Media Law and Practice in Southern Africa

Tanzania

Mainland
A REPORT BY ARTICLE 19 AND THE MEDIA INSTITUTE OF SOUTHERN AFRICA (MISA)

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This paper is one of a series dealing with media law and practice in countries belonging to the Southern African Development Community (SADC). A conference addressing this theme was held jointly by ARTICLE 19 and the Media Institute of Southern Africa (MISA) in Zanzibar in October 1995. Each paper in the series will focus on a particular country, describing current and recent developments in media law and practice, or a particular theme of wide relevance within the whole SADC region.

It is hoped that the series will contribute to greater awareness of issues affecting media freedom in this fast-changing region and will provide an invaluable resource for individuals and organizations working in this field.

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INTRODUCTION

On 26 April 1964 the two states of Tanganyika and Zanzibar merged to form the United Republic of Tanzania. A two-tier governmental structure was created at the time of the merger. A union government was established and a union Constitution was promulgated to cover all parts of the United Republic of Tanzania. However, Zanzibar was granted autonomy, retaining the right to have its own Constitution and establish a government with a number of exclusive spheres of competence. Media law was, and remains today, one such sphere of competence. Accordingly, the vast majority of media laws passed at the union level in practice apply solely in Tanganyika (henceforth called Tanzania mainland). However, there are a number of union-level spheres of competence which, while not media-specific, do strongly affect the media and which apply on both Tanzania mainland and Zanzibar. National security is the most important of these spheres of competence.¹

The focus of this report is Tanzania mainland. It describes the union-level Constitutional and legal provisions which affect the media either on Tanzania mainland only or on both Tanzania mainland and Zanzibar. As such, the report is an essential

¹ The spheres in which laws can only be passed by the House of Representatives of the United Republic of Tanzania are to be found in what is known as the union list. The original union list contained the following: Constitution and Government of the United Republic; External Affairs; Defence; Police; Emergency Powers; Citizenship; Immigration; External Trade and Borrowing; Public Services; Income Tax; Corporation Tax; Customs and Excise Duties; Harbours; Civil Aviation; Posts and Telegraphs. The piece-meal expansion of the union list in subsequent years, often without formal ratification by either the union or Zanzibar governments, has sometimes resulted in confusion over which laws apply in which jurisdictions.
companion-piece to the separate report on Zanzibar which ARTICLE 19 is also publishing. That report sets out the legal and institutional framework for the regulation of the media on Zanzibar. In each report we have sought wherever possible to refer briefly to equivalent or comparable provisions which apply in the other jurisdiction.

Between 1965 and 1992 Tanzania was a one-party state. The union Constitution stated that no political party other than the ruling party, the Tanzanian African National Union (from 1977, Chama cha Mapinduzi (CCM) [Party of the Revolution]), was allowed to operate either on Tanzania mainland or Zanzibar. This was a time when there was no media freedom. The few privately-owned periodicals which attempted to establish themselves were stifled. “Sensitive” articles could not be published in the government-owned media, which monopolised the landscape. Journalists were compelled to perform a public relations role for the government and ruling party if they wanted to retain their jobs. A culture of censorship and self-censorship prevailed at every level of the profession.

The first moves towards reform began in February 1991, when the union government appointed a Constitutional Commission, headed by the then Chief Justice Francis Nyalali, to gauge public opinion on a range of issues, including the one-party system. In 1992 the Constitutional Commission recommended the introduction of multi-partyism and the repeal or amendment of forty pieces of legislation which were considered unduly to restrict fundamental rights and freedoms. Among the laws recommended for repeal or amendment were those which hindered the smooth and effective collection and dissemination of information by the mass media in Tanzania.

Fundamental reforms to the Constitution, introduced in May 1992, marked the shift to a multi-party system. By 1997, there were more than a dozen daily newspapers, scores of weekly and monthly newspapers or periodicals, six television stations and dozens of radio stations operating on Tanzania mainland. The vast majority of these

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media outlets were privately-owned. Tanzanians on the mainland have a wealth of choice today compared to the pre-1992 situation. However, this positive trend does not represent the full picture. Most of the legal and institutional impediments to the full enjoyment of media freedom which prevailed prior to that date remain in place. The promise represented by the 1992 Constitutional Commission remains to be fulfilled in this regard.

**CONSTITUTIONAL PROVISIONS**

Unlike their East African neighbours (Kenya and Uganda), Tanganyika and Zanzibar emerged into independent statehood without Bills of Rights in their Constitutions. The merger of Tanganyika and Zanzibar in 1964 did not change this. In 1984, following pressure from lawyers and human rights activists on both the mainland and Zanzibar, constitutional amendments were introduced, including a Bill of Rights, into the 1977 Constitution of the United Republic of Tanzania. The Bill of Rights in the Tanzania Constitution was introduced by Act No. 15 of 1984.

Article 18(1) of the Constitution of the United Republic of Tanzania states:

> Without prejudice to the laws of the land, every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers, and also has the right of freedom from interference with his communications.

Article 18(2) of the Constitution declares that 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

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4 This was in stark contrast to the situation on Zanzibar, where no locally-based private media outlets had been able to take root. This remains the situation today.

5 The Bill of Rights in the Tanzania Constitution was introduced by Act No. 15 of 1984.
of importance to the lives and activities of the people and also of issues of importance to society”.

The constitutional guarantee of the right to freedom of expression under Article 18 appears to be undermined by the phrase “without prejudice to the laws of the land”. It clearly suggests that no legislation, however restrictive of the right to freedom of expression it may be, is necessarily in contradiction with the constitutional guarantee.

