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## CULTURE, MEDIA & FILM | RESEARCH ARTICLE

# Achieving media independence through legal and regulatory measures: A formality or reality?

Jacob Nyarko<sup>1\*</sup>, Eric Opoku Mensah<sup>1</sup> and Stephen Kwame Owusu-Amoh<sup>1</sup>

**Abstract:** Ghana's Fourth republican constitutional provisions on the independence of the media and of expression were subjected to a qualitative assessment on the question: has it lived up to expectation? The study showed that the constitution marked a takeoff point for media liberalisation that led to increased private ownership participation and broke the "culture of silence" to some appreciable extent within the public sphere. Some shortfalls were identified and these were: the media lacks right to information, some archaic laws still exist in the statute books and huge court fines cripple media outlets.

**Subjects:** Mass Media & Communication; Media Studies; Journalism & Professional Media

**Keywords:** media law; constitution; print; newspapers; independence; legal; freedom right-to-know

### 1. Introduction

Ghana's media history dates back to 1822 under the British colonial authority, but her struggles to achieve independence have been intercepted by legal and regulatory frameworks (Anokwa, 1997, p. 9) and these, till the present time, seem to linger on in a disguised order. Between the periods spanning 1957–1981, Ghana had three civilian Heads of States interspersed with many military rulers (AfriMap, 2007, p. 18; Rockson, 1990, p. 39) but embraced democratic rule fully from 1992 with a

### ABOUT THE AUTHORS

The authors are lecturers at the Department of Communication Studies of the University of Cape Coast, Ghana. Generally, their research focuses on media and communications with emphasis on participatory, political and development communication domains. Specifically, the authors explore rhetorical issues, linguistics, journalism, culture and society, advertising and promotions among others. The current study complements global efforts to enhancing access to information (right to know) by questioning whether constitutional provisions on "media freedoms" indeed reflect freedom of the media or it's a formality.

### PUBLIC INTEREST STATEMENT

The 21st century society is driven by information availability and accessibility and this has informed the "right to know" campaign globally. To achieve this, democracies have promulgated constitutions to enable media relay information to the masses. This work sought the views of media industry players to examine the situation and argues that within the Ghanaian, African and global contexts, media have a better chance to strengthen its freedom and hence critical reporting if constitutions do not pay a lip service. Some constitutions provide for media freedoms only to present a democratic front to the international community, but in reality its media remain somewhat stifled. Though Ghana's constitution recognises media freedom; it lacks Right to Information Law (RTIL) and holds some archaic laws. Successive Ghanaian governments profess to welcome the RTIL, they are adamant when it comes to its passage into law.

constitution that provides for independence of the media and of expression. The question is: are these provisions enforced and has the media felt their positive impact? For instance, in the Southern African Development Community (SADC) region, only one country does not have constitutional guarantee for media freedom; but in each country, the degree to these freedoms depends on whether its constitution expressly provides for the freedom, the right to information access, and whether restrictions are placed on the degree to which media freedom may be limited or derogated on “national security” grounds (Kanyongolo, 1996, p. 2). In America for instance, the term *national interest* has been employed as a mechanism to regulate and stifle the smooth information flow in the name of protecting the security of the state (Wasserman & de Beer, 2005, p. 45) despite the constitutional provisions in that country that guarantee media freedom. Furthermore, Singh and Kumar (2014, p. 4) argued: “expression means freedom from interference from authority which would have the effect of interfering with the content and circulation of the newspaper. There cannot be any interference in the name of ‘public interest’”. By this, most constitutions or regulations pay lip service to the principle of media freedom and of expression because their practices usually are utterly different (Nixon, 1960, p. 17). Thus, provisions on media freedom appear not to reflect what transpires in the media landscape (Duncan, 2011; Maina, 2011; Ogbondah, 2002; Senghore, 2011). This paper investigates the extent to which laws and regulations impact on the freedom of the Ghanaian print media (newspapers) under its Fourth republic and examines whether the 1992 constitution has lived up to its provisions as spelt out in Articles 162 and 163 of the twelfth chapter. However, this study does not intend to negate the significance of the social responsibility theory which asserts that media should observe ethics of the profession and be answerable to questionable reporting.

## 2. Literature review

Several factors tend to hamper the smooth functioning of the Fourth estate. However, legal and regulatory frameworks appear to impact media the most supposedly due to the traditional mandate of the media itself in society vis-à-vis the power of the state to enact those laws. In their paper “Silencing Critics: why and how presidents restrict media freedom in democracies”, Kellam and Stein (2014, p. 25) concluded that media’s freedom is more susceptible to encroachments by presidents when other political bodies neither “check and balances” executive authority nor have in place mechanisms to sanction its actions. They appear to argue that in the absence of strong state institutions to regulate activities of a president, the media’s watchdog role is stretched to the extent that it critically makes it vulnerable to executive crackdowns. Writing on constitutional promise, Ogbondah (2002, pp. 55–56) observed that “on paper, most African states have moved a long way in a short time [but] the constitutional promise contained in these reforms, however, has not been fulfilled”. This, among others might have informed Bank’s (2014, p. 410) observation that:

It is not without significance that section 16 of the South African Constitution, after stating that “everyone has the right to freedom of expression”, includes “freedom of the press and other media” under the general rubric of freedom of expression, and places these facets of the right on an equal footing with the “freedom to impart information and ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.”

