

An Assessment of the New Tanzanian Media Laws of 2015

By Hendrik Bussiek



Hendrik Bussiek
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Friedrich-Ebert-Stiftung (FES)
fesmedia Africa
Windhoek, Namibia
Tel: +264 (0)61 417500
E-mail: info@fesmedia.org
www.fesmedia-africa.org

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An Assessment of the New Tanzanian Media Laws of 2015

The Government of Tanzania has recently introduced four bills concerning media freedom and media regulation in the country.

- The Cybercrimes Act, 2015
- The Statistics Act, 2013
- The Media Services Act, 2015
- The Access to Information Act, 2015

The Government of the Republic of Tanzania argues that these four bills are needed to facilitate access to information and regulate the media sector. Its critics argue that those laws entail draconic measures and are going to close down democratic space.

The following analysis looks at all four bills against the international benchmarks of media freedom and media regulation. It comes to the conclusion that all four bills contravene African and International Standards on numerous counts and should be rewritten.

The author is Hendrik Bussiek, Media Consultant and Researcher on Media in Africa for the Open Society Foundations and Friedrich-Ebert-Stiftung; Co-author for the UNESCO Study on “World Trends in Freedom of Expression” (Africa), 2014.

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Cybercrimes Act

This analysis focuses on issues of rights to freedom of expression and information and the likelihood of these rights being compromised or violated by provisions in the act. It does not look into other possible crimes such as fraud.

1. General principle

In 2003, the United Nations' General Assembly passed a Resolution on the creation of a global culture of cyber security which states, among other things:

Security should be implemented in a manner consistent with the values recognised by democratic societies, including the freedom to exchange thoughts and ideas, the free flow of information, the confidentiality of information and communication, the appropriate protection of personal information, openness and transparency.

Accordingly, in 2011 the Special Rapporteurs on Freedom of Opinion and Expression¹ issued a joint statement on freedom of expression and the internet which outlines principles for the regulation of the internet. They say in 1 (a) and (b):

Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the 'three-part' test).

When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

2. Permissible restrictions

There are exceptional types of expression in the internet that need to be prohibited under international law. These are rightfully listed in the act as follows:

- child pornography (section 13): the definition provided, however, must be more specific to

¹ Special Rapporteurs are independent experts appointed by the United Nation's Human Rights Council, the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS) and the AU's Commission on Human and Peoples' Rights (ACHPR). They examine and report on specific country situations or general legal issues in regard to freedom of expression. Their statements are usually referred to in judgments by courts around the world.

exclude, for example, the harmless exchange of family photographs of naked children;

- incitement to commit genocide (section 19): the wording in the section which refers to “material which incites, denies, minimises or justifies” should be further examined; internationally, only incitement is categorized as a crime, with the added proviso that it must be committed with the specific intent to commit such a crime.
- racist material (article 17): the wording should be guided by article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (1969) which says “(States parties) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination ...”.

3. Questionable restrictions

All restrictions must be compatible with article 19 of the International Covenant on Civil and Political Rights which guarantees freedom of expression and information and allows restrictions only if they are “necessary ... for respect of the rights or reputations of others” and “for the protection of national security or of public order (ordre public), or of public health or morals”. This is the benchmark for judging other restrictions listed in the Act.

- Section 8 makes it a punishable offence to “obtain computer data protected against unauthorized access without permission”. This section is presumably aimed at criminalising ‘hacking’, but it fails to provide a public interest defence for cases where this type of action takes place for legitimate purposes, such as investigative journalism or research.
- Section 14 (1) makes it an offence to publish pornography through a computer or any other ICT system. Such a provision might be justified to protect public morals. However, the definition of ‘pornography’ in general is largely subjective and notoriously hard to pin down. In most countries access to pornography is regarded as the free choice of adults. Pornographic websites are obliged to block access to their material for under-age children. Unlike *child* pornography – as pointed out earlier – the dissemination of pornography as such does not fall into the category of permissible restrictions under international law.
- Section 16 makes it an offence to publish “information, data or facts ... in a computer system where such information, data or fact is false, deceptive, misleading or inaccurate”. In Uganda, the Supreme Court in 2004 pronounced unconstitutional a similar law that banned the reporting of “false” news likely to cause “fear and alarm” (introduced in 1954 by the British colonial masters) and struck it from the statute books:

[T]he right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information ... [A] person’s expression or statement is not precluded from the

constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant ... Indeed, the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof, as 'false' or 'wrong'.

