IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2016

CORAM: AKUFFO (MS) JSC PRESIDING
DOTSE JSC
BAFFOE-BONNIE JSC
AKOTO- BAMFO (MRS) JSC
BENIN JSC
AKAMBA JSC
PWAMANG JSC

WRIT NO. J1/4/2016

30TH NOVEMBER 2016

GHANA INDEPENDENT BROADCASTERS ASSOCIATION - PLAINTIFF

VRS

1. THE ATTORNEY GENERAL - 1ST DEFENDANT

2. NATIONAL MEDIA COMMISSION - 2ND DEFENDANT

JUDGMENT

BENIN, JSC:

My Lords, this is a matter that touches the heart of our democratic process, talking about freedom of expression in all its facets. In democratic societies it is regarded as the most prominent fundamental right, a lever upon which all other rights hinge. In an article by Harry H. Wellington titled 'On Freedom of Expression' 88 Yale L.J. 1105, the author suggests that free speech is preservative of other freedoms. In MURDOCK v. PENNYSLVANIA, 319 U.S. 105, 115 (1943) free speech is given what was described as 'preferred' position. In other words, it is afforded more extensive immunity from external interference than most other human endeavours. This fact was not lost on the Committee of Experts who drafted the proposals that culminated in the adoption of the 1992 Constitution. The Committee opened their proposals with a quotation from the renowned John Stuart Mill, who wrote that "if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." It may be recalled that the Committee was set up against the backdrop of what had become known in the country as the culture of silence. Simply put, as a result of the lack of democratic political atmosphere at the time, citizens did not venture to bare their thoughts. The Committee therefore sought to make provisions that would allow the citizenry to express themselves freely, subject only to such limitations as are reasonably required in the interest and progress of society. The Committee was thus mindful of the fact that the country should not transition from a culture of silence, which tends to inhibit the citizenry from participation in governance to a culture of media impunity that might bring about disorder. Thus a careful balance was required, because a culture of impunity by the media, which has the potential to breed chaos and insult public decency and morality, was certainly not an option. In this regard, the establishment of the National Media Commission, 2nd defendant herein, also referred to in this judgment as the Commission, was to insulate the media from governmental interference and to regulate the sector in order

to achieve the dual objective of free expression and sanity in media practice. Thus the Constitutional provisions and any other laws that have a bearing on free expression should be interpreted with the history and purpose of the constitutional provisions in mind. At page 85 of the report dated 31st July 1991, the Committee captured the essence of this freedom in these words:

"***It is through responsible and independent media that objective information is disseminated, different and opposed views are presented and shared, enlightened public opinion is formed and political consensus mobilized and achieved."***

It was not lost on the framers of the Constitution how important free expression was to the development of society. It ensures democratic self-government, informed voting and checks abuses of power. As a voter education tool, free speech is the foundation of democratic self-government. Needless to say it propels and promotes the development of culture, science, art, technology and commerce. It also ensures individual self-development, association and enjoyment of all other rights. The Constitution is thus a moribund document without the freedom of expression which enables people to talk about infractions thereof and to go to court to seek redress. Thus for democracy to thrive and survive, nothing should be done to stifle this freedom except where the person is said to have gone beyond legitimate boundaries prescribed by the Constitution itself or any other law which is not inconsistent with the Constitution. This piece of introduction sets the tone for our consideration of this case before us which places in focus the extent of the mandate entrusted by law upon the Commission.

The plaintiff claims that the2nd defendant, which is the regulatory body responsible for the media in Ghana, is going beyond bounds and is acting in a manner inimical to the attainment of this right of free expression. This concern has been raised as a result of certain provisions in the National Media Commission (Content Standards) Regulations, 2015, L.I. 2224 which

entered into force on the 9th day of December 2015; and in particular they complain about regulations 3 through 12 and 22. The plaintiff's case, as briefly stated in page 12 of their statement of case is that "***the said Regulation 3 together with its consequential Regulations contained in Regulations 4 to 11 are unconstitutional as same amounts to censorship, control and direction of operators of mass media communication in so far as the said regulations require an operator to seek authorization of his/her content before carrying same on any of the platforms of mass media communication……and therefore contrary to Articles 162(2), 162(4), 167(d) and 173 of the 1992 Constitution."*** They therefore seek these reliefs against the defendants:

1. A declaration that upon a true and proper interpretation of Articles 162(1), 162(2), 162(4), 167(d) and 173 of the 1992 Constitution, neither the Government of Ghana nor any other state institution created under the 1992 Constitution including the National Media Commission shall engage in acts or exercise any powers that are likely to amount to censorship, control and direction of institutions of mass media communication in Ghana and no institution of mass media communication shall be criminally penalized for their failure to procure authorization for the content of their publication from the Government or any state institution created under the 1992 Constitution including the National Media Commission.
2. A declaration that Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11 12 and 22 of the National Media Commission (Content Standards) Regulations 2015, L.I. 2224 in so far as their cumulative effect is to give the National Media Commission the power to determine which content can be conveyed by operators on a public electronic communications network, a public electronic communications service or a broadcasting service amounts to censorship of the media and same contravenes Articles 162(1) and (2) of the 1992 Constitution and therefore void.

3. A declaration that Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 22 of the National Media Commission (Content Standards) Regulations 2015 L.I. 2224 in so far as they give the National Media Commission the power to determine content that can be conveyed by operators on a public electronic communications network, a public electronic communications service or a broadcasting service amounts to control and direction over the professional functions of the operators and same contravenes and is inconsistent with Article 162(4) 167(d) and 173 of the 1992 Constitution and therefore void.
4. A declaration that the provisions under the Standard Guidelines referred to under Regulation 12 and specifically listed under the Third Schedule of the National Media Commission (Content Standards) Regulations 2015, L.I. 2224 which prefers criminal sanctions upon infractions of the Standard Guidelines are legally vague and also inconsistent with the spirit and letter of Article 162(4), Article 167(d) and 173 of the 1992 Constitution and therefore void.

5. An order deleting, expunging or striking out Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 22 of the National Media Commission (Content Standards) Regulations 2015, L.I. 2224 on the grounds that they are unconstitutional.

The plaintiffs bring this action in their capacity as a company limited by guarantee registered under the laws of the Republic of Ghana for the protection of media independence and the interest of private broadcasters in Ghana.

The provisions of L.I. 2224 which the plaintiffs seek to impugn are these:

'Content of Authorization

Requirement for Content authorization

3.(1) An operator shall not convey or permit to be carried, content on a public electronic communications network, a public electronic

communications service or a broadcasting service without obtaining a content authorization from the Commission

(2) An operator who contravenes subregulation (1) commits an offence and is liable on summary conviction to a fine of not less than five thousand penalty units and not more than fifty thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both the fine and term of imprisonment.

Qualification for grant of content authorization

4. An operator is not qualified to apply for content authorisation unless that operator is a citizen of Ghana, and is

a) a registered body corporate;
b) a registered professional body or association; or
c) a registered partnership

Application for content authorisation

5. (1) An operator who intends to carry content on a public electronic communications network, a public electronic communications service or a broadcasting service shall apply in writing to the Commission for content authorisation.

(2) The application shall be as set out in Form One of the First Schedule

(3) The application shall be submitted with

a) certified details of the registered capital of the public electronic communications network, public communications service or broadcasting service;

b) the editorial policy of the public electronic communications network, public electronic communications service or broadcasting service;
c) the fee as prescribed by the Commission;
d) a programme guide as set out in Form Two of the First Schedule, in respect of broadcasts;
e) a content profile in respect of other forms of public electronic communication networks or public electronic communication services as set out in Form Three of the First Schedule; and
f) any other information that the Commission may request.

(4) Where the application is made by a registered body corporate or registered partnership the application shall, in addition to the information required under sub regulation (3), be accompanied by a reference that provides information on the experience of the operator; and

a) in the case of a body corporate,
   (i) the certificate of incorporation, and
   (ii) a statutory declaration of the structure of the shareholding of the body corporate; or
b) in the case of a partnership, a statutory declaration of the partnership agreement.

(5) Application for content authorisation shall be supported with documents establishing the identity of the operator.

(6) On receipt of an application, the Commission shall determine whether the programme guide submitted by the applicant conforms to these Regulations and any other relevant enactment.

(7) Where the Commission considers that the programme guide is unsatisfactory, the Commission shall notify the applicant in writing and shall state in the notice, to what extent, the programme guide must be revised to meet the requirements of the Commission.

(8) The applicant shall revise the programme guide and submit the revised programme guide within the period stated, if any, in the notice referred to in sub regulation (7)

(9) An approved programme guide is valid for twelve months.

(10) A programme guide shall be renewed not less than forty-five days before its expiry and sub regulations (4), (5), (6) and (7) shall apply.

(11) An operator may revise a programme guide subject to the written approval of the Commission.

Procedure for grant of content authorisation

6. (1) The Commission shall, within fourteen days of receipt of a completed application for content authorisation, acknowledge receipt of the application;

(2) The Commission shall

(a) verify and validate the information received, and determine whether the applicant has met the requirements stipulated in regulation 5 within ninety days of receipt of the application, and
(b) notify the applicant in writing of its decision to grant or refuse the application within five working days of its determination.

