Malaysia: Draft Media Council Act (July 2020)

October 2020

Legal analysis

Executive summary

In this analysis, ARTICLE 19 reviews the draft Media Council Act, July 2020 (the Draft Act), currently being discussed in Malaysia, for its compliance with international freedom of expression standards.

ARTICLE 19 has already analysed an earlier draft of this Act (in March 2019) and offered a number of recommendations to improve it. In particular, we recommended that the drafters improve the Act's clarity, provide for greater transparency in the consultative process, and ensure the independence of the Media Council from government, commercial, or other interests.

ARTICLE 19 appreciates that a number of our earlier recommendations were incorporated into the most recent draft of the Act. These include expanding Media Council membership explicitly to independent journalists, adding procedural clarifications, removing the veto power of the Chairperson, ensuring balanced gender representation, and remedial actions including the publication of correction and reply. Also, the Report of the Pro-tem Committee (Committee Report) makes a recommendation to review the regulations of the Communications and Multimedia Act 1998 (CMA), as well as to reform and repeal repressive legislation, including the Sedition Act 1948, the Official Secrets Act 1972, and the Printing Presses and Publications Act 1984. The Draft Act also makes a general call for reforms to address censorship, criminal defamation, and secrecy laws (though we continue to suggest that mention of the Security Offences (Special Measures) Act 2012 be included in this list). We also welcome that the Committee Report makes explicit reference to the International Covenant on Civil and Political Rights as well as the Universal Declaration of Human Rights.

While the revision of the Draft Act features many positive developments, we observe that many of the improvements do not go far enough in addressing our underlying concerns. We wish to highlight the following:

- Numerous features of the Draft Act continue to call into question the independence of the Media Council and its Executive Committee (Exco) from government, commercial, or special interests. These include the lack of prohibition of political party members or media owners from being elected to the Exco, the lack of provisions guaranteeing functional and administrative autonomy of the Council and Exco, and the lack of clear restrictions on funding from government sources.

- The Draft Act includes a Draft Code of Conduct—which is supposed to be provided by the Media Council and Executive Committee—before these bodies even exist. The Committee Report indicates that the Draft Code of Conduct was drafted by a "subcommittee" and it is unclear what stakeholders, if any, were included or consulted in the drafting of this Code of Conduct, as there is little transparency regarding the process. ARTICLE 19 therefore remains concerned about the process that led to drafting the Draft Act. We continue to submit that any agreement on press regulation requires broad public participation and agreement between all relevant stakeholders.

- Finally, while the Committee Report recommends review and removal of restrictive provisions in the CMA, and the Draft Act Schedule C indicates that the proposed Draft Code of Conduct would supersede the CMA's Content Code where there is a conflict, there is still no mention of the Malaysian Communication and Multimedia Commission (MCMC) anywhere in the Draft Act. Also, the Draft Code of Conduct would not come into effect with the Draft Act. It is thus still unclear how the proposed Media Council will interact with the MCMC, or how any overlap in their mandates will be reconciled.

ARTICLE 19 believes that these problematic aspects of the Act have significant implications for freedom of expression in Malaysia, and we urge the drafters of the Act to revise them prior to seeing the Parliamentary approval of the Act.

