment) Bill, 2013 on 11th December, 2013, and the Media Council Bill on 24th December, 2013.

11. The petitioners have various grievances against the manner of enactment of the two Acts, as well as their contents. They allege that in declining to give his assent to the Kenya Information and Communications (Amendment) Bill, 2013, the President should not have made recommendations with respect thereto as that amounted to his taking on a legislative role. They also assert that the Bills, as they concern counties, should have been enacted with the involvement of the Senate. It is also their contention that the Bills were passed in a manner that violated the Standing Orders of the National Assembly and Senate, and it is their case further that the provisions of the two Acts violate various provisions in the Bill of Rights. They thus seek various declarations and orders, the gist of which is that the Court should declare the two statutes unconstitutional, null and void.

The Case of the 1st, 2nd and 3rd Petitioners

12. The first three petitioners have set out their case in the petition dated 22nd January, 2014. It is supported by an affidavit sworn on their behalf by Mr. Linus Gitahi, the Chief Executive Officer of Nation Media Group Limited, and written submissions dated 15th September, 2015.

13. The petitioners contend that the President is neither part of the national legislature nor is he a lawmaker in the context of legislation passed by Parliament. Consequently, in considering and refusing to assent to the Kenya Information and Communications (Amendment) Act, 2013, he went beyond

the procedures established for referral and making of reservations, thereby undermining the procedures for enacting legislation.

14. By making the recommendations that he made in declining to assent to the Bill, the President ended up introducing provisions that had not been subjected to publication, tabling, readings, sessions of the committee of the whole House and public participation. It is their contention therefore that the President exceeded his authority and powers under the Constitution and went beyond making reservations. Instead, he proceeded to make recommendations for amendment in the mode provided for under the repealed constitution.

15. The petitioners further assert that the two Bills were never tabled before the Senate for debate, and the Speaker of the National Assembly did not consult the Speaker of the Senate to jointly resolve whether the Bills concerned counties prior to the debate of the two Bills in the National Assembly.

16. It was also their case that the two Bills violate the Constitution in that they establish two different bodies to regulate broadcasting standards, monitoring compliance and punishment of journalists for any opinion, views, or content of any broadcast or publication. This results, in their view, in their employees and journalists being subjected to double jeopardy as the Communications and Multimedia Appeals Tribunal established under the Kenya Information and Communication (Amendment) Act, has concurrent, non-exclusive and identical jurisdiction to hear and determine complaints against the media and journalist, similar to that of the Complaints Commission established pursuant to section 27 of the Media Council Act.

17. The petitioners further argue that various provisions of the two Acts violate fundamental rights guaranteed under the Constitution. They assert that section 38 (1) (f) and (h) of the Media Council Act and section 102E (1) (f) and (h) of the Kenya Information and Communications (Amendment) Act contravene Articles 29 and 34 of the Constitution to the extent that they seek to exercise control over, interfere and penalize persons engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. They contend further that the two Acts fail to give effect to Article 34 (5) of the Constitution, and are therefore in violation of the Constitution. They ask the Court to grant the following orders:

    (1) A declaration that the National Assembly violated Articles 93, 94 (5), 96 (2), 110 (3) and (4) [of the Constitution] in its consideration and passing of the Media Council Bill, 2013 and the Kenya Information and Communication (Amendment) Bill, 2013.

    (2) A declaration that the Media Council Act, 2013 was passed in violation of the Constitution and therefore the Act is null and void.

    (3) A declaration that the Kenya Information and Communications (Amendment) Act, 2013 was passed in violation of the Constitution and therefore is null and void.

    (4) A declaration that the Communications Authority of Kenya as established by the Kenya Information and Communications (Amendment) Act is in violation of the provisions of Articles 34 (3) and (5) of the Constitution.

    (5) A declaration that the provisions of the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 are inconsistent with and violate the provisions of Articles 29 (f), 33, 34 (2), (3), (5), 50 (1) and (2) of the Constitution.

    (6) A declaration that the powers and authority conferred on the Complaints Commission and the Communications and Multimedia Appeals Tribunal are inconsistent with and violate the provisions of Articles 33, 34 and 50 of the Constitution.

(7) An order of prohibition to prohibit the 4th respondent from appointing the Chairperson and members of the Media Council of Kenya and the Communications and Multimedia Appeals Tribunal.

(8) An order of prohibition to prohibit the appointment of Chairperson and members of the Board of the 5th respondent pending the hearing and determination of the petition.

(9) The respondents to pay the petitioners costs of the petition in any event

The Case of the 4th, 5th and 6th Petitioners

18. These petitioners (together referred to as media practitioners) have set out their case in their petition dated 22nd January, 2014, which is supported by an affidavit sworn by Mr. David Ohito, the Vice Chairman of the Kenya Editor's Guild, on the same date. They also filed submissions dated 16th July, 2014.

19. In his affidavit, Mr. Ohito echoed the depositions by Mr. Gitahi on behalf of the media houses in relation to the shortcomings in the process of enactment of the two legislation. He also outlined the nature of the legal regime that governed the media in Kenya prior to the promulgation of the Constitution, 2010. He contended that the President exceeded his powers in declining to assent to the Kenya Information and Communications (Amendment) Act, as he went beyond the procedures established for referral and making of reservations thereby undermining the procedures for enacting legislation. His averment was that the President ended up introducing provisions that had not been subjected to publication, tabling, readings, sessions of the committee of the whole House and public participation, and the President proceeded to make recommendations for amendments as if he was operating under the repealed constitution.

20. The 4th, 5th and 6th petitioners depose that the Kenya Information and Communications (Amendment) Act and the Media Council Act as enacted are invalid as the mandatory provisions of Article 110 (3), (4) and (5) of the Constitution were not complied with. They argue further that Standing Order No. 122 of the National Assembly and Standing Order No. 116 of the Senate were not complied with. In addition, it is their contention that as is evident from the Hansard report of the debates in the Senate on 5th December, 2013, the two Acts were not subjected to a joint resolution by the Speakers of the National Assembly and the Senate, nor were they subjected to consideration by the Senate.

21. Mr. Ohito further deposes that various provisions of the two Acts are unconstitutional as they contravene the freedom of expression and of the media, thereby threatening the petitioners' full and equal enjoyment of all rights and fundamental freedoms guaranteed by the Constitution.

22. The petitioners deposed that other professional bodies in Kenya operate under self-regulatory mechanisms that guide, manage, monitor and discipline them on the basis of specific professional standards and ethics, and they contended that it is unjust, unfair and discriminative for journalists and other media practitioners to be governed and controlled directly or indirectly by the State or State organs and established institutions in which the government exercises dominant and overwhelming control. Further, that the implications of the provisions of the Kenya Information and Communications (Amendment) Act in terms of content, structure and framework cannot guarantee the freedoms of the media as donated by Article 34 of the Constitution unless there is an independent body created by a specific stand-alone legislation.

23. It is also the case of the media practitioners that the architecture of the said Act will enable the Executive and Communications Authority of Kenya to exercise government control over the media and, by

extension, journalists and media practitioners, which amounts to violation of Articles 33 and 34 of the Constitution. They therefore prayed for the following orders:

(1) A declaration that the Kenya Media Council Act, 2013 is invalid and therefore null and void.

(2) A declaration that the Kenya Information and Communications (Amendment) Act, 2013 is invalid and therefore null and void.

(3) A declaration that the National Assembly violated Articles 93, 94 (5), 96 (2), 110 (3) and (4) of the Constitution, in its consideration and passing of the Kenya Media Council Bill, 2013 and the Kenya Information and Communications (Amendment) Bill, 2013.

(4) A declaration that the provisions of the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 violate the provisions of Articles 27 (1), (2), (4), and (5), 29 (f), 33, 34 (2), (3) and (5), 35 and 50 (1) and (2) of the Constitution.

(5) A declaration that the provisions of the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 are inconsistent with the Constitution.

(6) A declaration that the provisions of the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 are not justified under Article 24 of the Constitution and are otherwise, not justified in an open democratic system.

(7) An order of judicial review in the nature of prohibition stopping the Cabinet Secretary for Information Communications and Technology from appointing the Chairperson and members of the Media Council of Kenya and the Communications and Multimedia Appeals Tribunal.

(8) An order of judicial review in the nature of prohibition stopping the process of the selection and appointment of the Chairperson and members of the Media Council of Kenya and the Communications Multimedia Appeals Tribunal.

(9) An order of judicial review in the nature of certiorari quashing the decision of the Cabinet Secretary for Information Communications and Technology to exercise the powers conferred by section 102 (2) of the Kenya Information and Communications Act and section 7 (2) of the Media Council of Kenya Act.

(10) An order expunging Gazette Notice No. 187 as published in the Special issue of the Kenya Gazette Vol CXVI-No 6 on 15th January, 2014.

(11) A conservatory order stopping the selection and appointment of the Chairperson and members of the Media Council of Kenya and the Communications Multimedia Appeals Tribunal.

(12) The respondents do pay the costs of the petition in any event.

Responses to the Petitions

The 1st and 4th Respondents' Case

24. These respondents, who were represented by the office of the Attorney General, filed an affidavit in response and in opposition to the petition sworn on 2nd May, 2014 by Mr. Joseph Tiampati Ole Musuni, the Principal Secretary in the Ministry of Communication and Technology. They also filed submissions dated 5th August, 2014.

25. The position taken by the respondents as it emerges from Mr. Ole Musuni's affidavit is that the impugned legislation is not unconstitutional since, even though it limits fundamental rights and freedom, such limitation is justifiable under Article 24 of the Constitution. According to the respondents, the only rights and fundamental freedoms that cannot be curtailed at all are provided for in Article 25 of the Constitution.

26. Mr. Ole Musuni deposes, however, that section 5B (2) and (3) of the Kenya Information and Communication (Amendment) Act on the limitation of freedom of the media is not ambiguous and has not stated any rights to be limited at all and therefore any challenge thereto is misconceived. In their view, the provision, which is anchored in the Constitution, will only limit the freedom of the media where there is a pressing social need and in accordance with the doctrine of proportionality when the rights of others are affected. In the respondents' view, the limitation of the freedom of the media is duly safeguarded by law and the media is not subject to any arbitrary treatment. It is their contention that the challenge made to section 5B (2) and (3) is equivalent to a challenge to the constitutional provisions that prescribe for the limiting of rights, and it therefore lacks logic.

27. The respondents further depose that section 5C (1) and (2) of the Kenya Information and Communications (Amendment) Act does not violate the independence of the media. In their view, the wording of the section implies that the provision is not mandatory but rather is an expression of discretionary authority assigned to the Cabinet Secretary. Their contention is that under Article 11 (2) (a) of the Constitution, under which the state is enjoined to promote culture in various ways, the Cabinet Secretary has discretion to issue "policy guidelines of a general nature" to effect the purposes of Article 11 (2) (a) for the public benefit or to advance public justice.

28. The respondents therefore aver that in this case, the Court is being asked to issue a blanket judgment on the policy guidelines which the Cabinet Secretary may issue. In their view, anything that might be an abuse of discretion in the exercise of power by the Cabinet Secretary in issuing such guidelines may be dealt with by the court on a case by case basis so that there is no need to issue a blanket judgment that outlaws all policy guidelines. Their contention is that in issuing a judgment that outlaws all policy guidelines, the Court would not only be removing the power to determine what is right in every given situation on the part of the Cabinet Secretary, but also the power of the Court to determine, on a case by case basis, what acts of the Cabinet Secretary are wrong or right.

29. Mr. Ole Musuni avers that the Court should only deal with the real life actions of a Cabinet Secretary within the milieu of given set of facts instead of being persuaded by an academic argument presented in this petition. In their view, the petitioners have not presented such a situation but have instead sought to demonstrate that Parliament erred in enacting the impugned legislation. The respondents contended that these proceedings are an attempt to impute blanket illegality on the part of the Cabinet Secretary's power to give guidelines of a general nature and they are against the law as they seek to oust the discretion of individual courts from determining the legality or the discretion of every single policy guidelines on its own merit.

30. With respect to the petitioners' challenge to the composition of the Board of the Communication Authority of Kenya under section 6 (1) of the Kenya Information and Communication (Amendment) Act, the respondents argue that the said section does not negate such independence. In any event, in their view, under the current statutory setting, the number of government nominees compared to non-government nominees demonstrates that any idea that the government would control the Communication Authority is far-fetched. Mr. Ole Musuni points out that only three government officers out of eleven Board members sit in the Board, the others being from other disciplines, including civil society. It is also their argument that it is a wrong and unsubstantiated assumption that mere

appointment of any person by the President or the Cabinet Secretary renders that person susceptible to influence from the President or the Cabinet Secretary.

