Somalia: Draft Media Law

April 2018

Legal analysis

Executive Summary

In April 2018, ARTICLE 19 reviewed the Draft Media Law of Somalia, which was approved by the Council of Ministers on 13 July 2017.

Our analysis shows that, like the media law which is already in place, the draft contains some positive provisions, but overall is quite control-oriented. It imposes licensing and registration procedures on all media outlets, to be overseen by the Ministry of Information ('the Ministry'). Furthermore, it envisages the creation of an 'independent' Somali Press Commission - though in reality this would be quite firmly under the control of the Ministry - whose powers will include sanctioning media professionals for violations of a code of conduct.

Journalists will also have to comply with numerous, and often vaguely-worded, content restrictions. A bright spot is the Draft Law's section on public service broadcasting which, though limited in scope, lays foundations for regulation in line with international best practice in this field.

ARTICLE 19 urges the Somali authorities to consider the recommendations below, which would help align the Draft Law more closely with international law and best practice.

Summary of recommendations

Definitions:

- Article 1 should be reviewed to eliminate redundant definitions and add missing ones;
- The definition of "electronic media" should be revised;
- To the extent they are retained, the definitions of "print media" and "print press" should be restricted in scope to mass circulation periodical publications;
- The definitions of "journalist" and "publisher" should be revised. In no case should these include the requirements to be authorised or licenced;

Principles and objectives:

- Article 3.1 should be reworked into a proper statement of the right to freedom of the media, including the right of every person to seek, receive and impart information through the media;
- It should be made clear, in Article 3.2, that public authorities and courts are required to implement and interpret the Media Law in conformity with Article 18 of the Provisional Constitution and human rights treaties to which Somalia is a party;
- Article 3.3 should ban prior censorship unconditionally, and not only as long as the media "perform their duties;"
- It should be forbidden in all circumstances to force a media outlet to broadcast any report, irrespective of the content or purpose of that report. Article 3.4 should be amended to this effect;
- Consideration should be given to deleting Article 6, which serves no real purpose;
- The objective of promoting "diversity of the media" in Article 7 could be further elaborated, explaining that diversity includes pluralism of media organisations, of ownership of those organisations, and of voices, viewpoints and languages represented within the media;

Licensing, registration and taxation of media outlets

- The requirement for media outlets to obtain a licence is illegitimate with respect to print and online media, and unnecessary with regard to broadcast media, which already require a licence under the National Communications Act. References to this requirement should be removed from the Draft Law, notably from Articles 6, 8-13 and 20-22;
- The requirement for media outlets to register should also be removed from the Draft Law. If it is retained, the Draft Law should state clearly that registration cannot be refused. The information required for registration should not include irrelevant details such as private addresses or educational qualifications, and consideration should be given to putting the Somali Press Commission in charge of the registration process;
- Failure to register should attract, at most, a minor administrative fine. The draconian penalties outlined in Article 26 should be removed;
- Article 23.1, requiring all media to show their address and the names of the director and editor on content they disseminate, is unnecessary and should be deleted;
- Media outlets should not be required to pay registration and licence fees over and above their tax burden under ordinary tax law, and the licence fees for broadcasters under the National Communications Act. Articles 16.2 and 17.1 should be deleted;

Media professionals

- Consideration should be given to allowing professional bodies such as the National Union of Somali Journalists to issue journalist ID cards on a self-regulatory basis;

The Somali Press Commission

- The Somali Press Commission's independence should be enhanced by limiting the government's role in appointing its members, extending the duration of members' term, and making the Federal Parliament responsible for approving its budget;
- The Somali Press Commission should not have powers to reward or discipline journalists, to recommend the granting or withdrawal of licences or to draw up a code of conduct. This should be left to self-regulation by the press. Articles 15.4, 15.5, and 25.2 should be amended in this regard;
- Media owners, administrators, journalists and editors should not be ineligible to serve on the Somali Press Commission;

Content regulation

- All content restrictions should be deleted from the Draft Law. Instead, content issues should be regulated through laws of general application like the criminal and civil codes;
- At a minimum, overbroad and vague prohibitions such as making "false reports", spreading "baseless propaganda;" "violating the Islamic religion," and "violating sound Somali culture" should be removed;
- Consideration should be given to replacing expressions such as "encouraging tribalism" and "broadcasting hatred and extremism" with the wording of Article 20(2) of the International Covenant on Civil and Political Rights.

