ARTICLE 19

Tanzania: Stakeholders' Proposal on Media Services Bill

October 2011

Legal analysis

Executive summary

In October 2011, ARTICLE 19 analysed the Tanzanian Stakeholders' Proposals on the Media Services Bill ("the Bill"). The Bill represents the Freedom of Information Campaign Coalition's vision of future media regulation in Tanzania. The Coalition brings together eleven institutional members, which have been jointly advocating for progressive media law reform and have entered a dialogue with the government about its Freedom of Information Bill and Media Services Bill, to which the Bill is a response.

ARTICLEW 19 analysed the Bill in detail for its compliance with international standards on freedom of expression. The overall assessment of ARTICLE 19 of the Bill is positive. If enacted, the Bill would be bringing Tanzania closer with international standards and best practice governing the right of freedom of expression and freedom of the media. In particular, the Bill would provide a basis for combating the pernicious problem of media concentration; assist in the establishment of genuine public service media; put in place a proper framework for the development of a diverse private and community broadcasting landscape; and promote the rights of media workers, including the all-important right to protection of sources.

However, ARTICLEW 19 has two major concerns. First, the Bill envisages a licensing requirement for print media, which runs counter to international standards. Second, we object that the accountability mechanism for media grants excessive powers to a statutory oversight body whose procedures and membership are poorly defined.

In many other areas, provisions of the Bill can be further improved based on ARTICLE 19's recommendations.

In order to bring the Bill in compliance with international standards, ARTICLE 19 recommends the following.

Recommendations on the objectives of the Bill

- The objectives of the Bill should include realisation of the public's right to access a wide range of information and opinions;

Recommendations on media ownership

- The Tanzania Communications Regulatory Authority (TCRA) should be required to draw up advance rules on the maximum level of market share any individual or corporation may achieve. These rules should address both concentration within one type of media and cross-concentration;
- It should be clarified whether the TCRA will have the authority to prevent or break up monopolies or merely to identify them;
- It should be clarified whether the TCRA's powers will apply to existing as well as future unfair shares of the media market;
- In order to be effective, the 30% cap on direct foreign ownership of Tanzanian media must be expanded to cover indirect forms of control;

Recommendations on regulation of public service media

- Public service media (PSM) require a more comprehensive legal framework than currently outlined in the Bill. The Bill should cover such issues as their public service

mandate, funding mechanisms and accountability to the public. In this respect, the Bill should either be substantially elaborated or should delegate elaboration of these issues to separate legislation;
- Persons who hold a position in private media should be ineligible to serve on the board of a PSM;
- Political parties should enjoy equitable, rather than "equal and unqualified" access to PSMs;
- Careful consideration should be given to whether to prohibit PSMs from competing for advertising and broadcasting contracts with private media, as this will cut them off from an important source of non-State funding;

Recommendations on regulation of private media
- The Tanzania Communications Regulatory Authority Act, 2003, should be amended in tandem with the Bill to ensure the TCRA's independence is guaranteed explicitly and through the appointments process, and that it has a mandate to promote and protect freedom of expression;
- There should be no licensing requirement for newspapers. This should be removed from the BILL or transformed into a technical registration requirement without the possibility of refusal;
- The TCRA should be required to issue periodic tenders for specific, high interest licences, in addition to receiving applications on a rolling basis;
- The extent to which a proposed broadcasting service would help fulfil the Broadcasting Frequency Spectrum Plan should be an important criterion in deciding whether to grant a licence;
- The TCRA should be required to seek public comment – whether positive or negative – on any application for a broadcasting licence;
- Clear timelines should be prescribed within which decisions must be made, and the TCRA should be required to give written reasons for all its decisions, including a refusal to grant a licence;
- The fees charged to licence holders should be set out in advance in a schedule published by the TCRA'
- The Broadcasting Frequency Spectrum Plan should be drawn up through an open and participatory process;
- The standard duration of a broadcast licence should be less than 10 years for regional, local and community broadcasters;
- Licence holders should benefit from a presumption of licence renewal at the end of their term, which can be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence conditions;

Recommendations on breaches of licence conditions
- Sanctions for breach of a broadcaster's licence conditions should be applied in a graduated fashion, with a warning or order to come into compliance defined as the initial response and more serious sanctions such as fines reserved for cases of repeated non-compliance;
- Consideration should be given to adding the possibility of suspension of a licence in cases of repeated and gross violations of licence terms;

Recommendations on the right of reply

- The Bill should differentiate between a correction or rectification to be broadcast by the broadcaster concerned, and a full 'counter-version'. A 'counter-version' should be available only when a simple rectification would not suffice to repair the harm done by the broadcast of the false assertion or statement;
- Only a person whose rights have been directly affected by the broadcast of a false statement should be able to demand a 'counter-version';
- The Bill should require that a 'counter-version' may not introduce new issues or comment on correct facts;

Recommendations on accreditation of media workers

- Issuing an accreditation card to a person not employed as a media worker should not be subject to a prison sentence;

Recommendations on offences against and by media workers

- The penalties prescribed for the offences in the BIll should be reviewed to ensure they are proportionate;
- The offence of wilfully publishing false or manipulated information in the Bill should be removed;
- Rather than establishing the new defences to criminal charges against media workers proposed in the Bill, the underlying criminal offences should be reviewed and as necessary amended to ensure they are compatible with the right to freedom of expression;

Recommendations on the protection of sources

- The definition of 'journalist' should be amended to ensure that the right to protection of sources may not only be invoked by 'media professionals', but by any social communicator professionally engaged in gathering and disseminating information to the public;

Recommendations on accountability of media outlets

- The Arbitral Committee's role should be limited to hearing complaints on the basis of the code of ethics for media, and issuing non-binding opinions on whether a violation has occurred;
- The appointments process, selection criteria and rules of procedure of the Arbitral Committee should be elaborated.