31. The respondents aver that under the Kenya Information and Communications (Amendment) Act, the positions of the chairperson and seven other members are competitively advertised and recruited under a comprehensive, tamper proof procedure which is set out in the Act. In their view, having both a selection panel and the Executive participate in selection and appointment provides checks and balances between different interests, including both government and commercial interests, and the resulting appointments are therefore credibly neutral.

32. The respondents also defended the provisions of section 6D of the Information and Communications (Amendment) Act, including the provisions for the removal of members of the Board of the Communication Authority. Their contention is that the section is in line with Article 47 of the Constitution.

33. It is also their case that the appointment of members of the Communications and Multimedia Appeals Tribunal under section 37 of the Media Council Act is transparent, above board and free from government control. Mr. Ole Musuni avers that the process of appointment to the Tribunal are closely modelled on the provisions for the appointment to the Board of the Communications Authority.

34. The respondents also defended the provisions of section 17 of the Kenya Information and Communications (Amendment) Act which contains a requirement for the broadcast of local content. They aver that the said provision does not violate the freedom of broadcasters under Article 34 (2) of the Constitution.

35. With regard to the penal consequences in the Act which the petitioners challenge, the respondents argue that such punitive penalties are part of all judicial and quasi-judicial processes the world over. In their view therefore, the penalties provided for under section 102E of the Kenya Information and Communications (Amendment) Act are not in any way meant to muzzle the media; that the section, like provisions in the Penal Code and other statutes that prescribe penalties for offences, only sets the maximum fines that a media enterprise and journalist can be required to pay. In their view, the petitioners have not demonstrated how the mere prescription of an offence and a consequential penalty, which is the normal feature of most legislation, breaches any of their rights.

36. With respect to the petitioners' challenge to the Kenya Information and Communications (Amendment) Act on the basis that the President made recommendations to Parliament with respect thereto, the respondents make two responses. First, they argue that the petitioners have not demonstrated that the President's action of referring the Bill back to Parliament with comments *per se,* was in contravention of the Constitution and amounted to usurping legislative powers. Secondly, they argue that the President was not part of the Parliament that sat to approve the proposals and did not have any influence on what was approved by Parliament.

37. The respondents also defend the acts of the Cabinet Secretary in placing advertisements for positions in the Media Council. Mr. Ole Musuni deposes that the Cabinet Secretary acted in accordance with section 7 (2) of the Media Council Act when he caused publication in the Kenya Gazette of all vacancies in the Media Council and Complaints Commission to be filled in accordance with the Media Council Act. They observe in this regard that section 7(2) of the Media Council Act requires that the Cabinet Secretary declares vacancies within the Council within 14 days from the commencement of the Act, or upon the occurrence of a vacancy in the Council.

38. It was their deposition that the members of the Council in office at the enactment of the Media Council Act in 2013 were not accommodated under the new Act as the Act did not contain transitional

provisions saving their terms. In any event, in their view, the retention of the Media Council under its current composition would be a breach of the Constitution.

39. With respect to the petitioners' argument that there are now two regulatory mechanisms under the Kenya Information and Communications (Amendment) Act, being the Complaints Commission and the Communication and Multimedia Appeals Tribunal, the respondents concede that there is indeed what they refer to as a co-regulatory mandate under Part IVA of the Kenya Information and Communications (Amendment) Act, 2013. Their averment, however, is that the said mechanism has never been taken up by the (media) industry due to challenges, including that of an underdeveloped subscriptions culture in the sector in previous years. The respondents give by way of illustration of such a culture the inability of the sector to comply with the mandatory contributions under Gazette Notices No. 896 and 897 of 2007, under the Media Act, No. 3 of 2007.

40. They therefore defend the existence of the two regulatory bodies, deposing that the Communication and Multimedia Appeals Tribunal and the Complaints Commission have distinct roles and functions which complement each other.

41. The respondents therefore argue that the consolidated petition is marred with unwarranted apprehension, speculation, suspicion and unfounded mistrust which have no basis in law and which the Court should not entertain.

42. They point out that in most established democracies, formalities, conditions or restrictions on the freedom of expression are permitted as long as they are prescribed by law and are necessary in a democratic society. They cite by way of illustration Article 10 of the European Convention on Human Rights, noting that the media wields immense power in terms of mass communication which has the potential to impact on the larger society and audience and therefore calling for coordinated checks and balance. In their view therefore, the provision of organs for regulation of the conduct of the members of the media fraternity, setting standards and dispensing justice in respect of offences and adjudication of disputes within the media sector is a corollary of their duties and responsibilities and should not be disregarded. It is their case therefore that the enactment of the impugned statutes cannot be said to be unconstitutional as they are crucial in terms of delineation of roles and accountability on the part of various stakeholders in the industry as they give effect to Article 34 of the Constitution.

43. It is also their contention that in order for any perceived grievance by the petitioners to be deemed by this Court to be justiciable, there has to be a factual matrix, a real set of experiences to be measured against the law as made by Parliament in order for an issue to arise and for the Court to determine that issue. In their view, the challenge raised against the Communications Authority of Kenya even before its constitution remains merely an academic argument. They therefore urged the Court to dismiss the petition as the petitioners have not made a case to warrant the orders that they seek.

The 5th Respondent's Case

44. The 5th respondent, the Communication Authority of Kenya (also referred to as the Authority), sets out its case in an affidavit sworn on its behalf by Ms. Mercy Wanjau, its Principal Legal Officer, on 14th May, 2014. It also filed submissions dated 9th December, 2015.

45. The Authority takes the position that neither of the two Acts impugned in this petition are unconstitutional as alleged or at all, and further, that the two petitions do not disclose any violation of the petitioners' constitutional rights. Its prayer therefore is that the consolidated petitions should be dismissed.

46. In response to the petitioners' argument that the process of enactment of the two Acts was unprocedural for non-involvement of the Senate, Ms. Wanjau deposes that the Constitution must be interpreted as a whole. As neither of the Bills was a Bill concerning counties within the meaning of Article 110 of the Constitution, they originated from and were passed by the National Assembly under Article 109 (3) of the Constitution. Her deposition was further that as no questions were raised by either the National Assembly or the Senate, the Bills did not need to be placed before the Speakers of the respective Houses for consultation.

47. With respect to the challenge of the Kenya Information and Communications (Amendment) Act on the basis that the President made recommendations to the National Assembly in refusing to assent to the Bill, the Authority argues that the President rightly exercised his powers and duties under Article 115 of the Constitution. In its view therefore, it was within the legislative competence of the National Assembly to amend the Bill to incorporate the President's reservations in the manner in which it deems fit, and it is not within the competence of this Court to determine whether the National Assembly should have done so.

48. The Authority further went on to defend the specific provisions of the Kenya Information and Communications (Amendment) Act and the Media Council Act which the petitioners allege are unconstitutional. Ms. Wanjau averred that neither sub-section (2) and (3) of section 5B of the Kenya Information and Communications (Amendment) Act should be read in isolation. Rather, it should be read together with sub-sections 5B (4) and (5) which explicitly set out the limitations to the right to freedom of expression in a manner that is consistent with the Constitution.

49. With respect to section 5C (1) and (2), the 5th respondent averred that the challenge thereto is misplaced as the role of the Cabinet Secretary is limited to issuing policy guidelines, which, in its view, is common practice globally. Its contention therefore is that the exercise of that role as provided in the Act does not and cannot amount to exercising control over the 5th respondent.

50. The Authority denies that the presence of the three Principal Secretaries on its Board would affect its decisional independence. Ms. Wanjau's averment in this regard is that there are seven other wholly independent persons appointed to the Board.

51. With respect to the challenge to section 6D of the Kenya Information and Communications (Amendment) Act relating to the power of the Cabinet Secretary to suspend a member of the Board of the Authority, its argument is that the said challenge is based on a misreading of the section. Ms. Wanjau deposes that the discretion of the Cabinet Secretary is limited and he cannot suspend a member merely on the basis of a complaint, but must be satisfied that there are genuine grounds which warrant the constitution of a tribunal.

52. The 5th respondent denied that there was anything unconstitutional in the provision relating to local content, noting that the said requirement is fully consistent with Article 34 of the Constitution with respect to regulation of the airwaves. Ms. Wanjau deposed that many countries impose local content requirements on the broadcasting sector with the aim of promoting local programming and to meet consumer needs and welfare. In the 5th respondent's view, such requirements as are set out in the Act are essential to promote pluralism, identity, unity and sovereignty of the nation. It was also the 5th respondent's case that there was no violation of the provisions of Article 27 of the Constitution demonstrated in respect to the said provisions of the Act.

53. Ms. Wanjau further deposed that the exclusion of the Kenya Union of Journalists, Kenya Editors Guild and the Kenya Correspondents Association from the selection panel for the Communications and Multimedia Appeals Tribunal did not amount to a constitutional violation. Her averment was that

the journalists and media practitioners are already represented by the Media Council of Kenya in the said selection panel.

54. The Authority further took the position that, contrary to the contention by the petitioners, the Communications and Multimedia Appeals Tribunal is impartial and independent as the Cabinet Secretary only exercises his powers of appointment with respect to names forwarded to him by an independent selection panel. It was also its contention that the suspension of an officer pending the outcome of a complaint is common practice and procedure with regard to disciplinary hearings of various organizations and cannot be termed as governmental control. Further, it was its contention that such suspension would only take place where the Cabinet Secretary is satisfied that a complaint lodged discloses a ground for suspension.

55. Ms. Wanjau averred further that the powers of the Cabinet Secretary to appoint a tribunal to investigate a complaint does not compromise the independence of the Communication and Multimedia Appeals Tribunal as the investigating tribunal would act independently, while the Cabinet Secretary is enjoined to act in accordance with the Tribunal's recommendation.

56. With respect to the complaint regarding the acceptance by the Communications and Multimedia Appeals Tribunal of anonymous complaints, which the petitioners allege is a violation of the rules of natural justice, Ms. Wanjau averred that the principles of natural justice do not necessarily require a person against whom a complaint is made to face his accuser. In her view, the rules simply require that the person be provided with as much detail as possible about the allegations against him and the factual basis for those allegations, and be afforded an opportunity to respond. It was her deposition therefore that there is no violation of the right to a fair hearing.

57. It was also the 5th respondent's deposition that no prejudice will be suffered by the petitioners and/or journalists and media practitioners regarding equal protection and equal benefits of the law due to the application of criminal and civil law sanctions. In the 5th respondent's view, several statutes provide for the concurrent application of penal sanctions and civil remedies depending on the nature and severity of the case. Accordingly, in its view, there is no risk of double jeopardy as the determination of a complaint by one Tribunal will of necessity bar the initiation of another proceeding over the same subject matter.

58. With regard to the impositions of fines and the recommendation for suspension or removal from the register of journalists who have violated the provisions of the Acts, the 5th respondent was of the view that this is within the mandate of the Tribunal and the Commission and they are in compliance with the Constitution.

59. It is also the 5th respondent's averment that section 38(i) of the Media Council Act provides for the maximum level of penalties, which will be applied to extreme breaches. It observes that it is a cardinal principle of law that imposition of penalties is determined by a variety of factors, including the severity of the offence, the degree of injury caused, and the culpability of the parties. Its position is that these matters cannot be the subject of legislation but will be addressed in subsidiary legislation as well as in decisions of the Tribunals which are ultimately subject to review by this Court. In its view, therefore, there is no risk of arbitrary and/or capricious imposition of the prescribed penalties.

60. The Authority further avers that the Amendment Act does not seek to exercise control or to interfere with the petitioners' or media enterprises' rights. It only seeks to give effect to Article 34 (5) (c) of the Constitution with respect to the setting of standards.

61. With regard to the provisions of the Media Council Act, the 5th respondent deposes that section 3 (2) thereof does not impose any limitations beyond those provided under Article 33 (2) and (3) of the

Constitution, so that in the exercise of freedom of expression by the media, there must be a reflection of the interests of all sections of society, as well as accuracy, accountability and respect for the rights of others.

62. As for the challenge to section 6 (2) of the Media Council Act, the 5th respondent argues that it does not impose any limitations beyond those contemplated in Article 33 (2). It also defends the provisions of section 7 (9), (10), (11) and (14) of the Media Council Act, its averment being that it does not curtail or infringes the freedom or independence of the Media. In any event, even if it does, the 5th respondent contends that such limitation is permissible under Article 24 of the Constitution. The Authority's contention is that sections 7(9)(10(11) and (14) of the Media Council Act, as well as section 14(2)(3)(4)(5)(6) and (7) thereof, and the powers that they vest in the Cabinet Secretary to appoint an independent tribunal to deal with a complaint, do not in any way violate Article 34.

