



# **Handbook on International Standards and Media Law in the Arab World**

**May 2013**

## **Acknowledgements**

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## **Table of Contents**

Acknowledgements .....	ii
Table of Contents.....	iii
Preface.....	1
Introduction.....	2
Part A: General Standards.....	3
Part B: Media Regulation .....	9
1. <i>Independence of Regulatory Bodies</i> .....	9
2. <i>Diversity</i> .....	177
3. <i>Regulation of Journalists</i> .....	24
4. <i>Regulation of the Print Media</i> .....	30
5. <i>Regulation of the Broadcast Media</i> .....	38
6. <i>Public Service Broadcasting</i> .....	43
Part C: Other Rules.....	49
7. <i>Right to Information</i> .....	49
8. <i>Civil Restrictions</i> .....	52
9. <i>Criminal Restrictions</i> .....	56
Conclusion .....	64

## **Preface**

The new Middle East after the so-called Arab Spring is more complicated than it was. As the whole region went into labour, it would take an all-powerful crystal ball to predict how the offspring will look. But one thing is certain. The “Arab” voice that made itself heard in more than a dozen countries since Tunisia erupted into revolution at the beginning of 2011 will not be silenced.

Journalists and their organisations in the region, most of them member unions of the International Federation of Journalists, have and continue to play a significant role at the heart of these extraordinary events. As the dam finally burst, the IFJ assembled the leaders of its member unions to discuss putting in place strategies on how to advance key media law reforms needed to promote a new vision for journalism in the Arab world, embedded in a host of democratic values.

We were encouraged by the real possibility of serious positive change, for the first time ever, in igniting a dynamic that would transform media freedom in the Arab world. There was no need to re-invent the wheel with such easy access to the plethora of international laws that provides a robust protection for freedom of expression and the media continuously enacted by international human rights courts and other official bodies.

For a start it is quite clear that all of the countries in the Arab world are in serious breach of all or most of these standards. The overwhelming interference by government in regulatory decisions, the lack of recognition of the most basic principles of content and source diversity, pluralism, the manipulation of licensing processes, manipulative rules on accreditation, the paucity of journalists’ rights, restriction on contents, the weak traditions of protection of confidentiality, of the right of citizens to know and the primacy of secrecy, and the continuous abuse of the concept of national security and public order to cower journalists are all formidable challenges.

In offering a unique overview of these rules and laws and spelling out solutions to the challenges facing Arab journalists, this Handbook will prove a solid tool for these journalists and their unions to strengthen their campaigns for key media reforms and promote practical actions to confront the continuing threats from poverty, corruption and undue political influence.

Jim Boumelha  
President  
International Federation of Journalists

## ***Introduction***

All serious commentators on democracy recognise the key role played by respect for freedom of expression in general, and freedom of the media in particular, in realising that grand social project. Democracy is, more than anything else, the ability of citizens to participate in the political process by voicing their views and concerns, and by forming opinions based on a solid foundation of information.

Until recently, respect for both democracy and freedom of expression has been in short supply in the Arab world. There has been a degree of tolerance for what some have termed 'Arab exceptionalism', or a lack of respect for these basic human values, for various political and economic reasons. This has now started to change with the advent of the so-called Arab Spring, which has been founded on demands by the citizens of Arab countries for greater freedom.

Achievements so far remain somewhat modest. Freedom House's annual Freedom of the Press rating gave five countries in the region a 'partly free' rating for 2011, up from just two in 2010.<sup>1</sup> While this is still poor, the direction is positive. More importantly, there is now real potential for very serious change in the region. Indeed, the potential now exists for the first time to build real democracies in a region hitherto characterised by dictatorships and monarchies.

For democratic change in the region to be effective, it must be built on solid foundations. The need for media law reform is an absolutely essential part of those wider foundations. While official tolerance of media freedom is possible even in the absence of structural legal reforms, the experience of countries around the world demonstrates that, without structural change, such tolerance will inevitably remain short-term and unstable.

This Handbook aims to provide reformers in the region with information about key international standards regarding different areas of media law, along with a description of the main trends within the region in relation to that issue. It covers all of the main media law issues, including media diversity, the need for bodies which regulate the media to be independent of political and commercial interference, regulatory standards in different media sectors – including journalists, the print and broadcast media and public broadcasting – the right to information, and criminal and civil restrictions on what may be published or broadcast.

The standards set out in this Handbook, as well as the changes it notes are needed for countries in the Arab world, are just a starting place. Reformers in each country will need to consider how to move from their very different existing legal and institutional situations towards a more democratic and free dispensation, taking

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<sup>1</sup> These ratings are reflected in the reports of the following year (i.e. the 2011 scores are given in the 2012 report). The ratings for all years are available at: <http://www.freedomhouse.org/report-types/freedom-press>.

into account their political, social and cultural realities. It is hoped, however, that this Handbook will prove useful as a starting place, for without an understanding of international standards regarding media law, and the ways in which existing rules and practices fail to respect those standards, it will be difficult to move forward.

### **Part A: General Standards**

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>2</sup> as follows:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>3</sup>

Freedom of expression is also guaranteed in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>4</sup> a treaty ratified by 167 States,<sup>5</sup> as follows:

- (1) Everyone shall have the right to freedom of opinion.
- (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.

Freedom of expression is protected in all three regional human rights treaties, specifically at Article 13 of the *American Convention on Human Rights* (ACHR),<sup>6</sup> at Article 10 of the *European Convention on Human Rights* (ECHR)<sup>7</sup> and at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR).<sup>8</sup> The latter is directly binding on most of the States of North Africa, while the other treaties, and the way in which freedom of expression has been interpreted in these systems, provides an important source of understanding as to its scope and nature under international guarantees.

### **The Importance of Freedom of Expression**

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<sup>2</sup> United Nations General Assembly Resolution 217A (III), 10 December 1948.

<sup>3</sup> See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

<sup>4</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

<sup>5</sup> As of May 2013. These include Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Somalia, Sudan, Syria, Tunisia and Yemen.

<sup>6</sup> Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

<sup>7</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>8</sup> Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.

It is difficult to overstate the importance of freedom of expression. Where this fundamental right is denied, and the free flow of information and ideas is constrained, other human rights, as well as democracy itself, are at risk. Democratic participation depends on the free flow of information and ideas, since the substantive engagement of citizens in decision-making processes can only be achieved if people are both informed and have access to the possibility of voicing their views. Other social values – including good governance, public accountability, development, individual fulfilment and combating corruption – also depend on respect for freedom of expression.

International bodies and courts have repeatedly emphasised the fundamental importance of the right to freedom of expression. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),<sup>9</sup> which refers to freedom of information in its widest sense:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is fundamentally important both as an individual right and as indispensable to the exercise of all other rights. The idea of freedom of expression as an underpinning of democracy and other human rights has also been stressed by international human rights bodies. The UN Human Rights Committee, the body established to monitor implementation of the ICCPR, has held:

The right to freedom of expression is of paramount importance in any democratic society.<sup>10</sup>

Similarly, the Inter-American Court of Human Rights has stated: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.”<sup>11</sup> And the European Court of Human Rights has noted: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”<sup>12</sup>

International guarantees of freedom of expression provide wide protection for all forms of expression, covering not only statements that are generally deemed to be in the public interest, but also those that are considered, even by most of the populace, as offensive or unpalatable. Indeed, the notion of protecting unpopular speech lies at the very heart of the importance of guarantees of freedom of expression. As the European Court has made clear:

[F]reedom of expression ... is applicable not only to “information” or “ideas” that are favourably received ... but also to those which offend, shock or disturb the State

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<sup>9</sup> Adopted 14 December 1946.

<sup>10</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

<sup>11</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

<sup>12</sup> *Handyside v. the United Kingdom*, 7 December 1976, Application no. 5493/72, para. 49.

or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.<sup>13</sup>

### The Importance of Media Freedom

The right to freedom of expression is of particular importance in relation to the media, given its role in making the free flow of information and ideas a reality. In most countries, the media remain the main vehicle for promoting and sustaining public discussion. The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>14</sup> The European Court of Human Rights has referred to “the pre-eminent role of the press in a State governed by the rule of law.”<sup>15</sup> The media as a whole merit special protection in part because of their role in making public “information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”<sup>16</sup>

Similarly, in its *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), adopted in 2003, the African Commission on Human and People’s Rights stressed “the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy.”<sup>17</sup>

The media play a very important role in underpinning democracy, including during elections. The UN Human Rights Committee has stressed the importance of free media to the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>18</sup>

In a similar vein, the European Court has emphasised:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>19</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 11, para. 34.

<sup>15</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application no. 13778/88, para. 63.

<sup>16</sup> *Ibid.*

<sup>17</sup> Adopted by the African Commission on Human and People’s Rights at its 32nd Session, 17-23 October 2002.

<sup>18</sup> UN Human Rights Committee General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996.

<sup>19</sup> *Castells v. Spain*, 24 April 1992, Application no. 11798/85, para. 43.



### The Right to Seek and Receive

Under international law, freedom of expression protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas). The implications of the right to seek and receive information and ideas, a key aspect of the right to freedom of expression, have been elaborated upon clearly and forcefully by the Inter-American Court of Human Rights. The Court recognised early on the important implications of the dual nature of the right to freedom of expression:

[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.<sup>20</sup>

The second aspect of the right rules out arbitrary interferences by the State that prevent individuals from receiving information that others wish to impart to them.<sup>21</sup> However, the rights of the listener also place a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. International law recognises generally that States must take positive measures to ensure rights. Article 2 of the ICCPR, for example, places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant".<sup>22</sup> The specific need for positive measures to ensure respect for freedom of expression has been widely recognised.<sup>23</sup>

### Restrictions on Freedom of Expression

International law recognises that freedom of expression is not absolute. However, international human rights law places strict conditions on any restrictions on the right. These must comply with the provisions of Article 19(3) of the ICCPR, which states:

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<sup>20</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 30-2.

<sup>21</sup> See, for example, *Leander v. Sweden*, 26 March 1987, Application no. 9248/81 (European Court of Human Rights), para. 74.

<sup>22</sup> See also Article 2 of the ACHR.

<sup>23</sup> See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application no. 24699/94 (European Court of Human Rights), para. 45 and *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights and reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This imposes a strict three-part test for restrictions. In its most recent General Comment on Article 19 of the ICCPR, adopted in September 2009, the UN Human Rights Committee stated:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. [references omitted]<sup>24</sup>

First, the restriction must be provided by law or imposed in conformity with the law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility. Where restrictions are vaguely drafted, they may be interpreted in a way that gives them a wide range of different meanings. This gives the authorities the discretion to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be protected. For those subject to the law, vague provisions fail to give adequate notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as individuals steer well clear of the potential zone of application to avoid censure. As the Human Rights Committee has stated:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.<sup>25</sup>

Second, the restriction must pursue one of the legitimate aims listed in Article 19(3). It is quite clear from both the wording of the article and the views of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed are not valid:

Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were

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<sup>24</sup> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 22. See also *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7 (UN Human Rights Committee).

<sup>25</sup> General Comment No. 34, *ibid.*, para. 25.

prescribed and must be directly related to the specific need on which they are predicated. [references omitted]<sup>26</sup>

It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.<sup>27</sup>

Third, the restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>28</sup>

Courts have identified three aspects of this part of the test. **First**, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. **Second**, restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as ‘overbreadth’). **Third**, restrictions must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two factors, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected.

The UN Human Rights Committee has summarised these conditions as follows:

Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “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...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action

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<sup>26</sup> *Ibid.*, para. 22. See also *Mukong v. Cameroon*, note 24, para.9.7.

<sup>27</sup> As the Indian Supreme Court has noted: “So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.” *Thappar v. State of Madras*, [1950] SCR 594, p. 603.

<sup>28</sup> See, for example, *Thorgeir Thorgeirson v. Iceland*, note 15, para. 63.

taken, in particular by establishing a direct and immediate connection between the expression and the threat. [references omitted]<sup>29</sup>

## ***Part B: Media Regulation***

### **1. Independence of Regulatory Bodies**

#### International and Comparative Standards

The idea that bodies which exercise regulatory powers over the media need to be independent of the government and protected against both political and commercial interference is well-rooted in international standards, as well as the comparative practice of democratic States. The rationale for this is evident: if regulators are controlled by the government, they are likely make regulatory decisions which favour the government of the day, rather than the wider public interest. This will undermine the ability of the media to report critically, especially on political actors, and thereby diminish respect for freedom of expression.

It is equally important that regulators are independent of the sectors they regulate. While this has not so far been a major issue in the Arab world, in part because of the extent of government control, it is a major or emerging problem in many democracies, where it is referred to as 'regulatory capture'. The negative implications of this are equally evident and essentially the same: if industry controls the regulator, it will operate with a bias towards industry, rather than making decisions in the wider public interest.

It is worth noting that the principle of independence applies to the exercise of regulatory powers, and not to higher-level policy making, which normally remains the preserve of government. For example, in most countries, framework decisions about the digital switchover – including what system will be used, the general timetable for the switchover and any general measures of public support for the process – are policy decisions which are made by a government body. On the other hand, specific decisions about which companies should receive digital multiplexes are regulatory decisions. If these are left to government, the choices will be influenced by politics, to the detriment of freedom of expression.

The lack of independence of regulators from government has left its scars throughout the Arab world. Interference has been rife starting with decisions about who may establish a media outlet (gatekeeping) and continuing into regulatory decisions to apply sanctions for breach of various rules. Decisions about who may operate a broadcaster, launch a newspaper or even practise as a journalist have in most countries in the region traditionally been determined more by political

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<sup>29</sup> General Comment No. 34, note 24, paras. 34 and 35.

allegiance, or at least acquiescence, than on the basis of professional criteria. Sanctions for breach of the rules – themselves often very elastic in nature – have often been applied on more of a political than objective basis.