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About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression, with the aim of supporting positive law reform efforts worldwide. Our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

Introduction

This document provides ARTICLE 19's analysis of the Tanzanian Stakeholders' Proposals on the Media Services Bill (hereinafter 'the Bill')[1] against international standards on freedom of expression. ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. The present analysis builds upon ARTICLE 19's previous analyses of Tanzanian draft and adopted legislation in the area of freedom of expression and the media. These have included commentaries on the Information and Broadcasting Policy 2003[2] and the Media Services Bill 2007.[3]

The Bill represents the Freedom of Information Campaign Coalition's vision of future media regulation in Tanzania. The Coalition brings together eleven institutional members, which have been jointly advocating for progressive media law reform and have entered a dialogue with the government about its Freedom of Information Bill and Media Services Bill, to which the Bill is a response.

Overall, ARTICLE 19 believes enactment of the Bill would represent a major step in aligning Tanzania closer with international standards and best practice governing the right of freedom of expression and freedom of the media. It would provide a basis for combating the pernicious problem of media concentration; assist in the establishment of genuine public service media; put in place a proper framework for the development of a diverse private and community broadcasting landscape; and promote the rights of media workers, including the all-important right to protection of sources.

On two subjects, we have significant concerns: the Bill envisages a licensing requirement for print media, which runs counter to international standards; and the accountability mechanism for media grants excessive powers to a statutory oversight body whose procedures and membership are poorly defined. In many other areas, details remain to be ironed out. We have attempted to contribute to this process by adding practical recommendations at the end of each section.

[1] The text of the Tanzanian Stakeholders' Proposals on the Media Services Bill is available on request from ARTICLE 19.

[2] ARTICLE 19, Note on the United Republic of Tanzania Information and Broadcasting Policy, February 2004. Available at http://www.article19.org/pdfs/analysis/tanzania-information-and-broadcasting-policy-f.pdf.

[3] ARTICLE 19, Memorandum on the Tanzanian Media Services Bill 2007, March 2007. Available at http://www.article19.org/pdfs/analysis/tanzania-media-services-bill.pdf.

Analysis of the Bill

The Tanzanian Stakeholders' Proposals on the Media Services Bill consists of four parts. The first part sets out the Bill's objectives and a definition of certain terms used, while the remaining parts cover three broad subjects: the establishment of media outlets (Part II), the regulation of media workers (Part III), and the accountability of media outlets (Part IV). The analysis below will broadly follow the same order.

Objectives of the Bill

Overview of provisions
Section 3 identifies 8 objectives of the Bill. These include promoting the establishment of media in Tanzania; protecting the rights of journalists and media subjects (*i.e.* outlets); regulating media ownership and operation; promoting the profession of journalism; and protecting journalists' confidential sources of information.

Analysis of provisions
The objectives set in Section 3 are proper goals for media regulation. Notably absent, however, is a mention of the public's right to receive information. Media freedom is not so much a goal in itself as a precondition for realising every person's right to receive diverse information and opinions on matters of local, national and international interest. A well-informed citizenry is in turn a precondition for a functioning democracy.

Further, it could be argued that the reference to protection of sources is superfluous since this already comes under the broader heading of protecting journalists' rights. Of course, there is no harm in expressly reaffirming this core right.

Recommendations:

- Realising the public's right to access a wide range of information and opinions should be amongst the Bill's objectives stated in Section 3 of the Bill.

Establishment and regulation of media outlets

a) Media ownership

Overview of provisions
Section 5 of the Bill establishes the principle that there shall be "freedom to establish media institutions and outlets in Tanzania", but this is subject to two exceptions: first, no one may own an unfair share of the national market, as determined by Tanzania Communications Regulatory Authority (TCRA) with the participation of media stakeholders; and second, foreign citizens will be limited to a share of 30% in any Tanzanian media outlet. This limitation does not apply to citizens of the East African Community (EAC) countries, who may own media on an equal footing with Tanzanian nationals, subject to conditions set out in the EAC's Common Market Protocol.

Analysis of provisions

Overall we regard Section 5 as a positive provision. The two exceptions to the general right to establish media outlets are legitimate and indeed may be necessary.

The Declaration of Principles on Freedom of Expression in Africa states, with regard to concentration of ownership:

> States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.[4]

As the *Declaration* indicates, there is a balance to be struck between pluralism on the one hand and economies of scale on the other. Excessive media concentration may lead to a lack of diversity in media content and puts unhealthy levels of power into the hands of media owners. But a highly fragmented media sector is also a problem, as producing quality content requires investments which small companies are less able to make.

The Bill takes a sensible approach by refraining from setting down specific rules on media concentration and instead charging the TCRA with studying and addressing the problem, in consultation with the sector itself. We do recommend, however, that the TCRA should be expressly required to draw up advance rules on the maximum level of market share any individual or corporation may achieve. The current wording is vague and leaves open the possibility of ad hoc decision-making. It may also be a good idea to expressly require the TCRA to regulate both concentration within one type of media and cross-ownership.