In making their decision, the judges specifically referred to the difficult choices to be made daily by journalists and editors:

In practical terms, the broadness [of the provision] can lead to grave consequences especially affecting the media. Because the section is capable of very wide application, it is bound to frequently place news publishers in doubt as to what is safe to publish and what is not. Some journalists will boldly take the plunge and publish...at the risk of suffering prosecution, and possible imprisonment. Inevitably, however, there will be the more cautious who, in order to avoid possible prosecution and imprisonment, will abstain from publishing. Needless to say, both the prosecution of those who dare, and the abstaining by those who are cautious, are gravely injurious to the freedom of expression and consequently to democracy.

- Section 18 says that "a person shall not insult another person through a computer system on the basis of race, colour, descent, nationality, ethnic origin or religion" and makes such an act a criminal offence. Given the fact that defamation has been rightfully de-criminalised in Tanzania and that insult is certainly a lesser offence, this provision is lacking in legal logic.

The African Court on Human and Peoples' Rights, based in Tanzania, argued in a landmark judgment in 2013:

Apart from serious and very exceptional circumstances, for example incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.

A mere insult does not constitute such "public *incitement* to hatred, discrimination or violence or threats against a person or a group of people", i.e. the intention of the offender to provoke such actions on the part of the audience, and thus does not qualify as a criminal offence.

Instead of criminalisation the United Nations Special Rapporteur on Freedom of Opinion and Expression recommended in his 2011 report:

... the types of expression that do not rise to criminal or civil sanctions, but still raise concerns in terms of civility and respect for others, effort should be focused on addressing the root causes of such expression, including intolerance, racism and bigotry by implementing strategies of prevention.

And the joint statement by the Special Rapporteurs on Freedom of Opinion and Expression concluded:

Self-regulation can be an effective tool in redressing harmful speech, and should be promoted.

4. Search and seizure

Part IV of the act gives police and law enforcement officers the right to “enter into any premise and search or seize a device or computer system (and) secure the computer data accessed” if he/she has “reasonable grounds to suspect or believe that a computer system may be used as evidence in proving an offence”. The following section gives these officials the power to “issue an order to any person in possession of such data (which could provide proof of an offence) compelling him to disclose such data”.

In practice this means that any police officer could search a smartphone, a laptop, a computer, if he/she suspects that it might contain material which could be used as proof of an offence listed in the act. This can be done on the premises of a subject or even in a public place. A court order is needed only if the person concerned refuses to comply or if this “cannot be done without the use of force or due to resistance” of the subject.

If un-suspecting citizens agree to grant a police officer access to their data without protesting (a not unlikely scenario) this would constitute a breach of the right to privacy as outlined in article 17 of the International Covenant on Civil and Political Rights:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ...

Article 37 (10) gives the Minister the power to prescribe “offences under which the court may grant an order for utilization of a forensic tool”, meaning “an investigative tool or device including software or hardware installed on ... a computer system”. Such a far reaching intrusion into the privacy of a person cannot be left to the discretion of a minister. Such action on the part of the authorities must be prescribed by law, serve a legitimate interest and be necessary in a democratic society.

5. Liability of service providers

Although section 39 (1) says that “a service provider shall not be obliged to monitor the data which the service provider transmit or store or actively seek facts or circumstances indicating an unlawful activity”. However, according to subsection 4, the provider is “obliged to notify (the) appropriate law enforcement authority” of any “illegal activity or information, relevant facts and the identity of the person for whom the service provider is supplying services”, if it has “actual knowledge of illegal information, or activity”.

The UN Special Rapporteur in his 2011 report warns against such obligations on service providers or “intermediaries”:

Intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences ... (and they) should not be held liable for refusing to take action that infringes individuals’ human rights.

Section 45 (1) makes provision for a take-down notification with which a person can request a service provider to remove “any data or activity infringing the rights of the recipient, any unlawful material or activity; or any other matter conducted or provided contrary to the provisions of any written law” .

The UN Special Rapporteur is highly critical of such a notice-and take-down system:

... it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by over-censoring potentially illegal content.

Therefore he recommends:

Any requests submitted to intermediaries to prevent access to certain content ... should be done through an order issued by a court or other competent body which is independent of any political, commercial or other unwarranted influence.

And in their joint statement on freedom of expression and the internet the four Special Rapporteurs on Freedom of Opinion and Expression say:

Intermediaries ... should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression.

Statistics Act

This section is meant to complement the analysis provided by Twaweza in April 2015 and provides some additional information based on African and international standards.