Numerous international statements by authoritative actors support the need for independence of bodies with the power to regulate the media. For the most part, these statements have been directed at broadcast or telecommunications regulators, largely because most democracies do not have official bodies that regulate the print media or journalists. A broader statement of the need for independence is the following quotation from a 2003 Joint Declaration adopted by the then three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Special Representative on Freedom of the Media:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>30</sup>

More recently, in its September 2009 General Comment on Article 19 of the ICCPR, the UN Human Rights Committee made a similar statement albeit limited to broadcast regulators:

It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses. [references omitted]<sup>31</sup>

All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also referred to this idea. Thus, the African Declaration states very clearly, at Principle VII(1):

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

The *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration), adopted by the Inter-American Commission on Human Rights in October 2000,<sup>32</sup> does not explicitly state that broadcast regulators must be

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<sup>30</sup> Adopted 18 December 2003. Available at: <http://www.osce.org/fom/66176>. The special international mandates, now four with the addition of the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have adopted a Joint Declaration on a freedom of expression theme every year since 1999.

<sup>31</sup> General Comment No. 34, note 24, para. 39.

<sup>32</sup> Adopted at the 108<sup>th</sup> Regular Session, 19 October 2000.

independent. But it does refer to the underlying reason for this, stating, in Principle 13:

[T]he concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.

An entire recommendation of the Council of Europe – the key human rights body for the wider community of European countries, which currently has 47 Member States – is devoted to this issue, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).<sup>33</sup> The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

This view has been upheld by international and national courts. The reasons for this were set out elegantly in a decision of the Supreme Court of Sri Lanka holding that a broadcasting bill which gave a government minister substantial power over appointments to the broadcast regulator was incompatible with the constitutional guarantee of freedom of expression. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”<sup>34</sup>

Very few cases involving control of regulatory bodies by private actors have come before international courts. In an interesting case before the UN Human Rights Committee from Canada, the issue was the legitimacy of a system for accreditation of journalists to Parliament. The system was run by a private association, which had effectively been recognised by Parliament for purpose of accreditation, but which had refused to accept the applicant in the case as a full member out of doubts about the regularity of the newspaper for which he worked. In holding that this was a breach of the right to freedom of expression, the Committee stated:

In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and

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<sup>33</sup> Adopted by the Committee of Ministers of the Council of Europe on 20 December 2000. See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted 26 March 2008.

<sup>34</sup> *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members.<sup>35</sup>

This gives some sense of the extent to which the right to freedom of expression imposes stringent requirements of independence and fairness on any body which has the power to restrict freedom of expression.

Recognising the principle of independent regulation is one thing, but guaranteeing it in practice is quite another, and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice. The COE Recommendation provides some guidance as to how independence may be guaranteed in practice, with sections on Appointment, Composition and Functioning (of the governing boards of these bodies), Financial Independence, Powers and Competence, and Accountability.

The way in which members are appointed to the governing boards of regulatory bodies is central to their independence. The African Declaration states that the appointments process should be “open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.”<sup>36</sup> The COE Recommendation devotes some attention to this matter, calling for: members to be “appointed in a democratic and transparent manner”; rules of ‘incompatibility’ to prevent individuals with strong political connections or commercial conflicts of interest from sitting on these bodies; prohibitions on members receiving instructions or a mandate from anyone other than pursuant to law; and protection against dismissal except for “non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions”.<sup>37</sup>

The COE Recommendation also notes the importance of funding arrangements to independence. It calls on public authorities not to use any financial decision-making power to interfere with regulatory bodies, and calls for funding arrangements to “be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities’ activities, so as to allow them to carry out their functions fully and independently”.<sup>38</sup> The Recommendation also calls for regulatory bodies to have the power to set their own internal rules.<sup>39</sup>

Both the COE Recommendation and the African Declaration recognise that broadcast regulators need to be accountable to the public but that such accountability should be achieved in a manner that does not compromise independence. The African Declaration, for example, states:

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<sup>35</sup> *Gauthier v. Canada*, Communication No. 633/1995, views adopted 5 May 1999, para. 13.6.

<sup>36</sup> Principle VII(2).

<sup>37</sup> Clauses 3-8.

<sup>38</sup> Clause 9.

<sup>39</sup> Clause 12.

Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.<sup>40</sup>

The COE Recommendation emphasises this point and notes that regulators “should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities”.<sup>41</sup>

These principles are widely recognised in democracies around the world. In South Africa, the very name of the broadcast regulator, the Independent Communications Authority of South Africa (ICASA), reflects the idea of independence, and this is also set out clearly in its founding legislation, which states:

(3) The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.

(4) The Authority must function without any political or commercial interference.<sup>42</sup>

The governing Council of ICASA consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles: a) participation by the public in the nomination process; (b) transparency and openness; and (c) the publication of a shortlist of candidates for appointment. Only individuals who are committed to freedom of expression and other positive social values, who have relevant expertise and who, collectively, are representative of South Africa as a whole may be appointed. Individuals with strong political connections, as well as those with vested interests in telecommunications or broadcasting, are prohibited from becoming members.<sup>43</sup>

In Chile, the law<sup>44</sup> makes it clear that the National Television Council (CNTC) is an autonomous public authority that is functionally decentralised, with its own legal capacity and accountable to the President through the Ministry of the General Secretary of Government (Ministerio Secretaria General de Gobierno). Council members should be individuals possessing relevant personal and professional virtues, in the opinion of both the President and the Senate. Members sit for an 8-year term of office and are re-elected by halves every four years. The President appoints the 11 members with the agreement of the Senate.

In 1995, a new process was put in place for all public appointments in the United Kingdom. Although the relevant Secretary of State continues to appoint the non-executive members of Ofcom, the broadcast and telecommunications regulator, appointments are made on the basis of recommendations reached through the

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<sup>40</sup> Principle VII(3).

<sup>41</sup> Clause 26.

<sup>42</sup> Independent Communications Authority of South Africa Act, No. 13 of 2000, s. 3.

<sup>43</sup> *Ibid.*, ss. 3 and 6.

<sup>44</sup> Law No 18,838. Available in Spanish at:

[http://www.cntv.cl/prontus\\_cntv/site/artic/20101221/pags/20101221112826.html](http://www.cntv.cl/prontus_cntv/site/artic/20101221/pags/20101221112826.html).



standard public appointments procedure. This stipulates that all public appointments should be based on merit and subject to scrutiny by at least one accredited independent assessor. All the candidates put forward for ministerial selection should meet these criteria.<sup>45</sup> Ofcom's board consists of five members and a chairman, appointed through the independent appointments process, together with three executive members, selected from the senior staff group and including the Chief Executive Officer.

Another system to ensure the independence of the appointments process is in place for the Jamaican Broadcasting Commission (JBC), established by the Broadcasting and Radio Re-Diffusion Act.<sup>46</sup> The members are appointed by the Governor-General (the titular Head of State) after consultation with the Prime Minister and the Leader of the Opposition. Any serving politician, and anyone who sought election within the past 7 years (whether or not they were successful), is disqualified from appointment.

Indonesia is perhaps a good example to be used as a reference by countries in the Arab world as it went through a rapid and generally successful process of democratisation after its 1998 revolution, which removed the long-standing authoritarian ruler, Suharto. Broadcast regulation had traditionally been vested in the Ministry of Information but the ministry was abolished when newly installed President Abdurrahman Wahid announced his first cabinet in October 1999.

The Broadcasting Law, adopted in 2002,<sup>47</sup> sets out a number of "principles, objectives, functions and directions" for broadcasting as a whole (Articles 2-5), which include several references to the idea of independence. Article 7 establishes the Indonesia Broadcasting Commission (KPI) as an "independent state body" responsible for broadcast regulation, composed of a national and regional bodies. The nine members of the national KPI and seven members of the regional KPIs may be nominated by the public and are elected by the parliament (or provincial parliaments) based on an "open fit and proper test", while appointments are formalised by the President and Governors, respectively. Each member must be loyal to Pancasila<sup>48</sup> and the Constitution, be a citizen of Indonesia, have a university degree or demonstrate the equivalent intellectual capacity, including knowledge of broadcasting, not be directly or indirectly involved in mass media activities, be a member of a legislative or judicial body, or be a government official. Membership is for three years and may be renewed once. Members may be removed following imprisonment based on a court decision or by a Presidential Decree upon the

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<sup>45</sup> See the website of the Office of the Commissioner for Public Appointments, at: <http://www.publicappointmentscommissioner.org/>.

<sup>46</sup> Cap. 47. Available at: [http://www.broadcastingcommission.org/uploads/content\\_page\\_files/BroadcastingandRadioRe-DiffusionAct.pdf](http://www.broadcastingcommission.org/uploads/content_page_files/BroadcastingandRadioRe-DiffusionAct.pdf).

<sup>47</sup> Law No. 32/2002.

<sup>48</sup> Pancasila is a set of five principles considered to be foundational to the Indonesian State, including belief in one god, the unity of Indonesia, democracy and social justice.

recommendation of the parliament. The members elect the chair and vice-chair from among themselves.

### Practice in the Region

The Arab world has historically been characterised by tight government control over both the print and broadcast media sectors. Although the notion of independent regulation is slowly starting to emerge in a few countries, no country has put in place a properly independent system. Iraq was the first country in the region to move in this direction, and moves in Tunisia to do so are relatively advanced.

In many countries in the region – including Palestine, Jordan and even the relatively liberal Lebanon – regulation of the print media, which usually includes something akin to a licensing requirement, is done directly by government, usually by the Ministry of Information or its equivalent. In other countries, such as Egypt, the print media are regulated by a separate body, in that case the Supreme Press Council (SPC), but for the most part these bodies are firmly under government control. The situation in Libya is in flux. The General Press Corporation (GPC), which was used to control the print media under the Qaddafi regime, has been abolished and replaced by the Press Support and Encouragement Corporation. It remains to be seen whether and to what extent this new body will prove to be more independent than its predecessor.

In many countries in the region, private broadcasting is very limited. In some cases, it is forbidden altogether, while in others it is limited to the satellite television sector. Where private broadcasters are allowed, there are different approaches to regulation. In some countries, such as Palestine, regulation of broadcasting is conducted directly by the government, in that case through the Ministry of Information.

A more common model in the region is to establish a separate broadcast regulator, such as the Haute Autorité de la Communication Audiovisuelle (HACA) (or the High Authority for Audio-visual Communication) in Morocco, the Audio-Visual Commission (AVC) in Jordan and the National Council for Audio Visual Media (NCAVM) in Lebanon. In most countries, including the three noted above, these bodies are under firm government or official control. In Morocco, for example, the King appoints the members of HACA while in Jordan the Commission simply makes recommendations to Cabinet, which takes the final decision as to the licensing or otherwise of broadcasters.

A version of this approach also applies in Egypt, where most of the private satellite television stations (there are no private terrestrial television stations yet) operate out of the Free Zones in Egypt, in particular the Media Public Free Zone. The Free Zones are located within the territory of Egypt, but are considered offshore areas for purposes of financial regulation. These Zones fall under the jurisdiction of the General Authority for Investment (GAFI), a government body, which is subject to

political control and direction. In the past, applicants needed a security clearance and to pay very large capital deposits, the equivalent of approximately USD 4 million, to obtain a broadcasting licence but both of these requirements have been waived in the post revolutionary environment. In the past, satellite televisions which applied to broadcast news were never approved, although this has also changed.

	Egypt	Iraq	Jordan	Lebanon	Morocco	Palestine	Tunisia
Direct government licensing	X	X	X	X	X	√	X
Government controlled body licenses	√ (GAFI)	X	√ (AVC)	√ (NCAVM)	√ (HACA)	X	X
Independent regulator	X	√ (CMC)	X	X	X	X	√ (HAICA)

Table 1: Licensing Broadcasters

Note: this is just a sample of the countries in the region

Two exceptions to this scenario of otherwise strict government control are Tunisia and Iraq. In Tunisia historically, authorisation to establish a new broadcaster was subject to ministerial authorisation and the licences were signed by the Prime Minister. A new law, adopted in November 2011, created the Independent High Authority for Broadcast Communication (Haute Autorité Indépendante de la Communication Audiovisuelle or HAICA).<sup>49</sup> The independence of HAICA is expressly guaranteed in the law, and its funding is also protected against political interference. Members are nominated by a range of different social actors (the President, the courts, the parliament, journalists and media owners), thereby ensuring that they are not subject to the control of any one political actor. Members hold tenure for six years, non-renewable, and may be removed only by a decision of the rest of the members. The members of HAICA were not appointed for a long time, so the body was not able to function in practice, but recently the government has moved forward with appointments.

In Iraq, the Communications and Media Commission (CMC) was originally created by the Coalition Provisional Authority (CPA) through Order 65 on 20 March 2004. Order 65 establishes the CMC as an independent body reporting to the parliament and funded by the fees it receives from licensing broadcasters and telecommunications service providers. Members of the board are proposed by the Prime Minister but appointed by parliament, and are subject to strong conflict of interest rules and political prohibitions. Sanctions against licensees are heard by a Hearings Panel, a five-member body of experts, and appeals against sanction decisions may be lodged with the Appeals Board, a three-member expert body. There have, however, been serious problems with the operations of CMC, with

<sup>49</sup> Décret-loi No 2011-116 du 2 novembre 2011, relatif à la liberté de la communication audiovisuelle et portant création d'une Haute Autorité Indépendante de la Communication Audiovisuelle.

persistent government attempts to interfere in its operations, as well as to amend its governing legislation in ways that would reduce its independence.