Bank appears to bring to light the deliberate intent of some governing authorities to promulgate provisions on media freedoms under general themes in constitutions to create a vacuum which somehow enables them to pounce on media at the least provocation even if the media is justified. Acharya and Sigdel (2016) undertook an analysis of press freedom provisions as spelt out in the 2015 Nepali constitution and noted that despite the improvement in fundamental rights generally and of the media specifically, restrictions on these rights are unclear in wording and are subject to several interpretations. They cited censorship in the 2015 document and requested that the court or lawmakers interpret the provisions clearly. Turkey and Germany’s constitutional provisions on media freedom are very similar because they both safeguard this right; however, the introduction of new strict laws by Turkey is making its landscape hostile to journalists leading to the arrest of German reporter Deniz Yücel (Dege, 2017). Despite the similarity of the media freedom provisions of the two countries, the law impacts their media environments differently with respect to reporting and

participating in public sphere discourse. This suggests that beyond codifying media freedoms in constitutions; social, traditions, historical and political factors as it pertains in different societies inform the extent to which media freedom is exercised or otherwise. Tracing constitutional provisions versus media freedom debate from the lens of a “monarchical-style” administration, Rooney (2006) conducted a qualitative analysis of Swaziland’s 2006 constitution and its impact on media freedom along three major research questions: [i] how repressive were media laws before the constitution was promulgated?, [ii] What are its provisions on media freedom? and [iii] to what degree has it enhanced media freedom? His study showed that the constitution has not made any distinct improvement in Swaziland’s media environment and the future is not promising. Rodney further concludes:

The constitution itself in Section 2 states, “This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. This should mean that all the anti-media laws that existed before 2006 are no longer operative. It is impossible to say with certainty that the laws are now void, since their validity or otherwise has not been tested in the Swazi courts. There are, however, reasons to be pessimistic (2006, 61).

These make the media thread so cautiously to the extent that sometimes their autonomy to report critically is compromised. Freedom House (2015) recorded that beyond attracting global applause for its remarkable provisions on freedom of expression and of the media in 2010, Kenyan lawmakers in 2014 promulgated a security legislation that stifles the coverage of terrorism and other security matters in the same constitution. Speaking to DW, Carl-Eugen Eberle, a German Law Professor reiterated that in Turkey, “even neutral reporting on terror attacks can be interpreted as terror propaganda” (Dege, 2017) and attracts sanctions. Balule (2008) assessed the growth of democracy in the SADC region by examining the extent to which “insult laws” impact on media freedom. The study showed that though the SADC countries are democratic with constitutions that protect media freedoms and of expression generally, archaic laws in the statute books protect public officials from being critical against them. These laws, according to Balule, contravene the very ideals of democracy which they practice especially the insult law. Cordis and Warren (2014) investigated the impact of Freedom of Information Act (FOIA) laws on official corruption in the US by strengthening weak FOIA laws. The following is evident from their study: [i] corruption level falls with a higher chance of detecting it leading to doubled conviction rates of corruption; [ii] as the FOIA is strengthened further, rate of conviction falls consistent with a 20% reduction of indulging in corrupt practices and [iii] all these impacts were evident in states where media reporting is vibrant. Conversely, posing the question: “Do Freedom of Information Laws Decrease Corruption?” in a global context, Costa (2013) used different corruption perception indices and noted that with the adoption of FOIA, respective countries rather witnessed an increase in perceived corruption coupled with a fall in good governance practices instead of expected improvement. Moreover, Costa explains that countries experiencing the increase seem to be those with free media. It appears that the passage of FOIA within a free media landscape does not necessarily lead to uprooting corruption if there are no stronger institutions to back them.

With Ghana’s media making strides on critical reporting in Africa and which has reflected on global media freedom rankings such as the Media Sustainability Index (MSI) and Reporters Without Borders, its landscape continues to witness occasional physical attacks (Nyarko & Akpojivi, 2017, p. 10) among other abuses and setbacks, it is imperative to examine the country’s constitutional provisions on media independence and the question, is it a reality or formality?

### 3. Method

Using qualitative research design from the perspective of “Participatory Action Research” (PAR), twenty participants were drawn from the print media industry in Ghana composed of newspaper editors, senior active media practitioners from four media outlets (private [N = 2] and public [N = 2]), regulatory body, professional media associations, West African sub-regional media organisation and media academics to comment on the extent to which Ghana’s 1992 constitution has influenced the landscape. Typically, PAR is a fusion of two divergent approaches, namely “participatory” and

“action” researches (Khanlou & Peter, 2005; Somerville, 2016; Whyte, 1991). To show their difference and complementary role, Somerville (2016) argued that with the deeply rooted nature of PAR in “participation”, it enhances the aims of traditional action research through strong emancipatory intentions, characteristically equated with empowerment. Thus, it encourages and introduces all-hands on deck approach during which both researcher(s) and participants are actively involved in a research activity (Mubuuke & Leibowitz, 2013; Watters, Comeau, & Restall, 2010, p. 5) to build relationships, launch open discussion and negotiate change (Somerville, 2016). This makes the PAR design appropriate for this study because participants (who are media practitioners) are seen as specialists due to their lived experiences in relation to the subject under consideration to ensure that significant issues are studied (Lucock, Barber, Jones, & Lowell, 2007) to enable them participate in matters that appear to challenge their professional practice. The current study draws on the three phases of PAR as presented by Emily Wolk (n.d.):

- (1) What is the challenge? (Researchers and participants identified constitutional provisions on media freedoms and how it impacts the landscape).
- (2) Undertake investigation (Researchers and participants interrogated and delved into the challenge [1] to collect data).
- (3) Take action (Reflect implementation of the conclusions drawn from the deliberations).

Generally, qualitative research method is concerned with experiences, feelings and attitudes (Polkinghorne, 2005; Ryan, Coughlan, & Cronin, 2007, p. 738) of people that enable a researcher to tap into to understand a subject under study. Convenience and purposive sampling approaches were used in the selection of these participants. Having all participants and the media organisations they represent consented to participate in this study and subsequently determining the location of the interaction; the following questions were discussed to seek for views:

- (i) What is your assessment of the independence of the media and of expression beyond the constitutional provision?
- (ii) How would you describe court judgments in cases concerning the media?
- (iii) What has delayed the passage of information legislation? And how will it enhance the work of media practitioners when implemented?
- (iv) How would you describe the laws that govern media operations? State and explain how they enhance or quash media freedom?

These questions, designed as “semi-structured” gave the researcher the flexibility to probe further responses that appeared inconclusive to ensure that the nitty-gritties of the subject under examination were fully unearthed.

