

Ethiopia: Draft Proclamation to Prevent the Spread of Hate Speech and False Information

October 2019

Executive summary

In October 2019, ARTICLE 19 analysed the draft Proclamation to Prevent the Spread of Hate Speech and False Information of Ethiopia (Draft Proclamation) for its compliance with international freedom of expression standards. The Draft Proclamation was drafted by the Government earlier that year, amidst growing concern about the ethnic tensions in the country.

The Draft Proclamation contains broad definitions of “hate speech” and “false information” and imposes criminal sanctions on anyone that publishes, disseminates or possesses content that falls under the expansive definitions. It also imposes a number of obligations on social media service providers to monitor, remove and take down the respective content.

ARTICLE 19 finds that the draft Proclamation fails to comply with international human rights standards. The Draft Proclamation contains broad definitions of “hate speech” and “false information” and imposes criminal sanctions to anyone that publishes, disseminates or possesses content that falls under these expansive definitions. These prohibitions go beyond the permissible limitations on freedom of expression under provisions of international and regional freedom of expression standards.

The Draft Proclamation also imposes a number of obligations on social media service providers to monitor, remove and take down the respective content. Hence the Draft Proclamation is delegating broad censorship powers to private companies, and is likely to create an environment wherein lawful content is routinely blocked or removed by private companies as a precaution.

The obligations of social media companies are subject to further legislation and are expected to be supported by the Broadcast Authority of Ethiopia to comply with their obligations under the respective provision. Yet the Draft Proclamation does not clearly set out the role of the Authority or the providers, nor does it determine the enforcement process of these responsibilities.

It is noteworthy that the Draft Proclamation includes exceptions for protected expressions, such as political comments, critics, jokes and sarcasm. However, the protection of these types of expressions is the rule under international freedom of expression standards, not the exception. Likewise, the punitive approach of the Draft Proclamation will place protected expressions under criminal scrutiny, posing dangers not only to the right to freedom of expression but also to the right of freedom from discrimination.

ARTICLE 19 is also concerned that the Proclamation is likely to be counter-productive to its intended objectives, posing particular risks for minority and marginalised groups, who are most often the victims of the most severe forms of “hate speech”.

ARTICLE 19 recommends that the Government of Ethiopia withdraws the Draft Proclamation in its entirety and adopts an entirely new approach, combining positive policy measures, reforms to existing criminal laws, and the enactment of a legal framework for the right to equality and non-discrimination and addressing the historical tensions, intolerance and violence between ethnic groups in the country. ARTICLE 19 stands ready to provide further support in this process.

Key recommendations

- The Government of Ethiopia should entirely withdraw the Draft Proclamation and ensure that all the legislation fully complies with international freedom of expression standards;
- The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);
- Article 486 of the Criminal Code should be repealed in any case as it is incompatible with international freedom of expression standards;
- The Government should refrain from obliging private companies to monitor and remove content; instead, consideration could be given to reporting requirements to increase transparency around online content moderation by private actors;
- The Government should also adopt a comprehensive legal framework and positive policy measures for the right to equality and non-discrimination, and hold an effective consultative and participatory process for the development of such legislation, with the participation of all relevant stakeholders. Any sanction and liability imposed on service providers must comply with the three-part test standard and guarantee that, if any imposition to monitor and remove content is required, it must be subject to independent and impartial judicial oversight.

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Introduction

In this legal analysis, ARTICLE 19 reviews the Draft Proclamation to Prevent the Spread of Hate Speech and False Information¹ (Draft Proclamation) for its compliance with international standards on the right to freedom of expression.

The Government of Ethiopia released the Draft Proclamation on 6 April 2019, a few weeks after the Prime Minister, Abiy Ahmed, published a statement of concerns about the dangers of using social media in the country.² In his statement, he alleged that fake accounts were disseminating ‘hate’ and ‘misinformation,’ labelling them as “poison brought to the country where Ethiopian population is in tension with two extreme opinions.”³

For decades, ethnic tensions have been a serious issue in Ethiopia. Ethnic intolerance and violence grew over the years causing political instability, widespread deaths, displacement, violence and discrimination. In 2018, democratic elections gave rise to opportunities of political change in which Prime Minister, Abiy Ahmed, initiated a plan to reform restrictive policies and build upon a progressive and democratic environment for the different political and ethnic groups.⁴ Still, conflicts between ethnicities continued throughout 2019 as a result of deep-rooted issues.⁵ International human rights bodies have recommended to Ethiopia to adopt specific legislation to eradicate racial discrimination.⁶

ARTICLE 19 welcomes the efforts of the Government of Ethiopia to take action against discrimination and ethnic intolerance in the country. Nevertheless, it is crucial that any regulatory framework geared to address these historical problems fully integrate a freedom of expression approach that complies with international human rights law. Otherwise, the opportunities for political and social change are likely to fail and worsen the situation of minorities and marginalised ethnicities.