Table of contents

Introduction

In this brief, ARTICLE 19 analyses the Draft Media Law of Somalia ('the Draft Law'), which was approved by the Somalia Council of Ministers on 13 July 2017.[1]

The Draft Law was proposed by the Minister of Information as an update to the current Media Law, which was passed by the Transitional Federal Parliament in Baidoa on 8 December 2007. The existing law has frequently been criticised as being out of step with the guarantee of freedom of expression and opinions under Article 18 of the Provisional Constitution of 2012, as well as with international law in this area.[2]

Civil society organisations have expressed substantial concern that the Draft Law fails to remedy these problems. Several NGOs, including the National Union of Somali Journalists, have petitioned President Mohamed Abdullahi Mohamed to prevent its passage into law until the concerns of journalists and other stakeholders are addressed.[3]

ARTICLE 19 has a long track record of engagement with legislation in the area of freedom of expression in Somalia; we have previously published analyses of the Media Law of 2007,[4] the amendments to the Media Law proposed in 2010,[5] and the Draft Communication Act of 2012[6] and 2015.[7]

Alongside the analysis, ARTICLE 19 is also publishing an analysis of the National Telecommunications Act, as adopted in 2017.[8] By assessing both laws' compatibility with international human rights standards, and making recommendations for amendments, we aim to make a constructive contribution to the ongoing debate on the future of this legislation.

In our 2008 analysis of the existing Media Law, we noted that it contained some positive provisions, but overall was overly control-oriented. Unfortunately, the same can be said of the current Draft Law, which imposes both licensing and registration procedures on all media outlets, overseen by the Ministry of Information.

Also firmly under the control of the Ministry is the (nominally independent) Somali Press Commission, which will have the power to sanction media professionals for violations of a code of conduct, which will be co-authored with the Ministry. Furthermore, journalists will have to comply with numerous often vaguely-worded content restrictions.

[1] The analysis is based on the unofficial translation of the Draft Law. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.
[2] See, for example, National Union of Somali Journalists, Somali media law open for consultation, 19 February 2013; or African Union / United Nations Information Support Team and the Centre for Law and Democracy, Somalia: Media Law and Policy Review, December 2012.
[3] Members of African Freedom of Expression Exchange, Petition of 19 July 2017.
[4] ARTICLE 19, Note on the Draft Media Law of Somalia, January 2008.
[5] ARTICLE 19, Comment on the Amendments to the 2007 Media Law of Somalia, September 2010.
[6] ARTICLE 19, Somalia: Draft Communications Act, March 2012.
[7] ARTICLE 19, Somalia: National Communication Act 2015, July 2015.
[8] ARTICLE 19, Somalia: National Communication Act 2017, forthcoming.

A bright spot are the Draft Law's provisions on public service broadcasting which, though limited in scope, lay the foundations for regulation in line with best international practice.

ARTICLE 19 concludes that the Draft Law should be revised in line with recommendations outlined in this analysis. We stand ready to provide further assistance to the Somalian Government and stakeholders in these efforts.

International standards applicable to the Draft Law

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[9] and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[10] At the regional level, Article 9 of the African Charter on **Human and Peoples' Rights** (ACHPR)[11] guarantees the right to freedom of expression.[12] Article II of the Declaration of Principles on Freedom of Expression in Africa 2002 (African Declaration) further elaborates the protections to be afforded to the right to freedom of expression by States.[13]

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed that the scope of the right extends to the expression of opinions and ideas that others may find deeply offensive.[14]

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- Provided for by law; any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;

- In pursuit of a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals; and

- Necessary and proportionate in a democratic society, i.e. if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the less restrictive measure must be applied.[15]

[9] Adopted in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).
[10] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Somalia ratified the ICCPR in 1990.
[11] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[12] Article 9 of the ACHPR provides: (1) Every individual shall have the right to receive information; (2) Every individual shall have the right to express and disseminate his opinions within the law.
[13] 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.
[14] See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.
[15] HR Committee, *Belichkin v. Belarus*, Communication No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).

Thus, any limitation imposed by the State on the right to freedom of expression must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

As a State party to the ICCPR, Somalia must ensure that any of its laws attempting to regulate electronic and Internet-based modes of expression comply with Article 19 of the ICCPR, as interpreted by the HR Committee, and that they are also in line with the special mandates' recommendations.

Somalia should also take into account the principles developed in the African Declaration on Internet Rights, an initiative from African civil society organisations, which largely reflects the principles outlined in this section of our analysis.[16]

[16] The African Declaration on Internet Rights and Freedoms, 2013.

