



## Notes on the Draft Media Law of Somalia

May 2007

This Note summarises ARTICLE 19's main comments on the draft Somali Media Law (draft Law), as released by the Ministry of Information, an unofficial English translation of which has been provided to us.<sup>1</sup>

The draft Law sets out a regulatory regime for all journalism and media activities. The main thinking and policy considerations behind the draft Law are set out in the preamble. This recognises that freedom of expression has an important role to play in democracy, but attaches particular value to telling the truth. For example, the second preambular paragraph states that,

A media built on telling the truth avails the promotion of democracy, human rights, country development and establishment of justice.

The preamble goes on to explain that, because of their value to the public, journalism and the media must be regulated by law, to ensure that they do not "breach the rights citizens, institutions and the government". The preamble then states:

Falsehood, groundless propaganda and distorting reality create vehemence, conflict, destruction and hatred, but what we need at this time is security, order, appreciation, justice, construction and living together in peace.

The rest of the law is then phrased in similar terms, with a strong emphasis on ensuring truth and accuracy in the media and a strict regulatory regime for both print and broadcast media, as well as for individual journalists.

While we appreciate that the media should strive to provide truthful information, we are concerned that the draft Law imposes strict obligations of accuracy, which it then seeks to enforce through the imposition of harsh criminal penalties, and that it imposes a straitjacket for the regulation of all journalistic and media activity. The restrictions it imposes on all journalists, in apparent pursuit of protecting the public's right to receive high quality information, go far beyond what is allowed under international law and will likely end up impeding rather than promoting a free media.

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<sup>1</sup> The draft is dated 3 April 2007. We take no responsibility for errors based on translation.

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We do not believe that this is the correct approach to take. Experience in countries around the world, including those in post-conflict situations, has shown that the public's right to know is best served by encouraging a diverse and pluralistic media, imposing restrictions only when this is truly necessary to achieve certain narrow public aims (for example, to protect national security). Strict media licensing schemes such as the one proposed under the draft Law, or restrictions on who may become a journalist, have no place in a democratic society. All of this has been recognised by international as well as regional human rights bodies.<sup>2</sup>

As a matter of international law, it should also be noted that Somalia is a State Party to the *International Covenant on Civil and Political Rights* (ICCPR), the main global human rights treaty which guarantees freedom of expression.<sup>3</sup> This treaty provides for a limited regime of exceptions that may be placed on the right to freedom of expression. The exceptions allow for restrictions to be imposed for the protection of national security and national defence, which is of obvious relevance to the present situation in Somalia, but requires them to be clearly and narrowly provided by law, and to be truly "necessary" for the protection of that interest.

This Note assesses the main features of the draft Media Law against international standards on freedom of expression drawn from both the ICCPR and the jurisprudence of the African Commission on Human and Peoples' Rights.<sup>4</sup> It is intended as input into the process of drafting the Media Law, with the goal of ensuring that it conforms as far as possible with international standards in this area.

### Key Recommendations:

#### *On freedom of expression and journalists rights*

- Article 2 should require that the Media Law itself be interpreted in accordance with international treaties and statements binding on Somalia.
- The draft Law should recognise the right of journalists to protect confidential sources of information.

#### *On licensing*

- Print and Internet media should not be licensed.
- An independent body should be set up to regulate and license the broadcast sector, rather than leaving this important and sensitive matter up to a government ministry.

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<sup>2</sup> See, for example, the *Declaration of Principles on Freedom of Expression in Africa* adopted by the African Commission on Human and Peoples' Rights, 23 October 2002, available at: [http://www.achpr.org/english/info/index\\_declarations\\_en.html](http://www.achpr.org/english/info/index_declarations_en.html).

<sup>3</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Somalia acceded to the ICCPR on 24 January 1990.

<sup>4</sup> Including the *Declaration* referred to in note 2.

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#### *On registration*

- The registration requirement for newspapers should be reconsidered. If it is to be retained, it should be transformed into a purely technical scheme, administered by an independent entity that merely acts as a public register of print media outlets. There should be no requirement to lodge copies of every publication with the authorities or any citizenship requirement for ownership.
- The requirement that all websites should be licensed or registered should be removed altogether from the draft Law.

#### *Regulation of journalists*

- Journalism is an open profession. There should be no substantive requirements for entry to the profession, whether they be educational, academic or relating to length of experience.

#### *Foreign media activities*

- There should be no licensing requirement for foreign journalists.
- Foreign journalists should not be required to act in accordance with “good moral principles”.