1. African and international standards on statistics

The African Charter on Statistics, adopted by the 12th Ordinary Session of the Assembly of the African Union in February 2009, proclaims in its part on Principles:

Accessibility: African statistics shall not be made inaccessible in any way whatsoever. This concomitant right of access for all users without restriction shall be guaranteed by domestic law.

A Resolution on the fundamental principles of official statistics was adopted by the United Nations Commission for Statistics in April 1994 and sets out the following as principle 1:

Official statistics provide an indispensable element in the information system of a democratic society, serving the Government, the economy and the public with data about the economic, demographic, social and environmental situation. To this end, official statistics that meet the test of practical utility are to be compiled and made available on an impartial basis by official statistical agencies to honour citizens' entitlement to public information.

"Official statistics" are defined by the African Charter as "the body of statistical information produced, validated, compiled and disseminated by Statistics Authorities", in the case of Tanzania by the National Bureau of Statistics.

The Act, as it stands, is not in line with these principles.

2. Scope of the Act

The Twaweza analysis expresses concern about the lack of clarity of the term "official statistics" in the Act. Section 20 (1) uses the exact wording of the AU quoted above: "the body of statistical information produced, validated, compiled and disseminated by Statistics Authorities", specified as "the Bureau" and "Government institutions". However, there is an added subsection (c) including "agencies" which are defined as "research institutions, non-governmental organizations, development partners or any other user or producer of statistics".

The scope of the act thus extends far beyond the institutions usually covered by a statistics act according to the African Charter and other international standards. Including NGOs, development partners and others means that they would also be subject to the same duties and responsibilities as the National Bureau of Statistics and other government institutions.

The objective of the inclusion of non-governmental agencies becomes clear in section 18 of the act which deals with the “relation with other agencies”. The section says that “only the Director General [of the Bureau] may commence an official statistical collection” and that “no person or agency may authorize the commencement of an official statistical collection except with the approval of the Director General”. This means that any NGO, research institute or development partner that wishes to undertake statistical research need the prior approval of the Bureau.

3. Whistleblowing

The Twaweza analysis points out that according to section 37(1)(b) any person who “without lawful authority publishes or communicates to any person otherwise than in the ordinary course of his employment any information acquired by him in the course of such employment ... commits an offence”. Furthermore section 37 (2) outlaws the publication of such information “disclosed in contravention of the provisions of this Act”.

The act fails to provide a public interest defence for cases where disclosure of statistical information takes place for legitimate purposes, such as investigative journalism or research. In addition, such a provision would contradict section 23 of the Access to Information Bill which provides for whistleblowers by protecting persons “in the service or employment of any information holder” against sanctions “for releasing information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment, as long as that person acted in good faith and in the reasonable belief that the information was substantially true”.

4. Publication of “false” information

The Twaweza analysis is also concerned about section 37 (4) and (5) of the act which makes it an offence for a “radio station, television station, newspaper or magazine, website or any other media” to publish “false statistical information” or for an “agency or person” to publish “official statistical information which may result in the distortion of facts”.

Given the above broad definition of “official statistical information” this would mean that the publication of all statistics, regardless of their source which may be deemed to be “false” a “distortion of facts” would be punishable with a “fine not less than two million shillings (US\$ 1 200)” or “imprisonment for a term of not less than six months or to both”.

Twaweza points out correctly that especially in the case of statistics it is notoriously hard to determine what is “right” or “false” – this will largely hinge on contextualisation and interpretation. Statistical figures are by their very nature potentially controversial.

The UN's Resolution on the fundamental principles of official statistics sets out a principle in this regard which is more appropriate for democratic societies than punitive measures:

The statistical agencies [here the Bureau] are entitled to comment on erroneous interpretation and misuse of statistics.

5. Simultaneity of publication

An important clause is missing in the act which would prevent the Bureau from preferential treatment of certain bodies and institutions in the publication of the results of its research. This is the principle of simultaneity as spelled out in the African Charter on Statistics:

African Statistics shall be disseminated in a manner that ensures that all users are able to use them simultaneously.

Media Services Act

1. Objectives of the bill

As will be shown in detail, the bill aims to restrict the independence and freedom of the media in Tanzania by way of, among others, establishing a statutory media council (called “media services council”), requiring journalists and media houses to obtain an official licence, affirming the government-controlled ‘public broadcaster’ as state broadcaster, introducing severe sanctions for a number of media-specific offences and allowing for the banning of newspapers as well as the import of publications.

