CENTRE FOR LAW AND DEMOCRACY

Tanzania

Analysis of the Media Services Act, 2016

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Executive Summary

The Media Services Act, 2016 (Act) is one of a number of pieces of legislation which affect the free flow of information and ideas in society, or freedom of expression, which the Government of Tanzania has adopted over the last year and one-half. While the other two – the Whistleblower and Witness Protection Act, 2015, and the Access to Information Act – make a clear contribution to freedom of expression, the benefits of the Media Services Act are less obvious.

The Act does have some positive provisions, including the rights of media houses and journalists set out in section 7(1). However, these are outweighed by its negative features. An initial problem with the Act is its potentially vast scope. Many of the definitions ultimately link back to the definition of a 'newspaper'. This includes any electronic material which contains, among other things, "news", "articles", "reports of occurrences" or "comments or observations which are published for distribution to the public either daily or periodically". This would cover almost any regularly updated blog or even social media page. As a result, the rules in the Act concerning licensing of both journalists and print media could be deemed to apply to any active Facebook user.

A second problem is the fact that two of the key regulators – namely the Director of Information Services Department (Director), who oversees the licensing of the print media, and the Journalists Accreditation Board (Board), which oversees the licensing of journalists – are not independent of government. International law is clear that media regulators need to be independent, for fairly obvious reasons, since bodies which are subject to political interference will make decisions based on politics rather than in the wider public interest and to support freedom of expression.

The Director is appointed on a largely discretionary basis by the President and presumably works inside of government, while the Minister exercises substantial control over appointments to the Board, as well as over some of its activities. Furthermore, a number of regulatory powers are allocated directly to the Minister, and the Board plays an important role in adopting and applying the code of ethics which is otherwise overseen by the Independent Media Council (Council).

Although the term used in the Act is accreditation, in fact the system it establishes in relation to journalists is a licensing system. Individuals cannot practise journalism unless they are accredited and those who wish to do so are required to apply for accreditation. Once again, the rules under international law on this issue are clear: there should be no licensing of, or even placing of conditions on, journalists.

The Act also establishes a system for licensing print media outlets based on requirements and conditions that have yet to be established. As with journalists, licensing of the print media is not considered legitimate under international law. Even a registration system will only pass muster if it does not impose substantive conditions on the print media. There are other problems with the licensing regime, including that it only envisages suspension or revocation of the licence as sanctions for non-compliance with licence conditions, rather than a more graduated system of sanctions which would

allow for more proportionate remedies to be applied.

The Act imposes a number of vague positive content obligations on the private media, which are open to abuse. It even allocates government the power to direct the media to carry nationally important news, which is clearly a breach of editorial independence.

Even more problematical is the large number of content restrictions imposed by various provisions in the Act. Some of these appear to be based on a confusion with exceptions in an access to information law, while others appear simply to duplicate rules in laws of general application. Yet others – including the prohibitions on publishing false news and seditious material – go beyond the content limitations that international law permits. The Act also establishes a very detailed regime governing defamation, which includes a number of positive features but also some problematical features, such as unduly limited defences to a defamation action.

It is welcome that the Act provides for a system of co-regulation, which can be a positive way to address problematical or unprofessional content in and behaviour by the media. However, the Council, which is independent, should be given full power to adopt and apply the code of ethics, and it should be clear that complaints against the media will be judged only on the basis of the code.

Key Recommendations:

- The scope of the Act should be substantially narrowed so that it only applies to journalists and mass media entities as these are commonly understood.
- Neither the Director nor the Minister should exercise regulatory powers over the media and, if the Board is to continue to play such a role, its independence should be very substantially enhanced.
- The system of licensing of journalists should be removed.
- The system of licensing of print media should be removed and, if it is replaced with a system of registration, this should only be technical in nature.
- The law should provide for a graduated system of sanctions for breach of the rules.
- The positive content obligations and most of the content restrictions should be removed.
- The defamation regime should be reviewed to bring it more fully into line with international standards.
- The Council should be the only official body with the power and responsibility to adopt and apply the code of ethics, and complaints against the media should be assessed only against that code.