## 2. Diversity

### International and Comparative Standards

The principle of independence is primarily about the manner in which media regulation should take place. The principle of diversity, on the other hand, is a key objective of such regulation, particularly in the context of broadcasting. Jurisprudentially, the principle of media diversity derives from the multi-dimensional nature of the right which, as noted above, protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas).<sup>50</sup> This prevents States from interfering with the right of listeners to seek and receive information from others. However, it also places a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. It is not enough for the State simply to take a laissez faire approach to media regulation, at least in the broadcasting sector, where externalities and rigidities like scarce frequencies and the high cost of entry into the sector have traditionally, in the absence of countervailing regulation, prevented the emergence of a truly diverse media.

Pluralism has received extremely broad endorsement as a key aspect of the right to freedom of expression. For example, the UN Human Rights Committee has stated:

As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.<sup>51</sup>

Similarly, the African Declaration states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.<sup>52</sup>

The Inter-American Court of Human rights has recognised that the right to seek and receive information and ideas requires the existence of a free and pluralistic media:

It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of

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<sup>50</sup> See, for example, the Inter-American Court's judgment in *Baruch Ivcher Bronstein v. Peru*, note **Error! Bookmark not defined.**, para. 146.

<sup>51</sup> General Comment No. 34, note 24, para. 14.

<sup>52</sup> Principle III.

communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.<sup>53</sup>

Within the European context, the issue of media diversity as an aspect of the right to freedom of expression has attracted considerable attention. In a 2012 case, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, a Grand Chamber of the European Court of Human Rights set out in some detail the key principles governing this idea:

129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.

130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

...

134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.

With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (see paragraph 72 above) the Committee of Ministers reaffirmed that “in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed”. [references omitted]<sup>54</sup>

The Court referred to the Council of Europe’s Recommendation 2007(2) on Media Pluralism and Diversity of Media Content,<sup>55</sup> which is entirely devoted to the question of media diversity and measures to promote it.

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<sup>53</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 20, para. 34.

<sup>54</sup> 7 June 2012, Application no. 38433/09. See also See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

<sup>55</sup> Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – focused entirely on media diversity, stressing its importance as an aspect of freedom of expression and as an underpinning of democracy.<sup>56</sup>

The Joint Declaration identified three distinct aspects of media pluralism or diversity: content, outlet and source.<sup>57</sup> **Diversity of content**, in the sense of the provision of a wide range of content that serves the needs and interests of different members of society, is the most obvious and ultimately the most important form of diversity. Diversity of content, one aspect of which is giving voice to all groups in society, depends, among other things, on the existence of a plurality of types of media, or **outlet diversity**. Specifically, democracy demands that the State create an environment in which different types of broadcasters – including public service, commercial and community broadcasters – which reflect different points of view and provide different types of programming, can flourish. The absence of **source diversity**, reflected in the growing phenomenon of concentration of media ownership, can impact in important ways on media content, as well as independence and quality.

A number of authoritative statements support the idea that the right to freedom of expression places States under an obligation to promote all three types of diversity, namely of source, of outlet and of content. It has, however, always been recognised that there is a need to distinguish between how the print and broadcast sectors are regulated. In many States, only diversity of source is regulated in the print media sector, which does not suffer from the same externalities and rigidities as the broadcasting sector. At the same time, some States do provide for subsidies for the print media as a means of promoting diversity of content in that sector.

The need to prevent undue concentration of media ownership, or **diversity of source**, is well established under international law. As the UN Human Rights Committee has stated:

The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”. The State should not have monopoly control over the

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<sup>56</sup> Adopted 12 December 2007. Available at: <http://www.osce.org/fom/66176>.

<sup>57</sup> See also: Thomas Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry”, in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views. [references omitted]<sup>58</sup>

Principle 12 of the Inter-American Declaration specifically calls for measures to limit “[m]onopolies or oligopolies in the ownership and control of the communication media”, on the basis that they undermine “the plurality and diversity which ensure the full exercise of people’s right to information”. The Inter-American Court of Human Rights has similarly called for the “barring of all monopolies [of ownership of the means of communication], in whatever form”, again in service of pluralism.<sup>59</sup> The African Declaration similarly calls for effective measures to prevent undue concentration of media ownership.<sup>60</sup> A 2007 Declaration of the Council of Europe highlights the problem of media concentration and makes a number of recommendations on how to address it, including through rules on transparency of ownership and prohibiting media concentrations above certain levels.<sup>61</sup> The European Court has identified one of the key problems with undue concentration of media ownership:

A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it.<sup>62</sup>

In practice, most democratic States do have in place specific rules that address the issue of concentration of media ownership, over and above their general anti-concentration rules. Licensing of broadcasters is an important means for enforcing rules relating to ownership. Such rules are also directly enforced in many countries, including by requiring licensed broadcasters to report changes of ownership to the regulatory authority.

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<sup>58</sup> General Comment No. 34, note 24, para. 40.

<sup>59</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 20, para. 34.

<sup>60</sup> Principle XIV(3). The African Declaration also rules out public broadcasting monopolies. See Principle V(1).

<sup>61</sup> Declaration of the Committee of Ministers of the Council of Europe on protecting the role of the media in democracy in the context of media concentration, adopted 31 January 2007. See also the 2007 Council of Europe Recommendation on media pluralism, note 55, clause I(2).

<sup>62</sup> *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, note 54, para. 133.

Many authoritative statements address the issue of **diversity of outlet**, either implicitly or directly. The Inter-American Declaration calls for licensing to “take into account democratic criteria that provide equal opportunity of access for all individuals.”<sup>63</sup> The African Declaration refers to the need to ensure “pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups”.<sup>64</sup>

A particular focus here is the need to promote, through regulation, the effective development of the three types of broadcasters, commercial, community and public. In an unregulated environment, commercial broadcasters are likely to dominate. While they make a very important contribution to diversity, other interests are served by the other types of broadcasters. Public service broadcasters can help ensure broad geographic reach of broadcasting, provide programming that is not commercially viable and prevent a downward spiral of programme quality as commercial broadcasters compete for profits. Community broadcasters provide voice and access to information for individuals and communities which are not reached by either commercial or public service outlets.

The African Declaration calls specifically for an equitable allocation of frequencies among commercial and community broadcasters, the particular promotion of community broadcasting “given its potential to broaden access by poor and rural communities to the airwaves”, and the transformation of State broadcasters into public service broadcasters.<sup>65</sup> The 2007 Council of Europe Recommendation on media pluralism also calls for the encouragement of media “capable of making a contribution to pluralism and diversity and providing a space for dialogue”, such as “community, local, minority or social media.”<sup>66</sup>

The 2007 Joint Declaration of the special international mandates calls for a range of measures to promote diversity of outlet, stating: “Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms.” To achieve this, it calls for the reservation of sufficient space on different broadcasting platforms, including in the digital environment, for all three types of broadcasters, and for special measures, in particular, to protect public service and community broadcasters. The same ideas are reflected in their 2013 Declaration, which is about the transition to digital terrestrial broadcasting.<sup>67</sup>

In practice, democracies around the world are increasingly recognising the need for outlet pluralism. The important and different roles played by commercial and public

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<sup>63</sup> Principle 12.

<sup>64</sup> Principle III.

<sup>65</sup> See Principles V and VI.

<sup>66</sup> Clause I(4).

<sup>67</sup> Available at: <http://www.law-democracy.org/live/international-mandates-diversity-key-in-digital-transition/>.



service broadcasters has long been understood and accepted. Community broadcasting has gained widespread recognition in recent years and frequencies are increasingly being set aside for this form of broadcasting, while licensing rules are being amended to accommodate it.

The general need to promote **content diversity** has also received widespread recognition. A key idea here is that licensing processes should be based on a beauty contest, of which a key criterion should be diversity, rather than a first-come, first-served or highest bidder approach. The African Declaration specifically calls for licensing processes to be used to promote diversity,<sup>68</sup> and the 2007 Council of Europe Recommendation on media diversity similarly calls for the licensing process to be used to this end.<sup>69</sup> In practice, most democracies include contributing to content diversity as one of the criteria for deciding between competing licence applications.

Both the 2007 Council of Europe Recommendation and the African Declaration also include more specific calls for the promotion of content diversity. The Council of Europe Recommendation, for example, calls on States to “define and implement an active policy in this area” and to encourage the media to provide diverse content while respecting editorial independence, and gives as a possible example requiring broadcasters to produce a certain volume of original programmes.<sup>70</sup> The African Declaration calls for the promotion of African voices, including through the media, and in local languages.<sup>71</sup> The European Convention on Transfrontier Television requires all States Parties to ensure that at least 50 percent of the programming carried by broadcasters within their jurisdictions is of European origin.<sup>72</sup>

In many States, broadcast regulators impose specific diversity obligations on licensees, for example through the imposition of minimum requirements relating to news, education, local content and access by independent producers to the airwaves. Most democracies also impose an obligation on all broadcasters to be balanced and impartial in their news and coverage of current affairs.

### Practice in the Region

The specific promotion of diversity has not been a priority in the Arab world. In most countries, regulation of both the print media and broadcasting has been largely controlled by the government. Instead of the promotion of diversity, the main objective of the licensing of broadcasters or print media outlets has been to ensure loyalty to the governing regime and an understanding that the owner would not engage in criticism of government or officials.

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<sup>68</sup> Principle V.

<sup>69</sup> Clause II(3).

<sup>70</sup> Clause II.

<sup>71</sup> Principle III.

<sup>72</sup> Adopted 5 May 1989, E.T.S. 132, entered into force 1 May 1993, as amended by the Protocol, adopted 1 October 1998, E.T.S. 171, entered into force 1 March 2002.

In terms of source diversity, few if any States in the region have specific rules on concentration of media ownership. Indeed, in some States, such as Egypt, there are not even general rules on ownership concentration. On the other hand, Egypt does have in place a rule that formally prohibits any one person from owning more than 10 percent of any newspaper. Although this was not devised to promote diversity, it could potentially have that effect, although the rule does not appear to be applied rigorously in practice.

In several countries in the region, the historical trend in terms of newspapers was for party political newspapers to develop first, followed only later, if at all, by more independent newspapers. In many countries, including Algeria, Palestine and Jordan, these party political newspapers, or newspapers close to the governing party, continue to play a very significant role in the newspaper sector, to the obvious detriment of diversity.

Despite the lack of regulation, ownership tends to be quite diverse in practice in most countries in the Arab world, due to the way the market happens to have developed. This is not cause for complacency. Instead, it should be a call for action. Experience in other countries has shown that the best time to put in place measures regarding media ownership is before undue concentrations emerge, because after this happens, it can be very difficult indeed to deconstruct concentrated media ownership empires.

Instead of promoting outlet diversity, most countries in the region have in place regulatory regimes that specifically discourage it. Community broadcasting is not developed anywhere in the region and we are not aware of any regulatory systems there that specifically provide for, let alone encourage, it. Even commercial broadcasting is underdeveloped and undermined by regulation in most countries in the region. In some, like Iran and Bahrain, private broadcasting is specifically prohibited. In many others, including Morocco, Jordan and Algeria, private broadcasting has only been authorised very recently and remains in its infancy. In Jordan, television remains a State monopoly while in Egypt radio is a virtual State monopoly. In several countries, including Egypt, Algeria and Morocco, only satellite television stations (and not free-to-air terrestrial television) have been allowed to operate, although they represent a robust market, at least in Egypt.

Rules aimed at promoting content diversity are also largely unknown in the region. In most countries, the news market is heavily dominated by national news, to the detriment of local news, with no regulatory counterweight to, and sometimes even regulatory support for, this unfortunate tendency. At the same time, there has been some movement by some media to try and include more local news among their output.

Instead of promoting diversity, in some countries the mandates of private broadcasters are constrained in ways that undermine diversity. In Morocco, for example, FM radio stations are not allowed to broadcast news. In Jordan, there are

separate licences for broadcasting news, which cost substantially more than non-news licences.

### 3. Regulation of Journalists

#### International and Comparative Standards

##### *Licensing of Journalists*

It is clear under international law that it is not permissible to impose limitations on who may practise as a journalist or to require journalists to belong to a particular association or to be licensed or registered. The UN Human Rights Committee has made it clear that this applies to all types of journalists:

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.<sup>73</sup>

In their 2003 Joint Declaration, the (then) three special international mandates for protecting freedom of expression supported this, stating:

Individual journalists should not be required to be licensed or to register.

There should be no legal restrictions on who may practise journalism.<sup>74</sup>

Similarly, the Inter-American Declaration rules out specific types of entry requirements for the profession of journalism:

Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.<sup>75</sup>

This issue was explored in detail in a 1985 opinion of the Inter-American Court of Human Rights, based on a reference by Costa Rica, which was seeking the Court's views of the legitimacy of a scheme whereby journalists were required to belong to a specific association and where conditions – for example as to age and education – were placed on them.<sup>76</sup> Costa Rica argued that the requirement that journalists belong to the colegio (association) was legitimate for three reasons. First, it was the 'normal' way to regulate professions. Second, it sought to promote higher professional and ethical standards, which would benefit society at large and ensure the right of the public to receive full and truthful information. Third, the licensing

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<sup>73</sup> General Comment No. 34, note 24, para. 44.

<sup>74</sup> Joint Declaration of 18 December 2003. Available at: <http://www.osce.org/fom/66176>.

<sup>75</sup> Principle 6.