Therefore, in this analysis, ARTICLE 19 aims to provide useful guidance on the application of freedom of expression standards in connection with the State's obligations to prohibit “hate speech,” including its most serious forms. We call on the Government of Ethiopia to withdraw the Draft Proclamation and instead, initiate a participatory process that enables the development of adequate measures to confront violence, hate, intolerance and discrimination against certain groups of the population, and ensure that all its legislation complies with international human rights standards. We stand ready to assist the government in this process.

¹ The analysis is based on the unofficial translation of the Draft Proclamation into English. ARTICLE 19 does not take responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

² See, e.g. Borkena, [Ethiopia issued advisory on social media hate speech, misinformation dissemination](#), 19 March 2019; Damte, Eldad, [More Than Armed Oppositions Social Media Becomes a Headache for Abiy's Government](#), Addis Insight, 21 March 2019.

³ See [Prime Minister statement in Amharic](#), twitter account [@PMEthiopia](#), published on 19 March 2019;

⁴ Human Rights Watch, [Ethiopia 2018](#), January 2019.

⁵ BBC, [Abi Ahmed's reforms in Ethiopia lift the lid on ethnic tensions](#), 29 July 2019.

⁶ Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination, 7 July 2009, available at <https://bit.ly/2WMnplb>

Applicable international standards

ARTICLE 19's comments on the Draft Proclamation are informed by international human rights law and standards. Further, any legislative and regulatory framework aimed at restricting the right to freedom of expression, including those based on racial, ethnic or religious discrimination, should also comply with these provisions.

The protection of the right to equality

Article 1 of the Universal Declaration of Human Rights (UDHR) states that “all humans beings are born free and equal in dignity and rights;” Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind,” and Article 7 requires protection from discrimination. These guarantees are given legal force in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression, and equal protection of the law.

The protection of the right to freedom of expression under international law

The right to freedom of expression is protected by Article 19 of the UDHR,⁷ and given legal force through Article 19 of the ICCPR.⁸

The scope of the right to freedom of expression is broad. Article 19 of the ICCPR 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; this also includes the Internet and digital media.⁹ 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,¹⁰ and that this may encompass discriminatory expression.

Limitations on the right to freedom of expression

⁷ Through its adoption 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).

⁸ International Covenant on Civil and Political Rights, 16 December 1966, [UN Doc. A/6316](#), Ethiopia acceded to the ICCPR on 11 June 1993.

⁹ Human Rights Committee, [General Comment No. 34](#) on Article 19: on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011. See also Human Rights Council, Resolution: [The promotion, protection and enjoyment of human rights on the Internet](#), A/HRC/20/L.13, 29 June 2012.

¹⁰ *Ibid.*, para 11.

Under international human rights law, States may exceptionally limit freedom of expression under Article 19 para 3 of the ICCPR. The restrictions may be legitimate only under specific circumstances (the so-called “three-part test”), requiring that limitations must:

- **Be provided by for law:** any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly; assurance of legality on limitations to Article 19 should comprise the oversight of independent and impartial judicial authorities;
- **Pursue 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;
- **Be necessary and proportionate:** requiring States to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.¹¹

Thus, any limitation imposed by the State on the right to freedom of expression, including to limit “hate speech,” must conform to the strict requirements of this three-part test. Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law (see more below). The three-part test applies to electronic forms of communication and expression.¹²

Limitations on “hate speech”

“Hate speech” is a broad term that has no definition under international human rights law. The expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response required from States under international human rights law.¹³

- Severe forms of “hate speech” that international law requires States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of “hate speech” that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;
- “Hate speech” that is lawful but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but which should be protected from restrictions under Article 19 para 3 of the ICCPR.

¹¹ *Ibid.*, para 22.

¹² *Ibid.*, para 43.

¹³ For a full explanation of ARTICLE 19’s policy on “hate speech,” see ARTICLE 19, [“Hate Speech” Explained: A Tool Kit](#), 2015, p. 8.

