ARTICLE 19

Tanzania: Media Services Bill, 2015

May 2015

Legal analysis

Executive summary

In May 2015, ARTICLE 19 reviewed the draft **Tanzanian Media Services Bill, 2015** against international standards and best practices on freedom of expression, with particular reference to African regional human rights instruments.

The Draft Media Services Bill, 2015 ('the Draft Bill') would come in the place of two existing pieces of legislation, the Newspapers Act and the Tanzania News Agency Act, both of which date to 1976. The former in particular is a controversial law that has been used to curtail freedom of expression in a number of instances, including through suspension of a number of newspapers whose coverage had angered the authorities.

ARTICLE 19 has previously called for the Newspapers Act to be repealed and replaced with a progressive media law. Regrettably, our analysis finds that although the Media Services Bill would bring minor improvement in some areas, its net effect is clearly negative for freedom of expression. It would make it impossible to practice journalism or run a media outlet without permission from regulatory bodies under the direct control of the government. This would predictably have a severe chilling effect on political debate, further compounded by tough criminal sanctions for vaguely-worded offences of "sedition" and publishing "false statements". Enactment of the Bill in its present form would place Tanzania in clear breach of its international obligation to respect and ensure the enjoyment of the right to freedom of expression.

ARTICLE 19 accordingly welcomes the government's recent decision to postpone tabling of the Draft Bill to allow a further exchange of views with the media sector and broader civil society.

Key recommendations

- There should be no licensing requirement for newspapers, and preferably no registration requirement either;
- There should be no licensing or registration requirement for social media;
- There should be no new licensing requirement for broadcast media over and above the one under the Tanzania Broadcasting Services Act of 1993;
- The Council's oversight and enforcement powers over the media should be reconsidered. Existing oversight mechanisms should not be duplicated, and where there are gaps, self-regulation should be encouraged as an alternative, for example through the Media Council of Tanzania;
- The Media Services Council should either not be established at all, or its independence from government and commercial interests should be safeguarded, among others by:
  - including a formal guarantee of the Council's independence in the Bill;
  - ensuring that its members are appointed through a transparent process which allows for public input and is not controlled by any particular political party;
  - requiring members to act independently and prohibiting them from concurrently holding positions in government or media;
  - granting the Council the power to appoint its own staff rather than providing it with a Director of Media Service selected by the Minister;
  - allowing the Council to exercise its powers without the need for any consultation with the Minister;
- To the extent the Media Services Council retains any powers in this area, the Bill should make it clear
  - exactly which rules the Council is charged with upholding;
  - what procedure the Council must follow when bringing a case or hearing a complaint;

    - which penalties may be applied in which situation. We believe the range of penalties should be limited to a warning, a reprimand or an order to carry an announcement of the ruling;
- Media houses should not be required each to develop a separate code of ethics. There should be one or more central codes, such as the one adopted by the Media Council of Tanzania. Further, there should be no requirement to enact a journalists' code of ethics over and above the codes of ethics of media houses;
- The prohibition on undue concentration of ownership found in Section 13(2) should be further elaborated. Appropriate limits should be identified, as well as the means by which they will be enforced;
- Section 14(b)(iv), requiring private media houses to carry the public broadcaster's news bulletin, should be deleted;
- The Journalist Accreditation Board should preferably not be established at all. At a minimum, its independence from government and commercial interests should be safeguarded, along the lines described previously in relation to the Council;
- There should be no compulsory accreditation requirement for journalists. It should not be an offence to practise journalism without being accredited. Moreover, possession of a degree or diploma in journalism should not be a mandatory precondition to entry into the profession.
- Defamation/libel should be fully decriminalised in Tanzania;
- Statements about deceased persons should not be capable of constituting libel;
- As for available defences for libel (as civil action/tort):
    - the defence of truth under Section 31 should be absolute. Its application should not depend on whether the publication was for the public benefit;
    - a defence of 'fair comment' or 'honest opinion,' should be recognised, which can be relied on whenever a person expresses a view in good faith;
    - a defence of 'reasonable publication' should be recognised, which can be relied on whenever it was reasonable under all the circumstances for the person to believe that the information was correct and that its publication was in the public interest;
- Tanzanian legislation should require public figures to tolerate a greater degree of criticism than ordinary citizens;
- The procedure for making amends under Section 34 should be simplified. A person should be able to avoid liability if s/he promptly corrects an innocent mistake in a publication upon discovering it;
- Sections 36 and 40, which prohibit the dissemination of false news, should be deleted;
- Sections 39 and 39, which prohibit seditions publications, should be deleted;
- Section 41, which makes directors automatically liable whenever a media outlet commits a criminal offence under the Bill, should be deleted;
- Section 43, which gives the Board discretion to ban the importation of publications, should be deleted;
- It should not be possible to seize equipment of a media outlet without a court order. Section 44 should be amended to this effect.