All these objectives violate a basic right as expressed in Article 19 of the Universal Declaration of Human Rights:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

They also contravene article 19 of the International Covenant on Civil and Political Rights, to which Tanzania acceded in 1976:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

2. Scope of the bill

According to section 3 (Interpretations), the bill attempts to regulate all media, defining “media” as “radio, television, newspaper, internet and any other related technology”, and “print media” as “newspapers, journals, magazines, newsletters”. Internet platforms are also included by way of defining an “editor” as “a person who is in charge of programme production at a radio or television station, newspaper production or online Platform”. Furthermore, the bill covers social media defined as “online interactions among people in which they create, share, and exchange information and ideas in virtual communities, networks and their associated platform”.

The inclusion of journals, magazines and newsletters means that all small publications, even those published by NGOs, companies etcetera are also subject to the restrictions of the act.

The inclusion of the internet, internet platforms and social media (i.e. facebook, twitter, blogs) contradicts General Comment No. 34 (2011) on article 19 of the International Covenant on Civil and Political Rights by the United Nations' Human Rights Committee²:

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. ... *States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.* (Emphasis by author)

3. Media Services Council

In its section 4 (1) the bill establishes a media services council "within the Authority", meaning the Tanzania Communication Regulatory Authority. At present the body is in charge of broadcasting services only; its chairman and vice chairman are appointed by the President of State and four non-executive members by the minister responsible for communications.

The Council is thus going to be constituted as part of a government controlled body.

According to sub-section 2, the council is to "consist of a Chairman appointed by the President and other six members appointed by the Minister" responsible for information. The members are to be persons from the board of the Communication Regulatory Authority, a media training institution, the journalistic profession, the broadcasting industry, the Office of the Attorney General and the Director of Information Services (who heads a department within the Ministry of Information). This composition ensures that the majority on the council will always be government representatives. A Director of Media Services would be appointed by the Minister and serve as Secretary to the Council (article 8).

The Council will thus be controlled by government.

Section 5 lists the functions of the Council. It will have to monitor radio and television broadcasts and social media content as well as the compliance of print media content with licence conditions and professional ethics. It will also licence newspapers, "broadcast content providers", social media and news agencies. In addition, it will have the power to "issue directives to media houses", "inspect media houses" and "enforce code(s) of ethics as stipulated in regulations", which are – according to section 49 – issued by the minister responsible for information. Section 6 empowers the Council to "warn, suspend or deregister content providers in the event that there is violation of laws; ... cancel or suspend licence(s);

² The Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by members of the United Nations. It has the power to develop its interpretation of the provisions in the Covenant, known as [General Comments](#) which are regularly referred to by courts such as the African Court on Human and Peoples' Rights (based in Tanzania) in their judgements.

and impose fines". According to article 9 (2) the minister will issue regulations prescribing "the requirement(s) and procedures for licensing a person who intends to offer media services". Article 12 gives the Council the power to adjudicate complaints from the public against the media adhering to "procedure prescribed in the regulations" as issued by the minister.

The government-controlled Council thus has the power to licence (or not to licence) or to ban media of any form. It has the power to enforce government-prescribed professional standards and deal with complaints from the public, thus overriding the voluntary Tanzania Media Council.

All of these provisions contravene the Comments of the United Nations Human Rights Committee:

... It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. ... Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3.

Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to [the] extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.

Paragraph 3 allows for restrictions only if they are "necessary ... for respect of the rights or reputations of others" and "for the protection of national security or of public order (ordre public), or of public health or morals". Licensing of media is not necessary in this regard and wholesale banning is prohibited.

The provisions run counter to the African Union's Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa:

Article VIII:

1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.

Article IX:

2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
3. Effective self-regulation is the best system for promoting high standards in the media.

The 'offence' of publishing without a licence carries a fine of not less than twenty million shillings (US\$ 10 000) or imprisonment for a period not less than five years or both. Apart from the fact that a sanction for not carrying a licence contradicts international and African

standards, the severity of the punishment is disproportionate and therefore also in breach of standards of jurisprudence. A fine of US\$ 10 000, for example, is exceedingly high given that the annual average income per capita stands at US\$ 603,50.

4. Media houses and institutions

According to section 13 (3) the minister of information will “prescribe in regulations” “conditions for ownership of media houses”. “Media house” is defined as “a legal person dealing in media services” and “‘media services’ means but [is] not limited to radio and television broadcasting, newspaper publishing, internet service, and any other related technology”.