It is unclear from the proposed wording whether the TCRA would actually have the authority to prevent or break up monopolies, or merely to determine what constitutes an unfair market share. It is also unclear whether the TCRA's powers would operate only prospectively, or whether it could tackle monopolies existing at the time of the law's entry into force. Concentration of ownership is already acknowledged by many to be a problem in the Tanzanian media sector. These issues need to be clarified; ARTICLE 19 would clearly advocate strong controls on concentration, and legislation which enables existing unfair shares to be trimmed down in an equitable manner.

It goes without saying that a body which has the power to set limits on control of the media and break up (or recommend the breaking up of) monopolies should be scrupulously independent from both government and the media sector, and should serve only the interests of the public. In this regard we have some concerns about the TCRA, which we will return to below.

Turning to the issue of foreign investment, the Bill as described above sets a 30% cap on ownership of Tanzanian media by non-nationals (with an exception for nationals of EAC countries). Such limitations are quite common in democracies and generally considered legitimate, as a way to ensure the development of national media and the relevance of media content to the national market. An example of a similar rule can be found in South Africa, where "foreign persons" are barred, directly or indirectly, from exercising control over a private

[4] Adopted by the African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia. See Principle XIV(3).

broadcaster, from owning more than 20% of the financial or voting interests in a licensee or from holding more than 20% of the directorships.[5] The South African government has considered raising this level to 25% or 30% to encourage more foreign investment, suggesting that 30% is a reasonable level.

Restrictions on foreign ownership often apply only to broadcast media, although the experience of some countries shows that the press may also become subject to extensive foreign takeovers. We believe applying the same 30% rule to print media can be justified.
Our main comment, however, is that the cap will prove ineffective as currently drafted, as it does not prevent foreign nationals from attaining a greater level of control in another way, for example by obtaining more than 30% of the voting interests or by investing in a Tanzanian media outlet indirectly, through a Tanzanian shell corporation.

Recommendations:

- The TCRA should be required to draw up advance rules on the maximum level of market share any individual or corporation may achieve. These rules should address both concentration within one type of media and cross-concentration.
- It should be clarified whether the TCRA will have the authority to prevent or break up monopolies or merely to identify them.
- It should be clarified whether the TCRA's powers will apply to existing as well as future unfair shares of the media market.
- In order to be effective, the 30% cap on direct foreign ownership of Tanzanian media must be expanded to cover indirect forms of control.

b) Public service media

Overview of provisions
Section 6 of the Bill deals with the establishment of public service media (PSM). PSMs "shall be owned by the public through independent governing boards accountable to parliament."

Appointments to the board of a PSM will be made by the Appointment Committee established under Section 24 of the Right to Information Act 2008. In order to be eligible for appointment, a person must be a Tanzanian citizen over the age of 18. Certain persons are disqualified, including those with a significant financial interest in the media sector and those with a criminal record for certain serious offences. Persons who work for a political party or in the civil service, or who hold elected office, are likewise ineligible, but may nevertheless be appointed if they resign from that position within 90 days.

The board of each PSM elects its own chairperson and hires a secretariat to perform its day-to-day business. PSMs are required to be independent and non-partisan, and "all registered political parties shall have equal and unqualified access". PSMs are not permitted to compete with private media in advertisement and broadcasting contracts.

Analysis of provisions

[5] Independent Broadcasting Authority Act, No. 153 of 1993, s. 48.

As far as they go, the Bill's provisions on public service media are broadly positive. They provide a suitable general framework for ensuring the independence – from political interests and business – of PSMs. However, we note that Section 39(2)(a) of the Bill proposes to do away with the Broadcasting Services Act, No. 6 of 1993, suggesting that the Bill is intended not just to provide a framework, but to comprehensively regulate PSMs. Without a doubt, the Broadcasting Services Act is an outdated and inadequate piece of legislation, but replacing it would require more than what is presently contained in Section 6.

Most countries choose to regulate their public service broadcaster (and public service press, if any) through separate legislation. Such dedicated legislation would normally cover several issues which are not addressed in Section 6, such as the public service broadcaster's mandate, a viable funding mechanism which insulates it from political interference, and a mechanism to hold it accountable to the public. Of course, there is no reason in principle why these subjects could not be addressed within the Bill, although delegation to a secondary piece of legislation may be more practical. ARTICLE 19 has published a Model Public Service Broadcasting Law,[6] which could provide guidance in the drafting of more elaborate provisions or a separate act.

Turning to the specifics of Section 6, we welcome the 'rules of incompatibility' set out for members of the board of PSMs. A minor comment is that persons employed in private media are not disbarred from serving on PSM boards, even though this could give rise to a conflict of interest.

We also welcome the explicit affirmation that PSMs will be open to all political parties. Some thought should be given to the exact expression of this principle, because a guarantee of "equal and unqualified access" might lead to claims by marginal or obscure parties that they should receive the same amount of airtime as mainstream parties. The objective should be to cover the activities of different political parties equitably, rather than equally – though without institutionalising the natural advantage of the largest parties.

Finally, the scope of the prohibition on PSMs competing for advertising and broadcasting contracts with private media is not clear. This appears to suggest that public service media would be effectively barred from carrying any paid-for advertising – an impression which is further strengthened by Section 7(3), which states that public companies are prohibited from awarding advertisements to PSMs.