<sup>76</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5. Available in English at: [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_05\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf).

scheme would guarantee the independence of journalists in relation to their employers. Costa Rica claimed that all three grounds could be justified as necessary to protect public order, understood broadly as “the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.”<sup>77</sup>

The Court remarked that the organisation of professions through associations could facilitate the development of a coherent system of values and principles, and so contribute to public order. However, it also observed that, at least in relation to the profession of journalism, public order would benefit much more by protecting the free flow of information and ideas than by controlling access to the profession:

Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard ... It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.<sup>78</sup>

Examining the first argument, the Court distinguished between journalism and other professions, noting:

The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. ... This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine – that is to say, the things that lawyers or physicians do – is not an activity specifically guaranteed by the Convention. ... The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of [the right to freedom of expression].<sup>79</sup>

The Court also dismissed the argument that licensing schemes are necessary to ensure the public’s right to be informed, by screening out poor journalists and promoting professional standards, among other things because of the potential for abuse of such a system:

[G]eneral welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare ... A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.<sup>80</sup>

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<sup>77</sup> Para. 64.

<sup>78</sup> Para. 69.

<sup>79</sup> Paras. 72-76.

<sup>80</sup> Para. 77.

The Court then turned to the argument that a licensing scheme would bolster the association and thereby strengthen the profession and help protect journalists defend their rights as against their employers. The Court found that this goal could be accomplished through less intrusive means and hence failed to meet the necessity part of the test for restrictions on freedom of expression:

[I]t is not enough that the restriction be **useful** to achieve a goal, that is, that it can be achieved through it. Rather, it must be **necessary**, which means that it must be shown that it cannot reasonably be achieved through a means less restrictive of a right protected by the Convention. In this sense, the compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention [regarding restrictions on freedom of expression] because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.<sup>81</sup>

### *Accreditation*

Notwithstanding the prohibition on licensing journalists, it is widely accepted that it may be appropriate to provide accreditation to journalists where this is necessary to enable them to gain access to limited space venues, in particular parliament but sometimes also the courts. As the UN Human Rights Committee has stated:

Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.<sup>82</sup>

Similarly, in their 2003 Joint Declaration, the special international mandates stated:

Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.

Accreditation should never be subject to withdrawal based only on the content of an individual journalist's work.

The OSCE has stressed that journalists should not lose their accreditation based on the contents of their writings:

Recalling that the legitimate pursuit of journalists' professional activity will neither render them liable to expulsion nor otherwise penalize them, [member States] will refrain from taking restrictive measures such as withdrawing a journalist's

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<sup>81</sup> Para. 79.

<sup>82</sup> General Comment No. 34, note 24, para. 44.

accreditation or expelling him because of the content of the reporting of the journalist or of his information media.<sup>83</sup>

Different countries take different approaches to the operation of accreditation schemes. In holding that the system in place in Canada, which was run by a private association of journalists, did not meet the standards required by Article 19 of the ICCPR, the Human Rights Committee stated:

[I]ts operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary ... The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent.<sup>84</sup>

An interesting system is in place in the United Kingdom where the Parliament runs its own special accreditation scheme. In parallel to this is the system of issuing press cards, which is overseen by the UK Press Card Authority,<sup>85</sup> a self-regulatory body which issues press cards to professional newsgatherers. The scheme represents a form of cooperation between the Metropolitan Police (the London police force) and professional bodies representing media workers. It was launched in 1992, with the aims of ending what had become a proliferation of different press cards being issued by different groups, and agreement on a universally recognised card.

The Authority is made up of 16 “gatekeepers”, all of which are national trade unions and professional associations representing journalists and other media personnel (employed and freelance). The gatekeepers issue cards to their members and are responsible for ensuring that the conditions are adhered to. There is a set of Press Card Scheme Rules which set standards for the scheme, as well as the cards themselves and the criteria for new gatekeepers. These Rules provide for a governing board, comprised of representatives of each gatekeeper. They also provide for a Gatekeepers’ Committee, which oversees the operation of the scheme.

The definition of eligibility for a card is very broad, as follows:

An Eligible Newsgatherer is anyone working in the UK whose employment or self-employment is wholly or significantly concerned with the gathering, transport or processing of information or images for publication in broadcast electronic or written media including TV, radio, internet-based services, newspapers and periodicals; and who needs in the course of those duties to identify themselves in public or other to official services.<sup>86</sup>

The press card is formally recognised by all police forces in the UK, and *de facto* by other public bodies.

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<sup>83</sup> Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 39.

<sup>84</sup> *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.6.

<sup>85</sup> See <http://www.presscard.uk.com/>.

<sup>86</sup> Press Card Scheme Rules, Rule 1.9.

### *Protection of Sources*

International law provides strong protection for the right of journalists and others who provide the public with information of public interest to refuse to divulge their confidential sources of information. This is recognised as being an important component of the protection of the free flow of information and ideas in society since, if journalists are not able to offer real protection for confidentiality for those who seek it, those individuals are unlikely to approach journalists in the first place and the information they relay would no longer be publicly available. The real interest being protected here is, therefore, the right of the public to seek and receive information and ideas.

The basic rationale for protection of sources was set out very clearly in a case before the European Court of Human Rights, *Goodwin v. United Kingdom*, as follows:

Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.<sup>87</sup>

The right has also been recognised by other authoritative international sources, including the UN Human Rights Committee, which has stated:

States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources. [references omitted]<sup>88</sup>

Protection for confidential sources is in practice strong in democracies around the world.

### Practice in the Region

There is a very strong tradition and belief in many countries in the Arab world that, due to its status as a profession, journalists should be required to belong to a single professional association or union, and there are often also conditions on who may become a member of these associations, beyond a simple requirement to be working as a journalist (such as minimum age, or educational or experience requirements). It is often believed that this is necessary for many of the reasons that

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<sup>87</sup> 27 March 1996, Application no. 17488/90, para. 39.

<sup>88</sup> General Comment No. 34, note 24, para. 45. See also Principle 8 of the Inter-American Declaration and Principle XV of the African Declaration.

were addressed, and rejected, in the case before the Inter-American Court of Human Rights.

At the same time, there are often anomalies in the way these systems are applied. For example, in Egypt, no one who is not a member of the Journalist Syndicate, which is established by law, is legally allowed to practise journalism and newspapers are formally barred from hiring journalists who are not members of the Syndicate. However, only 6,300 of the estimated total number of 15,000 journalists working for the print media are in fact Syndicate members, with the rest being formally in breach of the law.<sup>89</sup> In addition to the formal right to practise as a journalist, members receive very important other benefits, including a significant monthly stipend. There is currently a vibrant debate in Egypt about how to address this situation. A similar situation pertains in Jordan. Even in Lebanon, journalists are formally required to be included on the press roll of journalists developed by the Roll Committee of the Lebanese Press Association, although as in Egypt this is widely flouted in practice.

A less repressive but still problematical approach is taken in Iraq. Membership in the Journalists Syndicate is not formally required by law. However, the Journalist Law provides very significant benefits to members of the Syndicate, including protections against arrest and special procedural protections if arrested or questioned, various payments and social benefits, the right to access information from public bodies, and strong labour protections. As a result, it is difficult for a journalist simply to decide not to be a member or to join another (unrecognised) body. At the same time, this system does provide much-needed benefits to journalists, including legal representation, health care and compensation for being wounded or killed in a terrorist attack, and alternative means should be sought to continue to provide these benefits.

The problems of official control envisaged by the Inter-American Court of Human Rights are clearly manifested in several countries across the Arab world. Many of the legally mandatory associations of journalists have been subject to official influence which ranges from being problematical to cases of outright control, undermining the ability of these associations to represent their members and to stand up for their freedoms. Indeed, this has been an important part of the often comprehensive system of control of the media in many countries in the region.

In most countries in the region, the issue of accreditation effectively flows from membership in the syndicate, with no separate accreditation procedures beyond membership and the right to carry the card that comes with it. It goes without saying that these systems do not meet the international standards noted above. There are, however, some exceptions, including Morocco, Sudan and Mauritania, and some related developments in Tunisia.

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<sup>89</sup> This is an informal estimate for the print media sector only, and the numbers may be even higher, depending to some extent on who you consider to be a journalist.



There is formal legal protection for sources in many countries in the region. However, such protection is rarely absolute, and in some countries it is observed only weakly, or not at all, in practice, while in others it is more respected. In practice this has perhaps caused less problems than it otherwise might have because there is at best a weak tradition in many countries in the region of making confidential disclosures to journalists which would require active source protection.

#### **4. Regulation of the Print Media**

##### International and Comparative Standards

###### *Licensing and Registration*

There is an important distinction to be made, regarding regulation of the print media, between licensing systems – which require the prior authorisation of a regulatory authority or the government, which might be withheld – and registration requirements, which oblige those who wish to publish a newspaper to provide certain information to the regulator before they begin.

It is clear that, under international law, licensing regimes for newspapers are not legitimate. The UN Human Rights Committee has repeatedly expressed concern at licensing requirements for the print media, holding that they constitute a violation of the right to freedom of expression. In 1999, for example, the Committee noted, in respect of Lesotho's regular report:

The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant.<sup>90</sup>

More recently, the Committee stated:

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.<sup>91</sup>

This makes it quite clear that a licensing requirement for the print media is not legitimate.

Many democracies do not impose any sort of formality or condition on establishing a newspaper, on the basis that this is simply not necessary. Indeed, with the advent of the Internet and modern forms of publication, it is challenging even to define

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<sup>90</sup> *Concluding observations of the Human Rights Committee: Lesotho*, 8 April 1999, UN Doc. No. CCPR/C/79/Add.106, para 23.

<sup>91</sup> General Comment No. 34, note 24, para. 39.

what is a newspaper. Objectives such as keeping statistics about newspapers and providing individuals with information about how to obtain legal redress should they be defamed or otherwise harmed by a publication can be achieved in other, less intrusive, ways. In the United Kingdom, for example, only regular newspapers that do not otherwise have any legal form are required to register, and then only with the Registrar of Companies. In practice, this does not apply to the vast majority of newspapers, which are established as corporations, and even for other newspapers this rule has become largely obsolete.

Where States do impose registration requirements on the print media, they must meet certain conditions. As the special international mandates stated in their 2003 Joint Declaration:

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.

Similarly, the African Declaration states:

Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.<sup>92</sup>

Some of the cases decided by international human rights bodies give a sense of the standards to which a registration system should conform. In a case from Belarus, the UN Human Rights Committee noted that a registration requirement was clearly an interference with freedom of expression, which would need to be justified by reference to the three-part test for such restrictions. It rejected the State's claim that it was necessary to impose a registration requirement on a leaflet with a print run of just 200 copies.<sup>93</sup> A case from Poland involved the refusal of the authorities to register two periodicals on the basis that their titles were "in conflict with reality" (the titles were: *The Social and Political Monthly – A European Moral Tribune* and *Germany – a Thousand-year-old Enemy of Poland*). The European Court of Human Rights found a breach of the right to freedom of expression, noting that imposing a substantive condition like this was "inappropriate from the standpoint of freedom of the press."<sup>94</sup>

The various authoritative statements and cases make it clear that while a technical registration system is not *per se* a breach of the right to freedom of expression, it will become a breach if it is either applied too broadly or if substantive conditions are attached to it.

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<sup>92</sup> Principle VIII(1).

<sup>93</sup> *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

<sup>94</sup> *Gaweda v. Poland*, 14 March 2002, Application no. 26229/95, para. 43.

### *Rights of Correction and Reply*

The right of reply is a contentious issue in media law. It is not disputed that the right represents a *prima facie* interference with freedom of expression, which would need to be justified pursuant to the three-part test for restrictions.<sup>95</sup> Some observers see it as justifiable measure which actually improves the free flow of information, by ensuring that the public will hear both sides of the story and by preventing costly defamation suits which drain the resources of media outlets. Others regard it as an impermissible restriction on editorial freedom.

The American Convention on Human Rights requires State parties to introduce either a right of reply or a right of correction. Article 14 states:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

The European human rights system, too, recognises the value of the right of reply. In a 1989 case, the European Commission of Human Rights stated: “[I]n a democratic society, the right of reply constitutes a guarantee of the pluralism of information which must be respected.”<sup>96</sup> On the other hand, the UN Special Rapporteur on Freedom of Opinion and Expression has cautioned against a legally imposed right of reply, and added that the right should be limited to allegedly false facts:

The Special Rapporteur is of the view that if a right of reply system is to exist, it should ideally be part of the industry’s self-regulated system, and in any case can only feasibly apply to facts and not to opinions.<sup>97</sup>

At the domestic level, the US Supreme Court ruled that a mandatory right of reply for the print media is unconstitutional, on the basis that it represents an unwarranted interference in editorial matters:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues

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<sup>95</sup> See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application no. 13010/87 (European Commission of Human Rights) and *Enforceability of the Right to Reply or Correction*, Advisory Opinion to the Government of Costa Rica, 29 August 1986, OC-7/86, Ser. A, No.7 (Inter-American Court of Human Rights).

<sup>96</sup> *Ediciones Tiempo S.A. v. Spain*, Commission Decision (Admissibility), 12 July 1989, Application no. 13010/87. See also European Union Directive 89/552/EEC of 3 October 1989, OJ L 298, 17 October 1989, pp. 23-30, Article 23, prescribing a right of reply in the broadcast sector for all EU Member States.

<sup>97</sup> Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Report of the mission to Hungary, 29 January 1999, E/CN.4/1999/64/Add.2, para. 35.

and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment.<sup>98</sup>

To provide guidance to Member States on this issue, the Committee of Ministers of the Council of Europe adopted a resolution on the right of reply in 1974.<sup>99</sup> It recommends that the right should be recognised, but only for factually incorrect statements, and with the following exceptions:

- i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
- ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
- iii. if the reply is not limited to a correction of the facts challenged;
- iv. if it constitutes a punishable offence;
- v. if it is considered contrary to the legally protected interests of a third party;
- vi. if the individual concerned cannot show the existence of a legitimate interest.

