MEMORANDUM

on

the draft Law on Press and Publications of the Republic of Yemen

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1. Introduction

Yemen's government is currently considering amendments to the 1990 Law on Press and Publications (No. 25), in response to a June 2004 demand by President Ali Abdullah Saleh to remove clauses allowing the imprisonment of journalists. This Memorandum by ARTICLE 19 seeks to make a constructive contribution to the drafting process by suggesting ways in which the Law on Press and Publications can be brought into line with international law and standards on freedom of expression. Our comments are based on a draft prepared by the Ministry of Information (the 'Ministry draft'), which was made public earlier this year, as well as on a subsequent draft prepared by an *ad hoc* committee chaired by the Minister of Justice, Dr. Adnan al-Jifry (the 'Committee draft').

This analysis was requested by the Joint Yemeni Media Development Programme (JYMDP) and relies on translations provided to us by the JYMDP.[1] We note that the articles in the Ministry draft are not numbered and that the numbering of its sections is inconsistent; we apologise for any confusion this may cause. References to articles in the Ministry draft will be made as follows: *Section number – Chapter Number – Article.* For example, the fourth article in section two, first chapter would be: 2-1-4. References to corresponding articles in the Committee draft are made in square brackets ([]).

ARTICLE 19 welcomes the decision to remove the penalty of imprisonment from the Press and Publications Law. We also note some very positive provisions in both the ministry and Committee drafts; these include a guarantee of the rights to "freedom of knowledge, thought, practice of journalism, expression, communication and access to information" (Article 1-2-1 [Article 3]; assurances of the right to maintain the confidentiality of sources (Article 2-2-2 [Article 14]); and a guarantee that journalists shall not face any adverse consequences for their writings other than those prescribed by law (Article 2-2-9 [Article 18])

Regrettably, however, a large number of provisions in both drafts seem intended to regulate, or to control, the press. International law stipulates that freedom of expression should be the rule, and limitations the exception; the two drafts reverse this logic and mandate government interference in virtually every aspect of the operation of the print media. Many of these provisions are unnecessary and present the authorities with opportunities to stifle critical and independent voices. Of particular concern are the following:

- *The large number of restrictions on the content of what may be published.* Many of these restrictions are worded very vaguely, creating uncertainty about which expressions are illegal and allocating wide latitude to the government to interpret the law in ways it deems convenient.
- *The extensive use of licencing regimes.* A licence from the Ministry of Information or Culture is required for the establishment of virtually any kind of print media enterprise, as well as for the practice of journalism. In effective, Yemenis need permission from the government to exercise their right to freedom of expression through the print media. The use of licencing regimes for the print media is unnecessary and contravenes well-established rules of international law.

[1] ARTICLE 19 takes no responsibility for the accuracy of this translation or for comments based on mistaken or misleading translation.

- *The existence of qualification requirements for print media professionals.* Both drafts restrict certain professions, such as owner of a newspaper, editor-in-chief or journalist, to persons who possess certain academic qualifications and have attained a specified age. These qualification requirements are at odds with the idea that freedom of expression is a right which belongs to *everyone* without discrimination, not just those over 21 and with a university degree. They will also make it very difficult for talented young Yemenis to enter the print media sector and develop their skills.
- *The imposition of capitalisation requirements*. Under both drafts, owners of newspapers and magazines are required to make a capital deposit before commencing with publication. This requirement will be difficult or impossible to meet for small entrepreneurs and will effectively confine ownership of publications to the richest group of Yemenis.
- *The regulation of advertising tariffs.* Under both drafts, newspapers are required to seek the authorities' authorisation for their schedule of advertising tariffs. There is no reason why the government should prevent advertising rates from being determined in the marketplace. The power to authorise advertising tariffs could be abused to starve government-unfriendly newspapers of income from this source.
- *The imposition of deposit and registration requirements.* Both drafts impose a duty on printing houses to maintain a register of all materials printed, and require publishers of various types of printed matter to submit copies to the Ministries of Information and Culture. These provisions serve no apparent purpose, other than enabling the authorities to exercise illegitimate control over the content of what is published.
- *The continued existence of penal provisions.* Although the abolition of prison sentences for journalists is a positive move, ARTICLE 19 is of the opinion that the Press and Publications Law should not contain any penal provisions. The inclusion of such provisions sends a message that the press, when exercising the right to freedom of expression, is subject to special controls over and above those which apply to the general population. A particular cause for concern is the fact that the penal provisions in the committee's draft do not specify maximum fines that may be imposed.

The following sections provide an overview of the areas in which the two drafts are in tension or conflict with international law and standards on freedom of expression.

2. International Law and Standards

2.1. The International Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR)[2] guarantees the right to freedom of expression in the following terms:

> 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 the UDHR, including Article 19, are widely regarded as having acquired

[2] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

legal force as customary international law since its adoption in 1948.[3] Furthermore, Yemen has committed itself to respect the UDHR through Article 6 of its Constitution:

> The Republic of Yemen confirms its adherence to the UN Charter, the International Declaration of Human Rights, the Charter of the Arab League, and dogma of international law which are generally recognized.

In addition, Yemen is a party to the *International Covenant on Civil and Political Rights* (ICCPR),[4] the foremost United Nations human rights treaty, which has been ratified by 154 States.[5] The ICCPR is not merely a statement of principle, but reflects the common minimum standard of rights which all States Parties are legally required to respect, regardless of differences in history, culture or economic circumstances. Article 19 of the ICCPR guarantees the right to freedom of expression in the following terms:

> 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.

Compliance by States with their obligations under the ICCPR is overseen by an official UN body, the Human Rights Committee. Its comments and decisions are an important source of authority on how the right to freedom of expression should be understood. Further guidance on the scope of the right can be gained from a number regional human rights instruments which guarantee the right to freedom of expression in very similar terms to the ICCPR, and from the statements of bodies overseeing these treaties. Of particular relevance to Yemen is the *Arab Charter of Human Rights*, which was adopted by the Council of Ministers of the Arab League in March of 2004; its guarantee of free speech is found in Article 32. Mention should also be made of three regional human rights treaties whose implementation is overseen by an international court: these are the *European Convention on Human Rights* (freedom of expression guaranteed in Article 10), the *American Convention on Human Rights* (Article 13) and *African Charter on Human and Peoples' Rights* (Article 19). While the decisions of these courts are not binding on Yemen, they provide a rich source of authority on freedom of expression principles and will be referred to below.

2.2. The Constitutional Guarantee of Freedom of Expression

In addition to Article 6, referred to above, Yemen's Constitution contains an explicit guarantee of the right to freedom of expression in Article 41:

> Every citizen has the right to participate in the political, economic, social and cultural life of the country. The state shall guarantee freedom of thought and expression of opinion in speech, writing and photography within the limits of the law.

[3] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[4] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Yemen acceded to the ICCPR on the 9th of February 1987.
[5] As of 27 April 2005.

2.3. Restrictions on Freedom of Expression

The UN Human Rights Committee has stressed the paramount importance of a 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.[6]

Given the importance of the free media, any restrictions imposed on them must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the general conditions which any limitation on freedom of expression and information must meet:

> 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 or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Human Rights Committee has repeatedly stated that Article 19(3) entails a three-part test which States must satisfy as a condition of justifying any restriction on freedom of expression:

- In the first place, any interference with free expression must be provided for by law. This means not only that there must be a piece of legislation enacted by a competent body; the law must also be as clear and precise as reasonably possible, so that citizens know in advance exactly which expressions are prohibited.[7]
- Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive; no other aims are considered to be legitimate grounds for restricting freedom of expression.
- Finally, the restriction must be *necessary* to secure one of those aims. The word 'necessary' in Article 19(3) is understood to have a number of implications. First, if there exists an alternative measure which would be less intrusive to of the right to free expression but would nevertheless accomplish the same goal, the restriction is not necessary. Second, the restriction must impair the right as little as possible and, in particular, must not be overbroad and restrict legitimate speech. Thirdly, the impact of the restriction must be proportionate; the harm to freedom of expression must not be greater than the benefit to the interest protected.