Analysis of the Draft Law

General Comments

The Draft Law deals with a range of distinct issues, but is not divided into separate chapters. Provisions dealing with one topic are often found dispersed across the law. Accordingly, ARTICLE 19's analysis will not strictly follow the order of the Draft Law's articles, but will deal in turn with the various *subjects* covered by the Draft Law.

In particular, we comment on:

- Definitions used in the Draft Law (Article 1);
- Principles and objectives (Articles 3, 6 and 7);
- Licensing, registration and taxation of media outlets (Articles 8-13, 16-17, 19-24, 26-28 and 34);
- Regulation of media professionals (Articles 18 and 35);
- The establishment and powers of the Somali Press Commission (Articles 14 and 15);
- Rules on the content of media output (Articles 4, 5, 25, 29-31 and 36); and
- Regulation of public service broadcasting (Article 33).

As a preliminary matter, we would recommend dividing the Draft Law into thematic chapters or titles. Not only would this make the legislation easier to read, it would also help avoid the current inconsistency between provisions which occurs in this draft.

Recommendations

- The structure and coherence of the Draft Law should be improved by organising its provisions into thematic chapters or titles.

Definitions

Most of the definitions set out in Article 1 are straightforward and uncontroversial. However, several terms which are defined in Article 1 are apparently not used in the body of the Draft Law: these include "print media," "electronic media," "print press," "printing house owner," "advertisement" and "translation centre." Conversely, certain terms which appear in the Draft Law are not defined in Article 1: these include "media outlet," "censorship" and "publication".

We assume that this may partly be attributable to problems with translation available to ARTICLE 19, but we recommend reviewing Article 1 to ensure there are no redundant or missing definitions.

While the term **"electronic media"** is among those terms which do not appear in the body of the Draft Law, we are concerned that its definition includes not only radio and TV, but also the Internet. We believe that the Internet raises quite different considerations than broadcasting and should not be regulated in an identical way.

Furthermore, if they are retained, the definitions of **"print media"** and **"print press"** should be narrowed. They currently refer to any "dissemination of written material." Taken literally, this would include not only newspapers and magazines, but also communication not generally

thought of as media output, such as advertising flyers, books, personal websites, or posters. Indeed, Article 1 mentions "billboards" as an example of what falls under the term "print press". It would be inappropriate to impose the regulatory controls provided for in the Draft Law – such as the duty to licensed and registered by the Ministry of Information – on those disseminating fliers, books, personal websites, or indeed displaying posters on a billboard. The relevant definitions should be limited to mass circulation periodical publications.

The definitions of **"j**ournalist**"** and **"**publisher**"** refer to requirements which must be met in order to be authorised or licenced to fulfil these professions. We note that some international bodies have opted to entirely avoid the term "journalist."[17] Other bodies have instead been careful to formulate a very wide definition of "journalist," covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists.[18] Hence, the requirements outline in the Draft Law are not compatible with international law and should be removed.

Recommendations

- Article 1 should be reviewed to eliminate redundant definitions and add missing ones;
- Definition of "electronic media" should be revised;
- To the extent they are retained, the definitions of "print media" and "print press" should be restricted in scope to mass circulation periodical publications;
- The definitions of "journalist" and "publisher" should not refer to requirements to be authorised or licenced.

Principles and objectives

Article 3 of the Draft Law, entitled 'Press Freedom', mentions a number of important principles: freedom of journalistic and media activities, adherence to constitutional and international guarantees of freedom of expression, and the absence of censorship and compelled broadcasting.

Unfortunately, closer scrutiny reveals a series of problems.

- At the outset, it is not clear why the reference is to "press freedom", rather than the broader term "media freedom" used in Article 18 of the Provisional Constitution. This is perhaps another translation issue.