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Introduction

In this analysis, ARTICLE 19 reviews the Tanzanian Draft Media Services Bill, 2015 against international standards and best practices on freedom of expression, with particular reference to African regional human rights instruments.

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. In Tanzania, ARTICLE 19's legal work has included the production of a significant number of analyses of existing and proposed pieces of legislation, including the Media Services Bill, 2007[1] and the 2011 stakeholders' proposal for a Media Services Bill put forward by the Freedom of Information Campaign Coalition,[2] neither of which were ultimately enacted.

The latest iteration of the Draft Media Services Bill was sent to the National Assembly in March of 2015, alongside the Access to Information Bill. Initially the two bills were to be tabled under a certificate of urgency, which could have seen them adopted with very limited opportunity for public or parliamentary debate. However, responding to concern amongst media stakeholders, tabling of the bills has now been postponed to the next session of Parliament.

The Draft Media Services Bill, 2015 ('the Draft Bill') would come in the place of two existing pieces of legislation, the Newspapers Act and the Tanzania News Agency Act, both of which date to 1976. The former in particular is a controversial law that has been used to curtail freedom of expression in a number of instances, including through suspension of a number of newspapers whose coverage had angered the authorities.

ARTICLE 19 has previously called for the Newspapers Act to be repealed and replaced with a progressive media law.[3] Regrettably, our analysis finds that although the Media Services Bill would bring minor improvement in some areas, its net effect is clearly negative for freedom of expression. It would make it impossible to practice journalism or run a media outlet without permission from regulatory bodies under the direct control of the government. This would predictably have a severe chilling effect on political debate, further compounded by tough criminal sanctions for vaguely-worded offences of "sedition" and publishing "false statements". In many respects, the Bill is closer to the type of media legislation found in countries with an authoritarian form of government than to modern democratic practice. Enactment of the Bill in its present form would place Tanzania in clear breach of its international obligation to respect and ensure the enjoyment of the right to freedom of expression.

ARTICLE 19 accordingly welcomes the government's decision to postpone tabling of the Bill to allow a further exchange of views with the media sector and broader civil society. The present analysis seeks to make a constructive contribution by identifying the – quite substantial – revisions that would be needed to bring the Bill in line with international standards.

[1] See Memorandum on the Tanzanian Media Services Bill, March 2007.
[2] See Memorandum on the Tanzanian Stakeholders' Proposal for a Media Services Bill, October 2011.
[3] See Tanzania: call for repeal of Newspaper Act to expand media freedom, 17 February 2011.

Legal analysis of the Draft Bill

The Draft Bill is divided into nine parts. Part I deals with preliminary issues, such as definitions. The remaining parts contain substantive provisions, as follows:

- Part II creates body called the Media Services Council and vests it with powers to licence print, broadcast and internet media outlets, as well as to monitor their activities and take enforcement action against them.
- Part III sets out a number of obligations incumbent on media houses (defined in Part I as any legal person involved in media services, including broadcasting, publishing of newspapers and provision of internet services).
- Part IV establishes a Journalist Accreditation Board which, as the name suggests, will accredit (*i.e.* license) journalists, as well as setting educational standards for the profession.
- Part V creates a government department to be known as the Tanzania Information Services, whose primary function is to act as the government's spokesperson.
- Part VI sets up a Media Services Fund. It will be administered by the Journalist Accreditation Board with the aim of promoting local content development and professionalisation of the media.
- Parts VII and VIII set out extensive rules on content, relating to defamation, seditious libel and the publication of false news.
- Finally, Part IX, entitled "General Provisions", is a mishmash of provisions setting out transitional rules, creating powers for different bodies, defining obligations of owners of media houses and establishing criminal offences.

As is clear from this overview, an important effect of the Draft Bill, if enacted, would be to bring virtually all media activities under a licensing regime overseen by two statutory bodies, the Media Services Council and the Journalist Accreditation Board. The present analysis will first comment on the appropriateness of such a licensing regime in general, before providing a more specific commentary on the Bill's substantive provisions.

Permissibility of licensing requirements

Licensing requirements for media outlets and practitioners are a substantial interference with freedom of expression. This is not so much because of the burden of the paperwork involved, but because a licence may be denied or withdrawn, effectively cancelling the right to participate in the media. Even if this power is not exercised, it may exert a chilling effect on licence holders. The greater the discretion enjoyed by the licensing body to refuse or cancel licenses, the greater this chilling effect is likely to be, particularly if it is perceived as being under government control.

Broadcast media

It is generally recognised that licensing requirements for the broadcast media are nevertheless legitimate,[4] principally because broadcasting frequencies are scarce, and without a mechanism to parcel the frequency spectrum out, chaos would result with competing users drowning each other out. A secondary reason is that TV and radio penetrate the living room in a very direct manner, increasing the justification for certain controls on content, for example to protect minors or ensure that a wide range of viewpoints is available.

