Note on the Tanzanian Draft Media Services Act, 2015

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Introduction

The Government of Tanzania has prepared a draft Media Services Act, 2015 (draft Act). The scope of the draft Act is broad, covering print, broadcast and also online media, as well as the regulation of journalists. It also covers to a limited extent the information services of the government (i.e. the function of government spokesperson) and establishes a Media Services Fund to support various public interest objectives in the area of the media. Finally, the draft Act establishes a complex regime governing defamation, along with a number of criminal proscriptions on what may be disseminated, including through the media.

This Note provides an assessment of the draft Act, taking into account international standards relating to freedom of expression and better comparative practice in the area of media regulation.

The establishment of a Media Services Fund with the aim of promoting local content development, encouraging professionalism and promoting media research is positive, although it is unfortunate that this is overseen by a body which lacks independence from government. Otherwise, however, the draft Act largely fails to conform to international standards of respect for freedom of expression. The regulatory bodies that it establishes are all firmly under the control of the government, contrary to clear principles of international law. It suffers from significant regulatory overbreadth inasmuch as it subjects a wide range of types of media to a very discretionary licensing regime, imposes conditions on who may be a journalist, and gives government-controlled entities and actors the power to apply the rules on defamation and very broad discretionary powers to ban the import of publications.

If it were to be passed in its current form, the draft Act would very seriously undermine respect for freedom of expression in Tanzania. Indeed, the draft Act is in need of a fundamental rethink and major revision. It attempts to apply intrusive regulatory systems to an extraordinarily broad range of forms of communication. In some cases, the proposals are simply not realistic at a practical level. It proposes, for example, to subject social media to licensing but the main systems of social media – such as Facebook, Twitter and Snapchat – operate via websites which are established outside of Tanzania and which are essentially beyond the reach of the government of Tanzania. It also proposes very intrusive controls in other areas, such as granting the power to a government-controlled body to license journalists and, thereby, to stop people from working as journalists. Adoption of a law along these lines would place Tanzania in significant breach of her international legal obligations to respect freedom of expression.

This Note focuses on three main areas of concern with the draft Act. First, it analyses the various ways in which different regulatory bodies lack independence from government. Second, it describes the areas in which the draft Act provides for overbroad or unduly intrusive regulation of the media. Third, it assesses the various content restrictions established in the draft Act against international standards.

1. Independence of Regulatory Bodies

The draft Act establishes two bodies with regulatory powers over the media. The first is the Council, which is to operate within the ambit of the Tanzania Communication Regulatory Authority, and which is responsible for licensing newspapers, news agencies, broadcasters and social media, for monitoring media content, for addressing complaints about media performance and for enforcing media codes of ethics, among other functions. The second is the Journalist Accreditation Board which is responsible, as the name suggests, for accrediting but also for licensing journalists, as well as for administering (i.e. overseeing) the Media Services Fund.

It is clear that these are very significant and important regulatory powers, which touch directly on the operations of media outlets. Many of these powers are particularly sensitive to the risk of political interference as they involve gatekeeping functions (who can access the sector or profession), regulation of content and allocation of public goods. It is well established under international law that bodies which exercise such powers should be independent of government. For example, a 2003 Joint Declaration adopted by the then three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Special Representative on Freedom of the Media – stated:

> 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.[1]

Neither the Council nor the Board, nor, for that matter, the Tanzania Communication Regulatory Authority, are independent. The Chair of the Board is appointed by the President, in his or her sole discretion (subject only to some formal requirements of expertise and citizenship) and the other (ordinary) members are appointed by the Minister. Two of the ordinary members – the Director of Information Services (an official within the ministry responsible for information) and a law officer representing the Attorney General – are officials and there are no conditions on the Vice-Chair, while the other three represent various sectors of society (higher learning institutions, and the print and broadcasting sectors) (see section 4 of the draft Act). Pursuant to clause 1(2) of the First Schedule, members may be terminated by the appointing authority on very broad grounds. Clause 9 of the First Schedule gives the Minister the power to set the remuneration and allowances packages for members. Importantly, the Director of Media Service, who is appointed by the Minister from among senior public servants, is "responsible for day to day activities of the Council" (section 8 of the draft Act). Finally, one of the most important powers of the Council, namely to issue licences, can only be exercised with the approval of the minister (section 6(2)).

The relationship between the Council and the Tanzania Communication Regulatory Authority is not spelled out in the draft Act beyond the stipulation that the Council is "within the Authority" (section 4(1)). Pursuant to section 7 of the Tanzania Communications Regulatory Authority Act, 2003,[2] the Chair and Vice-Chair of the Authority are appointed by the President while the other members are appointed by the Minister, meaning that it also lacks independence from government.