- Secondly, press freedom, according to Article 3.1, is the right to conduct "different journalistic or media activities *while observing the media code of conduct"* (emphasis added), which reads as an attempt to restrict, rather than guarantee, media freedom. While certain limitations on media freedom can be legitimate (we will return to the subject of mandatory codes of conduct below) it seems more appropriate in Article 3 to focus on the content of the right, rather than its limits. For example, it would be helpful to spell

[17] See, e.g. the Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

[18] For example, the Recommendation adopted by the Council of Europe Committee of Ministers provides: "The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." See Recommendation No. R (2000)7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

out that freedom of expression includes the right to seek, receive and impart information and ideas through the media, and that everyone is entitled to do so on an equal footing. This idea is captured in Principle I of the *Declaration of Principles on Freedom of Expression in Africa* (the African Declaration):[19]

> 1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
>
> 2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

A similar problem occurs in Article 3.3, which states that no censorship shall be imposed on the media, but only "as long as they perform their duties in accordance with the laws of the country." The Draft Law does not define "censorship," though normally this term refers to scrutiny or prohibition of media content by a government body *prior* to its dissemination. A good example is Sweden's Freedom of the Press Act,[20] which prohibits censorship in the following terms:

> Article 2
> 1. No written matter may be scrutinized prior to printing, nor may it be permitted to prohibit the printing thereof.
>
> 2. Nor may it be permitted for a public authority or other public body to take any action not authorized under this Act to prevent the printing or publication of written matter, or its dissemination among the general public, on grounds of its content.

The breach of a law by a media outlet might be a grounds to impose a proportionate sanction, but it would not justify the introduction of censorship, as Article 3.3 seems to imply that it would. We recommend rewording this provision, perhaps drawing on the Swedish example above.

Article 3.2 states that freedom of expression and opinion "is practiced according to the way stipulated in Article 18 of the Provisional Constitution" as well as in "international, continental and regional conventions to which Somalia is party." We welcome the commitment to give effect to these instruments, but recommend clarifying that the duty to do so lies with the public authorities and courts implementing and interpreting the Media Law, rather than with those who exercise their rights to freedom of expression and opinion.

The final paragraph of Article 3 states that independent media outlets cannot be forced to broadcast reports that "are against the interest of the country, its security, economic, political and social interests", or that "serve the interest of a particular side." This is an important safeguard. However, there is no reason why a media outlet – independent or otherwise – should ever be forced to broadcast any specific report, whether it is against the country's interests or not. By simply prohibiting *all* forced broadcasts, Somalia could avoid the practice seen in some countries, where governing parties force broadcasters to give them airtime in order to deliver 'public service announcements'.

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[19] *Op.cit.*

[20] The Freedom of the Press Act is one of the four fundamental laws that make up the Constitution of Sweden.

Article 6, entitled 'Effects of the Media Law,' is a peculiar provision. As its title suggests, it seems to describe the intended effect of the Draft Law rather than laying down any rule. The text of this provision could more logically be transferred to a preamble, rather than appearing in the body of the legislation.

The objectives of the Draft Law, set out in Article 7, are in line with good practice. Consideration could be given to spelling out more clearly what is meant by promoting "diversity of the media" and the existence of "different types of media." Diversity has a number of different aspects, which are identified as follows in the ARTICLE 19 publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*:[21]

> Diversity implies pluralism of broadcasting organisations, of ownership of those organisations, and of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole.

Recommendations

- Article 3.1 should be reworked into a proper statement of the right to freedom of the media, including the right of every person to seek, receive and impart information through the media;
- It should be made clear, in Article 3.2, that public authorities and courts are required to implement and interpret the Media Law in conformity with Article 18 of the Provisional Constitution, and human rights treaties to which Somalia is a party;
- Article 3.3 should ban prior censorship unconditionally – i.e. not dependent on whether the media "perform their duties;"
- It should be forbidden in all circumstances to force a media outlet to broadcast any report, irrespective of the content or purpose of that report. Article 3.4 should be amended to this effect;
- Consideration should be given to deleting Article 6, which serves no real purpose;
- The objective of promoting "diversity of the media" in Article 7 could be further elaborated, explaining that diversity includes pluralism of media organisations, of ownership of those organisations, and of voices, viewpoints and languages represented within the media.

Licensing, registration and taxation of media outlets

The Draft Law sets out a rather confusing procedure for the establishment of media outlets.

Article 12 states that every person may in principle begin operating "media," after "fulfilling the criteria mentioned in Article 11 and obtaining the required license."

The first stumbling block is that the Draft Law does not define the term "media." Presumably this includes a number of categories that do have definitions, such as print media, broadcast media and electronic media. But it is not clear to what extent the other types of organisations

[21] ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, March 2002.

mentioned in Article 1, such as movie production companies or news agencies, are considered 'media' for the purposes of Article 12 and thus require a licence.

Secondly, although reference is made to "criteria mentioned in Article 11", that provision does not set out any criteria for the granting of a licence. Instead, it lists certain information (name and address, type of media, level and source of funding, responsible person) that an applicant for a licence must provide.