Obligation to prohibit

Article 20 para 2 of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19 para 3.¹⁴

The Rabat Plan of Action,¹⁵ adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20 para 2 of the ICCPR:¹⁶

- **Incitement:** prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence from the audience, rather than the advocacy of hatred *without regard* to its tendency to incite action by the audience against a protected group.
- **Six-part threshold test:** to assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
 - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework and the media landscape.
 - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader.
 - **Intent:** intent of the speaker to engage in advocacy to hatred, requiring both (i.) intent to target a protected group on the basis of a protected characteristic, and (ii.) knowledge that their conduct will likely incite the audience to discrimination, hostility or violence.
 - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;

¹⁴ General Comment No. 34, *op.cit.*, para 52.

¹⁵ [The Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012.

¹⁶ The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council, see, for example: Report of the Special Rapporteur on protecting and promoting the right to freedom of opinion and expression on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, Heiner Bielefeldt, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, Mutuma Ruteere, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

- **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
- **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility or violence occurring as a direct consequence of the incitement.
- **Protected characteristics:** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.
- **Proportionate sanctions:** the term “prohibit by law” does not mean criminalisation; the HR Committee has said it only requires States to “provide appropriate sanctions” in cases of incitement.¹⁷ Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.¹⁸

Permissible limitations

There are forms of “hate speech” that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR and the three-part test set out above.

Lawful expression

Expression may be inflammatory or offensive, but nonetheless does not meet any of the thresholds described above. This expression may be characterised by prejudice, and raise concerns over intolerance, but does not meet the threshold of severity, at which restrictions on expression are justified. This also includes expression related to denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-

¹⁷ Human Rights Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

¹⁸ UN Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, paras. 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

speech. Many of these positive measures are set out in the Rabat Plan of Action, which draws extensively upon ARTICLE 19's Camden Principles on Freedom of Expression and Equality.

Limitations on “false information”

The term “false information” is also not defined under international human rights law; while protecting persons from “false information” or “disinformation” is not, as such, a legitimate aim for justifying restrictions on the right to freedom of expression under Article 19 para 3 of the ICCPR.

The four international mandates on freedom of expression stated in their 2017 Joint Declaration that “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas should be abolished, including “false news” or “non-objective information” insofar as they are incompatible with international standards for restrictions on freedom of expression.”¹⁹ They also cautioned that such prohibitions are increasingly being used by persons in positions of power to denigrate and intimidate the media and independent voices, increasing the risk of such persons being subjected to threats of violence, and undermining public trust in the media.²⁰

An important point of principle remains that “the human right to impart information is not limited to ‘correct statements’, [and] that the right also protects information and ideas that may shock, offend or disturb.”

Freedom of expression online and intermediary liability

At the international level, several human rights bodies and mechanisms have developed soft law guidance on freedom of expression online and intermediary liability.

The UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online.”²¹ The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or “offline” communications, as set out above, while taking into account the differences between these media.²²

While international human rights law places obligations on States to protect, promote and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.²³ In meeting their obligations, States may have to regulate the

¹⁹ [Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda](#), adopted by the UN Special Rapporteur on Freedom of Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.

²⁰ *Ibid.*

²¹ HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

²² General Comment No. 34, *op cit.*, paras 12, 39, 43.

²³ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The UN Human Rights Council endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

behaviour of private actors in order to ensure the effective exercise of the right of freedom of expression.

Importantly, the UN Special Rapporteur on freedom of opinion and expression (Special Rapporteur on freedom of expression) has long held that censorship measures should never be delegated to private entities.²⁴ In his June 2016 report to the HRC,²⁵ the UN Special Rapporteur on freedom of expression, David Kaye, enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality,”²⁶ and reiterated criticism of notice and takedown frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation,” i.e. the danger of “self- or over-removal.”²⁷

The Special Rapporteur on freedom of expression recommended that any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19 para 3 of the ICCPR.²⁸

The international freedom of expression mandates have further expressed concerns at “attempts by some governments to suppress dissent and to control public communications through [...] efforts to ‘privatise’ control measures by pressuring intermediaries to take action to restrict content.”²⁹ Their 2017 Joint Declaration emphasises that:

[I]ntermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.

They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.³⁰

²⁴ Report of the Special Rapporteur on freedom of expression, 16 May 2011, A/HRC/17/27, paras. 75-76.

²⁵ Report of the Special Rapporteur on freedom of expression, 11 May 2016, A/HRC/32/38; para 40 – 44,

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 43.