Introduction[1]

Over the last year and one-half, the Government of Tanzania has adopted a number of pieces of legislation which address important issues regarding the free flow of information and ideas in society, or freedom of expression. The first was the Whistleblower and Witness Protection Act, 2015, which provided a degree of protection for whistleblowers.[2] This was followed by the Media Services Act, 2016 (Act),[3] which was signed into law in November 2016, and then the Access to Information Act, which was passed by Parliament but has yet to come into force.

Democratic observers, including the Centre for Law and Democracy, welcome the Whistleblower and Access to Information Acts. Even though these laws could be improved, they are designed to contribute to the free flow of information, in particular about matters of public importance, which is a foundational hallmark of a strong democracy.

The benefits of the Media Services Act are less apparent and many of its regulatory provisions appear designed more to limit or control media freedom than to promote it. It does have some positive provisions, including the rights for media houses and journalists found in section 7(1) and the establishment of a co-regulatory system for addressing unprofessional media behaviour.

In terms of restrictions, however, an initial point is that it is extremely broad in scope, covering not only the traditional media – print and broadcast – but also, at least potentially, a wide swath of online or electronic expressive mediums, including social media. Some of the entities which apply the regulatory tools and systems it establishes – in particular the Director of Information Services Department and the Journalists Accreditation Board – lack the independence which, according to international law, is required of bodies which regulate the media.

In terms of specific regulatory measures, it imposes a system of licensing on both individual journalists and print media outlets, in both cases in direct contravention of clear international standards. Both of these provisions also represent backsliding in relation to the Newspapers Act,[4] which it repeals, and

[2] The Centre for Law and Democracy did an analysis of that Act, which is available at: https://www.law-democracy.org/live/tanzania-whistleblower-protection-law-welcome-but-needs-improvement/.

[3] Act No. 12 of 2016, 16 November 2016.

[4] Nos. 3 of 1976 and 10 of 1994.

which only requires newspapers to submit to a system of technical registration and which does not impose any obligation on journalists to be licensed. The Media Services Act also contains a number of excessive and/or unnecessary content obligations and restrictions, which are imposed specially on the media The self-regulatory system it establishes, on the other hand, is welcome but could be further improved.

This Analysis reviews the provisions of the Act for compliance with international standards in this area, pointing to both areas where the Act respects those standards and where it fails to do so. In the case of the latter, the Analysis makes a number of recommendations for reform to bring the Act more fully into line with international rules.

1. Scope

Assessing the scope of the Act is somewhat complicated due to the overlapping, unclear and sometimes even circular definitions. However, it is at least apparent that it is very broad indeed. The two key sets of actors that are subject to regulatory measures are "journalists" and "print media", although some obligations also attach to "media houses" (see, for example, section 7(2)), "media services" (see, for example, section 50(1)), "media outlets" (see, for example, section 50(2)(a)), and "publications" (see, for example, section 51).

The definition of a journalist comprises two parts. First, the person has to be accredited as a journalist under the Act. However, since none of the provisions of the Act provide any indication of what substantive conditions would need to be met to be accredited (some procedural rules are provided for and the Act also calls for procedures to be set out in regulations), we must assume that the second part of the definition effectively sets the substantive conditions on who may be accredited (i.e. the scope of who may be a journalist).

The second part defines a journalist as someone who performs one of a range of actions – gathering, collecting, etc. – on news and information for a mass media service, whether as an employee or freelancer. A mass media service, in turn, is defined as providing any service through the media. Then, media is defined as a business which collects, processes and disseminates content through "radio, television or newspapers, and includes online platforms". Radio, television and online platforms are not defined, but a newspaper is defined as any printed or published material, including in electronic form, which contains, among other things, "news", "articles", "reports of occurrences" or "comments or observations which are published for distribution to the public either daily or periodically". It is not clear whether the last part, about daily or periodical distribution, qualifies all of the items on the list of what a newspaper might contain. The formatting – whereby this phrase appears to be part of just the last item – suggests otherwise but from a substantive point of view it would make sense for it to apply to all of the items, and we will work on that assumption here.