(3) Where the Commission refuses to grant an application, the Commission shall state the reasons for the refusal.

Grants, validity and duration of content authorisation

7. (1) A content authorisation granted by the Commission shall be as set out in the Second Schedule and is subject to the terms and conditions specified in the content authorisation.

(2) A content authorisation is valid from the date it is granted for a period of three years.

(3) The Commission may extend the period for the validity of the content authorisation.

Transferability of content authorisation

8. (1) An operator who has been granted a content authorisation shall not transfer the content authorisation to another person without the prior written approval of the Commission.

(2) An operator who contravenes sub regulation (1) commits an offence and is liable on summary conviction to a fine of not less than five thousand penalty units and not more than fifty thousand penalty units and in addition to the fine, the Commission shall revoke the content authorisation granted to the operator.

Renewal of content authorisation

9. (1) An operator who wishes to renew a content authorisation shall submit an application for renewal as set out in Form One of the First Schedule not less than three months before the expiry date of the content authorisation.

(2) An application for renewal shall be supported by

(a) the documents and information referred to in regulation 5;

(b) the prescribed fee; and

(c) any other information or documents that the Commission may request.

(3) The Commission shall

(a) acknowledge receipt of the application for renewal within five working days of receipt of the application, and

(b) notify the applicant of its decision to grant or refuse the application within sixty days of receipt of the application.

(4) In reaching a decision on an application for renewal, the Commission shall take into account the findings of its monitoring and investigative activities on whether and to what extent the operator

(a) has complied with the terms and conditions of a content authorisation;

(b) has met its obligations under these Regulations and Standard Guidelines issued by the Commission; and

(c) has generally remained in compliance with any enactment relating to electronic communications.

(5) Where the Commission makes a decision to renew a content authorisation, the Commission may issue the authorisation

(a) on such terms and conditions that the Commission considers necessary, or

(b) for a lesser period.

(6) The Commission shall give reasons in writing to an applicant for a refusal to renew a content authorisation.

Suspension or revocation of content authorisation

10. (1) The Commission may suspend or revoke a content authorisation where the Commission determines that an operator

(a) has changed its programme guide without obtaining prior written approval from the Commission

(b) is not complying with or has failed to comply with a provision in these Regulations or any other relevant enactment;

(c) has acted in a manner that is inconsistent with the Standard Guidelines or Directives of the Commission;

(d) is carrying content or has carried content that is considered by the Commission in consultation with the relevant Agency, to be a threat to national security or public order;

(e) is not complying with or has failed to comply with a term or condition specified in the content authorisation;

(f) has failed to appear before a Settlement Committee of the Commission; or

(g) has failed to comply with an order or directive of the Settlement Committee of the Commission.

(2) The Commission shall not suspend or revoke a content authorisation unless the Commission has given not less than seven days notice to the operator of its decision to suspend or revoke the content authorisation and shall specify in that notice

(a) details of the breach, defect or omission that has led to the decision of the Commission to suspend or revoke the content authorisation,

(b) the measures or steps required to remedy the breach, defect or omission; and

(c) the period within which to remedy the breach, defect or omission

(3) Where an operator remedies a breach, defect or omission within the period specified in the notice, the Commission shall not revoke the content authorisation upon payment to the Commission of an administrative penalty of not less than three thousand penalty units and not more than twenty thousand penalty units.

(4) Where the Commission determines that an operator has failed to remedy a breach, defect or omission within the period specified in the notice, the Commission may revoke the content authorisation or place conditions on the continued use of the content authorisation and shall notify the operator in writing of its decision immediately.

Review of decision to suspend or revoke content authorisation

11. (1) An operator who is dissatisfied with a decision of the Commission may request for a review of the decision.

(2) The Commission shall determine the procedure for a review and shall give an operator an opportunity to submit written representations or appear before the Commission to be considered and heard on its request for a review.

(3) The Commission shall make a decision on a request for a review within twenty-one days after receipt of the request for a review within twenty-one days after receipt of the request for a review and shall inform the in writing of its decision.

(4) Where the Commission fails to

(a) make a decision in accordance with sub regulation (3), or

(b) the applicant is dissatisfied with a decision of the Commission in relation to the review, the applicant may pursue the matter in Court.

Content standards

12. (1) For the purpose of these Regulations, the Commission shall set Standard Guidelines for the content of programmes for public electronic communications networks, public communications services or broadcasting services as set out in the Third Schedule.

(2) In setting Standard Guidelines, the Commission shall seek to achieve the following:

(a) the protection of minors;

(b) the preservation of the right to privacy;

(c) the accurate and impartial reporting and presentation of news,

(d) that electronic programmes are not harmful to audiences

(e) that respect for human dignity is maintained,

(f) that generally acceptable standards with respect to morality and the public are met,

(g)that advertisements do not contain obscene, racial, prejudice or harmful messages,

(h) that advertisement are not misleading or untruthful or designed to mislead the public,

(i) that political programmes are fair and provide an opportunity for responses to be made by representatives of other political groups, and

(j) that programmes and content do not contain information likely to encourage crime, racial or political tension in the country.

(3) Despite sub regulation (1), the Commission may set any other Guidelines, Notice or Order in respect of a matter that is relevant to

the operation of the public electronic communication network, public electronic communication service or broadcasting service.

(4) The Commission may amend or revise the Standard Guidelines, any Notice, Order or the other Guideline and shall publish the amendment or revision in the Gazette or in at least three daily newspapers of national circulation and on the website of the Commission.

(5) An operator who carries on or engages in an act that is determined by the Commission to be in breach of the Standard Guidelines, a Notice, Order or any other Guidelines, commits an offence and is liable on summary conviction to a fine of not less than five thousand penalty units and not more than fifty thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both the fine and the term of imprisonment.

Offences and penalties

22. (1) A person who contravenes a provision under these Regulations for which a penalty is not provided is liable on summary conviction to

(a) a fine of not less than three thousand penalty units and not more than twenty thousand penalty units or to a term of imprisonment of not less than one year and not more than five years or to both the fine and term of imprisonment; and

(b) a fine of not less than six thousand penalty units and not more than forty thousand penalty units or to a term of imprisonment of not less than two years and not more than ten years or to both the fine and term of imprisonment in the case of a subsequent offence.

(2) An applicant who knowingly makes a false statement in connection with an application for content authorisation commits an offence and is liable on

summary conviction to a fine of not less than ten thousand penalty units and not more than sixty thousand penalty units or to a term of imprisonment of not less than one year and not more than five years, and in addition to the fine or term of imprisonment, the Commission shall suspend or revoke the content authorisation granted to the operator under regulation 7

(3) An operator who fails to comply with a request to submit information or a document to the Commission within a period specified in the request commits an offence and is liable to pay an administrative penalty of five thousand penalty units and to a further administrative penalty equivalent to ten percent of that penalty for each day that the document or information remains undelivered.

(4) Where an offence is committed by a body corporate or partnership, each director, officer or secretary and each member of that partnership is liable on summary conviction to the penalty provided in respect of that offence.

(5) Despite sub regulation (4), a person shall not be convicted of an offence if that person proves that the offence was committed without the consent or connivance of that person and that due diligence was exercised to prevent the commission of the offence having regard to the circumstances.

(6) Where an operator is convicted of an offence, the Commission may

(a) suspend or revoke the content authorisation held by that this

(b) withhold a grant of a content authorisation or related approval until the contravention is remedied.

It is also the plaintiffs' case that the constitutional provisions are clear and their intent, according to them, at page 13 of their statement of case was "***to avoid a situation where prior approval for the content of any publication of newspapers…..as required to be sanctioned by the***

government. Furthermore it has been provided that there shall be no harassment or punishment for the content of any such publication. With this in mind, it would be almost impossible to assume that the Constitution would take such a power from the Government and grant same to the 2nd Defendant. This is because if the Constitution intended the 2nd Defendant to have that power it would expressly state so in unmistakable terms."

The plaintiffs also state at page 14 of the statement of case that however limited or whatever description is given to the content authorization, as long as the 2nd Defendant has the right to determine what should be contained in the authorization, the effect is the same, in the sense that there would be no publication without prior authorization. In their view, one cannot conceive of any higher form of media gagging than the one anticipated by the impugned Regulations in LI 2224.

The 1st Defendant's case is briefly summed up in paragraph 7 of their statement of case **".....that save that the penal provisions contained in LI 2224 which are quite harsh, the said Regulations are in consonance with the Constitution and are reasonable and also justified in a free and democratic society."**The 1st Defendant stated that there is nothing like absolute freedom under any provision of the Constitution, there are restrictions and limitations placed on the enjoyment of the rights guaranteed by the Constitution, and according to the 1st Defendant, these restrictions are necessary for effective governance.

For their part, the 2nd Defendant challenged the basis of this action by raising jurisdictional questions. On the merits of the case,it was their view that some amount of regulation was required in the media sector. They made reference to this court's decision in the case of REPUBLIC vs. INDEPENDENT MEDIA CORPORATION OF GHANA and Others (1996-97) SCGLR 258 which upheld the need for restraints on the broadcast media for various reasons, especially public interest. In their view the measures

taken by them were aimed at ensuring transparency which enables them to take remedial action even before broadcast institutions do any damage.