In a later Recommendation, the Committee of Ministers proposed extending the right of reply to Internet news services, but at the same time recognised two additional grounds to refuse to grant the right:

- if the reply is in a language different from that in which the contested information was made public;
- if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.<sup>100</sup>

Not a lot of international attention has been devoted to the issue of the relationship between a right of reply and a right of correction. Inasmuch as a right of correction represents less of an intrusion into editorial freedom, it should be the preferred remedy whenever it suffices to address the problem. This will likely be the case whenever the problem is a direct factual error, while more directed criticism, which cannot be resolved through a mere correction, might warrant a reply.

#### *Complaints Systems and Regulation of Content*

The very nature of the media, which includes an obligation to provide the public with timely information on matters of public interest, means that even the very best journalists will sometimes make mistakes. Furthermore, the pressure of competition for stories and audience share can sometimes lead to unprofessional behaviour. These problems are significantly exacerbated in transitional contexts, such as are found in several countries in the Arab world, where uncertain regulatory systems and a steep professional learning curve are added to the challenges that confront all journalists.

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<sup>98</sup> *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241, 258 (1974).

<sup>99</sup> Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974.

<sup>100</sup> Committee of Ministers of the Council of Europe, Recommendation No. Rec(2004)16 on the Right of Reply in the New Media Environment, adopted 15 December 2004, Principle 5.

It is widely recognised that members of the public should be able to lodge complaints where they are of the view that the media has not acted in a professional manner. Different systems have evolved to meet this need. As the African Declaration makes clear:

Effective self-regulation is the best system for promoting high standards in the media.<sup>101</sup>

Purely self-regulatory systems, by which is meant systems that lack any statutory basis and which are established by the media on a voluntary basis, are in place in many countries. These systems differ, but the vast majority assess complaints against a code of conduct or some other set of pre-established standards, often set by leading members of the media sector to which the system applies. Most also involve a council or other body to decide on complaints, which often includes not only members of the media, but also representatives of the public as a whole.

A good example of a purely self-regulatory system is the German Press Council, a non-profit association. The Council covers all types of print media outlets, including media available only on the Internet, but does not extend to the broadcast media. According to Article 9 of the statutes of the German Press Council of 25 February 1985, it has the following duties:

- to monitor problems in the press and to work towards resolving them;
- to safeguard unhindered access to news sources;
- to produce recommendations and guidelines on journalistic work;
- to fight developments which could endanger free information and the free formation of opinions among the public;
- to investigate and decide upon complaints about individual newspapers, magazines or press services; and
- to regulate editorial data protection.

In performing its duties, the Press Council issues recommendations and guidelines for journalistic work, including the Press Code and the Guidelines for Journalistic Work.

The structures and duties of the German Press Council are governed by its statutes. According to these statutes, the Association of Sponsors of the German Press Council brings together two representatives from each of the four founding journalists' and publishers' associations, namely: a) Bundesverband Deutscher Zeitungsverleger e.V. (BDZV); b) Verband deutscher Zeitschriftenverleger e.V. (VDZ); c) Deutscher Journalistenverband e.V. (DJV); and d) Deutsche Journalistenunion in Ver.di (dju). The Association of Sponsors primarily concerns itself with the legal, financial and personnel decisions of the organisation.

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<sup>101</sup> Principle IX(3).

The body also includes a 28-member Plenary or Member's Assembly, and two Complaints Committees. The General Complaints Committee has two chambers of six members each, and the Complaints Committee for Editorial Data Protection also has six members. All of the members of the various bodies are publishers and journalists. They are proposed by the four sponsor organisations and spend two years in office. The chair for each body changes every two years, rotating among the four sponsor organisations.

In other countries, co-regulatory systems have been put into place. These normally involve statutory bodies in which the media play a dominant or at least very significant role. A good example is the Indonesian Press Council, which is established by law but has its members appointed exclusively by the media. Specifically, three members are appointed by journalists' associations and three by media owners, while another three, representing the general public, are appointed by journalists and owners working together. The Council has only limited powers of sanction, namely to require media to carry statements recognising that they have operated in breach of the rules.

Under international law, while special systems for addressing harmful media content may be legitimate, the imposition of special criminal or civil content restrictions on the media is viewed with great suspicion. This is because the standards of what should or should not be prohibited do not depend on the way in which a particular expression is disseminated, so much as the nature of the speech in question. While dissemination through the media may cause more widespread harm, this should be addressed through the system of remedies, and not through the manner in which the wrong is defined in the first place.

For example, in most countries, defamation is a civil offence, regardless of whether it is committed in the media or through another means of expression, although the remedy of a right of reply is sometimes available for defamation through the media (noting that this remedy is particularly suited to the media). As the special international mandates stated in their 2003 Joint Declaration:

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

### Practice in the Region

In most countries in the region, one is required to obtain permission before publishing a newspaper. Although in some cases these systems are formally classed as registration systems, inasmuch as you are supposed to receive permission to publish as soon as you have filed the necessary information, in practice this is rarely the case. Instead, they are used as gate-keeping systems and as a means to control and to impose substantive conditions on who may operate a print media outlet.

These systems are run by different bodies, but are almost always ultimately under the control of the government. For example, in Bahrain, licensing of newspapers is under the authority of the official Information Affairs Authority (IAA), in Palestine, Kuwait and Lebanon this function is undertaken directly by the Ministry of Information, in Jordan permission is finally granted by the Cabinet, in Algeria it is the prosecutor's office and in Egypt it is the Supreme Press Council, a government controlled body.

In several countries in the region, including Lebanon, Kuwait, Jordan and Egypt, newspapers are subject to a capital deposit requirement, whereby they must deposit an often very substantial sum of money before they may be licensed. In Jordan this is now the same as for other companies but until 2007 the capital deposit required for a daily newspaper was JOD500,000 (approximately USD700,000), an extremely large sum of money, while in Kuwait it is nearly USD1 million.

Otherwise, the formal conditions for establishing a newspaper are often relatively limited. In practice, however, there are often informal conditions. In Egypt, for example, prior to the revolution applications for newspaper licences were vetted by the security establishment. In many countries, rather than refuse applications outright, the authorities simply leave them hanging. This problem was addressed by the Court of First Instance in Jordan, where the Press and Publications Law formally requires a response to an application within 30 days. The Court held that in the absence of a response from the Cabinet, the applicant is free to commence publication.<sup>102</sup>

	Bahrain	Egypt	Jordan	Kuwait	Lebanon	Palestine
Direct government registration	√	X	√	√	√	√
Government controlled body registers	X	√ (Press Council)	X	X	X	X
Capital deposit requirements	√	√	√	√	√	X

Table 2: Registering Newspapers  
 Note: this is just a sample of the countries in the region

In many countries, there are also indirect ways of controlling newspapers. In both Algeria and Egypt, most newspapers are printed on the printing presses of government media outlets, which can be used as a lever of control. In Lebanon, even newspaper vendors are formally supposed to be licensed by the Ministry of Information, while distribution systems are also under government control in Yemen.

<sup>102</sup> Amman Court of First Instance decision No. 2872/2001 of 10 June 2002, upheld on appeal in Court of Appeal decision No. 950/2002 of 29 September 2002.

In many countries in the region, the law formally provides for a right of reply, often in rather broadly defined circumstances. In Egypt, for example, no formal conditions are placed on claiming a right of reply, although a claim may be rejected if it is lodged after 30 days or where the reply itself is illegal. In Jordan, the right of reply applies only in the context of the publication of false or inaccurate information. Where the information relates to an individual, that individual may claim the right regardless of whether or not he or she has been harmed by the error. Where the information relates to a matter of public interest, relevant public authorities may claim a right of reply.

The dominant approach regionally is to apply codes of ethics to individual journalists, rather than to newspapers. While this is not *per se* a breach of the right to freedom of expression, it is problematical because real harm is caused through the editorial decision to publish a story in a newspaper rather than through the actions of an individual journalist. Furthermore, the real power to provide redress, in terms both of publishing replies and/or corrections and of providing financial redress, also rests with the newspaper.

A more serious problem with these systems is that they are normally applied by the same statutory bodies in which membership is required before one may practise as a journalist. In almost all cases, these bodies are not independent of government, although the extent of government influence varies from country-to-country and is often exercised as much through informal as through formal mechanisms. In most cases, the system does not run as a complaints system, providing redress to those wronged by unprofessional media reporting, but simply as an internal system of control. Furthermore, serious sanctions are in many cases available for breach of these rules.

An example is Lebanon, where the system is run by the Disciplinary Committee, which is established jointly by the Lebanese Press Association and the Lebanese Editors Association, neither of which is properly independent of government. The Committee has the power to reprimand a journalist, to suspend him or her for up to two years, or to remove him or her permanently from the press roll, thereby formally banning him or her from practising as a journalist. Similar systems are in place in Egypt and Jordan.

In many cases, the rules in the codes of ethics include inappropriate stipulations. For example, the *Press Code of Ethics* adopted by the Egyptian Supreme Press Council imposes a number of moral obligations on journalists which go beyond the professional standards one would expect to find in such a code. Instead of simply being required to strive to report accurately, journalists are called upon to respect the truth “in a manner that best secures the virtues and morals of the society”, and to show solidarity with other journalists. While these may be virtues one would wish to support, they are not appropriate for inclusion in a regulatory document.



## 5. Regulation of the Broadcast Media

### International and Comparative Standards

There is a significant difference in the ways that the print and broadcast media are regulated in most countries, in part because of the very different ways in which these media are distributed. An important consideration here is that distribution of broadcast signals has traditionally relied on a limited public resource, namely the airwaves. Regulation has thus been justified on the basis both that it is necessary to prevent disorder in the airwaves and that it is legitimate to regulate the exclusive grant of a right to use a public resource. These rationales have been used to justify two common forms of broadcast regulation, namely licensing and regulation of content.

Both rationales are being challenged by modern developments. Although there are still limits, new technologies – including cable and satellite broadcasting and, more recently, digital broadcasting - have significantly reduced pressure on the frequency spectrum in many countries. In due course, although this is just starting to be the case even in the more technologically advanced countries, even television broadcasting will be available over the Internet, thereby essentially doing away with the argument for regulation based on using a public resource.

### *Licensing*

The US Supreme Court set out clearly the need to license broadcasters, at least in a more traditional analogue, terrestrial broadcasting environment:

If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same “right” to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the [guarantee of freedom of expression], aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.<sup>103</sup>

As noted above, it is essential that licensing processes be conducted by a body that is independent of government, for otherwise the process will not promote the overall public interest but, instead, the interests of the government of the day. As also noted above, the licensing process is a key way of promoting diversity in the airwaves, and contributing to diversity should be an explicit goal of the licensing process.

Beyond the goals of independence and diversity, however, it is important that licensing be done in a democratic manner, so as to ensure that the process is fair and gives everyone an equal opportunity to obtain a licence. In addition, it should

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<sup>103</sup> *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al.* No. 2, 395 U.S. 367, 389 (1969).

not be unduly onerous, especially for community broadcasters. As the UN Human Rights Committee has stated:

States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. [references omitted]<sup>104</sup>

The Inter-American Declaration echoes these ideas, stating, in Principle 12:

The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

Similarly, Principle V(2) of the African Declaration states, in part:

[L]icensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting.<sup>105</sup>

In order to ensure fairness and transparency, the process for assessing licence applications should be set out clearly and precisely in law, with a framework of rules provided for in the primary legislation and more detail specified in subordinate rules. This should at least include the following:

- Clear time limits for each step of the process, including the deadline for filing applications and the timeframe within which decisions are expected to be made.
- Details about the nature of the process, which should be open and allow both the applicant and interested members of the public to make representations. The rules should also require the regulator to provide clear written reasons for any refusals, citing clearly the specific legal provisions that were relied upon. Applicants should also have a right to appeal to the courts against any adverse decision by the regulator.
- Details about any fees to be charged should also be included. It is common to charge a fee for processing licence applications, although this is often waived or reduced in competitions for community broadcasting licences. It is also very common to expect broadcasters to pay an annual fee for the use of the frequency, which may be based on a set schedule or on the basis of bids. Once again, different, and far less onerous, rules normally apply to community broadcasters.

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<sup>104</sup> General Comment No. 34, note 24, para. 39.

<sup>105</sup> See also the 2003 Joint Declaration of the special international mandates, which states: “The allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access.”

- The detailed criteria by which competing applications are to be assessed should be set out in the rules. Common criteria include whether the applicant possesses the necessary technical expertise and financial resources to provide the proposed broadcasting programme, as well as the contribution of the new service to promoting diversity. Where there are pre-set technical and financial conditions, these should be stipulated in advance.

In most democracies, political parties are not allowed to hold broadcasting licences. Indeed, in most democracies, broadcasters are required to treat matters of controversy with due balance and impartiality (see below), a condition which would negate the very idea of a political party broadcaster. In the past, religious institutions were also often prohibited from holding licences, although the trend is to relax this rule in light of reduced scarcity in the airwaves. Otherwise, blanket prohibitions based on broadcast applicants' form or nature would likely represent a breach of the right to freedom of expression.

Broadcasting licences come with conditions, which may be general or specific to the licensee. General conditions may include such matters as technical criteria, which would normally apply to a class of licences, a requirement to abide by promises made in the licence application, rules on copyright, licence duration (again normally by class of licence), and a requirement to adhere to a code of conduct and sometimes to positive content rules. Specific conditions may apply to individual licensees. These might, for example, require a licensee to carry a minimum quota of news or children's programming (both of which are aimed at promoting content diversity).

While it is legitimate to impose certain conditions on broadcasters, based largely on the ideas of promoting diversity and fairness in the system, these are still restrictions on freedom of expression, which therefore need to be justified. Unduly onerous conditions are, therefore, not legitimate.