Both the Ministry draft and the Committee draft contain wide-ranging restrictions on the practice of journalism and the operation of newspapers and printing presses. In order to ensure that the law eventually adopted complies with international law as embodied in Article 19(3) of the ICCPR, any restrictions it contains must be evaluated under the three-part test set out above. If a restriction is insufficiently clear, does not address a recognised legitimate aim or is not strictly necessary for such aim, it should be amended or removed.

[6] General Comment 25, issued 12 July 1996.
[7] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

3. Analysis of the Press and Publications Law

3.1. General Comment on the Need for a Press and Publications Law

At the outset, it must be stated that ARTICLE 19 tends to view press laws with caution as they are often a tool for governments to overly restrict, rather than protect the right to freedom of expression and information. Given the importance of the press in a democratic society, it stands to reason that journalists and publications should not be subject to greater restrictions on the right to express themselves than ordinary people. Indeed, most advanced democracies have moved to abolish their press laws and regulate the print media through laws of general application, such as the civil code and business code, which apply without distinction to all citizens. In these countries, a newspaper which publishes a defamatory statement can simply be sued under the same section of the civil code as a private person making a similar statement. This prevents the government from using the press law as a means of selectively prosecuting critical newspapers and thus endangering free debate about politics and public figures, a cornerstone of democracy.

ARTICLE 19 recognises that in those countries which still maintain a specific law on the print media, such as Yemen, the government's motivation may derive from a desire to improve journalistic standards of professionalism and ethical conduct. But even if adopted with a legitimate purpose in mind, a press law may easily become a vehicle for over-regulation and selective control of what newspapers and other periodicals may say. The government has so far applied the 1990 law with a certain degree of restraint, but its 116 articles provide ample opportunity for a crackdown on critical media. This fact is confirmed by the repeated need for the President to pardon journalists who have been prosecuted under the law by the Press and Publications Prosecutor.

Careful consideration should be given to simply abolishing or at a minimum greatly reducing the scope of the Law on Press and Publications. We believe that this is entirely feasible; the print media would by no means be placed in a legal vacuum, as the civil and criminal codes presently contain a large number of provisions relating to freedom of expression. (Incidentally, it is widely agreed amongst both politicians and print media workers that some of these provisions are also problematic and should be reviewed alongside the press law.) The example of some countries in Eastern Europe, like Romania and Bulgaria, shows that even young democracies with an immature free media do not need a press law. Like Yemen, these two nations began their democratisation process in 1989 after having experienced war and/or dictatorship in preceding decades.

All the above is not to say that the (draft) Press and Publications law does not contain useful provisions, particularly those relating to freedom of information, the protection of sources and the right of reply. However, we believe that the right to access information should be regulated in a separate freedom of information law, both because this is a complicated issue and because the right should belong to all citizens, not only journalists.[8] While the issues of protection of sources and the right of reply are important, they can be incorporated into other laws, such as laws on evidence for protection of sources or defamation laws for the right of reply.

[8] ARTICLE 19 has published a Model Freedom of Information Law, available at http://a19.sylaba.pl/docImages/25119_modellaw.htm.

3.2. Content Restrictions

Overview

The Ministry draft contains a large number of provisions which are intended to, or could have the effect of, imposing restrictions on the content of what may be published. A number of these provisions appear also in the Committee draft (where this is the case, the corresponding article number is added in [brackets]).

Article 1-2-3 [Article 4], states that the press is a means of monitoring society "within the context of Islamic creed, basic principles of the constitution, and the goals of the Yemeni Revolution and the aim of solidifying of national unity, with keeping the respect of basic social foundations and the rights and freedoms of others." This may be intended as a statement of principle and not a binding content restriction, but a prosecutor or court could easily interpret it otherwise in conjunction with the Article 8-3 [Article 104]: "Any person or party that violates the provisions of this law is subject to a fine not less than (…) but does not exceed (…)."

Article 1-2-6 states that journalists are free and that their profession is not subject to control by any power "except for the law, and professional conscience, morals and principles." Article 1-3-2 contains a partial elaboration of the concept of "morals." It states: "Morals and ethics of the journalistic profession are obligatory to the journalist, which include: 1) respect of freedoms of others, preservation of their rights, and respect of their private lives; 2) balance, objectivity, integrity in presentation of the journalistic material and avoiding personal insults that disgraces the profession; 3) avoid wrongly accusing without a proof, which will distort the image of journalism profession; 4) by all means avoiding publishing material that would instigate violence, or differences among population; 5) avoiding publishing created or deliberately altered news being unsuitable for publishing; 6) avoiding insult, exaggeration, and blackmail."

Section 2 of Chapter 2 [part two] deals with the rights and duties of journalists and contains further content restrictions. A journalist is required to:

- "respect the objectives and aims of the Yemeni Revolution and the provisions of the Constitution" (Article 2-2-13 [Article 20]);
- "respect the dignity and reputation of individuals and families, and shall not touch their personal lives" (Article 2-2-15 [Article 22]);
- "consider requirements of integrity, honesty, frankness and professional morals to preserve the values of the society and avoid violating rights and freedoms of citizens" (Article 2-2-16);
- "to obtain information and facts from its sources and conveying the same to recipients honestly" (Article 2-2-17 [Article 23]);
- "abstain from publishing non-credible information or distorting true information, or misquote sayings or deeds to a person or a body without making sure of such quotation, or without referring for such person or body for confirmation" (Article 2-2-18 [Article 24]).

In addition, Article 2-2-14 [Article 21] states that journalists are bound to the journalistic convention of honour issued by the Syndicate. Under the Ministry draft, they "are subject to penal questioning in case of violating such convention or threatening citizens in any manner using the profession of journalism."

Article 2-3-5 [Article 30(1)] contains a content restriction incumbent specifically on foreign journalists; they "shall also respect the sovereignty and independence of the country, the creed, religious law and the ethics and traditions of the Yemeni people."

Section 5, Chapter 1 sets out various content restrictions applicable to newspapers, magazines and Internet news services:

- "Publications shall abstain from tackling cases under investigation or subject to trial in a manner that might affect the process of investigation or course of justice" (Article 5-1-17 [Article 103(7)]);
- "Newspapers commit not to highlight crime news, photos of suspects or convicts in juvenile, prostitution and moral cases" (Article 5-1-18);
- "Newspapers are not allowed to publish contents of discussions in secret or closed sessions of parliamentary sessions, or untrue contents of public sessions" (Article 5-1-19 [Article 103(6)]).

Finally, Section 7 contains a number of wide-ranging restrictions applicable to various groups:

- "Printing, publishing, and circulation of the following is banned: 1) any material that may jeopardize the highest interests of the state or expose any of its security or defense secrets in accordance with this law; 2) incitement of violence, vengeance, terrorism or rebellion, or any acts marked as crimes by prevailing laws" (Article 7-3 [Article 103(2), 103(9)]).
- "All workers in radio, television and written journalism and especially those employed in responsible positions in radio and television journalism, owners and editors-in-chief of newspapers, owners of printing houses and publishing houses and journalists, shall be bound to abstain from publishing and printing any material that could offend or show contempt to the person of the head of state, or his dignity or to attribute to him declarations or pictures without approval, unless the declarations were made or the picture taken during a public speech or meeting. These provisions do not necessarily apply to constructive criticism" (Article 7-5 [Article 103(12)]);
- "Publishing or printing of any material that negatively touches directly and personally the presidents and kings of brotherly and friendly countries" (Article 7-6);
- "Journalists, newspapers, owners and editors-in-chief of newspapers, owners of printing houses and publishing houses commit, in all what's published, to respect constitution and law, preserving the values of honesty and honour, preserve social values and principles, not to violate rights and freedoms of citizens, and abstain from supporting calls for racial, fanatic, and extremist discourse, as well as insulting religions, calls of hatred of others or discarding beliefs of others and discrimination among various factions, and calls of disdain or contempt thereof" (Article 7-7 [Article 103(1), 103(3)]).

