ARTICLE 19

Kenya Programming Code

April 2016

Legal analysis

Executive summary

In April 2016, ARTICLE 19 analysed the Programming Code of Kenya (the Code), which was adopted in December 2015 by the Communications Authority of Kenya (the Authority). The Code will take effect on 1st June 2016.

The Code provides detailed recommendations to broadcasters on how to approach a number of content-related issues. It seeks to ensure that broadcast media contributes to, and abides by, the respect and promotion of public interest, notably by providing reliable and fair information and protecting minors. A number of provisions in the Code reflect international good practice in the field of broadcasting and journalism.

However, ARTICLE 19 find that, overall, the Programming Code fails to meet the requirements of international standards on freedom of expression. Many of its provisions are vague and over-generalized, or fail to set an appropriate balance between freedom of expression and competing rights. Further, several detailed provisions of the Code are only operational as recommendations or guidelines rather than strictly binding provisions. Last but not least, the Programming Code gives rise to a conflict of jurisdiction for all matters related to professional ethics in broadcast media. As such, it undermines co-regulatory mechanisms currently in existence in Kenya.

ARTICLE 19 calls on the Authority to review the Programming Code in order to ensure its compliance with international freedom of expression standards based on our recommendations. Pending this revision, the Authority should abstain from applying provisions that do not comply with international standards.

Summary of recommendations

1. The Communications Authority should refer all questions related to professional ethics and good practices to the Media Council of Kenya;

2. Pending a future revision of the Code, the Authority should ensure that all decisions in which the Code is applied are in conformity with the requirements of international standards on freedom of expression;

3. The legislation on media regulation in Kenya should be revised in order to:
   - Reinforce the independence of the Authority in conformity with international standards on the regulation of broadcast media;
   - Prevent any control of public authorities over independent self-/co-regulatory bodies; and
   - Ensure that the Media Council of Kenya holds jurisdiction over all matters related to professional ethics in broadcast media.

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Introduction

In April 2016, ARTICLE 19 analysed the Programming Code of Kenya (the Code), adopted by the Communications Authority of Kenya (the Authority) in December 2015. The Code shall become effective on 1st June 2016.

ARTICLE 19 has previously commented on the draft Programming Code[1] and the accompanying Broadcasting Regulations. Following up on our previous analysis, we now focus on a number of elements that the Authority should take into account in the application of the Code when it comes into effect in June 2016. These observations also serve as recommendations for a future revision of the Code.

In addition, we observe that the Code enacted by the Authority is likely to cause a certain degree of confusion between the respective roles of the Communications Authority of Kenya and the Media Council of Kenya, which might result in a weakening of the existing co-regulation and self-regulation mechanisms in Kenya. Therefore, we suggest that – as a principle – all matters related to professional ethics should be referred to the Council.

Our analyses are based on international standards on freedom of expression, and particularly on international standards that are applicable to broadcast regulation. These are presented in a separate publication of ARTICLE 19: *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation.*[2]

ARTICLE 19 hopes that the Authority will use this analysis in its review of the Code: we are ready to engage constructively in the process of bringing the Kenyan regulations on media into full compliance with international freedom of expression standards.

[1] ARTICLE 19, Kenya: Information and Communications (Broadcasting) Regulations and Programming Code, June 2015, available at http://bit.ly/1nSCyEI.
[2] ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, available at http://bit.ly/1Ii4CdL.

Analysis of the Programming Code

The Code provides detailed recommendations to broadcasters on how to approach a number of content-related issues. It seeks to ensure that broadcast media contributes to, and abides by, the respect and promotion of public interest, notably by providing reliable and fair information and protecting minors. A number of provisions in the Code reflect international good practice in the field of broadcasting and journalism.

However, the Code overall is based on an overly restrictive conception of freedom of expression which falls short of the requirements of international standards in this area. In this analysis, we do not comment on each Section or provision of the Code; instead, we have focussed on specific problematic areas. For the full analysis of remaining provisions, see our previous analysis of the draft Code.

We also observe that it should be the responsibility of the self-/co-regulatory body to apply a body of detailed rules which are essentially principles of professional ethics (see below).

Legal basis of the Code

In the earlier analysis, ARTICLE 19 noted that the Code partly corresponds to Part IV of the Broadcasting Regulations, but does not cover every topic addressed in Part IV; such as the duty to correct errors promptly, which is provided for in Section 23 of the Regulations but is not found in the Code. On the other hand, we observed that the Code addressed topics that are not covered in the Regulations, such as personal attacks, religious programmes, occultism and superstition.