The minister thus has the right to set conditions which go beyond the rules that apply to other businesses. The broad definition of “media services” potentially includes internet platforms, websites, blogs and even social media (if set up by a company). The minister could, for example, issue also regulations on cross-ownership of media (e.g. a media house owning both newspapers and a radio station). This would constitute a severe interference with the independence of business in general and media in particular. Any restriction of this kind must not be left to ministerial discretion but can only be imposed by law, following a basic principle as stated, for example, in the Declaration of Principles on Freedom of Expression in article II (2):

Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

Section 14 (b) (iv) obliges private media houses to “hook with [the] public broadcaster for news at twenty hours every day to enable the public to follow issues of national interest”.

This provision contradicts article 19 of the Covenant because the right to freedom of expression and freedom to seek, receive and impart information and ideas of all kinds through media of one’s choice implies that no one can be forced to receive information from a prescribed medium.

Public media houses which are defined as being “owned by the Government” are obliged to “enhance communication within Government and between Government and the Public” and to “provide public awareness on development matters from Government and public sector” (section 14 (a)(iv and v)).

The bill thus defines ‘public’ media as one-way communication from the government to the public, i.e. as a mouthpiece of government, and affirms the government-controlled ‘public broadcaster’ as state broadcaster. This misconstrues the meaning of ‘public’ media and contravenes the Declaration of Principles on Freedom of Expression in Africa:

Article VIII (2)

Any print media published by a public authority should be protected adequately against undue political interference.

Article VI

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed [...]

The provisions also run counter to the Comments of the United Nations' Human Rights Committee:

States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom.

5. Accreditation of journalists

Part IV of the bill obliges journalists to be accredited and prescribes the applicable procedure.

"Journalist" is defined as "a person enrolled as journalist under this Act, who gathers, collects, edits, prepares or present news, stories, materials and information for a mass media service, whether an employee of media house or as a freelancer". A freelancer, according to the bill, is "a journalist enrolled under this Act working independently for media houses".

Section 15 establishes a journalist accreditation board which shall consist of seven members appointed by the minister: a chairman, one person from a media training institution, the Director of Tanzania Information Services, two senior accredited journalists, a State Attorney representing the office of the Attorney General and the Director of Media Services. This composition makes sure that the majority on the board will always be government representatives. The Chief Executive Officer of this board shall also be appointed by the Minister.

Among the functions of this board is to "uphold standards of professional conduct and promote good ethical standards and discipline among journalists" and to "enforce journalists code of ethics" (section 17 (a) and (b)). Section 18 gives the body the power to "impose fines" and to "deregister journalist(s) from the roll". Section 21 (6) says that "the accreditation of a journalist may be cancelled if the Board has discovered that the journalist conducted gross professional misconduct". The consequence is spelt out in section 23 (3): "an accredited journalist whose name is deleted from the roll of journalists or is suspended shall not be employed in any capacity in the business or career connected to (the) journalistic profession unless that journalist has a

written consent of the Board”.

Only persons with an academic degree are entitled to apply for accreditation as a journalist. Section 21 (3) says that they have either to possess a degree in journalism or mass communication or any other media related field from the recognized institution of higher learning or possess at least a diploma in journalism and a degree in sociology, law, education, languages, economics or any other social science related subject.

Section 36 (g) provides that a person who “practices journalism without accreditation ... commits an offence and upon conviction, shall be liable to a fine of not less than twenty million or to imprisonment for a period not less than five years or to both”.

All of these conditions for entry into the journalistic profession contravene article 19 of the Covenant. As the United Nations’ Human Rights Committee points out:

Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3.

And the Declaration on Freedom of Expression in Africa says in article X:

The right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.

The prescription of set requirements for journalists as imposed by the bill is not desirable also for practical reasons. The media have very different formats and levels of sophistication, and hence different personnel requirements. Given the all-encompassing nature of journalistic work, which covers all areas of human life and endeavour, there can be no one set body of required qualifications. Experience shows that many of the best journalists in the world, including Africa, never had any formal journalistic training at all.

6. Defamation

In its part VII the bill in deals in extenso with defamation and libel, with many sections having been lifted from the Newspaper Act 1976.

Although sections 187 to 194 of the Penal Code on defamation were repealed, thus decriminalising defamation, the bill still speaks of “punishment” in section 32 (1) which deals with “privileged” cases of defamation.

In general, civil defamation legislation must be applicable to all persons and organisations and

not the media alone. Media practitioners are citizens like all others and must be treated equally. Clauses on civil defamation should thus be part of the general law and not a media services act.

The bill provides for redress for defamation by saying in section 35 that a person who “alleges that a print or electronic media content is defamatory within the meaning of this Act, that person may make (a) complaint to the Board for redress”.

The Board as a government controlled organ is not the appropriate body for adjudication in such matters. The Declaration of Principles on Freedom of Expression in Africa says in its article IX (2):

Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.