Raw data captured electronically were systematically transcribed, organised for readability and printed. To ensure data reliability and validity, an experienced transcriptionist played the audiotaped responses alongside the transcribed text to check for exactness. Also, using the “member checking” method (Gandy & Terrion, 2015, p. 3), some participants who were reachable were approached to verify their contributions and where discrepancies and inconsistencies were identified, they were sorted. Data was finally subjected to the process of recognising pattern within data and the themes identified became categories for analysis (Fereday & Muir-Cochrane, 2006, p. 4) through coding.

#### 4. Results

The study identified five major legal spheres in relation to print media independence, and these are enforcement of constitutional provisions; passage of information law; existence of deterring media laws; court adjudication; and the autonomy of National Media Commission (NMC).

#### 4.1. Constitutional enforcement

Regarding whether the media has enjoyed freedom beyond the constitutional provisions; overall, informants indicated that the Ghanaian print media has felt the positive impact of the provisions on media independence spelt out in the 1992 constitution on the basis that hitherto, no constitution (First, Second and Third Republics) guaranteed the media's freedom as categorically as it is depicted under the Fourth republic. These are reflected in the following responses:

We [Ghana] have a very liberal constitution that provides for a wide range of freedoms and guarantees media freedom specifically. This is the first time in our legal history that a constitution makes reference to media freedom, otherwise in the previous ones it was about basic freedoms that is why we cannot ignore the provisions in this constitution. But beyond these provisions, I think the Ghanaian media has lived the constitution's provisions because you have divergent views and contrary positions and there are very vibrant debates in the media. Even in the state-owned media, which before 1992 people used to describe them as the mouthpieces of the government, today, one can see the open criticism of government policy and direct avenues of people expressing their disagreement with what government is doing or somebody taking on government in a very open way.

This highlights that freedom of expression is not limited to the media alone, but to the entire citizenry. This has widened discourse in the public sphere in a manner without fear of intimidation. With media freedoms being clearly stipulated in the constitution, media practitioners and society have legal basis to protect their freedom of expression using the very legal document to back their actions at the law court. Furthermore, other respondents explained:

The law is so explicit and categorical so it makes it difficult for any government to have control over the media in terms of content. If you look at the state media, the NMC has been saddled with that responsibility of making appointments of [Chief Executive Officers] CEOs. So they have taken the control completely from the arms of the government. So clearly, looking at the content, nobody is under duress to do publication or air the news. I think by and large, the constitutional provision is strictly adhered to.

[...]

Relatively, the press since the fourth republic has been given quite some freedom or leeway to operate. Since the repeal of the Criminal Libel Law, it gave the press a lot of impetus to conduct itself as enshrined in its ethics and as evidence of this, we in the print media saw the boom and the influx of several media houses because apparently they want to tap from this newfound freedom they have acquired.

Again, these responses indicate that the guaranteed media independence in the constitution has impacted positively on the media landscape. With the creation of the NMC by the constitution as a regulator, the Commission has the legal right to appoint CEOs of state-owned media and it has remained so, thus obscuring government's role. However, when the constitution was promulgated in 1992, the Criminal Libel Law was still in the statute books. This presupposes that the media remained suppressed for nine years until the abolishment of the latter by parliament in 2001. This position holds on grounds that the constitution was promulgated during the administration of a military government that then gave way for democratic ideals.

Furthermore, the study showed that there are no strict legal impediments to set up a print media house. The law only prescribes the processes to get the establishment registered. Entry into the print media industry is open to citizens of Ghana and non-Ghanaians. This, a participant admit that the legal flexibility to run outlet is evidenced by the government-private media ownership mix as the following comment exemplifies:

It is pretty much easier in Ghana than elsewhere in Africa. The NMC does not put restrictions in the way of anyone who wants to run a newspaper business in Ghana. Any Ghanaian can establish print media outlet. Moreover, the law does not restrict entry to citizens of Ghana. There are a lot of Nigerians who are running newspaper in Ghana. The requirement is to register the company at the Registrar-General Department and state [specify] the business area [as media] and receive endorsement from the NMC. Finally, a certificate is issued to that effect to start operation to publish either a two, four-page to 100-page newspapers and more.

#### **4.2. Information law**

The study also explored the reason why Ghana has no Right to Information Law (RTIL) under two major sub-themes (political will and content of bill stalemate). All respondents noted that free information access by civil society, especially the media, would enhance the work of media through accurate reportage. However, currently, Ghana has no law that permits free information access. To shed light on the state of information access in the print media landscape, the following is evident:

Currently, access to information is limited in Ghana: Generally, the Communication Ministry (formerly Ministry of Information and Media Relations) is very inefficient in providing adequate, relevant information to the media and the population. This is highly due to organisational challenges within the Ministry and especially [has] been a problem under past governments. Currently the provision of information has some authoritarian characteristics, where information and party propaganda are mixed. Information is not objective but frames the [government in power] in the best way possible.

##### **(i) Political will**

All the participants indicated that the passage of the Freedom of Information Bill (FOIB) into law has been delayed because the Ghanaian political authorities are unprepared to live with RTIL. The following responses point to that fact:

Ghana has actually drafted the Freedom of Information Bill [FOIB] and it has been on the drawing board for several years, probably up to a decade now. It is now awaiting parliamentary and cabinet accents. The reason that I anticipate [the parliament] to have delayed the enactment of this law is that the executive arm of government is reluctant in giving the press the “last mile of freedom” or the last mile of having constitutionally endorsed access to information. Otherwise, the deal is still on paper and as at now, we don’t have an enforced freedom of information law in operation.