[4] For example, Article 10(1) of the European Convention on Human Rights guarantees the right to freedom of expression, and then goes on to state that "[t]his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

Print media

The UN Human Rights Committee has underlined that "[r]egulatory systems should take into account the differences between the print and broadcast sectors and the internet".[5]

The arguments that justify licensing of broadcasters are far less relevant to the print media; there are no technical limits to the number of publications that can exist concurrently, and newspapers are magazines are not as pervasive as the broadcast media. Consequently, most democracies either do not prescribe any formalities for the establishment of a print media outlet (beyond the ordinary requirements for the establishment of a business), or impose a purely administrative requirement to register, with no discretion to refuse or terminate registration once the required details (*e.g.* the place of business and identity of the owners) have been provided.

There is a wealth of authority to the effect that a licensing requirement for print media violates international law. For example, the African Commission on Human and Peoples' Rights (ACHPR) has ruled that a Nigerian decree which made it an offence to own, publish or print a newspaper without registering violated the right to freedom of expression under the *African Charter on Human and Peoples' Rights*, to which Tanzania is also a party. The Commission found that the requirement to register was not necessarily problematic in itself, nor was the requirement to pay a modest registration fee, but:

> Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1. There has thus been a violation of Article 9.1.[6]

Similarly, the UN Human Rights Committee has stated that the "unfettered discretionary power to grant or to refuse registration to a newspaper" under Lesotho's Printing and Publishing Act placed that country in contravention of Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), on freedom of expression.[7] Tanzania is also a party to the Covenant.[8]

Internet media

Much the same considerations apply to internet media as to the press. Democracies do not require operators of websites and other online services to obtain a licence. There is no technical need for licensing, and it would in any event be ineffective given the ease with which a website can be moved to a foreign server. In 2011, the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights, along with her counterparts from Europe, the Americas and the UN, adopted a Joint Declaration stating that even registration requirements for providers of online services are generally not legitimate:

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[5] General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (Freedoms of opinion and expression), adopted 12 September 2011, UN Doc. CCPR/C/GC/34, para. 39.

[6] *Media Rights Agenda and Others v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94 and 152/96, Recommendation of 31 October 1998.

[7] Concluding observations on Lesotho, 8 April 1999, UN Doc. No. CCPR/C/79/Add.106, para 23.

[8] See further the Joint Declaration by 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, which states: "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."

> Other measures which limit access to the Internet, such as imposing registration or other requirements on service providers, are not legitimate unless they conform to the test for restrictions on freedom of expression under international law.[9]

Individual journalists

The question whether the practice of journalism may be subjected to a system of licensing or compulsory accreditation has come up before several national and international courts. A seminal precedent is a 1985 opinion of the Inter-American Court of Human Rights (IACHR), in which it criticised a requirement under Costa Rican law for journalists to become members of a *colegio* (professional association). The Court observed that:

> The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. [...] A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.[10]

In 2009, the African Commission on Human and Peoples' Rights considered a complaint against an accreditation requirement for journalists under that Zimbabwe's Access to Information and Protection of Privacy Act (AIPPA). The Commission cited the 1985 IACHR opinion with approval, and ruled that the accreditation requirement violated the Banjul Charter:

> The Inter-American Court found that compulsory licensing aimed at controlling journalists was a violation of Article 13 of the American Convention. By applying the same logic, and analogy to the conditions stipulated for compulsory accreditation under AIPPA, without which, one could not practice journalism, the African Commission finds that section 79 of AIPPA constitutes a violation of Article 9 under the African Charter.[11]

In the same vein, the UN, OAS and OSCE special mandates for protecting freedom of expression stated in their 2003 Joint Declaration: "Individual journalists should not be required to be licensed or to register."[12] And a Zambian law establishing a statutory body to regulate journalists was struck down as unconstitutional by that country's High Court in August 1997.[13]

A clear distinction should be drawn between licensing or compulsory accreditation of journalists, which is clearly not permitted under international law, and voluntary accreditation, which generally serves a very different, legitimate purpose. In most established democracies, journalists have formed a voluntary association that issues press cards to its members. The card is not required to be able to practise journalism, but it confers certain benefits; for example, holders of a press card may be given preferential access to meetings of public bodies, court hearings or crime scenes.

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[9] Joint Declaration on Freedom of Expression and the Internet, 1 June 2011, paragraph 6(d).
[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).
[11] *Scanlen & Holderness v. Zimbabwe*, Comm. No. 297/05, Recommendation of April 2009, para. 98.
[12] Joint Declaration of 18 December 2003, *supra* note 8.
[13] *Francis Kasoma v. Attorney General*, 22 August 1997, Civil Case No. 95/HP/29/59.