In addition, although Tanzania is a party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (ACHPR), their applicability in terms of enforcement of rights has also been undermined by the attitude of the union government to its obligations. When Tanzania was questioned by the Human Rights Committee in July 1998 on its third periodic report on the implementation of the ICCPR into Tanzanian law, the government representative stated that the United Republic of Tanzania did not automatically apply international conventions without incorporating them into domestic legislation – which has not happened. Therefore, the representative added, the provisions of the ICCPR cannot operate as a direct source of individual rights or be invoked in courts of law. The representative concluded by stating that Tanzanian courts were prepared to be guided by the letter and spirit of human rights instruments ratified by the Government and, though the ICCPR could not be cited by name, the courts did apply its underlying principles in their decisions.6

The apparent primacy of “the laws of the land” and the downgrading of international guarantees such as those provided for in the ICCPR creates an inauspicious climate for protecting and promoting freedom of expression in Tanzania and contravenes those international guarantees.

In addition, Article 30(4) of the Constitution restricts the determination of petitions for enforcement of basic rights to the High Court. The fact that the High Court operates on a regular basis in only eight out of twenty major urban centres on the mainland means this recourse is not available to large numbers of citizens. Similarly, the 1994 Basic Rights and Duties Enforcement Act requires every petition for enforcement of rights

under the Constitution to be heard and determined by three judges.\textsuperscript{7} This requirement in a huge country with no more than twenty High Court judges further affects the prospects for successful litigation. Not only are the costs of going to court and beyond the reach of many citizens, the language of the court remains English in a country where Kiswahili is widely spoken and over 95 per cent of the people can neither properly understand nor speak English.

Further, Article 30 (5) of the Constitution allows the High Court where and when “it deems fit” or “the circumstances or public interest so requires” to give the government or other authority concerned an opportunity to rectify the defect found in the law or action complained of, instead of declaring the law or action unconstitutional and void. This can have the effect of protecting the government from liability for unconstitutional laws and potentially puts the judiciary on the side of the executive rather than on the side of those seeking to enforce their rights.

While Tanzania’s Bill of Rights does have a general provision guaranteeing freedom of opinion and expression, it does not – in contrast to other Constitutions in southern Africa – provide specific guarantees for crucial aspects of that right such as media freedom (as do Namibia, South Africa, Malawi, Mozambique), the editorial independence of the public media (as do South Africa, Mozambique), the right to government-held information (as does South Africa) or the confidentiality of journalists’ sources (as does Mozambique).

The constitutional limitations upon the right to freedom of expression already described are further compounded by Articles 30 and 31.

Article 30(1) states that human rights and freedoms shall not be exercised “by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest”.

Article 30(2) states that the provisions setting out the basic human rights and freedoms do not invalidate any existing legislation, prohibit the enactment of any new legislation or any lawful act which is aimed at:

\textsuperscript{7} Act No. 33 of 1994. See particularly Section 10.
(b) ensuring the defence, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals … or any other interests for the purposes of enhancing the public benefit;

(d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;

(f) enabling any other thing to be done which promotes or preserves the national interest in general.

Phrases such as “any other interests for the purposes of enhancing the public benefit” and “the national interest in general” are vague and subjective. They allow wide scope for political abuse by government and are in violation of the ICCPR.

Article 31(2) states that restrictions are permissible during a state of emergency, provided “that they are necessary and justifiable”. It also defines specific circumstances in which a state of emergency can be declared. However, Article 31(2)(f) provides another “catch-all” statement when it talks of circumstances of “some other kind of danger which clearly constitutes a threat to the state”.

The provisions of Articles 30 and 31 fall short of international standards. The ICCPR permits restrictions on freedom of expression, but only where these meet strict conditions. Three conditions are usually imposed. First, restrictions must be prescribed by or under the authority of law. State action restricting freedom of expression that is not specifically provided for by law is not acceptable. Restrictions must be accessible and foreseeable so that citizens know in advance what is prohibited and may regulate their conduct accordingly.

Secondly, any restriction must either serve one of a limited list of legitimate objectives or promote a legislative objective of sufficient importance to warrant overriding a constitutionally protected right. Under international law, the ICCPR permits restrictions on freedom of expression only as necessary to protect the rights and
reputations of others, national security, or public order, health or morals. The list of legitimate objectives is exclusive. Measures restricting freedom of expression which have been motivated by other interests, even if these measures are specifically provided for by law, breach these legal guarantees.

Third, any restrictions must be reasonable, and necessary or justifiable in a democratic society. Given the pivotal importance of freedom of expression in a democratic society, it is not enough for the government simply to claim that a restriction relates to a legitimate objective. The restriction must be proportionate to the importance of the legitimate objective. Where the harm to freedom of expression caused by a restriction outweighs the benefit in terms of advancing the legitimate objective, the restriction is contrary to international obligations. Under this part of the test, courts may require restrictions to be rationally connected to, and no more than necessary to further, a legitimate objective.

For example, Article 42 (2) of the Constitution of Malawi provides:

Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

The 1977 Tanzanian Constitution clearly fails the three-part test provided for under international law. The Bill of Rights in the 1984 Zanzibar Constitution suffers from the same range of defects. However, it contains no provisions regarding states of emergency.

**THE PRESS**

As stated earlier, the 1992 Constitutional Commission identified forty pieces of legislation (some applicable across the union and others applicable only on Tanzania
mainland or Zanzibar) for repeal or amendment. The list included the **Newspapers Act** (1976) and the **Tanzania News Agency Act** (1976).