Analysis

Our very first concern regarding all of these provisions is that, fundamentally, there is simply no reason why a press law should contain *any content restrictions at all*. A small number of the content restrictions in both drafts are in principle permissible under the international law of freedom of expression, insofar as they comply with the three-part test described in section 2.3 above. However, as was remarked previously, the right to freedom of expression is of particular importance to the media, so any legitimate restrictions on this right should be contained in laws of general application which do not single out the media for particular treatment. Furthermore, the content restrictions in the two drafts probably duplicate existing

provisions in laws of general application and thus create a regime of double standards. This may well give rise to confusion, with prosecutors seeking to apply both the press law and the civil or criminal code to the press, or opting for the more stringent standard.

Beyond this general recommendation, we are of the view that a number of the content restrictions in the Press Law would be objectionable even if they were placed in a law of general application. Our concerns regarding these specific restrictions are outlined below.

Vague content restrictions

In the first place, there are several references to vague concepts, about whose meaning reasonable people may hold widely different opinions. These include 'professional conscience', 'morals', 'principles', the ' creed' or 'ethics and traditions of the Yemeni people', 'basic social foundations', 'social values and principles' and 'the goals of the Yemeni revolution'. Such limitations offend against the first part of the three-part test, as they are insufficiently clear to allow an individual to foresee the consequences of a particular expression. They also promote self-censorship, thereby endangering the free exchange of ideas and information. Moreover, asking a judge in a court of law to decide what 'the traditions of the Yemeni people' or 'professional conscience' are hands him or her a vast degree of power to determine the content of the law, power which should be exercised by the democratically elected legislature.

Duty to respect the Constitution

The requirement for journalists and media organisations to respect the Constitution should also be removed. While the Constitution without doubt expresses important principles which are relevant to the media, it should be possible to discuss and criticise its provisions without fear of prosecution.

Content restrictions for the protection of national security

A number of limitations aim to prevent internal or external threats to Yemen's sovereignty; Article 1-2-3 [Article 4] requires journalists to respect the "aim of solidifying of national unity"; according to Article 1-3-2 they must also prevent, by all means, publishing "material that would instigate violence". Article 7-3 [Article 103(2)] prohibits publication of "any material that may jeopardize the highest interests of the State or expose any of its security or defence secrets," while Article 2-3-5 mandates foreign journalists to respect the "sovereignty and independence of the country."

As stated in section 2.3, international law permits restrictions on freedom of expression which aim to ensure national security. At the same time, such restrictions, like all restrictions, are subject to the requirement of being clearly defined by law and of being necessary (which includes a requirement of proportionality). The provisions relating to national security in the current draft fail to define sufficiently narrowly and precisely the risks against which they are directed. In order to comply with the necessity prong of the three-part test, these provisions require a much closer link between the publication in question and the risk of harm to national security or political stability. Publications should never be prohibited unless they pose a *genuine and immediate threat* to the country's *territorial integrity or its capacity to respond to the use or threat of force*, whether from an external or internal source.[9] As a separate matter, it

[9] Principle 2(a) of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted on 1 October 1995 by a group of experts in international law, national security, and human rights and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression. See his 1996, 1998,1999 and 2001 reports to the United Nations Commission on Human Rights.

may be observed that while restricting certain types of expression may appear to promote national security, in fact increased freedom of expression can often persuade restive segments of the population to voice their concerns through words rather than guns.

Prohibitions on false or one-sided news

A further category of content restrictions aims to ensure balanced reporting by journalists and to prevent the publication of false news. Article 1-3-2 of the Ministry draft requires "balance, objectivity, integrity in presentation of the journalistic material", as well as "avoiding publishing created or deliberately altered news" and "avoiding exaggeration." Section 2, Chapter 2 contains very similar prescriptions, namely a duty to "consider requirements of integrity, honesty [and] frankness" (Article 2-2-16), to "obtain information and facts from its sources and conveying the same to recipients honestly" (Article 2-2-16 [Article 23]); Finally, Section 7 requires "journalists, newspapers, owners and editors-in-chief of newspapers, owners of printing houses and publishing houses […] to respect […] the values of honesty and honour" (seventh article).

Requirements to report in a balanced way may be legitimate when applied to the State or broadcast media but, when applied to independent publications, international law regards them with extreme suspicion. While it is the State's duty to inform its citizens objectively and truthfully, it is incumbent on the independent media to explore topics critically from all sides and its publications may therefore express clear opinions and positions. As regards the truthfulness of news reports, clearly journalists should not aim to report false news; however, an actual prohibition on such news makes the work of journalists covering current developments unreasonably dangerous, as in situations of breaking news facts are often not easy to check. Moreover, it is often open to debate what the 'truth' on a particular matter is and the State should trust citizens to make their own judgement instead of imposing its particular view of events. The UN Human Rights Committee has condemned the use of false news provisions in national laws, cautioning that they "unduly limit the exercise of freedom of opinion and expression."[10] It has also clarified that "prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news was false [is a] clear violation of article 19 of the Covenant."[11]

Restrictions on infringements of the rights of others

A large number of provisions in the Ministry draft (and a smaller number in the Committee draft) limit the right of journalists and print media organisations to express themselves in ways which infringe on the rights of others, such as defamation and invasion of privacy. Some refer simply to the "rights and freedoms of citizens", others require the avoidance of insults or false accusations, while yet others require respect for citizens' private lives and respect for the dignity and reputation of individuals and families, as well as their personal lives.

As in the case of national security, the protection of the rights and reputations of others is a legitimate ground for restricting free speech. However, two important observations are relevant.

In the first place, freedom of expression is itself a fundamental human right which should be balanced against, rather than simply overruled by, the rights of others, including the right to a

[10] *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89.
[11] Concluding Observations on Cameroon, 4 November 1999, CCPR/C/79/Add.116.

private life. All unqualified references to the "rights and freedoms of citizens" or the private lives of others are inconsistent with international law *per se*, as they restrict freedom of expression regardless of whether it is strictly necessary to do so (as required by the third part of the test for such restrictions in Article 19(3)) of the ICCPR. For example, if it were revealed in a newspaper that a candidate in elections did poorly on his exams at university, this would damage both his privacy and his reputation; but because of the public interest in knowing about the competence of politicians, prohibiting such a publication is unjustifiable, in the sense that the importance of allowing this news to be spread is greater than the importance of protecting the candidate's rights.

In the second place, an invasion of one citizen's rights by another citizen, where it involves only words, is by definition a private matter and should therefore be resolved under civil law through corrections and/or the payment of damages, not by criminal prosecution and the imposition fines, as the two drafts envisage. We presume that Yemen's civil code allows individuals to bring actions against others for defamation or invasion of privacy. These provisions are probably sufficient or could be revised alongside the Press and Publications Law; at a minimum, they should not distinguish between the media and ordinary citizens, should limit damages awardable to reasonable levels, should place the burden of proof on the complaining party and should allow the defendant party to invoke the truth as a legal defence. We also note that Yemen still appears to maintain provisions on defamation in its criminal law. For the reasons stated above, there is an increasing trend in international law towards the abolition of criminal defamation;[12] Yemen could set a significant positive example by joining this trend in its early stages.

