



CENTRE FOR LAW
AND DEMOCRACY

Iraq

Note on the Draft Journalist Protection Law

April 2011

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

Introduction

This Note contains an analysis by the Centre for Law and Democracy (CLD) of the draft Iraqi Journalist Protection Law (draft Law).¹ The draft Law was prepared by the Iraqi Syndicate of Journalists and endorsed by the government of Iraq, which has now sent the draft to Parliament. This Note aims to provide interested stakeholders with an assessment of the extent to which the draft Law conforms, and does not conform, to international human rights standards and, in particular, the right to freedom of expression. It provides recommendations for reform, as relevant, with a view to helping to ensure that any law which is finally adopted gives effect, as fully as possible, to this fundamental right.

The draft Law mostly consists of provisions which aim to provide various sorts of protections and benefits to journalists, in line with its purpose, as set out in Article 2. It defines a journalist, for purpose of these benefits, as someone who belongs to the Syndicate of Journalists, a journalists' union which was established through legislation. The draft Law also grants a number of other rights and responsibilities to the Syndicate, including to be informed whenever a journalist is charged (Article 10), to prepare employment contracts for journalists (Article 15), and to settle disputes between journalists and their employers (Article 16).

A number of articles are devoted to the physical protection of journalists, including by setting the penalties for assaults against journalists at the same level for such crimes against officers (Article 9), by requiring police officers and judges to respond to allegations of crimes against journalists (Articles 11-12), by putting in place pension schemes for journalists who have been murdered or injured in the line of work (Article 13), and by providing for free medical treatment to be given to injured journalists (Article 15).

The specific benefits accorded to journalists include:

- the right to access information held by public bodies, as well as 'facilities necessary' to perform their duties (Articles 3 and 6);
- the right to protect confidential sources of information (Article 4);
- the right to refrain from writing reports that are incompatible with their beliefs (Article 5); and
- the right not to be held accountable for their work, except in accordance with the law (Article 8).

The draft Law is unusual inasmuch as few countries have adopted a law along these lines. Some of its features, notably the right to protect confidential sources of

¹ These Comments are based on an unofficial translation of the draft Law from Arabic into English. CLD regrets any errors based on translation.

information, are commonly found in the laws of other countries and are, indeed, considered to be key to respect for the right to freedom of expression. The provisions on protection of journalists against crimes and attacks are tailored to the specific circumstances of Iraq, although analogous efforts have been made in some other countries where journalists suffer significantly from attacks, such as Mexico.

Although many of the provisions in the draft Law appear to be for the benefit of journalists, the real underlying rationale is to safeguard the flow of information to the public. In other words, if the free flow of information and ideas from journalists and others who disseminate information in the public interest is not protected, everyone will suffer. As the European Court of Human Rights noted in relation to protection of confidential sources:

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.²

Despite the fact that the main thrust of the draft Law is positive, there are some significant problems with it. The most serious is that it vests exclusive power in the Syndicate of Journalists to determine who is a journalist, and allocates certain rights exclusively to the Syndicate of Journalists. This puts pressure on journalists to join the Syndicate, contrary to their rights to freedom of expression and to association. The benefits allocated by the law should accrue to anyone who regularly disseminates information of public interest, regardless of their organisational or institutional affiliations.

1. The Role of the Syndicate of Journalists

As noted above, the draft Law allocates extensive powers to the Syndicate of Journalists. The most significant of these is the power of the Syndicate to decide who shall receive the benefits described in the law, through the grant or refusal of membership to individuals (i.e. through defining who is a journalist). This flows from Article 1, which states that for the purposes of the law, a journalist shall be “each member of the Journalists Syndicate”.

There are various problems with this. It discriminates against other existing or would-be journalists’ associations. Far more serious, however, is that, in effect, this elevates the Syndicate of Journalists to a mandatory membership body, since no journalist wish to be denied the very significant benefits that membership brings. This is a breach of the right to freedom of association, as well as the right to freedom of expression.

² *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

It is clear under international law that a rule requiring journalists to belong to a sole journalists' association is a breach of the right to freedom of expression. In an important Advisory Opinion from 1985, the Inter-American Court of Human Rights comprehensively rejected all of the arguments put forward in favour of such a rule, including that it would promote professionalism, protect public order and enhance the bargaining power of journalists, and that it was the 'normal' way to regulate professions. It is true that the draft Law does not directly require journalists to be members of the Syndicate, but the fact that this is achieved indirectly does not mitigate the problem.

