New Tanzanian Media Policy – 2001

Comments on the Draft for Discussion by Stake Holders
by
ARTICLE 19, Global Campaign for Free Expression

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Introduction

ARTICLE 19 welcomes this timely and important review of Tanzania Mainland's Media Policy and congratulates the Government on the *Draft for Discussion by Stake Holders: New Media Policy – 2001 (Tanzania Mainland*). In April 2000, we published *Media Law and Practice in Southern Africa: Tanzania Mainland*, setting out a number of concerns we had with existing media law and practice. We hope that this policy review will provide an effective opportunity to redress some of the shortcomings with the current legal and policy framework, including those noted in our publication.

We welcome a number of positive features in the draft Policy. Some of the objectives of the Policy are key, including the promotion of a pluralistic, free and independent media, enhancing democracy, and reinforcing human rights. Implementation of the Policy would bring Tanzanian into line with international standards and trends by making a commitment to allow national private broadcasters, while maintaining support for community and local broadcasters. The Policy also recognises the success and importance of the Media Council of Tanzania (MCT), a self-regulatory mechanism whose establishment ended official threats to establish a statutory media council. Finally, we welcome the commitment in the Policy to quality education and training for journalists, noting that this is a key means of securing effective respect for freedom of expression.

At the same time, ARTICLE 19 believes that the Policy should be much clearer about the many media responsibilities it provides for, in particular, by making it clear that these responsibilities are not to be enforced through direct legal means. Also, we think that the Policy could go much further in terms of making a concrete commitment to reform. Specifically, we would like to see the Policy address the need to:

- transform Tanzania Broadcasting Services into a public service broadcaster;
- ensure the independence of the regulatory body, the Tanzania Broadcasting Commission;

- conduct an urgent review of existing laws which breach the right to freedom of expression; and
- introduce effective freedom of information legislation.

These Comments elaborate on the points noted above, as well as some of ARTICLE 19's other main concerns and suggestions. They are intended as a contribution to the debate on the draft Policy and have been drawn from international law and standards on freedom of expression, as well as comparative constitutional law.

ARTICLE 19 notes that the review process applies only to Tanzania Mainland. While we recognise that Zanzibar has separate jurisdiction over media issues, we note that Union Government has direct responsibility under international law for promoting and protecting human rights, including freedom of expression, throughout the whole of Tanzania. We therefore urge the Union Government to acknowledge this responsibility and to do everything in its power to encourage the authorities in Zanzibar to initiate a parallel media policy review.

Key Issues

1. Responsibility of the Media

The Policy notes numerous responsibilities of the media, media owners, newspapers and magazines, news agencies, radio and television, films and videos and media associations. Almost no one would disagree that all of these are laudable goals for these various bodies and people. However, only a few of these responsibilities are legitimate topics for legal regulation, although many are dealt with through self-regulation in other countries. The Policy uses different terms to describe the nature of the various responsibilities, including, for example, "obliged", "function", "required", "shall perform" or "observe". These terms fail to distinguish clearly between those responsibilities which may be the subject of legal regulation, those which might be dealt with through self-regulatory mechanisms, and those which are simply a matter of professional journalism.

At several places, the Policy lists a series of responsibilities under one point, as follows:

- Paragraph 3.6 lists 10 "functions" of the media;
- Paragraph 5.5 lists 8 principles which media owners are "required to abide by";
- Paragraph 6.2 lists 3 tasks newspapers and magazines are "required to perform";
- Paragraph 7.5 lists 6 tasks which news agencies "shall perform";
- Paragraph 9.3 lists 3 "obligations" of films, videos and audio visual companies;
- Paragraphs 11.2 and 11.3 list 3 tasks that the Media Council "shall" undertake; and
- Paragraph 12.2 lists 4 "major tasks" of media associations.

