



Statement

on the

Draft Media Council of Kenya Bill, 2006

London
March 2006

1. Introduction

ARTICLE 19 is gravely concerned at the proposal of a statutory media council in Kenya, as outlined in the Media Council of Kenya Bill 2006. We urge the Kenyan Parliament to abandon this Bill and recommend that efforts should instead be directed towards making the existing, voluntary Media Council work. It is well established that media self-regulation is highly preferable to regulation by a statutory authority, which would risk endangering the independence of the media and impinge on the free flow of information which is fundamental for any democratic society.

We believe that the Bill, if enacted in the form that we have seen it,¹ would violate the right to freedom of expression as stated in Article 19 of the *International Covenant on Civil and Political Rights*² and Article 9 of the *African Charter on Human and Peoples' Rights*,³ and as elaborated in the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights.⁴

First and foremost, we are concerned at the very proposal of statutory regulation of the media, which we believe is both unnecessary and inappropriate. In relation to the detail of the Bill, we are furthermore concerned at the risk of political interference with the proposed Council, at the proposal to license all journalists and pose educational and citizenship requirements for the profession, and at the limitation of the right to appeal the proposed council's decisions.

We therefore call on the Kenyan government to respect its obligations under international law and abandon the Bill. While we understand that concerns have been raised regarding the conduct of the Kenyan press and their adherence to the voluntary code of ethics, we do not believe that the Media Council Bill 2006 is the right response to these matters; it is an unconsidered regulatory response that is easily abused as an instrument of control over the media. The legitimate concerns that have been raised regarding poor levels of pay and standards of employment are better addressed through employment law.

We also call on the media themselves to focus their efforts on remedying the failings of the current voluntary media council, thereby averting the now very real risk of statutory regulation.

We elaborate on our concerns and recommendations in the following paragraphs.

2. Statutory media regulation is unnecessary and inappropriate

It is well-established under international law that self-regulation is the best form of media regulation. With the exception of the broadcast media, for whom regulation is commonly

¹ We were given an undated draft copy of the Bill by our partners in Kenya.

² Adopted in UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976. Kenya acceded to the ICCPR on 1 May 1972.

³ Adopted 26 June 1981, in force 21 October 1986. Kenya ratified the ACHPR on 23 January 1992.

⁴ *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October 2002: Banjul, The Gambia.

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accepted as necessary,⁵ we are seriously concerned at the creation of any statutory body with regulatory powers over the media. Statutory bodies are always at risk of political interference and abuse; in our experience, they can function satisfactorily only in well-established democracies with a strong tradition of the rule of law. The *Declaration of Principles on Freedom of Expression in Africa* recognises this and states:

Effective self-regulation is the best system for promoting high standards in the media.⁶

The same concern has been expressed by national courts in Africa. For example, the High Court of Zambia, in a decision released in August 1997, struck down an attempt to establish a statutory body to regulate journalists.⁷ The Court stressed that statutory licensing of journalists, as proposed in the legislation, would breach the rights to freedom of expression and association:

I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purpose of the Constitutional powers, among them, to promote democracy and related democratic ideals such as freedom of assembly and association, freedom of expression, and press freedom in particular. ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the Council would entail losing his status as a journalist, and with the denial of the opportunity to express and communicate his ideas through the media. In the light of the above it cannot be seriously argued that the creation of the Media Association of any other regulatory body by the Government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in Articles 20 and 21 [which guarantee freedom of expression and association].

Our primary concern with the draft Media Council of Kenya Bill, 2006, is therefore the very suggestion of a statutory mechanism to regulate the media. We do not believe that the creation of a statutory body to regulate the media is necessary or even appropriate in present-day Kenya, particularly in light of the recent raid on the Standard newspaper.

We appreciate that concerns have been raised about the failure of certain media outlets to act ethically and at the failings of the current voluntary media council to tackle this. However, the creation of a statutory media council will not provide an answer to this problem. We recommend that the media themselves focus their energies on remedying the failings of the current voluntary mechanism. Lessons can be learned from other countries that have successfully established self-regulatory mechanisms. Self-regulatory systems exist in various African countries, including in Botswana, South Africa and Tanzania, and these systems should be studied with a view to incorporating elements from them into the Kenyan system. Additionally, the media that currently participate in the voluntary Media Council should persuade those newspapers that are outside the mechanism to join.

To the extent that the Media Council Bill aims to improve employment conditions for journalists, we suggest that this can be done through separate legislation: the establishment

⁵ Broadcast regulation is necessary in order to avoid chaos in the radio spectrum. This rationale for regulation does not apply to the print media.

⁶ Note 4, Principle IX.

⁷ *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.

of a media council with the kind of regulatory powers proposed in the bill is unnecessary for this purpose.

3. Particular problems with the draft Bill

Beyond our principled concern at statutory regulation of the media, we are concerned at various aspects of the draft Bill. In particular, we are concerned at the potential for political interference; the proposed licensing of journalists and the setting of citizenship and educational requirements; and the envisaged restrictions on the right to appeal from the Media Council's decisions.

3.1. Political interference with the Media Council

As currently drafted, the Bill would establish a committee known as the 'Media Industry Advisory Board', which would appoint members of the media council. While it would receive nominations from several civil society organisations, three of the Advisory Board's seven members would be political appointees.⁸ This means that if at any meeting, two of the other members fail to show up, the three political appointees could control the Board; while a no-show of only one other member would result in the political appointees having a blocking vote. This introduces the danger of significant political interference with the appointments mechanism.