The Media Services Council

Section 5 of the Draft Bill sets out the functions which the future Media Services Council ('the Council') would perform. These include the licensing of newspapers, broadcasters and social media; monitoring of their content; the issuing of directives to media houses; conducting inspections and taking enforcement measures.

Licensing powers and procedures

The Draft Bill is silent on what the procedure to obtain a licence would look like:

- Section 9(2) consigns this matter to subsequent elaboration in regulations to be adopted by the Minister;
- However, Section 6 states that the Council may reject, suspend or cancel licences, whilst Section 11 refers to the possibility of conditions being attached to a licence.

It is therefore clear that the proposed scheme goes beyond the minimal, administrative registration requirement that international law would allow with respect to the print media, as discussed in the previous section. What is more, the definition of "newspaper" in Section 3 is so broad that the licence requirement would extend to small-scale publications, such as a school newsletter, as well as virtually any website. We believe there should be no special formalities at all for the establishment of a newspaper, but if a decision is taken to downgrade the licensing requirement to simple registration, it should apply only to 'true' print media outlets with a meaningful circulation.

Equally problematic is the license requirement for "social media." These are defined in Section 3 as "online interactions among people in which they create, share, and exchange information and ideas in virtual communities, networks and their associated platform". Taken literally, this would imply a need to obtain a license both for social media platforms like Facebook, YouTube or LinkedIn, and for their individual users in Tanzania when engaged in creating, sharing or exchanging materials, such as posting comments or photos. Apart from being contrary to international standards, this is also seems impractical. The most likely effect of this license requirement, if any, would be to deter social media companies from establishing themselves in Tanzania.

That leaves the licensing requirement for broadcasters. This is in principle legitimate, but it is not clear to us why the Bill apparently seeks to create a parallel track to the existing regime under the Tanzania Broadcasting Services Act of 1993. That Act sets out a reasonably detailed licensing procedure administered by the Tanzania Communications Regulatory Authority (TCRA) – the parent body of the proposed Council (see Section 4(1)). Whilst the Broadcasting Services Act could be improved, that should be done by amending it directly, rather than supplementing it with a (potentially contradictory) ministerial regulation adopted under the present Bill without the involvement of Parliament.

Recommendations

- There should be no licensing requirement for newspapers, and preferably no registration requirement either. If a registration regime is retained, it should
  - apply only to mass media print outlets, not to small-scale or internet publications;
  - be technical in nature, and require only the furnishing of essential data such as name and contact details;
  - there should be no discretion to refuse registration, to impose conditions, or to cancel registration on grounds related to the content of the publication;
- There should be no licensing or registration requirement for social media;
- There should be no new licensing requirement for broadcast media over and above the one under the Tanzania Broadcasting Services Act of 1993.

Oversight and enforcement powers

Apart from its role in the area of licensing, the Draft Bill envisages the Council as an oversight and complaints body. Several clauses (Sections 5(a) – (d) and (k)) require the Council to "monitor" or "analyse" media content. The purpose of these activities is not stated expressly, except in respect of the print media, where monitoring serves to ascertain "compliance to licence conditions and professional ethics" (Section 5(c)).

Section 6 reveals that the Council may take various types of enforcement action, including issuing warnings, suspending content providers, cancelling licences or imposing fines of unspecified height, presumably in the event its monitoring reveals some kind of wrongdoing. Another possibility is that the Council receives a complaint from a "person who is not satisfied with the conduct or services of a content provider" (Section 12(1)), in which case the Council takes a decision based on "principles of natural justice" as well as regulations to be adopted by the Minister. The decision may be appealed to the Fair Competition Tribunal (Section 12(2) and (3)).

These provisions are problematic for several reasons.

- First of all, to quote the *Declaration of Principles on Freedom of Expression in Africa,* "[e]ffective self-regulation is the best system for promoting high standards in the media."[14] Statutory bodies are always at risk of political interference and abuse; as will be seen below, this risk is particularly acute in the case of the proposed Council, which would be closely controlled by the government. Tanzania has a comparatively well-established self-regulatory body in the form of the Media Council of Tanzania (MCT). To the extent the government has concerns about its effectiveness, we would encourage a dialogue with the MCT and other relevant stakeholders on how these can be addressed without the need for a new statutory system.

- Secondly, the Bill is rather vague about which rules the Council would be upholding. References are variously made to codes of ethics, license conditions, laws and regulations. Some of these rules are already enforceable through other mechanisms (*e.g.* civil and criminal laws are enforceable through the court system, and broadcasters may be hauled before the TCRA if they violate the terms of their licence) and it is not clear how the Council would relate to these or what its added value would be. The picture is further clouded by the fact that citizens may complain about any "content provider" they are "not satisfied" with, apparently without the need to refer to breach of any specific standard.