Summary of key recommendations

- The Act should be a part of broader reforms in Malaysia to improve human rights protection. In particular, Malaysia should sign and ratify the International Covenant on Civil and Political Rights as a matter of urgency. This would send a strong message that international human rights standards are integral to any legislation related to the media, and freedom of expression in general, in the country.
- The Act should clearly differentiate between the regulation of broadcast and print/online media. The relationship between the Media Council and the existing MCMC should be clarified. At the same time, we reiterate that regulatory bodies for the press should be set through an entirely voluntary process rather than legislation.
- The Preamble of the Act should explicitly provide for the independence of the Council, the accountability of members of the profession to their peers, accountability of media outlets to the public, and protection for journalists.
- The Act should include a provision explicitly stating that the functional, operational, and administrative autonomy of the Council and the Exco is fully guaranteed in all matters and that any economic or political interference is prohibited.
- The Act should specify that members of the Exco cannot be members of the government or members of a political party.
- The Act should not include a Draft Code of Conduct. Any media code of conduct should be adopted after a consultative, transparent, and inclusive process open to all relevant stakeholders and the public. The Code of Conduct should also be informed by international professional ethics and avoid vague, broad moral concepts. Bearing in mind the dynamic nature of the media and changing values in society, any code of conduct should be considered a working document subject to interpretation, rather than a set of rigid rules.
- There should be a clearly defined procedure for additional appointments to the Exco, and definition for how additional appointments to the Exco will remedy issues of representation or balance; as drafted, the provision may be used to dilute the voice of existing stakeholders.
- The possibility of the Exco to direct the nature, extent, and placement of corrections and replies should be limited.
- Funding sources to the Council and Exco from the government should be explicitly restricted and only be a source of supplementary funds. Any governmental grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government.
- The Act should establish a scaled industry-specific levy as the main source of funds for the Council.

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Introduction

The Media Council Act (Draft Act) was prepared by a by a Pro-Tem Committee that was appointed by the previous Pakatan Harapan government on 16 of January 2020[1]. The Pro-Tem committee is comprised of representatives from the journalist associations, print, electronic and online media, publishers, local and foreign media and non-governmental organisations in the Malaysian media industry, in response to the Government's call for self-regulation of the media industry. There has been discussion for several years regarding the creation of a press council in the country, but no press council has been formed.

ARTICLE 19 continues to welcome the opportunity to contribute to the process of improving the protection of media freedom in the country, which includes improving accountability of the media. Our comments to the Draft Act are based on international standards on freedom of expression, and particularly on international standards that are applicable to broadcast regulation[2] and standards on press self-regulation.[3]

ARTICLE 19 notes positively that numerous recommendations we provided to the initial draft of the Act were incorporated into the current version of the Act. However, several of the core features of ARTICLE 19's concerns have yet to be implemented. Specifically, these features include guarantees of independence from government, commercial, and other interests within the Executive Committee and the Media Council's funding, a consultative and inclusive process for adopting any Code of Conduct, and more democratic and transparent processes for selecting members and decision-making.

ARTICLE 19 also remains concerned about the plans to establish one regulatory body – the Media Council – under the Act to regulate all the media. As we noted previously, self-regulation for the press should be the preferable option to statutory councils, in line with the requirement that media regulation should use the least restrictive means possible. For these reasons, the Act should clearly differentiate between the regulation of broadcast and print/online media, and consider whether statutory media council, covering the press is necessary. The relationship between the Media Council and the existing MCMC should be clarified, while the Communications and Multimedia Act should also be fully reviewed for its compliance with international standards.

Further, ARTICLE 19 remains concerned that not only the Draft Act, but the Code of Conduct, were prepared by large media organisations without the full participation of all stakeholders. Representatives of all the media or the public do not appear to have been included. The limited participation of stakeholders continues to raise doubts regarding the process of drafting the Code of Conduct in particular, and does not bode well for establishing a professional, independent, and accountable Media Council. ARTICLE 19 has long argued that processes for setting up regulatory bodies for the media and ethical standards codes should be consultative, inclusive and transparent. In particular, a step-by-step approach which encourages support for press self-regulation from the bottom up is preferable to a top down or centrally imposed solution.

We continue to find that the Draft Act should be a part of broader efforts to fully guarantee media

[1] The Star, M'sian Media Council: 17 appointed as pro-tem committee members, 16 January 2020.
[2] ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002.
[3] See, e.g. ARTICLE 19, Freedom And Accountability Safeguarding Free Expression Through Media Self-Regulation, March 2006.

freedom in the country and independence of any regulatory media bodies. In the following sections, we analyse the key provisions of the Draft Act and offer recommendations for improvement while elaborating upon past recommendations that were either not implemented or only partially implemented. We stand ready to provide further assistance in incorporating these comments into the final version of the Act.

Analysis of the Draft Media Council Act (July 2020)

In its prior analysis, ARTICLE 19 followed the structure of the Draft Act. We recall our earlier recommendations and want to stress the following issues.