It is well established under international law that any bodies that have regulatory powers over the media should be free from any commercial or political interference. In 2003, the three special rapporteurs for the protection of freedom of expression at the United Nations, Organisation of American States and Organisation for Security and Cooperation in Europe adopted a Joint Declaration in which they 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.⁹

Similarly, Principle IX of the *Declaration of Principles on Freedom of Expression in Africa* states:

Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference.¹⁰

The Bill undermines this crucial principle by allowing for potential political interference in the appointment of its members. This would endanger the Media Council's independence and have important repercussions for its work and for the journalistic profession as a whole.

⁸ Of its seven members, one would be appointed by Parliament; one by the ministry in charge of information and broadcasting, and one by the Communications Commission – which itself is made up of governmental representatives and appointees.

⁹ Adopted 18 December 2003.

¹⁰ Note 4.

3.2. Licensing of Journalists and Entry Requirements into the Profession

Under the draft Bill, one of the functions of the new Media Council would be to ‘accredit’ journalists to practice in Kenya. Journalists would have to be accredited annually and pay a prescribed fee. Although the draft is not explicit, the inference is that it would be impossible, and perhaps even illegal, to practice journalism without being properly accredited. The Council would ensure that ‘suitably qualified citizens’ would have ‘priority’ in employment, and it would set rules regarding training and qualification of journalists. The secretary-general of the Kenya Union of Journalists is reported to have said that this would lead to a rise in the level of professionalism.

Under international law, neither a general licensing requirement nor specific educational requirements for journalistic profession are legitimate. It may be noted that very few countries around the world, including in Africa, require individual journalists to be licensed.¹¹ The journalistic profession is very different in nature from the legal or medical profession, whom it is in the public interest to regulate strictly. It is correct that only suitably qualified medical professionals should be allowed to practice medicine, which concerns life and death matters; or that only legally qualified professionals should be allowed to represent people in court. The media, on the other hand, is an open profession for the reason that this will contribute to the expression of a diverse variety of views which ultimately facilitates the public’s right to know. Furthermore, unlike the medical or legal profession, the media exercise a fundamental human right: the right to freedom of expression. The exercise of this right may only be limited when this is necessary in a democratic society for the protection of a legitimate state interest. This is recognised in the *Declaration of Principles on Freedom of Expression in Africa*, which states that “[t]he right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.”¹²

The same principle is also recognised in a judgment by the Inter-American Court of Human Rights. Faced with the argument that journalists should be regulated in the same way that lawyers and medical professionals are, it stated:

[J]ournalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because 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 granting a service to the public through the application of some knowledge or training acquired in a university ...

The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the [Inter-American] Convention [on Human Rights] guarantees. This is not true of the practice of law or medicine, for example.¹³

¹¹ A recent survey by ARTICLE 19 from Southern Africa indicates that only Zimbabwe currently requires individual journalists to register. Botswana, Malawi, Namibia, South Africa, Swaziland, Tanzania and Zambia all do not impose such requirements. Indeed, an attempt to impose a registration system was struck down as unconstitutional in Zambia and the Zimbabwean system is currently being challenged before the African Commission on Human and Peoples’ Rights.

¹² Adopted 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia; Principle X.

¹³ *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. , paras 71-2.

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In the same case, the Court also dismissed the argument that licensing schemes are necessary to fulfil the public's right to be informed by raising professional standards or to protect the journalistic profession.¹⁴ There can be no justification for restricting the practice of journalism to persons who have gone through some kind of professional training. Experience in democratic countries around the world shows that persons with no formal journalistic qualifications – or indeed, no formal qualification of any kind – can still make excellent journalists. In practice, many of the best journalists have backgrounds in such areas as law, politics, economics or business. It should also be noted that no amount of training will guarantee ethical conduct or a high standard of journalism.

Finally, the proposal that journalism should be limited to “citizens” disregards the universal nature of the right to freedom of expression, which belongs to ‘every person’. There is no conceivable legitimate justification why someone who does not hold Kenyan nationality should not still be allowed to work at a Kenyan newspaper.

3.3. Sanctions and limitations on right of appeal

The Bill proposes that the Media Council should have jurisdiction to hear complaints regarding a wide variety of matters, and have the power to impose sanctions including suspension from the accreditation list – which amounts to a suspension from practice – and a fine. A sanction may be appealed to the High Court, but only on points of law and if a judge of the High Court has certified the existence of such a point.

ARTICLE 19 is concerned that this would amount to a serious restriction of the right to appeal. It is a fundamental principle of human rights law that a decision that imposes a serious sanction, such as a fine or a suspension from practice, should be appealable to a higher court;¹⁵ and that every person whose rights have been violated should have an effective remedy – including an appeal to the courts.¹⁶ To limit this appeal to points of law would leave the Council disproportionate discretion in deciding matters involving the exercise of the human right to freedom of expression. The proposed mechanism could result in a journalist being deprived of his or her right to practise journalism for as long as a year, without adequate recourse. This cannot be justified in a democratic society.

Recommendations:

- The Kenyan media should take urgent steps to address the failings of the current voluntary media council.
- We urge the Kenyan authorities to abandon the Media Council Bill, 2006, and allow the Kenyan media to take measures to address the deficiencies of the current self-regulatory mechanism.
- No legislation should be adopted that imposes a compulsory licensing mechanism for journalists; that sets entry requirements for the journalistic profession, whether educational, nationality or otherwise; or that allows for the imposition of heavy sanctions with only a limited right of appeal.

¹⁴ *Ibid.*, para. 77.

¹⁵ Article 14(5) ICCPR. Note that the term ‘crime’ must be interpreted autonomously as applying to any decision that results in a serious sanction: M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd edition, Kehl/Strasbourg/Arlington: 2005, p. 318.

¹⁶ Article 2 ICCPR.

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