The issues agreed upon for determination are as follows:

1. Whether or not the original jurisdiction of the Supreme Court has been properly invoked having regard to Plaintiff's reliefs.
2. Whether or not the cumulative effect of Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 22 of National Media Commission (Content Standards) Regulations 2015, LI 2224 amounts to censorship of the media and inconsistent with Article 162(2) of the 1992 Constitution and to the extent of the inconsistency, unconstitutional, null and void.
3. Whether or not the cumulative effect of Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 22 of National Media Commission (Content Standards) Regulations 2015, LI 2224 amounts to control and direction over the professional functions of operations and inconsistent with the spirit and letter of Article 162(4) and Article 167(d) of the 1992 Constitution and to the extent of the inconsistency, unconstitutional, null and void.
4. Whether or not the Standard Guidelines under Regulation 12 of the National Media Commission (Content Standards) Regulations 2015, LI 2224 are legally vague and also inconsistent with the spirit and letter of Article 162(4) and Article 173 of the 1992 Constitution and to the extent of the inconsistency, unconstitutional, null and void.

The first issue will be addressed to start with. Then the second and fourth issues will be addressed together, followed by the third issue. The first issue relates to the court's jurisdiction in respect of this matter.

Before the issues are discussed let us clear a procedural hurdle raised by the 2nd defendant. The 2nd defendant took issue with the plaintiff's description of the statement of case as having been filed "pursuant to Article 2(1)(a) and (b) and Article 3(4)(a) of the 1992 Constitution of Ghana." In their view "….the statement of case filed by the plaintiff (after

issuing the writ which invokes the original jurisdiction of this court) is required by rule 46(1) of the rules of this court but not the constitutional provisions relied upon by the plaintiff." Counsel then said he would not make capital of this point and yet he proceeded to state that "if this statement of case is indeed filed pursuant to article 2(1)(a)and (b) as well as article 3(4)(a) of the 1992 Constitution then the statement of case is void."

The point raised by the 2nd defendant is really a matter of procedural error or slip. It is a case of wrongful reference to the relevant legislation, but the body of the statement and its contents leave no one in any doubt that the plaintiff was submitting a statement of case in support of the writ which they had earlier issued. This obvious error causes no injustice, as the other parties and the court are not left in any suspense as to what to make of the document filed. But for the vigilance of counsel for the 2nd defendant it would have passed unnoticed as the title clearly suggested it was the plaintiff's statement of case, which was filed within the time permitted by the rules. We would waive this slip, exercising our discretion under rule 79 of The Supreme Court Rules, 1996, C.I. 16, and admit the statement as duly filed as no injustice, not even an inconvenience, results therefrom.

On the question of jurisdiction, the central point of complaint against the plaintiff's case is that "it is not appropriate, as what plaintiff has done in this case is to assemble as many statutory provisions in the enactment complained about in relation to his/her case, and then throw it at the Court, for the court to now determine the extent of their inconsistency with or contravention of the Constitution." They made reference to this court's decision in the case of ASARE BAAH III and Others vs. ATTORNEY-GENERAL and Another (2010-2012) 1 GLR 427 where the court stated, per Wood CJ at 435"……that all alleged acts of statutory and constitutional invalidity, breaches or violations, inconsistencies or non-compliance be identified with sufficient particularity….." The 2nd defendant referred to the reliefs being sought by the plaintiff and said that "a reading of plaintiff's reliefs will confirm that plaintiff actually seeks the striking down of almost

the entirety of L.I. 2224 without a scrutiny of each of its provisions for purposes of assisting this court determine just to what extent the pervasive provisions of regulations 3-12 and 22 of L.I. 2224 are inconsistent with or in contravention of the Constitution."

The 1st defendant lent support to the 2nd defendant on this issue. After citing article 2(1) of the Constitution under which this action was mounted, the 1st defendant argued that this was not a proper case in which the original jurisdiction of this court could be invoked in the sense that it does not raise a genuine case of interpretation. They cited these cases to buttress their arguments: BORTIER & QUAYE vs. ELECTORAL COMMISSION & ATTORNEY-GENERAL (2012) SCGLR 433, per Sophia Akuffo, JSC, at page 438; ADUMOA II vs. TWUM (2000) SCGLR 165. Their submission was that "the effect of the legal authorities cited above is that for the plaintiff to successfully invoke the original jurisdiction of this Honourable Court it must indicate any specific provisions of the 1992 Constitution in respect of which it seeks an interpretation or demonstrate by pleadings that any legislation is in contravention of any provisions of the 1992 Constitution." They also made reference to this court's decision in the case of ASARE BAAH III and 4 Others vs. ATTORNEY-GENERAL and the ELECTORAL COMMISSION, supra. In that case the plaintiff's action founded on a subsidiary legislation, namely E.I. 11 of 2007 was dismissed because it did not raise any specific provision that was inconsistent with any specified provision of the Constitution and the action was thus not cognizable under the Constitution. The 1st defendant then said that this is a subsidiary legislation which raises no constitutional interpretation so the plaintiff is seeking remedies in the wrong forum and on the strength of the ASARE BAAH case, supra, it ought to be dismissed. Accordingly it is the contention of the 1st defendant that the original jurisdiction of this honourable Court has not been properly invoked.

On the question of wrong forum and whether the case raises a question for constitutional interpretation, we have to examine the reliefs sought and the pleadings in order to make a determination of this issue. The plaintiff has

listed as many as eleven of the regulations under L.I. 2224 and labeled them as being inconsistent with specific provisions of the Constitution. Prima facie, the objection is not sustainable on the facts and law. The reliefs make reference to specific provisions of L.I. 2224 which they say are inconsistent with specific provisions of the Constitution on stated ground or reason in each case. They have explained why and how these regulations affect the constitutional guarantee of media freedom. This satisfies the requirement of article 2(1) of the Constitution. The fact that these impugned provisions virtually affect the entire L.I. 2224 and expunging them might render the other provisions redundant is no reason why the action cannot be maintained. From a clear reading of the language of article 2(1), even an entire legislation could be struck down as unconstitutional. The cases cited by defense counsels do not really advance their argument, for the reliefs sought herein are clearly cognizable under the Constitution. It is noted that there is no magical or standard formula in setting out a constitutional case before this court; what is important is that the contents of the reliefs sought and the affidavit in support must raise a case cognizable under the Constitution. However inelegant the words used in expressing the reliefs, what is important is that they are couched in language that the court will appreciate without difficulty; the court will then look at the substance of the claim in order to do substantial justice. The jurisdictional objection is accordingly rejected as unsustainable.

On the merits of the case, the first question raised is whether the impugned regulations, namely 3 through 12 and 22 constitute censorship within the meaning of articles162(1) and (2) of the 1992 Constitution which read:

162(1): Freedom and independence of the media are hereby guaranteed.

162(2): **Subject to this Constitution and any other law not inconsistent with this Constitution, there shall be no censorship in Ghana.**

The main thrust of the plaintiff's case has been set out already. The 1st defendant's case, besides what has already been set out above, made reference to a number of authorities, both local and foreign, to buttress their argument. They referred to the regulations as well as the forms in the Schedules and stated that nothing contained therein supports what the plaintiff is saying. They referred to the proportionality test which measures the objectives of the regulations against the restrictions on press freedom. Applying this test one cannot say that these regulations have any adverse or negative effect on press freedom. The 2nd defendant's arguments are not substantially different from those of the 1st defendant. But the 2nd defendant took the view that the plaintiff's reliefs are "too broad and are couched oblivious of this Court's power to strike out statutory provisions, taking into account the extent to which the provisions sought to be struck out comply with the Constitution, or otherwise" They cited some decisions by this court which had upheld the view that a certain amount of restraint was required on press freedom. Their conclusion was that "regulating broadcasting standards does not infringe the 1992 Constitution provided they can be justified on the ground of public interest."

The use of the expression 'subject to' in clause 2 of Article 162 is suggestive that some form of censorship is permissible under the Constitution and other law duly passed that is not inconsistent with the Constitution. Therefore, in the event of a collision the free expression will yield to the restriction imposed by article 164, for instance, aimed at curtailing media freedom. Indeed it is only an affirmation of the view expressed by this court that there is nothing like an absolute freedom. Thus for instance the Constitution itself under Article 12(2) recognizes and imposes restriction and limitation on the rights guaranteed under Chapter 5 to individuals. On the specific right to free expression to persons including corporate bodies, the restriction to, or limitation on, its enjoyment is imposed by Article 164 of the Constitution, which provides:

The provisions of articles 162 and 163 of the Constitution are subject to laws that are reasonably required in the interest of

national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.

The Constitution, therefore, envisages that any authority which is entrusted with the responsibility to pass laws to manage the media landscape would pass such laws as are devoid of censorship, in the first place. And where it is necessary to introduce a form of censorship, it must be justified in terms of the clear provisions of Article 164 of the Constitution or any other material provision in the Constitution or law that is not inconsistent with the Constitution. Where any restriction or limitation fails the test of justification in terms of the Constitution, it would not have passed the no-censorship requirement in Article 162(2).