Most of the responsibilities in all of these lists should not, under international and constitutional guarantees of freedom of expression, be subject to legal regulation. A few examples (one for each sector) are as follows:

- 3.6(b): [function of the media]: "Indicate relations of power in society."
- 5.5(e): [principle for media owners]: "Provide adequate professional training for staff."
- 6.2(a): [task of newspapers]: "Maintain the highest standards of professionalism and ethical conduct."
- 7.5(c): [task of news agencies]: "Report on events that take place daily."
- 9.3(a): [obligation of films and videos]: "Collaborate with artists with a view to developing their skills and thus promote national culture."
- 11.3(b): [task of Media Council]: "Maintain and raise professional standards and ensure the well being of those in the media profession."
- 12.2(c): [major task of media associations]: "Cooperate with other media associations of similar nature for the benefit of their members."

We recommend that the introductory sentences in each of these provisions be amended to make it clear that these are self-regulatory or professional goals, not legal obligations.

Paragraph 2.2 of the Policy states that media "contents must of necessity reflect the Tanzanian society." In a similar vein, Paragraph 8.2 states that radio and television programmes "shall observe national values" and Paragraph 9.2 requires owners of film, video and audio visual material to "encourage the observance of national values, traditions, customs and culture." These are clearly valid and important goals of overall media policy, but at the same time it should be clear that they cannot be implemented by imposing specific legal obligations on individual owners, media or programmes. Such obligations would provide an opportunity for the authorities to interfere in the media, contrary to the objectives of the Policy, set out in Paragraph 2.6, which include ensuring a pluralistic, free and independent media. This is because the concepts "Tanzanian society" and "national values", while important, are incapable of precise legal definition, so that practically any media could, at any time, be accused of failing to reflect or observe them.

There are, however, legitimate ways of promoting these goals, for example through general regulation or promotional measures. For example, licensing of broadcasters should ensure that the airwaves are distributed equitably among all sectors of society, and this should help ensure that this medium reflects society as a whole. This is already provided for in the Policy, at Paragraph 8.5. Licensing conditions can require minimum levels of local content for broadcasters. Training programmes can build local content production capacity, and promote a better understanding of the media's need to address broad social concerns and interests. This is to some extent provided for in Paragraphs 10.1 and 10.4. Undue concentration of media ownership can be prohibited, as provided for in Paragraph 5.3. Self-regulatory mechanisms may play a role in ensuring professionalism and responsiveness to local need. Finally, local and community broadcasting can be promoted, as envisaged to some extent by Paragraphs 8.7 and 8.8.

Paragraph 3.2 of the Policy interprets Article 18(2) of the Constitution of the United Republic of Tanzania as imposing an obligation on the media to serve the interests of society. Similarly, Paragraph 3.5 states that, "the media have a duty to give information that will enable the people to know and fight for their rights." Article 18(2) of the Constitution stipulates:

> Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

There is no question that the right of citizens to be informed, sometimes called "the public's right to know" is of the greatest constitutional and social importance. Indeed, as ARTICLE 19 has noted in a recent publication, "Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society."[1] However, as with promoting national values, this cannot be achieved by placing legal obligations on individual media outlets or owners. The nature of an obligation "to inform" is simply too subjective to be enforced without serious risk to media freedom or editorial independence. The authorities cannot, for example, have the power to second-guess editors on which stories they chose to publish.

Rather, the public's right to know should be promoted in two key ways. First, by ensuring an overall regulatory and economic environment in which a diverse, pluralistic media can flourish, thereby giving citizens access to a wide range of viewpoints and sources of information. Second, by enacting effective freedom of information legislation, giving individuals a right to access information held by public authorities (see below under 4. Role of Government). In addition, professional bodies and training should stress the role of the media in promoting a free flow of information and ideas.

Paragraph 5.4 provides that owners may publish or broadcast foreign material, but only if this is in the national interest. This is not only too subjective and vague to be applied fairly, but appears to directly contradict Article 18(1) of the Constitution, which guarantees freedom of expression "through any media regardless of national frontiers". Ensuring adequate local content is a legitimate policy goal, but this should be achieved through promoting local content, for example in the ways suggested above, rather than through general restrictions on foreign content.

In at least two places – Paragraph 6.2(b), for newspapers and magazines, and Paragraph 7.3, for news agencies – the Policy explicitly states that the media should abide by various laws and regulations. It is self-evident that the media must obey the law, and to state it in a Policy appears to question the rule of law. It would, therefore, be better to remove these statements.