Even in this case, however, the scope of a newspaper – and hence a media, mass media service and journalist – are very broad indeed. Any regularly updated blog which reported on occurrences would qualify, and this would even extend to any Facebook or Twitter account which included comments or observations and which was updated regularly (noting that a vast number of such accounts get posted to daily). As a result, anyone who actively posts comments or observations on social media, i.e. anyone who is active on social media at all, would, under the Act, be subject to the rules regarding journalists, including being required to obtain accreditation to continue doing this.

The same breadth also applies to the "print media", the type of entity which may not, pursuant to section 8, be produced or distributed without a licence, since it includes any newspaper, as well as any journal, magazine and so on. Similar breadth issues apply to publications, which include anything which communicates any content via the media. For what it is worth, "mass media" is even broader, including any service which consists of the transmission of "voice, visual data or textual messages" to the general public.

It seems clear that pushing the definitions to these limits is not in anyone's interest and neither would it be practical, since it would be almost impossible for Tanzania to seek to regulate social media users and accounts in this way. However, the fact that the definitions are so broad is very problematical since the authorities always have the option of at least threatening to apply the rules to an enormous range of actors.

Recommendation:

- Relevant definitions, including of "journalist" and "print media", should be narrowed down substantially so as only to apply to mass media entities as commonly understood and to those who work for them. In this regard, consideration could be given to introducing the idea of an editorial process into the definition so as to exclude individuals posting material online.

2. Independence of Regulatory Bodies

It is a well established international standard that entities which exercise regulatory powers over the media should be independent of government (and of the sector they are regulating), in particular in the sense of not being subject to political interference. In 2002, the African Commission on Human and Peoples' Rights adopted a groundbreaking statement on standards regarding freedom of expression, the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration). Principle VII(1) of that Declaration states:

> 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.[5]

This refers to the broadcast media, because the Declaration does not envisage intrusive regulation of the print media, but the underlying rationale is the same for the print media and the principle clearly applies to all media.

Every year, the four special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – adopt a joint declaration on a key freedom of expression theme. In 2003, the Joint Declaration of the (then three – UN, OSCE and OAS) special mandates focused on regulation of media and journalists, stating, among other things:

> 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.[6]

Similarly, in its 2011 General Comment No. 34: Article 19: Freedoms of opinion and expression, the UN Human Rights Committee, the body which oversees compliance with the *International Covenant on Civil and Political Rights*,[7] which Tanzania ratified in 1976, stated:

> It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.[8]

The Act allocates regulatory powers to three entities, the Director of Information Services Department (Director), the Journalists Accreditation Board (Board) and the Independent Media Council (Council). Broadly speaking the Director licenses the print media, the Board accredits (licenses) journalists and the Council oversees the system of self-regulation or professional standards. The Act also allocates various oversight and regulatory functions directly to the Minister.

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[5] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

[6] 18 December 2003. All of these annual Joint Declarations are available at: http://www.osce.org/fom/66176.

[7] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

[8] 12 September 2011, CCPR/C/GC/34, para. 39.

The Director is appointed by the President (section 4(1)) and essentially serves as the spokesperson of the government and principal advisor on media affairs (section 4(2)). Section 5 of the Act lists the functions of the Director, most of which fall into these two categories (i.e. spokesperson and advisor). These are core government functions. However, the Director also licenses the print media (sections 5(e) and 9), a highly sensitive regulatory function regarding the media.

It is obvious that the Director is not independent. He or she is appointed directly by the President, with only limited conditions on the latter's discretion in this regard (namely that the person be of high integrity and proven knowledge in one of a number of fields). Although the Act does not stipulate this, the Director presumably reports directly to the President (or to another senior government figure). This follows from the spokesperson and advisor functions exercised by the Director which are everywhere allocated to internal government people. There is no reason why the person undertaking those functions should be independent, but it is, of course, very different as regards any licensing of the print media, which would need to be done by an independent body.

According to section 12(1) of the Act, the Minister appoints the seven members of the Board. He or she would appear to have broad discretion regarding the choice of the Chair, subject to that person being a senior accredited journalist, and complete discretion regarding the Secretary. The Director is another member and the Attorney General nominates a legal expert as member. Thus, a majority of the members – four, including the important positions of Chair and Secretary – is controlled by government. The other three members "represent" higher learning institutions, public media and private media, respectively, although it is not clear how this will work in practice and, in particular, how matters will be arranged between the Minister, who appoints, and those sectors.