63. With respect to the provisions of section 27(2)(3)(4)(5) and (6) of the Media Council Act, the 5th respondent avers that it does not violate Article 34(5) of the Constitution. This is because it provides for a competent and independent selection panel to select a chairman and members of the Complaints Commission through a transparent process. In its view, this does not in any way compromise the independence of the media. The Authority therefore contends that this petition is misconceived, lacks legal and factual foundation, and should be dismissed with costs.

Analysis and Determination

64. We have carefully read and considered the respective pleadings of the parties in this matter, which we have endeavoured to summarise in the preceding paragraphs. We have also considered their submissions on the facts and the law, as well as their authorities in support, which we shall advert to in the course of this analysis.

65. The petitioners challenge the constitutionality of the Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act, 2013. They are aggrieved both by the process of enactment of the two statutes, as well as their contents. In brief, their arguments are that the process of enactment of both Acts was unconstitutional as they are legislation that affect counties but were not tabled before the Senate, nor did the Speakers of the National Assembly and Senate consult and agree that the Bills in respect of the two Acts did not concern counties and therefore did not need to be placed before the Senate.

66. The petitioners are also aggrieved that in declining to give his assent to the Kenya Information and Communication (Amendment) Act, the President made certain recommendations, which were taken into account by the National Assembly in enacting the Act.

67. Finally, the petitioners are aggrieved by the provisions of the Bills, whose contents, they allege, violate the constitutional guarantees to freedom of expression and of the media contained in Articles 33 and 34 of the Constitution. In this regard, they challenge the establishment, functions, powers and composition, as well as the manner of appointment of members of, the Complaints Commission, the Communication Authority of Kenya, and the Communication and Multimedia Appeals Tribunal.

68. Taking into account the above challenges, it is our view that the petitions before us and the responses thereto raise four main issues:

    a) Whether this Court has the jurisdiction to hear and determine the issues raised in the consolidated petitions;

    b) Whether the process of enactment of the Media Council Act and the Kenya Information and Communications (Amendment) Act was unconstitutional.

c) Whether the provisions of the Media Council Act and the Kenya Information and Communications (Amendment) Act are unconstitutional.

d) What reliefs (if any) to grant to the petitioners.

Jurisdiction

69. The respondents have opposed the proceedings in this matter on the basis that the Court does not have the jurisdiction to deal with them. The basis of this argument, from the 1st and 4th respondents' perspective, is that there are no undisputed facts on the basis of which the Court is being asked to interpret the Constitution. Where no such facts, exist, the Court is being asked to deal with a hypothetical situation, or a matter that can be the subject of civil proceedings in judicial review.

70. The respondents have cited the decision in The Owners of Motor Vessel "Lillian S" VS Caltex Oil Kenya Ltd [1989] KLR 1. They have also relied on the case of Hariksoon vs Attorney General of Trinidad and Tobago [1980] AC 265, Mumo Matemu v Attorney General, Civil Appeal No. 260 of 2012, and HWR Wade's Book, Administrative Law, 5th Edition to submit that these petitions have not been presented in good faith as they have been premised on no facts except the enactment of the two Acts.

71. The respondents have also argued that where the other arms of government are vested with the power to perform some tasks, such tasks should be completed by those arms. In their view, it would be an affront on the doctrine of separation of powers between the judiciary and the legislature if every law was to be challenged on no factual ground.

72. We agree with the respondents about the importance of jurisdiction. It is, we believe, settled that where a Court finds that it has no jurisdiction, in the words of Nyarangi J in The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd (supra) case, it has no power to take another step and must down its tools. The question is whether, as argued by the respondents, we have no jurisdiction in this matter, and we are precluded by the doctrine of separation of powers from enquiring into the acts of the legislature or the executive.

73. This is a question that the High Court has addressed itself to in the light of similar challenges to its jurisdiction- see the case of Coalition for Reforms and Democracy and Others vs Republic and Others, Petition No 628 of 2014 (the CORD case). As was done in that decision, our response to the challenge of our jurisdiction must be in the negative.

74. We give this response bearing in mind that the petitioners in this case are raising two main constitutional concerns. The first is that they are questioning the constitutionality of the process leading to the enactment of the Kenya Information and Communication (Amendment) Act 2013 and the Media Council Act. Their argument is that the process of enactment of the Acts was, for various reasons, in breach of the Constitution.

75. Article 258 (1) of the Constitution grants the Court jurisdiction to hear petitions alleging contravention or threat of contravention of the Constitution. It provides as follows:

> " Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." (Emphasis added)

76. The second constitutional concern is that the two impugned Acts infringe or threaten to infringe the constitutional rights of the petitioners. Article 22 is clear that:

> (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.(Emphasis added)

77. We are also satisfied that the Constitution grants to the Court the jurisdiction to inquire whether any act done by any person or state organ has been done in accordance with the Constitution. Article 165 (3) (d) (i) and (ii) of the Constitution provide that:

(3) Subject to clause (5), the High Court shall have—

(a) ...

(b) ...

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

78. It is our finding therefore, and we so hold, that we have the jurisdiction to hear and determine the issues raised in this petition.

Applicable Principles

79. In exercising the jurisdiction to determine the above issues, we consider it useful to commence by setting out the principles that we believe should guide the exercise of the constitutional mandate that is bestowed on us. To reiterate, we are called upon to determine whether the process of enactment of the impugned legislation violated the Constitution. If it did not, we are called upon to determine whether the provisions of the statutes at issue violate or threaten to violate the petitioners' rights under Articles 33 and 34 of the Constitution.

80. The first principle of interpretation is set out in the Constitution itself. Article 259 requires that the Constitution:

"shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

81. Article 159(2) (e) of the Constitution mandates the Court, in exercising its judicial authority, to protect and promote the purpose and principles of the Constitution. In addition, we bear in mind

the provisions of the Constitution with respect to its position vis a vis other laws. At Article 2, it is expressly stated that:

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

.....

(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.

82. We are also guided by various judicial pronouncements with respect to the interpretation of the Constitution. In the case of Tinyefuza vs Attorney General of Uganda, Constitutional Petition No. 1 of 1997 [1997] UGCC 3), it was held that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.

83. We also bear in mind that in interpreting the constitutionality of an impugned statute, we must be guided by the principle enunciated in Ndyanabo v Attorney General of Tanzania [2001] EA 495. This principle is to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proving the contrary rests upon any person who alleges otherwise.

84. Article 24 of the Constitution, however, imposes an express duty on the state with respect to legislation that seeks to limit fundamental rights and freedoms after the effective date. It provides that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation;

85. Further, in determining the constitutionality of legislation, the Court must be guided by the object, purpose and effect of the impugned statute. The object and purpose can be discerned from the legislation itself- see Murang'a Bar Operators and Another vs Minister of State for Provincial

Administration and Internal Security and Others Nairobi Petition No. 3 of 2011. In the case of R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, the Court expressed the principle as follows;

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

86. It is also useful to bear in mind the words of the Court in the case of U.S vs Butler, 297 U.S. 1[1936], in which the Court expressed the role of the Court when dealing with a challenge to legislation such as is before us in the following words:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.This Court neither approves nor condemns any legislative policy.Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."(Emphasis added)

87. We shall now turn to consider the first issue that we have identified as falling for determination.

Whether the process of enactment of the Media Council Act and the Kenya Information and Communications (Amendment) Act was unconstitutional

88. From the pleadings and submissions before us, we believe that there are three elements to the challenge to the process of enactment of the impugned legislation. The first relates to the question whether the two Bills were Bills affecting counties, and therefore should have been placed before the Senate. The second, which is connected to the first, relates to the question whether there was a violation of the Standing Orders of the National Assembly and the Senate. The third pertains to the actions of the President in making recommendations when he declined to assent to the Kenya Information and Communications (Amendment) Bill, and the incorporation of those recommendations by the National Assembly in the legislation that was subsequently passed and received Presidential assent.

Whether the two Bills were Bills affecting counties, and therefore should have been placed before the Senate

89. The 1st, 2nd and 3rd petitioners have contended that the process of enactment of the two legislation was unconstitutional due to the exclusion of the Senate. They submit that Article 34 (5) of the Constitution mandates Parliament to enact legislation that provides for the establishment of the body contemplated under Article 34 of the Constitution. In their view, the Constitution requires that the contemplated legislation should be debated and passed by the National Assembly and the Senate in accordance with Articles 94 (1), 109 (1), 110 (3) and (4), as well as Article 115 (1) and (2) of the Constitution.

90. Their submission is that the two laws affect counties in that, even though communication is a national function, the ownership of public broadcasting is not prohibited to county governments or to private investors interested in investing only in county radio and television services. It is also their submission that the government's own policy statements undertake to promote community radio, presumably at county levels and below. Accordingly, the structure of broadcasting regulation, allocation of frequencies and regulation of journalism is a matter of great concern to counties.

91. The petitioners contend that the two statutes were passed by the National Assembly without any preliminary determination, based on inter-chamber consultation with the Senate, as required under Article 96 of the Constitution; that the Memorandum of Refusal by the President, which was required to be taken to Parliament and, therefore, for reconsideration by both the National Assembly and the Senate, was in fact only reconsidered by the National Assembly. Their contention is that there was therefore a violation of the Constitution which rendered the two Acts unconstitutional.

92. The petitioners have relied on, among others, the decisions in Speaker of the Senate and Another vs Hon. Attorney General and 3 Others [2013] eKLR, Okiya Omtatah Okoiti and 3 Others vs Attorney General and 5 Others [2014] eKLR to submit that the provisions of Article 34 (5) of the Constitution are phrased in mandatory terms and require that both Houses pass the legislation contemplated.

93. The 4th, 5th and 6th petitioners agree with the position taken by the media house petitioners. They submit, in reliance on, inter alia, the decisions in Marbury v Madison, 5US 137 (1803) Doctors for Life International v Speaker of the National Assembly and Others, (CCT 12 /05) [2006] ZACC 11 and Roth vs United States 354 US 476 [1957] that Parliament must enact legislation within the principles and the law of the Constitution. In doing so, it must follow the procedure for enacting legislation as commanded by the Constitution and ensure that the final product, the legislation, is not repugnant to or in violation of the Constitution.

94. In his submissions, Learned Counsel, Mr. Orengo, reiterated the position that there was no consultation between the Speakers of the two houses of Parliament. He distinguished the present proceedings from the proceedings in the Coalition for Reforms and Democracy Case (supra), noting that unlike in that case, the petitioners in this case have joined the Speakers as parties to these proceedings. Accordingly, Counsel argued that it is not enough for this Court to look at the Bills and determine whether there was concurrence between the Speakers.

95. The response from the AG is that the petitioners have failed to demonstrate that there was no consultation between the Speakers. In any event, it was his submission that the word *'shall'* in Article 110 (3) of the Constitution is only applicable where a question has arisen as to whether a Bill concerns counties or not. If such a question arises, it is then resolved. Accordingly, they argued that the Speaker of the National Assembly is in a position to determine whether that question arises in respect of any Bill and in the present petition, no such question arose. According to the AG, it could not have been intended that all Bills, including the ones whose status a plain cursory reading would clarify, must be discussed between the Speakers.

96. The 5th respondent's position on this point is that the main purpose of the Kenya Information and Communications (Amendment) Bill was the amendment of the Kenya Information and Communications Act, 1998 so as to regulate the information and communications sector including broadcasting, multimedia, telecommunications and postal services. Its submission was that the 5th Schedule of the Constitution has placed these functions strictly under the ambit of the national government, and Article 109 gives the National Assembly exclusive power over Bills not concerning county governments.

97. It is, we believe, undisputed that the impugned Acts were enacted pursuant to Article 34 (5) of the Constitution which provides that:

> " 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."

98. It may thus be argued that the use of the word "Parliament" implies that the enactment of the legislation requires the input of both Houses of Parliament, given that Article 93 of the Constitution defines Parliament to mean both the National Assembly and the Senate.

99. However, we bear in mind the provisions of Article 110 of the Constitution, which defines the phrase "a Bill concerning county government" as:

(a) A Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

(b) A Bill relating to the election of members of a county assembly or a county executive; and

(c) A Bill referred to in Chapter Twelve affecting the finances of county governments.

100. Put simply, therefore, a Bill concerning county governments is one whose provisions affect the functions and powers of the County which are delineated in the Fourth Schedule of the Constitution; one whose provisions affect the election of members of a county assembly or a county executive; or one that affects the finances of county governments.