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[1] *The Public's Right to Know: Principles on Freedom of Information Legislation* (1999, London, ARTICLE 19), Preface.

At several places – Paragraph 5.5(f), for media owners, Paragraph 7.6, for news agencies, and Paragraph 8.5(f), for radio and television – the Policy imposes obligations to hire professionally qualified or trained staff. While training is important, it is not the only way for media workers to gain skills, and the Policy should ensure that media outlets have the flexibility to hire staff as they see fit. Furthermore, as regards radio and television, the financial and technical capacity to deliver programming is an explicit licensing criteria, which should cover issues of staffing. We suggest that these statements be removed.

Paragraph 2.4 of the Policy requires owners to specify the exact geographic scope of their service, on the basis that the media should serve a specific community or area. It is certainly legitimate for some purposes to impose geographic restrictions on broadcasters, for example as necessary to ensure orderly use of the airwaves. However, an absolute restriction on national private broadcasters is not legitimate. In addition, there is no justification for geographic restrictions on the print media. It should be up to individual newspapers to decide which communities they wish to serve. Furthermore, a newspaper should have the right to expand or contract its geographical scope, although in practice this may be rare. It is clear that a geographic limitation cannot apply to at least the vast majority of films, videos or other audio visual productions. Paragraph 2.4 should, therefore, be restricted in scope to the broadcast media.

Recommendations

- The introductory sentences of Paragraphs 3.6, 5.5, 6.2, 7.5, 9.3, 11.2, 11.3 and 12.2 should be amended to make it clear that these paragraphs do not set out legal obligations. For example, Paragraph 3.6 could start with: "As a matter of professionalism, the media should undertake the following functions:-"
- The second sentence of Paragraph 2.2 should be amended to make it clear that this is an area for promotional or regulatory efforts, not the imposition of specific legal obligations. It could, for example, be amended to read: "Efforts should be expended to ensure that the media as a whole serve social interests, and that the contents reflect Tanzanian society." Paragraph 8.2 and the second sentence of Paragraph 9.2 should either be deleted or amended to make it clear that these are to be achieve through regulatory and other general approaches, rather than through specific legal obligations on individual media outlets and owners.
- The second sentences of both Paragraphs 3.2 and 3.5 should be amended to make it clear that individual media may not be required by law to serve society or promote the public's right to know; rather these are matters to be promoted through the overall regulatory system and by professional bodies. For example, the second sentence of Paragraph 3.2 could be amended to read: "The media should, as a matter of professionalism, strive to promote the free flow of information in the interests of society."
- The qualification in Paragraph 5.4 that foreign material may be published or broadcast only if it is "of national interest" should be removed. Instead, local content should be promoted.

- Paragraphs 6.2(b) and 7.3, stating that the media must obey the law and regulations, should be removed.
- The first part of Paragraph 5.5(f), and Paragraphs 7.6 and 8.5(f), requiring the media to hire professionally qualified or trained staff, should be removed.
- Paragraph 2.4, requiring media owners to specify the exact geographic scope of the service, should be applicable only to the broadcast media.

2. State Media

Several paragraphs of the Policy refer to Government media of various sorts. Paragraph 4.1(b) sets out the Government's general right to establish media outlets, Paragraph 7.2 provides that Government or individuals may establish news agencies, and Paragraph 8.7 refers to local government broadcasting. Finally, Paragraph 8.8 lists "three types" of radio and television ownership, including "State or Government", "public", "private" and "community", although there appears to be a mistake of some sort, since the list actually includes four types of broadcasters.

Experience around the world clearly shows that the public media can serve the overall public interest only if they are independent of political or commercial interference. In particular, they must be insulated from government control, since otherwise they can be expected to serve the interests of the party in power, rather than the public as a whole. Indeed, it is well established that international and constitutional guarantees of freedom of expression prohibit government or party control over public media. The following quotation from the Supreme Court of Ghana, one among many statements by international bodies and superior courts, provides a succinct and powerful statement of this principle:

> [T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.[2]

The Charter on African Broadcasting 2001, recently adopted by a UNESCO/MISA-sponsored conference celebrating the 10th anniversary of the Declaration of Windhoek on Promoting an Independent and Pluralistic African Press, which was unanimously endorsed by the General Conference of UNESCO,[3] includes the following recommendations under the heading Public Service Broadcasting:

> 1. All State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.