The Schedule also applies to the members of the Board. It fixes tenure at three years (clause 2(1)), but also provides that the appointing authority, i.e. the Minister, may at any time remove a member (clause 2(4)), thereby completely undoing any protection of independence that would otherwise come with guaranteeing tenure. Furthermore, according to section 12(5) of the Act, the Minister may amend the Schedule.

The Minister exercises a number of other powers in relation to the Board. Pursuant to section 13(j), he or she may direct the Board to carry out "such other functions" as he or she wishes. The Minister's approval is also required for the appointment by the members of the Board of the Director General (section 15(1)), who essentially runs the organisation. The Minister also exercises various powers in relation to finances (see sections 43 and 46(4), (5) and (7)).

As elaborated on in more detail below, a core function of the Board is to license (accredit) journalists. This is an intrusive regulatory function which should never be overseen by a body which, like the Board, lacks the requisite independence from government.

The situation with the Council is a bit more complicated. According to section 25(1) of the Act, every accredited journalist is a member, while section 25(2) calls on the Minister to convene the first meeting to elect the leaders, who shall consist of the Chairman, Vice Chairman and two other journalists, "nominated by media associations". This is confusing because a system of nominations does not fit easily with the idea of members electing their leaders. Section 26(2) requires the Council, in the execution of its functions, to "adhere to national unity, national security, sovereignty, integrity, and public morals". These seem odd constraints to place on a body like this, and it is unclear how they would affect the independence of the body. On a more positive note, section 30 grants the Council fairly broad powers to regulate its own procedures and meetings.

The bigger problem here is the role of the Board in relation to the code of ethics for journalists. Section 13(b) lists enforcement of the code as one of the functions of the Board, while section 13(c) calls on it to uphold professional and ethical standards and section 19(5)(a) allows it to cancel the accreditation of a journalist for gross professional misconduct as assessed against the code of ethics. Section 26(1)(a), however, is more problematical since it calls on the Council, "in consultation with the Board", to adopt the code of ethics and otherwise to promote ethical and professional standards. This means that the Board plays an important role in terms both of setting professional standards and applying them, both highly sensitive regulatory functions.

The Act allocates a number of regulatory roles directly to the Minister. He or she serves as the appellate authority for, respectively, decisions of the Director in relation to licensing of the print media (section 10) and decisions of the Board in relation to accrediting journalists (section 21(5)). Giving the Minister oversight power in this way is a serious breach of the principle of independent regulation and, instead, appeals from regulatory decisions should go to the courts. Pursuant to section 58, the Minister has the "absolute discretion" to prohibit the importation of any publication which he or she believes would be contrary to the public interest. This a very wide and intrusive regulatory power, exercised by a highly political actor. Furthermore, its scope is extremely vague, being bounded only by the highly subjective notion of the public interest, which is not a sufficiently clear basis to regulate content. Section 59 gives the Minister similar powers in relation to content that jeopardises national security or public order. While this is more defined than the section 58 power, it is still draconian in nature and should be exercised only by a court.

Recommendations:

- The Director should not exercise any regulatory powers over the media. If some form of registration is retained for the print media, the oversight of this should be vested in an independent body.
- If the Board is to continue to exercise regulatory powers over the media,

the whole system of appointments, tenure and operations for the Board needs to be revised so as to limit the power of government over these processes with a view to enhancing the independence of this body.
- The rules on selection of the leaders of the Council should be clarified in favour of a democratic approach driven by the members.
- The Council should not be required to "adhere to national unity, national security, sovereignty, integrity, and public morals", as is currently provided for in section 26(2).
- The Board should play no role in either setting or applying professional standards for journalists.
- The oversight powers of the Minister – in terms of serving as an appellate authority for both the Director and Board – should be removed and should, instead, be allocated to the courts.
- There should be no power to ban content simply because it is deemed to be contrary to the public interest.
- Any power to ban content for jeopardising national security and public order should be removed from the Minister and, instead, vest in the courts.