101. While Article 34 does use the word "Parliament",it must be read, as the principles we set out elsewhere above indicate, purposively, and with the intention of giving effect to the intention behind the constitutional provision. In our view, the legislation contemplated under Article 34 of the Constitution is intended to regulate matters touching on the media in general. Under the Fourth Schedule of the Constitution which delineates the respective functions of the national and county governments, transport and communications, including, in particular telecommunications and radio and television broadcasting, are vested in the national government.

102. The legislation in question does not concern county government functions, finances, or elections of county assembly members or executives. It touches solely on regulation of the media, a function that is clearly vested by the Constitution in the national government.

103. It is also important to bear in mind the constitutional role of the Senate with respect to legislation. Article 96 (2) of the Constitution clearly articulates this role when it states:

> "The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113."

104. At Article 109 (3), it is expressly stated that "a Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

105. We therefore agree with the respondents that there was no violation of the Constitution in the non-involvement of the Senate in the enactment of the two Acts impugned in this petition. In that respect therefore, the process of enacting the two Acts was in accordance with the requirements of the Constitution.

106. The petitioners have alleged a violation of the Constitution in that there was no resolution by the Speakers on whether the Bills concerned counties. They allege that this is required under Article 110 (3) of the Constitution which provides that:

> " Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill." (Emphasis added)

107. The argument pertaining to the resolution by the Speakers is tied in with the allegation that there was violation of the Standing Orders of the National Assembly and the Senate. The argument by the petitioners is that Standing Order No. 122 of the National Assembly and Standing Order No. 116 of the Senate were not complied with.

108. It appears to us that this requirement contained in Article 110(3), which is part of the Article relating to Bills concerning county governments, comes into play when there is a question or doubt as to whether or not a Bill concerns counties. In that event, the Speakers of the two Houses are required to consult and resolve whether or not the matter involves counties. In the present case, given the clear definition of what amounts to a Bill concerning counties, and the clear demarcation of functions between the national and county governments in the Fourth Schedule of the Constitution, it seems to us that there was no doubt or question as to whether or not the Bills concerned counties.

109. Thus, it can be properly argued, as the AG submits, that there was no question whether the Bills concerned counties, the implication being that it was clear that they were not. That being the case, in our view, there was no violation of the Constitution in the absence of consultation and a resolution between the two Speakers of the House on whether or not the two Bills concerned counties. Nor, in our view, was there a violation of the Standing Orders of either House. In our view, therefore, this challenge to the process is also without merit.

110. It is therefore our finding and we so hold, that there was no violation of the Constitution in the absence of consultation between the Speakers of the two Houses of Parliament, or in the failure to table the two Bills before the Senate. In this regard therefore, the process that led to the enactment of the Kenya Information and Communications (Amendment) Act and the Media Council Act was in accordance with the Constitution.

111. We now turn to the challenge to the constitutionality of the Kenya Information and Communications (Amendment) Act on the basis that the President made recommendations in declining to assent to it, and the recommendations were accepted by Parliament.

Whether the President's actions with Regard to the enactment of the Kenya Information and Communications (Amendment) Act 2013 were unconstitutional

112. The 1st -3rd petitioners note that when the Bill in respect of the Kenya Information and Communications (Amendment) Act was sent to the President for assent on 26th November 2015, in accordance with Article 115 of the Constitution, the President, in exercise of powers conferred under Article 115(1)(b), refused to assent to the Bill. Instead, he issued a Memorandum of Refusal in which he set out his reasons for refusing his assent to the Bill, and made proposals and recommendations for its

amendment. The petitioners have set out the proposals and recommendations made by the President in his Memorandum of Refusal which we need not go into here. The gist of their challenge, and what concerns us in this petition, is the question whether the President acted unconstitutionally in making recommendations for amendment of the Bill.

113. The petitioners submit that the manner in which the two Bills were referred back to the National Assembly and the recommendations on numerous clauses as drafted by the President passed was in violation of the Constitution as the President assigned himself a legislative role not contemplated or provided for in the Constitution, and thus violated the doctrine of separation of powers. In their view, under the Constitution, the President does not share legislative power with Parliament. As this is a pure presidential system, the role of the President in the legislative process is strictly defined and limited to either approving or rejecting bills passed by Parliament.

114. We pause here to observe that while the petitioners allege that the two Bills were referred back to Parliament by the President with recommendations, it was actually only one Bill, the Kenya Information and Communications (Amendment) Bill, 2013, that was so referred. We shall therefore, in this section, refer only to the Bill that was sent back to Parliament by the President.

115. The petitioners' argument was therefore that the referral of the Bill to the National Assembly with explicit reservations and suggested alternative clauses, and the acceptance of the recommendations by the National Assembly, amounted to a usurpation of legislative authority and a surrender of constitutionally vested power by the National Assembly. In their view, this was in violation of the mandatory provisions of Articles 93, 94 (1), 96 (2), 109, 110 (3), 115 and 116. It was their further contention that the President exceeded his constitutional remit and acted against the doctrine of separation of powers. The petitioners placed reliance in support of this argument on the decisions in Trusted Society of Human Rights Alliance v The Attorney General and Others, Civil Appeal No. 290 of 2012 and Speaker of the National Assembly and Others vs De Lille, M.P and Another [297/298] [1999] ZASCA.

116. While agreeing in general terms with the arguments of the 1st -3rd petitioners, the 4th, 5th and 6th petitioners took the position that the President, in declining to assent to the impugned Bill, save for time frames, appeared to have invoked section 46 of the repealed constitution as opposed to Article 115 of the Constitution, 2010. In doing so, the President adopted the language and text of the repealed constitution and went beyond executive authority, usurped legislative powers, and offended the doctrine of separation of powers.

117. It was submitted on behalf of the petitioners that the Constitution assigns functions to the President as the Head of State and Head of Government. When he assents to Bills, he does so as the Head of State, not as head of Government. In their view, under Article 115 of the Constitution, the President can only refer Bills to Parliament for reconsideration. In this case, since the President, through his Memorandum of Refusal, made recommendations, that amounted to creation of his own laws, and thereby a usurpation of legislative authority.

118. The petitioners submitted further that under the repealed Constitution, the President had a role in legislation making but as it stands currently, he does not have any legislative power.

119. In response, the AG argued that Article 115 (2) and (4) of the Constitution show that Parliament had the discretion to consider and pass the Bill just as it was presented to the President a second time, or amend the Bill in light of the President's reservations, or partially amend it to accommodate some of the President's reservations. In the AG's view, the President merely made suggestions for amendment like any other citizen would, and Parliament had the discretion to accept or reject the proposals and recommendations.

120. It was submitted on behalf of the AG that Article 115 of the Constitution donates power to the President on legislative matters. In the present case, the President acted properly and in line with the law, and the petitioners had not presented any evidence in support of their contention that the President usurped legislative functions.

121. The Authority agreed substantially with the AG. In its view, the President was exercising his powers according to Article 115 of the Constitution by noting reservations to the Bill and sending it back to Parliament in the form of a Memorandum. It agreed with the AG that Parliament had an option to either amend the Bill in light of the President's recommendations, or to pass it without any amendment. It observes that the reservations were tabled in Parliament, debated and passed, which shows that the President did not take over the role of Parliament but referred the Bill back to Parliament for debate.

122. It was further submitted on its behalf that the President, when refusing to assent to a Bill, has to make reservations in a practical and purposeful way. In its view, there must be a purposive interpretation of the Constitution and the President has to express reservations with reasons.

123. In determining this issue, we consider first the provisions of the Constitution relating to the enactment of legislation. Article 94 thereof provides that:

(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) ...

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) .....

124. The Constitution thus vests legislative authority on Parliament, which comprises the National Assembly and Senate. With respect to national legislation, legislative power is vested in the National Assembly.

125. In exercising legislative authority, Parliament is under an obligation to do so in accordance with the Constitution and in a manner that promotes democratic governance. As was stated by the Supreme Court in Speaker of the Senate and Another v Attorney General (supra):

> " [61] It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective

functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution.This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."(Emphasis added)

126. In the case of President of the Republic of South Africa and Others vs United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (CCT23/02) [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) (4 October 2002), it was observed that:

> " [25] ... The legislature has a very special role to play in such a democracy. It is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the legislature and the executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law." (Emphasis added)

127. With respect to the manner in which Parliament exercises its legislative powers, Article 109 (1) of the Constitution stipulates that:

> " Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President."

128. At Article 115, the Constitution then prescribes the role of the President in the legislative process by providing that:

> " (1) Within fourteen days after receipt of a Bill, the President shall-
>
> (a) Assent to the Bill; or
>
> (b) Refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.
>
> (2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part-
>
> (a) Amend the Bill in light of the President's reservations; or
>
> (b) Pass the Bill a second time without amendment.

(3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.

(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported-

(a) By two-thirds of members of the National Assembly; and

(b) Two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate

(5) If Parliament has passed a Bill under clause (4)-

(a) The appropriate Speaker shall within seven days re-submit it to the President; and

(b) The President shall within seven days assent to the Bill.

(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5) (b), the Bill shall be taken to have been assented to on the expiry of that period." (Emphasis added)

129. The crux of the petitioners' complaint with regard to the actions of the President in respect of the Kenya Information and Communication (Amendment) Bill 2013 is that he made specific recommendations in respect of various provisions of the Act. In their view, as we understand their submissions, he should have confined himself to declining to assent to the Bill, indicate that he had "reservations" to some of its provisions, presumably without indicating the nature of the reservations, and sent the Bill back to the National Assembly for reconsideration.

130. The question that we must grapple with in light of these contentions is: how, exactly, is the President required to express his reservations in respect of a Bill placed before him for assent? Does pointing out what he sees as problematic with specific provisions in the Bill, and making suggestions and recommendations in respect thereto, amount to usurpation of the legislative role of Parliament and therefore a violation of the Constitution?

131. The Constitution does not define the word 'reservations.' However, the Concise Oxford English Dictionary, 12th Edition at page 1223 defines "reservation" as "a qualification or expression of doubt attached to a statement or claim."

132. It seems to us that the petitioners have ascribed a very narrow meaning to the term, which, with respect, we do not believe is in accord with the Constitution. It will be noted that Article 115 uses phrases such "noting any reservations that the President has concerning the Bill" (Article 115(1)(b); "in light of the President's reservations" (115(2)(a); fully accommodating the President's reservations" (115(3)) and "after considering the President's reservations"

133. With all due respect to the petitioners, we must bear in mind the constitutional interpretation principles that require that we interpret constitutional provisions broadly so as to give effect to its provisions, and to promote the purposes, values and principles of the Constitution. To give the provisions of Article 115 the very narrow meaning that the petitioners contend it has would render its provisions meaningless. In our view, the reservations by the President under section 115 must entail

such recommendations and observations pertaining to specific provisions of the Bills presented to him for assent as he deems merit consideration by the National Assembly.

134. To hold otherwise, to expect the President to, as it were, simply state "I have reservations about this Bill", without more, would be to leave the legislature guessing, casting about, trying to figure out what the President has reservations about. There would be nothing for the legislature to consider, or accommodate, or reject. In sum, there would be no point to Article 115 of the Constitution.

135. On the material before us, we take the view that the President properly exercised his constitutional mandate as is vested in his office under Article 115. We are also satisfied that the National Assembly acted in accordance with the provisions of the said Article. The National Assembly sent the Kenya Information and Communications (Amendment) Bill to the President for assent. The President considered it, expressed his reservations or doubts regarding certain provisions of the Bill, and then made various recommendations with regard thereto.

136. The Memorandum of Refusal was placed before the National Assembly as required under Article 115 (1) (b) of the Constitution. Parliament exercised its discretion as stipulated under Article 115 (2) (a). It amended the Bill "fully accommodating" the President's reservations as provided under Article 115(3) of the Constitution. We are therefore unable to find that the President or the National Assembly acted in violation of the Constitution, or that the President in any way acted in excess of his powers and usurped the legislative powers of the National Assembly.

137. In light of our findings set out above regarding the process of enactment of the two impugned Acts, which we are satisfied was constitutional, we can now turn to consider the specific provisions of the legislation which the petitioners allege violate or threaten to violate their constitutional rights.

Whether the provisions of the Media Council Act and the Kenya Information and Communications (Amendment) Act are unconstitutional.