This suggests that without a RTIL, the independent operation of the media is incomplete. Thus, to be truly independent means the media’s ability to request information and receive it without question or hassle, in order to effectively educate and inform. It signals to the political class that its co-operation to pass the Bill means signing its own “death warrant” because it will compel them to give information to the media. As defined by the constitution as the Fourth estate, the Ghanaian media would stand very independently when they receive the “final baton” (the RTIL) and this is what government is not comfortable with. Other responses note:

The Bill has been pending only God knows for “Kojo O...O” [Ghanaian jargon: connoting a very, very long time] to this period. Every government tries to proclaim they are for press freedom but when it comes to pushing through the FOIB, it’s been delayed. The last governments tried even from the NPP [National Patriotic Party] to Prof. Mills [NDC]. Before the last parliament [under NDC] was dissolved, the Majority Leader said it [the passage of the Bill] was his priority. This government came [into office in] 2012, it is almost two years and they said they are going to pass it but we haven’t seen much.

[...]

Governments since the Second Republic have been dilly-dallying. No government has shown real commitment to it [the passage of the Bill]. The Bill is in parliament now and as far as some of us are concerned, the Bill is not a good Bill, the provisions are not very enabling of citizens RTI being held by government or public institutions and agencies. So, one can say that the politicians have no real commitment to enhancing citizen's access to information. I think that is the explanation one can give to, that is, our political class particularly in their political parties and in government have not shown any commitment to people's freedom to access information.

These responses suggest that unwillingness on the part of executive transcends over successive governments (NPP and NDC) who have ruled Ghana from the Fourth republic. These parties have capitalised on the desire to pass the Bill merely as a propaganda subject but without any real intentions. The political unwillingness to pass the Bill becomes more pronounced when tracked historically. Ghana under the governments of Dr. Busia and Dr. Limann in the Second and Third Republics respectively suffered the same fate. For example, one year after assuming office in 2017, the Akuffo-Addo government hastily passed the "Special Prosecutor Bill" and the "Special Petroleum Tax Amendment Bill" into laws, leaving the long-awaited FOIB in limbo. The paradox is how effective will the Special Prosecutor's office operate without a media that can access public information to uncover wrongdoings. Thus, politicians perceive the Ghanaian media as free enough to function effectively without RTI legislation. This is reflected in the response that follows:

It is our political leaders who are afraid of the RTI. I have come across politicians who have said: Ah! But you people, look at all the troubles you are causing us, you want to add freedom of information law too? Already ha-ha-ha [laughed] ... we could not take the heat and you want us to add more. But, that is the only means to get authentic information out so that electorates can also make informed choices.

(ii) Stalemate over content of Bill

Secondly, participants indicated that the Bill has been delayed because it does not favour civil society. They noted that the Bill if passed now will not enhance access to information avenues and will still enable government and other institutions to hold information. Some of these concerns include the duration to obtain information requested and information from some sectors is restricted among others.

Clearly, they [the government] want to have certain contents in the law while the civil society groups, especially the Coalition for Freedom of Information [FOI], are against them – so clearly there is some kind of bone of contention. There are certain areas they think it needs to be refined because it gives the government the chance to still possess some amount of information without releasing it. There is also a monetary value that one has to pay. All these are creating the bone of contention which is also stalling the passage of the Bill.

The posture of the ruling class suggests that they have something to conceal from the ruled (civil society) and thus are unprepared to endorse a law that will back the media's demands for information to be disclosed, should they refuse disclosure. Moreover, the government is very aware of the poor financial position of the media so the payment of money as a condition to secure information will be a major hindrance for them. This will enable government to withhold information. Another respondent pointed to the stalemate as follows:

Part of the problem is the inability of civil and public servants to effectively package and manage information, so it appears they are hiding under the cloak of the Official Secret Act. But that law [RTI] should be passed because part of the guarantee of people's access to information requires the passage of the law to give meaning to the realisation of that right. Secondly, the law is not passed because there is a strong lobby. The Coalition on the FOI is

fighting and their problem is that there are so many don'tsin the draft. Their argument is that if the law is supposed to facilitate, then it should not be clogging so they want as many of the "You cannot!! ... You cannot!!" to be removed so that it is replaced with "You can!! ... You can!!"... Also, the processes take too long because information can lose it effectiveness with time. Timelines are critical in terms of information use so "14 working days" is a delay. People suggest it could be done within a shorter time period. These have combined to delay the process.

By this, the Bill would have been passed if government had been given a free hand to determine its content. The government is prepared to hasten the passage of a Bill that will exist in theory to beautify Ghana as upholding democratic ideals but would be unworkable. The resistance of civil society is reminiscent of the adage: "one man's meat is another man's poison". While the Bill as it stands now benefits the government, it is injurious to media and the reverse holds. For instance, the waiting period of fourteen working days that must elapse before information can be released is too long to condense the substance of the story to be conveyed to the public. Furthermore, other participants' state:

Some society actors agree that it is better if the Bill is not passed, because the Bill rather limits the access to information instead of increasing it. The Bill does not provide for an Independent Information Commission and has many public and government entities exempted from supplying information under the current draft.

[...]

There are countries like Zimbabwe with FOIL but it's a useless one. That is not the kind of FOIL we want. If we want to have FOIL, it should be one that will lift FOI up further and not to bring it down, then it becomes just "window dressing".

These positions indicate that the Bill is so bad that it defeats the "half a loaf is better than none" principle. Civil society expects the Ghanaian media to progress on the press freedom ladder and not retrogress, so any attempts to make them worse off was fiercely resisted. Moreover, to ensure transparency, an autonomous secretariat is required to man data, so to ignore its creation creates suspicion. It is worth mentioning that an information Bill which bars certain state departments from divulging information is dead at birth. From the stance of the latter comment, it would appear that the political class want to take a cue from other nations who have passed RTIL just to brand them as having adhered to good democratic ideals, but this is impracticable. The benefit of RTIL is to expose corrupt acts as expressed by this informant:

All this corruption we are complaining about, the solution is to have a FOIL because what it does is [ensure] that you won't be kept in the dark. I am not going to struggle for two, three months before I get information. For instance, if we had FOIL, SADA [the Savannah Accelerated Development Authority] and GYEEDA [Ghana Youth Employment and Entrepreneurial Development Agency] monies that had gone down the drain, we would have arrested the situation before it got out of hand. When you have a FOIL, it also serves as a deterrent on people in authority that... hmmm! If I do something wrong, somebody will ask me to disclose so people in authority become more cautious. They are certain that whatever they do will be made public one day. That is its importance and it's something that Ghana and Africa... need badly because it will serve as a deterrent to people in authority.