### *Regulation of Content*

The approach taken to regulation of content in broadcasting is again quite different from the print media sector. Whereas the former, in democracies, takes the form of either self- or co-regulation, for the broadcast media the model is more of a range from co- to statutory regulation. Independence of the regulator is important in relation to licensing but it is absolutely imperative if the regulator is to be involved in content regulation. Giving a body which is subject to government influence or control the power to regulate content is, fairly obviously, an invitation to interfere.

It is common in many countries to impose certain positive obligations on broadcasters, which may be either general or specific in nature. The idea behind these obligations is to promote content diversity or, to put it differently, to ensure that the public receives a range of different types of programming through the airwaves. In many countries, broadcasters are required to carry a certain amount of domestic or regional programming. As noted earlier, the European Convention on

Transfrontier Television<sup>106</sup> requires 50 percent of all programming to be of European origin. It is usually cheaper to purchase and even translate foreign programming than to produce original programming; the rationale behind domestic content requirements is to counteract the commercial incentives against producing rather than just buying content.

Another general positive obligation commonly imposed on broadcasters is to carry local programming, especially in larger States. This represents an attempt to ensure that audiences can access news and other programming about local, as opposed simply to national, events. Once again, this is to counteract the fact that it is more expensive to produce different local programmes than to provide uniform national programming. In the United Kingdom, for example, local radio stations must provide at least seven hours of local content a day, which must be produced within the geographic area for which the service has been licensed. In addition, local news bulletins must be broadcast throughout the weekday daytime schedule.

In many countries, broadcasters are also required to carry programming produced by independent producers. The idea behind this is to promote wider access to the airwaves and, as a result, greater content diversity. Just because licences are normally allocated to individual businesses does not mean that those businesses should produce all of the content that goes out over their station. Requiring broadcasters to carry independent productions broadens the production base, and leads to a more intense competition of ideas and innovation in the sector. The European Convention on Transfrontier Television requires all broadcasters to carry at least 10 percent independent productions. Public broadcasters are often subject to higher independent production quotas.

In most democracies, broadcasters are required to respect standards set out in a code of conduct developed either as part of a co- or statutory regulation system. These codes, like their counterparts in the print media sector, address a range of programme issues and often form the basis of a complaints system. A difference in the broadcasting sector is that the codes are often also used as the basis of *suo moto* monitoring by the oversight body. Another difference is that the sanctions which may be applied for breach of the rules in the codes often ranges from light sanctions such as warnings and requirements to carry a message acknowledging the breach to more serious measures, such as fines and even possibly licence revocation.

A good example of a co-regulatory system is South Africa, where the statutory regulator, ICASA, has the formal power to regulate broadcasters but the legislation also formally grants it the power to recognise other oversight bodies. As a result, in functional terms, the Broadcasting Complaints Commission of South Africa (BCCSA)<sup>107</sup> undertakes content regulation. The BCCSA was created by the National

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<sup>106</sup> Note 72.

<sup>107</sup> See: <http://www.bccsa.co.za/>.

Association of Broadcasters (NAB),<sup>108</sup> the industry body, in 1993 and, although it continues to be funded by NAB, it is functionally independent of it. BCCSA members are appointed by an independent panel chaired by an independent person (usually a retired Judge of the Court of Appeal), along with other persons appointed at an AGM of BCCSA. At the insistence of the regulator, BCCSA's constitution was amended so that all candidates for membership are nominated by members of the public.

Statutory systems exist in many democracies. An example is France, where regulation of broadcasting is undertaken by the Conseil supérieur de l'audiovisuel (CSA), an independent statutory body (autorité administrative indépendante), established through 1989 amendments<sup>109</sup> to the main 1986 Law relating to freedom of communication.<sup>110</sup> The CSA has adopted various codes relating to different aspects of broadcasting and applies them directly.

### Practice in the Region

In contrast to established international practice, the rules relating to licensing of broadcasters in the Arab world, where they exist at all, tend to be less developed and clear than the analogous systems for the print media sector. An absence of clear rules largely leaves licensing decisions to the discretion of the authorities, which has been relied on extensively as a mechanism for control across the region.

In Egypt, for example, the rules regarding licensing of broadcasters by the General Authority for Investment (GAFI) are not specifically tailored to the broadcasting sector. As a result, GAFI, a government controlled body, has wide latitude to grant or refuse broadcasting licences. Similarly, in Jordan, the Council of Ministers has broad discretion when granting licences. The law specifically allows them to do so without providing reasons, and the courts have upheld their broad discretion to refuse a licence, on the somewhat improbably grounds that this is in the overall public interest.

In terms of the regulation of content in broadcasting, there are no independent production requirements or even rules mandating minimum quotas for domestic content in countries in the Arab world. At the same time, the preference for Arabic language broadcasting operates as a relatively effective means of ensuring a high proportion of at least regional programming.

Co-regulatory approaches towards content regulation are unknown in the broadcasting sector in the region, and even statutory regulation of the sort described above is largely unknown. Most countries do not have in place complaints systems, whereby members of the public who feel that their rights have been

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<sup>108</sup> <http://www.nab.org.za/>.

<sup>109</sup> Law No. 89-25 of 17 January 1989. The changes introduced in 1989 were incorporated into the 1986 Law. References to the 1986 Law will be as amended.

<sup>110</sup> Law No. 86-1067 of 30 September 1986, as subsequently modified. Available online, in French, at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20101203>.

breached by broadcasters may approach an oversight body for a decision on the matter.

Instead, in many countries in the Arab world there are unwritten red lines as regards both politically and socially unacceptable content over the airwaves. These standard may also be reflected in clauses in licences or even distribution agreements, for example with satellite or cable distributors. Broadcasters who challenge these redlines face a variety of consequences, including non-renewal of their licences and direct pressure from the authorities, including through the allocation of advertising. In many countries in the region, broadcasters' advertising revenues depend in important ways on support, or at least the absence of opposition, from government. This is both because government is itself a major advertiser and due to the close relations between government and large businesses and the consequent ability of government to influence where those businesses place their advertising.

There are a number of regional examples of codes of conduct which apply to broadcasters, such as the code developed by the Egyptian Radio and Television Union (ERTU), the public broadcaster in that country. But, at least in that case, application of the code is sporadic, at best, and it cannot be said to represent a real set of standards for broadcasting in any proper sense of that term.

One exception to this is Iraq, where the Communications and Media Commission has issued a number of different rules and codes dealing with a range of broadcasting issues including licensing, professional practices, content issues (such as accuracy and balance, coverage during elections and incitement to hatred), and how complaints will be handled.

As noted above, private terrestrial broadcasting is limited in the region. Where it does exist, it may be subject to special forms of control. For example, in Lebanon, there is still prior security screening of many terrestrial programmes, and prior censorship of satellite programmes was only brought to an end with a 16 April 1997 decision of the State Shura Council suspending the ministerial decision under which this form of censorship had operated. Post distribution administrative controls are still in place and the Minister of Information can suspend a broadcaster for up to three days for a first breach and the Council of Ministers may impose a suspension of between three days and three months for a second breach.

## **6. Public Service Broadcasting**

### International and Comparative Standards

Broadcasters which are publicly owned exist in most countries around the world. Historically, in many countries, these broadcasters have often been subject to government control. The idea of public service broadcasting posits another approach: publicly owned broadcasters which operate independently of

government control, and which serve the wider public interest, complementing and extending the services offered by commercial broadcasters, and thereby contributing to diversity in the media.

The main reason why independence is so important for public broadcasters has been elaborated on eloquently by the Supreme Court of Ghana: “[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.”<sup>111</sup> As regards the governing body, the National Media Commission, the Ghanaian Supreme Court stated that it was their role “to breathe the air of independence into the state media to ensure that they are insulated from Governmental control.”<sup>112</sup>

This vision of independent public broadcasting is clearly supported by international law, as is clear from the following quote from the UN 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. They should provide funding in a manner that does not undermine their independence. [references omitted]<sup>113</sup>

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 Declaration of Sana’a calls on the international community to provide assistance to public broadcasters only where they are independent and calls on individual States to guarantee such independence.<sup>114</sup> The 1997 Declaration of Sofia notes the need for state-owned broadcasters to be transformed into proper public service broadcasting organisations with guaranteed editorial independence and independent supervisory bodies.<sup>115</sup>

Similarly, in their Joint Declaration of 2010, the special international mandates expressed concern about political “influence or control” over public broadcasters, which results in them serving “as government mouthpieces instead of as independent bodies operating in the public interest.”<sup>116</sup>

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<sup>111</sup> *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

<sup>112</sup> *Ibid.*, p. 13. See also *National Media Commission v. Attorney General*, 20 January 2000, Writ No. 2/96 (Supreme Court of Ghana).

<sup>113</sup> General Comment No. 34, note 24, para. 16.

<sup>114</sup> Resolution 34 adopted by the General Conference at its twenty-ninth session (1997). Available at: [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=5351&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=5351&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>115</sup> Resolution 35 adopted by the General Conference at its twenty-ninth session (1997), Clause 7. Available at: [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=5352&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=5352&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>116</sup> Adopted 3 February 2010.

This principle finds support in statements by regional human rights bodies as well. The African Declaration highlights the importance of independence for public broadcasters, calling for State and government controlled broadcasters to be transformed into public service broadcasters.<sup>117</sup> The most comprehensive such statement is Recommendation (1996)10 on the Guarantee of the Independence of Public Service Broadcasting, passed by the Committee of Ministers of the Council of Europe,<sup>118</sup> which was followed by a Declaration on the same issue ten years later.<sup>119</sup> The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasters, and the recommendation provides detailed guidance on how this is to be achieved in practice.

The European Court of Human Rights has also held that the right to freedom of expression imposes a positive obligation on States to protect the independence of public broadcasters, so as to ensure that they can serve the public's diverse information needs, stating:

Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.<sup>120</sup>

In practical terms, protecting the independence of public broadcasters is achieved in many of the same ways as protecting the independence of broadcast regulators, namely through measures to ensure that their governing bodies and funding are independent.

Another key means of promoting independence, which does not apply in the case of regulatory bodies, is through protection for editorial independence. Editorial independence refers to the idea that editorial decisions are made by professional staff – and ultimately by senior editors – rather than governing bodies. In practice, this is promoted by ensuring a clear separation between the governing body, which has overall responsibility for the organisation, and managers and editors, who have responsibility for day-to-day and editorial decision-making. The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision. This approach erects a two-tier structure to protect independence, composed of a governing body, which

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<sup>117</sup> Principle VI.

<sup>118</sup> Adopted 11 September 1996.

<sup>119</sup> Declaration of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in the member states, 27 September 2006.

<sup>120</sup> *Manole and others v. Moldova*, 17 September 2009, Application no. 13936/02, para. 101.



oversees the work and reports to parliament, (i.e. acts as an interface between the organisation and top-level accountability bodies) and the management of the organisation itself.

A number of international statements reflect these ideas of structural independence. Thus, the African Declaration calls for public broadcasters to be accountable to the public through the legislature, and also states:

- 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.<sup>121</sup>

Resolution No. 1: Future of Public Service Broadcasting of the 4<sup>th</sup> Council of Europe Ministerial Conference on Mass Media Policy<sup>122</sup> reiterates these principles, stating:

Participating states undertake to guarantee the independence of public service broadcasters against political and economic interference. In particular, day to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.

The independence of public service broadcasters must be guaranteed by appropriate structures such as pluralistic internal boards or other independent bodies.

Independence does not mean lack of accountability, and in many democracies accountability is primarily through the governing board to the public, not the government. In most cases, this involves the submission of an annual report, often to parliament, as well as more direct accountability systems, such as public surveys and direct stakeholder meetings.

Another way of ensuring independence is to give public broadcasters clear public interest mandates, against which their performance can be measured. The Council of Europe has adopted a Recommendation specifically on the issue of the mandate of public service broadcasters. Among other things, this identifies providing “a reference point for all members of the public, offering universal access” and “a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals” as key public service broadcasting roles.<sup>123</sup> The specific nature of this mandate will vary from country to country, depending on local needs and interests.

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<sup>121</sup> Principle VI.

<sup>122</sup> See European Ministerial Conferences on Mass Media Policy: Texts Adopted, Council of Europe Document DH-MM (2006) 4. Available at: [http://www.coe.int/t/dghl/standardsetting/media/doc/DH-MM\(2006\)004\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/DH-MM(2006)004_en.pdf).

<sup>123</sup> Recommendation Rec(2007)3 of the Committee of Ministers of the Council of Europe to member states on the remit of public service media in the information society, adopted 31 January 2007, clause I(1).

Many public broadcasters are also required to be balanced and impartial, particularly in relation to their news and current affairs programming. Thus, the African Declaration calls for public service broadcasters to be under an “obligation to ensure that the public receive adequate, politically balanced information”,<sup>124</sup> Resolution No. 1 states that the missions of public broadcasters should include providing “impartial and independent news, information and comment”,<sup>125</sup> and Council of Europe Recommendation (1996)10 calls for the legal framework to require public broadcasters to “ensure that news programmes fairly present the facts and events and encourage the free formation of opinions.” Furthermore, they should be compelled to broadcast official messages only in exceptional circumstances.<sup>126</sup>

If public broadcasters are to be able to fulfil a true public service mandate, they need to benefit from public funding. It is not realistic to call on these broadcasters to provide special services and functions, and yet not to provide them with the wherewithal to do so. At the same time, true independence for public broadcasters is possible only if funding is secure from arbitrary government control. In particular, protecting the structural independence of the governing bodies of public broadcasters is unlikely to be effective if the government can exert pressure through its control over the funding which is available to them.