The **Newspapers Act** (1976), which applies only on Tanzania mainland, remains in force today. Its cumbersome and restrictive provisions are viewed by many as a major impediment to freedom of expression, including media freedom. The Act retains most of the oppressive aspects of its predecessor, the Newspapers Ordinance, which was in force during the colonial era.

The Act imposes a fine and a jail sentence of up to four years on any person who prints or publishes a newspaper without registering it with the Registrar of Newspapers or who furnishes the Registrar with false information regarding the paper’s particulars. The Registrar, an appointee of the union-level Minister responsible for matters relating to newspapers, enjoys wide discretionary powers with regard to the registration process. S/he can refuse to register if it appears to him/her that the paper in question may be used for any purpose prejudicial to, or incompatible with, the maintenance of peace, order and good government.

The Act also states that the Minister may require a publisher to deposit a bond of an unrestricted amount against any possible monetary penalties or damages which the newspaper may incur. Where the Minister requires such a bond, non-payment can result in a fine or a term of imprisonment of up to two years, or both.

The Act also stipulates that printers must keep copies of all materials they publish for a period of up to six months. Non-compliance can result in a fine or a maximum term of one year in prison, or both.

Section 22 permits any police officer “to seize any newspaper, wherever found, which has been printed or published, or which he reasonably suspects to have been printed or published, in contravention of this Act’. A magistrate can also authorise police officers above a certain rank to enter and search “any place where it is reasonably suspected that any newspaper printed or published in contravention of this Act is being kept”.

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9 Sections 6, 10, 12 of the Act and Regulation 12 (1) of the Newspaper Regulations (1977).
The Act gives the Minister wide discretionary powers to ban or close down newspapers. The Minister may prohibit publication of any newspaper “in the public interest” or “in the interest of peace and good order”.\(^\text{10}\) If an order to cease publication is disobeyed, the offending person can face a fine or a maximum prison sentence of four years, or both. Registration of any newspaper can be cancelled if the Minister is satisfied that the paper is being used or likely to be used for any purpose “prejudicial to or incompatible with the maintenance of peace, order and good government”.\(^\text{11}\)

The authorities on Tanzania mainland have used these powers unsparingly. Between 1993 and 1999, at least a dozen newspapers were temporarily banned by the Government under the Act. These included *Michapo, Cheka, Arusha Leo, Kasheshiya, Nyundo, Chombeza, Kombora, Watu, Tingisha*. The newspapers were banned for reasons ranging from publishing indecent cartoons and pictures to using profane and obscene language in their stories. For example, in June 1998 the union government banned the printing, publication and circulation of *Chombeza, Arusha Leo* and *Kasheshiya* for publishing insulting cartoons. When two new tabloids took their place, the union government also closed them. The ban on *Chombeza* was lifted in October 1998, but the newspaper was banned again in December for publishing lewd material.\(^\text{12}\)

*Majira* was banned for one week in July 1999 by the union government for publishing information about proposed salaries for government ministers and members of parliament.\(^\text{13}\) The newspaper has also faced serious problems in Zanzibar where it was banned between 1996 and 1998 for sedition and malicious reporting in the context of critical stories about Zanzibar President Salmin Amour and the activities of CCM.

Part V of the Act is entitled *Offences against the Republic*. It grants the union President the power to prohibit the importation of any publication which is “contrary to the public interest”.\(^\text{14}\) Delivery of prohibited publications carries a fine or a maximum prison sentence of one year, or both.

\(^{10}\) Section 25 of the Newspapers Act (1976).
\(^{11}\) Regulation 15 (1) of the Newspaper Regulations (1977).
\(^{13}\) Ibid.
\(^{14}\) Section 27 of the Newspapers Act (1976).
The Act also provides for the offences of sedition, false news and defamation. These are discussed later in this report.

Finally, Section 52 of the Act removes the right of anyone to prosecute any public officer in respect of anything done or omitted to be done under this Act, provided it is done “in good faith”.

The Zanzibar counterpart to this Act is the **Registration of News Agents, Newspapers and Books Act** (1988). The Zanzibar Act is even more sweeping and restrictive in its provisions. For example, it provides for the licensing of journalists and the establishment of a government-controlled “advisory board” to oversee the private print media.

The **Tanzania News Agency Act** (1976) also remains in force. However, it was amended in 1992 to remove provisions which the Constitutional Commission had deemed excessively restrictive in 1992. For example, the Agency’s monopoly over news collection and distribution was abolished. In 1999 the Agency was disbanded.

In 1993 the government placed before the union House of Representatives a Bill to establish the Tanzania Media Council, whose remit was to act as the statutory regulator of the private media on Tanzania mainland. The aim was that it should be an equivalent of the “advisory board” which had been in existence since 1988 on Zanzibar.

The Bill proposed giving far-reaching powers to the Tanzania Media Council, which was to be directly under the authority of the Minister responsible for information, to license journalists and to set standards of conduct and activities for media professionals. Journalists and political activists in the country launched a massive campaign against the Bill which led to its withdrawal.

To forestall future government efforts to reintroduce the Bill in amended form, media workers on the mainland decided to form an independent, self-regulatory body with responsibilities for protecting media freedom and improving professional standards. The Media Council of Tanzania was formally registered on 22 May 1997, nearly two years after it had been formed. This body has quickly grown in credibility. Its Constitution and Rules of Procedure were widely distributed via the media and an Ethics Committee was set up to adjudicate on complaints about the media. It has diverted numerous potential libel suits from the courts to its mediation machinery which has
gained considerable popularity in the country on account of its speed and transparency. Senior government figures, including the Vice-President, have brought their complaints against media outlets to the Media Council of Tanzania for resolution.