Special protection for the head of State

A particular problem is presented by Article 103(12) of the Committee draft and Article 7-5 of the Ministry draft, which prohibit expressions which "criticise" (Committee draft) or "could offend or show contempt to" (Ministry draft) the person of the head of State. Both laws prohibit attributing to him or her "declarations or pictures without approval, unless the declarations were made or the picture taken during a public speech or meeting. These provisions do not necessarily apply to constructive criticism."

These provisions run directly counter to well-established principles of international law and are in tension with basic tenets of democracy. They hand the head of State almost complete discretion to prosecute his critics. The statement that constructive criticism is "not necessarily" prohibited is not clear enough to provide a true defence to journalists; moreover, there is no justification for limiting criticism of a public figure to that which is considered "constructive".

The European Court of Human Rights has been very clear on the matter of public officials and defamation: they are required to tolerate more, not less, criticism than ordinary people, in

[12] The UN Special Rapporteur on Freedom of Opinion and Expression, appointed by the UN Commission on Human Rights, has called on States to repeal all criminal defamation laws in favour of civil defamation laws (see *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001). Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel" (see, for example, Resolution 2000/38, 20 April 2000, para. 3). Finally, in their joint Declarations of November 1999, November 2000 and again in December 2002, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – called on States to repeal their criminal defamation laws.

part because of the public interest in open debate about public figures and institutions. In its very first defamation case, the Court emphasised:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[13]

The UN Human Rights Committee has confirmed that Article 19 of the ICCPR should be interpreted in a similar manner:

> The State party … should take into consideration on the one hand the principle that the limits for acceptable criticism for public figures are wider than for private individuals, and on the other hand the provisions of Article 19(3), which do not allow restrictions to freedom of expression for political purposes.[14]

Special protection for foreign kings and presidents

Also problematic is Article 7-5 of the Ministry draft, which prohibits expressions which "negatively [touch] directly and personally the presidents and kings of brotherly and friendly countries." Kings and presidents of friendly countries are public figures, too, and are subject to the same principles as outlined above. While it might be embarrassing for the government if the media offend a friendly head of State, this should not serve as a justification for restricting freedom of expression; the discussion of foreign leaders bears on the country's foreign policy, an area of legitimate concern for the population.

Prohibition on publications about criminal investigations

Turning to another area of content restrictions, Section 5, Chapter 1 [Article 103(7)] prohibits amongst others the publication of articles on cases under investigation or trial "in a manner that might affect the process of investigation or course of justice", and prohibits highlighting "crime news, photos of suspects or convicts in juvenile, prostitution and moral cases."

Clearly, preventing prejudice to the conduct of criminal investigations and the rights of suspects is a legitimate concern and may justify restrictions on free speech, when necessary for the protection of public safety and the rights of suspects. ARTICLE 19 recommends formulating the provisions above more precisely, however. The former should not simply refer to the possibility of "affecting" the course of justice, but clearly state that only articles which genuinely threaten to *prejudice* the conduct of an investigation or the *fairness* of a trial are prohibited. We recommend reconsideration of the latter; at a minimum, it should not refer to such a general concept as "crime news" but be limited to the publication of pictures (and perhaps names) of juvenile suspects or cases where such publication would prejudice the fairness of a trial.

Binding code of ethics

Finally, we note that Article 2-2-14 of the Ministry draft binds journalists to the Syndicate's journalistic convention of honour, and threatens them with "penal questioning" in case of non-compliance. ARTICLE 19 believes that self-regulation of the media should, indeed, be self-regulation, and should not be enforced by the government, as this carries the risk of politically motivated prosecutions. Experience in many countries shows that even the

[13] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 42.
[14] Concluding Observations on Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO.

possibility of a reprimand issued by a self-regulatory body consisting of fellow journalists, media owners and members of the public can have a strong deterrent effect against unprofessional or unethical reporting, particularly if the body is seen as genuinely independent and impartial. It is unnecessary to back this up with criminal sanction.

Recommendations:

- All restrictions on the content of what may be published should be removed from the Law on Press and Publications.
- To the extent that other laws contain such content restrictions, these should be assessed to determine whether they are consistent with international law, as outlined above in section 2.3.
- In particular, content restrictions should be clearly defined, and should not limit expression more broadly than is strictly necessary to protect a legitimate interest.
- Public figures should be subject to wider, rather than narrower, margins of criticism than ordinary people.
- The Yemeni Journalists' Syndicate's journalistic convention of honour should not be enforced by the State, but should take the form of non-binding self-regulation.

3.3. Licensing, Registration, Accreditation and Membership Requirements

Overview

The Committee draft imposes a large number of licence, registration, accreditation and membership obligations on journalists and print media organisations. The Ministry draft goes even further in this respect.

Yemeni journalists

Both drafts impose a licence requirement on journalists who work as correspondents for one or more Yemeni or foreign press bodies. The licence must be obtained from the Ministry of Information and be renewed every two years (Article 2-2-7 [Article 17]).

In addition, the Committee draft states that the Journalists' Syndicate "shall set out the conditions for registration, licensing and the practice of the profession" (Section 2-1, last article), raising the possibility that a licence will be required for any kind of journalistic activity. The situation under the Ministry draft is less clear. Article 2-1-1(f) provides that all Yemeni journalists must be inscribed in the registers of the Syndicate; but while not stated explicitly, it appears that the requirement in fact goes beyond mere registration. Under the list of definitions in Chapter 1, a journalist is defined as one who is a *member* of the "competent Syndicate". Another implicit requirement is the obtaining of a "journalism experience certificate" According to Article 2-1-5, a journalism experience certificate "shall not be considered as valid unless being issued through the Journalists' Syndicate..." The following article of the same chapter states that it is prohibited for non-journalists to practice journalism or present themselves as journalists.

Editors-in-chief

Editors-in-chief are subject to the same registration requirement as journalists (Article 2-1-2 [Article 8]). Again, it appears that, by default, editors-in-chief should be members of the

Syndicate; this can be inferred from Article 2-1-3: "Editors-in-chief of specialized, scientific, and irregular publications published by scientific institutions, Syndicates, trade unions, and other similar bodies and societies are exempted from the condition of being members of the Syndicate."

Foreign journalists
According to Section 2-3 [Articles 27-32], a foreign or Arab journalist must obtain an accreditation card from the Ministry of Information before practicing as a journalist in Yemen. Accreditation is for a period of one year and on a reciprocal basis, although the Ministry has the discretion to refuse or cancel accreditation without stating reasons. The application must be accompanied by proof of the applicant's status as a journalist and of registration with a body regulating journalists in his or her country of origin.

Yemeni newspapers and magazines
Pursuant to Article 5-1-4 [Article 34], a licence is required for the publication of a newspaper or magazine in Yemen. A licence application must be presented in writing to the Ministry of Information and must contain certain data, such as the name and contact details of the applicant and the responsible editor-in-chief, the name of the printing house where the newspaper or magazine will be printed, the publication's name, logo, language, regularity and nature, as well as a statement of the newspaper's capital, which under the Ministry draft must be no less than YR3 million (about US$16,400). The Ministry draft also requires an applicant for a licence to be incorporated as a shareholding company with nominal value for shares, although this condition does not apply to political parties, trade unions or unions. Under the Committee draft, a licence must be granted to whomever meets the conditions set out in the law (Article 36(1)). The Ministry draft does not provide such a guarantee, nor does it set out any criteria by which a licence application should be assessed. It does, however, provide that a decision must be issued within 40 days and that a rejection must be 'motivated'. If no response is received, the licence is considered granted. Under both drafts, rejections can be contested in a court of law within 30 days.