- Thirdly, and similarly, almost nothing is said about the procedure that the Council must follow in proceedings against media outlets. Whilst there is a reference to "natural justice", there are no concrete safeguards of procedural fairness, apart from the right to appeal. Here, we question whether the Fair Competition Tribunal is the right body to provide recourse; media issues seem quite far removed from its core mandate, although we do note that it is also the appointed court of appeal under the Broadcasting Services Act.

- Finally, while it is clear that the Council would have various sanctioning powers, the Bill does not correlate these with specific infractions. Effectively a media outlet found in breach of any requirement could face any of the range penalties available to the Council. This lack of foreseeability is at odds with the rule of law. More generally, we believe the Council should not be able to impose sanctions beyond a warning or a reprimand and possibly an order to carry an announcement of its ruling. We have argued above that the Council should not have licensing powers; by implication, it would be unable to suspend or cancel a licence. The

[14] See Principle IX(3) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17 - 23 October 2002, Banjul, The Gambia.

imposition of a fine, particularly one large enough to have a deterrent effect on a media outlet, is a criminal sanction which should be reserved for the court system, which offers the procedural safeguards required in a criminal trial.

Recommendations

- The Council's oversight and enforcement powers over the media should be reconsidered. Existing oversight mechanisms should not be duplicated, and where there are gaps, self-regulation should be encouraged as an alternative, for example through the Media Council of Tanzania.
- To the extent the Council retains any powers in this area, the Bill should make it clear
  - exactly which rules the Council is charged with upholding;
  - what procedure the Council must follow when bringing a case or hearing a complaint;
  - which penalties may be applied in which situation. We believe the range of penalties should be limited to a warning, a reprimand or an order to carry an announcement of the ruling.

Independence

Since most of the functions envisaged for the Council are either inappropriate from the standpoint of international law, or already performed by other bodies, one may ask whether it has sufficient *raison d'être.* If it is nevertheless established, a further problem is that the Bill lacks even elementary safeguards ensuring the Council's independence from government.

Principle VII(1) of the *Declaration of Principles on Freedom of Expression in Africa,*[15] which reflects well-established international law, underlines the need to ensure the independence of media regulators:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

The print media are not mentioned in Principle VII; this is not because regulators in this area need not be independent, but rather because, as noted above, the *Declaration* favours self-regulation of the press over statutory regulation.[16]

As the Draft Bill stands now, all the Council's members would be political appointees, picked without parliamentary oversight. Pursuant to Section 4(2), the Chairman would be selected by the President, and the remaining six members by the Minister responsible for information. Two members would be drawn from other government bodies; the Council would include a representative of the Office of the Attorney General, as well as the Director of Information Services, an official within the Ministry of Information, Culture and Sports. Indeed, it is possible that the remaining five members would also hold other concurrent functions in government; whilst Section 4(4) sets out certain qualifications a member would need to possess, there are no *dis*qualifications (with the sole exception that the journalist serving on the Council may not be a media owner – see Section 4(2)(c)).

[15] Declaration of Principles on Freedom of Expression in Africa, *op.cit.*.

[16] See also the Joint Declaration of 18 December 2003, *supra* note 8: "All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party."

The Council's day-to-day affairs would be handled by the Director of Media Service, picked by the Minister from amongst senior civil servants (Section 8). Before issuing or withdrawing a licence – the most significant powers invested in the Council – it would need to seek a statement of "no objection" from the Minister (Section 6(2)). Moreover, as noted above, the Council would reside under the Tanzania Communications Regulatory Authority, a body that is not independent either.

In sum, the Council would very much be an extension of the government, rather than an independent regulator, and would probably use its powers to favour pro-government media (or at least be constantly suspected of doing so). In order to bring the Bill in line with international standards, the appointments process and composition of the Council would need to be altered quite drastically. There would have to be an open nominations process, and Members would need to be chosen by Parliament through a procedure ensuring a measure of cross-party support. Persons holding concurrent positions in government or media should be ineligible to serve on the Council.

Recommendations

- The Council should either not be established at all, or its independence from government and commercial interests should be safeguarded, among others by:
  - including a formal guarantee of the Council's independence in the Bill;
  - ensuring that its members are appointed through a transparent process which allows for public input and is not controlled by any particular political party;
  - requiring members to act independently and prohibiting them from concurrently holding positions in government or media;
  - granting the Council the power to appoint its own staff rather than providing it with a Director of Media Service selected by the Minister;
  - allowing the Council to exercise its powers without the need for any consultation with the Minister.

Media houses

Section 13 of the Draft Bill distinguishes between public and private media houses, and imposes a number of obligations on each.

A common element is that both types of media house must have a code of ethics (see Sections 14(a)(iii) and 14(b)(iii)). Requiring each outlet to develop its own code seems unduly cumbersome, and if the Council is charged with enforcing these codes (as Section 5(n) currently envisages), media houses will be incentivised to adopt a lax code. It would make more sense to require adherence to a general code of ethics, such as the one adopted by the Media Council of Tanzania. Separate codes could potentially be developed for different sectors (*e.g.* broadcasting and print media).