We reiterate our observation that the content-related provisions of Part IV of the Regulations are so detailed and extensive that they have substantially pre-empted the Authority's Programming Code and rendered the co-regulation pointless (as outlined in detail below). Instead, it should simply identify all the topics to be addressed in the Code, possibly indicating general principles but not articulating the actual rule.

Vagueness and paternalism

A major flaw of the Code lies in the vagueness of a number of concepts that it uses. Under international human rights standards, all restrictions to freedom of expression must meet the three-part test, including legal certainty. This means that the regulations that restrict freedom of expression must be sufficiently clear and precise to allow individuals to foresee the consequences of their actions. Words with broad and various significance, as well as indefinite notions, fall short of this requirement because they pave the way to potentially arbitrary interpretations.

In that sense, Section 1.3 of the Code, which describes the values that should be reflected in broadcasting (for example, the “aspirations, hopes and dreams of Kenyans” (1.3.1) or the “values and customs of civilized society” (1.3.3)), is too vague to provide a clear and precise legal basis.

At the same time, as we pointed out in our previous analysis, the Code showed a tendency toward excessive paternalism. While one may agree with the general objectives of the Code, some requirements are too subjective to be included in binding rules: the responsibility to promote and respect moral values rests with each individual or, as far as children are concerned, with their parents or guardians.

In our view, promoting and protecting the right to freedom of expression should be explicitly enshrined in the objectives and general principles of the Code. An explicit reference to the constitutional and international protection of freedom of expression, including the right to offend or shock all or part of the population, would be welcome.

Vagueness is even more problematic in provisions which not only assign general objectives to broadcasting but also set actual rules. In this way, references to "good taste" (Section 3, Section 5.8.1), "morality" (1.3.2), "indecent programming" (2.1), "standards of decency" (2.6), and the prohibition of "vulgar double meaning words and phrases" (16.2.4), are all easily open to subjective or arbitrary interpretation that could result in excessive restriction of freedom of expression.

From a comparative perspective, the 2013 Broadcasting Code of Ofcom (UK) provides an example of a more balanced approach between the protection of morals and freedom of expression in broadcast, namely:

> 2.1 Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.
>
> 2.2 Factual programmes or items or portrayals of factual matters must not materially mislead the audience. (...)
>
> 2.3 In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (...) Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.[3]

Under international standards, the protection of minors is a justification for restrictions on content, and the Code provides for an exhaustive set of rules in that respect. However, as we noted previously, the requirement that all broadcasters devote at least five hours per week to programmes for children (Section 4.3.1) may be excessive, especially where it applies to private media. Another option would be to grant licenses to a limited number of specialised channels dedicated to children. We also noted that the promotion of social and moral values or positive moral character (Section 4) is overly developed in the Code; such responsibility is better left with the parents, schools or religious institutions.

The Code provides an exhaustive list of rules related to news programmes, interviews, and news gathering (Sections 5 and 6). While there are signs of excessive paternalism in some provisions (Section 5.2.7 requires for instance that presenters act as role models as far as the

[3] See the Ofcom Broadcasting Code, September 2010, available at http://bit.ly/1Wo5S3V.

use of language is concerned), the rules generally seem to reflect international good practices. However, they are excessively detailed and sometimes overly subjective - in particular, Section 5.8.1 requires that the presentation of news "must always be in good taste". They would be better framed as recommendations and best practice rather than legally binding rules.

A reference to international texts on professional ethics and good practices would be welcome. The Authority could consider the available standards on professional ethics when reviewing this section of the Code.[4]

Recommendations

- Rather than requiring all broadcasters to carry five hours of child-friendly programming, the Authority should reserve a number of national, regional and local frequencies for broadcasting services tailored to children through its frequency plan.
- All vague provisions, such as those requiring broadcasts to promote or correspond to "good taste", "morality", "fair criticism" or similar subjective qualities, should be removed from the Programming Code.

Restrictions on the right to freedom of expression in the Code

Some provisions of the Code create a disproportionate restriction of the right to freedom of expression, and fail to set an appropriate balance between freedom of expression and other legitimate interests.