A rule like this requires close consideration, as it cuts off a potentially significant source of funding for PSMs, meaning their budgets will either be lower or they will need greater support from the public purse, with the attendant dangers of greater political control. On the other hand, it may strengthen PSMs' independence from business, and will leave more room for private media to generate income from ads.

Recommendations:

- Public service media (PSM) require a more comprehensive legal framework, covering such issues as their public service mandate, funding mechanisms and accountability to

[6] London, June 2005. Available online at http://www.article19.org/pdfs/standards/modelpsblaw.pdf.

the public. Section 6 of the Bill should either be substantially elaborated or should delegate elaboration of these issues to separate legislation.
- Persons who hold a position in private media should be ineligible to serve on the board of a PSM.
- Political parties should enjoy equitable, rather than "equal and unqualified" access to PSMs.
- Careful consideration should be given to whether to prohibit PSMs from competing for advertising and broadcasting contracts with private media, as this will cut them off from an important source of non-State funding.

c) Private media

Overview of provisions

Sections 9 – 13 of the Bill establish a licensing regime applicable to private broadcasters and, to a lesser extent, to privately-owned newspapers, though apparently not to other types of press publications such as magazines.

Licence may be issued to three categories of applicants: Tanzanian citizens, Tanzanian companies whose shares are in majority beneficially owned by Tanzanians; and citizens of EAC Member States (s. 10(1)). Applications for a licence must be made to the TCRA and, along with a fee, must contain certain particulars such as a proposed programme schedule in the case of a broadcaster, and information on trained journalists, equipment and capital in the case of a newspaper. The TCRA may request broadcasters to provide further information it deems necessary for a "technically viable and socially acceptable broadcasting service" (s. 10(2)).

In deciding whether to grant the licence, the TCRA must consider a range of criteria, including the applicant's expertise, experience and financial plan; compliance with technical standards; diversity of programming and the optimal utilisation of the broadcasting spectrum; the applicant's intention to train local staff; and whether "the conditions of broadcasting licence shall unjustly benefit one holder of a broadcasting licence above another". The TCRA may exempt community media from any of these conditions (s. 10(3)).

Applications for a licence are published in the mass media and interested parties are invited to oppose the grant of a licence (s. 10(4) and (5)). If the TCRA is satisfied that the applicant meets the requirements, it issues a licence and publishes its decision in the Government Gazette and a newspaper. In addition to the payment of a fee, the TCRA may impose technical licence conditions related to the frequency to be used, the location of transmitter stations, the prevention of interference and so on. Licence conditions may subsequently be varied for a number of reasons, though not without granting the licence holder the right to make written representations. Decisions of TCRA to grant or refuse licences are subject to legal review before the High Court of Tanzania (s. 11).

The TCRA is charged with developing a Broadcasting Frequency Spectrum Plan, "in order to promote the optimal use of frequencies and the widest possible broadcasting diversity". The plan must ensure that the available frequencies are shared equitably and in the public interest among the three tiers of broadcasters – public, commercial and community, and may reserve certain frequencies for future use in order to ensure diversity and equitable access to

frequencies over time. The Plan and any revisions to it must be widely published and disseminated (s. 12).

The duration of licences shall be set by the TCRA, but shall be at least ten years for electronic media and twenty years for print media. Licences may be renewed upon request (s. 13).

Analysis of provisions

Although ARTICLE 19 broadly welcomes the proposed licensing regime for broadcasters, we are concerned at the licensing requirement for newspapers. We also believe that if a new licensing procedure is to be set up, the independence of the Tanzania Communications Regulatory Authority should be increased concurrently.

The TCRA is the pivotal body in the communications field in Tanzania, and it is essential that it is protected from undue interference by the government or any other political or commercial interests – particularly if its powers will be expanded to enable it to combat undue concentration in the media sector, as proposed by the Bill. While the TCRA Act, 2003 provides some safeguards to protect the Authority's independence, we believe that these can be improved upon.

We would suggest that, at a minimum, the following amendments are made to the 2003 Act:

- the insertion of a separate and explicit clause to protect the independence of the Authority, its staff and the members of its Board and Content Committee;
- the imposition of an explicit duty on the Authority to promote and protect freedom of expression and the free flow of information; and
- improving public participation in the appointment procedure for members of the Board and Content Committee, and drastically reducing the role played in the appointments process by the Minister and senior public officials.

Turning to the licensing regime, the requirement for owners, printers and distributors of newspapers to obtain a licence is unjustified and contrary to international standards.

A licensing requirement is in principle difficult to reconcile with the notion that everyone enjoys the right to freedom of expression through any media, as Article 19 of the Universal Declaration of Human Rights declares. In the case of the broadcast media, it is a necessary evil, as the broadcasting spectrum is a limited resource and a system is required to apportion the available frequencies in a way that best serves the public interest. There are no technological constraints on the number of newspapers that can exist concurrently, however, and which publications are worthy of a readership is a matter to be determined by the free market, rather than a public body. With the exception of purely technical registration requirements – which do not allow registration to be refused – most democracies treat the print media like any other business.