The process to apply for a licence is unclear. Article 9 is entitled 'Process of Issuing Licences' but, in fact, this provision sets out the criteria for *deciding* on the granting of a licence, which are missing from Article 11.

Briefly put, Article 9 states that a proposed media outlet must i) correspond to a need and comply with the "national plan;" ii) be adequately funded; and iii) contribute to diversity of media services. It is not stated whether any outlet meeting these conditions would *automatically* be eligible for a licence or not.

The Draft Law does not state directly to whom the licence application must be made. A careful reading of Article 8.1, entitled 'Media Licence', suggests that this is the Ministry of Information:

> [T]he Ministry of Posts and Telecommunications is responsible for the distribution and planning of airwaves and frequencies spectrum development, which will be preceded by first *obtaining the license of the Ministry of Information* which will then be submitted to the Ministry of Telecommunications which is responsible for granting the airwaves frequencies, as stated in the telecommunications law. (Emphasis added)

This interpretation is further supported by other provisions, including Article 15.5, which states that one of the functions of the Somali Press Commission is to make recommendations on the "granting and withdrawal of licenses so that the ministry can make a decision."

These provisions are not just problematic because they are unclear and confusing, however: they also raise larger concerns.

In the first place, the recently-enacted National Telecommunications Act (NTA) vests the power to licence broadcasters in the National Communication Agency (NCA) - an ostensibly independent regulatory body - rather than in the Ministry of Information (or, for that matter, the Ministry of Posts and Telecommunications). Article 35.2 of the NTA states that the Communication Agency "is responsible for the planning, management, allocation and supervision the usage of radio, television and internet frequencies." Article 36 adds that "the Communication Agency … shall be responsible for the following issues: … (2) issuing of licenses for radio and television frequencies."

While the licensing process established by the NTA is not above reproach (see the ARTICLE 19 analysis of that Act[22]) – we can see no justification for creating an additional requirement for broadcasters to be licensed, all the more so if that process is administered by the Ministry of Information, which is self-evidently not an independent body.

[22] ARTICLE 19, Somalia: National Communication Act 2017, forthcoming.

One of the most essential requirements under international law relevant to broadcasting is that regulatory bodies should independent, both from the government and from the sector they regulate. This requirement is expressed, for example, in Principle VII(1) of the African Declaration:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[23]

It is furthermore highly problematic that Article 12 requires print media and possibly also online media to be licensed. The concern here is not duplication, since these types of media are not covered by the NTA and thus do not require a licence under that Act. Rather, subjecting print and internet media to a licensing requirement is considered unnecessary and inappropriate in democratic States.

The UN Human Rights Committee has underlined that "regulatory systems should take into account the differences between the print and broadcast sectors and the internet."[24] Broadcast media rely on a limited resource: the electromagnetic spectrum. Different users (radio and TV stations, mobile phone services, radar etc.) compete for scarce frequencies, and the State must establish a system to allocate them, or the result would be chaos on the airwaves. No such necessity exists with regard to print and online media; the number of such publications that can exist alongside each other is technically unlimited. Nor can concerns about content justify the imposition of a licence requirement. Denying a media outlet a licence based on fears about what it might publish would amount to crass censorship. Sanctions for unlawful content should be imposed after the fact, and not pre-emptively.

In summary, the licensing system foreseen in the Draft Law is inappropriate and should not be put in place.

Article 16.1 of the Draft Law states that "[e]very media outlet, such as Radio Stations, TV stations, Newspapers, Publishers, Cinemas, Media Training Schools, Advertising Companies, etc. … shall register with the Ministry of Information." It would seem this requirement is separate from, and additional to, the requirement to obtain a licence.

Purely technical registration requirements for print media (i.e. requirements to submit certain information, rather than to obtain an operating permit) are not condemned in international law to the same extent as licence requirements, but they are nevertheless discouraged. The UN Special Rapporteur on Freedom of Opinion and Expression and his counterparts at the OAS and OSCE adopted a Joint Declaration in 2003 which states:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[25]

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[23] Declaration of Principles on Freedom of Expression in Africa, *op.cit.*

[24] General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (Freedoms of opinion and expression), adopted 12 September 2011, UN Doc. CCPR/C/GC/34, para. 39.

[25] The 2003 Joint Declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on regulation of the media, restrictions on journalists and investigating corruption, adopted 18 April 2003.