3. Licensing Journalists

According to section 13(a) of the Act, one of the functions of the Board is to accredit and issue press cards to journalists while, pursuant to section 13(h), it shall maintain a roll call or register of accredited journalists. Section 14(b) gives the Board the power to "suspend or expunge journalists from the roll of accredited journalists", which would presumably amount to suspending or revoking their accreditation, although the exact relationship between accreditation and being listed on the roll is never made clear. Section 19(5) sets out the grounds for cancellation of accreditation which are gross professional misconduct or, for a foreign journalist, not pursuing the purpose for which accreditation was granted.

Although the Act uses the term "accreditation", it is clear that in fact this is a licensing system for journalists. This is apparent from section 19(1), which states that no one may practise as a journalist unless he or she is accredited, while section 19(2) provides that anyone who intends to practise as a journalist must apply for accreditation. These rules are supported by section 21(2), which provides for the suspension from practice of anyone who ceases to be accredited or is expunged from the roll. In other words, obtaining accreditation and getting on the roll is a formal precondition to practising as a journalist (i.e. it is required as a licence to practice).

A different system applies to foreign journalists, who may be accredited for a specific purpose for up to 90 days (section 19(3)), which may be extended for a further 21 days where appropriate (section 19(4)).

According to international law, licensing of journalists is not legitimate. Principle 10(2) of the African Declaration supports this, stating:

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

The 2003 Joint Declaration is even clearer, stating:

> Individual journalists should not be required to be licensed or to register.
>
> There should be no legal restrictions on who may practise journalism.

Similarly, General Comment No. 34 of the UN Human Rights Committee states:

> Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events.[9]

Clearly, the system of accreditation under the Media Services Act does not meet the conditions stipulated above and is instead, as noted above, a licensing system. These problems are exacerbated by the extremely harsh sanctions which await anyone who practices journalism without being accredited. According to section 50(2)(b), this may be punished by a fine of between five and twenty million shillings (approximately USD 2,200 to 8,800) and/or imprisonment of not less than three years (and not more than five years).

International law not only rules out licensing journalists but goes much further and even rules out the placing of any conditions on who may practise journalism. In the case *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the Inter-American Court of Human Rights was asked to assess a system which required journalists to belong to a particular association ("colegio") and to have certain qualifications, including a university degree, to practise journalism. It may be noted that this is in many respects far less intrusive than the Tanzanian system, among other things because it envisages neither the need to apply for membership nor the possibility of it being withdrawn.

The Court had no difficulty finding a breach of the right to freedom of expression. In response to the argument that this was a normal way to regulate professions, the Court noted:

> [B]ecause it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely

[9] Note 8, para. 44.

> granting a service to the public through the application of some knowledge or training ....[10]

And, ruling that the whole system represented a breach of the right to freedom of expression, the Court stated:

> It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention.[11]

Recommendation:

- The system of accreditation (licensing) should be done away with entirely and there should be no formal preconditions placed on the practise of journalism.

4. Licensing the Print Media

According to section 5(e), one of the roles of the Director is to license the print media. Section 8 prohibits anyone from, among other things, publishing, selling, importing, distributing or producing a print media unless he or she is licensed to do so. According to section 9(a), the Director may reject an application for a licence which "does not comply with the prescribed requirements", while section 9(b) allows the Director to suspend or cancel a licence where the licensee fails to comply with the conditions of the licence. No requirements or conditions are set out in the Act, but section 65(2)(b) calls for the Minister to adopt regulations on licensing of the print media. Appeals from a decision under section 9 go, pursuant to section 10(1), to the Minister, although section 10(2) purports to limit the grounds for an appeal to cases where the decision was not based on evidence, there was an error in law, or the procedures or other legal requirements were not complied with. An appeal from the decision of the Minister lies to the courts (section 10(3)). Operating a media outlet without a licence may lead to extremely harsh sanctions being imposed. Section 50(2)(a) provides for a fine of between five and twenty million shillings (approximately USD 2,200 to 8,800) and/or imprisonment of between three and five years for this offence.

The primary problem with this whole system is that international standards rule out licensing systems for the print media. Indeed, international standards even view registration systems with some suspicion. As Principle VIII(1) of the African Declaration states:

[10] Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 71.
[11] *Ibid.*, para. 81.

> Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.[12]

This clearly precludes the licensing system under the Act which involves substantive restrictions since a licence may be suspended or cancelled for breach of those conditions. Although we do not yet know what conditions might be imposed on the print media, since this will be spelt out in regulations or in individual licences, an indication of this is given in section 7(2)(b)(i), which suggests that print media licences will provide for limited "service areas" or geographic distribution. The 2003 Joint Declaration of the (then) three special international mandates on freedom of expression largely reiterates the position set out in the African Declaration:

> 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.[13]

The system of licensing envisaged in the Media Services Act fails to pass muster in relation to any of the three conditions in this statement since it does allow for discretion to refuse to issue a licence, since, by the same token, it does impose substantive conditions on print media outlets and since it is not overseen by an independent body.

There are other problems with the licensing system. First, pursuant to section 9(b), non-compliance with licence conditions may lead to suspension or cancellation of the licence. This is automatically a problem, given that international law does not envisage special conditions being placed on the print media. It is also a problem inasmuch as even suspension of a media outlet is an extremely harsh sanction. The rules should provide for graduated sanctions for breaches, starting with warnings, so that sanctions may be proportionate to the nature of the breach.

It is, as noted above, problematical that the Minister serves as the first appellate authority for the system of licensing. It is also problematical that section 10(2) attempts to limit the grounds of appeal, which should instead be allowed for any claim that the rules have not been followed.

Section 7(2)(a) states, as obligations of the public media, to provide media services to government, to enhance communication within the government and between the government and the public, and to raise public awareness "from Government and public sector". This reflects a very old-fashioned notion of the

[12] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.
[13] 18 December 2003. Available at: http://www.osce.org/fom/66176.

role of the public media, which is inconsistent with modern democratic values and, indeed, the right to freedom of expression under international law. While public media should indeed enhance communications between different sectors of society, including government, they should in no way be seen as a government mouthpiece or as being subject to any form of government control. The idea that the public media should provide services to government, for example, is simply not appropriate. Rather, they should provide services to the public.

Recommendations:

- The licensing system imposed by the Media Services Act should either be done away with entirely or replaced with a technical registration system whereby print media obtain registration simply by submitting certain information.
- Any system of sanctions for breach of the rules relating to print media should be graduated in nature.
- Appeals, which should not go to the Minister, should not be restricted but should instead be allowed for any breach of the rules.
- The obligations of the public media should be revised so it is clear that their mandate is to serve the public and that they operate fully independently of government.

5. Content Restrictions

The Act imposes a number of both obligations and restrictions regarding the content that may be carried in different types of media. In terms of obligations, section 7(2)(b)(iii) requires private media to promote public awareness about issues of national interest, while section (iv) calls on them to publish or broadcast nationally important news "as the Government may direct". The latter is clearly offensive to freedom of expression inasmuch as the government has no right to tell the media what to do. The right of media outlets to decide what news to carry is an integral part of editorial independence. More generally, vague positive content obligations of this sort are open to abuse since what constitutes an issue of national interest or national importance is almost entirely subjective.

The Act contains a large number of rules prohibiting certain types of content being carried in different media outlets, or being disseminated by the public at large. Section 7(3), for example, prohibits a "media house" from disseminating information that:

- undermines national security or a lawful investigation;
- impedes due process or endangers anyone;

- constitutes hate speech;[14]
- discloses the proceedings of the Cabinet;
- facilitates an offence;
- involves unwarranted invasion of privacy;
- infringes lawful commercial interests, including intellectual property rights;
- hinders or harms the ability of the government to manage the economy;
- undermines the "information holder's" ability to give judicious consideration to a matter; or
- damages the "information holder's" position in legal proceedings.

According to section 7(4), in case of conflict with other laws, these rules shall prevail.

While the first six of these might appear to be reasonably legitimate, the others resemble more exceptions in an access to information law than content restrictions. Indeed, the specific reference to "information holder" in the last two renders them incoherent in the latter context, while the reference to managing the economy in the third to last one is classical access to information language but is not appropriate as a restriction on media content.