As for the Board, all of its seven members are appointed by the minister. In this case, the minister has unfettered discretion to appoint the Chair, three of the other six members are officials – the Director of Tanzania Information Services (an official within the ministry responsible for information), a State Attorney representing the Attorney General and the Director of Media Services (a senior official) – while the other three members represent higher learning institutions and senior journalists (two) (section 16(1) of the draft Act). The minister also appoints the Chief Executive Officer of the Board, who is "responsible for the day to day activities of the Board" (section 19). The minister also has apparently unlimited power to revoke the appointment of a member, "at any time" (clause 2(4) of the Second Schedule).

As a result of these provisions, both the Council and the Board are effectively subject to the control of the government.

[1] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176. The special international mandates, now four with the addition of the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have adopted a Joint Declaration on a freedom of expression theme every year since 1999.
[2] No. 12 of 2003, 23 May 2003.

The draft Act also contains provisions which undermine the independence of the public media. Pursuant to section 14(a), such media are required to provide "media services to the … Government", to "enhance communication within Government and between Government and the Public", and to "provide public awareness on development matters from Government and public sector". This appears to subject the public media outlets to extensive reporting control on the part of government, as opposed to them being free to decide on their own editorial positions.

Recommendations:

- The rules relating to the appointment of the members of both the Council and Board should be significantly revised so as to ensure, as far as possible, their independence from both the government and commercial pressures.
- The Council and Board should have the power to appoint their own executive directors, the individuals who are responsible for running the day-to-day affairs of these bodies, and other staff.
- The public media should enjoy editorial independence within an overall mandate to provide comprehensive news services to the public (which would include reporting on important government actions).

2. Regulatory Overbreadth

International law recognises that there is a need for certain forms of regulation of the media – such as licensing of broadcasters – among other things to promote media diversity which is itself a freedom of expression interest (freedom of expression as guaranteed under international law protects the rights of both the speaker and the listener, in the latter case to be able to receive a diversity of information and ideas). At the same time, this is limited to what is needed to achieve legitimate regulatory objectives. The regulatory proposals in the draft Act go far beyond what is considered to be legitimate under international law.

A first problem is the extension of intrusive regulatory powers – including licensing, monitoring and dealing with complaints – to the Internet in general, including specifically social media. The definitions, found in section 3 of the draft Act, of such terms as 'content', 'electronic media', 'mass media', 'media' and 'media services' all capture, either explicitly or implicitly, Internet communications systems including websites. Section 5 explicitly provides for the monitoring and licensing of social media and implicitly for these functions in relation to all websites (via the definitions noted above). Section 6 provides for the cancellation or suspension of licences, including of online actors, on grounds which remain very unclear. Section 9 prohibits the offering of any "media service", which explicitly includes any "internet service", without a licence, while section 11 envisages the inclusion of conditions in licences (although the scope of such conditions its not stipulated), along with the power to suspend the licence for breach of

those conditions. Section 12 provides for complaints in relation to any "content provider", which includes any form of information, including 'data'.

Pursuant to these rules, anyone who wished to run a website – whether to advertise his or her business, to profile his or her personal activities or to promote public interest objectives, for example as a civil society organisation or even public body – would need to obtain a licence to do so. This is simply illegitimate according to international law. As the special international mandates on freedom of expression stated in their 2011 Joint Declaration:

> 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.[3]

This rules out even registration requirements for most online service providers, let alone the imposition of a requirement to obtain a licence. It may be noted that, in most democracies, online service providers are not required to go through any special process or formalities to operate, beyond normal business registration rules.

Furthermore, as noted above, these rules also appear to be an attempt to impose Tanzanian licensing requirements on social media, although the vast majority of such services are operated from abroad and are effectively beyond the reach of Tanzanian regulators.

A second problem is that the Council is given the power to "license newspapers" (see sections 5(e) and 9(1), which refer to this power of the Council and prohibit the operation of a media service without a licence), as well as to "reject applications for licence" (section 6(1)(d)) and to "cancel or suspend licence" (section 6(1)(e)), the latter on a no objection basis from the minister. It is not legitimate to impose licensing requirements on newspapers and, once again, this is not done in democracies. The problem with these provisions (including inasmuch they are applied to online content forms) is exacerbated by the fact that the draft Act provides no detail at all as to how the licensing system should work – the rules relating to licensing are to be set by the Minister (section 9(2)) – and so the authorities have extremely wide discretion in this regard. Better practice for cases in which licensing is required, for example for broadcasters, is to set clear parameters on how the regulator is to do this, so as to limit the possibility of abuse of discretion and to ensure that the process is scrupulously fair.