The special mechanisms on freedom of expression of the UN, OSCE and OAS issued a Joint Statement in 2003 in which they condemned licensing requirements for the media:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are

> overseen by bodies which are not independent of government are particularly problematical.[7]

We recommend removing the licensing requirement for newspapers or converting it to a simple requirement to notify the TCRA of the establishment of a new newspaper, along with any relevant information such as compliance with limits on shareholding by foreign nationals.

The licensing procedure for broadcasters, by contrast, is well-designed and overall complies with international best practice. We do believe it can be further improved in a number of respects.

In addition to the provision that an application for a licence may be made at any time, we would suggest that from time to time, the Authority should also issue a tender for specific licences, especially those for which there is likely to be competition.

The criteria for considering applications are broadly sensible, but an important criterion should be the extent to which the proposed broadcasting service would help fulfil the Broadcasting Frequency Spectrum Plan. We are a bit puzzled, moreover, that the TCRA must take into consideration whether "the conditions of broadcasting licence shall unjustly benefit one holder of a broadcasting licence above another" (s. 10(3)(c)). We are not sure what this means, but in any case the conditions of a broadcast licence should only come into play after the decision to grant one.

Rather than inviting interested persons to oppose a licence application, the TCRA should more generally seek public comment, whether positive or negative, on the applicant's proposal. Clear timelines should be prescribed within which decisions must be made, and the TCRA should be required to give written reasons for all its decisions, including a refusal to grant a licence. The fees charged to licence holders should be set out in advance in a schedule published by the TCRA.

It is positive that the Broadcasting Frequency Spectrum Plan and any changes to it will be widely publicised, but what is equally important is that the TCRA consults widely with the public in order to understand what kind of broadcasting landscape Tanzanians would like to see.

Finally, we believe 10 years is rather a long minimum term for the duration of a broadcasting licence. Although a longer licence term has the advantage of encouraging the broadcaster to make the necessary investments in a quality service, it may also foster complacency. We believe 10 years may be appropriate for a national-level broadcaster but shorter terms should be considered for regional and local stations, in particular community broadcasters. On the other hand, licence holders could benefit from a presumption of licence renewal at the end of their term, which could be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence conditions.

Recommendations:

[7] Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 18 December 2003, available online at http://www.cidh.org/relatoria/showarticle.asp?artID=88&lID=1.

- The Tanzania Communications Regulatory Authority Act, 2003, should be amended in tandem with the Bill to ensure the TCRA's independence is guaranteed explicitly and through the appointments process, and that it has a mandate to promote and protect freedom of expression.
- There should be no licensing requirement for newspapers. This should be removed from the Bill or transformed into a technical registration requirement without the possibility of refusal.
- The TCRA should be required to issue periodic tenders for specific, high interest licences, in addition to receiving applications on a rolling basis.
- The extent to which a proposed broadcasting service would help fulfil the Broadcasting Frequency Spectrum Plan should be an important criterion in deciding whether to grant a licence.
- The TCRA should be required to seek public comment – whether positive or negative – on any application for a broadcasting licence.
- Clear timelines should be prescribed within which decisions must be made, and the TCRA should be required to give written reasons for all its decisions, including a refusal to grant a licence.
- The fees charged to licence holders should be set out in advance in a schedule published by the TCRA.
- The Broadcasting Frequency Spectrum Plan should be drawn up through an open and participatory process.
- The standard duration of a broadcast licence should be less than 10 years for regional, local and community broadcasters.
- Licence holders should benefit from a presumption of licence renewal at the end of their term, which can be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence conditions.

d) Breach of licence conditions

Overview of provisions

In addition to its licensing powers, Section 20 of the Bill puts the TCRA in charge of supervising compliance by licence holders with the terms of their licence.

Where the TCRA identifies a suspected breach as a result of its own monitoring or a complaint from a member of the public, it must request the licence holder to make written representations on the matter (s. 20(2)). If the TCRA considers, after studying the response, that there has been a material breach, it may issue a warning, an order to come into compliance within 30 days, an order to publish the findings of the TCRA, or it may impose a fine of up to one million Tanzanian shillings, or up to 50 million for a repeated breach (s. 20(3)). The TCRA's decision is subject to judicial review before the High Court of Tanzania (s. 20(5)).

Analysis of provisions

For the most part, Section 20 of the Bill is in line with international standards. It is positive that the emphasis is more on encouraging compliance by broadcasters through 'soft' sanctions such as a warning than aggressively policing the sector.

This provision could be further improved by introducing the idea of graduation and proportionality. While the penalties the TCRA may impose are technically listed in order of

least to most severe, the provision fails to state the order in which penalties should be enforced. Hence, the TCRA apparently enjoys discretion to choose any of the listed punishments, with the exception of the high fines, which require a 'repeat offence'. A warning or order to come into compliance should be defined as the normal initial response, with fines and orders to publish findings coming into play cases of repeated non-compliance. Consideration might also be given to adding the possibility of suspension of a licence in cases of repeated and gross violations of the terms.

Recommendations:

- Sanctions for breach of a broadcaster's licence conditions should be applied in a graduated fashion, with a warning or order to come into compliance defined as the initial response and more serious sanctions such as fines reserved for cases of repeated non-compliance.
- Consideration should be given to adding the possibility of suspension of a licence in cases of repeated and gross violations of licence terms.

e) Duty to broadcast a counter-version

Overview of provisions

Section 21 of the Bill entitles persons 'affected' by a broadcast to demand that the licence holder broadcast a 'counter-version' establishing the falsehood of an alleged fact previously broadcast by that channel.