It is almost a universal concept that freedom of expression should be unhampered except in the very limited situations specifically provided for by law. That has been the position in Ghana and other jurisdictions whose decisions are of persuasive influence. It must be observed that in the area of freedom of expression in a multi-party democracy, the standards of practice and norms are similar; thus it is an area where the practice and jurisprudence of other jurisdictions could safely be applied here, except in clear cases of incompatibility with our laws and social values. In the case of HANDYSIDE v. UNITED KINGDOM, judgment of 7 December 1976, Series A No. 24 at 49, the European Court of Human Rights, described freedom of expression as "one of the basic conditions for the progress of democratic societies and for the development of each individual." It presupposes that every person, human or corporate, must have the liberty to air their views freely, bearing in mind the restrictions imposed by the Constitution and other laws, not inconsistent with the Constitution, and also bearing in mind the possible consequences of the views expressed, including criminal sanctions. The viability of civil and political institutions largely depends on free discussion and debate, or exchange of ideas which in the words of Chief Justice Hughes in the case of DE JONGE v. OREGON, 299 U.S. 353, (1937) at 365 ensures "that government remains responsive to the will of

the people and peaceful change is effected. The right to speak freely……publish or act freely and to promote diversity of ideas and programmes is therefore one of the chief distinctions that sets apart democracies and totalitarian regimes."

Whilst taking a very extreme view of free speech, Justice Douglas who wrote for the majority in the case of TERMINIELLO v. CITY OF CHICAGO, 337 U.S. 1 (1949) said at pages 4 and 5 that:

"***A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech not absolute……is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantial evil that rises far above publicinconvenience, annoyance, or unrest. The alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."*** Emphasis supplied.Despite the extreme view of freedom of expression by Justice Douglas, the refreshing thing is the recognition that it is not an absolute right, but is subject to some form of censorship for the public good.

The standardization of ideas is a likely product of content authorisation regime. It is what the 2nd defendant wants that will be the one to publish and broadcast. It is another way of saying that they want to see the contents of a publication before it comes out, a derivative of the concept of prior restraint, which this court and most democratic countries frown upon as amounting to censorship, unless there is justification by clearly defined law.

Reference will be made at this stage to some decided cases to illustrate the extent of the prior restraint concept or doctrine and how the courts have decisively rejected any such move that is not justified and clearly backed by law. First is the case of NEAR v. MINNESOTA, 283 U.S. 697 (1931). The State of Minnesota passed a law which provided that any "malicious, scandalous and defamatory newspaper" was "a nuisance, and all persons guilty of such nuisance may be enjoined" from publication. On the strength of this law, the state attorney obtained an injunction against the newspaper or periodical called the Saturday Press, which had published series of articles charging law enforcement officers with graft and neglect of duty in dealing with gangsters. The injunction which prevented publication of any 'malicious, scandalous or defamatory newspaper' or of a 'nuisance under the name and title of said Saturday Press or any other name or title,' was affirmed by the state supreme court. However, it was reversed by the US Supreme Court. In the words of Chief Justice Hughes:

"The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper……. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under effective censorship……in determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guarantee to prevent previous restraints upon publication. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press…..consists in laying no previous restraints upon publications. Every free man has an undoubted right to lay what sentiments he pleases before the public……But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

The above passage from Blackstone was quoted with approval by this court in the case of REPUBLIC v. TOMMY THOMPSON BOOKS LTD, QUARCOO & COOMSON(1996-97) SCGLR 804 hereafter referred to as the Tommy Thompson case. At 871, Adjabeng, JSC made reference to the case of

RICHARDS v. ATTORNEY-GENERALOF ST. VINCENT AND THE GRENADINES (1991) LRC (Const) 311. In that case the court made this pronouncement at page 327 of the report, which Adjabeng JSC quoted at length in the TOMMY THOMPSON case, supra. The relevant part of that quotation is this:

"Blackstone, the great English lawyer and oracle of the common law, wrote in 1765: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences **of his own temerity*****…..Accordingly, as Blackstone saw it, freedom of speech and freedom of the press, which are both comprehended in freedom of expression, protected an individual from any prior restraint upon what he said. There was no need to obtain government approval or consent before a man expressed himself, and government has no right to interfere with or to prevent anyone from writing, publishing and circulating a book or other pamphlet.Government could not keep ideas from being communicated, but it could…..punish a man for what he said after he had said it."***

This dictum highlights the balance that the framers of the Constitution sought to maintain between the enjoyment of rights and respect for the rights of others, which are echoed in Articles 12(2), 162, and 164 of the Constitution. In the Tommy Thompson case, supra, at page 873, Amuah JSC, cited the case of ATTORNEY-GENERALOF ANTIGUA AND BARBUDA v. HECTOR, dated 22 June 1987, unreported judgment of the Court of Appeal of the Eastern Caribbean Supreme Court at St. Vincent. The learned judge quoted this relevant passage from the dictum of Robotham CJ:

"Absolute and unrestricted individual rights wholly freed from any form of restraint cannot exist in a modern democratic society. As was said in the case of Ackins v. Children's Hospital 261 U.S. 525 (1923), the liberty of an individual to do as he pleases even in innocent matters is not absolute. It must frequently yield to common good. Thus it is that a publisher has no more right to print what he pleases about a person than that person has to the protection of his reputation from scurrilous attacks. Thus it is that the enjoyment of all rights guaranteed by the Constitution must be subject to such reasonable conditions as may be seen by the authorities in control to be essential for the general order, safety, health, and peace of the State."

Sophia Akuffo JSC also shared similar opinion in the Tommy Thompson case, supra. At page 883, this is what the learned judge said on prior restraints: ***"As was acknowledged by this court in the case of New Patriotic Party v. Inspector-General of Police, Supreme Court, 30 November 1993, unreported, the principle of prior restraint of a constitutional freedom, even an entrenched freedom, is not unknown to our Constitution and is founded on the universally accepted principle that every right of freedom is subject to the rights and freedoms of others and the protection of the reasonable interests for the common good."***

The universality of reasonable restraint on the enjoyment of freedom of expression was clearly accepted by this court in the case of Tommy Thompson, supra. See also GORMAN and Others vs. THE REPUBLIC (2003-2004) SCGLR 784 at 806, per Modibo Ocran JSC; AHUMAH-OCANSEY vs. ELECTORAL COMMISSION; CENTRE FOR HUMAN RIGHTS & CIVIL LIBERTIES(CHURCIL) v. ATTORNEY-GENERAL & ELECTORAL COMMISSION (CONSOLIDATED) (2010) SCGLR 575, per Dotse JSC at 655. I would just affirm this by reference to other jurisdictions, infurther support of the position this court has already taken.In principle prior restraint raises constitutional question of illegality, albeit prima facie, but it is permissible if

justified by law. As stated in the case of NEW YORK TIMES CO. v. UNITED STATES (THE 'PENTAGON PAPERS' CASE) 403 U.S 670 (1971): "Any system of prior restraints of expression comes to this court with a heavy presumption against its constitutional validity…..the Government thus carries a heavy burden of showing justification for the imposition of such a restraint."

It is noted that any prior restraint has an immediate irreversible sanction, hence the requirement for justification.Thus in the English case of A v. B plc and Another (2002)TLR 113 the court stated, per Lord Woolf, Lord Chief Justice, that regardless of the quality of the material which was intended to publish, prima facie, the court should not interfere with its publication. Any interference with publication must be justified.

Besides finding justification for a prior restraint, the courts have also taken the position that if there are alternative ways of imposing restriction on publication, the court should not order prior restraint because prima facie prior restraint raises question of constitutional validity. The case of NEBRASKA PRESS ASSOCIATION v. STUART, 427 U.S. 539 (1976) involved a pretrial judge issuing what the Supreme Court described as a 'press gag' against publication of accounts of confessions made by the accused or facts strongly implicating the accused. The Supreme Court struck down the order. What is relevant to the ongoing discussion is the concurring opinion of Justice Brennan, which was supported by Justices Stewart and Marshall wherein he said: ***"I would hold……that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing the right to a fair trial; judges have at their disposal a broad spectrum of devices for insuring thatfundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental…..constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors."***

In the case of LOVELL v. GRIFFIN, 303 U.S. 444 (1938), the court struck down a state ordinance which forbade the distribution by hand or otherwise of literature of any kind without prior permission from the city manager. The court's opinion was that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the priviledge of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time and place of distribution. The court said whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defence of liberty, by subjecting such distribution to license and censorship. The ordinance was therefore void because on its face it abridged the freedom expression.

It is desirable to sum up all that has been said so far in respect of legitimate restrictions to the freedom of expression by reference to what Justice Roberts, who delivered the opinion of the court in the case of SCHNEIDER v. STATE, 308 U.S. 147(1939) said: ***"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one, and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.***

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to

weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In the SCHNEIDER case itself, supra, the court struck down an ordinance which forbade the distribution of pamphlets for littering, for reasons, inter alia, that there were other ways of dealing with the situation on hand like imposing penalties for littering without curtailing the fundamental right to disseminate information to people who care to receive same.