Article XII of the Declaration addresses the issue as follows:

1. States should ensure that their laws relating to defamation conform to the following standards
no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
public figures shall be required to tolerate a greater degree of criticism; and
sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

Instead, as outlined above, the bill even empowers the board to strike a journalist from the roll of accredited journalists for “gross professional misconduct”. If the Board regards a statement as defamatory, it could thus punish the author with the loss of his/her livelihood and that of his/her family. This goes far beyond any reasonable measure of redress such as an apology or – in the case of a court judgment – the payment of damages. In effect this constitutes a kind of re-criminalisation of defamation through the backdoor.

The Human Rights Committee says:

Defamation laws must be carefully formulated so as to ensure that they meet the necessity requirement stipulated in paragraph 3 and that they should not be used, in practice, to stifle freedom of expression.

Given the ‘necessity requirement’ referred to in paragraph 3 of article 19 of the Covenant states it is highly questionable whether the banning of a person from the journalistic profession might be deemed necessary. It is certainly not proportional, another condition set by the Human

Rights Committee:

... restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...

In general, the Declaration of Principles on Freedom of Expression in Africa says in its article IX (3) that “effective self-regulation is the best system for promoting high standards in the media”.

7. Offences relating to media services

According to section 36 (c) “any person who makes use by any means, of a media service for the purposes of publishing ... any statement the contents of which is threatening the interests of defence, public safety, public order, the economic interests of the State, public morality or public health” commits a punishable offence and is “liable to a fine of not less than twenty million or to imprisonment for a period not less than five years”.

In part, this section takes its cue from article 19 (3) of the Covenant which allows for restrictions on freedom of expression “for the protection of national security or of public order (ordre public), or of public health or morals”. However, the bill goes much further by including the interests of defence, public safety and the economic interests of the State as justifiable grounds for restrictions.

In regard to “morals” the Human Rights Committee cautions:

... the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

For all these reasons, the Declaration on Principles of Freedom of Expression warns in its article XIII:

Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

8. Sedition

Section 38 defines “seditious intention” as, amongst others “an intention to bring into hatred or contempt or to excite disaffection against the lawful authority of the Government of the United Republic”. This is an unduly wide general definition, even though the section contains a public interest defence: a publication “shall not be deemed as seditious by reason only that it intends to show that the Government has been misled or mistaken in any of its measures or point out errors or defects in the Government of the United Republic or Constitution of the United Republic or in legislation or in the administration of justice with a view to remedying such errors or defects”.

A first offender will be liable to a fine not less than five million shillings or to imprisonment for a term of not less than three years or both, a subsequent offender to a fine of not less than seven million shillings or to imprisonment for a term of not less than five years or both. A person who has “any seditious publication” in his/her possession and does not deliver it to the authorities attracts punishment in the form of a fine of not less than two million shillings or imprisonment for a term of not less than two years or both. A printing machine used for the printing or reproduction of a seditious publication may be seized. In addition, the court may ban the further publication of the newspaper for a period not less than twelve months.

The United Nation’s Human Rights Committee warns:

Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest *that does not harm national security* or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. (Emphasis by author)

To “excite disaffection” against the government does certainly not harm national security; it is in the nature of the media to do just this from time to time.

In Nigeria, the Court of Appeal ruled in 1983 that the provisions on sedition in its Criminal Code which have their roots in the Colonial Criminal Code Act of 1916 (and are similar to those in the Tanzanian bill) are inconsistent with the right to freedom of expression:

We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. ... (The) Section (on sedition) will be a deadly weapon and be used at will by a corrupt government or tyrant ... let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose. ... Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds, there should be a resort

to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society.

As pointed out earlier, a ban on the publication of a newspaper for alleged sedition violates the right to freedom of expression. The seizure of a printing machine could also amount to such a ban. The Human Rights Committee says:

It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. ... Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3.

9. Publication likely to cause fear

Section 40 says that “any person who publishes any false statement, rumor or report which is likely to cause fear and alarm to the public or to disturb the public peace commits an offence and shall be liable upon conviction to a fine of not less than fifteen million shillings or to imprisonment for a term of not less than four years or to both”. “It shall be a defence ... if the accused proves that, prior to publication, he took such measures to verify the accuracy of such a statement, rumor or report and that such verification led him to reasonably believe that the publication was true”.

In Uganda, the Supreme Court in 2004 pronounced unconstitutional a similar law banning the reporting of “false” news likely to cause “fear and alarm” (introduced in 1954 by the British colonial masters) and struck it from the statute books:

[T]he right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information ... [A] person’s expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant ... Indeed, the protection is most relevant and required where a person’s views are opposed or objected to by society or any part thereof, as ‘false’ or ‘wrong’.