The experience of many other countries, including many of Iraq's neighbours, demonstrates clearly the possible harm to freedom of expression that may flow from a mandatory membership rule, even of an indirect nature. The association may define journalists in a way that excludes certain individuals who should normally be considered to be journalists. The leadership of the association may be influenced by political, commercial or other interests, or other leadership problems may arise. The association may seek to apply rules for journalists with which significant parts of the profession disagree and which, due to mandatory membership, they are forced to live with.

Finally, international law requires States to provide certain of the benefits provided through the draft Law, such as the right to protect confidential sources. Limiting the scope of this protect to individuals who are members of the Syndicate of Journalists is a direct breach of the rights of any journalists or others who disseminate information in the public interest who happen not to be members.

Given the centrality of this rule to the entire system envisaged by the draft Law, CLD recommends that the whole approach be reconsidered. We note that in most cases, the legitimate benefit schemes in the draft Law can be achieved in ways that do not require journalists to belong to a particular association. For example, many countries have strong rules on protection of confidential sources without requiring journalists to belong to a particular association (see Article 4 of the draft Law). It would be a simple matter to require the authorities to alert any professional association to which a journalist may happen to belong in case that journalist is charged (see Article 10 of the draft Law). And journalists' associations which operate as unions should always have the right, in appropriate circumstances and in accordance with the general labour law, to intervene in disputes between members and their employers (see Article 16 of the draft Law).

Article 15 requires media outlets to conclude employment contracts with journalists in accordance with a form prepared by the Syndicate of Journalists. This is not appropriate. The Syndicate represents journalists, and is hence not a neutral actor when it comes to their rights and employment benefits. This rule provides no

protect for media outlets against unreasonable clauses that the Syndicate might seek to include in employment contracts. Furthermore, it forces journalists and media outlets to use a uniform type of contract. This would prevent media outlets from offering greater benefits to their employees, offering greater benefits to certain employees (such as very senior or high-profile journalists or journalists in management positions), or adapting their employment practices to the particular nature of their business.

Recommendations:

- The whole approach of the draft Law, which revolves around the Syndicate of Journalists defining who is a journalist, should be reconsidered in favour of a system that does give the power to define who is a journalist to a particular association.
- Means of providing the benefits allocated by the draft Law which are not based on membership in a particular association should be considered, including approaches used in other countries.
- Article 15, which effectively allows the Syndicate of Journalists to dictate employment contract terms for journalists, should be removed.

2. Protection of Journalists

The draft Law includes a number of measures aimed at protecting journalists from attacks or mitigating the impact of such attacks. Articles 11 and 12 require police officers and magistrates, upon hearing of a crime against a journalist, to inform the relevant authorities and then to go immediately to the crime scene and “take action pursuant to law”. This is presumably intended to apply to crimes which are related to the work of journalists, and this should be stated in the law (the draft Law does not make this clear).

The intention behind this rule is positive, but it is not clear that the specific proposal is very practical. It may make little sense to go to the crime scene, for example if the crime took place some time ago. It may also be impractical, for example if the officer who hears of the crime is in a different city from where it occurred. There may be other more useful priority investigation actions. It also does not seem to make sense for magistrates to go to the crime scene. Indeed, involving magistrates in the investigation of a crime may be considered to be a conflict of interest should the case come before them to be judged later on. While it is important to prioritise investigation of crimes against journalists, law enforcement authorities should have the flexibility to decide how best to do this.

Article 13 provides for significant benefits to be provided to journalists and their families where they have been killed or injured by a terrorist attack in the course of their duties. Children of journalists who have been killed on duty shall be given 500,000 Iraqi Dinars (around US\$425). Journalists who have been injured due to a terrorist attack so that they become disabled by “50% or more” will receive 250,000 Dinars (around US\$215).

These benefits are welcome. Journalism in Iraq is a dangerous profession, and compensating for these types of severe losses can at least help to mitigate these losses somewhat. At the same time, questions may be raised as to whether it is appropriate to allocate these sorts of benefits only to journalists, while others engaged in dangerous work – such as soldiers, police, security guards and medical workers – do not receive them. This is ultimately a policy choice for the Iraqi authorities; the right to freedom of expression does not of itself require States to make such payments.