#### **4.3. Deterring media laws**

The study further explored the extent to which media laws in the constitution have impacted media independence. Overall, participants indicated that some unfriendly media laws exist in the constitution and though some have good intentions, their interpretation and application on media is questionable. For instance, an informant remarked:

We are bound by the Criminal Code and the law of Civil Libel. These are the laws that we operate on so when you defame anybody, the fellow will sue you. They protect the privacy of

individuals. When you violate the privacy of an individual, you can be sued. These are some of the legal deterrents to freedom of expression and of the media.

This shows that laws exist in the constitution to insulate citizens within the public sphere from media reportage. While the media has the right to publish, the law subject it to self-verification of its facts before publishing about persons to avoid tarnishing their reputation. Failure to observe these have led to civil cases brought against the media by individuals. Frequently this leads to self-censorship. In a related argument, another participant sheds more light:

To me, I don't see them [the law] as fighting the right to free expression, but rather regulating and ensuring sanity in the system. There is also "Contempt of Court" clause which, when you publish things that tries [*sic*] to interfere with the administration of justice you can also be dealt with. So we have: "Civil aspect of Defamation Law", "Laws of Obscenity" and "Contempt of Court" [still in law books]. These are three laws. Other than that, I do not know of any law which fights freedom of expression. To me, it rather ensures sanity: the way the media and the entire society should operate.

On the contrary, other participants share mixed views that:

The Criminal Code (1960) is a provision that talks about "publishing false information to create panic and alarm". Attempts have been made by the Former President Rawlings to invoke that law and use it in court. It is still on the books and it can be used [anytime]. The law itself is not necessarily negative. It is not just about the media but it covers media and some of their actions. Basically, the law says that you shouldn't create false alarm in a situation where it can create panic and therefore could be dangerous for people's life, health among others. Essentially it is not a bad law but needs to be reviewed so that the qualifications are clear and the media are certain as to what would actually define and create that kind of situation the law wants to prevent. But it could be invoked by anybody so that is not a very healthy situation.

Having acknowledged that it is not in society's best interest to live in fear and panic, and thus any attempt by media to publish in this regard is unacceptable, there are unanswered questions regarding this very law that forbids this media action. First, the law is undefined and not explicit on what constitutes the precautions journalists need to take in order to know their expected boundary. The law seems to trap journalists into staying mute on certain subjects if they are unsure whether it contravenes that law. This scenario stifles the media's vibrancy and it is public sphere discourse that suffers. The law has been applied previously by government, so there is no reason why it would not be applied again. Similarly, another participant remarked:

There are other [pieces of] legislation like the Official Secrets Act which should also be reviewed because again in a situation where we don't have a RTIL, what constitutes "official secrets" could be arbitrarily defined by officials. So, old legislations also need some improvement. There is other legislation in the books which, if invoked, could be injurious to press freedom but it could be used anytime because government change, individual politician change from one regime to another so something must be done.

Thus, there are laws traced to the colonial era in the constitution and one of these is the "Official Secrets Acts". Its continued stay in the constitution have benefited the ruling class because it puts civil society (especially the media) at a disadvantage. For instance, in the absence of the RTI, the woes of the media have further been worsened by most civil and public servants who use this law as a pretext to deny information access from official sources. These concerns inform why a participant stated:

There are so many of such laws on the statutes. A lawyer, Akoto Ampaw, was commissioned to rake out all those laws because they are not in conformity with the current Ghanaian constitution. It is something we have recognised [is necessary] to do, but I am sure people have relaxed because the constitution is the supreme law of the land. At the end of the day

if you take somebody to court and use the wrong charge, any good judge will tell you that our constitution does not allow it. But I think the best way is to look for those statutes and clean them out and make sure that all the laws there are in direct line with the constitution.

Based on the stance of the previous quote, it is arguable that governments and governance systems change over time so complete eradication of any laws whose dictates contravene the constitution should be expunged because they could be (mis)applied to the media (and other spheres) either now or in the future. Overall, though there are laws with good intentions, ones detrimental to media also exist in the same constitution.

#### **4.4. Court adjudication**

Ghana's courts adjudicate several cases and some of these concern summons against media. The study further explored verdicts served on media by the Ghanaian courts. Participants expressed mixed views about how they perceive such judgments. Whereas some find judgments by the judiciary as fair because media practitioners flout the law by publishing matters that defame individuals, others complained of partiality considering the level of fines against media. Overall, all participants indicated that the fines the courts give media are too huge. The following responses were evident:

Sometimes, some media people are not very careful in what they do and so they find themselves at the wrong side of the law. If they would exercise some level of care in cross-checking and rechecking their facts and not making assumptions, [this would not happen]. I think that one problem for the media is that sometimes they have so much confidence in sources particularly if the sources are official. There is a certain assumption that officials don't lie and so when you receive information from people in public office, particularly ministers of state and the like, the media are too ready to go out with such information without trying to find out from the parties involved. This is one of the critical tests that the media have to look into otherwise it reduces the substance of the cause in fighting against our freedom. For as long as the media do not do the minimal checks on information they receive, and they go out to publish it, they may have unfavourable rulings [against them]. So it is not that the courts are partial.