In response to this threat, Resolution No. 1 calls for an “appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions.” The African Declaration states: “public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.”<sup>127</sup>

Recommendation (1996)10 of the Council of Europe essentially reiterates the general statement on funding in Resolution No. 1. It further notes that funding arrangements should not be used “to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy” of public service broadcasters. The level of funding should be set after consultation with the public broadcaster, and take into account trends in the costs of its activities. Furthermore, payment should be effected in a manner which “guarantees the continuity of the activities” of the broadcaster and allows it to “engage in long-term planning”.<sup>128</sup>

These statements reflect the idea that public service broadcasters should be able to count on a degree of reliability in the allocation of their funding, without which it is difficult to plan their activities, maintain a stable workforce and adapt to new

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<sup>124</sup> Principle VI.

<sup>125</sup> Principle II.

<sup>126</sup> Principle VI.

<sup>127</sup> Principle VI.

<sup>128</sup> Principle V.

technologies. This suggests that they need longer-term, multi-year funding allocations.

In most cases, public service broadcasters work on a mixed funding model, whereby some of their funding comes from public sources and some from commercial activities, including advertising. Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe refers to the following possible sources of funding:

The funding of public service media may be ensured, through a flat broadcasting licence fee, taxation, state subsidies, subscription fees, advertising and sponsoring revenue, specialised pay-per-view or on-demand services, the sale of related products such as books, videos or films, and the exploitation of their audiovisual archives.<sup>129</sup>

There are pros and cons to each of the various sources of funding. A license fee has the advantage of being more stable and less susceptible of government interference, although the government normally sets the rate of the license fee. At the same time, license fees may be difficult and/or costly to collect and, where they are not already in place, they may be politically difficult to introduce because they are not likely to be very popular. In addition, the high visibility of a general charge may put pressure on the public broadcaster to compete for ratings, in order to justify the general charge, rather than to concentrate on quality and diversity. Direct government grants are less associated with these pressures, but it is far more difficult to insulate them from political influence.

Practice in the Region

As has already been noted, public broadcasters remain extremely dominant in countries throughout the Arab world, in some cases as monopolies, in other cases as monopolies in the free-to-air terrestrial broadcasting sector or parts of that sector (i.e. television and/or radio), and in other cases alongside competing commercial broadcasters. Exceptions are Lebanon and Palestine, where the commercial broadcast media are more dominant. In other countries, including Jordan and Egypt, public broadcasters have come under heavy competition from private satellite television stations.

This dominance of public players also extends in many countries to the print media sector. In countries such as Egypt, Morocco, Algeria and Bahrain, public newspapers have traditionally been very dominant and continue to play a strong role in the sector. In Jordan, in a slightly alternative approach, the government has shares in the two largest dailies. In many countries in the region, the main or only news agencies are also publicly owned.

	Algeria	Bahrain	Egypt	Lebanon	Morocco	Palestine
Government						

<sup>129</sup> Para. 14.

broadcasting is dominant	√	√	√	X	√	X
Private broadcasting is dominant	X	X	X	√	X	√
Strong government newspapers	√	√	√	X	√	X

Table 3: Public Media

Note: this is just a sample of the countries in the region, most of which have dominant public media

If governments in the region have maintained extensive control over private broadcasters either directly or through government controlled regulators, they have maintained even closer control over public media and public broadcasters in particular. Throughout the region, these have largely served as mouthpieces of government, rather than as independent public service broadcasters. In almost all cases, the government appoints or has direct representation on the boards of these bodies, and often also appoints their chief executive officers. In addition, the government normally has extensive access to them both directly (i.e. in terms of its ability to receive direct coverage of its statements and activities) and in terms more generally of positive media coverage.

This model has been challenged in Tunisia and Egypt in the aftermath of their revolutions, when the public broadcasters and public print media had to make more of an effort to report objectively and in the public interest. This has been relatively short-lived, however, especially in Egypt, where the government has again asserted control over the public broadcaster, including through the appointment of leading staff who support the government.

In most cases, public broadcasters in the Arab world are funded directly through government grants. This is another way in which their independence is undermined.

## ***Part C: Other Rules***

### **7. Right to Information**

#### International and Comparative Standards

The right to access information held by public bodies was not yet recognised as a human right when the UDHR and ICCPR were adopted. However, subsequent developments have led to the recognition of this right as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to 'seek' and 'receive' information and ideas. This was highlighted early on by the UN Special Rapporteur on Freedom of Expression, who stated in his 1998 Annual Report: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information,

particularly with regard to information held by Government in all types of storage and retrieval systems. ...”<sup>130</sup>

Since 1999, the special international mandates on freedom of expression have repeatedly recognised the right to information. Their 1999 Joint Declaration included the following statement:

Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.<sup>131</sup>

Their 2004 Joint Declaration included a significant focus on the right to information, stating, among other things:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>132</sup>

The statement went on to elaborate in some detail on the specific content of the right.

Around the same time, declarations on freedom of expression or specifically on the right to information were adopted by all three regional systems for the protection of human rights, in the Americas, Africa and Europe. The Inter-American Declaration unequivocally recognises the right to information stating, in paragraph 4:

Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

The right to information was similarly recognised in both the African Declaration<sup>133</sup> and in Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents,<sup>134</sup> which is devoted entirely to the issue.

Formal recognition of the right to information by international courts came a little bit later. The first such court to do so was the Inter-American Court of Human

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<sup>130</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

<sup>131</sup> 26 November 1999. Available at: <http://www.osce.org/fom/66176?page=1>.

<sup>132</sup> Adopted on 6 December 2004. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.

<sup>133</sup> Principle IV.

<sup>134</sup> 21 February 2002. It should be noted that this document focuses more on the content of the right to information than on specifically recognising it as a human right.

Rights, in the 2006 case of *Claude Reyes and Others v. Chile*.<sup>135</sup> In that case, the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the ACHR, included the right to information. In spelling out the scope and nature of the right, the Court stated:

In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.<sup>136</sup>

It took a few more years but, in April 2009, the European Court of Human Rights followed suit, recognising a right to information based solely on Article 10 of the ECHR, which guarantees the right to freedom of expression.<sup>137</sup> Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 protects the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide it was a legitimate restriction on freedom of expression).

The UN Human Rights Committee was relatively late to recognise clearly the right to information. However, in its 2011 General Comment on Article 19 of the ICCPR it did just this, stating:

Article 19, paragraph 2 embraces a right of access to information held by public bodies.<sup>138</sup>

### Practice in the Region

Only three countries in the Arab world – namely Jordan (2007), Tunisia (2011) and Yemen (2012) – have adopted right to information laws. According to the RTI Rating developed by the Centre for Law and Democracy and Access Info Europe, which is an established system for assessing the quality of right to information laws, the Jordanian law is very weak (56 points out of a possible 150, and 88<sup>th</sup> place globally out of 93 countries with right to information laws), the Tunisian law is more middle of the pack (89 points, tied for 39<sup>th</sup> place) and the Yemeni law is quite strong (105 points, tied for 18<sup>th</sup> place).

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<sup>135</sup> *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151.

<sup>136</sup> *Ibid.*, para. 77.

<sup>137</sup> *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

<sup>138</sup> General Comment No. 34, note 24, para. 18.

Longstanding efforts in Palestine and Lebanon have yet to result in the adoption of right to information legislation. On the other hand, the 2011 Moroccan Constitution guarantees the right to information and the government there recently launched a consultation on a draft law. In Egypt, as well, the new constitution adopted in December 2012 guarantees the right to information and the government has held a public consultation in relation to a draft right to information law it is currently developing. It would appear that other countries in the region are not moving to adopt these sorts of laws.

In all countries in the region, there are vastly overbroad secrecy laws. These range from archival laws which impose set periods of secrecy on all information held by public bodies, for example of thirty years, to penal codes, to dedicated secrecy laws, to laws imposing professional secrecy obligations on all civil servants. These laws often provide for very severe sanctions for breach of their provisions, including long prison sentences.

	Egypt	Jordan	Morocco	Tunisia	Yemen
RTI Law		√		√	√
Constitutional guarantee	√	X	√	X	X
Advanced draft law	√		√		

Table 4: Right to Information

Note: countries not included do not have any of the three types of rules listed

Given these broad secrecy regimes, the way in which right to information laws in the region relate to other laws becomes very important. The Jordanian law preserves secrecy provisions in other laws, largely undermining its impact. The Tunisian law overrides most other laws, with a couple of exceptions, while the Yemeni law overrides other inconsistent laws.

Another hallmark of a strong right to information law is the ability to appeal refusals to grant access to an independent oversight body. Both the Jordanian and Yemeni laws provide for such a body, but the Jordanian one is subject to extensive government control, while the Yemeni body is more structurally independent. There are moves underway in Tunisia to put in place such a body.

## 8. Civil Restrictions

### International and Comparative Standards

This is a complex area and each specific type of restriction on freedom of expression has its own characteristics. Some of the leading international standards for two types of restrictions on freedom of expression – namely to protect reputation (defamation laws) and privacy – are outlined below. A key international principle here is that where the civil law will provide adequate protection, it is unnecessary to resort to the criminal law to protect the interest.

### 1. Defamation

The protection of reputation through defamation laws is one area where it is unnecessary to use the criminal law, although criminal defamation laws remain in place in many countries. As the UN Human Rights Committee has put it:

The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.

...

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. [references omitted]<sup>139</sup>

In their 2002 Joint Declaration, the special international mandates put it even more clearly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.<sup>140</sup>

A large number of defamation cases have come before international courts and a number of principles can be drawn both from these cases and from other authoritative international statements. In their 2011 General Comment, the UN Human Rights Committee stated:

Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should **include such defences as the defence of truth** and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, **a public interest in the subject matter of the criticism should be recognized as a defence**. Care should be taken by States parties to **avoid excessively punitive measures and penalties**. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. [references omitted, emphasis added]<sup>141</sup>

The African Declaration supports the idea that sanctions should not be excessive. Regarding public figures, it posits a slightly different test, essentially calling for a defence of reasonable publication.<sup>142</sup> The 2000 Joint Declaration by the special

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<sup>139</sup> General Comment No. 34, note 24, paras. 42 and 47 (in part).

<sup>140</sup> 10 December 2002.

<sup>141</sup> General Comment No. 34, note 24, para. 47 (in part).

<sup>142</sup> Principle XII(1).



international mandates contains the most detailed single statement on standards for defamation laws, as follows:

At a minimum, defamation laws should comply with the following standards:

- the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
- defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed;
- the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- no one should be liable under defamation law for the expression of an opinion;
- it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and
- civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.<sup>143</sup>

Once again we see the concern with criminal defamation, undue protection for public figures and excessive sanctions, as well as a call for defences of truth and of reasonable publication, albeit applicable more broadly to all statements on matters of public concern, not just statements about public figures. This statement also rules out defamation cases in defence of symbols or public bodies and calls for absolute protection for the expression of opinions.

## 2. *Privacy*

Two international standards are of particular relevance for privacy. First, the concept must be defined in an appropriate manner. In their seminal piece on the topic in 1890, Warren and Brandeis defined privacy as the “right to be left alone”.<sup>144</sup> International courts have often avoided attempts to define the concept. For example, the European Court of Human Rights has stated: “The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’.”<sup>145</sup> However, it should be defined narrowly when it comes into conflict with the freedom of expression rights of third parties. For example, many right to information laws expressly exclude information concerning the work-relating functions of an individual from their exceptions for privacy.

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<sup>143</sup> 30 November 2000.

<sup>144</sup> “The Right to Privacy” (1890) 4 *Harvard Law Review* 193, p. 195.

<sup>145</sup> *Niemietz v. Germany*, 16 December 1992, Application no. 13710/88, para. 29.

Second, and even more important, when the right to freedom of expression comes into conflict with privacy, decision-makers, including courts, should assess the overall public interest in protecting privacy against the interest in allowing the expression. This is reflected in Principle 9 of the Inter-American Declaration, which states:

Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest.<sup>146</sup>

The European Court of Human Rights has provided a reasonably exhaustive elaboration of the principles to be taken into account in balancing freedom of expression and the protection of privacy. The first of these is the extent to which the publication contributed to a matter of public interest, which depends on all of the circumstances. Other factors referred to by the Court, which largely appear to be an elaboration of the first, public interest, criterion, including the following:

- the degree of fame of the person involved and the subject of the report;
- the prior conduct of the persons involved;
- the content, form and consequences of the publication; and
- the circumstances in which the alleged invasion of privacy took place.<sup>147</sup>

#### Practice in the Region

The dominant approach towards restrictions on content in the Arab world remains a criminal one, with civil restrictions taking a distinctly second place. In a number of countries, including Kuwait, Jordan and Egypt, there have been relatively high-profile moves to eliminate some or all of the criminal provisions from the press laws. While welcome, this is ultimately not very useful where general criminal provisions, which also apply to the media, remain in place.

Defamation, in particular, remains a criminal offence throughout the region, with few if any developed civil defamation systems in place. In many countries in the region, (criminal) defamation laws provide special protection for officials. In those countries which are governed by monarchs, it is common to provide them with special protection against criticism; indeed, criticism of ruling monarchs is effectively a redline in many countries in the region. As an example, the 2006 Press and Publications Law of Kuwait, one of the less repressive countries in the region, rules out criticism of the Emir, even though this law established some important protections for the media. A similar rule is found in the 2002 Press and Publications Law of Bahrain.

In Lebanon, pursuant to Article 387 of the Penal Code, it is a defence to a defamation charge involving a public figure if the statement is proven to be true, and in some cases courts have admitted analogous public interest defences. However, in

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<sup>146</sup> See also Principle XII(2) of the African Declaration.

<sup>147</sup> *Von Hannover v. Germany (No. 2)*, 7 February 2012, Applications nos. 40660/08 and 60641/08, paras. 109-113.

Lebanon, at least, the rule is not consistently applied, in particular in cases involving the president and army.