138. The petitioners have challenged various provisions of the impugned legislation on the basis that they violate or threaten to violate their rights under Articles 33 and 34 of the Constitution. Article 33 provides as follows:

(1) Every person has the right to freedom of expression, which includes-

(a) Freedom to seek, receive or impart information or ideas;

(b) Freedom of artistic creativity; and

(c) Academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to-

(a) Propaganda for war;

(b) Incitement to violence;

(c) Hate speech; or

(d) Advocacy of hatred that-
SUBPARA (i)

Constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) Is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

139. At Article 34, the Constitution guarantees the freedom of the media in the following terms:

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does 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—

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

(b) be impartial; and

(c) 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.

140. The importance of the twin rights to freedom of expression and freedom of the media cannot be gainsaid, and has been underscored in various decisions from this and other jurisdictions. The Supreme Court of Uganda (per Mulenga SCJ) in Charles Onyango-Obbo and Another v Attorney General, Constitutional Appeal No. 2 of 2002 underscored the importance of freedom of expression in the following words:

> "Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfillment and advancement, recognising the individual's rights and freedoms as inherent in humanity....

> Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance." (Emphasis added)

141. In the same decision, Odoki CJ expressed the view that:

> " The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable."

142. It is, however, recognised that freedom of the media, of a free press, carries with it great responsibilities, while the Constitution itself contains restrictions with regard to freedom of expression.The Constitution states at Article 33 that the right to freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy to hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm, or that is based on the grounds of discrimination enumerated in Article 27, which include race, sex, ethnic origin or social status. Further, in exercise of freedom of expression, there is an obligation to respect the rights and reputation of others.

143. The parties to the consolidated petitions before us have, in their respective submissions, underscored the importance of the freedom of expression, but also the need for these freedoms to be exercised responsibly for the greater good of society. In this regard, the 4th, 5th and 6th petitioners have referred us to amongst others, the decisions in Mail and Guardian Limited and Others vs M.J Chipu N.O and Others, (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) (27 September 2013), Indian Express Newspaper (Bombay) Private Ltd and Others v Union of India and Others,1986 AIR 515, 1985 SCR (2) 287 and Reynolds vs Times Newspapers Ltd and Others [1999] E 411 ER 609 for the proposition that freedom of expression and of the media lie at the heart of a democracy. Their submission is that these rights should only be restricted in the clearest of circumstances, for without them, all other rights are weakened.

144. The 1st, 2nd and 3rd petitioners took the position that media freedom is important in established democracies, and in countries like Kenya, the independence of the media assures more profound and greater significance. In their view, the media educates, highlights debate and is the watchman of the public, and the incremental whittling away of media freedom needs to be arrested quickly.

145. The 4th, 5th and 6th petitioners agreed with their co-petitioners. Their submission was that in constitutional democracies, the need to limit power has been expressed through the Constitution. They conceded that the media must enjoy its freedom in a responsible manner and must observe certain professional standards. However, it was their submission that the Constitution has determined that the media should be regulated by a regulatory body that is independent and accessible. It was also their submission that the media is central to the constitutional commitment to democracy and the promotion of a culture of openness and transparency. Consequently, whatever system of regulation that Parliament puts in place must be one that promotes pluralism and free speech.

146. The petitioners have set out specific provisions of the impugned legislation which they assert ran afoul of the above constitutional principles and jeopardise media freedom and freedom of expression. We shall address ourselves to the specific provisions impugned in this petition shortly.

147. In response, it was submitted on behalf of the 5th respondent that the enactment of the impugned laws was also informed by the need to stop the control of the media by powerful commercial interests which would infringe on the citizens' right to a free media. In its view, regulation cannot amount only to self-regulation, and neither the media houses nor the State should determine what is good for the citizens, which is why Parliament created a balance of all the competing interests. Its position is that it is the citizen who is at the centre of the enjoyment of the right to freedom of the media. The 5th respondent therefore denied that there was any violation or threat of violation of the petitioners' rights by the provisions of the two impugned legislation.

Whether the Provisions of the Kenya Information and Communications (Amendment) Act and the Media Council Act Violate Freedom of Expression or of the Media

148. We now turn to consider the specific provisions of the Media Council Act and the Kenya Information and Communication (Amendment) Act that are impugned in these petitions. In doing so, we bear in mind the provisions of Article 24 of the Constitution. Under this provision, which we have set out elsewhere in this judgment, the petitioners must show that the impugned provision limits or threatens to limit any of the rights set out in the Bill of Rights. Once they do this, then the respondents have a duty, in accordance with the said Article 24, to demonstrate that the limitation meets the criteria set out therein.

149. In summary, Article 24 requires that the limitation should be reasonable and justifiable in an open and democratic society, taking into account the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others, and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

150. The petitioners have impugned the provisions of the legislation on three broad levels. The first, which is advanced by the 1st - 3rd petitioners, is that section 5B(2) and (3) of the Kenya Information and Communication Act and section 6(2) (c) of the Media Council Act limit freedom of expression in a manner not permitted by the Constitution. This is because, in their view, the provisions are ambiguous and general. The 4th - 6th petitioners add that the provisions are vague and overbroad. The petitioners also challenge the constitutionality of section 3(2) of the Media Council Act, read with section 4 thereof, as being overbroad and overreaching and, if applied strictly, will leave the press with "no breathing space."

151. The second level relates to the body established for the regulation of the media. The petitioners challenge the mode of appointment of members of the Communications Authority, the issuance of policy guidelines by the Cabinet Secretary in charge of information, and the autonomy and independence of the complaints mechanism of the Media Council as provided for under the Act. Thirdly, the petitioners complain that the legislation has established concurrent and conflicting mechanisms for media regulation.

Section 3 (2) of the Media Council Act

152. Section 3 (2) of the Media Council Act 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.

153. The 4th, 5th and 6th petitioners contend that this section is unconstitutional because to require that the persons specified under section 4 of the Media Council Act should be accurate, fair, accountable, transparent and to reflect the interests of all sections of society in the exercise of the right to freedom of expression is to curtail the freedoms set out in the Bill of Rights. Section 4 of the Media Council Act provides that the Act applies to media enterprises, journalists, media practitioners, and foreign journalists accredited under the Act, as well as to consumers of media services.

154. It is also their submission that the section excludes from protection varieties of expression that touch on a wide range of concerns and subjects which, together, constitute an impenetrable and major obstacle to the concept and existence of media freedom. In their view, as long as the Constitution guarantees the freedom of conscience, religion, belief and opinion, freedom of association and the right to campaign for a political party or cause, it would be impossible to exercise the freedom of expression in a manner that reflects the interests of all sections of society.

155. They have relied in support of their argument on the decision in Cantwell v Connecticut, 310 US 296 [1940] and New York Times v Sullivan 376 US 254 [1964] in which the Court stated that:

> " In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view the pleader as we know, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view essential to enlightened opinion and right conduct on the part of the citizens of a democracy".

156. As we illustrate below, we are in agreement with the petitioners with respect to one portion of section 3(2) of the Media Council Act. However, we have some difficulty understanding the manner in which the petitioners view unconstitutionality with the totality of the above provisions. The section requires that individuals should exercise their freedom of expression while taking into account various societal needs. It requires that in exercising the right to freedom of the media, they must be accurate and fair, accountable and transparent, respect the personal dignity and privacy of others, demonstrate professionalism and respect for the rights of others, and be guided by the national values and principles of governance set out under Article 10 of the Constitution. It seems to us that this provision of the Media Council Act largely sets out what the media is under a constitutional duty to do.

157. However, the petitioners' concern with respect to the requirement that in exercise of the freedom of expression, media practitioners, amongst others, must reflect the interests of all sections of society is justifiable. As the case of Cantwell v Connecticut (supra) relied on by the petitioners illustrates, there are different shades of beliefs and opinions, as well as political expression. It is, in our view, to limit freedom of expression to require that "In exercise of the right to freedom of expression" media enterprises, journalists, media practitioners, and foreign journalists accredited under the Act, as well as consumers of media services "reflect the interests of all sections of society." Society being the way

it is, it is impossible to expect the kind of uniformity in thought and opinion that would result in media practitioners reflecting the interests of all in society. To demand such uniformity of thought from media practitioners is, in our view, to limit the right to freedom of expression.

158. Having so found, is there a justification advanced by the respondents that would bring that provision under the ambit of Article 24? Regrettably, the respondents have not responded to this challenge to demonstrate that the limitation imposed is reasonable and justifiable in a free and democratic society.

159. In the circumstances, and in the absence of a justification for the provision as required under Article 24, our finding is that section 3(2)(a) of the Media Council Act, to the extent that it requires that in exercise of the right to freedom of expression, the persons specified under section 4 of the Act "shall reflect the interests of all sections of society" is an unjustifiable limitation of the right to freedom of expression and is therefore unconstitutional.

Section 6 (2) and (3) of the Media Council Act

160. The petitioners are aggrieved by sections 6(2) and (3) of the Media Council Act which provide as follows:

> (2) In exercise of its powers and discharge of its function under this Act the Council and every person to whom this Act applies shall ensure —
>
> (a) that the provisions of Article 33(2) of the Constitution are safeguarded;
>
> (b) that the freedom and independence of media is exercised in a manner that respects the rights and reputations of others;
>
> (c) that the protection of national security, public order, public health and public morals is safeguarded; and the compliance with any other written law.
>
> (3) The Cabinet Secretary shall, in consultation with the Council, make regulations to give further effect to subsection (2).

161. The 1st - 3rd petitioners allege this section violates Article 33 (2) of the Constitution. They submit that it imposes limitations on the freedom of expression not permitted by the Constitution and which are not justifiable under Article 24. They rely in support on the decision of the Indian Supreme Court in Romesh Thappar vs The State of Madras 1950 AIR 124, 1950 SCR 594 and an Article, Broadcasting Law, OUP, 1993, by Eric Brandent, which underscore the importance of free speech and press freedom, and free speech in the context of broadcasting, respectively.

162. The 4th-6th petitioners argue, with regard to this section, which they consider alongside section 3(2) of the Media Council Act, that it opens up a big window for the Cabinet Secretary to restrict and manage the space of press freedom through regulations which are to be made to give further effect to the derogations found in section 6 (2) of the said Act. They further argue that the provision is couched in mandatory terms so that individual journalists, media practitioners or media houses have no choice or options in the matter. As a result, in their view, the effect of the limitations are extremely overboard, overreaching and the strict application of the statute may in effect leave the press with no breathing space.

163. A reading of the pleadings and submissions of the petitioners narrows their grievances with respect to this section to section 6(2)(c) and 6(3). The petitioners view these provisions, particularly section 6(2)(c), as a recreation of the old order under the repealed constitution in which derogations to the right to freedom of expression were permitted in the name of national security, public order, public health and public morals. The petitioners rely on the decision in the Canadian Supreme Court of R v Zundel,

[1992] 2 S.C.R 731 to submit that the provision does not identify a political problem, a social evil or a pressing social need that would justify the limitation.

164. The 1st and 4th respondents have not addressed themselves to section 6(2) and (3) of the Media Council Act. They have dealt instead with section 5C(1) and (2) of the Kenya Information and Communication Act which deals with the issuance of policy guidelines by the Cabinet Secretary. Their submission with respect to 5C(1) and (2) is that the wording of the section indicates that the issuance of policy guidelines by the Cabinet Secretary is not mandatory but rather an expression of discretionary authority. In that regard, they relied on Michele M Asprey's article, Plain Language for Lawyers and Barbara Child's Drafting Legal Documents: Principles and Practices, 383, 2nd Edition, West, 1992 to submit that the use of the word "may" expresses discretionary authority. They argue that policy guidelines have been and are still being issued by Cabinet Secretaries from time to time as the State, is under Article 11(2) of the Constitution, under a duty to promote all forms of national and cultural expression.

165. Two questions arise with respect to section 6(2) and (3) of the Media Council Act. First, is it justifiable to require of the Council and every person to whom the Act applies, in "exercise of its powers and discharge of its function under (the) Act," to ensure "that the protection of national security, public order, public health and public morals" is safeguarded"? It is reasonable, in our view, to expect that there will be compliance with the requirement that the provisions of Article 33(2) of the Constitution will be safeguarded, and that the freedom and independence of the media is exercised in a manner that respects the rights and reputations of others. It is also reasonable to expect that compliance with any other written law will be adhered to. The same, regrettably, cannot be said of the requirement with respect to ensuring "that the protection of national security, public order, public health and public morals" is safeguarded. This is because such terms are, as the 4th, 5th and 6th petitioners argue, overbroad and vague, indeed, in our view, prone to subjective interpretation that they cannot reasonably be justifiable in a democratic society.

166. Which brings us to the provisions of section 6(3) which gives the Cabinet Secretary power, in consultation with the Council, to make regulations to give further effect to subsection (2).