**BROADCASTING**

The **Broadcasting Services Act** (1993) regulates broadcasting on Tanzania mainland. Section 4 of the Act provides for the establishment of the state-owned Tanzania Broadcasting Services (TBS). TBS has a radio and a television branch. To date, no television broadcasting service has been established. The Act does not guarantee the independence of the TBS’s governing body or that editorial policy and decision-making should be free from interference by government.\(^\text{15}\)

The Act also establishes the Tanzania Broadcasting Commission (TBC). Its main responsibilities are to issue licences to private broadcasters and generally supervise private broadcasting in terms of programme content and the discharge of licensing conditions.\(^\text{16}\) The TBC consists of a chairperson appointed by the union President and not less than six or more than eight members, all appointed by the union Minister of Information. The current appointments process and the absence of any legal safeguards for its independence means that the TBC lacks credibility.

The TBC issues radio and television broadcasting licences of between three and five years’ duration. The Act specifies what criteria will be taken into consideration when deciding whether to grant a broadcasting licence. These include provisions safeguarding against undue concentration in media ownership and promoting community radio. On granting a licence, the TBC is entitled to attach conditions and later amend them. Section 11(3) of the Act stipulates that the TBC may attach conditions in relation to “the broadcasting or non-broadcasting of reports, announcements, news or other information which is required to be broadcast in the public interest”. Section 11(3)(d), which allows

\(^{15}\) For a more detailed analysis of the principles which should underpin the legal and institutional framework for broadcasting, see ARTICLE 19’s *Measures Necessary to Protect and Promote Broadcasting Freedom*. These are available on the organisation’s website at [www.article19.org](http://www.article19.org).

\(^{16}\) Section 6(1) of the Broadcasting Services Act (1993).
conditions relating to the “specific geographical area to which the broadcast may be made”, has been subject to legal challenge (see below).

Section 11(5) allows for a written right of appeal to the Minister by any person aggrieved by a decision to grant or refuse a licence. There is no provision for a right of appeal to the courts.

Section 13 of the Act describes the licence holder’s duties in terms of programme content. While these duties require private broadcasters to present news and current affairs in a balanced and impartial manner, the wording of some of them is sufficiently vague and subjective potentially to open the way for politically-motivated action by the authorities. For example, one duty is to encourage “the development of Tanzanian and African expression” and “contribute through programming to shared national consciousness, identity and continuity”.

The process for allocating broadcast licences should be transparent, fair and non-discriminatory. The Act requires urgent review in this regard. In addition, licence applications should be made public, so that the merit of the application and the reasons for the TBC’s decisions are a matter of public knowledge and debate.

The penalties for breaches of the conditions and duties set out by the Act include fines or even suspension and revocation of a licence. No right of administrative or judicial appeal is provided for. The Act also provides for a right of reply (see below).

Section 25 of the Act relates to national security and obliges any licence holder to broadcast any announcement “which the Minister deems to be in the interest of national security or in the public interest”. Additionally, if the Minister believes that broadcasting on any particular matters would be contrary to the national security or public interest, he may, by written notice, “prohibit the licence holder from broadcasting such matter … and the licence holder shall comply with any such notice so delivered”. Nowhere are national security or public interest defined. These provisions provide wide scope for political abuse. They also violate the fundamental principle of editorial independence. They should be repealed.

Section 11(3) provides as follows: “where the Commission decides to grant an application for a licence, it may attach conditions to the licence in relation to … the specific geographical area to which the broadcast may be made”. Taking its cue from the
union CCM cabinet, which decided immediately after the Act was passed that no single private broadcaster should be allowed to broadcast to more than 25 per cent of the country or in five geographical regions, the TBC used its powers under Section 11(3)(d) of the Act to allow only government radio and television stations to broadcast throughout the entire country. Soon after the Act came into force, private licence holders complained about the TBC’s powers in this regard, which they felt were unconstitutional.

In April 1999, a law firm based in Dar es Salaam called the South Law Chambers (Advocates), filed a petition in the High Court of Tanzania on behalf of three prominent members of the Media Institute of Southern Africa - Tanzanian Chapter (MISA-TAN). The petition argued that Sections 11(3)(d) and 25 (see above) of the Broadcasting Services Act violate the guarantee in the union Constitution (Section 18(1)) of the right to freedom of expression.

The union Attorney General has responded that the right to freedom of expression under Section 18 of the union Constitution was not absolute. A panel of three High Court judges heard the case. A ruling is expected in the near future.

The equivalent Act on Zanzibar, the Zanzibar Broadcasting Commission Act, (1997) is virtually identical in its provisions. The main difference appears to be that the Zanzibar Broadcasting Commission has one additional responsibility to those set out for the TBC. This is “to protect the policy, security, culture and tradition of Zanzibar”.

ELECTIONS

Elections for union-level or mainland representative political institutions are governed by a range of electoral laws. Elections for the President of the United Republic of Tanzania and for Members of Parliament of the Union House of Representatives are governed by the Elections Act (1985). Elections for local government representatives on the mainland are governed by the Local Authorities (Elections) Act (1979).