From this viewpoint, media practitioners themselves have continually dug their own grave because the chances of being sued or not is left solely to individual media houses and their journalists to determine. This is based on the fact that different sources of information inform the content of daily media publications and as such, journalists should be cautious and come to terms that information gathered is not necessarily credible unless it has been subjected to verification and proved so. Moreover, failure to seek clarifications from concerned persons in an issue causes journalists to defeat one of their basic principles of ensuring balance. By this, the woes of media with regard to court cases against them can single-handedly be reversed by them if they publish only after thorough scrutiny of sourced information to avoid civil defamation. The informant seems to suggest that self-regulation is the key to make media struggle for independence feasible. However, others labelled the judicial system differently as the following comment attest:

That is the paradox of the fourth republic. The republic is supposed to have created the opportunity for the media to practice freely. In fact, it was during the fourth republic that the Criminal Libel Law was expunged from the statutes books and that signals to the whole country that the media is indeed free to practice, but the courts are the ones who are slapping very heavy fines against the media in the last few years. This defeats the very purpose of the freedom of the press because if the press should practice freely and at the same time [courts are] slapping heavy fines, it means that even though nobody has been attacked physically, their financial peace is being attacked and that is also a great danger to the press.

This paints a picture that there is a conflict of interest considering the provisions on media independence in relation to existing media laws in the constitution. By this, the informant highlights that freedom of the media goes beyond protection from physical assault because the Ghanaian legal system, through the courts, has inflicted a financial burden on the media through heavy fines which

threatens their independence to operate confidently. In a related argument, a participant remarked:

Relatively, we have had recent experiences where the courts have been a bit hard handed on the press. Daily Guide, for instance was fined for publishing information on a politician who allegedly used public funds to finance the acquisition of private properties, was slapped with several hundreds of thousands of Ghana Cedis in damages. Apparently, the judge who ruled on the case has a brother who was a former minister and a staunch member of the [then] NDC party. Therefore, this is an example of how judges who have some discretionary powers rule cases involving the press.

By this, though the judiciary is expected to be independent in the execution of their functions; the political alignment of judges is linked to how they give their rulings. Thus, the weight of sanctions pronounced on a media outlet by the courts is dictated by political orientation. With this, the courts were branded as biased in the adjudication of cases concerning the media as expressed by another informant:

Because of defamation we were slapped with damages to be paid over a story we published and we are contesting because we think the judge was biased. But that is not to say, it cut across because there have been several instances that we have won cases and if you are into the media, the business of publishing news or selling news, obviously you will always step on sensitive toes. People might not like you and even when they know the story is true, they will always like to go to court as a means of gagging you. They want to use the court system to gag you – but we are not obstructed, we continue to do our story as it is. But hey! We are all human, we have feelings and sometimes you may not get it all right. Sometimes when it comes, you take it like that and strive.

Having acknowledged their story defamed a person, the newspaper contended that the said offence should not have attracted as high a level of fine as given in the verdict, and thus argued for an element of partiality in the entire process. However, it is worth noting that judges do not always find media guilty and impose huge fines, but on some occasions, media also win their cases. This seems to suggest that the courts go by the facts and evidence available to them so each case is dealt with on its own merit(s). In the public sphere, there is a high chance that a publication may offend someone and they constantly seek redress from the courts. As a human institution, the media undoubtedly are likely to make oversights that is why an informant (see above: constitutional enforcement) expressed the sentiment that journalists must scrutinise their facts and cross-check them before publication in order to avoid defamatory lawsuits. In a more mixed positions, an informant agreed that it is appropriate to hand down punitive actions on offending media outlets that go against the Civil Laws (Defamatory and Obscenity), however, the fines are cutthroat. These claims are reflected in the following comments:

If you talk about penalties, yes, sometimes we think the penalties are too huge but then if you would blame them without justification by damaging the integrity of another person, no amount of money can pay for that so the media have to exercise a lot of caution in their performance.

[...]

In my mind, I think that the judgment has been fair, it is the sanctions that some are too big that it (*sic*) will even kill the media house – so that is the problem I have with it.

Notwithstanding the fact that a damaged reputation is difficult to regain, the question that comes up is: should the damages be so huge that it can cripple a media house? This can be seen as a calculated attempt to bring silence to the public sphere because most of the print outlets are already ailing financially.

#### 4.5. *Autonomy and application of NMC regulation(s)*

The constitution created the NMC as a regulatory body under the NMC ACT-1993 (ACT 449) to insulate the state-owned media from government influences. The question is, to what extent is the NMC able to execute its functions freely without external influences as provided for in the constitution. The majority of the informants recorded that the NMC is autonomous while a few noted that government can influence it through its representatives on the Commission's Board. However, they explained that as to whether their independence reflects in their ability to effectively regulate the media landscape is another question. The following responses are evident:

The NMC is the most independent regulatory body we have in this country. We have four governance institutions under the fourth republican constitution made up of the NMC, Commission on Human Rights and Administrative Justice, National Commission for Civic Education and the Electoral Commission. Among the four, the other three Commissioners are appointed by the president. It is only NMC that is independent in the true sense of the word simply because we have representatives who constitute an 18-member Commission so that is the most independent commission. You just cannot actually manipulate the membership of the NMC and with my experience, none of the Commissioners could actually be dictated to. They are the freest body that we have now in the country.

By this, the autonomous stature of the Commission is attributed solely to its mode of composition by different sections of civil society as provided for by the constitution. By this, it makes the Commissioner accountable to the board of the Commission instead of the ruling government. However, some informants pointed out that the president has representation on the board through which he can influence the Commission's decision(s), although, others hold the view that government does not have the majority to overturn the board's rulings:

The 1992 constitution provides for the NMC and its composition, functions and mandate. There is also an Act [NMC Act] that operationalises the Media Commission. But talking about its functions, I think it plays its functions very well and has freedom to operate. The problem is that government appoints three people into the Commission so these members go there to champion the cause of the president, government and party in power. Those other people who are professionals on the Commission will also like to uphold the independence of the media so there are always challenges.