Preamble

ARTICLE 19 continues to observe positively that the Preamble to the Draft Act makes reference to the Universal Declaration of Human Rights and international standards generally. The Preamble to the Draft Act could be improved by explicitly stating important aims of the Act, including maintaining the independence of the Council, accountability within the profession and to the public, and protection for journalists.

Recommendations

- The Preamble of the Draft Act should explicitly provide for the independence of the Council, the accountability of members of the profession to their peers, accountability of media outlets to the public, and protection for journalists.

The Media Council

We observed previously that the Draft Act established three categories of membership: publishers and owners of print, online, and broadcast media; media associations; and working journalists. The Draft Act has since been amended to include "independent journalists" within the purview of the latter category, and also explicitly includes representatives from the public and civil society organisations.

We specifically observed that the operating context for broadcasters in Malaysia differs significantly from that of print or online media. Broadcasters are regulated by the Communications and Multimedia Act 1998 (CMA).[4] Under the CMA, the Malaysian Communications and Multimedia Commission (MCMC) performs a wide range of administrative and quasi-judicial tasks, including regulating the content of broadcasts. As we noted previously, and still maintain, the relationship between the existing MCMC and the proposed Media Council is not specified in the Draft Act and is thus unclear. The Draft Act makes no reference to the MCMC, although it covers broadcasters. While the Draft Act repeals Sections 211 and 233 of the CMA in Section 25, and proposes in the Draft Code of Conduct for the Code of Conduct to supersede the CMA's Content Code where the two conflict, it is unclear how the MCMC and Media Council interact in instances of potential conflict as they possess similar mandates over the broadcasting industry.

ARTICLE 19 thus continues to recommend that the relationship between the Media Council and the MCMC be clarified. This is notwithstanding our continued concern with the MCMC's lack of independence and other freedom of expression concerns with the CMA.

[4] ARTICLE 19, Malaysia: The Communications and Multimedia Act 1998, February 2017.

We also previously observed that the definition of "working journalist" in Section 2(d) was restrictive, requiring that a person works in the media on a permanent basis, receives remuneration on a regular basis, and works in editorial functions. We suggested that this definition excluded journalists working as independent freelancers or for multiple press outlets and should be opened to individuals on a voluntary basis.

The revised Draft Act appears to take a positive step in this direction, by including "independent journalists" in the category of Media Council membership that includes working editors and journalists in Section 6.2(b). However, we observe that while "working journalists" are defined earlier in the Draft Act, "independent journalists" are not; it should be made explicit, by adding a definition for "independent journalists" in Section 2 that indicates that it includes individuals working in the media industry, but may be on a voluntary basis, and work does not need be primarily related to editorial or reporting functions.

Finally, the rules pertaining to Extraordinary General Meetings (EGMs), including notice and quorum provisions, should be explicitly defined as to prevent the potential for their abuse.

Recommendations

- Clearly differentiate between the regulation of broadcast and print-online media, or only cover the press under the Media Council Act, given existing regulation of broadcasters;
- Clarify the relationship between the Media Council and the existing MCMC;
- Clarify, in Section 2, that "independent journalists" include individuals working in the media industry but can do so on a voluntary basis without a proscription of the scope of their work;
- The same rules for notice and quorum should apply to extraordinary general meetings.

Composition of the Executive Committee

As we observed before, the Draft Act provides that the Chair of the Executive Committee (Exco) must not be a member of government or member of a political party (Section 9.1). However, this prohibition should apply to the rest of the Exco as well. This ensures not only freedom from political interference, but also strengthens the credibility and perception of objectivity of the Exco.

An essential requirement for an effective press regulator is independence from potential sources of interference, including the government, business, and the press itself. In the prior draft, there was language that "no working journalist who owns, or carries on the business of management of any media company shall be eligible for election" to the Exco. This provision appears to have been removed, in favour of less restrictive language in Section 8.2 that only requires that where media publishers have common ownership, the common owner will not have more than one elected person. We recommend including more robust language that ensures that the Exco is independent from commercial and other interests, which could entail restrictions on owners of media being included from the Exco.