Even purely technical registration requirements (i.e. whereby aspirant newspapers simply notify the authorities that they are starting to operate and which do not grant any discretion to the authorities to refuse permission) can be abused and should, therefore, be designed with particular care where they are imposed. As the special international mandates on freedom of expression stated in their 2003 Joint 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

[3] Adopted 1 June 2011. Available at: http://www.osce.org/fom/66176.

> registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[4]

Section 12 provides for individuals to lodge complaints with the Council where they are "not satisfied with the conduct or services of a content provider". There are a number of general problems with this approach. First, better practice in relation to the print media is to allow for a system of self-regulation to emerge or, at a minimum, to ensure that media actors play a dominant role in any complaints system, even if it is established by law, which is known as co-regulation. This is clearly not the case here. Second, the system appears to allow for entirely open-ended complaints based on any form of dissatisfaction with media services or conduct, whereas better practice in this area is to provide for the preparation of a code of conduct against which to measure media performance. This is only fair, as it provides the media with clarity about the standards it is expected to meet. Third, better practice is to limit the sanctioning powers in case of a breach of the code of conduct to a warning or a requirement to carry a statement by the oversight body recognising the breach. The draft Act does not set out the powers of the Council when it upholds a complaint, but it must be assumed that they are significant, probably including possible licence revocation. Finally, those aggrieved by a decision of the Council may appeal to the Fair Competition Tribunal. This seems an odd place for appeals to go given that complaints will presumably rarely be about competition issues and that this Tribunal will not have any expertise on issues of media regulation.

Sections 17, 18 and 21-23 of the draft Act establish what is in effect a licensing system for individual journalists, although it is presented as an accreditation system. Pursuant to sections 17(d) and 21(2), the Board has the power to accredit journalists and then to issue cards to those who are accredited. Importantly, pursuant to section 21(1), no person shall practise journalism unless he or she is accredited. Section 21(3) sets out conditions for accreditation, including that the person has a degree in journalism or mass media, or a diploma in journalism and a degree in a relevant field, and has "complied with the requirement for accreditation", although what this consists of is not stipulated. Accreditation may be cancelled if the journalist has engaged in "gross professional misconduct" (section 22(6)(b)). The Council maintains a roll call of journalists and if a person's name is deleted from the roll call, he or she may not practise journalism or any career "connected to the journalism profession" unless he or she has the written consent of the Board (section 23). Section 18(b) grants the Board the power to fine journalists and to "deregister journalist from the role".

It is very clear under international law that it is not legitimate to license journalists in this way or to impose conditions, including as to education, on who may be a journalist. Working as a journalist is a fundamental human right which cannot, as a result, be subject to the same measures of control as apply to other professions. This has been decided by

[4] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.

international courts[5] and has also been noted by the special international mandates on freedom of expression in their 2003 Joint Declaration:

> Individual journalists should not be required to be licensed or to register.
>
> There should be no legal restrictions on who may practise journalism.[6]

Section 17(b) also gives the Board the power to "enforce journalists code of ethics", but no further details on how this should work are provided. As with the complaints system for the media, it is better practice for any such system to be applied on a self-regulatory basis and indeed this is even more important for individual journalists than in the case of the print media. Furthermore, there is no need for two systems along these lines to be applied; if there is a complaints system for the media as a whole (or different media sectors), that is enough and it is not necessary to extend this to individual journalists. At a very minimum, international law imposes a number of constraints on any system of ethics for journalists, including that it be applied by an independent body, that it be based on a clear set of rules established in advance and that it provide for only limited sanctions (essentially a warning or requirement to publish a statement).

Pursuant to section 35, anyone who alleges that a media outlet has defamed them may apply to the Board for redress. As with the other complaints and enforcement mechanisms in the draft Act, this section does not stipulate what sanctions might be applicable, providing only for an appeal to the courts, but it may again be assumed that this would potentially extend to suspension or even revocation of the licence of the offending media outlet. Once again, this is illegitimate. Only a fully independent body – in an analogous way to the need for an independent judiciary – should have the power to impose sanctions on media outlets.

Section 43 gives the Board the power, where it is of the opinion that the importation of any publication would be "contrary to the public interest" and "in its *absolute discretion*" [emphasis added], to prohibit such importation. This is an extremely broad, discretionary power vested in a government-controlled body and, as such, is not legitimate. It may be noted that the right to freedom of expression under international law applies "regardless of frontiers". The power to ban the importation of content should be limited to clearly defined grounds – as opposed to the idea of the public interest, which can be understood to include practically anything – and should be exercised only by an independent body, such as the courts.