Regulation 3 of LI 2224 obliges broadcasters to disclose the contents of their programmes for authorisation before broadcast. Prima facie it raises an issue of press censorship by the 2nd defendant. This is because by asking for these contents to be disclosed before authorisation will be given, it amounts to saying that the 2nd defendant predetermines what should be broadcast by the operators. It is akin to a licensing regime which the Constitution has effectively eliminated from our body politic. The framers of the Constitution were very clear in their mind that they were giving the media freedom to operate subject only to such restrictions or limitations as the Constitution itself has prescribed under Article 164 or any other relevant provision thereof or other law not inconsistent with the Constitution. Therefore any law that seeks to impose restrictions on the enjoyment of the right of freedom of expression must find legal justification.

Thus where a legislation seeks to impose restrictions, it must be able to justify it by saying that it is reasonably required in the national security interest (like disclosing military strategies in public), or of public order (like prohibiting broadcast of ethnocentric materials), public morality (like for instance prohibition of pornographic materials on TV) and for protecting the rights, freedoms and reputations of other persons. These must be clearly stated in the legislation, without leaving room for inferences and conjectures. In other words the law or any regulation which introduces a restriction must be precise and give clear guidance as to future conduct.

That is the extent that any regulation may go. Any attempt to approve in advance what has to be published goes beyond the power that a regulator has unless it is permitted by legislation. The 2nd defendant's functions are spelt out in Article 167 of the Constitution and in Act 449 and they do not in way permit them to regulate the media in this manner. Its mandate entitlesit to publish guidelines to regulate the future conduct of the industry players and to possibly sanction infractions of the regulations. Once the 2nd defendant comes out with the guidelines as to future conduct on what may or what may not be published, the operators may impose a self-censorship on themselves, knowing full well the consequences of violating the regulations. But the Constitution frowns upon censorship imposed from outside unless justified by law as earlier explained.

It is clear from even a cursory reading of regulation 3 of LI 2224 that there is clearly a case of censorship contrary to article 162 of the Constitution. It is a blanket provision which enables the 2nd defendant to determine what may be broadcast or not, thereby undermining the very reason which encouraged the framers of the Constitution to remove control of the media from the government and placed it in the hands of an independent body. That regulation will have the effect of stifling diversity of ideas and lead to standardization of ideas like what happens in dictatorships and communist societies. And to cap it all, no legal justification in terms of article 164 of the Constitution or Act 449 or any other law has been given why it is necessary to impose this requirement of prior authorisation. It is recalled that in the case of REPUBLIC vs. INDEPENDENT MEDIA CORP. supra, the court upheld the restriction on media freedom because the measures were reasonably required for the protection of national security, public order and public morality, which restrictions are within the ambit of article 164. Regulation 3, as it stands, violates article 162(2) of the Constitution and is thus void. The 2nd defendant's position that there is no censorship is not acceptable in the face of the clear expressions they themselves have used in enacting this piece of legislation for no legal justification has been proffered.

The Commission could have achieved the result without a restraint on press freedom if Parliament had published detailed legislation on content and impose sanctions for infringement which they could do under article 164. It is desirable to explore every available alternative ways of carrying out its mandate without curtailing media freedom. It is advisable to go back to the drawing board, and reconsider their core functions and the limitations placed on media practitioners by article 164 of the Constitution. Their feathers might have been ruffled by the overtones that the expression 'censorship' connotes in their functions, but they should recognize unblinkingly that censorship was exactly what regulation 3 was all about.

Regulations 4 through 11 are largely the steps or procedures put in place to perfect the requirement for content authorisation imposed by regulation 3. Their survival is dependent on regulation 3. They are the vehicles put in place to give effect to regulation 3. Let us take a critical view at some of these provisions and the effect they have on press censorship. Regulations 6, 9, 10 and 11 make detailed provisions for application by an operator, acknowledgement of receipt of the application by the Commission, consideration of the application, approval or refusal to grant;also the renewal of authorisation and right to refuse application for renewal. There are certain time lines provided. What the regulations entail is that during the period of consideration of an application, an operator's existing authorisation may run out and he will have to cease operation or suffer some penalties.What is even disturbing is that if the Commission decides not to approve the content of the programme upon an application to renew or decides to delay it, an operator cannot operate. It is acknowledged that some news item cannot be delayed else it loses its viability and relevance. Any regulation should have clear guidelines as will leave no room for officials of the Commission to block an operator under the guise of the law. As observed by the European Court of Human Rights in the case of THE OBSERVER and GUARDIAN v. the UNITED KINGDOM, 26 November 1991, Appn. No. 13585/88, para. 60:

"The dangers inherent in prior restraints are such that they call for most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."

A system whereby media content must be officially cleared before it can be broadcast or published is unacceptable in law, it is a clear violation of the constitutional provisions on media freedom; the harm it does to freedom of expression plainly outweighs whatever benefit it aims to achieve. For these reasons, it follows that these regulations 4 through 11 will have to suffer the same fate as regulation 3 and are accordingly declared void.

But the same cannot be said of regulation 12, with the exception ofsub-regulation (5) which imposes criminal sanctions or penalties.What this regulation seeks to do is precisely what the 2nd defendant is required by law to do. It has to set the guidelines to bring into practical effect the limits of media freedom in the context of article 164 of the Constitution and any other law not inconsistent with the Constitution. It is a legitimate function entrusted to the 2nd defendant to perform; the plaintiff is not saying that the Standard Guidelines contained in the Third Schedule contain material which cannot come within the provisions of article 164 of the Constitution. But as conceded by the 1st defendant the penalties appear too harsh, yet the court cannot strike down a penal legislation because the various forms of punishment prescribed therein are too harsh. It is for Parliament to act on that, failing which the law remains valid. The court is thus unable to accept the case to declare regulation 12 of LI 2224 as unconstitutional. However, for the reasons embodied in the ensuing discussions, sub-regulation (5) of regulation 12 of L.I. 2224 is struck down as unconstitutional.

The second issue also attacks regulation 22 as amounting to censorship and therefore unconstitutional. In relation to this issue of censorship, an answer may be found if we consider first of all whether any power has

been given to the 2nd defendant to impose criminal sanctions for infractions of the guidelines it publishes to regulate media activities. Next we will have to consider whether in the context of this case, the penalties prescribed under regulation 22 derive their existence or justification from regulation 3 which has been declared void, and if so whether they can survive in the absence of regulation 3.

To begin with, It is noted for emphasis that article 162(4) states in no uncertain terms that media operators shall not be penalized for their editorial opinions, views and content of their publications. Despite the fact that the provision refers to the government, does the Commission have the power to prescribe criminal sanctions by subsidiary legislation under this provision? This court has upheld the view that the provisions of article 162(4) apply to the Government. That was in the case of REPUBLIC v. TOMMY THOMPSON BOOKS LTD (No. 2) and Others (1996-97) SCGLR 484. Acquah JSC (as he then was) at pages 497-498 stated as follows:

"***Now the rationale for enacting article 162(4), in the light of the then state of the press and media, is stated in paragraph 188, page 86 of the said Report as follows:***

'As things stand now, there is direct governemental (ministerial) interference in or control of the operations of the press. Editors and reporters are appointed by the Ministry of Information, and they see themselves as civil servants and feel constrained in carrying out their professional standards possible. This ministerial power ofappointment and dismissal of reporters and governmental interference in media activities have greatly contributed to the erosion of the freedom and independence of the press and media in Ghana.'

.....*It is to save editors and publishers from such ministerial manipulation and treatment that article 162(4) in particular and the National Media Commission were put forward.....The article did not exempt editors and publishers from both civil and*

criminal proceedings at the courts in respect of contents of their publication. And this is quite clear from the Committee of Experts' own draft of article 162(4) as appearing at page 88, paragraph 190(iii) in their Report as follows:

'Editors and newspaper publishers, the press and mass-media should not be subject to governmental control, interference and harassment nor should they be penalized for their editorial opinions or views expressed in the mass-media beyond the requirement of public order, morality etc and relevant laws.'

Accordingly the words 'control', 'interference', 'penalised' and 'harassed' used in article 162(4) are all referable to the government...."

The court therefore upheld the provisions under the Criminal Offences Act, 1960 (Act 29) criminalizing libel, before those provisions were subsequently repealed by Parliament. Government is defined by article 295(1) of the Constitution to mean "any authority by which the executive authority of Ghana is duly exercised." There can be no dispute that neither Parliament nor the Commission exercises executive authority in Ghana. If follows that the prohibition on criminalization of media freedom is restricted to only the Government, meaning the executive.

It is noted that article 162 is even subject to the provisions of article 164 which for purposes of emphasis is reproduced here:

"The provisions of articles 162 and 163 of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons."

This provision gives room for laws to be passed that will restrict media freedom and free speech in general. The issue that arises for our consideration is who has the responsibility to enact laws that restrict the

right to enjoy free expression guaranteed by the Constitution. The Commission purported to pass this instrument pursuant to the power conferred on it by Parliament under Act 449. By virtue of article 11(1)(b) of the Constitution, enactment made under the authority of Parliament constitute part of the laws of Ghana. However, the person who claims to have been empowered by Parliament must be one who could legitimately be the recipient of such power, often done by way of delegated legislation.

We would thus examine the relevant provisions of the Constitution as well as the legislative antecedents curtailing free expression in this country and the provisions of Act 449 itself, to determine whether the Commission has the power to impose criminal sanctions, besides the limited legislative power conferred on it by article 167(d) of the Constitution.