Section 13(2) of the Draft Bill prohibits one person owning "an unfair share" of the national media market. We welcome this provision; excessive concentration of ownership reduces the diversity of media offerings and therefore harms the public's right to receive a wide range of information and viewpoints. But the Bill is silent on what the appropriate limits on ownership are or how they will be enforced, including against existing market players. This requires further thought.

Section 14(b)(iv) of the Draft Bill requires private media houses to carry the public broadcaster's news programme at 8pm every evening, "to enable to public to follow issues of national interest". This provision is at best misguided, and at worst designed to force, rather than enable the public to receive these news bulletins. It might arguably be legitimate to require broadcasters, particularly national-level ones, to carry a news bulleting at 8pm; but prescribing the content of

that bulletin is a serious and unjustifiable interference in editorial freedom. The public interest is much better served if a range of different perspectives is available than if each and every station provides exactly the same content at prime time.

Recommendations

- Media houses should not be required each to develop a separate code of ethics. There should be one or more central codes, such as the one adopted by the Media Council of Tanzania.
- The prohibition on undue concentration of ownership found in Section 13(2) should be further elaborated. Appropriate limits should be identified, as well as the means by which they will be enforced.
- Section 14(b)(iv), requiring private media houses to carry the public broadcaster's news bulletin, should be deleted.

Accreditation of journalists

Part IV of the Bill establishes a Journalist Accreditation Board (hereinafter 'the Board'), with many similarities to the Media Services Council discussed above. As with the Council, guarantees of the Board's independence are completely absent; it would be under the wing of the Ministry of Information, Culture and Sports. Its seven members would be appointed by the Minister, and would include amongst their number the Director of Media Services and a representative of the office of the Attorney General (Section 16). The Board's day-to-day affairs would be managed by a Chief Executive Officer, again appointed by the Minister (Section 19). It is therefore clear that the Board's set-up does not conform to international standards.

The primary function of the Board, as its name suggests, would be to accredit journalists and issue press cards to them (Section 17(d)). Section 21(1) states that it is prohibited to practice journalism without being accredited, and Section 23(2) adds that journalists whose accreditation has been suspended or who have been deleted from the roll are not permitted to continue to practise. Practising journalism without accreditation carries a draconian minimum five-year sentence (Section 36(g)). These provisions demonstrate that accreditation is mandatory, and boils down to a licensing requirement. As was discussed above, such a system has been ruled contrary to international law by among others the African Commission on Human and Peoples' Rights. The danger is very real that the Board would use its powers to institute censorship, barring journalists who are critical of the government from the profession.

The Board would also be tasked with enforcing the journalists' code of ethics (Section 17(b)). Nothing more is said about this code and who would adopt it; in any event, it seems an unnecessary duplication, since the Bill already requires media houses to enact codes of ethics.

Another questionable provision is Section 21(3), which makes any person who has not obtained a degree or diploma in journalism ineligible to practice the profession. This kind of requirement is uncommon or even non-existent in established democracies; many of the finest journalists around the world have no formal education in the field. The Inter-American Commission on Human Rights, in its *Declaration of Principles on Freedom of Expression,* even stated: "Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression."[17] In our view, it should be left to the judgment of media outlets themselves whether a person possesses suitable qualifications to work in the field. Of course, the absence of a degree should not serve as a defence if a journalist is found to have breached ethical rules or legal requirements.

[17] Principle 6 of the Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108 regular session, October 2000.

Recommendations

- The Journalist Accreditation Board should preferably not be established at all. At a minimum, its independence from government and commercial interests should be safeguarded, along the lines described previously in relation to the Council.
- There should be no compulsory accreditation requirement for journalists. It should not be an offence to practise journalism without being accredited.
- There should be no requirement to enact a journalists' code of ethics over and above the codes of ethics of media houses.
- Possession of a degree or diploma in journalism should not be a mandatory precondition to entry into the profession.

The Media Services Fund

Part VI of the Draft Bill foresees the establishment of a Media Services Fund, administered by the Board, and funded from a range of sources, including incoming arising in the course of the Board's activities and allocations from Parliament (Section 27). The Fund's purpose is to promote the development of local content, encourage media professionalism and promote research and development (Section 26(2)).

Although it should be administered by an independent body, ARTICLE 19 welcomes the concept of the fund, as a positive measure designed to improve the quality and local relevance of Tanzanian media.

Defamation/Libel

The Draft Bill sets out extensive rules related to defamation in Part VII. These would replace the provisions on this subject found in the Newspapers Act of 1976.