#### *Content restrictions*

- There should be no restrictions on the import of media equipment.
- The draft Media Law should not repeat content restrictions already found in laws of general application, including the criminal law. If the intention is to establish a parallel quasi self-regulatory mechanism linked to the right of correction or reply, the particular rules should be redrafted in clear and narrow terms, avoiding broad and open-ended terms such as ‘un-Islamic’.
- There should be no blanket prohibition on the publication of ‘false news’.

#### *State media*

- Instead of being placed under the control of the Ministry of Information, State media should be transformed into public service media outlets in accordance with the following:
  - they are governed by a board which is protected against interference, particularly of a political or economic nature;
  - their editorial independence is guaranteed;
  - they are adequately funded in a manner that protects them from arbitrary interference with their budgets;
  - they are under an obligation to strive to ensure that their transmission system covers the whole territory of the country; and
  - their public service ambit is clearly defined and includes an obligation to ensure that the public receives adequate, politically balanced information, particularly during election periods.

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### Media freedom

The draft Law contains a number of provisions that aim to protect media freedom. In particular, Article 2 refers to the *Universal Declaration of Human Rights* and other treaties and declarations that protect freedom of expression, and Article 23 enumerates the following rights of journalists:

- to be protected and to express their opinions, subject to legal restrictions;
- to be provided with the information they need, as long as there is no reason to refuse it;
- to be provided with facilities and professional training opportunities;
- to establish journalists' and media owners' associations; and
- to be protected in their employment, including with regard to working hours, vacations, sick leave and unfair dismissal.

We welcome this statement of rights and recommend that it be retained in future drafts. We also have two specific suggestions for the improvement of these provisions. First, Article 2 could go further and require that the Media Law itself be interpreted in accordance with international treaties and statements which are binding on Somalia. This would ensure that judges and executive bodies apply the Law in accordance with international standards. Second, we recommend that a right to protect sources be added to the statement of journalists' rights. It is internationally recognised that this is an important corollary of the right to freedom of expression.<sup>5</sup> As drafted, this protection is not only missing from Article 23, but Article 22(7) goes against the spirit of it by requiring journalists to investigate actively the reasons why a source wishes to remain anonymous, and ensure that publication would "benefit common national interests" and not the interests of one party.

### Licensing

Article 4 of the draft Law states:

1. Organisation, group or very Somali citizen shall have right to establish private media, when fills below written conditions:
  - a) To make consultations with the Ministry of Information, the media he/she wants to establish: its kind, its capacity, its quality, its nature of work and the channel or the frequency he/she wants to use.
  - b) To get permission of establishing and registration from the ministry of information.
  - c) That the equipments he/she intends to bring in or acquires do not alien the environment or the ordinary work of the other media.
2. When this law is applied, the private media which is currently working shall request media licence, and shall submit to the Ministry its media structure, the equipment acquire, the frequency they are using and the place media is stationed. It will be registered when the Ministry accepts.

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<sup>5</sup> See Principle XV of the *African Declaration*, note 2.

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The reference to “private media” suggests that the licensing requirement established under this provision applies all media, including print outlets. If so, then this violates a basic tenet of international human rights law, namely that the print media should not be subject to any licensing requirement.

However, the various references in the text to technical equipment, channels and frequencies also suggest that the original Somali text (we are working from an unofficial translation) may limit the licensing requirement to broadcasters.

While it is internationally accepted that broadcasters should be licensed – if they are not, chaos will ensue on the airwaves – international best practice is that an independent authority should be responsible for the licensing process.<sup>6</sup> This is to avoid political interference and favouritism in this sensitive process. Article 4 contradicts this best practice principle by placing a ministry in charge.

We also note that the draft Media Law seeks to regulate broadcasting through a single legal provision. This is not sufficient. Broadcast regulation is a highly complex area of law and requires important technical and public policy considerations to be taken into account. Broadcast regulation is also very different from regulation of the print media. For the latter, self-regulation or a light touch form of statutory regulation is considered sufficient while broadcasters are, for various reasons, regulated more strictly. For these reasons, broadcast regulation is in most countries normally addressed in separate legislation. We therefore recommend that consideration be given to developing a more comprehensive regulatory regime for the broadcast media, through a separate law.

### **Registration**

Under Article 7, all media outlets, whether broadcast, print or internet-based, are required to register with the Ministry of Information. The Ministry will forward a copy of the registration certificate to the regional court or governor of the region in which the media is established. A fee will be charged in accordance with ministerial regulations, and only Somali citizens will be allowed to register as owners.

Article 8 provides that a media outlet may lose its certificate when it ceases publication for 3 months or longer and, under Article 9, copies of every issue or web page must be lodged with the Ministry of Information, the regional court and the office of the attorney general of the region where the media is established.