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17 Joseph Mazanilo, Dr. Gideon Shoo and Frederick Ntobi Vs. The Attorney General, Civil Case no.308 of 1999.  
18 Section 6(1) of the Zanzibar Broadcasting Commission Act (1997).
The union Constitution provides for the establishment of a National Electoral Commission (NEC), whose writ runs on the mainland. The process for appointing members of the NEC has meant in the past that the body has lacked genuine independence from government.

The union Constitution does not give the NEC any specific responsibilities regarding balanced and impartial coverage of election campaigns by the public media. Unlike in countries such as South Africa and Mozambique, there are no explicit provisions in the above laws guaranteeing equitable broadcasting time during election periods.

Reform is needed ahead of the October 2000 elections to bring these laws into line with international standards under the ICCPR. It is worth noting that both laws were originally passed during the period of one-party rule. A major review of these laws is required so that they can adequately reflect the new multi-party dispensation and the responsibilities which should properly rest with an electoral commission in a functioning democracy.

The situation is, if anything, even worse on Zanzibar, where elections for the President of Zanzibar and the Zanzibar House of Representatives are covered by the Elections Act (1984). Local elections are covered by the Municipal Council Act (1995) and the District and Town Councils Act (1995). Elections are monitored by a Zanzibar Electoral Commission (ZEC), which is established by the Zanzibar Constitution. The ZEC revealed itself to be a servile tool of the ruling CCM during the 1995 presidential and parliamentary elections. ¹⁹

**NATIONAL SECURITY AND SEDITION**

The union-level National Security Act (1970) applies on both the mainland and Zanzibar. It is a draconian piece of legislation which should be completely repealed and replaced by legislation which is in line with international human rights standards.

The Act gives the government absolute scope to define what should be disclosed to or withheld from the public and makes it a punishable offence in any way to investigate, obtain, possess, comment on, pass on or publish any document or information which the government considers to be classified. This includes documents or information relating to any public parastatal or authority, company, organisation or entity which is in any way connected with the government, including the ruling party. Any official or contractor to any government agency or department who might have been a source of any such information is also liable to prosecution. Anyone who receives or communicates any classified matter is also guilty of an offence. And it is no defence that an accused person could not reasonably have known that it was classified matter. The penalty if found guilty of any of these offences is imprisonment for up to twenty years.

In addition, anyone who has accessed or is suspected of having accessed a “protected place” can be charged with espionage and sabotage. A protected place means anywhere so designated by the union President or government.

The National Security Act further threatens freedom of expression by criminalising contact with outside bodies which could include international news agencies, trade unions and other international bodies. Section 12(1) of the Act states that "communication with, or attempts to communicate with, a foreign agent in the United Republic or elsewhere" will be presumed to be "for a purpose prejudicial to the safety or interest of the United Republic" and "directly or indirectly useful to a foreign power ", unless an accused can prove that the contrary is the case. This provision also reverses the burden of proof, placing it on the defendant.

The Act also provides sweeping powers to search, seize and arrest and detain with or without warrants on the grounds of suspicion alone. Property seized may be forfeited even if the accused has been acquitted of the offence charged.
Refusal to provide information or the provision of false information to investigators is punishable by a term of imprisonment not exceeding five years. Protection of national security should not be used as a reason to compel a journalist to reveal a confidential source. Journalists should enjoy the right to professional secrecy in relation to the source of the information published or broadcast, and their silence should not lead to any kind of punishment under national security laws.

Section 5 of the Act states that proving ignorance about the classified nature of the information is not a permissible defence. This provision, which reverses the onus of proof and places it upon the defendant, ensnared a journalist in 1996.

Adam Mwaibabile, a freelance journalist based in the small mainland town of Songea, was denied a licence he needed for his small stationery business by the regional authorities. Unknown to him, the authorities had been irritated by his tough, balanced and incisive style of news presentation and seized an opportunity to exercise their power. A sympathetic government employee, who was not happy with the decision, sent a copy of a “confidential” letter which gave instructions from the Regional Commissioner to the licensing officers that the journalist should not be issued with any type of business licence. When the freelance journalist confronted the regional authorities for an explanation regarding the “confidential letter”, the latter reported him to the police who immediately charged him with possession of a classified document. A Resident Magistrate’s Court found the journalist guilty and jailed him for a year without giving him an option to pay a fine instead.

This decision sparked off loud protests from academic members of staff of the University of Dar es Salaam, journalists’ organizations and human rights groups. A group of lawyers, mainly from the university, offered the jailed journalist free legal

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20 Principle 18 of The Johannesburg Principles. National Security, Freedom of Expression and Access to Information (ARTICLE 19 and the Centre for Applied Legal Studies, University of Witwatersrand, London and Johannesburg, 1995). These principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand, in Johannesburg. The principles are based on international and regional standards relating to the protection of human rights, evolving state practice (as reflected inter alia in judgements of national courts), and the general principles of law recognized by the community of nations.

21 For example, see the protection afforded to journalists’ sources by Article 74(3) of the 1990 Constitution of Mozambique and Article 30 of its 1991 Press Law.
services and appealed to the High Court against both conviction and sentence. The High Court quashed the lower court’s decision and set the journalist free. It ruled that the resident magistrate had misconstrued the provisions of the Act and failed to consider whether the documents in question could reasonably be categorised as classified.\textsuperscript{22}

As described above (see \textbf{Broadcasting}), Section 25 of the \textbf{Broadcasting Services Act} (1993) gives the mainland authorities powers to censor and control the content of broadcasts on grounds of national security.