Foreign newspapers and magazines
The Ministry draft states explicitly that foreign clubs, societies and centres also need a 'permit' from the Ministry to publish (Article 5-1-41); it is not clear whether the procedure for applying for such a permit is the same as the licensing procedure for domestic publications. Diplomatic, consular and other foreign bodies likewise require a permit from the Ministry to publish, which must be obtained "through diplomatic channels" (Article 5-1-40).

Bookshops and importers, distributors and vendors of newspapers and magazines
According to Article 3-3-2 [Article 56(b)], "[a]ny person who wishes to carry on the business of import, sale, distribution and circulation of newspapers and magazines shall obtain permission in writing from the Ministry of Information prior to such activity." Permission is also required to open a bookshop which sells newspapers, magazines, publications and even stationary (Article 3-3-2 [Article 59]). No procedure for applying for such a permit is defined.

Advertising agencies
Under the Ministry draft, permission from the Ministry of Information is necessary for the establishment of an advertising agency (Article 3-3-1). The same rule applies under the Committee draft except that permission must be obtained from the Ministry of Culture (Article 68). No procedure for applying for a permit is defined, although the last article of the

respective chapters specifies that a procedure will be defined in a bylaw to be issued by the Minister of Information/Ministry of Culture.

Printing houses
A licence from the Ministry of Information [Culture] must be obtained prior to the establishment of a printing house (Article 4-1-1 [Article 76]). An application for a licence must be in writing and contain a range of information. The Ministry is required to respond within 30 days; if the application is turned down or no reply is given, the applicant may file an appeal in a court of law within 30 days (same section, third article). No criteria for the assessment of licence requests are provided.

Publishing houses
Permission from the Ministry of Information [Culture] must be obtained prior to the establishment of a publishing house (Article 4-2-1 [Article 87]). The information to be provided along with the application is similar to that for printing houses. Again, no criteria for the assessment of requests are provided; nor is there any provision for timeframes or for the possibility to appeal any refusal to provide a licence.

The 'electronic communications network'
Article 4-2-7 of the Ministry draft states that "provisions that apply to providers of media and journalistic services apply to the electronic communication network, regarding ownership and publication." The meaning of this sentence is not entirely clear in translation, but it appears to imply that Internet and/or broadcasting services are subject to the same licence and other requirements as print media companies.

Analysis

The wide-ranging use of licence and permit requirements (hereafter referred to simply as licence requirements) for all types of print media establishments is one of the most problematic aspects of the both drafts. Contemporary international law holds that any type of *licensing* requirement for the media is incompatible with the right to freedom of expression, except when applied to the broadcast media. A licence requirement may be distinguished from a technical registration requirement, which simply involves the provision of information, with not discretion to refuse registration.

Even simple registration requirements are increasingly being questioned as legitimate restrictions on freedom of expression. For example, in a joint declaration, the special mandates on freedom of expression of the United Nations, the Organisation of American States and the Organisation for Security and Cooperation in Europe have stated:

> 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. […]
>
> Individual journalists should not be required to be licensed or to register.[15]

Most democracies have abolished even registration for the print media, let alone licensing rules, without suffering any negative consequences; indeed, it is not quite clear what the

[15] Adopted 18 December 2003. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument

benefits of such a requirement might be. On the other hand, the dangers inherent in licensing schemes are apparent: not only do they present a bureaucratic hurdle to be overcome, they also hand the body overseeing the scheme, in this case the Ministry of Information or Culture, the ability to deny or withdraw licences and prevent the emergence of a critical press. For these reasons, we recommend without reserve that all the licence and permit requirements described above be removed from the law.

There are also practical reasons for doing away with the licensing requirement. Apart from greatly reducing the workload of the Ministry of Information and Culture, this could also yield benefits for the quality of the print media in Yemen. The reduced barriers to entry in the market would result in increased competition amongst publications, thereby pushing up the standards of professionalism which are agreed to be lacking at present.

Related to the problem of the licensing schemes is the requirement for journalists and editors-in-chief to register with or become members of the Journalists' Syndicate. Although the Syndicate undoubtedly fulfils a useful function, and many journalists would probably join it voluntarily, a registration or membership requirement is clearly incompatible with international law. This is confirmed not only by the joint declaration of the UN, OAS and OSCE freedom of expression mandates quoted above, but also by an authoritative decision rendered unanimously by the Inter-American Court of Human Rights in 1985.[16] The Court dismissed Costa Rica's argument that a compulsory membership scheme is necessary to raise professional standards:

> The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. 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.[17]

The Court also refused to draw an analogy with the medical and legal professions:

> [J]ournalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training … The practice of journalism … 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.[18]

[16] *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.
[17] *Ibid.*, para. 77.
[18] *Ibid.*, paras. 71-72.

Similar decisions have been issued by various domestic courts.[19] We strongly recommend removing the requirement that journalists and editors-in-chief register with the Journalists' Syndicate.

Finally, the discriminatory treatment of foreign journalists compared with Yemeni ones should be reconsidered. It is conceded that many countries impose restrictions on foreign reporters; however, the right to freedom of expression as defined in Article 19 of the ICCPR applies "regardless of frontiers", which implies that distinctions should not be made between foreign and domestic journalists. Moreover, allowing foreign journalists unrestricted access to the country allows the outside world to gain an honest picture of developments in Yemen, rather than one based on conjecture and rumours.

Recommendations:

- The requirement for journalists to register with, or even become members of, the Yemeni Journalists' Syndicate should be removed.
- All licensing requirements for print media enterprises and Internet services should be abolished.
- Foreign journalists should be subject to the same rules as Yemeni journalists and should not be required to obtain permission for their activities from the government.

3.4. Qualification Requirements

Overview

In addition to licensing requirements, the ministry and Committee draft impose a number of qualification requirements on certain persons active in the print media sector.

Journalists

Journalists must not only be members of the Syndicate, but must, according to Article 2-1-1 [Article 7], also a) be Yemeni nationals; b) be at least 21 years old; c) enjoy full citizen's rights; d) not have been found guilty by a court of an offence against honour and integrity unless his or her reputation has been restored in accordance with the law; and e) be the holder of a qualification from a college or institute or have journalistic experience of not less than three years. The Committee draft includes an additional element, namely that journalists must "work effectively and continuously in journalism."

Editors-in-chief

Editors-in-chief are subject to the same requirements as journalists. In addition, they must a) not work for a foreign state or organisation; b) be at least 25 years old; c) have perfect knowledge of the language in which the newspaper is published; d) have experience and knowledge of journalism for not less than five years for holders of qualifications in journalism and eight years for others; e) work full-time at their editing job; f) be resident at the location where the newspaper or magazine is published; g) not be among persons legally immune according to prevailing laws; h) not be editor-in-chief of more than one newspaper or

[19] See, for example, *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59 (High Court of Zambia) and HR 7 November 1892, W 625.9 (Supreme Court of the Netherlands).

magazine, or director of publishing in electronic press (Article 2-1-2 [Article 8]; the last three requirements do not apply under the Committee draft.)

Owners of newspapers or magazines
Owners of newspapers or magazines are regulated by Article 5-1-30 of the Ministry draft and must meet the following conditions: a) be a fully eligible citizen; b) be at least 25 years old; c) have perfect knowledge of the language in which the newspaper is published; d) have experience and knowledge of journalism for not less than five years for holders of qualifications in journalism and eight years for others; e) not have been found guilty by the court of an offence against honours or integrity unless his or her reputation has been restored; f) have an account in a Yemeni bank of not less than YR5 million (around US$27,300); and g) if the owner is a shareholding company, have nominal shares, and an account in a Yemeni bank of not less than YR15 million (around US$82,000).