In making their decision, the judges specifically referred to the difficult choices to be made daily by journalists and editors:

In practical terms, the broadness [of the provision] can lead to grave consequences especially affecting the media. Because the section is capable of very wide application, it is bound to frequently place news publishers in doubt as to what is safe to publish and what is not. Some journalists will boldly take the plunge and publish...at the risk of suffering prosecution, and possible imprisonment. Inevitably, however, there will be the more cautious who, in order to avoid possible prosecution and imprisonment, will abstain from publishing. Needless to say, both

the prosecution of those who dare, and the abstaining by those who are cautious, are gravely injurious to the freedom of expression and consequently to democracy.

10. Importation of publications

Section 43 empowers the “Board” to prohibit “in its absolute discretion and by order published in the Gazette” the importation of any publication if it is “of the opinion that the importation ...would be contrary to the public interest”.

This provision contravenes article 19 of the Universal Declaration of Human Rights:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media *and regardless of frontiers*. (Emphasis by author)

According to article 19 of the Covenant restrictions are permissible only under very limited circumstances (respect of the rights or reputations of others, protection of national security or of public order or of public health or morals). Being “contrary to” an unspecific “public interest” is certainly not one of these permissible circumstances, nor can the decision of such a far reaching limitation of a basic right be left to the “absolute discretion” of anybody other than a court of law.

Access to Information Act

The African Charter on Human and Peoples' Rights guarantees in its article 9 that "every individual shall have the right to receive information".

Article 19 of the International Covenant on Civil and Political Rights, to which Tanzania acceded in 1976, speaks of the right to "seek, receive and impart information ... of all kinds". The United Nations' Human Rights Committee³ says in its Comments on this article that this right also "embraces a right of access to information held by public bodies".

The Declaration of Principles on Freedom of Expression in Africa states in its article IV: "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."

The African Charter on Democracy, Elections and Governance in article 3 spells out "transparency and fairness in the management of public affairs" as one of its principles.

In general outline, the Bill attempts to follow these standards on access to information.

It contains a number of provisions, though, which should raise concern and some which are in clear breach of these principles. Other essential provisions are missing.

In assessing these matters, the author follows the Draft Model Law on Access to Information for Member States of the African Union prepared under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa. The drafters of the bill seem to have drawn on this Model Law to some extent, but made several modifications – either by addition or omission – that tend to impede rather than enable access to information.

1. Provisions of concern

1.1. Application

The Model Law defines "public body" as any body "established by or under the Constitution, established by statute or which forms part of any level or branch of government". "Private bodies", i.e. natural or juristic persons which are in business, trade or a profession, have to release information only if an individual wants to protect its individual rights. More important in this context are "*relevant private bodies*", meaning "any body which is (a) owned, controlled or substantially financed directly or indirectly by funds provided by government, but only to

³ The Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by members of the United Nations. It has the power to develop its interpretation of the provisions in the Covenant, known as [General Comments](#), which are regularly referred to by courts such as the African Court on Human and Peoples' Rights (based in Tanzania) in their judgments.

the extent of that financing; or (b) carrying out a statutory or public function, but only to the extent of that statutory or public function". With regard to their public funding or function, these bodies have the same duties as public bodies.

The bill refers to "public authorities" and "private bodies". The first are defined in similar fashion as in the Model Law. The definition of "private bodies" includes those which "utilize public funds", but does not make mention of those with a "statutory or public function".

Another part of this definition refers to bodies which "are in possession of information which is of significant public interest due to its relation to the protection of human rights, environment, public health and safety, exposure of corruption or illegal actions". This is of grave concern because it would oblige non-governmental organisations not funded by government which are active in the fields of human rights, environment etcetera to release information just like public bodies are expected to do, for example if a ministry were to request the release of documents. This would be a severe intrusion into the privacy of such organisations and undermine the independence of civil society organisations.

1.2. Exempt information

Section 6 contains a list of exempt information, i.e. information which may be withheld. Parts of this list lack precision and sufficiently tight definitions, for example:

- (2)(g) "hinder or cause substantial harm to the Government to manage the economy". As it stands this provision could serve to exempt nearly all information held by public bodies in charge of economic affairs.