It is worth noting that the NMC is financed exclusively by the ruling government. This suggests that their operational efficacy is glued firmly to a financial resource which firstly, is inadequate and secondly, not released on time. The constitution *legally* tries to safeguard the independence of the NMC; *economically* they remain dependent and can be influenced remotely to some extent. For instance, the NMC does not even own a website as at the time of this study. With their hands tied financially, the question of how they could take decisions against the very hand that feeds them is a major concern, thus compromising the NMC's autonomy. This, to some degree, is reminiscent of the constitution's guarantees on media independence vis-à-vis the lack of RTIL to make it functional as this comment attests:

[The] NMC is supposed to be an autonomous body and also expected to practice in a way deemed fit because their cardinal mandate is to ensure high journalistic standards in the country. They are supposed to do these things, but are limited by funding because the government has to provide them with the funds to operate effectively. According to sources, the funds do not come as they may have wished it [should] come and therefore it inhibits them in their work. In fact the year [2014], up to about the first quarter, they had not received their subvention and I don't know the status now but I think that they are facing few challenges in terms of funds to operate. Regarding independence, I think they have it absolutely because they are made up of certain bodies that come together to form the Commission.

Furthermore, beyond the NMC's financial dependence on the executive, the constitution leaves the Commission powerless to execute its mandate. Thus, it lacks power to hand down punitive rulings on

media outlets / practitioners who flout the Commission's regulations. Its role assigned by the constitution was merely *advisory* rather than *disciplinary*. This best explains why some media practitioners flout orders of their own parent regulatory body. It appears that the impression has been created that the media fraternity themselves do not regard the NMC; thus, aggrieved persons/bodies defamed have also lost confidence in the NMC's mediation and prefers the courts instead. See comment:

The challenge is that the NMC Act does not actually empower it to give sanctions to violators of media ethics and professional codes so it is just a matter of moral persuasion. If I defame somebody, what happens is that the person will lay a complaint before the Commission and they will invite me so that they try to settle it. At the end of the day, they will ask you to retract it and sometimes apologise as well. What happens usually is that some of these journalists, I don't want to describe as unprofessional. They don't respect the Commission. Somebody lays a complaint and you invite them and they will not go and the Commission does not have the legal or coercive power to compel them like subpoena them as a court will do. At the end of the day, people don't like to send their cases to them. Some will just resign or appeal to the editors or friends who know the editor to retract or apologise. Those who actually want to clear their names will go to the law courts.

From the above, it is to some extent arguable that the constitution has done its part to create the NMC but the media fraternity have not contributed their quota by giving due recognition to the Commission. The disrespect media accords the NMC explains the height of unprofessionalism in the print media landscape.

## 5. Discussion

This study investigated how the print media in Ghana fares beyond constitutional provisions. Firstly, the constitution has impacted positively on the media and is evident in the media landscape because: (i) it improved freedom of expression for both media and citizens; and (ii) it represented an assurance for the legal basis to defend this freedom. Consistent with other studies, the sort of authoritarian governance that existed in Africa prior to the present democratic transition reserved no or little space for the media to express its views independently (Ogbondah, 2002, p. 55) and this is typical of Ghana's autocratic regime prior to 1992 and even afterwards. In a study about media violations nations in West Africa, Ghana pulled the highest incidents [8], Nigeria [4], Cote d'Ivoire [3] and Sierra Leone, Liberia, Togo, Gambia and Niger polled two [2] violations each (Media Foundation for West Africa [MFWA], 2014, p. 3). Print media registration flexibility in Ghana is consistent with a study of seventeen countries in Africa that showed that fourteen of them did not require compulsory registration for journalists (African Media Development Initiative, 2006, p. 39). Overall, compulsory registration of journalists has had negligible effect twenty years after the 1991 Windhoek Declaration on media freedom (Berger, 2011, p. 23).

Secondly, RTI would enhance the public sphere in Ghana, but the constitution provides for media independence without it. This is consistent with other studies that have revealed that the introduction of the RTI Laws in the US led to a reduction in official corruption (Cordis & Warren, 2014; Costa, 2013) but in the long term, there was no significant decrease (Costa, 2013). Furthermore, successive governments in Ghana have ignored the Bill's reviews and recommendations by Commonwealth Human Rights Initiative (CHRI) and Ghana's Right to Information Coalition (RTIC). They further argued that the government's refusal to incorporate its recommendations signifies its unpreparedness to embrace transparent governance (Daruwala, Choudhary, Nayak, & Paul, 2013, p. 2). Similarly, though constitutions of countries in the SADC region provide for media freedom, this has not guaranteed that information has been accessed freely or not (Balule, 2008; Kanyongolo, 1996, p. 2). The Ghanaian media is caged in the FOI dilemma because of hindrances to access information. Reacting to Ghana's Minister of Youth and Sports, Mahama Ayariga's statement that he is not accountable to the media and thus not obliged to furnish them with information, Agyemang-Asante (2015) wrote on *citifmonline*: "It is absurd to ask the media to inform and educate, but then refuse to provide information needed". This suggests the fight against official corruption requires an independent

media with access to information because often RTILs are lacking and should be implemented (Hunt, 2011, pp. 55–56). In Africa, eighteen countries somewhat guarantee information freedom but only seven (Nigeria, Angola, Ethiopia, South Africa, Liberia, Zimbabwe and Uganda) have at least actually implemented nominal information freedom laws. The Zimbabwean and Angolan laws emphasise exceptions rather than access (Maina, 2011, pp. 66–67).

Thirdly, the Ghanaian constitution still holds laws that inhibit media freedom. Consistent with other studies, the constitutions of democratic Nigeria and Uganda still hold sedition, libel and license requirements laws (Schiffrin, 2010, p. 6). The US constitution capitalises on “national interest” clauses to regulate and suppress the free flow of information in the name of safeguarding state security (Wasserman & de Beer, 2005, p. 45). The constitutions of the democratic SADC region still hold archaic laws like the “insult law” that makes it an offence to criticise government officials (Balule, 2008) in a democratic setting. Most of these laws lack clear-cut definition and gives governments space to manipulate them to their advantage (Berger, 2011, p. 22; Senghore, 2011, p. 69). This informs Ogbondah’s (2002) position that “the tendency for constitutional paragraphs to remain contradictory and ambiguous allows the political leadership to find justification for interferences aimed at limiting the freedom of the media”. Moreover, it is expected that a positive correlation exists between a law and the very society it governs. Society is dynamic likewise the subjects and institutions that inhabit it, but some laws promulgated decades ago with colonial undertones are still in the law books though they have lost their relevance to contemporary democratic society. The assertion that the “law was made for man and not man for the law” contravenes the foregoing as it pertains in Ghana and elsewhere. By this, “when a law ceases to serve its purpose, it is either amended or changed. In some instances, a new law is enacted to keep up with the call of the times” (Philippine Daily Inquirer, 2016).