Section 44 grants the Director of Media Services the power to seize any equipment from a premise which "he has reasonable grounds to believe" hosts a media house that has been established or operated in breach of the Act. This is, once again, an extremely broad and intrusive power being granted to a government actor. It may be noted that the seize of equipment from a media house will effectively shut it down, a very severe measure. The

[5] See, for example, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5 (inter-American Court of Human Rights). Available in English at: http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf.
[6] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.

standard for application of this rule – reasonable grounds to believe – is exceedingly low, far too permissive for such an intrusive measure. And the grounds that trigger this action – which include operating in contravention of the Act, which might include something as simple as a breach of the code of conduct – are too broad.

Recommendations:

- Intrusive regulatory requirements should not be imposed on the Internet or social media, including to obtain a licence or even to register, or to be subject to any system of complaints, apart from before the courts for breach of the law.
- The requirement to obtain a licence to operate a newspaper should be removed.
- The approach to complaints against the media should be reconsidered. Ideally, at least the print media should be encouraged to establish their own self-regulatory system. At a minimum, the system should be overseen by an independent body, should involve the development of a clear code of conduct and should provide for only limited sanctions in case of breach.
- The system of licensing journalists should be removed. Any system of accreditation should apply only to ensure access to limited space venues, and not access to the profession as a whole, and should be applied by a body which is independent of government.
- The rules providing for a code of ethics to be imposed on individual journalists should be removed.
- Section 35, providing for complaints about defamation to go to the Board, should be removed.
- The power to ban the importation of content should be limited to the courts or another independent body and should be based on clearly defined grounds, such as the fact that the content is illegal.
- A media house should not be subject to seizure of its equipment except where a court order to this effect has been issued, based on a serious breach of the rules relating to the operation of a such an outlet.

3. Content Restrictions

A number of provisions in the draft Act impose limitations on the content of what may be disseminated by the media (and more generally). Section 12, relating to dissatisfaction with the conduct or services of a content provider, has already been addressed above. Section 14(b)(ii) requires private media outlets to maintain a professional code of ethics (which will then, pursuant to section 5(n), be enforced by the Council). It is neither necessary nor efficient to require every media outlet to maintain its own code of ethics. Instead, it makes far more sense for a central complaints system, based on a central code, to be developed to cover all of the media or all of the media in a particular media sector (such as the print or broadcast media).

Section 14(b)(iv) requires private media outlets to carry the news produced by the public broadcaster at 20:00 each day. This is simply not legitimate and unheard of in democracies. Editorial independence of both public and private broadcasters is a foundational principle of international standards relating to freedom of expression. The *Declaration of Principles on Freedom of Expression in Africa*, for example notes the importance of editorial independence for both the public and the private media.[7]

The draft Act contains detailed rules relating to defamation which fail to conform to international standards in this area. Pursuant to section 31, the only defences to a defamation action are that either "the matter is true and it was for the public benefit that it is published" or that it is privileged. Under international law, true statements should never attract liability in defamation, whether or not they meet the additional condition that they are for the public benefit. Furthermore, international law provides for additional defences – including that the statement was an opinion or that it related to a public figure and it was reasonable to publish it. Principle XII(1) of the *Declaration of Principles on Freedom of Expression in Africa* states, in part:

> States should ensure that their laws relating to defamation conform to the following standards:
>
> - no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;

Section 36 of the draft Act includes a number of unduly broad and/or vague criminal offences which may lead to the harsh punishment of five years' imprisonment. These include any statement which threatens the economic interests of the State or public morality or health, false statements and seditious publications. Section 38 defines sedition in an extremely broad manner, for example to include creating "discontent or disaffection amongst people", which would apply to much of the criticism of government that is made on a daily basis in democracies around the world, while section 39 provides for very broad offences in relation to seditious material, including simply possessing it. Section 40 repeats the prohibition on false news. These are all offences which have been rejected by courts in different countries. The Supreme Court of Zimbabwe, for example, struck down a false news provision which was more carefully worded than the one in the draft Act on the basis that it was an unconstitutional limitation on freedom of expression.[8] The offence of sedition has been considered to be illegitimate for a long time and has been either struck down or removed from the books in most democracies.

Recommendations:

- The law should not require individual media outlets to maintain their own individual codes of conduct or ethics and any such codes should only be enforced by an independent body.
- Private broadcasters should not be required to carry the news produced by the

[7] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, Principles VI and VIII.

[8] See *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99.

public broadcaster.

- The rules on defamation should allow for a simple defence of truth without the need to prove anything more, as well as the defences of opinion and reasonableness in relation to statements on public figures.
- Sections 36 and 38-40 should be removed.