²⁸ *Ibid.*

²⁹ 2017 Joint Declaration, *op. cit.*

³⁰ [Manilla Principles on Intermediary Liability](#), May 2015.

Analysis of the Draft Proclamation

Definitions, prohibited acts and criminal liability

ARTICLE 19 finds that the Draft Proclamation adopts broad definitions for key terms, upon which ambiguous offences enable authorities to censor any expression on the basis of its supposed veracity.

- **“Hate speech:”** is defined in Section 2.1 as “a speech intentionally made to undermine, insult, threaten, discriminate, incite and degrade a certain individual, group, race, religion, color, gender, disability, nationality, language, citizenship status, and external appearance.” Section 4.1 then prohibits “any act that is intentionally made to undermine, insult, threaten, discriminate, incite and degrade a certain individual, group, race, religion, color, gender, disability, nationality, language, citizenship status, and external appearance through a) oral messages, b) scripts/articles, c) works of art, d) image, painting, audio recording, motion picture, e) broadcasting on mass media or social media or d) other means of communication to the public.” Section 4.2 further stipulates that “anyone is prohibited from possessing [such e message] [...] in the form of publication or article(text).” Section 6.1 provides exceptions in cases where the act is “a) committed for scientific or educational purpose,” is “b) part of a fair report, an acceptable political comment and critics under a democratic system or part of a notice or warning,” or “is a religious teaching or interpretation made in good faith.”
- **“False information:”** Section 2.2 defines “false Information” as “information with a falsified content and with high tendency of inciting violence, or attack.” Section 5 prohibits “spreading information with a (main or core) falsified content having high, tendency of inciting violence or attack having full knowledge or with obligation to know.”

Article 7 provides criminal penalties for violations of the provisions on “hate speech” and “false information:”

- Violations of prohibitions on hate speech is punishable with “a simple imprisonment” for up to 3 years or with a fine of up to Birr 10,000 depending on the degree of the offense. The penalty can be increased if as a result of an expression, prohibited attack is committed or attempted on an individual or group; in such case, punishment can be increased to “a rigorous imprisonment” up to five years depending on the degree of the offense. Possession of “hate speech” material (as per Section 4.2) is punishable with “a simple imprisonment” of up to one year or a fine of up to Birr 1,000 depending on the degree of the offense.
- Violation of “false information” provisions is punishable with “a simple imprisonment” up to one year or with a fine not exceeding Birr 3,000 depending on the degree of the offense; but when the offence was committed on social media page with more than 5 thousand followers, on broadcast media or on a periodical publication, the punishment can be increase to imprisonment of up to three year or a fine not exceeding 10,000 Birr. If a prohibited act was committed or attempted as a result of expression, the punishment can be increased to “a rigorous imprisonment” of up to five years.
- In both cases, if no attack was committed or attempted as a result of the expression, the court may change the punishment to a social service as an alternative sentence.

These provisions do not comply with international human rights law for the following reasons.

First, they do not meet the requirement of legality under the three-part test, which requires any law or regulation to be formulated with sufficient precision to enable individuals to regulate their conduct accordingly. The breadth, and subjectivity of the key terms in these provisions make the offences in the Draft Proclamation indeterminate in scope. Exceptions in the provisions are also very vague and therefore problematic. It is impossible for a person, be it the author of potentially problematic expression, or the persons who share or host that content, to know whether they would be held liable under the law. The potential for arbitrary application is significant, and thus individuals may self-censor to avoid expressing opinions or ideas that may lead to censure, and even close platforms or discussion forums to avoid becoming an accessory to an offence.

As for “hate speech,” ARTICLE 19 suggests that more precise categories of expression that may legitimately be subject to restriction should be identified in the legislation. These include:

- Key elements of the Article 20 para 2 of ICCPR – namely prohibition of “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” should be integrated into the Draft Proclamation or into the Criminal Law Integrating these elements is necessary to distinguish acts of incitement that are discriminatory from controversial statements that may cause a violent backlash.
- **A target group defined by a protected characteristic:** To more accurately reflect Article 20 para 2 of the ICCPR, there must be advocacy of a hatred against a particular group because of their protected characteristic (such as race, nationality or religion). The listing should include, *inter alia*: race, ethnic or national origin, migrant or refugee status, sexual orientation, gender identity, sex, disability, and any other protected characteristic recognised under international human rights law.
- **Incitement to violence, hostility or discrimination:** Section 4.1 does not require the audience of the expression to be incited towards committing a harmful act against the target group. International standards require that for prohibition to be necessary, the advocacy of hatred must reach a threshold of severity so high that it is likely to incite a harmful act, i.e. imminent violence, hostility or discrimination. Determining whether the severity threshold has been met requires applying the six-part test, set out in the international standards section above.
- **Intent:** It is not clear from Section 4.1 what standard of intent must be demonstrated to find a person criminally liable under these provisions. Additionally, it is extremely problematic that a simple possession of the prohibited material is also a criminal act, regardless of having control or not of the information a person received through different means of communication. Given the serious nature of the penalties to be imposed on the exercise of a fundamental right, specific intent should be shown. There is therefore a need to show intent to engage in the advocacy of discriminatory hatred, intent to target a particular group on the basis of a protected characteristic, and knowledge that this would likely cause a proscribed outcome (violence, hostility or discrimination).

Second, the prohibition on “false information” does not meet the requirement of legitimate aim under Article 19 para 3 of the ICCPR. Section 5 connects the expression to a particular harm -

incitement to violence – however, it does it in a way that does not comply with the incitement standard under international human rights law outlined above.

Third, international human rights law does not require criminal sanctions for cases of incitement, in particular for cases of incitement to discrimination or hostility. The focus on custodial sentences does not provide judges with sufficient flexibility to ensure that any sanctions imposed are proportionate. Fines and community sentences should also be considered as alternative sentences for incitement offences. In addition, alternative causes of action in civil and administrative law provide alternative forms of seeking redress that can prove more proportionate and effective.

Recommendations

- Definitions of “hate speech” and “false information” in Section 2 should be removed.
- Sections 4 and 5 should be revised in their entirety, to meet the requirements of Article 20 para 2 and Article 19 para 3 of the ICCPR, including by making clear that there is a high threshold for limitations on expression, as set out in the six-part test of the Rabat Plan of Action.
- Alternative criminal sentences, such as community service, should also be available for all incitement offences.
- The Government should also adopt provisions for civil causes of action against advocacy of discriminatory hatred constituting incitement to violence, discrimination or hostility, and, where necessary, in the administrative law, develop and implement more victim-centred approaches.

Responsibility of Institutions and Service Providers

Section 8 stipulates the responsibility of institutions and service providers in respect to the provisions of the Draft Proclamation.

- Any institutions providing a social media service are obliged to monitor and prevent the transmission of information under Sections 5.1 (on false information) and 6 and “take immediate measures in removing or taking down such speeches from transmissions upon receiving the information on their prohibition depending on the viability of the information.” ARTICLE 19 notes that the Draft Proclamation probably means monitoring of the provisions on “hate speech” (in Section 4), alongside false information, as Section 6 deals with sentencing. Social media companies are obliged to “have policy and manual to properly discharge the obligation imposed” under the Proclamation.
- Additionally, the Draft Proclamation envisages further responsibilities for the public authorities. The Ethiopian Broadcast Authority (EBA) “shall provide support and follow up for social media service providers in order to enable them discharge their obligations” under the Proclamation and “facilitate and organize events to provide awareness on the spread of false information and the entailed damages.” The Ethiopian Human Rights Commission (EHRC) shall “facilitate and organize events to provide awareness on the prevention of hate speech and the entailed damages.”

ARTICLE 19 notes that the Draft Proclamation does not establish any liability on companies for failure to comply with these provisions. However, there is a danger that Section 8 could be interpreted to provide for such liability.

In any case, in ARTICLE 19's view, the obligation imposed on the companies is problematic for several reasons.

- First, there is no guidance to service providers on what constitutes “upon receiving the information on their prohibition depending on the viability of the information.” A single user complaint through a platform’s complaint mechanism may satisfy this, even when a platform or administrator may not have the adequate information to judge the legality of the content. This guidance may be further complicated, as platforms’ terms of service – against which user complaints are ordinarily judged – do not use the same terminology as the Draft Proclamation.
- Second, the obligation to remove or take down content applies without any prior determination of the legality of the content at issue by an independent and impartial court or an adjudicative authority, and gives no guidance to service providers on respecting the right to freedom of expression in their determinations. The companies would thus be placed in a position of determining legality, and considering the rights of an accused in making a removal decision. Private enterprises are not competent to make these complex factual and legal determinations and do not necessarily equip their staff with the knowledge and expertise to carry out such an assessment. The Draft Proclamation envisages no recourse to users whose content is deleted unfairly.
- Third, it is not clear what is meant by “immediate measures” of removing or taking down the content. “Immediate” removal is both impractical and dangerous for freedom of expression, as it would essentially require automated content removal on unclear grounds. This is something that cannot be done accurately with current filtering and artificial intelligence technologies, as determination of compatibility is highly context specific, an assessment that companies’ tools are incapable of making.