The rules are unclear, but the Draft Law does seem to envisage the possibility of registration being refused, in which case this would be, in effect, an additional – and impermissible – licence requirement. Article 20, for example, states that applicants may complain to the competent court "if a decision is made to reject their registration and license." (Article 21 unnecessarily repeats this.)

Particularly concerning is Article 26, which states that unregistered media outlets will be closed down and the persons responsible "taken to court to face justice". Given the tenuous justification for imposing a registration requirement, a breach of that requirement should not be treated as a serious offence or grounds for closure. At most, a minor administrative fine might be justified.

The registration procedure also appears to be somewhat more onerous than necessary. Article 19 of the Draft Act states that every media outlet must have an owner and an administrator responsible for operations, who must provide a number of details when registering. Some of the details required, in particular their names, the type of outlet and the place of business, could reasonably be seen as necessary to ensure the media outlet is contactable. However, we fail to see the need to ask for private addresses or the qualifications of the administrator. We also question why Article 23.1 requires all media to show their address and the names of the director and editor on content they disseminate, when this information will already be available to the authorities. If the concern is that it should be available to third parties too, the authorities could make their register of media outlets public.

As already observed above, the body administering the registration process – the Ministry of Information – is hardly independent of government. It would be more appropriate to put the Somali Press Commission in charge of the registration process, with the proviso that its independence should be enhanced, as discussed below.

Finally, Articles 16.2 and 17.1 mention that media outlets must pay both a one-time registration fee and an annual licence fee, the rate of which will be specified in a national tax tariff table. While we are sympathetic to the challenges the Somali Government faces in establishing a tax base, it is inappropriate to subject the exercise of a human right – freedom of expression – to the payment of fees, whether regular or one-off. Like any other business, media corporations may, of course, be taxed on a non-discriminatory basis. It is also appropriate to charge commercial broadcasters a fee for the use of frequencies, as a public resource which they use to generate revenues. But this is already adequately provided for in Article 40 of the National Communications Act.

Recommendations

- The requirement for media outlets to obtain a licence is illegitimate with respect to print and online media, and unnecessary with regard to broadcast media, which already require a licence under the National Communications Act. References to this requirement should be removed from the Draft Law, notably from Articles 6, 8-13 and 20-22;
- The requirement for media outlets to register should ideally be removed from the Draft Law. If it is retained, the Draft Law should state clearly that registration cannot be refused; the information required for registration should not include irrelevant details such as private addresses or educational qualifications, and consideration should be given to putting the Somali Press Commission in charge of the registration process;
- Failure to register should, at most, attract a minor administrative fine. The draconian penalties foreseen in Article 26 should be removed;

- Article 23.1, requiring all media to show their address and the names of the director and editor on content they disseminate, is unnecessary and should be removed;
- Media outlets should not be required to pay registration and licence fees over and above their tax burden under ordinary tax law, and the licence fees for broadcasters under the National Communications Act. Articles 16.2 and 17.1 should be deleted.

Media professionals

Article 18 of the Draft Law stipulates that every "person working in the journalism profession shall be recorded in the registry of journalists after checking his press qualifications … and shall be issued with journalist identification card after meeting the criteria." The qualifications required to be officially considered a journalist are stated in Article 35.1, which stipulates that a journalist is defined as "any person with journalist skills or who has been in the journalism profession for 2 (two) years or more."

The Draft Law does not elaborate further on what benefits are conferred by recognition as a journalist or by possession of an identification card. Moreover, Articles 35.2 and 35.3 state that other operators in the press and media who are not journalists but have "experience and expertise related to their technical profession" have same the duties and privileges as journalists.

ARTICLE 19 notes that it is well-established in international law that every person has the right to practice journalism, and that it is impermissible to require individuals to join a professional association or to obtain a particular education. For instance:

- Principle X(2) of the African Declaration notes: "[t]he right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions;"

- Additionally, the UN, OAS, and OSCE special mandates for protecting freedom of expression stated in their 2003 Joint Declaration: "[i]ndividual journalists should not be required to be licensed or to register."[26]

The Draft Law does not appear to impose these restrictions. It does, however, restrict access to journalist ID cards to a degree. Since the purpose of these cards is not clear, it is difficult to assess the implications.

Generally, we believe self-regulation of the journalistic profession is to be preferred. In most established democracies, journalists have formed voluntary associations which issue press cards to their members. Possession of such a card is not required to be able to practise journalism, but public authorities may give certain benefits to card holders, such as preferential access to hearings of government bodies or courts, or permission to work in areas that are closed off to the general public, such as crime scenes.