The Media Services Bill, 2007, which was ultimately not enacted, would also have updated the law on defamation. ARTICLE 19's analysis at the time found that the proposal was very well drafted, and to a high degree in accord with international best practice. It is regrettable that the work accomplished at that time has not been incorporated into the present Bill, which represents only an incremental improvement compared to the defamation provisions in the 1976 Act.

Criminal defamation/libel

Section 29 of the Draft Bill sets out the offence of libel, which is committed when a person unlawfully publishes any defamatory matter with intent to defame another. Defamatory matter, in turn, is defined in as matter likely to injure the personal or professional reputation of any person – whether alive or dead – by exposing him to hatred, contempt or ridicule.

This definition corresponds to what is found in many democracies. However, recent years have seen a strong trend globally towards the abolition of criminal libel, and the handling of these cases in civil courts. For example, Mexico decriminalised libel in 2007, followed by the UK in 2009 and Ireland in 2010. In 2011, the UN Human Rights Committee called on States to "consider the decriminalization of defamation".[18] India[19] and the Philippines[20] are currently contemplating

[18] See General Comment No. 34, note 5, paragraph 47.
[19] See, e.g. Times of India, Decriminalize defamation? Govt seeks panel's view, 11 April 2015.
[20] See, e.g. GMA News, Pimentel: Senate may pass bill to decriminalize libel by June, 6 March 2014.

abolishing the offence, and late last year, the African Court of Human and Peoples' Rights handed down a landmark judgment[21] that significantly limits the scope for criminal prosecution for libel.

In a similar vein, protecting the reputation of deceased persons is increasingly viewed as outdated and a potential hindrance to historical inquiry. In short, Tanzania would be swimming against the tide by enacting a law that makes libel a criminal offence rather than a civil action/tort, all the more so if it protects the dead as well as the living.

Available defences

Section 31 of the Draft Bill sets out defences of truth and privilege which a person accused of libel may rely on. In our view, the former is formulated too restrictively; it applies where material "is true and it was for the public benefit that it is published." True statements should never attract liability, irrespective of whether publication is for the public benefit or not.

The defence of privilege defined across Sections 31(b)-33 covers a number of different things. It shields a person from liability when reporting on statements made by the government or in the course of parliamentary or judicial proceedings. But it also applies when expressing an opinion in good faith in certain specific settings (*e.g.* criticism of a public figure or critical review of a book or other work).

Again, we believe this is too narrow. There should be a general defence of 'fair comment' or 'honest opinion', which can be relied on whenever a person expresses a view in good faith, whatever the setting. Moreover, a defence of 'reasonable publication' should be recognised. Journalists often work under substantial time pressure and even the best professionals are at risk of making mistakes. This should not lead to liability if it was reasonable under all the circumstances for the person to believe that the information was correct and that publication was in the public interest.

We recall that Principle XII(1) of the *Declaration of Principles on Freedom of Expression in Africa*[22] states that "public figures shall be required to tolerate a greater degree of criticism". This requirement – which incidentally is well-established in international law, and applies also to public bodies and publicly traded companies – is not reflected at all in Part VII of the Bill.

Section 34 of the Draft Bill allows a person who has accidentally published defamatory material to escape liability by promptly making an offer of amends. This is a helpful provision, but the procedure to make the offer seems unnecessarily complicated; it must be accompanied by an affidavit explaining how the mistake came about. Perhaps it would be more straightforward to stipulate that any person who promptly corrects an innocent mistake in a publication upon discovering it shall not be held liable.

Recommendations

- Defamation/libel should be fully decriminalised in Tanzania. Libel, as defined in Section 29, should not be a criminal offence but a civil tort;
- Statements about deceased persons should not be capable of constituting libel;
- In the light of decriminalisation of defamation/libel, as for available defences in cases of defamation (as civil action):
    - The defence of truth under Section 31 should be absolute. Its application should not depend on whether the publication was for the public benefit

[21] *Lohé Issa Konaté v. Burkina Faso*, Application No 004/2013, Judgment of 5 December 2014.
[22] See *supra* note 14.

- A defence of 'fair comment' or 'honest opinion', should be recognised, which can be relied on whenever a person expresses a view in good faith;
- A defence of 'reasonable publication' should be recognised, which can be relied on whenever it was reasonable under all the circumstances for the person to believe that the information was correct and that its publication was in the public interest.

- The Bill – and Tanzanian legislation overall - should require public figures to tolerate a greater degree of criticism;
- The procedure for making amends under Section 34 should be simplified. A person should be able to avoid liability if he promptly corrects an innocent mistake in a publication upon discovering it.

Offences

Part VIII of the Draft Bill sets out a number of criminal offences, which cover such things as the publication of false information and the dissemination of seditious material.