The conditions under the Committee draft are substantially different, except for the requirement to have full citizens' rights and not to have been convicted of certain crimes. According to Article 46, owners must be Yemenis (or shareholding companies whose equity is 100% in Yemeni hands) and they must deposit a proportion of their capital in accordance with a bylaw issued by the Ministry of Information. Newspapers of political parties, popular organisations, ministries and government authorities are exempt.

Responsible directors of printing houses
The responsible director of a printing house must, under Article 4-1-2 [Article 77], a) possess full citizen's rights; b) not have been found guilty of a criminal offence concerned with this profession unless his or her reputation has been restored through due process of the law; c) be at least 25 years of age; d) have no less than five years experience in printing houses; and e) not be the director of another printing house at the same time. Where the printing house takes the form of an establishment or a share-holding company, the shares must be nominal.

Owners of publishing houses
The owner of a publishing house is subject to two alternative conditions under Article 4-2-2 [Article 88(a)]. He or she must a) be a person who has not been found guilty of a criminal offence concerned with the profession unless his or her reputation has been restored according to the law; and b) if the publishing house is an establishment or share-holding company, it should have nominal shares.

Directors of publishing houses
The director of a publishing house must fulfil the same conditions as the director of a printing house (Article 4-2-2 [Article 88(b)]).

Analysis
Restrictions on who may enter the journalistic profession or be employed in the media sector have long been considered to breach the international guarantee of freedom of expression. Mandatory qualification requirements like the ones described above effectively limit the right to express oneself through the print media to a small class of persons. Under Article 19 of the ICCPR, the right to freedom of expression belongs to 'everyone', not only those who possess a university degree, have reached the age of 21 or 25, or have a clean criminal record. In addition, qualification requirements infringe on the right of the general public to receive information and ideas from any source, regardless of the professional credentials of that source.

In the above-discussed 1985 decision of the Inter-American Court of Human Rights, the Court condemned a requirement that journalists should have a university degree:

> Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.[20]

The African Commission on Human and Peoples' Rights has similarly stated:

> The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[21]

The qualification requirements under the two drafts cannot be fairly described as other than 'undue'. None of them is necessary for the attainment of any recognised legitimate goal (ensuring respect for the rights or reputations of others, or protecting national security, public order, health or morals) and thus they collectively fail the third part of the three-part test described in the second chapter above.

Most of the qualification requirements presumably have the purpose of ensuring professionalism amongst the media. In addition to the basic point that international law does not recognise the promotion of professional standards as a legitimate reason to limit freedom of expression, it is apt to make two further observations.

First, many of these requirements will operate unfairly and counterproductively in practice. The age, experience and university degree requirements mean that youths will not be able to produce their own publications, such as a school newspaper or teenagers' magazine. Talented young Yemenis with the ability to become excellent journalists will be excluded from the profession, leaving the older generation (whose members are often criticised by the government for their lack of professionalism) with a monopoly on publications. The requirement of a clean criminal record might also exclude excellent journalists who have been wrongly convicted in the past, when media freedoms were more limited than they are nowadays.

Second, the qualification requirements are simply unnecessary, as the free market will act as a suitable filter in the long run. Initially, new publications might hire incompetent or unethical staff, but as readers grow more experienced and critical, they are unlikely to continue spending money on newspapers or magazines which are published or edited by notorious criminals, written by foolish young children or printed in an improper way. Publications will have to either improve the quality of their staff and printing or face going out of business.

Recommendation:

- The Press and Publications Law should not impose any qualification requirements as a precondition for individuals to work as journalists or to fulfil

[20] Note 12.
[21] *Declaration of Principles on Freedom of Expression in Africa*, Principle X, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October 2002, Banjul, The Gambia.

any function within a print media enterprise.

3.5. Capital and Incorporation Requirements

Overview

In addition to licensing and qualifications requirements, the two drafts impose a further burden on the print media by requiring the owners of particular types of enterprises in the sector to deposit a certain amount of capital before commencing publication.

According to Article 46(5) of the Committee draft, owners of newspapers or magazines must "provide capital to the newspaper or magazine on the scale specified in the by-laws to be issued by the Ministry of Information." Newspapers of political parties, popular organisations, ministries and government authorities are exempted from this requirement. Article 46(5) is identical to the provision in the 1990 law; pursuant to this law, the Ministry has adopted Decree No. 9 (1998), in which the capital requirements are fixed at YR2 million (US$10,920) for a daily newspaper, YR700,000 (US$3,820) for a weekly paper, YR1.2 million (US$6,550) for a weekly magazine or a periodical, and YR100,000 (US$545) for an advertisement bulletin.

The Ministry draft contains revised figures for newspapers and magazines. Persons applying for a licence to publish a magazine or newspaper will have to present proof of having deposited no less than YR3 million (about US$16,400) in a Yemeni bank (Article 5-1-6). This amount must be further raised to YR7 million (over US$38,000) upon the commencement of publication (Article 5-1-7). In addition, owners of newspapers or magazines are required to have a private bank account with a balance of at least YR5 million (around US$27,300); if the owner is a legal person, this rises to YR15 million (almost US$82,000) (Article 5-1-30).

While the Ministry draft removes the Ministry's discretion to determine the size of the capital deposit for newspapers and magazines, Article 5-1-31 grants the Minister with an even greater power. It allows him simply to confiscate any share of a media company's deposited capital in exchange for a licence: "The Minister shall issue a bylaw to determine a portion of the capital of the newspaper, magazine, institution, or publication against granting the license thereto. Such amount shall be deposited to the state treasury."

Finally, the Ministry draft also introduces a requirement for persons issuing newspapers or magazines to be incorporated as a shareholding company with nominal value for shares (Article 5-1-5). An exception applies to political parties, trade unions and unions

Analysis

ARTICLE 19 is extremely concerned that the capitalisation and incorporation requirements in the two drafts present a serious obstacle to the establishment of new publications, hindering the emergence of a pluralistic and independent press.

As noted above, the level of capital required for the operation of various publications is currently specified in the Ministry's Decree No. 9. For a daily newspaper, the amount is fixed at YR2 million. Under the Ministry draft, this is set to rise dramatically: a private person will have to raise YR7 million for the deposit and must maintain a balance YR5 million in his or her private bank account. In addition, he/she will have to establish a shareholding company,

something which presumably also carries certain expenses. In total, the amount comes to YR12 million (US$65,600) at the very least, and this figure doesn't take into account the capital necessary for the actual operation of the newspaper. Legal persons are subject to a YR15 million deposit requirement in their private accounts and will thus need at least YR22 million (around US$120,200) as their starting capital.

It requires no argument that such massive financial burdens will make it very difficult for all but the richest Yemenis to found a publication, thereby severely limiting both poorer peoples' right to freedom of expression and the general public's right to receive information from diverse sources. Such a substantial limitation of a fundamental human right requires a similarly weighty justification. The Ministry of Information has explained that the purpose of the capitalisation and incorporation requirements is to ensure that newspapers and magazines have enough resources to pay their staff and to appear regularly;[22] ARTICLE 19 does not believe these interests are such that they should prevail over the interest of having a genuine free press. Moreover, we strongly doubt that the capitalisation and incorporation requirements will actually contribute to their supposed goals. Certainly such requirements are not found in established democracies, without there being any apparent negative side effects.