Recommendations

- Provisions of Article 18 and Article 35 should be revised. Consideration should be given to allowing professional bodies such as the National Union of Somali Journalists to issue journalist ID cards on a self-regulatory basis.

[26] The 2003 Joint Declaration, *op.cit.*

The Somali Press Commission

The Draft Law envisages the creation of a new body, the Somali Press Commission (SPC), with expertise in media matters. Its nine members will be appointed by the President, after a proposal from the Minister of Information. They will serve a two-year renewable term and can be dismissed either according to the same procedure as appointment, or upon a court order.

The SPC's mandate, set out in Article 15, includes protecting ethics and applying Somali media law; resolving disputes regarding the application of the Media Law; mediating complaints against the Government and private media, except criminal offences; rewarding and disciplining media professionals; and recommending the granting and withdrawal of licences. Furthermore, Article 25.2 mandates the SPC to draw up a code of conduct for journalists jointly with the Ministry of Information and in consultation with the journalists' union.

While the SPC is described in Article 14.1 as an "independent commission," in reality there are no credible safeguards for its autonomy. Three members will be drawn from state media, and an equal number will come from private media and from civil society organisations, but those will apparently be hand-picked by the Minister of Information. The SPC's budget will also require approval from the Ministry of Information, and its members will depend on the Minister's support for reappointment at the end of their short term.

In principle, ARTICLE 19 welcomes the idea of a commission composed of media representatives that can mediate in conflicts and play an advisory role to the Government. However, to enjoy any confidence from the media, its independence would need to be adequately protected. The fact that media owners, administrators, journalists, and editors – in other words, all the key stakeholders – are ineligible for membership "in order to avoid a conflict of interest" (Article 14.1) further reduces the prospect that the SPC will be seen as a credible institution by anyone but the Government.

The concern about a conflict of interest presumably stems from the fact that the SPC's proposed mandate includes taking disciplinary measures and making recommendations on licences. It would indeed be inappropriate for a journalist or editor from one media outlet to be wielding these types of powers over a competitor, as was also pointed out in ARTICLE 19's comments on the Draft Media Law of 2007.[27] The solution, however, is not to exclude these stakeholders from membership, but rather to avoid giving them powers that would raise a conflict of interest. We have already stated our view that there should be no licensing system; further, we do not believe the SPC should play any role in enforcing a code of conduct or law.

In order to ensure the media can play its role of public watchdog, the degree of control imposed by the government should be kept to a minimum, and the press should be given an opportunity to form its own self-regulatory systems. As Principle IX(3) of the African Declaration states,"[e]ffective self-regulation is the best system for promoting high standards in the media."[28] In many countries, well-functioning press councils are in place, formed with no

[27] ARTICLE 19, Note on the Draft Media Law of Somalia, January 2008, p. 12.
[28] See Principle IX(3) of the Declaration of Principles on Freedom of Expression in Africa, *op.cit.*

involvement by authorities, which consider complaints from members of the public and assess them against a code of ethics developed by the press itself.

Recommendations

- The SPC's independence should be enhanced by limiting the Government's role in appointing its members, extending the duration of their term and making the Federal Parliament responsible for approving its budget;
- The SPC should not have powers to reward or discipline journalists, to recommend the granting or withdrawal of licences or to draw up a code of conduct. This should be left to self-regulation by the press. Articles 15.4, 15.5 and 25.2 should be amended in this regard;
- Media owners, administrators, journalists and editors should not be ineligible to serve on the SPC.

Content regulation

The Draft Law imposes a number of constraints on the content that media may disseminate:

- Article 4, entitled 'Exceptions to the freedom of independent media' prohibits false reports, inciting violence or encouraging tribalism, "baseless propaganda targeting an individual or organisation" and broadcasting hatred and extremism;

- Article 29 deals with defamatory material. It provides that the media should not disseminate false material which undermines the dignity of any individual, institution, or the Government. In case such material is disseminated, an apology and correction must be provided within 48 hours. Furthermore, the person or entity claiming to be defamed should be provided with a right of reply for free, which shall be published or broadcast, unabridged, with the same prominence as the original piece;

- Article 31 provides that media outlets which have been sanctioned should publish the decision on the sentence, failing which they shall be fined up to US $1,500. Likewise, individuals who violate the law risk a penalty of a monetary fine of up to US $1,500, pursuant to Article 5. This might, for example, come into play under Article 36, which warns journalists not to violate "the rights of a person, institutions, places of worship, the Islamic religion, laws of the country and sound Somali culture."