167. We also consider it apposite to consider at this stage the challenge to the power of the Cabinet Secretary under section 5C of the Kenya Information and Communication (Amendment) Act to issue policy guidelines of a general nature to the Communications Authority. It is the petitioners' contention that the powers given to the Cabinet Secretary impact on the independence of the Authority and therefore are a violation of Article 34(5).

168. Section 5C of the Kenya Information and Communications (Amendment) Act provides that:

(1) The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act.

(2) The guidelines referred to under subsection (1) shall be in writing and shall be published in the Gazette.

169. We are of the view that there is nothing unconstitutional in granting the Cabinet Secretary in charge of information and communication the power to issue policy guidelines of a general nature in respect of matters that are within his Cabinet docket. We are also of the view that since such power is to be exercised, in the case of the Media Council Act, "in consultation with the Council", the issuance of guidelines that are likely to limit media freedom is to that extent limited.

170. We also take into account one other consideration: we are being asked to rule that the grant of power to make policy guidelines is unconstitutional. We are not satisfied, and it has not been demonstrated

before us, that there is anything unconstitutional in the grant of the policy-making power *per se*. As is the case with the making of regulations, for instance, under the Statutory Instruments Act, No. 23 of 2013, Parliament enacts the legislation but vests power for the making of regulations or issuance of guidelines for the operationalization of the legislation to the Minister or Cabinet Secretary in charge of the docket in question.

171. To state the obvious, someone must make regulations and issue policy guidelines. Policy matters fall within the purview of the executive. In respect to matters related to information and communication, such powers can only be vested in the Cabinet Secretary responsible for information and communication. Happily for us, there are constitutional and statutory guidelines, such as are found in the Statutory Instrument Act, which demand consultation of stakeholders and public participation.

172. Consequently, while in our view the provisions of section 6(2)(c) of the Media Council Act are so vague and broad as to unjustifiably limit media freedom and freedom of expression, and therefore the Cabinet Secretary cannot properly issue guidelines in furtherance thereof, we cannot speculate with respect to the constitutionality or otherwise of any guidelines that may be issued to put into effect the provisions of the rest of the section which accord with the Constitution and the exercise of the freedom of expression, or with respect to the operations of the Authority established under the Kenya Information and Communications (Amendment) Act.

173. Our finding, therefore, with regard to the challenge to section 6(2) and (3) of the Media Council Act is that section 6(2)(c) is unconstitutional for being couched in a manner that is vague and broad and that is likely to limit the freedom of expression.

174. We have, however, found nothing untoward in the provisions of section 5C of the Information and Communications (Amendment) Act.

Section 5B (2) and (3) of the Kenya Information and Communications (Amendment) Act

175. The petitioners have challenged the provisions of these sections, which they assert are contrary to Article 24 (2) (b) and (c) of the Constitution.

176. Section 5B provides that:

(1) The Authority shall, in undertaking its functions under this Act comply with the provisions of Article 34 (1) and (2) of the Constitution.

(2) Subject to Article 24 of the Constitution, the right to freedom of the media and freedom of expression may be limited for the purposes, in the manner and to the extent set out in this Act and any other written law.

(3) A limitation of a freedom under subsection (2) shall be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

(4) The right to freedom of expression shall not extend to-

(a) the spread of propaganda for war;

(b) incitement to violence;

(c) the spread of hate speech; or

(d) advocacy of hatred that-

(i) constitutes ethnic incitement, vilification of others persons or community or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

(5) The Authority may make regulations for the better carrying out of the provisions of this section.

177. The petitioners' contention is that section 5B (2) and (3) are in contravention of Article 24 (2) (b) and (c), which are to the effect that a provision in legislation limiting a right or fundamental freedom "shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation" and shall not limit the right or the right or fundamental freedom so far as to derogate from its core or essential content.

178. In submissions on behalf of the petitioners, it was contended that the provisions of section 5B (2) and (3) of the Kenya information and Communication Act violate Article 24 by being ambiguous and general in the proposed limitation of the freedom of the media. In their oral submissions, the petitioners argued that the respondents have introduced "proportionality" and "pressing social need" in the legislation but have failed to illustrate how the limitations meet the standards set by Article 24.

179. In response, the 1st and 4th respondents submitted that the section cannot be said to be ambiguous since what an open and democratic society entails is an established concept that has been judicially defined. Further, that even if the section was to be deemed as restrictive of the rights of the media, then the doctrine of proportionality would be invoked. The respondents relied on the decisions in The Sunday Times v United Kingdom [1979] 2 EHRR 245 and MS v Sweden [1997] 3 BHRC 248.

180. In the respondents' view, the Act will only limit the freedom of the media where there is a pressing social need and in accordance with the doctrine of proportionality when the rights of others are affected. In any event, according to the respondents, a statute that invokes the constitutional provisions verbatim as its countercheck mechanism cannot be said to be unconstitutional but will, in the appropriate factual circumstances, be measured against that Constitution to determine constitutionality of anything done under that statute.

181. The 5th respondent's answer to the petitioners' contentions is that section 5(4) (which appears to be intended to be a reference to section 5B(4)) of the Kenyan Information and Communications (Amendment) Act not only clearly elaborates the nature and extent of the limitation but it also echoes verbatim the content of Article 33 (2) of the Constitution. Consequently, in its view, the section cannot be said to be in contravention of the Constitution as it sets out clearly the limitations as provided in Article 24 of the Constitution, and the limits it sets are already in the Constitution.

182. Having considered the submissions of the parties against the impugned provisions of the Act vis a vis the provisions of the Constitution, it is difficult to see what the problem is with section 5B (2) and (3) of the Kenya Information and Communication (Amendment Act. The section merely reproduces the provisions of Article 33 (2) of the Constitution. It surely cannot be said that a statute is unconstitutional merely because the Legislature, in enacting it, engaged in the clearly superfluous business of reproducing what is already set out in the Constitution. To hold the provisions of section 5B of the Kenya Information and Communication Act unconstitutional is to say that the provisions of the Constitution which it is an echo of are unconstitutional. It is to ask for the Court to engage in an absurdity to demand that it so finds.

Independence and Autonomy of the Regulatory Authority

183. The petitioners base their claim with regard to the independence of the regulatory authority on the provisions of Article 34(5) of the Constitution, which states that:

> (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;
>
> (c) reflect the interests of all sections of the society; and
>
> (c) set media standards and regulate and monitor compliance with those standards.

184. They are aggrieved by three matters in relation to the provisions of the two Acts. First, they challenge the process set out in the Information and Communication (Amendment) Act relating to the appointment of the Chairman and members of the Communications Authority. They argue that the granting of discretionary powers to the Cabinet Secretary over the choice of candidates from whom to select the final appointees is contrary to the independence of the regulatory authority envisioned under Article 34 (3) and (5) of the Constitution and various other principles and values in the Constitution as well as those underlying an independent media guaranteed by the Constitution.

185. Secondly, it is their contention that the provision permitting the Cabinet Secretary to give policy guidelines of a general nature is incompatible with the constitutional standard of independence. Thirdly, it is their claim that the provisions of the Kenya Information and Communication (Amendment) Act undermine the independence of the Complaints Commission of the Media Council of Kenya by giving the state-controlled Multimedia and Communications Tribunal jurisdiction to hear appeals from the Complaints Commission of the Media Council of Kenya.

186. The petitioners placed reliance on the decision by Lord Wilberforce in Minister of Home Affairs v Fisher, [1979]3 All E.R. 21, to argue that the applicable standards of independence are to be determined with reference to what the Constitution says about other independent bodies and from international best practices that elaborate on those constitutional standards or are drawn from international treaties and conventions that Kenya has ratified. They enumerated the constitutional principles for independence and autonomy with respect to constitutional commissions and independent offices as entailing a transparent method of appointment, a sharing of the powers of appointment between the political branches of government, the Executive and legislature, with a detailed and open process of scrutiny vested in the legislature, assurances of integrity by mandating compliance with Chapter Six of the Constitution, proper remuneration for holders of independent offices, secure tenure and guarantees for non-removal except in clearly articulated circumstances, involvement of the National Assembly in the removal process and a requirement that such bodies be self-managing, including setting their own administrative and operational policies and guidelines.

187. According to the petitioners, the President and Cabinet Secretary have the discretion as to who to pick as chairman and members of the Board of the Authority, which goes against Article 34 of the Constitution. They argue further that the Cabinet Secretary has control over the Multi-Media Appeals Tribunal, which results, in their view, in the regulator being under the control of the Executive. They also observe that the President can suspend the chairperson or member of the Board, while the Cabinet Secretary can suspend members of the Media Council.

188. The petitioners argue that for regulation and restrictions to be legitimate, they must not put in jeopardy the right itself; that states may regulate but they must discharge that duty in a manner that does not impact or have the potential to impact on the freedom of speech and the media. They place reliance

for these submissions on Article 19's Principles for the Regulation of Broadcasting Media, the Banjul Declaration of Principles on Freedom of Expression in Africa, the International Covenant on Civil and Political Rights, the New Zealand Law Commission Report, 2010, and the case of Schneider v State, 308, US 147 [1939].

189. It was further submitted on behalf of the petitioners that Article 34 (3) rights can only be enjoyed where an independent authority to deal with frequencies and licenses is created, and that the International Telecommunications Union in Geneva allocates to each country the same number of frequency bundles. In their view therefore, Kenya will always require an authority to regulate frequencies but that must be independent of Government. Accordingly, Articles 34 (5) and 34 (3) of the Constitution are intertwined and therefore, print and electronic media, broadcasting, licensing and ethics must be regulated by the same body, and further, that under Article 34 (5), legislation is required to regulate standards but self-regulation is also encouraged.

190. The 1st -4th respondent's position is that the regulatory authorities shall be independent and the appointing powers of the President and the Cabinet Secretary are controlled by the Act. It is also their submission that the said powers are fettered and cannot be exercised arbitrarily or ultra vires. In their view, in order for the Court to determine the independence of the regulatory authority, there ought to be a factual matrix, a real life set of experiences; and in the absence of such facts and experiences, the present challenge remains a mere academic exercise. They urged the Court not to waste time on matters that are not backed by hard evidence to support the allegations of influence of the Executive over the regulatory body. In that regard, they juxtaposed the situation with a scenario in which a party may argue against the independence of the judiciary owing to the fact that the President appoints judges, yet such judges are first interviewed, vetted and recommended for appointment by the Judicial Service Commission. In their view, the Government's role in appointing members or chairman should not be presumed, without proof, to compromise the integrity of the appointees' decisions.

191. The 5th respondent's response to the petitioners' arguments under this head is that it is the licensing procedures, not the body itself, that are required to be independent of control by government, political or commercial interests as was held by the Supreme Court in Communications Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others, [2014] eKLR. In its view, the licensing and regulation of the broad industry is an administrative function and the Government cannot be excluded from it.

192. According to the 5th respondent, the State has the role to regulate the airwaves and other forms of signal distribution and the broad communication and telecommunication industry to protect its citizens. It placed reliance for this argument on the decision in R Radio Authority, ex parte Canadian Media Group plc. [1995] 2 All ER 139. It also cited by way of illustration the situation in South Africa and the United States with respect to media regulation. According to the 5th respondent, the Independent Communications Authority of South Africa has the mandate of regulating the telecommunication, broadcasting and postal industries in the public interest and ensure affordable services of high quality for all South Africans; and that it conducts its affairs through a Council consisting of seven councillors appointed by the President on the recommendation of the National Assembly. The 5th respondent cites the case of e.tv (PTY) vs Minister of Communications and 3 Others, Case No. 346/94/2012 in which the Court acknowledged the Independent Communications Authority of South Africa role as a regulator.

193. In the 5th respondent's view, the true intention of Article 34 (3) was not to entrust the role of the government in licence regulation to an independent body but to ensure that the administrative body entrusted with that role has operational independence, that is the independence that the body has in operating and performing its functions on a day to day basis.

194. As we understand it, the body contemplated under Article 34 is one that is free from government, political and commercial interests. It must enjoy autonomy in terms of its functioning and decision making, free from influence from any quarter. As is stated in Article VII of the Banjul Declaration of Principles on Freedom of Expression in Africa, 2002:

> 1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
>
> 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
>
> 3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

195. The question is whether, in the present case, the regulatory body established under the Kenya Information and Communication (Amendment) Act meets the criteria of independence set out in the Constitution and the Banjul Principles. We shall consider this issue in relation to the mode of appointment and removal of the members of the authority's board.