Section 36 criminalises the publication of information that is "intentionally or recklessly falsified" and harms various interests, such as defence, public order, the economy or public health. Also forbidden is the publication of information that is "maliciously or fraudulently fabricated". The offence carries a fine of not less than twenty million Tzs or imprisonment for at least five years. This provision is comparable with Section 40, which threatens a slightly less sizeable fine or minimum four-year jail term for anyone who publishes "any false statement, rumor or report which is likely to cause fear and alarm to the public or to disturb the public peace". The difference between the two provisions seems to lie in the fact that Section 36 requires deliberate falsehood whereas Section 40 applies regardless of intent.

International law takes a very dim view of such 'false news' provisions. The UN Human Rights Committee has stated that they "unduly limit the exercise of freedom of opinion and expression,"[23] and the UN Special Rapporteur on Freedom of Opinion and Expression has forcefully criticised the imposition of jail sentences for the publication of false news:

> In the case of offences such as ... publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.[24]

This criticism stems from the observation that the cure is often worse than the disease: false news is an undesirable phenomenon, but incorrect stories are easily rebutted and provisions prohibiting them often end up being used to 'shoot the messenger'. In many countries, false news laws have been abused to go after journalists who wrote critically about issues such as food safety, the stability of financial institutions, disaster preparedness or the quality of healthcare. In response, several domestic courts have ruled false news provisions to be unconstitutional, including in Antigua and Barbuda, Canada, Uganda and Zimbabwe.[25] Bans on false news have nowadays

[23] See, for example, Annual General Assembly Report of the Human Rights Committee, UN Doc. A/50/40, 3 October 1995, para. 89; Concluding Observations of the Human Rights Committee: Mauritius, UN Doc. CCPR/C/79/Add.60, 4 April 1996, para. 19.

[24] Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression, 18 January 2000, UN Doc. E/CN.4/2000/63, para. 205.

[25] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (Judicial Committee of the Privy Council); *R. v. Zündel*, [1992] 2 SCR 731, p. 749; *Onyango-Obbo and Mwenda v. the Attorney General of Uganda*, Constitutional Appeal No. 2 of 2002 (11 February 2004); *Chavunduka and Choto v. Minister of Home Affairs & Attorney General of Zimbabwe*, 22 May 2000, Judgment No. S.C. 36/2000 (Supreme Court of Zimbabwe).

largely died out in the democratic world. Sections 36 and 40 should be deleted from the Draft Bill.

Sections 38 and 39, which prohibit seditious publications, largely reproduce Sections 31 and 32 of the Newspapers Act of 1976, but with (even) stiffer penalties and narrower defences. ARTICLE 19 has previously extensively commented on these provisions, finding that they are outdated, violate international law, and should be repealed in their entirety.[26]

Section 41 creates automatic criminal liability for all the directors of a media outlet whenever the outlet commits a criminal offence under the Bill. They can escape conviction if they can prove to the court's satisfaction that they had no knowledge of the offence and could not have known about it through the exercise of reasonable diligence. It is not clear why this rule would be necessary, over and above ordinary criminal law principles on the liability of accessories, and it is likely to have a negative impact on editorial freedom, since it forces directors to take a more active interest in what is happening in the newsroom.

Recommendations

- Sections 36 and 40, which prohibit the dissemination of false news, should be deleted.
- Sections 39 and 39, which prohibit seditions publications, should be deleted.
- Section 41, which makes directors automatically liable whenever a media outlet commits a criminal offence under the Bill, should be deleted.

General provisions

Part IX of the Draft Bill sets forth a mixture of different rules, collected under the heading 'General Provisions'.

Section 43 gives the Board absolute discretion to ban the importation of any publication by order published in the Gazette. (Under Section 37, importing or otherwise disseminating materials whose importation is prohibited carries a five million shilling fine or imprisonment for a term of not less than three years.) This retrogressive provision is out of step with Article 19 ICCPR, which guarantees freedom of expression "regardless of frontiers". We also question how effective censorship of foreign publications by the Board would be in practice, given the fact that they can easily be uploaded to the internet and subsequently accessed by anyone with internet access in Tanzania.

Section 44 allows the Director of Media Services, a police officer or any authorised officer to seize equipment from media houses upon a suspicion of operation contrary to the Act. Exercise of this power could lead to the shutting down of a media outlet; in our view, this should not be possible without a prior court order.

A positive provision is Section 47, which requires broadcasters to make their services available to persons with impaired sight and hearing and those who have developmental imbalances. Some more detail might be needed to make this provision effective in practice; consideration should also be given to exempting smaller outlets, such as community broadcasters, who may not have the resources to comply with this requirement.

Recommendations

[26] See Memorandum on the Sedition Offences in the Tanzanian Newspapers Act and Penal Code, November 2014.

- Section 43, which gives the Board discretion to ban the importation of publications, should be deleted.
- It should not be possible to seize equipment of a media outlet without a court order. Section 44 should be amended to this effect.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, 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 organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available 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. For more information about the ARTICLE 19's work in Kenya and East Africa, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa, at henry@article19.org.

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