The Model Law defines "economic interests of the State or the ability of the State to manage the economy" that might justify exemption from access as referring "information relating to the determination of currency or exchange rates, interest rates or taxes, including duties of customs or of excise". As far as "commercial interests" are concerned, the model law says that a "request must not be refused where the disclosure of the information would facilitate accountability and transparency of decisions taken by the information holder; the information relates to expenditure of public funds; or the disclosure of the information would reveal misconduct or deception". These are all vital reasons to disclose information.

- (2)(j) "significantly undermine the operations of (the) Tanzania Broadcasting Corporation". Such an exemption for a single public body is unprecedented in Access to Information legislation.
- (3) lists "information relating to national security" as well as to "foreign relations or foreign activities". As it stands this provision could exempt nearly all information held by public bodies in charge of foreign affairs or being otherwise active in foreign relations.

The Model Law refers to “information which relates to the international relations of the State” and describes this more specifically as “information supplied by or on behalf of the State to another State or an international organisation in terms of an international agreement with that State or organisation which requires the information to be held in confidence; required to be held in confidence by international law; on the positions adopted or to be adopted by the State, another State or an international organisation for the purpose of present or future international negotiations or that constitutes diplomatic correspondence exchanges with another State or with an international organisation or official correspondence exchanges with diplomatic missions or consular posts of the country”.

- Section (3) of the bill also includes “vulnerabilities or capabilities of systems, installation, infrastructures, projects, plans or protection services relating to national security”. Such “vulnerabilities” could be of particular public interest: they might be caused by mismanagement, corruption or misuse of funds, among others, and could also endanger public health, the environment etcetera.
- Section (6) makes it an offence punishable with “imprisonment for a term not less than fifteen years” if a person “discloses exempt information withheld by the public authority in contradiction of this Act”.

This section contradicts section 4 (e) of the same bill which lists as one of the objectives of the law to “provide for the protection of persons who release information of public interest in good faith”. It fails to provide a public interest defence for cases where such release takes place for legitimate purposes, such as investigative journalism or research. In addition, the minimum punishment is exceedingly high and thus disproportionate and it does not differentiate between the various types of exemptions: the unlawful release of information on the management of the economy or the Tanzania Corporation would attract the same term as revelations on military matters.

The section also contradicts section 23 which provides for the legitimate activities of whistleblowers by protecting persons “in the service or employment of any information holder” against sanctions “for releasing information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment, as long as that person acted in good faith and in the reasonable belief that the information was substantially true”.

1.3 Use of the information

Section 18 states that “information obtained by a person requesting from the information holder shall not be for public use”. Any person who brings such information into the public sphere would be “liable to imprisonment of a term not less than five years”.

This provision defeats the whole purpose of an Access to Information Act. In practice, it

means that a journalist or any other person who obtained requested information from a state authority legally, in line with this bill, would not be allowed to share or publish this information.

The Model Law expressly states that “information to which a requester is granted access shall thereafter be information in the public domain”. The only exemption is “where a requester is granted access to their *personal* information”.

1.4 Fees

According to section 21 “the information holder ... may charge a prescribed fee for the provision of information”. This provision is too vague and allows too much room for the discretion of the information holder: charging a high fee could deter the public from requesting information.

The Model Law only provides for a “reasonable *reproduction* fee”, i.e. for the actual costs of copying the information. Reproduction of information “which is in the public interest” is supposed to be free of charge.

2. Missing provisions

2.1. Public interest override

The Model Law contains a section that guarantees a public interest override relating to information which may be exempted, saying that “a request for access to information” must be granted “if the public interest in the disclosure of the information outweighs the harm to the interest protected under the relevant exemption”. Such a provision is essential to avoid arbitrary refusal of access.

2.2. Classified information

Information may carry different classifications of confidentiality – from “official” to “top secret”. In order to avoid any misuse of such classification by information holders the Model Law contains a clear proviso: “Information is not exempt from access under this Act merely on the basis of its classification status”.

2.3. Judicial review

The bill provides for a review of decisions by information holders by the Commission for Human Rights and Good Governance. However, there is no mention of a review by an appropriate court of law as a further instance, as stated in the Model Law.

2.4. Personal information

Every person should be able to ascertain which public authorities or private bodies control or may control their files. If such files contain incorrect personal data, the individual should have the right to have his or her records rectified, as the Declaration on Freedom of Expression states in its article IV (3): “Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies”.

2.5. Promotion

A right of access to information will have little impact if the public does not know that it exists. Therefore the Model Law gives the oversight mechanism – in the case of Tanzania this would be the Commission for Human Rights and Good Governance – the “mandate of promoting, education and popularising” this right. Such a provision is essential: the implementation of Access to Information Laws is often lacking because the public is not aware of them.