Appointments of the Board of the Communications Authority

196. Section 6B of the Kenya Information and Communications (Amendment) Act outlines the procedure for appointments to the Board of the Communications Authority. When a vacancy occurs in the Authority, section 6B(1) sets the out process to be followed to fill the vacancy:

> (1) Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall—
>
> (a) by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and
>
> (b) convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board. (Emphasis added)

197. With respect to the composition of the selection panel, section 6B(2) states as follows:

> (2) The selection panel referred to under subsection (1) shall comprise of persons drawn from the following organisations—
>
> a) Media Council of Kenya;
>
> b) Kenya Private Sector Alliance;
>
> c) Law Society of Kenya;
>
> d) Institute of Engineers of Kenya;
>
> e) Public Relations Society of Kenya;
>
> f) Kenya National Union of Teachers;
>
> g) Consumers Federation of Kenya; and
>
> h) The Ministry responsible for matters relating to media.

198. Section 6B(3)-(8) then set out the process to be followed by the selection panel in the recruitment of the chairman and members in the following terms:

(3) At their first meeting, the panel shall appoint a chairperson and a vice-chairperson who shall be of opposite gender.

(4) An application in respect of a vacancy declared under subsection (1) shall be forwarded to the selection panel within seven days of the publication of the notice, and may be made by—

(a) any qualified person; or

(b) any person, organisation or group of persons proposing the nomination of any qualified person.

(5) The selection panel shall, subject to this section, determine its own procedure and the Cabinet Secretary shall provide it with such facilities and other support as it may require for the discharge of its functions under this section.

(6) The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry, within seven days from the expiry of the deadline of receipt of applications under subsection (4).

(7) The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (6).

(8) Upon carrying out the interviews, the selection panel shall select

(a) three persons qualified to be appointed as chairperson; and

(b) two persons, in relation to each vacancy, qualified to be appointed as members of the Board, and shall forward the names to the President or the Cabinet Secretary, as the case may be." (Emphasis added)

199. Finally, subsection (9) thereof provides the role of the President and the Cabinet Secretary in the appointment process as follows: ////

SUBPARA (9)

The President or the Cabinet Secretary shall, within fourteen days of receipt of the names under subsection (8), appoint the chairperson and the members, respectively.

(10) In selecting, shortlisting and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall—

(a) ensure that the appointees to the Board reflect the interests of all sections of society;

(b) ensure equal opportunities for persons with disabilities and other marginalized groups; and

(c) ensure that not more than two-thirds of the members are of the same gender.

(11) Every appointment made under this section shall be published in the Kenya Gazette. (Emphasis added)

200. The process for the appointment of the chairman and members of the Board is set out clearly in the Act, and needs no belabouring. It is under the control of a selection panel which comprises

representatives from various civil society organisations, including the Media Council of Kenya. It also has representation from government, which is represented by a person drawn from the Ministry for the time being responsible for matters relating to media.

201. The selection panel is mandated to select three persons qualified to be appointed as chairperson; and two persons, in relation to each vacancy, qualified to be appointed as members of the Board, and to forward the names to the President or the Cabinet Secretary, as the case may be. The President and the Cabinet Secretary are given a timeline of fourteen days within which to appoint the chairman and members respectively upon receipt of the names from the selection panel.

202. As is also evident from the provisions of the Act, the selection panel is required to perform its functions in accordance with constitutional principles with regard to appointments to public offices.

203. Section 6B of the Act provides, in our view, a process of appointment that, in all fairness, cannot be challenged on the lack of independence. It is conducted by a body comprising a large number of persons drawn from various sectors of society, including the media, with the government providing only one of the members of the selection panel. The Act clearly sets out the principles to be followed in the selection process, which are all based on the Constitution. With the greatest respect to the petitioners, we must state that their complaints with regard to the appointment of members of the Board of the Authority are patently without any basis.

204. However, the Court does note that there is a problem with the provisions of section 6B (10). The section seems to suggest that the President and the Cabinet Secretary will be "selecting, shortlisting and appointing the chairperson and members of the Board." This provision is in conflict with the preceding sections, which clearly give the mandate of selection and shortlisting to the selection panel. The role of the President and the Cabinet Secretary is to then appoint the chairman and members of the Board from the names presented to them by the selection panel.

205. It is therefore our view that there is no violation of Article 34(5) by the provisions of section 6B. In reaching this conclusion, we are persuaded by the views expressed in the case of Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe and Others (162/2001) ((Pvt)) [2003] ZWSC 65 (25 September 2003). In this case, the Supreme Court of Zimbabwe was confronted with the question of whether the independence of the Broadcasting Authority of Zimbabwe was compromised owing to its composition. Under the impugned Zimbabwean law, section 4 thereof provided that the Broadcasting Authority was to be managed by a Board and the Board was to consist of not fewer than five members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions that the President may give him. The court in addressing the question made reference to various media regulatory bodies and their independence and the appointing authority of such Boards. The court then made the following observations:

> " The challenge to section 4 and 6 of the Act was based on the lack of independence from government control of the regulating authority created under the Act and the undue influence of the Minister in the licensing process...
>
> This section, as already pointed out, is very similar to section 1(2) of the British Broadcasting Act [Chapter 42] of 1990 which provides that the Independent Television Commission shall consist of a Chairman and a deputy Chairman appointed by the Secretary of State and such other members appointed by the Secretary of State, not being less than eight nor more than ten as he may, from time to time, determine.
>
> Similarly the Australian Broadcasting Services Act 1992 creates the Australian Broadcasting Authority as the licensing and regulating authority. The Australian Broadcasting Authority

consists of seven members all appointed by the Governor-General without any reference to any other body or persons outside governmental structures.

In Australia the Governor-General and the Minister for Communications, Information, Technology and Arts have other controlling powers that I have already adverted to in the analysis of the Australian Act above.

In Ireland, as already indicated, members of the regulating authority are appointed by government through the responsible Minister. The government has power to remove a member of the regulating authority for state reasons.

In Norway the King and the Minister have very wide powers including those of making appointment to the regulating authority.

In the United States appointments to the regulating authority are made by the President with the advice and consent of the Senate. Similarly in Sweden, Malaysia, South Korea, Canada and New Zealand the government makes appointments to the regulating authority.

In South Africa the government's power to appoint members of the Independent Communications Authority of South Africa is seriously circumscribed by statutory provisions that seek to enhance the plurality of the regulating authority.

In France and Italy more than one arm of government controls the appointments to the regulating authority."

206. After evaluating the position in the jurisdictions mentioned above, the Court went on to state as follows with regard to the position in Zimbabwe:

> " It is quite apparent from the foregoing that section 4 of the Act is modelled onprovisions existing in countries that are generally considered as democratic.
>
> Section 4 of the Act merely creates the regulating authority and identifies the Minister as the person who appoints members of the authority. Someone has to make the appointments to the authority. Section 4 does not identify who should be appointed to the authority. It merely provides for the number of appointees and who makes the appointment. The persons to be appointed are not identified in such a manner as to leave the Minister without choice but to appoint people dependant on the government as was the case in Athukorale's case, supra. Athukorale's case, supra, is certainly distinguishable from this case. The provisions of section 3 of the Sri Lankan Bill are very different from section 4 of the Act.
>
> On this basis I am satisfied that section 4(2) and (3) creates a regulating authority that cannot be said to be overly dependent on government and, therefore, unconstitutional. I am, therefore, satisfied that the challenge to section 4(2) and (3) of the Act should be dismissed. ...."

207. This decision was rendered in 2003, and it may well be that the situation in some of the countries cited has since changed. We note from the current situation in England, Australia and the United States that the situation is more or less as it was in 2003. In any event, the point that emerges is that there is considerable government involvement in the appointment to bodies that regulate the media. However, the impugned legislation in Kenya provides a process that is highly participatory, has limited representation from government, is bound to conduct its proceedings in accordance with the Constitution, and is clearly not one that can be said to be under the influence of any one sector of society. It is our finding, therefore that the regulatory authority in respect of whose appointments

provision is made under section 6B of the Kenya Information and Communications (Amendment) Act is constitutional and does not breach Article 34(5) of the Constitution.

Autonomy and Independence of the Complaints Mechanism

208. The petitioners raise two grievances with respect to the complaints mechanisms under the two Acts. They contend, first, that by establishing the Communication and Multi-media Appeals Tribunal under the Kenya Information and Communications (Amendment) Act, and giving it the same powers as the Complaints Commission established under section 34 of the Media Council Act, the respondents have violated the spirit of Article 34 of the Media Council Act. The 3rd -6th petitioners see the problem as a muddled, conflicting and concurrent jurisdiction conferred on the Complaints Commission under the Media Council Act and the Multi-media Appeals Tribunal under the Kenya Information and Communications (Amendment) Act.

209. It is submitted that the provisions with respect to these bodies violate the constitutional guarantees under Article 34. That to give the state-controlled Communication and Multi-media Appeals Tribunal power to hear appeals from the Complaints Commission of the Media Council of Kenya undermines the independence of the Complaints Commission of the Media Council. Further, the legislation subjects media practitioners to two disciplinary processes, which in their view exposes them to double jeopardy.

210. The question to ask with regard to the petitioners' complaint is what the respective mandates of the two bodies are. The Complaints Commission of the Media Council is established under section 27 of the Media Council Act. Its functions are set out at section 31 thereof as including to:

(a) mediate or adjudicate in disputes between the government and the media and between the public and the media and intra media on ethical issues;

(b) ensure the adherence to high standards of journalism as provided for in the code of conduct for the practice of journalism in Kenya; and

(c) achieve impartial, speedy and cost effective settlement of complaints against journalists and media enterprises, without fear or favour in relation to this Act.

211. Section 42(2) of the Media Council Act provides that a party aggrieved by the decision of the Complaints Commission may, thirty days after the Commission has made its decision, apply to the High Court for such orders as the court may, in exercise of its jurisdiction under Article 165(6) of the Constitution, think just.

212. The Communications and Multimedia Appeals Tribunal, on the other hand, is established under section 102 (1) of the Kenya Information and Communications (Amendment) Act. It is granted jurisdiction to hear complaints under section 102A as follows:

A person aggrieved by—

(a) any publication by or conduct of a journalist or media enterprise;

(b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or

(c) any action taken, any omission made or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

213. Its appellate jurisdiction is provided for under section 102F as follows:

> "(1) Unless otherwise expressly provided in this Act, the Media Council Act or any other law, where this Act or the Media Council Act, empowers the Media Council or the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.
>
> (2) Any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or the making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal. (Emphasis added)

214. It appears to us that the Communications and Multimedia Appeals Tribunal is given wide jurisdiction with respect not just to decisions of the Media Council, but to decisions of the Authority "or a person licensed under the Act".

215. The petitioners have complained that the grant of jurisdiction to the Multimedia Tribunal exposes them to double jeopardy. The basis of this argument is that the Tribunal has the same jurisdiction as the Media Complaints Commission under section 34 of the Media Council Act, which provides that:

> "(1) A person aggrieved by—
>
> (a) any publication by or conduct of a journalist or media enterprise in relation to this Act; or
>
> (b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise, may make a written complaint to the Complaints Commission setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.
>
> (2) A complaint under section 31 may be made—
>
> a) orally, either in person or by any form of electronic communication; or
>
> b) in writing, given to the Registrar of the Complaints Commission setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought. (Emphasis added)

216. We agree with the petitioners that there is a clear overlap in the jurisdiction of the Multimedia and Communications Appeals Tribunal and the Complaints Commission under the Media Council Act. While section 34 appears intended to cover complaints in relation to matters "under (the) Act", and the jurisdiction of the Tribunal is wider, it cannot be disputed that there is bound to be confusion in the making of complaints with respect to which is the appropriate body to lodge a complaint to.

217. Does this, however, amount to double jeopardy and therefore a violation of the constitutional rights of the petitioners? Article 50(2)(o) contains the constitutional protection against double jeopardy when it provides that every accused person has the right to a fair trial which includes the right "not to be

tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

218. We agree with the petitioners that the two provisions in the two Acts demonstrate muddled thinking and drafting in respect of the powers and mandates of the two dispute resolution mechanisms. However, we are unable to agree with them that they pose any threat to the right guaranteed under Article 50(2)(o). As the AG submits in reliance on the decision in **Stanley Maina Mutuota & 11 Others vs Labour Commissioner & 3 Others 2012) eKLR**, there is nothing that demonstrates a violation or threat of violation of the right against double jeopardy.