More generally, however, it is unclear why special content rules in relation to these matters need to be applied to media houses, or whether these rules are in any material way different from their counterparts in laws of general application. All of these issues, to the extent that they are legitimate, are presumably already addressed in laws of general application, mainly the Penal Code. Special rules governing the media are legitimate only where the media stand in a particular position in relation to the matter. This would not appear to be the case with any of the restrictions in section 7(3) and special rules in these areas are not imposed on the media in democracies.

Section 50(1) sets out a number of content-related offences based on publishing certain types of content through a "media service". Many of these revolve around the idea of publishing false information which leads to one or another consequence, including harm to reputation, although others deal independently with harm to such things as reputation, defence, public safety, economic interests of Tanzania and even "prohibited information". Section 54 also addresses the publication of false statements.

Many of the section 50(1) offences suffer from the same criticisms as are applicable to the section 7(3) restrictions inasmuch as there is no apparent reason why special offences along these lines might be needed for the media. In terms of reputation, the Act already includes an extremely detailed regime for

[14] The provision actually states "does not constitute hate speech" but this is presumably a drafting error.

defamation so it is surely not helpful to provide, in a far less sophisticated way, for a parallel regime governing this issue.

On the issue of false news, in their 2010 Joint Declaration, the special international mandates on freedom of expression noted their concerns with the "retention of antiquated legal rules – such as sedition laws or rules against publishing false news – which penalise criticism of government".[15] Furthermore, a provision which was remarkably similar to the section 54 rule was comprehensively struck down by the Supreme Court of Zimbabwe in the case of *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*.[16] In that case, the Court recognises that such offences are notoriously vague and open to abuse, and that the harm that is sometimes assumed to flow from the publication of so-called 'false news' is more often than not illusory in nature.

Sections 52 and 53 address, in some detail, the question of sedition. These rules have no apparent link to the media so it is unclear why they have been included in the Act at all. Furthermore, the Penal Code already includes provisions, albeit less detailed, on sedition. Perhaps more importantly, as is apparent from the quotation above from the 2010 Joint Declaration, there are very serious problems with the whole idea of sedition and such rules have either been repealed or fallen into disuse in most democracies. The UN Human Rights Committee has also expressed concern about rules on sedition, stating:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. [references omitted][17]

Sections 35 to 41 of the Act establish a very detailed regime for defamation. It is beyond the scope of this Analysis to provide a precise assessment of this regime. An initial comment is that although some parts of this regime appear to be oriented towards a civil law approach, it would seem that overall the regime envisages defamation as a criminal offence. For example, section 35(3) refers to the need for certain cases to go through the Director of Public Prosecutions. According to international standards, defamation should be civil in nature.

Otherwise, we note that sections 38 and 39 contain very detailed lists of cases in which statements shall be deemed, respectively, to be absolutely or conditionally privileged, which is helpful. We also note that section 40 seeks to institute a system of making an offer of amends, which is generally designed to allow a defendant in a defamation case to accept some level of responsibility and thereby bring the proceedings to a close more rapidly and/or limit his or her responsibility for the costs of defending the action. This sort of approach has been implemented with some success in a number of other jurisdictions.

[15] 3 February 2010, para. 1(g). Available at: http://www.osce.org/fom/66176.
[16] 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99.
[17] General Comment No. 34, note 8, para. 30.

Otherwise, we note that, apart from section 41, which addresses certain procedural issues relating to allegations of defamation against a print or electronic media, the rules on defamation do not appear to be confined in any way to the media, so it is not entirely clear why they have been included in this particular Act.

Regardless, we note a few concerns with the remaining provisions. Pursuant to section 36(1), merely making the defamatory meaning known to the person who is the target of the statement is deemed to constitute a libel. Given that the whole purpose of defamation laws is to protect the reputations of individuals, as explicitly recognised in section 35(1), it is unclear how a statement which was not heard by a third party, and only by the target of the defamation, could qualify. Better practice in this area is to require the statement to have been heard by third parties.