These legal provisions violate internationally accepted standards on freedom of expression and access to information and should be repealed. ARTICLE 19 believes that any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. A state may not categorically deny access to all information related to national security. In particular, a restriction provided for on grounds of national security is not legitimate if its genuine purpose or demonstrable effect is to protect government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest. Also, any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. Governments may not prevent journalists or representatives of intergovernmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violation of human rights or humanitarian law have been committed.\textsuperscript{23}

The \textbf{Newspapers Act} (1976), which applies solely on the mainland, provides for fines and jail terms for sedition. The Act defines an act, speech or publication as seditious if it aims to bring lawful authority into hatred or contempt, or excites disaffection against the same, or promotes feelings of ill-will and hostility between different categories of the population. Anyone printing or publishing a newspaper which contravenes these provisions is liable to face a fine or a prison sentence of a maximum of three years, or

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  \item \textsuperscript{22} \textit{R. Vs. Adam Mwaibabile}, High Court of Tanzania at Dar es Salaam, Cr. App. No. 1 of 1997 (unreported).
  \item \textsuperscript{23} This analysis is based on \textit{The Johannesburg Principles}.
\end{itemize}
both. Identical provisions for sedition apply at the Zanzibar level in the **News Agents, Newspapers and Books Act** (1988). The only difference is that the sanctions for sedition are set at a higher level on Zanzibar.

Since the advent of multi-partyism, the offence of sedition has often been employed against opposition politicians noted for their vociferous criticism of the government and leaders of the CCM. Historically, sedition is the crime of speaking words against the state. The basic premise of sedition laws is that it is wrong to criticise leaders. This is fundamentally incompatible with the democratic form of government, in which the ability to criticise leaders is a *sina qua non* for informed choice. As a result, in many jurisdictions, sedition is either formally or effectively a dead letter. Criminal sanctions for criticism of government should never be imposed unless the State can prove beyond reasonable doubt that there is an intention to incite violence or lawless conduct and that there is a real risk that such violence will imminently ensue.

Sedition continues to be used regularly by the authorities against opposition politicians on the mainland. For example, in December 1999, during the election campaign, Augustine Mrema, Chairperson of the Tanzania Labour Party was arrested with six others and charged with sedition for uttering disparaging words against top government officials and CCM leaders and the late former President Julius Nyerere.24

Section 89(1)(a) of the **Tanganyika Penal Code** (1945), which still applies on the mainland, criminalises the use of abusive and insulting language likely to cause a breach of peace. In *Rev. Christopher Mtikila and 3 Others v. Republic*, the first appellant had been convicted by a magistrate’s court under Section 89(1)(a) of the Penal Code for uttering the following words:

(1) That (the then) President Mwinyi is a thief who has bankrupted the United Republic of Tanzania to Zanzibaris;
(2) That retired President Nyerere has sold Tanzania;
(3) That the police are dogs of *Chama cha Mapinduzi* (the ruling party);

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24 “Mrema to face sedition, defamation charges in Moshi”, *The Guardian (Tanzania)*, 29 December 1999.
(4) That Chama cha Mapinduzi is a party of thugs.\textsuperscript{25}

Overturning the conviction on appeal, Judge Mwalusanya ruled that in determining whether words spoken came within the provisions of Section 89(1)(a), they had to be taken in the context in which they were spoken. In this case, since the first appellant was a politician, his words had to be taken to have been mere political propaganda or a political harangue which no reasonable person in the audience could have taken at their face value or in their literal meaning. These words were a figurative form of speech. Accordingly, Judge Mwalusanya ruled that they could not amount to terms of abuse and insults.

Despite this clear legal guidance on the correct interpretation of the law, the police have continued to arrest and charge politicians for uttering similar words in similar contexts. Rev. Christopher Mtikila, who was involved in the above case, received a one year jail sentence in December 1999 for “uttering filthy words” two years previously against former President Nyerere and the current union President Benjamin Mkapa. Mtikila reportedly said that they were devils, calling the incumbent CCM Secretary General, Phillip Mangula, “a stupid dog” and referring to the CCM as “a devil’s organ” and “a party of thieves”.\textsuperscript{26}

**PROTECTION OF SOURCES**

There are no Constitutional or legal provisions for the protection of journalists’ sources at either the union- or Zanzibar-levels in Tanzania. On the contrary, the legal provisions which do exist all undermine what is increasingly acknowledged within international law to be a vital aspect of the right to freedom of expression and information.

\textsuperscript{25} High Court of Tanzania, Civil Case No. 2 of 1993.
\textsuperscript{26} “Government critic receives one year jail term”, *Daily Times (Tanzania)*, 15 December 1999.
Section 114(1)(b) of the *Tanganyika Penal Code* (1945) states that non-disclosure by the media of a source in court may lead to contempt proceedings. The punishment if found guilty is a fine or up to six months’ imprisonment.

Also in direct conflict with the principle of the protection of journalists’ sources is Section 15(2) of the *National Security Act* (1970). This provides for trial *in camera*, with no right to bail and a maximum prison sentence of five years, of anybody who refuses to supply information about any suspected offence under the Act.

Although the protection of journalists’ sources is becoming increasingly recognised as a crucial aspect of the right to freedom of expression, it is not set out explicitly in international human rights standards or in most countries’ Constitutions. The growing legal recognition of the confidential relationship between journalists and their sources of information derives from an understanding of the role of the press in ensuring freedom of expression and information and, in particular, as a public watchdog. The press cannot effectively perform that function, which is essential in a democratic society, if people in possession of information which they conscientiously believe should be brought into the public domain are at risk of being identified and penalised for disclosing it to the press. Only in exceptional cases may there be countervailing factors which justify disclosure, such as where disclosure is necessary for compelling reasons of justice or national security or relating to the prevention of serious disorder or crime. What is meant by “national security” should, as we have already seen, be clearly defined and any restrictions should meet the three-part test (see *Constitutional Provisions* above).