[2] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.
[3] Resolution 4.3, adopted by the General Conference at its 26th Session, 1991.

2. Public service broadcasters should, like broadcasting and telecommunications regulators, be governed by bodies which are protected against interference.

To ensure freedom from government control, the editorial independence of publicly funded broadcasters should be guaranteed. The Charter on African Broadcasting 2001 also deals with this issue:

4. The editorial independence of public service broadcasters should be guaranteed.[4]

It is thus clear that the independence of publicly funded broadcasters should be guaranteed in law and in practice, as should their editorial independence. The same principles apply to other public media, including newspapers and news agencies. At the moment, the governing board of Tanzania Broadcasting Services (TBS) lacks effective independence from the Government and the editorial independence of TBS is not guaranteed. The Policy should thus provide for the transformation of TBS into an independent public service broadcaster whose editorial independence is respected, both in law and in practice.

Paragraph 8.7 specifically states that, "Central and Local Governments shall be encouraged to establish community radio and television broadcasting." This not only runs counter to the fundamental principle that public media should not be government controlled, but also appears to reflect a misunderstanding about the difference between public and community broadcasting. Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community and which is non-profit. This is quite different from local public broadcasting, which is also important.

Recommendations

- References to the Government in Paragraphs 4.1(b), 7.2 and 8.7 should be removed and replaced with references to public service broadcasting. Similarly, the first example of ownership under Paragraph 8.8 – State or Government ownership – should be removed, leaving in place "public", "private" and "community" ownership.
- The Government should make a commitment in the Policy to transform, in both law and practice, all State and Government media, including TBS, into public service broadcasters.
- Paragraph 8.7 should refer to local public service broadcasting, rather than community radio and television.

[4] See also the ARTICLE 19 *Measures Necessary to Protect and Promote Broadcasting Freedom*, in *Who Rules the Airwaves? Broadcasting in Africa* (1995, London, ARTICLE 19), pp. 133-140, Recommendations 1 and 2.

3. Broadcast Regulation

Chapter 8 of the Policy deals with radio and television. Paragraph 8.3 provides that airtime shall be allocated equally to all political parties during election campaign periods. It would be more appropriate to change this to "equitably". Otherwise, broadcasters would be required to provide strictly equal coverage to all parties, no matter how large or small they were, which would be unfair and could be confusing to the electorate. Paragraph 8.6 states that no one may own more than one radio or television station in one locality, but this repeats a broader provision in Paragraph 5.3 and so is unnecessary.

More important, however, are a number of elements that appear to be missing from Chapter 8. Paragraph 8.1 provides that broadcasters shall be established in accordance with the law and Paragraph 8.6 sets out a number of criteria for license allocation. Presumably, licensing will be carried out by the Tanzania Broadcasting Commission (TBC).

As with public broadcasters, it is now well established that bodies with regulatory and licensing powers over the media must be independent of political or commercial control. In the case from Ghana noted before, the Supreme Court went on to note that the role of the broadcast regulator, the National Media Commission, was, "to breathe the air of independence into the state media to ensure that they are insulated from Governmental control."[5] Similarly, the Supreme Court of Sri Lanka ruled a Bill proposing to establish a broadcast regulatory body unconstitutional, in part on the basis that:

> [T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.[6]

The African Charter for Broadcasting 2001 states, under the heading General Regulatory Issues:

> 2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party.

The members of the TBC are all appointed by either the President or the responsible Minister. As a result, it lacks the independence required by international and constitutional guarantees of freedom of expression.

In addition to independence, licensing processes must be open, fair and based on clear criteria. On this topic, the African Charter on Broadcasting 2001 states:

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[5] *Ibid.*, p. 13.
[6] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

While the Policy does set out clear criteria for licensing at Paragraph 8.5, licensing processes so far have lacked sufficient openness and the Policy should help to redress this problem.