Articles 10 and 11 require that any changes in registered details or in ownership be promptly notified to the relevant authorities.

While international law allows purely technical registration schemes for the print media, it frowns on anything that imposes substantive requirements on the media or that is open to abuse. A 2003 Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression provides:

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<sup>6</sup> See, amongst others, Principle V of the *African Declaration*, note 2.

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Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.<sup>7</sup>

The *African Declaration* states, similarly:

Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.<sup>8</sup>

We are concerned that the scheme proposed in Articles 7-11 of the draft Law may be open to abuse through the refusal to register media outlets. Practice in other countries has shown that registration schemes are easily manipulated by the authorities and can become an instrument of censorship. We are also concerned at the requirement that copies of every publication be lodged with three different government bodies, including the Attorney General's office, a measure that smacks of control and censorship. Finally, we note that the rule that only Somali nationals may own a media outlet violates a fundamental tenet of international law, namely that *everyone* enjoys the right to freedom of expression, including foreign citizens. While some restrictions may be imposed on the ownership of broadcasting outlets, of which by their nature there are only a limited number in every country, such restrictions should not be extended to all media.

As for websites, international law does not allow for their licensing or for a registration requirement to be imposed on them. A 2005 Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression provides:

No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.<sup>9</sup>

We recommend, therefore that the registration requirement for newspapers be reconsidered. If it is to be retained, it should be transformed into a purely technical scheme, administered by an independent entity that merely acts as a public register of print media outlets. There should be no requirement to lodge copies of every publication with the authorities or any citizenship requirement for ownership.

The requirement that all websites should be licensed or registered should be removed altogether.

### **Regulation of journalists**

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<sup>7</sup> Adopted 18 December 2003.

<sup>8</sup> Principle VIII, note 2.

<sup>9</sup> Adopted 21 December 2005.

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Article 21 provides: “Journalist shall be recognised to person graduated from journalism education institutions, holds recognised certificate such as university level, professional journalism institute or training and experience not less than 12 years.”

We assume that this provision aims to raise the standards of the journalistic profession. We are concerned, however, not only that an academic qualification is no guarantee for high standards of journalism, but that this will exclude from the profession many individuals who may have excellent journalistic skills but happen to lack an academic qualification. We are also concerned at the proposed threshold of twelve years experience, which is absurdly high and also a contradiction in terms, since one cannot gain such experience without being a journalist.

Internationally, it is recognised that journalism is an open profession and access to it should not be barred by unnecessary legal hurdles. This was recognised as long ago as 1985 by the Inter-American Court of Human Rights in a landmark Advisory Opinion from Costa Rica,<sup>10</sup> and has since been adopted on the African continent as well. The *African Declaration* referred to above states:

Effective self-regulation is the best system for promoting high standards in the media.

...

The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.<sup>11</sup>

We therefore recommend that Article 21 be removed from the draft Law.

### **Foreign media activities**

Under Article 6 of the draft Law, all foreign journalists working in Somalia need to be licensed by the government and are required to act in accordance with “good moral principles”.

We are concerned that both of these restrictions violate international law. A requirement to licence any journalists, foreign or local, cannot be justified as a legitimate restriction on the right to freedom of expression. As noted above, such licensing contradicts long-established jurisprudence on freedom of expression and the regulation of journalists.

We are also concerned that the requirement to act in accordance with “good moral principles” imposes a vague and open-ended duty that may easily be abused for political purposes. For example, a journalist who reports critically on the government may be judged to have acted in violation of “good moral principles” and, as a result, lose his or her licence and be expelled from the country. We strongly suggest that both proposals be reconsidered.

### **Restrictions on freedom of expression**

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<sup>10</sup> Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985).

<sup>11</sup> Note 2, Principles IX and X.

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The draft Law proposes a number of content restrictions. Article 12, titled “Ethics of Journalism”, prohibits the publication of “any thing afflicting the good culture of Somali people”. This notion is elaborated in a number of specific bullet points, which specifically rule out the following:

- the publication of “false news” or groundless information from unconfirmed sources;
- publishing materials that “involve national secrets and security”;
- the publication of anything that is “contrary to Islamic law and doctrine”;
- publishing nudity, unless related to issues of health; and
- publishing pictures of human bodies that are “cut down, raped or terrible pictures that can create horror for the society”.

Article 16 imposes a further specific prohibition on the publication of “false news and propaganda against reputation citizen, institution and government”, and provides for a procedure to request a right of reply or correction.