In particular:

- The requirement of a 'text crawl' running throughout newscasts (Section 5.5.1) is excessive;
- The right of reply (Section 5.6.4) is too broad. While it may be a good practice for journalists to try to present divergent views on an issue they are investigating, the simple fact that a person or an organisation's opinions have been criticised is not sufficient to create a legal cause for a right of reply. This would amount to an excessive restriction of the editorial freedom of the broadcasters.
- Provisions on the right of reply in Section 8.2.4 are equally ill-defined: the notion of "personal attack" is too vague. Under international standards, the right of reply serves as a practical means to restore harm to reputation only.
- Section 7 of the Code generally gives precedence to privacy rights over the requirements of public access to information on matters of general interest and freedom of the media. While these rules may work as practical recommendations for media professionals, they should not be enshrined in a legally binding document. For instance, Section 7.2.4 provides that the media are under obligation to respect the presumption of innocence. Presumption of innocence is a duty that binds official authorities and the judiciary, not the media, which only have a duty to report on judicial proceedings according to their professional ethics, in order to bring information to the public.
- Under the guise of protecting national unity, Section 8.2 on prohibition of "personal attacks") unduly restricts the freedom expression: under international law, the right to

[4] Declaration on the Duties and Rights of Journalists, Munich, 1971, available at bit.ly/1RRqf7Y; UNESCO Declaration on media, 1983, available at bit.ly/1aXKKx2; IFJ, Ethical Journalism Initiative, 2008, available at bit.ly/1SFFjU5; EFJ, Declaration of Varna on Journalism in the Vanguard of Change, 2009, available at bit.ly/1SULZkJ.For comparative purposes, see the materials developed by the Ethical Journalism Network, available at http://ethicaljournalismnetwork.org/en.

freedom of expression includes the right to humorous, provocative, or even offensive forms of speech.
- While religious sentiments might be of great importance in the Kenyan context, we observe that the rules under Section 12 allow for the prohibition of legitimate debate on the role of religion in society, including criticism of religion or religious doctrines;
- While protection of public order may justify some degree of restriction on freedom of expression,[5] there is no justification under international standards for rules such as Section 15.2.3, which states that broadcasters should "avoid humour which offends good taste and decency."

Recommendations
- All content-based restrictions must be revised for compliance with international freedom of expression standards. Pending a future revision of the Code, the Authority should ensure that all decisions in which the Code is applied are in conformity with these standards;
- The right to reply guaranteed in Section 5.6.4 and 8.2.4 of the Code is not justified. This provision should be deleted.

Regulation, self-regulation and independence from the State

ARTICLE 19 is concerned that the Code enacted by the Authority will seriously undermine the effectiveness of self-/co-regulation in Kenya.

In our earlier analysis of the Draft Code, we expressed concern regarding the level of government control over the Authority, notably the role of the government in appointing its Board of Directors. We reiterate the utmost importance of the independence of the regulatory authority. While perfect independence may be difficult to achieve, there are certain clear measures which need to be adopted in order to prevent political or other interference upon the decisions of the regulatory body.[6]

By contrast, through the adoption of the 2013 Media Council Act (nr. 20-2013), the Council has a co-regulatory status whereby its independence is guaranteed, while the law defines its remit and further provides for a certain level of public funding. However, the law also provided that the Council can impose sanctions such as limited fines, which brings it somewhat closer to a statutory media regulator than a self-regulatory body.

ARTICLE 19 previously expressed concern at the fact that the 2013 Act undermined the independence of the Complaints Commission of the Council, since the decisions of the Commission can be challenged by appeal to the state-controlled Multimedia and Communications Tribunal.[7]

We observe that according to Section 1.2, the Code will not apply to broadcasters that take part in a self-regulation mechanism, provided that said mechanism has been registered with, and approved by, the Authority. In other words, the Authority reserves control over all self-regulatory mechanisms. Given that a number of concepts in the Code are vague, the risk of arbitrariness is extended further by this power of the Authority to accept or discard a self-

[5] See ARTICLE 19, Hate Speech Explained, December 2015, available at http://bit.ly/1PfLHh4
[6] See for instance ARTICLE 19, Policy Brief: International standards: Regulation of broadcasting media, April 2012, available at http://bit.ly/1SsikyX
[7] ARTICLE 19, Kenya: New laws mark major setback for media freedom, December 2013, available at bit.ly/1qsTVxw.

regulatory system. This serves to keep any self-regulation initiative under the control of the Authority, and thereby of the State.

In sum, the current legislation defeats the purpose of self-regulatory or co-regulatory mechanisms.

Recommendations

- Kenyan legislation on media regulation should be revised in order to:
  - Reinforce the independence of the Authority in conformity with international standards on the regulation of broadcast media;
  - Prevent any control of public authorities over self-regulatory or co-regulatory bodies.