Recommendations

- The word "equally" in Paragraph 8.3, referring to election coverage, should be changed to "equitably".
- Paragraph 8.6, limiting ownership of radio and television in one locality, should be removed as it repeats Paragraph 5.3.
- The Government should commit itself in Chapter 8 to guaranteeing, in law and in practice, the independence of the TBC.
- A new Paragraph should be added to Chapter 8, stating that licensing processes for broadcasters will be open and fair.

4. Role of Government

Chapter Four of the Policy deals with the topic "Government and Media". Paragraph 4.1 sets out the obligations of the Government in relation to the media and Paragraph 4.1(c) stipulates that one such obligation is "To create a conducive environment in order to strengthen the media industry." This might be improved by referring to the objectives, set out in Paragraph 2.6, specifically to the need for a free, independent and pluralistic media.

A number of elements are missing from Chapter Four. For example, Paragraph 4.1 does not set out the obligation on Government to refrain from interfering with freedom of the media.

More importantly, Chapter Four fails to commit the Government to undertaking a comprehensive review and reform of all laws which restrict freedom of expression and of the media, contrary to international and constitutional guarantees. In our April 2000 publication, *Media Law and Practice in Southern Africa: Tanzania Mainland*,[7] ARTICLE 19 provided an analysis of various laws and practices in Tanzania which breach international and constitutional guarantees of freedom of expression. These include a number of laws which the 1992 report of the Constitutional Commission, headed by then Chief Justice Nyalali, recommended should be repealed or amended.

[7] (2000, London, ARTICLE 19).

It is not intended in these Comments to reiterate the points made in our 2000 publication. However, the following are some of the main legal provisions which breach international and constitutional standards on freedom of expression:

- Various provisions in the Newspapers Act (1976), in particular:
  - the discretionary powers of the Registrar to refuse to register periodicals;
  - the wide powers of the police to seize newspapers and of the Minister to ban or suspend newspapers;
  - provisions criminalizing sedition and publishing false news; and
  - broad provisions criminalizing defamation, and providing for possible imprisonment for breach.
- Sections 11(3)(d) and 25 of the Broadcasting Services Act (1993), limiting the geographic scope of broadcasters and requiring broadcasters to carry announcements by the Minister.
- Provisions in the National Security Act (1970) providing for broad classification of documents and serious sanctions for breach.
- Provisions in the Tanganyika Penal Code (1945) criminalizing the use of abusive and insulting language likely to cause a breach of the peace and requiring journalists to disclose their sources in court.
- Regulations restricting the use of languages other than English and Swahili in broadcasting.

The need for Tanzania to adopt effective freedom of information legislation, giving full effect to the public's right to know and to access information held by public authorities, has already been referred to. Numerous international bodies, including the UN and the Commonwealth, have noted the importance of freedom of information as an aspect of the right to freedom of expression. For example, in his 1998 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression declared: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[8]

In his 2000 Annual Report, the Special Rapporteur made the following observations on the nature of the right to freedom of information:

> 44. On that basis, the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
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> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational

[8] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. These views were welcomed by the Commission on Human Rights. See Resolution 1998/42, 17 April 1998, para. 2.

information about how the public body functions and the content of any decision or policy affecting the public;

- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[9]

Although freedom of information is a right shared by everyone, not just the media, legislation giving effect to this right is of particular importance for the media, given their role in ensuring the public's right to know. We therefore recommend that the Policy include a commitment to passing such legislation.

Recommendations

- Paragraph 4.1(c) should be amended to link more closely to the objectives of the Policy. It could be amended to read: "To put in place an administrative and legal framework that guarantees and promotes a free, independent and pluralistic media."
- A new paragraph should be added to Paragraph 4.1, setting out the obligation on the Government to refrain from interfering with media freedom.
- In Chapter 4, the Government should make a commitment to undertake immediately a comprehensive review and reform of all laws which unduly restrict freedom of expression and of the media.

[9] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

- In Chapter 4, the Government should commit itself to adopting an effective freedom of information law, in line with the principles set out by the UN Special Rapporteur on Freedom of Opinion and Expression.