Article 17 provides that any person who is insulted by something that is published in the media will be entitled to monetary compensation.<sup>12</sup>

Article 22 imposes a number of specific duties on journalists, including:

- not to violate the rights of citizens, institutions, respect for religions and the culture of the people;
- to avoid spreading false news and propaganda;
- to protect the dignity, privacy, rights and prestige of persons;
- not to employ deceitful means or thievery to obtain news or pictures;
- to provide impartial and facts-based reports; and
- not to encourage tribalism or treat people differently because of their ethnicity with the aim of inciting violence and hatred.

The draft Law also proposes import restrictions; Article 5 prohibits the import of any media equipment without a licence.

We have a number of concerns with regard to these proposed restrictions.

First, with regard to the restriction on importing media equipment, we see absolutely no justification for either a broad prohibition along the lines proposed, which would potentially ban even the unlicensed import of a pencil, or a more narrow prohibition on, say, transmission equipment. There is no legitimate democratic justification for this kind of restriction, and we recommend it be removed.

Second, many of the restrictions in the draft Media Law echo restrictions already found in the general criminal law of Somalia. For example, we assume that there are already criminal law provisions dealing with the release of state secrets, invasion of privacy, defamation and obscenity. We question why it was deemed necessary to repeat these

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<sup>12</sup> Our translation is unclear on the mechanism for determining the amount of compensation.



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restrictions. This not only creates an ambiguous legal situation, especially when the restrictions in the draft Media Law are worded slightly differently from those in the criminal law, but it also sends the signal that the media are being singled out for harsh treatment. This cannot be justified, unless perhaps as part of a semi-self regulatory approach for the media. The kernel of such an approach may be found in Article 16, which establishes a right of reply mechanism for defamatory allegations. Although there are problems with the detail of what is being proposed in Article 16 – no distinction is made between a reply and a correction, a right of reply is allowed in a very broad range of circumstances, and there are no limitations on the length or content of a reply – we recognise that in principle this is preferable to using the criminal law. We would therefore suggest that the all content restrictions in the draft Media Law either be linked to a self-regulatory mechanism. Otherwise or be removed and, as necessary, inserted into laws of general application.

Third, there is a recurring prohibition on the publication of ‘false news’. International law does not permit general rules of this nature. In recent years, courts of final appeal in Zimbabwe and Uganda have struck down analogous provisions as violating the right to freedom of expression.<sup>13</sup> While journalists should generally strive to provide truthful information, it is only natural that there will be mistakes from time to time. To render them criminally liable for such mistakes is fundamentally unfair and has a significant chilling effect on the right to freedom of expression. Ultimately, this will actually reduce the amount and quality of information available to the public, and thus impede their right to know as well as journalists’ right to freedom of expression. We recommend that these provisions be removed.

Fourth, many of the restrictions are phrased in extremely vague terms and punish speech that merely “relates to” a specific interest. Under international law, the State may only restrict speech that actually causes harm, or is very likely to do so. For example, it is legitimate to bar the publication of the details of actual troop movements in a frontline war zone, as this will cause harm to national security; but it is not legitimate to ban general discussion of army tactics. International law also requires that laws that restrict speech must be clearly and narrowly worded. It is illegitimate, therefore, to ban all publications that are un-Islamic. This is far too broad and vague a term to serve as a basis for restrictions and it may easily be abused to muzzle the press. We strongly recommend that all of the proposed restrictions be reviewed in light of these considerations.

### **State media**

Article 19 of the draft Law provides that all State media will fall under the control of the Ministry for Information. The third paragraph of this provision indicates that the draft Law envisages that the Ministry will be running radio and television stations, as well as newspapers.

Article 20 provides that State media may set up joint ventures with private media.

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<sup>13</sup> *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000 (Supreme Court of Zimbabwe) and *Onyango-Obbo and Mwenda v. AG*, Constitutional Appeal No. 2, 2002, 11 February 2004 (not yet published) (Supreme Court of Uganda).

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International best practice requires that State-owned media be transformed into independent public service broadcasters which answer to the public, not the government. This is because State broadcasters that are under direct government control, which is the formula proposed under Article 19, often become propaganda mouthpieces for the government. This is not in the overall public interest. Rather, they should be transformed into independent entities, run by an independent board of governors and with a mandate to provide impartial and balanced news, entertainment and educational and cultural programming. This is reflected in Principle VI of the *African Declaration* referred to above, which states:

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;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;
- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.<sup>14</sup>

We strongly urge that Articles 19 and 20 be reconsidered in light of this recommendation.

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<sup>14</sup> Note 2.