The counter-version must be broadcast uninterrupted and for free within fourteen days of its receipt. It should be carried in the same programme where the contested statement was made, and at the same time or at least in a timeslot of equal value (s. 21(5)).

The counter-version must meet certain requirements, such as being limited to a factual account and not containing any legally problematic material (s. 21(2)). The broadcaster may moreover refuse to carry it if the person or organisation submitting it lacks a direct interest, the piece is unreasonably long or it contains false statements (s. 21(3)).

Analysis of provisions

The effect of Section 21 of the Bill is to create a legally binding right of reply applicable to broadcasters. Under international law, the right of reply is a controversial issue and a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights have been harmed by the publication or broadcasting of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.

Because of its intrusive nature, in the United States a mandatory right to reply with regard to the print media has been struck down as an unconstitutional interference with the First Amendment right to free speech. In *Miami Herald Publishing Co. v Tornillo*, the Supreme Court held:

> [A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a

> newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[8]

On the other hand, the American Convention on Human Rights, covering the entire continent, requires States to introduce a right of reply[9] and in Europe, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe,[10] while many countries guarantee some form of a right of reply in law.

A right of reply is quite different from a right of correction or refutation, which are normally limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material. A right of reply, on the other hand, requires the publication or broadcaster to grant space to an individual whose rights have been harmed by a statement based on erroneous facts, to 'set the record straight'. As such, it is a more intrusive interference with editorial freedom than the right to correction.

ARTICLE 19, together with other advocates of media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:

- A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.
- A reply should not be available where a correction or refutation suffices.
- A reply should receive similar, but not necessarily identical prominence to the original article.
- The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
- The media should not be required to carry a reply which is abusive or illegal.
- A reply should not be used to introduce new issues or to comment on correct facts.

Set against these standards, we have some concerns about the proposed right to reply scheme. First, any person or organisation which has merely been "affected by" and which has a "direct interest" in rectifying a false assertion or statement may demand that a counter-version is broadcast. We do not believe this can be justified; only persons whose rights have been affected by a false statement should be provided with a remedy.

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[8] 418 U.S. 241 (1974), p. 258.

[9] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, Article 14. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).

[10] Resolution (74) 26 on the Right of reply – position of the individual in relation to the press, adopted on 2 July 1974.

Second, the Bill does not differentiate between a rectification to be offered by the broadcaster concerned, and a full "counter-version" (which we take to mean a form of access to airtime). In many cases, a simple rectification will suffice to repair harm done by the broadcast of the false statement and this should be recognised in the Bill.

Third, the Bill does not require that the "counter-version" to refrain from introducing new issues or commenting on correct facts.

Recommendations:

- The Bill should differentiate between a correction or rectification to be broadcast by the broadcaster concerned, and a full 'counter-version'. A 'counter-version' should be available only when a simple rectification would not suffice to repair the harm done by the broadcast of the false assertion or statement.
- Only a person whose rights have been directly affected by the broadcast of a false statement should be able to demand a 'counter-version'
- The Bill should require that a 'counter-version' may not introduce new issues or comment on correct facts.

Regulation of media workers

a) Accreditation of media workers

Overview of provisions

Section 22 of the Bill requires media outlets to maintain a register of all persons employed by them as media workers. A copy of this register must be submitted to the Council for Media Education, and all persons on the register may be issued with a professional accreditation card by their employer on behalf of the Council. Media professionals not employed by an outlet can obtain accreditation directly from the Council (s. 21(1)).

A person who issues a card to someone who is not a media worker – that is, a reporter, a photographer, a broadcaster, a journalist, an editor, a managing editor or a director of a programme – is liable to a fine or imprisonment of up to two years (s. 22(4)).

Analysis of provisions

The purpose of the Bill's provisions on accreditation of journalists is not immediately clear to us. The Bill does not seem to identify any special benefit flowing from the possession of an accreditation card (nor does it impose any disadvantage on media professionals who do not own such a card).

It is however very positive that, unlike the government's Media Services Bill, 2007, the Bill does not seek to impose any licensing requirement on journalists by making the issuance of an accreditation card a precondition for the practice of journalism. It is well-established in international law that the profession of journalism should be open to any person without excessive formalities, as expressed for example in Principle X(2) of the Declaration of Principles on Freedom of Expression in Africa:

> 2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[11]

In established democracies, journalists carry a press pass in order to gain preferential access to the public gallery in public bodies when there are constraints on seating, to identify themselves as neutral fact-finders in tense situations such as riots, to gain access to areas cordoned off by police, and so on. These would be legitimate reasons for issuing the accreditation cards envisaged by the Bill.

We do believe the possibility of a two-year prison sentence being imposed on a person wrongly issuing a card to a non-media worker is rather draconian, particularly since journalism is not a protected profession and any citizen could choose to take up a career in the field without any prior formalities.

Recommendations:

- Issuing an accreditation card to a person not employed as a media worker should not be subject to a prison sentence.

b) Offences against and by media workers

Overview of provisions

The Bill defines a number of criminal offences that may be committed by or against media workers. Furthermore, under certain circumstances it also seeks to exempt media workers from criminal liability for a number of crimes set out in other laws.