We continue to encourage the adoption of more transparent processes for the selection of Exco members. Specifically, we observe that under Section 8.1(d), appointments of up to 12 members may be used to "remedy any reduced representation or balance and to ensure that media of various languages and medium are represented." While we commend the objective of inclusivity and diversity that this provision appears to encourage, we are concerned that the lack of defined appointment process or standards in ensuring what balance entails, coupled with the large capacity for additional

appointments (the whole size of the original Exco), provides a mechanism for appointments to dilute the voices and influence of existing Exco members. We suggest laying out an explicit process for appointments and either reducing the maximum size of the Exco from 24 or addressing the goal of balance by alternatively allowing additional members in the category of Section 6.2(c) representing the public interest.

Recommendations

- The Act should include a provision stating that the functional, operational, and administrative autonomy of the Council and the Exco is fully guaranteed in all matters and that any economic or political interference is prohibited;
- The Act should specify that no member of the Exco may be a member of government or member of a political party, and that members are free to carry out their work without economic or political interference;
- There should be a clearly defined procedure for additional appointments to the Exco, and definition for how additional appointments to the Exco will remedy issues of representation or balance; as drafted, the provision may be used to dilute the voice of existing stakeholders;
- There should be fewer additionally appointed Exco positions, or, in the alternative, issues of diversity should be addressed by allowing for more spots for members representing the public interest under Section 6.2(c).

Code of Conduct

The Draft Act includes, in Schedule C, a Draft Code of Conduct. ARTICLE 19 notes that Section 17 provides for the Exco to prescribe a Code of Conduct, subject to review by general meeting of the Council. However, it is unclear what role the Exco and Media Council would play in the introduction and adoption of the Code of Conduct, given that a draft has already been created. This is especially important as the Code of Conduct is a foundational document upon which decisions of the Council will be made; hence the Code should be established through a consultative, inclusive, and transparent process.

We noted previously that the process for development of the Code of Conduct is unclear, and the fact that a draft has already been created only exemplifies this confusion. Indeed, there does not appear to have been *any* such consultation, as the Media Council and Exco have not even been established. The Pro-tem Committee Report indicates that a "working sub-committee" was established to draft the code of conduct. There is no further information as to who comprised this committee, but based on the fact alone that a committee drafted it, the process was *per se* not consultative, inclusive, or transparent.

The Committee Report indicates that the Code of Conduct "borrows from international best practises" but also "is cognizant of the constitutional position on free speech as well as local practises and concerns." What these local concerns are is not clearly defined. We note positively that the Committee Report indicates that the code should always be "scrutinised against the wider principles of justice and human rights." However, we also observe that there is no specificity as to what these principles entail.

Since ARTICLE 19's position is that the current Draft Code of Conduct does not represent an inclusive and consultative process, we suggest subjecting any Code of Conduct to such a process rather than attempting to revise the current Draft.

However, we make some initial observations regarding some issues with the current Draft Code, which exemplify the necessity of an inclusive process:

- Many terms are not clearly defined and are subject to potential over-interpretation or abuse, including terms like "misleading or distorted information." The Draft Code of Conduct makes repeated reference to the term "distorted" and it is not clear what this means.

- The provisions are in places overly prescriptive, requiring explicit labelling of commentary or opinion, or distinguishing between fact and comment (which may not be workable in practice).

- Other provisions are not clearly defined, such as what is meant by "adult-content" in Section 7.5. "Appropriate language" and "sensitivity" in Section 7.8 are similarly undefined.

- Section 7.11 appears to be an incomplete sentence.

- The caution in Section 7.12 against "publication or broadcast of news and views impinging on communal rights and culture that promote extremism, and are contrary to the norms of a pluralistic and a multiracial society" is vague and not well-defined. We suggest against such broad and subjective prohibitions.

- Similarly, "sensational, provocative and alarming" headlines in Section 7.14 are not defined.

While the final code is subject to Media Council approval, it is unclear how much meaningful discretion the Council will have to amend or change the Code of Conduct if the Draft Act is passed in its current form.