ARTICLE 19 notes that in most established democracies, media laws do not set out any content restrictions of this kind. Instead, such restrictions are found in laws of general application, such as the criminal and civil code. The reasons for this approach are explained in the 2003 Joint Declaration of the UN, OAS and OSCE special mandates:

> Content restrictions are problematical. Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.[29]

[29] Joint Declaration of 18 December 2003, supra note 25.

ARTICLE 19 assumes that Somalia's criminal law or its civil law, or both, already contain rules on issues such as protecting national security, or preventing the dissemination of defamatory material, under which media and media professionals can be held accountable, just as any other person or entity. Adding a second layer of restrictions leads to unnecessary confusion.

Moreover, many of the content restrictions described above are unacceptably broad or vague. The UN Human Rights Committee has stressed that laws should make it sufficiently clear what type of content is prohibited, and what type is not:

> [A] norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[30]

Terms like "baseless propaganda," "violation of religion" or "violation of sound culture" give very little guidance to the media, or indeed the authorities, as to what is permitted and what should be removed.

Combating 'fake' or 'false' news reports is a topic of frequent discussion around the world at present. Nevertheless, the consensus in international law remains that legal prohibitions regarding the spread of 'false news' are not the answer to the issue, given the subjectivity of this term. Falsity of information is not a legitimate basis for restricting expression under international human rights law.

For example, the UN, OAS and OSCE special mandates stated in their 2017 Joint Declaration:

> General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.[31]

It is easy to sympathise with concerns about the encouragement of tribalism, violence, or hatred in the Somali context. However, as noted above, the ICCPR in fact requires the prohibition of incitement in Article 20(2) as "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." This is an appropriately clear and precise wording that could be replicated in the Draft Law, or preferably in the criminal code, instead of the vague terms currently used.

Article 29, on defamation, is also problematic. This is a complex area of law, and a single provision in a media law cannot do it justice. A proper defamation law would, for example, provide for widely accepted defences to defamation, e.g. that the statement in question was an opinion, a quotation, or was reasonable to publish in the circumstances of the case. As with other content-related issues, defamation should be regulated in the civil code, or in a dedicated

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[30] General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (Freedoms of opinion and expression), adopted 12 September 2011, UN Doc. CCPR/C/GC/34, para. 25.

[31] The 2017 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on Freedom of Expression and "Fake News", Disinformation and Propaganda, adopted 3 March 2017.

law. Guidance on the subject can be found in the ARTICLE 19 publication *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation.*[32]

Recommendations

- All content restrictions should be removed from the Draft Law. Instead, content issues should be regulated through laws of general application like the criminal and civil code. This, in particular, includes Article 29 on defamation.
- At a minimum, overbroad and vague prohibitions such as making "false reports", spreading "baseless propaganda", "violating the Islamic religion" and "violating sound Somali culture" should be removed.
- Consideration should be given to replacing expressions such as "encouraging tribalism" and "broadcasting hatred and extremism" with the wording of Article 20(2) of the ICCPR.

Public Service Broadcasting

Perhaps the most positive provision in the Draft Law is Article 33, which sets out the mandate of Somalia's public service broadcaster (PSB). To a high degree, this provision corresponds with international best practice. The principles the Article establishes include the independence of the PSB from political and commercial interests; its duty to provide diverse programming serving different sections of society; its objective to encourage citizen participation in the democratic process; and the promotion of the domestic audio-visual industry.

The regulation of a PSB is a complex matter. Article 33 represents an excellent start regarding the broadcaster's guiding principles, but it also leaves many practical questions unanswered, such as how it will be governed, what its sources of funding will be, and how it will be made accountable to the public. These questions in turn have a heavy bearing on how independent and successful the PSB will be in practice.

In our view, the PSB is a sufficiently large topic to merit the adoption of a separate law. In this regard, inspiration could be drawn from ARTICLE 19's publication: *A Model Public Service Broadcasting Law.*[33]

Recommendation

- Consideration should be given to excerpting Article 33 from the Draft Law, using it as the starting point for a future comprehensive public service broadcasting law.

[32] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, Updated Version of 2017.
[33] ARTICLE 19, A Model Public Service Broadcasting Law, June 2005.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at www.article19.org.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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