The new offences against media workers are found in Section 25 of the Bill. They include threatening, physically attacking or poisoning a media practitioner in relation to his or her work; abducting or wilfully intimidating a media practitioner; and wilfully causing damage to the tools of work and/or communications facilities of a media practitioner or outlet. Maximum penalties range from one to 16 years.

Section 31of the Bill defines two offences which media practitioners may commit against the public. A journalist who uses the threat of publishing or broadcasting certain information as a means to blackmail or extort a person faces a two-year prison sentence, or a fine not exceeding two million shillings. The same penalty awaits a person who wilfully publishes "false or manipulated information through any media".

Section 37 of the Bill introduces five new defences which a media worker may invoke against charges brought under various other laws, such as abusive language, solicitation, treason, trespass and terrorism. A journalist charged with one of these offences would, for example, escape criminal liability if he could demonstrate that the act was done in the exercise of a constitutional or human right, or that it constituted the truth, fair comment or an opinion.

Analysis of provisions

[11] See note 4.

Specific penal provisions which seek to prevent harassment or violence against media workers are quite rare internationally. This is perhaps surprising, as journalists in many countries face special dangers as a result of their work. The offences set out in the Bill seem fairly justified and appropriate to us, although some of the penalties are excessive. Causing wilful damage to a media outlet or practitioner's tools or facilities, for example, is subject to a minimum fine of 1 million shillings or a minimum sentence of one year's imprisonment. While such penalties might be justified in severe cases, it would be over the top to jail a youngster who caused some minor damage out of boredom for a whole year, or impose a heavy fine.

We suspect the proposed offence of soliciting money in exchange for forgoing the publication of embarrassing information responds to a concrete problem in the Tanzanian media sector. In all likelihood this provision duplicates an existing general prohibition on extortion or blackmail, in which case it is not necessary, although the desire to make a clear statement against such behaviour is understandable.

The prohibition on wilfully publishing false or manipulated information through any media, however, is cause for serious concern. We assume it has been included with the best of intentions, but this offence is very open-ended and vague and therefore wide open to abuse. So-called 'false news laws' are a favourite tool of authoritarian regimes to lock up their critics. Ultimately, what constitutes 'truthful' or 'reliable' information is subjective and, as US Supreme Court Justice Oliver Wendell Holmes Jr. famously wrote, "the best test of truth is the power of the thought to get itself accepted in the competition of the market".[12] Unfortunately, the marketplace does produce some media content of dubious quality, but empowering prosecutors to go after authors and publishers of stories they consider false is bound to have serious knock-on effects on quality journalism.

Finally, although we support the thought underlying the new defences proposed in Section 37, we are concerned that the end result is a rather bewildering and inconsistent tangle of provisions. To give just one example, pursuant to Section 37(1)(f), quoting a statement of another is a defence – not against use of abusive language, but also against charges such as trespass and terrorism. This plainly makes little sense. It would be better to directly amend the criminal offences in other acts that improperly restrict media freedom and perhaps to promote training for judges, so that they apply the constitutional and international guarantee of freedom of expression correctly in criminal and other cases.

Recommendations:

- The penalties prescribed for the offences set out in Section 25 should be reviewed to ensure they are proportionate.
- The offence of wilfully publishing false or manipulated information in Section 31(2) should be removed.
- Rather than establishing the new defences to criminal charges against media workers proposed in Section 37, the underlying criminal offences should be reviewed and as necessary amended to ensure they are compatible with the right to freedom of expression.

[12] Dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919).

c) Protection of sources

Overview of provisions

Sections 35 and 36 of the Bill deal with the issue of protection of journalists' confidential sources.

The basic principle established in Section 35 of the Bill is that no journalist can be compelled to disclose the source for a story, or to disclose other information that would enable the source to be identified. This protection applies not only to the author, but also to others involved in "gathering, procuring, compiling, editing, or publishing" the story, and it overrides any contrary provisions in other legislation.

It is only journalists who may invoke the right. The Bill defines a journalist as "a media professional who collects and processes information from first hand sources for purposes of dissemination to the public through media", while 'media professional' is defined as "a skilled person who is qualified in media sciences and or media studies".

Section 36(1) of the Bill envisages three conditions under which the High Court may lift the privilege, namely that a) the information is necessary for the investigation, prosecution or defence of a serious criminal offence punishable by life imprisonment or death; b) the information is necessary for protection of life; and c) that the interest in disclosure of the source outweighs the interest in non-disclosure. We assume that conditions a) and b) are meant to be alternative while c) is intended to be cumulative.

A disclosure order may not be made if the information can be obtained from alternative sources (s. 36(2)), and must be limited to what is necessary to serve the interest for whose protection disclosure is ordered (s. 36(3)). Information obtained under a disclosure order may be used only for the purposes indicated in that order (s. 36(4)).

Analysis of provisions

The protection of journalists' confidential sources of information is an important aspect of media freedom. Journalists rely on sources to uncover interesting stories and provide important information to the public. In some cases, a source will only agree to provide the information on condition that the journalist preserves his or her anonymity. This will be the case particularly when the information is controversial, secret or exposes wrongdoing by powerful persons and bodies. The stories of greatest public interest often emanate from anonymous sources. Clearly, the willingness of sources to speak depends on the confidence they can have that their anonymity will indeed be protected.