Overlap between regulation and self-regulation

Broadcast and virtual media conflicts between self-regulation and regulation

Under international standards, regulation is justified for the broadcast media sector, where the naturally-limited resource of the electro-magnetic spectrum calls for a necessary public intervention. For other categories of media, self-regulation has emerged as a less-restrictive means to achieve objectives of public interest such as the promotion of quality journalism. For example, in *Access to Airwaves,* ARTICLE 19 noted that where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.[8]

However, in countries where a regulatory body and self-regulation mechanisms have both been instituted, there may be an overlap between the respective roles of each institution with regard to audio-visual media. This often comes from the fact that legal rules, of which the regulatory body is the legal guardian, may contain prescriptions very similar to rules of professional ethics, of which the self-regulation mechanism is the "natural" guardian.

The current situation in Kenya is further complicated by the overlap between the Code enacted by the Authority, and the code of conduct for the practice of journalism in Kenya adopted by the Council. Indeed, there are three co-existing instruments which partially overlap: the overly detailed law (Part IV of the Broadcasting Regulations), the Code (see above), and the code of conduct for the practice of journalism in Kenya.

We observe that divergences may emerge between decisions adopted by the Authority and the Council on similar matters of professional ethics. This could lead to a situation where rules of professional ethics would vary when applied to audio-visual media and to journalists working in other categories of media. Such divergence makes no practical sense.

Furthermore, one has to consider the technological evolution: as traditional formats of media increasingly converge in the digital era, it becomes difficult to distinguish print media from audio-visual media. Websites and applications, for instance, sometimes combine text, images and film, and thus cannot be classified either as print or audio-visual media. This reinforces the above conclusion, that rules of professional ethics should be the same for all media.

[8] ARTICLE 19, *Access to Airwaves*, *op. cit.*, Principle 23.2

Harmonious co-existence of regulation and self-regulation for broadcast media

It should be made clear that the regulatory authority's remit covers all legal disputes, that is, complaints that relate to the violation of the law on broadcast media; the self-regulatory body, meanwhile, should deal with violations of the rules of professional ethics. However, one and the same rule may be enshrined both in the code of professional ethics and in the law on broadcast media: the application of such a rule may be implemented both by the regulatory authority (in as far as the rule is enshrined in law) and by the self-regulatory body (as the rule is also part of professional ethics). In theory, both institutions may thus examine a case, each from the point of view of applying their own set of rules.

As a general principle, ARTICLE 19 suggests that the violation of professional ethics should only be assessed by the self-regulatory body. Self-regulation is a lesser restriction on freedom of expression. Such a solution would also ensure a uniform interpretation of professional ethics and good practices.

By way of consequence, the regulatory authority should refer all complaints where an issue of professional ethics is at stake to the self-/co-regulatory body.

Once the self-regulatory body has reached a decision on a case that was referred to it by the regulatory authority, the regulatory authority will have to determine whether:

- The decision of the self-regulatory body offers an adequate and sufficient resolution of the legal dispute (that is, a complaint that concerns the violation of a legal rule); or
- A separate decision on the legal issue at stake is necessary.

When it decides to further examine a case that has been decided by the self-regulatory body, the regulatory authority must take into account any sanctions that may already have been imposed by the self-regulatory body.

It may happen that the self-regulatory body and the regulatory authority reach diverging conclusions on the interpretation of a rule that is enshrined both in professional ethics and in the law on broadcast media. Both institutions should hold meetings on a regular basis to discuss possible divergences and elaborate a refined common understanding of rules that are provided for both in law and in codes of professional ethics.

This system, as outlined below, will allow each institution to operate effectively:

- In all matters of professional ethics, priority is given to the least restrictive burden on freedom of expression (that is, self-regulation or co-regulation);
- However, the fact that the regulatory authority may still reach a binding decision in the same case will serve as a *de facto* incentive for the self-regulatory body to work with efficiency and make impactful decisions;
- The regulatory authority reserves the right to apply the law on broadcast media where it deems it necessary;
- The institutional dialogue between both institutions will help resolve diverging views.

From a practical perspective, however, ARTICLE 19 reiterates that the Authority currently lacks the guarantees of independence which are required under international standards on freedom of expression. Pending a revision of the legal status of the Authority, ARTICLE 19 recommends that it should have no possible influence over the operation and decisions of the Council. To this effect, the Authority should be prevented from examining and deciding any case where an issue of professional ethics is at stake.

Recommendations

- Laws on media should be revised in order to ensure that the Council holds jurisdiction over all matters related to professional ethics in broadcast media;
- Pending revision of the laws on media, the Authority should refer to the Council all complaints related to professional ethics; the Authority should not be allowed to decide cases where an issue of professional ethics is at stake.

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, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa, at henry@article19.org.