219. It may be true, as the petitioners argue, that the overlapping mandate may lead to the simultaneous institution of complaints or processes in both of these bodies. It may also be true, as the AG argues, that institutions have a way of drawing their boundaries once they begin working, and in his view, it can be presumed that this will be the case with the two bodies. However, in our view, there needs to be clarity in the law. The AG cannot blithely ask that the confusion or concurrence in mandate and jurisdiction be allowed to play itself out and reach a resolution in time. In our view, there is a need to rethink the two bodies and to spell out clearly their respective mandates and jurisdiction. However, we are not able to reach the conclusion that the establishment of the two bodies, given the wider jurisdiction of the Multimedia and Communications Appeals Tribunal, violates the provisions of Article 34(5).

Sections 102A (5) (b) and 102B (2) of the Kenya Information and Communications Act

220. The petitioners are aggrieved by the provisions of these sections which allow for anonymous complaints to be made. They are also unhappy about the penalties imposed on media houses if they fail to respond or are found liable with respect to the complaints made. Their submission is that in general criminal law, anonymous witnesses are the exception and not the rule.

221. They illustrate this by making reference to Rule 69 of the Rules of Procedure for the International Criminal Tribunal for Rwanda which articulated the exceptional rule by noting that only in exceptional circumstances may either party apply to the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk. According to the petitioners, neither the Rwanda Tribunal nor the Tribunal for the former Yugoslavia exempted disclosures of witnesses between the parties themselves: the rule in such cases was that the identity of the victim or witness had to be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and defence.

222. The petitioners also relied on the decision in Kostovski v The Netherlands, Application No.11454 of 1985 to submit that the proceedings of the Communications and Appeals Multimedia Tribunal are trial *sui generis* and the protections available in a proper trial should apply with equal force. Their contention was therefore that the provisions of the Kenya Information and Communications (Amendment) Act permitting anonymous complaints and requiring people to respond to such complaints on the pain of severe sanctions are incompatible with due process and are unjustifiable. In their view, fair hearing entails an open and transparent process and one must know who his or her accuser is.

223. The AG's response on behalf of the 1st and 4th respondents, while generally defending the provisions of the section, was that some of the provisions in the section are protective of the profession of journalism, the prescribed maximum fines is a safeguard in itself, and that the rules of natural justice are inbuilt in these provisions.

224. Section 102A (5) provides that despite subsection (4), the Tribunal may—

(a) keep information provided by a complainant confidential if there are special circumstances to do so, or the Tribunal considers it is in the complainant's interests to do so; or

(b) accept an anonymous complaint concerning an issue of public interest or where no clearly identifiable person or group is affected." (Emphasis added)

225. Section 102B provides that:

(1) Upon receipt of a complaint, the Tribunal shall notify, in writing, the party against whom the complaint has been made, within fourteen-days of receipt of the complaint, stating the nature of the complaint, the breach, act or omission complained of and the date on which the matter shall be considered by the Tribunal.

(2) The notice referred to in subsection (1) shall require the person against whom the complaint is made to respond to the complaint in writing or appear before it at the hearing of the complaint.

(3) After considering each party's submissions, the Tribunal shall then conduct a preliminary assessment to determine the admissibility or otherwise of the complaint lodged within fourteen days.

(4) The Tribunal or any of its panels 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 'complaint and give reasons thereto.

(5) A party may, within fourteen days from the date of dismissal, apply for review or variation of the Tribunal's decision under subsection (4).

226. Is the acceptance of anonymous complaints concerning issues of public interest or where no clearly identifiable person or group is affected unconstitutional? We note, first, that the petitioners do concede that there may be circumstances under which anonymous complaints and witnesses are acceptable. We are also of the view that, as the provisions of the Witness Protection Act, 2006 [Revised 2012] demonstrate, there may be need to take measures for the protection of witnesses, which may include the need to keep their identity confidential. Having said that, however, we are mindful of the fair trail guarantees under Article 50(2).

227. The rationale for allowing anonymous complaints is to enable citizens to raise issues of public interest without the fear that their identity would be disclosed and their safety compromised. We note, however, that in respect of complaints under the Kenya Information and Communication Act, the circumstances under which anonymous complaints are entertained are reasonably circumscribed so that, in our view, they do not pose a threat of violation of fair trial guarantees. To recap, the Act provides that the complainant may be kept confidential if there are special circumstances to do so, or the Tribunal considers it is in the complainant's interests to do so. The Tribunal may also accept an anonymous complaint concerning an issue of public interest or where no clearly identifiable person or group is affected. In our view, these provisions do not constitute a violation or threat to the fair hearing provisions of Article 50(2).

Whether Section 38 (1) (f) and (h) of the Media Council Act and Sections 102E (1) (f) and (h) of the Kenya Information and Communications (Amendment) Act are unconstitutional

228. The petitioners have also challenged the provisions of Section 38 (1) (f) and (h) of the Media Council Act and Sections 102E (1) (f) and (h) of the Kenya Information and Communications (Amendment) Act. They submit that these provisions contravene Articles 29 and 34 of the Constitution to the extent

that they seek to exercise control over, interfere and penalize persons engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium.

229. According to the 4th, 5th and 6th petitioners, these provisions, combined with other available processes for challenging publications by journalists under the Penal Code, Defamation Act and general libel suits, will have a chilling effect on journalists and indeed media enterprises who may want, in the public interest and for public good, to engage in vigorous and justified criticism either on the conduct of government or matters that often attract public discussion like religion, family, education and lifestyles.

230. The AG defends the penalties imposed in the two sections, noting that the setting of a maximum fine, rather than a minimum, is actually a safeguard. It is also his submission that some of the provisions are actually protective of the profession of journalism.

231. Section 38 of the Media Act provides that:

(1) The Complaints Commission or any of its panels may, after hearing the parties to a complaint —

(a) order the offending party to publish an apology and correction in such manner as the Commission may specify;

(b) order the return, repair, or replacement of any equipment or material belonging to a journalist confiscated or destroyed;

(c) make any directive and declaration on freedom of expression;

(d) issue a public reprimand of the journalist or media enterprise involved;

(e) order the offending editor of the broadcast, print or on-line material to publish the Commission's decision in such manner as specified by the Commission;

(f) impose a fine of not more than five hundred thousand shillings on any respondent media enterprise and a fine of not more than one hundred thousand shillings, on any journalist, adjudged to have violated the Act or Code of Conduct, where upon such a fine shall be a debt due to the Council and recoverable as such;

(g) in its reasons for its findings, record a criticism of the conduct of the complainant in relation of the Complaint, where such criticism, is in its view, warranted;

(h) recommend to the Council the suspension or removal from the register of the journalist involved;

(i) make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made,

(2) The Complaints Commission or any of its panels may make any or a combination of the orders set out in subsection (1).

232. Section 102E of the Information and Communications Act on the other hand provides that:

(1) The Tribunal may, after hearing the parties to a complaint—

(a) order the offending party to publish an apology and correction in such manner as the Tribunal may specify;

(b) order the return, repair, or replacement of any equipment or material confiscated or destroyed;

(c) make any directive and declaration on freedom of expression;

(d) issue a public reprimand of the journalist or media enterprise involved;

(e) order the offending editor of the broadcast, print or on-line material to publish the Tribunal's decision, in such manner as the Tribunal may specify;

(f) impose a fine of not more than twenty million shillings on any respondent media enterprise and a fine of not more than five hundred thousand shillings on any journalist adjudged to have violated this Act;

(g) in its reasons for its findings, record a criticism of the conduct of the complainant in relation of the complaint, where such criticism, is in its view, warranted;

(h) recommend the suspension or removal from the register of the journalist involved;

(i) make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made.

(2) The Tribunal may make any or a combination of the orders set out in subsection (1).

233. We start from the premise, which we believe is reasonable, that there ought to be penalties for media malpractices. We have not heard the petitioners to argue that there should be no sanctions against those of their members who conduct themselves in a manner that attracts complaints with respect to the injury or violation of the rights of others. That being the case, then in principle, the imposition of penalties under the two impugned legislation is not, of itself, a violation of any of the petitioners' rights.

234. Secondly, the Complaints Commission and the Communications and Multimedia Appeals Tribunal, after hearing complaints against the media lodged before them, have been mandated to impose various remedies, which include fines up to a maximum of Kshs 500,000 against a journalist and Kshs 20,000,000 against a media enterprise.

235. Where the penalty is imposed for acts which are in breach of the law, and it is imposed after the party in question has been heard and been given an opportunity to present its case, then the imposition of the penalty cannot be said to violate the Constitution. It must be acknowledged that journalists and the media enterprises that they work for, not to put too fine a point on it, are not angels. They will do things that they ought not to do, either deliberately, inadvertently or negligently. They must be prepared to face consequences which are in accord with the law, and in our view, the provisions of 38 (1) (f) and (h) of the Media Council Act and Sections 102E (1) (f) and (h) of the Kenya Information and Communications (Amendment) Act are not in violation of the Constitution.

Disposition

236. We have considered the various challenges posed by the petitioners to the process of enactment of the Kenya Information and Communications (Amendment) Act 2013 and the Media Council Act, 2013. Our findings are that the process was in accord with the requirements of the Constitution, and the two Acts were enacted constitutionally

237. In addition, we have considered the challenges to the specific provisions of the two Acts which were impugned on the basis that they violated or threatened to violate various of the petitioners' constitutional rights. With very limited exceptions, we have not been able to find that any of the impugned provisions of the two Acts are unconstitutional for being in violation of the petitioners' constitutional rights. We set out hereunder in summary our findings on the issues raised before us.

Summary of Findings

238. At the beginning of our analysis and determination of this matter, we had identified the following as the issues falling for determination:

a) Whether this Court has the jurisdiction to hear and determine the issues raised in the consolidated petitions;

b) Whether the process of enactment of the Media Council Act and the Kenya Information and Communications (Amendment) Act was unconstitutional.

c) Whether the provisions of the Media Council Act and the Kenya Information and Communications (Amendment) Act are unconstitutional.

d) What reliefs (if any) to grant to the petitioners.

239. In the course of the analysis, we identified sub-issues in each of the main issues. Our responses in respect to the main and sub-issues are as follows:

(1) On whether this Court has the jurisdiction to hear and determine the issues raised in the consolidated petitions, it is our finding that the Court does have the jurisdiction to hear and determine the said issues;

(2) On whether the process of enactment of the Media Council Act and the Kenya Information and Communications (Amendment) Act was unconstitutional, our response is that the process was constitutional.We arrived at this conclusion upon a consideration of three sub-issues:

(a) Whether the two Bills were Bills affecting counties, and therefore should have been placed before the Senate:

It was our finding that the legislation in dispute does not concern county government functions, finances, or elections of county assembly members or executives. It touches solely on regulation of the media, a function that is clearly vested by the Constitution in the national government. It was our finding further that there was no violation of the Constitution in the non-involvement of the Senate in the enactment of the two Acts. Further, there was no violation of the Constitution in the absence of consultation between the Speakers of the two Houses of Parliament, or in the failure to table the two Bills before the Senate.

(b) On whether the President's actions with regard to the enactment of the Kenya Information and Communications (Amendment) Act were unconstitutional:It was our finding that the reservations by the President under Article 115 must entail recommendations and observations pertaining to specific provisions of the Bills presented to him for assent. It was further our finding that the President properly exercised his constitutional mandate as is vested in his office under Article 115, and that the National Assembly acted in accordance with the provisions of the said Article in considering and adopting his recommendations.

(3) On whether specific provisions of the Media Council Act and the Kenya Information and Communications (Amendment) Act are unconstitutional:

i. It was our finding that section 3(2)(a) of the Media Council Act, to the extent that it requires that in exercise of the right to freedom of expression, the persons specified

under section 4 of the Act "shall reflect the interests of all sections of society" is an unjustifiable limitation of the right to freedom of expression and is therefore unconstitutional;

ii. It was our finding that section 6(2)(c) of the Media Council Act is unconstitutional for being couched in a manner that is vague and broad and that is likely to limit the freedom of expression.

(4) With the exception of the above provisions, we are satisfied that the provisions of the two Acts impugned in this matter are in accord with the Constitution.

Disposition

240. In the event, the petitions partly, albeit only to a very limited extent, succeed.

241. With respect to costs, which are in the Court's discretion, we take into account the very important public interest issues that the consolidated petitions raise. In our view, no party should be burdened with costs, and we direct therefore that each party bears its own costs of the petition.

242. Finally, we wish to express our gratitude to Counsel for the parties for their detailed pleadings and exhaustive research, as well as for the authorities presented before the Court. If we did not refer to all of them in the judgment, it is not because they were not of assistance to the Court.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY 2016

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ISAAC LENAOLA

JUDGE

.....

MUMBI NGUGI

JUDGE

.....

W. KORIR

JUDGE

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DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY 2016

ISAAC LENAOLA

JUDGE