The question of free expression as stated in this decision and others cited herein leave no room to doubt that any curtailment should be done by the legislature. All the external decisions cited were founded on substantive statutes, and not left to administrative bodies to enact laws curtailing free expression. Such administrative bodies could be empowered to implement the laws as passed by the legislature. Let us take article 167(e) of the Constitution which enables the Commission to be given additional functions. It could never be argued that Parliament could authorize the Commission to add to its functions by subsidiary legislation. The clear implication from article 167(e) is that the Commission cannot perform any other function except it has been enacted into law by Parliament. Parliament cannot confer that responsibility upon the Commission to perform. The provisions of article 164 could be legislated by Parliament itself and then the Commission could be empowered by Parliament to implement. The framers of the Constitution could not have contemplated that it is the Commission which would determine what matters constitute national security interest especially given the fact that such matters often involve state secrets. Thus in the legislative antecedents of this country, all matters which have the effect of restricting free expression have been made laws by Acts of Parliament. Examples are the Cinematograph Act,

1961 (Act 76) which permits some form of film censorship and creates offences with criminal sanctions for infractions thereof; Public Order Act,1994 (Act 491); the Criminal Offences Act, 1960 (Act 29), which criminalizes minor offences like use of insulting words (section 207), publication of false news (section 208) all of which impose some restrictions on free expression. But they can be justified in terms of article 164 of the Constitution in protection of the rights and reputations of other persons. These are all substantive legislations which Parliament cannot delegate to an administrative body.

A close reading of the provisions of Act 449 would show that the Commission was not empowered to add to its functions. The provisions of article 164 affect the substantive rights of all persons as they restrict free expression and are thus neither incidental to, nor do they arise from the functions specifically entrusted to the Commission by Article 167 of the Constitution and reproduced in section 2 of Act 449. It is for Parliament, if it is so minded, to pass law/s spelling out what matters are reasonably required in the interest of national security, public order (like they did in Act 491), public morality (like Act 76) and for purpose of protecting the reputations, rights and freedoms of others (like sections 207 and 208 of Act 29). Parliament did not and could not have empowered the Commission to criminalize free expression by Act 449. For these reasons the penal provisions in L.I. 2224 were ultra vires the functions of the Commission and thus void. This decision equally applies to regulation 13(5) of L.I. 2224. There are other reasons why regulation 22 cannot stand.

The regulations were made by the 2nd defendant pursuant to section 24 of the National Media Commission Act, 1993 (Act 449). Act 449 is an Act of Parliament and must therefore derive its source from the Constitution. Every existing legislation that has some relationship with the present Act may be resorted to in order to give effect to its provisions. Section 21(7)(a) of the Interpretation Act, 2009 (Act 792) provides that:

Where an enactment confers a power to make statutory instrument that power includes a power to provide (a) a punishment by way of a fine or a term of imprisonment or both or to community service for a contravention of that statutory instrument.

It is clear from this provision that the authority to prescribe criminal sanctions by a body other than Parliament, which is entrusted with power of making laws for the country under article 93 of the Constitution, can only do so by way of a constitutional instrument, which must derive its source from the Constitution or a statutory instrument which derives its strength from an Act of Parliament. Article 167 which sets out the functions of the Commission, states in clause (d) that it may perform the particular function prescribed therein, that is registration of newspapers and other publications, by way of a constitutional instrument. It could thus include criminal sanctions as stated in section 21(7)(a) of Act 792 when it publishes regulations by a constitutional instrument for the registration of newspapers and other publications. It follows that the Commission cannot create criminal offences in respect of its other functions specified under article 167 of the Constitution. The ***'expressio unius est exclusio alterius'*** principle applies since the intent of Article 167, considered in the light of article 162 and the purpose and intent of the provisions on media freedom, was to give the Commission this limited legislative power in respect of its function spelt out in article 167(d) of the Constitution. If it was intended that it should have wide legislative power in respect of all its functions, language similar to the ones in articles 51 (concerning the Electoral Commission) and 157(2) (concerning the Rules of Court Committee) would have been employed. The 'exclusio' could not have been accidental or inadvertent, but deliberate and on purpose in order not to criminalize almost every aspect of the Commission's functions and thereby put the right to free expression in jeopardy. No injustice results from the application of the 'exclusio unius' principle in the instant.

Moreover, the principle applies where, as in the instant situation, a specific remedy or procedure has been fixed by the legislation; the intention being that only that remedy or procedure should apply. Thus in the case of BLACKBURN vs. FLAVELLE (1881) 6 App Cas 628 where an Act provided that in certain circumstances Crown land could be forfeited and was then liable to be sold at auction, it was held that the latter words precluded any other mode of dealing with forfeited land by the Crown. In the case of GRIFFITHS vs. SECRETARY OF STATE FOR THE ENVIRONMENT (1983) 2 AC 51, an Act contained numerous provisions imposing an express obligation on the Secretary of State for the Environment to give notice of planning determinations. It was held, per Lord Bridge at pp 68-69 that "it is impossible to imply a statutory obligation (as opposed to a duty in the course of good administration) to give notice, where no express obligation is imposed."

Parliament therefore could not be said to have side-stepped this clear provision and empower the Commission to perform all its functions by legislative instrument. It is noted that section 24(1)(b) of Act 449 is inconsistent with section 2(1)(f) thereof. Whilst section 2(1)(f) empowers the Commission to act by constitutional instrument, section 24(1)(b) empowers them to act by legislative instrument. A constitutional instrument derives its direct authority from the Constitution itself, whereas the power conferred on the Commission to act by legislative instrument derives its authority from Act 449. See article 295(1) of the Constitution and section 1 of the Act 792. Section 24(1) of Act 449 should be interpreted as not affecting or undermining the provisions of article 167 of the Constitution. Thus section 24(1) of Act 449 should be restricted to other functions of the Commission that are not covered by article 167 clauses (a), (b), (c), and (d), applying the principle of harmonious interpretation. This principle was explained by this court in Case No. J1/29/2015 titled JUSTICE PAUL UTTER DERY vs. TIGER EYE PI and 2 Others, dated 4th February, 2016, unreported, to mean where two constitutional rights come into conflict, such conflict should be resolved in a

manner which least restricts both rights. In this case we are looking at Parliament's power to enhance the Commission's functions under article 167(e) and thereby empower it to perform some task by way of a legislative instrument. We are also considering the limited power of legislation given to the Commission under article 167(d) which does not entitle them to criminalize the functions ascribed to them by article 167(a) (b) and (c) which is a right media operators should enjoy. The principle is equally applicable to situations where two legislations come into conflict and the court finds that the rights created by both legislations can co-exist, without striking down either of them.

The residual power of Parliament under article 298 of the Constitution is exercisable only where no provision is expressly or impliedly made in the Constitution. Thus since article 167(e) permits Parliament to pass legislation to give additional functions to the Commission, it could do so and empower it to act by legislative instrument, as long as they do not stray into its functions specifically conferred by article 167 of the Constitution. Admittedly, the constitutionality of section 24 of Act 449 is not raised directly but it is ancillary to the issues for determination. Even LI 2224 makes specific reference to Act 449. But having invoked the principle of harmonious interpretation, Act 449 can stand, subject to the opinion expressed herein that section 24(1) thereof does not apply to clauses (a), (b), (c) and(d) of article 167 which are reproduced verbatim in Act 449, section 2(1) (a) (b) (c) and (f) respectively.

By virtue of article 164 Parliament may pass appropriate legislation to give effect to the limitations which the Constitution has provided for in respect of the right to free expression; it may also grant the Commission additional functions under article 167(e) and then empower the Commission to enforce the law. The Commission cannot entrust upon itself the power to do anything except it has been given power by the Constitution or an Act of Parliament. Following the use of the expression 'such other functions as may be prescribed by law' in article 167(e), the law envisages an Act of Parliament. It is not the function of the court to question the constitutional

provision giving limited legislative function to the Commission. It is up to the Commission to liaise with Parliament to act and pass the appropriate legislation bearing in mind articles 164, 167(d) and (e) of the Constitution, especially the fact that the Commission has been given very limited legislative power by the Constitution itself which cannot be extended except through an amendment of Article 167(d) to include its other functions.

It is also observed that some of the provisions of regulation 22 have the effect of stifling media freedom, directly or indirectly, without justification. We will draw attention to only regulation 22(3). It reads in relevant part thus:

An operator who fails to comply with a request to submit information or a document to the Commission within a period specified in the request commits an offence ……(emphasis supplied)

Article 19(11) requires that every criminal offence be defined with clarity. The sub-regulation does not define or describe the type of information that the 2nddefendant may require from an operator so as to make failure to disclose it an offence. If one considers the ordinary or legal meaning of the expression 'information' it is very expansive, permitting of every conceivable type of information that the regulator may seek. This is too vague, imprecise or absurd and therefore not permitted by law. It also means the 2nd defendant can even request an operator to disclose his source of information. In principle, a request to a journalist to disclose his source of information was a violation of the right to press freedom. The court may only intervene when there was an overriding requirement in the public interest. The court will have to consider whether on the facts a disclosure of the source was necessary to achieve the legitimate aim, and also whether the achievement of the legitimate aim on the facts was so important that it overrode the public interest in protecting journalistic sources in order to ensure free communication of information to and through the media. See these cases: GOODWIN v. UNITED KINGDOM,

judgment of the ECHR dated 27 March 1996, 1996 reports; ASHWORTH SECURITY HOSPITAL v. MGN LTD. (2001) TLR 28 CA. Thus regulation 22(3) is imprecise as it does not prescribe the type of information which may legitimately be required, and embraces the possibility of asking for disclosure of journalistic source which is illegal unless justified by law. For all the foregoing reasons this regulation should be struck down as unconstitutional.