The 1990 law, and the two drafts based on it, appear to have been partially inspired by the Jordanian Law on Press and Publications. It is therefore instructive to refer to Jordan's experience with capitalisation requirements. In May 1997, the Jordanian government substantially increased the capital reserve that daily newspapers were required to maintain, in a manner similar to what is envisaged by the Ministry draft. The effects were immediate and severely detrimental to the Jordanian press. After three months, thirteen weekly newspapers were closed down for failure to meet their capitalisation requirement.[23]

The Jordanian example clearly shows how a capitalisation requirement can actually lead to a deterioration of working conditions for journalists; any capital that must be held in a deposit is no longer available for investment in the publication itself, leading to lower levels of employment in the print media sector and potentially also to increased irregularity of publications. It is difficult to avoid the impression that the true underlying purpose of the capitalisation and incorporation requirements is in fact precisely to prevent the emergence of an independent press. Such requirements are not imposed on other types of businesses, although failure to pay staff or to provide a regular service are not problems unique to the print media sector. In addition, publications of political parties and the government are exempt from the capitalisation and incorporation requirements, a distinction for which there seems to be no logical explanation, other than that the government and the ruling coalition desire to shield themselves from the impact of these requirements.

We strongly recommend that all capital and incorporation requirements be removed from the Press and Publications Law. Such requirements are not necessary for the achievement of any goal recognised as legitimate in international law, namely protecting of the rights of others or protecting national security, public health, public order or public morals. As a result, they fail to pass the second part of the three-part test for restrictions on freedom of expression.

Lastly, it is imperative that the Minister of Information not be permitted arbitrarily to determine a fee to be paid by media organisations in exchange for a licence in a bylaw. Not

[22] Meeting of 11 July 2005.
[23] *Press Freedoms in Jordan,* Euro-Mediterranean Human Rights Network report prepared by Sa'eda Kilani (2002), p. 14.

only should there be no licence requirement in the first place; requiring newspapers and magazines to pay the government in exchange for the right to publish is a wholly unwarranted limitation on freedom of expression. Human rights are enjoyed by all persons by reason of their birth; they are not a luxury which the government can sell to interested parties.

Recommendations:

- The Press and Publications Law should not require owners of newspapers or magazines to make a capital depositment for their publication.
- Owners of newspapers and magazines should also not be required to maintain a particular balance in their private bank accounts.
- There should be no requirement for a publication to be incorporated in any form.
- Owners of newspapers, magazines or other print media outlets should not be required to make any payment to the government in exchange for the right to publish.

3.6. Press Facilitation Cards

Overview

According to Articles 2-1-7 to 2-1-9 [Articles 10-12], the Ministry of Information has the right to issue 'Press Facilitation Cards'. Holders of such cards enjoy "all the features and privileges provided by the State authorities to journalists in accordance with a decision of the Cabinet." A holder of a card must meet certain alternative qualification requirements, such as either having a degree in journalism and a year of work experience, or having no such degree but 10 years of experience. Neither law states any criteria by which an application for a card will be assessed, although applicants may appeal in a court of law if their request is turned down or if they do not receive an answer within 30 days.

Analysis

For the media to be able to report on the activities of government bodies, it is necessary for them to have some form of physical access to these institutions.[24] The UN Human Rights Committee has recognised that physical access to the premises of public bodies may be limited to the extent necessary to ensure that the body can carry on its regular activities:

> [S]uch access should not interfere with or obstruct the carrying out of the functions of elected bodies, and … a State party is thus entitled to limit access.[25]

However, the Committee also stressed that any restrictions imposed by an accreditation scheme must pass the three-part test.[26] Accreditation schemes should not be susceptible to political interference and should impair the right to freedom of expression as little as possible. Furthermore, accreditation should be an automatic procedure and the number of accredited journalists may be limited only when there are real and demonstrable problems in accommodating the number of journalists. In particular, the Human Rights Committee stated:

[24] We deal with the issue of access to information held by government bodies separately; this section is concerned with physical access to government or administrative premises.
[25] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.
[26] See section 2.3 above.

> [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.[27]

We note that the rules laid down in the two drafts do not meet these standards. First, there does not appear to be a guarantee that a card will be issued automatically to anybody who fulfils the minimum conditions set out in the law. There is thus the possibility that certain individuals may arbitrarily be denied a card or that additional, unreasonable conditions we be added to those set out in the drafts. Second, neither draft specifies that press facilitation cards will be required only when there is a demonstrable need to limit attendance by journalists. They may be required even where space or disruption is not an issue. Third, the qualification requirements set out in the drafts are inappropriate and arbitrary. Cards should not be issued based on seniority but rather on public interest considerations. If a major newspaper wishes to send a junior (but perhaps excellent) reporter to cover a certain important event, he or she should obviously be given access to that event regardless of his or her experience as a journalist.

Recommendations:

- The provisions on accreditation should be fundamentally reworked so as to ensure that:
  - any applicant who meets the minimum requirements defined in the law is automatically issued with a press facilitation card;
  - cards are only required to access events or premises where there is a clear need to limit attendance based on limited space or the potential for disruption;
  - the conditions for obtaining a card are based on the overall public interest and not arbitrary considerations such as length of time as a journalist.

3.7. Freedom of Information

Overview

The Committee draft contains certain provisions defining a right to access information. Article 3 states the general principle that "access to information [is a right] guaranteed to all citizens." Article 16 elaborates that "a journalist has the right to peruse official reports, facts, information and data, and authorities possessing such items shall make it possible for him/her to have cognisance of and use from them." Similar provisions appear in the Ministry draft.

Analysis

ARTICLE 19 welcomes the Yemeni government's recognition of the right to access information held by public bodies and of the need to guarantee this right by law. However, we are of the view that proper implementation of the right to access information requires full treatment in a law specifically devoted to this issue rather than one or two provisions in a press law. Freedom of information is a complex topic which needs detailed legislative attention. For example, the two drafts do not define what restrictions apply to the right to access information, while it is widely accepted that such a right must be limited under some circumstances to protect overriding public and private interests, such as national security,

[27] *Gauthier v. Canada*, note 25, para. 13.6.

commercial secrets, privacy and the prevention and prosecution of crime. A full law on access to information should also set out the procedures by which access may be requested, along with time limits for responding to requests and the right to appeal any refusals to an independent body.

Recommendation:

- The government should make a commitment to adopt a fully-fledged law on access to information held by public authorities.

3.8. Financial Supervision

Overview

Pursuant to Section 5-2 of the Ministry draft and Section 3-2 of the Committee draft, newspapers and magazines are "strictly forbidden from accepting subventions or gifts of any sort from non-Yemeni bodies, whatever the purpose of such subventions or gifts" (Article 5-2-1 [Article 51]). The Ministry of Information has the right to scrutinise their books periodically and, under the Ministry draft, they are even required to publish their budgets (Article 5-2-3 [Article 54]).

Analysis

ARTICLE 19 is concerned that the provisions on financial supervision serve no other purpose than to assert the government's pervasive authority over every aspect of the print media sector.

Some countries do place certain limits on foreign ownership of the print media, to the extent necessary to ensure that the press retains a local character and that the people have access to information and ideas emanating from their own society. A blanket prohibition on any type of assistance from abroad goes much further than this, however, and is clearly not tailored carefully to prevent excess foreign domination of the media. Not only is such a prohibition unnecessary, it may also have the unfortunate consequence of preventing beneficial foreign aid or investment in the Yemeni media enterprises, which often suffer from a lack of funding or expertise.

The power of the Ministry of Information to scrutinise the books of Yemeni publications is wholly excessive. A visit from the Ministry is likely to have an intimidating effect on a media enterprise. In most countries, the power to inspect a company's accounts is reserved to ordinary law enforcement agencies, such as the police or the corporate regulator, and may only be exercised if there are specific reasons to believe that actual wrongdoing has occurred. By the same token, there is no justification for requiring media enterprises to publish their accounts. The internal administration of media companies is not a matter of public concern, and releasing such data may cause damage to a company's competitive position.