For these reasons, there exists an important public interest in offering journalists an extensive safeguard that they will not be legally compelled to disclose their sources. Although journalists are the immediate beneficiaries, it should be remembered that the underlying purpose of the safeguard is not to so much to protect journalists, but to protect the public's right to receive information of general interest.

The right to protection of sources is well-recognised in international law. In a seminal case, *Goodwin v. the United Kingdom*,[13] the European Court of Human Rights ruled that an order to

[13] *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

force a journalist to reveal his source for a news story may violate the right to freedom of expression. The Court held, specifically:

> Protection of journalistic sources is one of the basic conditions for press freedom ...Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention [protecting the right to freedom of expression] unless it is justified by an overriding requirement in the public interest.[14]

The Declaration of Principles on Freedom of Expression in Africa[15] similarly acknowledges the importance of protecting journalists' confidential sources of information, and states, in Principle XV:

> Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
>
> - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> - the information or similar information leading to the same result cannot be obtained elsewhere;
> - the public interest in disclosure outweighs the harm to freedom of expression; and
> - disclosure has been ordered by a court, after a full hearing.

Sections 35 and 36 of the Bill are very well drafted and would bring Tanzanian law in line with best international practice in this field. We warmly welcome the proposal.

Our sole concern relates to the definition of who is a 'journalist' for the purposes of the privilege. Our position is that any person professionally engaged in the gathering or processing of information with a view to disseminating it to the public should be able to invoke the right – in most cases this will be a journalist, but it could also for example be an academic researcher or civil society campaigner. As discussed above, the purpose of the privilege is not really to protect journalists, but to protect the public's right to information by ensuring that sources can safely entrust information to someone who will convey it to the public – whether it be a journalist or another social communicator.

The Bill's definition of who is a 'journalist' at first blush looks very wide – indeed so wide that it could cover academics and campaigners. The problem is that it refers to the term 'media professional' which is defined as a person with an academic background in the media field, meaning that even many people who consider themselves journalists might not be able to invoke the privilege. We suggest to remove the connection between these two terms.

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[14] *Id.*, para. 39.

[15] See note 4.

Recommendations:

- The definition of 'journalist' should be amended to ensure that the right to protection of sources may not only be invoked by 'media professionals', but by any social communicator professionally engaged in gathering and disseminating information to the public.

Accountability of media outlets

Overview of provisions

Part IV of the Bill addresses the issue of accountability of the media, and envisages the establishment of a binding arbitration process through which persons aggrieved by publications or broadcasts can obtain a remedy. This is to be accomplished by mandating the independent, voluntary Media Council of Tanzania (MCT) to establish a statutory Arbitration Committee to hear and decide on complaints.

Section 33 of the Bill states that the MCT should appoint members of the public to a list of arbitrators, from which arbitration panels shall be formed. Each panel must consist of a lawyer, a media practitioner and a member of the general public (s. 33(3)). Funding for the arbitral proceedings may be derived from various sources including members' contributions, fees paid by the parties to the dispute and allocations from the government budget (s. 33(4)).

A complaint filed by a member of the public may allege either a breach of the code of ethics for media, or a violation of the person's basic human rights (s. 32(1)). The Arbitration Committee hearing the case must "call upon and consider the evidence of both parties" (s. 34(2)) and may issue a preliminary injunction pending consideration of the case (s. 34(2)(b)). Rulings may be based on any law, the code of ethics or 'rules of natural justice' (s. 34(1)). The Arbitration Committee may either dismiss the complaint or grant one of the following remedies: 1) an order to pay damages; 2) an order to publish or broadcast an apology; 3) an order to pay costs; 4) suspension of the responsible editor for up to a year; 5) any other remedy the Committee deems fit.

Analysis of provisions

While ARTICLE 19 welcomes some elements of the proposal, such as the idea that complaints against media should be heard by an Arbitral Committee appointed by the Media Council of Tanzania and that panels should consist of a mixture of members of the public, jurists and media professionals, we are concerned that the framework established by the Bill is very rudimentary, in places somewhat contradictory, and that the powers attributed to the Arbitral Committee are grossly excessive.

It is well-established internationally that self-regulation is by far the most preferable model for regulation of the print media. The Declaration of Principles on Freedom of Expression in Africa states:

> Effective self-regulation is the best system for promoting high standards in the media.[16]

[16] Note 4, Principle IX.

The idea to entrust a committee appointed by the Media Council of Tanzania with the responsibility to hear complaints against the media fits with this approach. However, the proposal goes far beyond establishing a body to hear complaints about ethical violations. As conceived, the Arbitral Committee will have powers to mete out civil and criminal sanctions, as well as any other remedies it sees fit; and it may do so not only on the basis of the code of ethics, but it may also interpret the Constitution and normal laws, and even apply principles of natural justice.

These powers far exceed those enjoyed by an ordinary court, which is rather worrying when one considers that there is no clear appointments process and no clear selection criteria for who can sit on the Arbitral Committee, and a legal background is required for only one out of three members.

We strongly recommend trimming down the powers of the Arbitral Committee to interpreting the code of ethics and issuing non-binding opinions on whether a violation has occurred. Moreover, the appointments process, selection criteria and rules of procedure should be elaborated.

Recommendations:

- The Arbitral Committee's role should be limited to hearing complaints on the basis of the code of ethics for media, and issuing non-binding opinions on whether a violation has occurred.
- The appointments process, selection criteria and rules of procedure of the Arbitral Committee should be elaborated.