Pursuant to section 37(a), it is a defence to defamation to show that the statement is true and that it was published for the public benefit. It is well established under international law that is it enough to prove that the statement is true, without being required additionally to prove that it was for the public benefit. Thus, the UN Human Rights Committee has stated that defamation laws "should include such defences as the defence of truth".[18]

Section 37 only recognises two defences to an action for defamation, namely the proof of truth, noted above, and the defence of privilege. Under international law, however, a number of other defences have been recognised, among others, a defence based on the reasonableness or good faith of the statement. As the special international mandates on freedom of expression stated in their 2000 Joint Declaration:

> [I]t should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances.[19]

Recommendations:

- The law should not impose vague positive content obligations on the media.
- The government should not have the power to direct the media to carry any sort of news or information.
- To the extent that restrictions on media content in the Act have been inappropriately transcribed from an access to information context, they should be removed.
- Special restrictions on media content which essentially run in parallel to

[18] General Comment No. 34, note 8, para. 47.
[19] 30 November 2000. Available at: http://www.osce.org/fom/66176.

general rules relating to the same matters and which either are not materially different from the general rules or cannot be justified by reference to the particular role played by the media in society should be removed.
- Rules providing for general prohibitions on false news or related ideas should be removed.
- The prohibitions on sedition should be removed.
- A statement should only be eligible to be assessed as defamatory if it was heard by at least one third party.
- Proof that a statement is true should be a complete defence to a claim of defamation.
- The list of defences for defamation should be expanded to cover all of the defences that are recognised under international law.

6. Self-Regulation

The Council is the body that oversees the primary system of self-regulation – or, more properly, co-regulation, because the Council is established by law – for the print media. In accordance with section 26(1)(a), the Council, albeit in consultation with the Board, is tasked with adopting a "code of ethics for journalists professionals". Section 26(1)(c) calls on the Council to determine print media content complaints, while section 28(1) gives anyone who is "aggrieved by content of a print media" to lodge a complaint with the relevant committee of the Council. Section 28(2) mandates the Council to establish rules for the processing and resolution of complaints. Pursuant to section 27(2), the Council shall establish a special committee to deal with "print media content complaints".

Self- or co-regulation has often been recognised as one of the best forms of addressing harmful content in the media. It can provide a system for this which is effective and yet does not intrude unduly on media freedom or open up opportunities for political interference with the media. However, Tanzania already has in place a system of self-regulation in the form of the Media Council of Tanzania.[20] It is beyond the scope of this Analysis to assess or comment on the effectiveness of the Media Council of Tanzania. However, where an effective self-regulatory system is in place, there is no need to create a new, co-regulatory system.

Subject to the comment above, the idea of an co-regulatory system for professional complaints is generally welcome. At the same time, there are a few ways in which the system could be improved. The problematical role of the Board in both developing and applying the code, the latter through cancelling the accreditation of a journalist for gross breaches of the code (section 19(5)(a)), has

[20] See http://www.mct.or.tz.

already been noted above. Better practice would be to require the Council to consult with interested stakeholders, and not another regulatory body, especially one that lacks independence, when developing the code. Respect for the code is also established as a direct legal obligation for both public and private media (sections 7(2)(a)(iii) and 7(2)(b)(ii)). While it is not necessarily inappropriate to make compliance with the code and the decisions of a co-regulatory body a legal obligation, the matter of sanctions should be left entirely to the co-regulatory body. It is unclear whether breach of section 7(2) may lead to other forms of sanction and, if so, what they are and who might apply them.

The system under the Act also fails to make it clear that decisions in relation to complaints will be decided by reference to the code, rather than anything else. Section 28(1), establishing a right to lodge a complaint, simply refers to the complainant being "aggrieved" by media content. It would be preferable to link complaints to the code (and also to limit them to that – i.e. to cases where there is an allegation of a breach of the code).

The Act consistently refers to print media content in this context. However, better practice codes address not only content, *per se*, but also the manner in which that content has been collected or produced. Thus, it is common for such codes to address issues like treatment of individuals suffering from grief, using subterfuge or covert recording devices to gather news, treatment of children and so on.

Recommendations:

- The Council should develop the code itself, in consultation with interested stakeholders rather than the Board.
- The power to impose sanctions for breach of the code should vest exclusively in the Council.
- It should be clear that complaints about print media outlets shall be assessed exclusively against the code, as opposed to any other set of standards.
- The law should envisage the code, and complaints relating to the print media, addressing a range of professional media behaviour and not just media content.