Recommendations:

- The law should not impose a blanket prohibition on print media enterprises receiving aid from abroad. Any restriction on foreign involvement in the media sector should be limited to what is strictly necessary to ensure that Yemenis are able to access diverse and relevant sources of information and ideas.

- The Ministry of Information should not be granted the power to inspect media enterprises' accounts.
- Media enterprises should not be required to publish their accounts.

3.9. Advertising Regulation

Overview

Article 69 of the Committee draft requires newspapers to "fix their tariffs for advertisements in consultation with the pricing authorities" and to "deposit this tariff and any subsequent changes with the Ministry of Information to guarantee adherence to them by the newspaper." The same provision appears in Article 5-5-2 of the Ministry draft.

Analysis

Advertising is one of the main means by which newspapers support themselves and the rates charged for the publication of adverts is an important tool of competition with other publications. ARTICLE 19 is of the view the constraints outlined above allow the authorities to interfere with the free market for advertising, are not necessary for any legitimate purpose and carry a serious risk of abuse. The authorities may seek to fix the rates that a critical or otherwise disfavoured newspaper may charge at unrealistically high or low levels, making it impossible either to find advertisers or to earn enough from advertising. Price controls on advertising are unknown in most countries and there is no reason to believe that abolishing them will cause any problems.

Recommendation:

- Newspapers should not be required to consult with the authorities on their tariffs for advertisements, nor should they be required to notify the Ministry of Information of their schedule of tariffs.

3.10. Deposit and registry requirements

Overview

Under both drafts, the owner or responsible director of a printing press is required to maintain a register stamped by the Ministry of Information [Ministry of Culture] in which details of all material printed in the press are recorded (Article 4-1-7 [Article 82]). This register must contain the titles of the publications entered by order of date, the names of the authors and the number of copies printed.

Furthermore, under Article 4-4-2 [Article 97], anyone who publishes any kind of printed material, except of a commercial nature, is required to deposit five copies with the Ministry of Information, the Ministry of Culture and the National Library (or their respective regional offices). A similar requirement applies even to Yemeni authors and translators based outside of the country (Article 4-4-4 [Article 99]). In case a reprint is carried out without alteration, again five copies must be deposited with the Ministries of Information and Culture, but only two with the National Library (Article 4-4-3 [Article 98]).

Analysis

In contrast to the deposit requirement relating to the National Library, which might be justified by reference to archive interests, there can be little legitimate reason for the deposit requirements which apply to the Ministries of Information and Culture. The danger that such a requirement will be used as a vehicle for censorship is obvious, especially as it is entirely unclear for which other purposes the two Ministries might need to have five copies of every non-commercial publication in the land. Furthermore, the deposition requirement is wholly unnecessary since these authorities have ample means at their disposal to obtain copies of publications, should they so desire.

In the same vein, it is unclear why the Ministry of Information or Culture thinks it is necessary to check and stamp the registers of printing houses, unless it is for purposes of exercising control over what is printed. It should be up to printing houses and their contractors to ensure that their books are properly audited.

Recommendations:

- Printing presses should not be required to maintain a register of the materials they print for inspection by the authorities.
- Publishers of printed material should not be required to deposit copies thereof with any authority, except perhaps the National Library.

3.11. Penal Provisions

Overview

In accordance with the President's recommendation, both the Ministry draft and the committee's draft abolish the imprisonment sanctions which exist currently under the 1990 Press and Publications Law. The Ministry draft does so explicitly (Article 8-1) while the Committee draft simply makes no reference to the possibility of imprisonment.

Both drafts, however, continue to threaten journalists and publications with various criminal sanctions. Article 104 of the Committee draft specifies a minimum fine of YR30,000 (US$165) for anyone who violates any provision of the law; no maximum is defined. Article 8-3 of the Ministry draft currently leaves the penalties blank but will apparently specify a maximum fine.

In addition to fines, both drafts allow the courts to strip journalists and other print media professionals of their right to work in the sector; under the Ministry draft, this prohibition may not be imposed for a period exceeding six months (Article 8-8 [Article 106]). Newspapers and other publications may be seized by the Minister of Information. Such seizure must be brought before a court of law 'expediently' (Ministry draft) or within one day (Article 8-4 [Article 107]). In case a print media enterprise does not possess the required licences, it may be closed down by a court (Article 8-5 [Article 105]).

Finally, under both drafts, cases involving the press are to be heard by specialised bodies (Article 8-9 [Article 110+1]).

Analysis

ARTICLE 19 applauds the decision to abolish the sanction of imprisonment for journalists. At the same time, we believe that the Press and Publications Law should not contain *any* penal provisions at all, however limited they may be. Criminal sanctions which single out the print media for special treatment are by nature in tension with the right to freedom of expression and should be avoided.[28] Equally problematic is the establishment of specialised courts and prosecutorial units to deal with the media; these hang like a sword over the neck of print media workers and may well have a 'chilling effect' on the exercise of the right to freedom of expression. We note that a 'Press and Publications Prosecutor's Office' was established in 1993 and strongly recommend its abolition.

In addition to these basic considerations, we have a number of concrete concerns about the drafting of the penal provisions in both legislative proposals.

First, a provision which simply states that *any* violation of the law may be punished is completely unsuitable to be applied in practice. For example, Article 78 of the committee's draft states that the "Ministry of Culture shall take the decision on the license application within 30 days of its presentation"; it seems rather peculiar that the Ministry might be subject to criminal prosecution if it takes, say, 31 days to issue a decision. It is all the more worrying that the committee's draft does not stipulate any maximum penalties, in contravention of a foundational principle of criminal law, namely that all criminal sanctions must be provided by law.

Second, the power to strip journalists and other print media professionals of their right to practice in the sector is unjustifiable as it amounts to a draconian form of prior censorship. In one of its early cases, the European Commission of Human Rights considered the legitimacy of an order depriving an individual of the right to practise journalism as part of an ongoing sentence in a criminal case. The individual in question had been convicted in Belgium of collaborating with the German authorities and sentenced to life imprisonment. The sentence of imprisonment was later commuted and the individual released. However, the journalist's punishment carried with it a prohibition on participating in any way in the publication of a newspaper. The Commission held that this was a breach of his right to freedom of expression[29] and referred the case to the Court. By the time the Court heard the case, Belgium had amended the law so that the journalist's right to freedom of expression was no longer restricted and the case was struck off the list as a result.[30] However, the case is widely understood as standing for the proposition that depriving individuals of the right to practise journalism, even as part of a criminal sanction, is not a justifiable restriction on freedom of expression.

Finally, we note that while imprisonment may no longer be a sanction under the two draft laws, several speech crimes are defined under the penal code, some of them subject even to the death penalty. In order to be more than a hollow gesture, the initiative to abolish imprisonment of journalists under the Press and Publications Law should be undertaken alongside a similar reform of the penal code.

Recommendations:

[28] This does not necessarily imply that all general criminal restrictions on freedom of expression are illegitimate.
[29] Report on the merits, 8 January 1960.
[30] *De Becker v. Belgium*, 23 March 1962, Application No. 214/56.

- The Press and Publications Law should not contain any penal provisions.
- No specialised jurisdictions or prosecutorial units should exist for dealing with press offences.
- There should be no provisions in any law allowing journalists or others to be deprived of their right to publish.
- In addition to the Press and Publications Law, all laws which provide for the imprisonment of journalists should be reviewed and amended as appropriate.