**DEFAMATION, PRIVACY AND RIGHT OF REPLY**

The *Newspapers Act* (1976) provides for the offence of defamation with regard to Tanzania mainland. All matters relating to defamation which before 1976 were provided for in the Tanganyika Penal Code (Sections 187-194) were repealed by the Act.

The Act defines defamation as a written, printed or other act, except for the spoken word, which concerns “another person, with intent to defame that other person”.

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**Media Law and Practice in Southern Africa-Tanzania Mainland**
Defamatory matter is defined as something likely to injure the reputation of a person by exposing them to hatred, contempt or ridicule.

While the Act sets out situations in which publication of defamatory matter is protected from prosecution (“absolute privilege”), they do not include the conduct of public figures and government officials. Despite this fact, public figures and government officials are accustomed to behaving as if their work is not a matter of legitimate public interest.

The Act also places the onus on the defendant to prove his or her innocence rather than on the plaintiff to prove guilt – a clear reversal of a fundamental tenet of justice. Section 43 of the Act defines types of publication of defamatory matter which are permitted provided they are published in good faith (“conditional privilege”). Section 44 describes circumstances in which the defence of “good faith” does not apply. The circumstances are: where the matter was untrue, and the person did not believe it to be true; where it was untrue and it was published without taking reasonable care to ascertain whether it was true or false; or if it was published with an intent to injure the defamed person.

Section 46 states that anybody who defames a foreign dignitary “with intent to disturb the peace and friendship between the United Republic and the country to which such ruler, ambassador or dignitary belongs” will be guilty of defamation.

Anybody found guilty of defamation under the Act may be subject to a fine or a maximum prison sentence of two years, or both.

In the past, mainland courts have generally been friendly to plaintiffs. This has constrained the development of a tradition of investigative journalism, notwithstanding the growth of the private media in recent years.

Developing international jurisprudence on defamation has clearly established that provisions for imprisonment in cases of defamation should be repealed. Prison sentences, suspended sentences, suspension of the right to practice journalism, excessive fines and

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27 Section 42 of the Act sets out the situations where “absolute privilege” applies. They are as follows: if the matter is published by the union President, government or House of Representatives in any official document or proceeding; if the matter is published in the union House of Representatives by any Member of Parliament or the Speaker; if the matter is published in the course of any judicial proceedings; if the matter is published concerning a person subject to military or naval discipline; and if the matter is published in a fair report of anything said, done or published in the union House of Representatives.
other harsh criminal sanctions should never be available as a sanction for breach of defamation laws. The state should take no part in the prosecution of defamation cases regardless of the status of the plaintiff. Criminalisation of a particular activity implies a clear state interest in controlling that activity. The protection of one’s reputation is a private interest.

With regard to civil defamation, the objective of balancing the right to freedom of expression and information against the right of individuals to protect reputations against inaccurate reporting is entirely legitimate. However, recent developments in international jurisprudence have led to a growing consensus that certain broad principles should be reflected in laws on defamation and the way the laws are implemented. These principles are as follows:

- the defendants should not be required to prove the truth of value judgements, statements reflecting public opinion or allegations based on rumours or the statements of others;
- a public official who brings a defamation suit should have to prove not just that s/he has been defamed but that the defamation was committed maliciously;
- a claim for defamation is weaker if the allegedly defamatory statement was made in response to a statement which was in itself provocative or inflammatory;
- the limits of acceptable criticism are wider as regards a government body or public figure than as regards a private individual; and
- the press has a pre-eminent role in informing public opinion on matters of public interest and in acting as a public watchdog and should be accorded particular latitude when commenting on matters of political or other public interest.  

The Newspapers Act (1976) should be reviewed in the light of these emerging principles. Zanzibar’s law of defamation is found in the Registration of News Agents,
**Newspapers and Books Act** (1988). The two Acts are virtually identical in their provisions. However, the Zanzibar Act imposes heavier sanctions on those found guilty of defamation.

The right of reply is provided for on the mainland only with regard to broadcasting. Section 15 of the **Broadcasting Services Act** (1993) gives the TBC a role in assisting people to have the right of reply where they dispute the veracity of anything which has been broadcast. ARTICLE 19 believes that such a role should only be played by a body which is independent of government and that the right should apply only where a legal right has clearly been breached by a broadcast.

Section 16 of the union Constitution gives every person, including public figures, the right to privacy of their person, family and of matrimonial life, including their private communications. Section 15 of the Zanzibar Constitution provides for the right to privacy with regard to Zanzibar.

**FALSE NEWS**

Section 36 of the union-level **Newspapers Act** (1976), which applies only on the mainland, defines false news as “any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace”. The punishment if found guilty is a fine or a prison sentence of up to three years, or both.

Although the Act states that it is a defence if a person can prove “that, prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true”, the reality is that any approach to the authorities to do so is as likely to be met with suspicion as co-operation.