As for the role of public bodies, ARTICLE 19 notes that any meaningful strategy to address the root causes of “hate speech” while protecting the rights to freedom of expression and equality requires comprehensive action from agencies across government, as is foreseen in the Rabat Plan of Action. The role of public bodies in the Draft Proclamation is not linked to any comprehensive action or strategy or to the resources to implement them.

Additionally, although the broadcasting authorities have experience in sanctioning violations of licensing conditions for the broadcast media (that is radio and television), the type of content and activities on the social media and service providers are significantly different. The Draft Proclamation does not clearly set out the role of the EBA, nor the types of policy actions that it will be responsible for implementing. It is therefore difficult to evaluate, on the basis of the Draft Proclamation, whether its role would be a positive or negative development in terms of compliance with international freedom of expression standards.

As for the role of the Human Rights Commission, ARTICLE 19 notes that national human rights institutions (NHRIs) with mandates in the area of non-discrimination and equality play a crucial role in responding to “hate speech” and promoting and protecting the right to equality and non-discrimination, including with respect to the right to freedom of expression. ARTICLE 19 has previously recommended that it is important that such institutions are properly resourced and that their mandate and role are clearly defined and set, as appropriate. Their mandate may include, but is not limited to, the following responsibilities:

- Assist legislatures and governments in the development of laws and policies that comply with States' international human rights obligations, including in relation to freedom of expression and non-discrimination, encouraging the full and effective participation of civil society in these processes;
- Receive complaints regarding discrimination, and, where appropriate, provide alternative and/or voluntary dispute resolution mechanisms;
- Complement and provide information to governmental early warning mechanisms or focal-points that monitor tensions within or between different communities; and
- Encourage and, where appropriate, support alternative mechanisms for intercommunal interaction and dialogue. It is important that national human rights bodies, do not operate in isolation. They should be empowered to build partnerships across public sector agencies and, where appropriate, with private actors and civil society, to tackle the root causes of discrimination. In this regard, they should play an integral role in developing and implementing national action plans to tackle the root causes of discrimination.

However, the Draft Proclamation does not specify any such obligations and only envisages the very narrow role of the EHRC in addressing "hate speech." Moreover, the campaigns and events expected to be undertaken under the Proclamation, given its extremely problematic provisions, might promote over restrictive and criminal responses to "hate speech," instead of positive measures.

Recommendations

- The Government should refrain from obliging private companies to monitor and remove content; instead, consideration could be given to reporting requirements to increase transparency around online content moderation by private actors;
- The responsibilities of the EBA should be reviewed and significantly amended to ensure that any action and support provided to the social media companies complies with international human rights standards and guarantees a politically independent participation in the process;
- The EBA and the ECHR should be regarded as promoters of freedom of expression, non-discrimination and tolerance, as well as main developers of positive measures to confront discrimination and hatred, rather than fostering restrictive measures.

Other provisions

ARTICLE 19 strongly support the intention of the Government to repeal Article 486 of the Criminal Code of the Federal Democratic Republic of Ethiopia³¹ as it is incompatible with international freedom of expression standards. Regardless of the recommendation to withdraw

³¹ Article 486 (Inciting the Public through False Rumours) reads as follows: "Whoever, apart from crimes against the security of the State (Arts. 240, 257 (e) and 261 (a)): a) starts or spreads false rumours, suspicions or false charges against the Government or the public authorities or their activities, thereby disturbing or inflaming public opinion, or creating a danger of public disturbances; or b) by whatever accusation or any other means foments dissension, arouses hatred, or stirs up acts of violence or political, racial or religious disturbances, is punishable with simple imprisonment or fine, or, in serious cases, with rigorous imprisonment not exceeding three years.

the draft Proclamation, which would substitute Article 486, we strongly encourage the Government to repeal Article 486, irrespective of the Draft Proclamation.

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, under implementation in domestic legal systems. The organisation has produced a number of standard setting publications which outline international and comparative law and best practice areas such as defamation law, freedom of expression and equality, access to information and broadcast regulations.

On the basis of this publications and ARTICLE 19's overall legal expertise, the organisation published a number of legal analyses each year, comment 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 effort worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>.

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