Now to the third agreed issue. This is brought under articles 162(4) and 167(d) of the Constitution. They provide thus:

162(4)-**Editors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications.**

167(d)-The functions of the National Media Commission are-

To make regulations by constitutional instrument for the registration of newspapers and other publications, except that the regulations shall not provide for the exercise of any direction or control over the professional functions of a person engaged in the production of newspapers or other means of mass communication.

It is necessary to include article 173 in the present discussion, in order to appreciate the full import of these provisions, read together. The said article 173 provides that

Subject to article 167 of this Constitution, the National Media Commission shall not exercise any control or direction over the professional functions of a person engaged in the production of newspapers or other means of communication.

The plaintiffs contend that "any law that requires the operators contemplated under LI 2224 to submit their program guide or content

profile for authorization is a law that seeks to exercise control and direction over operators over their professional functions or that of their agents and so flies in the face of article 173 of the Constitution. This is because the power in the 2nd defendant to vet and approve the program guide and content profile of the operators amounts to nothing but a situation where the operators cannot carry out any other program except the one approved by the 2nd defendant. That amounts to control and direction of the said operator in the discharge of his functions and same must find validity under Article 167 otherwise same must be declared as being inconsistent with the Constitution."

Article 167 of the Constitution sets out the functions of the 2nd defendant as follows:

(a) to promote and ensure the freedom and independence of the media for mass communication or information;
(b) to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media;
(c) to insulate the state-owned media from governmental control;
(d) to make regulations by constitutional instrument for the registration of newspapers and other publications, except that the regulations shall not provide for the exercise of any direction or control over the professional functions of a person engaged in the production of newspapers or other means of mass communication; and
(e) to perform such other functions as may be prescribed by law not inconsistent with this Constitution.

Pursuant to article 166(1) of the Constitution, Parliament passed Act 449. Section 2 of the said Act repeated verbatim the functions of the Commission as set out in article 167 of the Constitution, and to that extent the Act 449 is consistent with the Constitution. Does regulation 3 of LI 2224 seek to or have the effect of seeking to control and direct the affairs

of media operators in question? We need to find the legal meaning of the expression 'direction or control' in the context of articles 167(d) and 173 of the Constitution. Each one of the words 'control' and 'direction' has several meanings and has wide ramifications, such that no one meaning could be attributed to them. Thus their meaning/s could only be expressed in the context in which they are used in order to achieve the purpose and intent of the provision in question. The framers of the Constitution, as earlier mentioned, intended to allow as much media freedom as possible in the country, subject to only such restrictions as were reasonably allowed by the Constitution or by law, not inconsistent with the Constitution. Consequently any form of restriction raises a veritable presumption of illegality in the eyes of the Constitution and therefore where a restriction appears on the face of the law, the proponent will have to give justification for it to stand in the law books.

Control or direction as used in the provision under consideration has the same meaning and effect; and that is to tell the operators what they should or not include in their broadcast or publication. If there is something in the form of a guideline as to content, it is acceptable within the law. But the decision, as to what the content to broadcast or publish shall be, properly belongs to the editors and/or proprietors of a newspaper or other means of mass communication. The proprietors are the ones to control or direct the editorial policy and determine what shall or what shall not be published or broadcast. They do so mindful of article 164 of the Constitution and any guidelines published by the 2nd defendant to give effect to the provisions of the Constitution as well as Act 449. By calling for prior approval of the contents, the 2nd defendant would, in effect, be deciding on what an operator shall or shall not put out into the public domain.

The functions of the 2nd defendant as stated in article 167 of the Constitution do not allow it to direct the affairs of a media operator, indeed it is specifically excluded by article 173 and by article 162(4) if it is coming from the Government. By asking for advanced approval of programme

content, the 2nd defendant will be predetermining the direction that a broadcaster should take. The direction that a media house takes certainly influences its editorial policies. The programmes that a TV station for instance decides to air should be determined by its owners or proprietors. These are not within the functions of the 2nd defendant. Thus any decision by the 2nd defendant that has the effect of taking part in fixing the programme content for any media operator will amount to directing or controlling the affairs of the operator. For these reasons there is a violation of article 173 of the Constitution.

In view of the relative importance of the issues raised herein, a snapshot summary of what has been said will be necessary. It is an undisputed fact that there is no absolute freedom under the Constitution; articles 12(2) and 164 are instances of the limitations that may legitimately be placed on enjoyment of individual and corporate freedom of expression guaranteed under the Constitution. Other restrictions also apply, for instance in matters of contempt of Parliament and the Court. These instances are by no means exhaustive. In respect of restraint of the media, this should be spelt out clearly by law to regulate future conduct, devoid of directing or controlling the programmes, policies and publications of the media. It should be noted that even educational institutions have regulations that curtail free speech, but such rules are clearly spelt out in advance in writing and made known to every student. A classic example of educational rules curtailing free speech may be found in the case of BETHEL SCHOOL DISTRICT v. FRASER, 478 U.S. 675 (1986) where the US Supreme Court upheld a school rule prohibiting "conduct which materially and substantially interferes with the educational process…..including the use of obscene, profane language or gestures." The restraint was specific, precise, in writing and known to the students to guide their future conduct. The fact that restraint on speech even in a school could travel as far as the Supreme Court should tell you how important the right to free expression is. The case of FCC v. PACIFICA FOUNDATION, 438 U.S 726 (1978) was about the use of "obscene, indecent or profane language" on radio

contrary to paragraph 1464 of the Communication Act, 18 U.S.C. The court upheld this law, because it was precise and known to radio broadcasters in advance and most importantly it was justified in terms of the law , so if they allowed their station to be used to utter such language they should suffer the sanction prescribed by law.

Another case of interest is RED LION BROADCASTING CO. v. FCC, 395 U.S. 367 (1969). The Federal Communications Commission (FCC) has responsibility to license radio and television broadcasters. The FCC promulgated what was called the "fairness doctrine", which required broadcasters to provide coverage of each side whenever they covered a controversial issue. Two regulations which were put in place to implement the doctrine were the issues in this case. These regulations provided that:

(1) The 'personal attack rule' which required the broadcaster to furnish a tape or transcript and free response time whenever an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group" was aired; and
(2) The "political editorial rule" which required a broadcaster that endorsed or opposed a candidate for office to furnish a tape or transcript and a reasonable opportunity for response.

The Supreme Court upheld both rules. What should be noted once again is that the regulations, though amounting to restraint on media freedom, were deemed necessary and were clearly set out in writing with clear particulars. These prior restrictions are required to be precise and clearly set out in writing and must be necessary in the eyes of the law. In the event that a dispute arises, if the court is told that the restriction was for instance necessary to preserve public peace and safety, it has to be satisfied that the time and circumstances created conditions which were essential to validity under the Constitution.

In no case that we are of, was the regulator allowed to approve in advance the programme content, policies and direction that a media person desired to take. The terms of award of a license by the National Communication

Authority, for instance, could spell out some restrictions upon being allocated a radio frequency; and so too registration of newspapers and other publications by the Commission under article 167(d) of the Constitution. The 2nd defendant as the overall media regulator could come out with clearly defined guidelines as to content. We have said there is no need for these regulations which have been struck down, since the Commission could have set out clear guidelines with own panel sanctions, if need be, for violation of clearly defined areas of restriction. There is also no legally acceptable justification for these regulations. It is for these reasons that we uphold the plaintiff's claim in large measure.

The court is not entitled to direct the 2nd defendant as to how to regulate the media, but it is advisable to learn some lessons from this decision; after all the real essence of a court's decision, apart from resolving the immediate dispute on hand, is also to guide future conduct of all persons.

In conclusion, the court's decision is that issues 1, 2 and 3 are resolved in favour of the plaintiffs, whilst issue 4 is resolved in favour of the defendants. Consequently, we grant reliefs 1, 2 and 3; subject to striking down sub-regulation (5) of regulation 12, we reject relief 4. Regulations 3, 4, 5, 6, 7, 8, 9, 10, 11,12(5) and 22 of the National Media Commission (Content Standards) Regulations, 2015 (L.I. 2224) are hereby struck down as unconstitutional.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

AKUFFO (MS)JSC

I agree

(SGD) S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

BAFFOE - BONNIE JSC

I agree

(SGD) P. BAFFOE - BONNIE
JUSTICE OF THE SUPREME COURT

AKOTO- BAMFO (MRS) JSC

I agree

(SGD) V. AKOTO – BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

AKAMBA JSC

I agree

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

PWAMANG JSC

I agree

(SGD) G. PWAMANG
JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

DOTSE JSC

I have had the benefit of reading the lucid and detailed opinion of my learned and respected brother Benin JSC, and I agree entirely with the delivery and the conclusions reached in the judgment just read. However, as was stated by him in the lead opinion, this matter touches the heart of our democratic process, I find it expedient and indeed very compelling that since the issues raised herein affect as well the soul and destiny of this country in its democratic sojourn, it is important to add my own views in these few words. This is because I consider the issues germane to this judgment as having the potential of determining the path which this country should tread, whether it should be the dreadful path of censorship and media control as is associated with authoritarian and tyrannical regimes or a liberal media landscape without the vestiges of control saddled with criminal sanctions as unfortunately has been introduced in the impugned legislations by the 2nd Defendants.