If such financial benefits are to be allocated, this needs to be done in a manner that is scrupulously fair so as to avoid potential abuses of the system. At a minimum, these benefits should not only be awarded to members of the Syndicate of Journalists. As noted above, they need to be allocated to anyone who is genuinely working as a journalist. There are many possible ways of doing this. It is beyond the scope of this Note to describe these in detail; the point is simply that a more open system is needed. In addition, the allocation of these benefits needs to be done through a process that is transparent and which includes clear procedural safeguards, including the right to appeal to an independent oversight body.

Recommendations:

- Articles 11 and 12 should be limited in scope to crimes which target journalists in relation to their work.
- The approach taken in these articles should be reconsidered in favour of one that ensures that priority is given to investigating crimes against journalists, while avoiding dictating rigid strategies for such investigations.
- If the idea of allocating financial benefits for journalists who are murdered or injured in terrorist attacks is retained, these benefits should be provided to anyone who is working as a journalist, whether or not they happen to belong to the Syndicate. Furthermore, clear procedural safeguards, including requirements of transparency and the right to appeal to an independent oversight body, should be put in place to prevent any abuse of the system.

3. Other Benefits

The draft Law provides a number of other benefits to journalists. Pursuant to Article 3, public bodies should “commit to providing facilitations necessary” to the work of journalists. The sentiment behind this is positive but, as with some other provisions, it is unclear how it should be implemented. In particular, it is so vague that it is almost completely unclear what public bodies are actually being asked to do. As a result, some public bodies may not do anything to implement this provision.

Article 4 provides, in part, that journalists may have access from their sources “as permitted by law”. It is not clear what exactly this means, but if it means that journalists are not able to take advantage of illegal leaks of information from sources, then it is inappropriate. Journalists should be allowed to use any information leaked to them by a confidential source, regardless of whether or not the source acted within the scope of the law. Where a source acts illegally, he or she may risk sanction, but this is a different matter. And even in this case, the journalist should be able to refuse to disclose the identity of the source.

Article 6 protects the right of journalists to have access to “formal reports, information and statements”. This is welcome but it should not be taken as in any way replacing the need to put in place a proper right to information or access to information law, which grants everyone the right to access information held by public bodies. Such a law should, among other things, elaborate clearly on the manner in which requests for information will be processed, set out a narrow regime of exceptions to the right and provide for a right of appeal where a request has been refused.

The right of access as provided for in Article 6 may be limited where disclosure of the information may harm “the public interest”. This is inappropriate. The public interest is a vague concept which may be abused to refuse to disclose information in a wide range of circumstances. Democratic right to information laws do not allow for information to be withheld on this vague ground. Furthermore, it allows for requests to be refused where this would violate another law. Given the presence of numerous laws which allow for excessive secrecy, including laws dating from before 2003, this is problematical. It is not practical to address this issue within the context of the draft Law, but this highlights again the need for comprehensive legislation on the right to information, where this issue could be addressed properly.

Article 8 stipulates that a journalist shall not be held accountable for the information he or she publishes, except in accordance with the law. Once again, the issue of problematical laws from the past arises. Ideally, a process should be put in place to review all laws which restrict freedom of expression with a view to bringing them into line with constitutional and international protection for this right. In addition, it is not clear what the term “accountable” means here. However, to the extent that

this may rule out self-regulatory measures aimed at improving professionalism – for example to give a right to reply to those who have been harmed by an article published in the media – it is not justifiable.

Recommendations:

- Article 3, calling on public bodies to provide support to journalists, should either be made more concrete or removed.
- Article 4 should be amended so that the right of journalists to receive information from confidential sources is not conditioned by a requirement that the provision of the information in the first place was “permitted by the law”.
- A fully-fledged right to information law should be adopted, giving everyone the right to access information held by public bodies.
- The right of public bodies to refuse to disclose information on the grounds that it may harm the public interest should be removed from Article 6.
- The Iraqi authorities should make a commitment to review all laws which limit freedom of expression, with a view to bringing them into line with constitutional and international standards.
- It should be made clear that the term ‘accountable’ in Article 8 only refers to legal accountability, or at least that it does not rule out self-regulatory measures.