Laws against the dissemination of false news originated in medieval England, where they were aimed at preventing slanderous statements against the King and nobles of the realm. The law has been abolished in the United Kingdom. In the Commonwealth, the Privy Council has held with regard to Antigua and Barbuda that false news provisions were contrary to that country’s constitutional guarantee of freedom of expression. ARTICLE 19 believes that such provisions have no place in a democratic society. Civil
or criminal redress for false statements is better addressed through specific laws of defamation, incitement to racial hatred and incitement to violence.

Section 52 of The Zanzibar Registration of News Agents, Newspapers and Books Act (1988) covers false news in an identical fashion.

TOLERANCE AND INCITEMENT TO HATRED

Tanzania has not signed or ratified the International Convention on the Elimination of all Forms of Racial Discrimination, which obliges states parties to adopt criminal sanctions against racist propaganda. However, Tanzania has ratified the ICCPR, which obliges states parties to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

Section 37 of the union-level Newspapers Act (1976) provides for the offence of incitement to violence with regard to the mainland. The Act prohibits publications or declarations to a group of more than three people that it would be desirable to take action which would cause the death or physical injury of another individual or community, or lead to damage or destruction of property. The punishment for anybody who is found guilty is a fine or up to three years’ imprisonment, or both.

Also relevant here is Section 89(1)(a) of the Tanganyika Penal Code (1945), which prohibits the use of abusive and insulting language which may result in a breach of the peace (see the case of Rev. Christopher Mtikila and 3 Others v. Republic in the section of this report on National Security and Sedition).

FREEDOM OF INFORMATION

Article 18 of the union Constitution guarantees every person the right to freedom of expression, but also the right to seek, receive and impart information. The Zanzibar
Constitution explicitly protects only the right to receive information, not the right to seek or impart it. There is no legislation in Tanzania at either the union- or Zanzibar-levels through which the right to information can be realised in practice. Indeed, the National Security Act (1970) gives the authorities on both the mainland and Zanzibar unfettered discretion in deciding what official information should or should not be disclosed to the public.

Another Act which demonstrates just how ingrained the culture of secrecy is in Tanzania is the Prisons Act (1967). This union-level Act applies on both the mainland and Zanzibar. The Act restricts comment by the media or members of the public on the prison system or the conditions under which prisoners are being kept, regardless of whether this is in the public interest or not. The restrictions apply to the behaviour or experience in prison of any ex-prisoner or concerning the administration of any prison, unless reasonable steps to verify such information can be shown to have been taken. Section 83 of the Act disallows communication with any prisoner and forbids making sketches or taking photographs of a prison or a prisoner within or outside a prison. It also prohibits loitering in the vicinity of a prison or any other place where prisoners may be in the course of their imprisonment. The Act imposes blanket restrictions upon the right to freedom of expression of prisoners which cannot be justified in a democratic society.

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 meaningful part in the affairs of that society. Most governments, however, prefer to conduct their business in secret. Governments can usually find reasons for maintaining secrecy – national security, public order and the wider public interest are just some of the reasons they use. However, too often governments treat official information as their property, rather than something which they hold and maintain on behalf of the people. This is why ARTICLE 19 believes that freedom of information legislation is essential in a genuinely democratic society. The United Republic of Tanzania should be no exception.

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ARTICLE 19 has established a set of principles on what freedom of information legislation should embody. They can be summarised as follows:

- Freedom of information legislation should be guided by the principle of maximum disclosure;
- Public bodies should be under an obligation to publish key information;
- Public bodies must actively promote open government;
- Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests;
- Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available;
- Individuals should not be deterred from making requests for information by excessive costs;
- Meetings of public bodies should be open to the public;
- Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed;
- Individuals who release information on wrongdoing – whistleblowers – must be protected.

REPORTING OF COURTS AND PARLIAMENT

Section 42 of the union-level Newspapers Act (1976), which applies on the mainland, states that if matter is published in the union House of Representatives by the President, government, any member of the union House of Representatives or Speaker, it cannot be used in defamation cases. Also protected in this way is any matter published in the course of judicial proceedings by any person taking part in the proceedings. Given that these matters are “absolutely privileged”, it is immaterial “whether the matter is true or false, and whether it be known or be not known or believed to be false, and whether it be or not be published in good faith”.

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Provisions for contempt of court on Tanzania mainland can be found in Section 114 of the Tanganyika Penal Code (1945). Section 114(1)(b) provides that non-disclosure by the media of a source of information when required by a court can lead to charges of contempt of court. Section 114(1)(d) provides that any person who, “while a judicial proceeding is pending, publishes, prints or makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken” will be guilty of contempt of court. Section 114(1)(e) prohibits publication of reports of evidence taken in court where proceedings are being held in private. The punishment for contempt of court under each of these sub-provisions is a fine or imprisonment for six months.

CONCLUSION

As Tanzania approaches its second multi-party elections in October 2000, the fate of the country’s democratic transition depends on a successful vanquishing of the many legacies of the one-party period. These legacies remain remarkably resilient. The situation with regard to freedom of expression on Tanzania mainland has been the main focus of this report. But the situation there cannot be meaningfully addressed in isolation from the situation on Zanzibar, where the climate for freedom of expression is, if anything, even more hostile. The government of the United Republic of Tanzania should accept that the time has come for it to honour fully the international human rights obligations it has as a party to the ICCPR and the ACHPR. The union government and its Zanzibar counterpart should work together to implement a comprehensive programme of human rights reform, including with regard to freedom of expression, which embraces both the mainland and Zanzibar. The reform process should take as its starting point the recommendations made in 1992 by the Constitutional Commission headed by the then Chief Justice Francis Nyalali, which have in so many respects been ignored.