	Dubai	Kuwait	Lebanon	Morocco	Qatar	Tunisia
Data protection law	√ (limited)	X	X	√	√ (limited)	√
Criminal defamation	√	√	√	√	√	√
Blasphemy law	√	√	√	√	√	√

Table 5: Civil/Criminal Rules

Note: this is only a sample of the countries in the region, all of which have criminal defamation and blasphemy laws

There is limited protection for privacy in the region. Only Morocco and Tunisia have proper data protection laws, although Qatar and Dubai have limited scope data protection regimes for their financial centres. All three of the right to information laws in the region, namely in Jordan, Tunisia and Yemen, recognise privacy as an exception to the right of access. There has been little in the way of legal accommodation between freedom of expression and privacy, largely because of the high degree of deference in the media for privacy.

## 9. Criminal Restrictions

### International and Comparative Standards

Given the very serious sanctions associated with criminal proscriptions on speech, extreme care must be taken to ensure that they are not applied in a manner which unduly restricts freedom of expression. A particular risk here is that, to avoid any possibility of receiving a serious criminal sanction, individuals will steer well clear of the zone of prohibition, avoiding even protected speech, a phenomenon which is sometimes referred to as the chilling effect.

At the same time, certain expressions pose such a serious risk of harm to the general public interest that they may be the subject of criminal proscriptions. It is generally accepted that States may limit speech to protect equality, security and public order, public morals and the administration of justice. Each of these is addressed in turn below.

### *Protecting Equality and Hate Speech Rules*

Article 19(3) of the ICCPR allows States to restrict freedom of expression in certain limited circumstances, but the ICCPR does not generally require States to restrict speech. One exception to this is the obligation on States to prohibit hate speech, in accordance with Article 20(2) of the ICCPR, which states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It seems clear that while States must prohibit speech in accordance with this provision, they may not go beyond the parameters of Article 20(2) in prohibiting speech to protect equality. In other words, Article 20(2) defines precisely what States must prohibit in this area.

The term 'advocacy' in Article 20(2) has been understood as meaning that the person acted with the intent of inciting to hatred, an important limitation on the scope of legitimate hate speech prohibitions, which is consistent with general principles of criminal law. Incitement has been interpreted as requiring a very close nexus between the speech and the prohibited outcome. Only incitement to discrimination, violence and hostility may be prohibited, and the latter should be understood as an extreme emotion that goes well beyond mere prejudice or stereotyping.

In a 2001 Joint Statement on Racism and the Media, the special international mandates set out a number of conditions which hate speech laws should respect:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.<sup>148</sup>

#### *Protecting Security and Public Order*

It is incumbent on States to safeguard national security and public order, failing which they would not be in a position to protect human rights or democracy itself. At the same time, abuse of this duty has been rife in many States around the world, and particularly in States in the Arab world. This is exemplified well by the long-standing states of emergency in many countries in the region, such as Egypt, where an emergency was in place for the entirety of the Mubarak regime.

International courts and leading commentators have applied three main measures to prevent abuse of national security and public order rules. First, they have insisted that these concepts, and national security in particular, not be defined in an unduly broad manner. The UN Human Rights Committee, for example, has stated:

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

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<sup>148</sup> 27 February 2001.

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. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.

Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities. [references omitted]<sup>149</sup>

Second, they have insisted on a clear intent requirement, consistently with basic criminal law principles. The European Court of Human Rights has, for example, stated in a case involving a conviction for publishing a poem:

[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>150</sup>

Third, they have insisted on a very close causal relationship, or close nexus, between the expression and the risk of harm. In this regard, Principle XIII(2) of the African Declaration states:

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.

International law does allow for the proclamation of states of emergencies in certain limited circumstances, as defined by Article 4(1) of the ICCPR, and for the derogation from certain rights, including the right to freedom of expression, during emergencies. However, Article 4(1) sets very clear conditions on when emergencies may legitimately be declared, including the following:

- Emergencies may only be proclaimed in circumstances which “threaten the life of the nation”.
- States of emergency must be officially proclaimed.
- Derogations may only limit rights to the extent strictly required by the circumstances and may never be applied in a discriminatory way.

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<sup>149</sup> General Comment No. 34, note 24, paras. 30 and 46.

<sup>150</sup> *Karataş v. Turkey*, 8 July 1999, Application no. 23168/94, para. 52.

- States imposing derogations must inform other States Parties through the UN Secretary-General of the rights to be limited and the reasons for any limitations.
- Derogating States must inform other States Parties upon the termination of any derogations.

### *Morals*

Most States have in place certain restrictions on freedom of expression to protect moral, such as rules on obscenity. While it is accepted that what constitutes an appropriate limitation on freedom of expression to protect morals does vary from society to society, at the same time there are limits to this. As the UN Human Rights Committee has stated:

The Committee observed in general comment No. 22, that “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. [references omitted]<sup>151</sup>

A particular issue here is the legitimate scope of laws which aim to protect the religious sensitivities of believers. Many democracies no longer have blasphemy laws on the books and in others these laws have not been used for many years. This is an issue which has received widespread attention in the Arab world, in particular in recent years. It has also received a lot of attention at the United Nations, with active debates over a series of resolutions adopted by the General Assembly and Human Rights Council on defamation of religion.

It is becoming increasingly clear that while international law does provide protection to believers against incitement to hatred against them as individuals, in accordance with Article 20(2) of the ICCPR, it is not legitimate to protect religions, as such. Perhaps the clearest statement on this is found in the recent General Comment on Article 19 adopted by the UN Human Rights Committee:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith. [references omitted]<sup>152</sup>

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<sup>151</sup> General Comment No. 34, note 24, para. 32.

<sup>152</sup> *Ibid.*, para. 48.

While this runs counter to the practice in countries in not only the Arab world but also in some other regions, as well as to the sentiment of many people in those regions, it is clear that this is the only position that is compatible with non-discrimination, which is a fundamental human right. In particular, non-believers and those with different religious beliefs have the same right to articulate their views as those who belong to established religions, and the right of all in this area can only be respected by avoiding laws which protect particular religious beliefs. It may be noted that this in no way undermines the right to freedom of religion since, in the absence of incitement to discrimination, hatred or violence, one may practise one's religion regardless of what others happen to say or think about it.

### *The Administration of Justice*

It is well established under international law that court hearings should be open to the public. Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In most cases, the public interest in open justice outweighs privacy interests although, as this provision suggests, privacy may be given priority in cases involving children.

Two other interests come up in this context. The first, and more important, is protection of the impartiality of the judicial system. It is clearly legitimate to prohibit certain types of expressions to this end, such as intimidating witnesses, acting in a manner which disrupts court processes or lying to the court.

A more difficult issue arises regarding the presumption of innocence in criminal trials. This is an important human right, which merits strong protection. At the same time, the presumption of innocence does not mean that the media may be prevented from commenting on ongoing criminal trials. In this context, the European Court of Human Rights has noted:

Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large.

Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings

contributes to their publicity and is thus perfectly consonant with the requirement ... that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. [references omitted]<sup>153</sup>

Courts in many countries have been somewhat trigger happy in applying this rule, without taking into account the real extent to which media reporting may in fact sway the outcome of a case. One relevant factor here is whether the case is being heard by a judge or judge and jury, with the presumption being that juries are more prone to be affected by media reporting. Another consideration is the extent to which the court can counteract the effects of media reporting, taking into account the importance of allowing free coverage of trials, for example by sequestering the jury. Finally, one should not underestimate the power of juries to make proper decisions. They are exposed to the full weight of opposing legal counsel, who are often very skilled in the art of persuasion, and yet we place a great deal of trust in them to come to the right decisions. It would be inconsistent with this approach to assume that they are unable to withstand a degree of biased or uninformed media reporting.

A second interest is protection of the 'authority' of the judicial system. In many countries, this has been interpreted as justifying protection for the reputation of the courts or even individual judges. However, the real interest here is ensuring that individuals accept the courts as the proper forum for final arbitration of social disputes, not maintaining the reputation of the courts for more abstract reasons.

In most democracies, restrictions on freedom of expression to protect the authority of the courts are no longer applied. A Canadian case, which involved a lawyer, an officer of the courts, stating to the media that he had lost faith in the ability of the judicial system to render justice, provides an eloquent description of the reasons for this:

As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy.... The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions.<sup>154</sup>

The implications of this are clear: in democracies, courts must earn respect through their behaviour rather than impose it via judicial fiat.

### Practice in the Region

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<sup>153</sup> *Worm v. Austria*, 29 August 1997, Application no. 22714/93, para. 50.

<sup>154</sup> *R. v. Koptyo* (1987), 62 OR (2d) 449, p. 469.



Countries in the Arab world are characterised by extensive criminal prohibitions on the content of what may be published or broadcast, which are often cast in very vague terms and which are abused by a variety of official actors, often including the judiciary, for political ends. These provisions are found in media specific laws – for example, the 2002 Press and Publications Law of Bahrain contains 17 criminal proscriptions<sup>155</sup> – in penal codes and in more specialised laws, for example on secrecy, the civil service, the military and so on.

National security and public order are concepts that have been subject to particular abuse in most countries in the region, with laws making vague references to State security that are interpreted by the authorities to cover contexts that bear little relationship to security as it is commonly understood, including economic development and even protection of the government against embarrassment.

In many countries, the security establishment plays an important direct role in controlling media output, for example by participating in licensing processes or by reviewing content before or after publication. In some countries, publication offences involving security may be prosecuted through military courts, which offer little protection for due process rights. Often, the influence of the security establishment goes beyond what is legally mandated. In Egypt prior to the revolution, for example, members of the security establishment were embedded in all of the main media outlets, where they served to promote censorship in various ways.

These problems are exacerbated by general problems with the criminal justice system, such as rules authorising administrative detention, generally weak rule of law and due process guarantees, and poor prison conditions. In some countries, there are also problems with torture and disappearances.

In an attempt to address some of these problems, special courts to deal with press offences have been established in some countries. For example, in Lebanon there is a special Publications Court and a similar institution exists in Jordan. While this approach may appear odd and even undemocratic from a theoretical perspective, in practice these courts have tended to demonstrate more understanding of, and sensitivity to, the reality of media operations than ordinary courts.

Somewhat surprisingly, in contrast to the overbroad national security and public order provisions, hate speech laws do not appear to be well developed in the Arab world. It is not clear why this is so, and minorities in several countries suffer from fairly serious forms of discrimination and attacks.

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<sup>155</sup> See Freedom House report on Bahrain, available at: <http://www.freedomhouse.org/sites/default/files/Bahrain%20draft.pdf>.

As might be expected, given the strong religious sentiment across the region, there are expansive moral restrictions on the media and other means of expression. Obscenity, defined very broadly, is banned throughout the region.

In all countries it is also a criminal offence to criticise Islam, and sometimes other 'divine' (i.e. one God) religions (in practice, Christianity and Judaism). In most cases, the scope of these restrictions is not defined either in the law or elsewhere. For example, the 2002 Press and Publications Law of Bahrain prohibits the publication of "material that is offensive to Islam". Islam, unlike some religions, does not have a supreme religious authority, with the result that there is no central or clear decision regarding what is considered to be offensive to Islam or to breach the principles or values of Islam. In practice, these laws also often blur the distinction between criticising religion and criticising religious personalities, many of whom wield enormous political and social power. These provisions thus breach the international law rule that restrictions on freedom of expression must not be vague and must provide clear guidance as to what types of speech are prohibited.

These restrictions have come under closer scrutiny and debate in recent times, in particular following on from the revolutions in Tunisia and Egypt. In both of those countries, for example, there has been active debate about the extent to which the new constitutions which are being debated should protect religion against criticism.

While the finer points of the issue of protection of religion may be debated, in practice there is at least the potential and often the reality of serious abuse of these provisions, for example with accusations being used to settle scores.<sup>156</sup> There has been a spate of cases across the region, including many against bloggers, in a challenge to the greater openness of debate about religion that generally pertains online. Many of these cases have attracted enormous public attention, giving rise to concerns about the independence of the judicial decision-making process in the face of this attention.

Most countries in the region also have strong protections against criticism of the judiciary, which some reports suggest is particularly resistant to tolerating criticism, despite the fact that it is a public sector institution.<sup>157</sup>

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<sup>156</sup> See, for example, the story outlined here: <http://allafrica.com/stories/201210081065.html>.

<sup>157</sup> See Nizar Saghie, Rana Saghie and Nayla Geagea, *Censorship in Lebanon: Law and Practice*, p. 57. Available at: <http://www.lb.boell.org/web/52-744.html>.

## **Conclusion**

International law provides robust general protection for freedom of expression, including freedom of the media, and this has been subject to detailed elaboration by international human rights courts and other official bodies tasked with promoting human rights globally and regionally. For the media, some of the key implications of the right to freedom of expression are that the media should only be regulated where this is necessary to serve an overriding social interest and that such regulation should be undertaken only by bodies which are protected against political and commercial interference. Furthermore, an important goal of media regulation should be to foster and promote diversity in the media. International law also places clear limits on restrictions on what may be published or broadcast through the media, while also imposing a positive obligation on States to put in place systems to ensure that individuals can access information held by public bodies.

All of the countries in the Arab world are in serious breach of all or most of these standards. While there has been some progress recently, particularly in terms of respect for freedom of expression in practice, the need for comprehensive media law reform in the region remains pressing and very substantial. Unless structural protection for media freedom is provided through law reform efforts, it is extremely unlikely that any gains in respect for freedom of expression will be lasting.

The Arab Spring has created a real possibility of serious positive change in terms of respect for media freedom in the Arab world, and in that way for building democratic structures. This Handbook identifies the key media law reform needs. It is now up to local authorities and decision-makers, with the support of and pressure from local advocates, and the assistance of the international community, to deliver on those needs.