Recommendations

- The Act should not include a Draft Code of Conduct prior to the Media Council or Exco being established; the process of developing the Code should be participatory and open to public consultation, involving all stakeholders and the public;
- The Code of Conduct should be based on international professional ethics and good practices, rather than any vague, broad moral concepts. It should address sexual harassment.

Dispute Resolution Mechanisms

Schedule D, the Draft Dispute Resolution Procedure, provides for the ability to issue corrective measures including amending articles, making private or public apologies, or removing articles or pictures.

ARTICLE 19 observes that the right of correction and the right to reply – which are the most appropriate forms of sanctions for press misconduct – should be defined and distinguished as follows:

- A **right of correction** is limited to identifying erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material;

- A **right of reply** gives any person the right to prepare a response that will be disseminated by a mass media outlet where the publication of incorrect or misleading facts has infringed a recognised right of that person and where a correction cannot reasonably be expected to redress

the wrong.[5]

Generally, while ARTICLE 19 recognises that a right of reply is capable of contributing to professional, accurate media reporting,[6] we, together with other advocates of media freedom, have long advocated that a right of reply should be voluntary rather than prescribed by law. In any case, ability to direct corrections and replies should be limited by explicit safeguards to prevent their abuse. In particular:

- A reply should only be available to respond to incorrect facts or in case of breach of a legal right, not to comment on opinions that the reader/viewer does not like or that present the reader/viewer in a negative light.
- The party requesting the reply should be required to prove that the body in question published the contested material.
- The reply should receive similar, but not necessarily identical prominence to the original article.
- The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
- The media should not be required to carry a reply which is abusive or illegal.
- A reply should not be used to introduce new issues or to comment on correct facts.
- Such safeguards are not present in the current Draft Act.

The Draft Act does not elaborate on how the right of reply should interact with other legal rights and remedies. For example, there might be an overlap with defamation law and in some cases, claimants, having exercised their right of reply, may go on to sue for monetary compensation. In such cases, the timely exercise of the right to reply should normally mitigate any damages that may be awarded.

It is also unclear what "administrative sanctions" refer to under Section 5.1.3(a). Any potential sanctions must be clearly defined, and not include the ability to impose monetary penalties.

Recommendations

- Any potential sanctions must be clearly defined; this includes defining terms like "administrative sanctions;"
- The right to reply should be voluntary rather than mandatory, and the Act should express a clear preference in that regard;
- The Act should distinguish between a right of reply and the right of correction and consideration should be given to restricting its scope to the right of correction;
- The Act should clarify how the right of reply interacts with the exercise of other legal rights, for example in defamation cases.

[5] *C.f.* ARTICLE 19, The Camden Principles on Freedom of Expression and Equality, 2009, Principle 7.
[6] As even the US Supreme Court recognised in *Miami Herald Publishing Co. v. Tortillo*, 418 U.S. 241 (1974), p. 258.

Funding

ARTICLE 19 observes that the issue of funding is a key factor in ensuring the Council's independence and public perception of its credibility. We previously advised that a scaled industry-specific levy as the main source of funds for the Council is the best manner to ensure independence. There is also substantial potential for such a levy to cover the vast bulk of operating costs of the Council. The Draft Act provides a fee schedule, which is subject to modification by majority vote of the Council. However, the fee schedule is not attached, and there is no guidance on whether levies correspond to financial abilities of media outlets.

We note that Section 20.3 allows the Council to seek funding from Parliament or private bodies "as long as such funding does not compromise the Council or the Exco's independence and impartiality". However, nowhere is it defined what it means for funding to compromise the Council. We would suggest, at a minimum, that any funds received from these sources do not comprise a substantial part of the Council's funding, and be subject to restrictions, i.e. specification that any government grants to the Council will not be perceived as conditional on the Media Council conducting its work in a manner which is not antagonistic to the Government.

Recommendations

- Funding of the Council via Parliament or government grants should be explicitly restricted and should only be a source of supplemental funds. Any government grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government;
- The Act should establish a scaled industry-specific levy as the main source of funds for the Council.

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, 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 http://www.article19.org/resources.php/legal.

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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