Fourthly, Ghana’s judicial system weighs media freedom down through its huge fines. In Ecuador, the president sued *EL Universo* newspaper for an alleged libellous editorial that criticised the president’s management of police unrest that turned fatal and labelled him a “dictator”. The owners and opinion editor were fined \$40 million, a penalty huge enough to collapse the media outlet, and also suffered a three-year prison term (Kellam & Stein, 2014, p. 1). Furthermore, in Ghana, the ruling class hides behind the judicial system to suffocate the media because the huge financial penalties their judgment hands down to the print media in favour of politicians is an indirect attempt to stifle media independence (Karikari, 2014). Media freedom is so central that the key obligation of the courts is to defend and abrogate laws and administrative tendencies which obstruct its observance to the mandate of the constitution (Singh & Kumar, 2014), rather than suffocate it. Recently, two Ghanaian private newspapers: *The Informer* and *Daily Guide* were fined US\$120,000 and US\$98,000 respectively on charges of defamation by the courts. Taking the operational size of these papers and the overall financial standing of the print media industry in Ghana, these damages were cutthroat (Karikari, 2014; MFWA, 2014, pp. 5–6).

Finally, the NMC is powerless because it has no disciplinary powers to execute some of the very mandate that the constitution created it for, and this has created a situation where it lacks respect from its members (media) who treat it with contempt (Nyarko & Teer-Tomaselli, 2017, p. 11). This shows that the NMC is unable to handle to satisfaction complaint cases that are laid before it against the media and explains why most aggrieved persons prefer the court system instead, in order to seek justice. This is attributed to weaknesses in the Complaint Settlement Committee that warrants the need to review current structures. However, NMC’s legal status contrasts sharply with that of Ivorian Media Regulatory Body (Conseil National De La Press) whose adjudication powers enabled it to fine the newspapers, *Notre Voie*, *Le Jour Plus*, and *Le Nouveau Courrie*, US\$1000.00, US\$2000.00 and US\$6000.00 respectively for offences the body claimed to be false publication of stories (MFWA, 2014, p. 5).

## 6. Conclusion

The “right to know” has become a global agenda and only constitutions can safeguard it but they have paid lip-service to some extent. Generally, the 1992 constitution of Ghana has had an impact on media independence and expression by assigning a chapter to it and this has been felt in the print media landscape. This position is anchored on the premise that compared to the First, Second and Third Republics and how the media fared under each, those constitutions provided for just basic freedoms. The constitution made the process of print media ownership flexible requiring just a registration and token fee to run a newspaper within the public sphere. Also, the mandate assigned to the NMC by the constitution is evident with respect to its composition and appointment of board members of the state-owned media. However, beyond these, the constitution paid lip service on some major issues regarding media autonomy.

The constitution that preaches independence of the Ghanaian media was promulgated with the Criminal Libel Law still in the same document for nine years (1992–2001) before it was abrogated after fierce agitation. It was only after this period that newspapers flooded Ghana despite the flexible registration. Currently, the constitution’s provision on media independence is meaningless because it does not provide for RTI law to enable media to access information. The passage of RTI law in Ghana is the best way to expose official corruption, but it has been delayed due to political unwillingness on one hand and a stalemate over the content of the Bill which favours government on the other. The Bill, if passed in its current state, would make media worse off and the political class is dragging its feet because they are unprepared for the transparency that the RTI will bring.

At present, the constitution still holds the Emergency Powers Act 472, Contempt of Court, Criminal Code of 1960—Civil aspect of Defamation and Obscenity Law which, though it protects the reputation of citizens against wrongful reportage by the media within the public sphere, the courts capitalise on such cases normally brought against the media by politicians and impose huge fines on the media. Whereas fines check media against unethical reporting, judges were seen to have political inclinations which dictate their verdicts. The Ghanaian media opposes these fines which could shut down an outlet. Some archaic laws lack precise definitions and leave room for the government to misapply them against journalists. For instance, civil and public servants hide behind the Official Secrets Act to deny access to information.

The constitution’s failure to accord the NMC sanctioning power makes it ineffective to regulate the landscape, and as such cases are referred to the courts instead. This structural cycle of seeking redress to media infractions appears to have been orchestrated by the ruling authority to ensure that all such matters end up on its doorstep. Moreover, the NMC is fully dependent financially on the very executive arm the constitution has mandated it to insulate the state-owned media from, though legally it is independent in the books. The above shortfalls are summed up in the notion that: “The media must not simply trust the government’s promises that they will maintain media freedom; they must ensure that policies and structures are put in place to guarantee media freedom going into the future” (Duncan, 2011, p. 57). This is consistent with the study’s finding that in Ghana, successive governments claim to be in favour of media independence, but they are very resistant when it comes to the implementation of this.

From the inference, two major actions were evident. Firstly, stakeholders (participants) applauded aspects of the provisions of the constitution on media freedom that enhanced the landscape leading to the proliferation of private media sector. This is because in Ghana’s democratic governance, it is only the Fourth republican constitution that gave a chapter and clearly spelt out freedoms of the media under it instead of being “basic freedoms” as it existed in previous republics. Secondly, due to the legal nature of the subject under consideration and the different themes that emerged from the study, such as passage of RTIL, court adjudication, existence of archaic laws and autonomy of NMC, petitioning and lobbying the legal arm of government is appropriate to effect changes to the law to further enhance freedom of expression in the media environment and society generally.

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