Even though my brother Benin JSC has skillfully dismissed the jurisdictional issue to my admiration, I think a note of caution should be sounded to practitioners

and parties before the Supreme Court to be circumspect in the undue reliance on this jurisdictional objections. This is because, as was explained in detail in the lead judgment, there were several genuine reasons why this court's jurisdiction had been raised, but as has become the norm these days the first objection to a Plaintiff's writ is that of jurisdiction.

In this regard, I wish to refer to the unreported decision of the Supreme Court in the case of **Noble Kor v Attorney General and Justice Duose**, Writ No. J1/16/2016 dated 10th March 2016 digested in the 3rd Edition of Manual on Election Adjudication pages 375 to 387 where the court faced with a similar jurisdictional challenge to the writ of the Plaintiff therein stated through Atuguba JSC as follows:-

> *"The Plaintiff had properly invoked the enforcement jurisdiction of the Supreme Court because it could not be said that the Supreme Court could not compel the observance of a constitutional provision unless that provision was ambiguous. Article 2 of the Constitution headed "Enforcement of the Constitution" was an express authority in the Constitution itself for the view that the enforcement jurisdiction of the Supreme Court was a conspicuously independent item of jurisdiction of the court."*

Explaining further, the court per Atuguba JSC stated,

> *"The ratio constitutionis for an action to invoke the enforcement jurisdiction of this court under article 130 is stated in article 2 to be that the event specified in its clauses (1) (a) and (b) "is inconsistent with, or is in contravention of a provision of this Constitution." Therefore a cause of action thereupon accrues for access to the court for enforcement of the Constitution. Indeed, it is difficult to see how the requirement of ambiguity*

can necessarily arise particularly in respect of the provisions of article 2 (1) (b) relating to "any act or omission of any person". Emphasis supplied

In the instant case, if the Plaintiff's writ and the Statement of case in support thereof are duly analysed vis-à-vis the various constitutional provisions, i.e. articles 162 (1), (2), (4), 167 (d) and 173 of the Constitution 1992 and the impugned provisions in the National Media Commission (Content standards) Regulations, 2015 L.I. 2224, Regulations 3 -12 and 22 thereof and the National Media Commission Act, 1993 (Act 449) are duly considered, it will be clearly observed that this court's jurisdiction is in tune with the settled practice and decisions of this court and the **Nobel Kor v A. G. and Anor** case. The Plaintiff's have thus properly invoked this court's jurisdiction.

On the remaining three issues set down by this court and dealt with in extenso by my respected brother Benin JSC, I wish to refer to the often quoted passage of Thomas Jefferson, in his letter to Marquis de Lafayette, 1823, published on page 125 of *The Quotable Founding Fathers*, edited by Buckner F. Melton Jr as follows:-

"The only security of all is in a free press"

That realization was definitely not lost on the drafters of the Constitution 1992 and that explains why the Committee of Experts took pains to guarantee and protect the enjoyment of freedom of speech. There is also no doubt that the history of this country during the first Republic was also not lost on our forebears in the provisions to ensure and guarantee free speech. I believe that, it is that sordid history that guided the Consultative Assembly to include provisions in article 162, clauses 1 to 5 on Freedom and Independence of the media as one of the few provisions of the Constitution 1992 that are considered and labeled as entrenched provisions. These are provisions that can only be amended by the

holding of a referendum among other procedures that have been specified in articles 290 (1) through to 290 (6) of the Constitution.

It must be noted that, all the rights, freedoms, and responsibilities that the Constitution 1992 has bestowed on us as citizens of Ghana, for example the Chapter Five rights on Fundamental Human Rights and Freedoms and Freedom and Independence of the media particularly articles 162 (1) through to (5) in Chapter Twelve of the Constitution can only be guaranteed and protected by the courts who are constitutionally mandated to do so, see article 125 (3) and (5) of the Constitution.

It is indeed a great credit to this court that, in the early years of the 4th Republic, and even before then, several landmark judgments had been delivered which granted citizens, including corporate entities the right and locus standi to question the unconstitutional conduct or legislation without any interest or benefit being accrued to them in the Supreme Court.

This has no doubt expanded the scope and frontiers of the court's jurisdiction. This was a marked departure from the stance of the Supreme Court in the infamous Re Akoto decision in 1961 in which the Supreme Court refused to enforce fundamental human rights provisions in the 1960 1st Republican Constitution.

In this respect, I find the views and opinions of Amua-Sekyi JSC in the celebrated case of ***NPP v IGP*** [1993-94] 2 GLR 459, at 469 to 470 very relevant and edifying from which those who govern as well as the governed and especially the Judiciary must take serious lessons.

Commenting on why he granted the Plaintiff's request in the ***NPP v IGP*** case supra in declaring sections 7,8, 12 (a) and 13 (a) of the Public Order Decree, 1972 NRCD 68 as inconsistent with article 21 (1) (d) of the Constitution 1992 wherein he traced the sordid history of our constitutional past and referred to notable but infamous decisions in the following cases:-

1. ***Lardan v A.G [1957] 3 WALR 114***
2. ***Balogun v Edusei [1957] 3 WALR 547***
3. ***In Re Okine [1959] GLR 1***
4. ***Amponsah v Minsister of Defence [1960] GLR 140 CA***
5. ***In Re Dumoga [1961] GLR 44 and***
6. ***Re Akoto, [1961] GLR 523, SC***

In this respect, the learned Judge urged that the guaranteed rights and freedoms in the Constitution 1992 should be held as sacred and duly enforced. He urged that there should be no return to the bad old days in the following words:-

> *"And when in In re Akoto (supra) the matter finally reached the Supreme Court, Korsah CJ, writing on behalf of himself, van Lare and Akiwumi JJSC said at 535:*
>
> *"We do not accept the view that Parliament is competent to pass a Preventive Detention Act in war time only and not in time of peace. The authority of Parliament to pass laws is derived from the same source, the Constitution, and if by it, Parliament can pass laws to detain persons in war time there is no reason why the same Parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the State in peace time. It is not only in Ghana that Detention Acts have been passed in peace time.*

With this pronouncement all resistance to oppression came to an end. We had rammed down our throats, a constitutional tyranny which those who professed to believe in it called a "one party" state. Dr. Danquah was arrested, detained and died in prison: the Minister for the Interior and the Chief of police who had taken refuge behind an Act of Indemnity to flout the authority of the Courts were arrested and detained; the Minister for Foreign Affairs and two protagonists of the new order were arrested and charged with treason. *Acquitted in proceedings intituled State v Otchere [1963] 2 GLR 463, SC the verdicts were set aside by executive order: see Special Criminal Division Instrument, 1963 (El 161). Put back on trial before a more pliant bench, the executive had the satisfaction of seeing them convicted and sentenced to death.* ***Mercifully, the sentences were not carried out; but a grave precedent had been set.*** *The Judges were not spared: Korsah CJ was removed from office. And a constitutional amendment cleared the way for the dismissal of Adumua-Bossman J (as he then was) and other Judges whose loyalty to the absolutist State was now called in question.*

It was to rescue us from such an abyss of despair that on three successive occasions, in 1969, 1979 and 1992, elaborate provisions on fundamental human rights have been set out in our Constitutions and the courts given clear and unequivocal power to enforce them. The Constitution, 1992 is now the supreme law of the land, and any enactment or executive order inconsistent with it is null and void. Thus, except for the periods of dictatorship when these fundamental human rights were suspended, our courts have since 1969 had power to protect the

people from the abuse of legislative and executive power. Unfortunately, we have had too little experience of true democracy since independence. Like a bird kept in a cage for years, we have come to think of the cage as home rather than a prison. The door has been flung wide open, yet we huddle in a corner and refuse to leave." Emphasis

In my opinion, the citizens have now realized that the doors to the cage have really been widely kept open and have no intention of returning to the cage. The courts have also given tacit recognition to the fact that the freedoms guaranteed in the Constitution 1992 including those on press freedoms in article 162 are meant to be enjoyed and there should be no turning back.

Our only security as a country lies in a free press, and any attempt to muzzle the press and return to the days of old by unconstitutional restraint on this invaluable right must not be allowed to see the light of day.

It is in my resolve to ensure that the freedoms and responsibilities of the media, granted and protected by the article 162 provisions of the Constitution 1992 are not whittled away by the over zealous acts of any constitutional body set up under the Constitution, like the 2nd Defendant. It is for this and the other reasons espoused in the detailed judgment of my learned and respected brother Benin JSC that I agree that the Plaintiff's should succeed in part as has been articulated in the lead judgment.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

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