



FREEDOM OF EXPRESSION ESSENTIAL TO IRAQ'S FUTURE

IRAQ MEDIA LAW ANALYSIS EXECUTIVE SUMMARY

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I. Introduction

A free, independent and pluralistic media is vital to the rebuilding of Iraq as a democratic society. A Gallup Poll published in November 2003 found that virtually without exception, residents of Baghdad regarded the right to freedom of expression as the most important right to be guaranteed in Iraq's new constitution.¹ The "Agreement on Political Process" concluded by the Iraqi Governing Council and the Coalition Provisional Authority (CPA) in November 2003 guarantees that the "Fundamental Law" to be drawn up by February 2004 will include a Bill of Rights, which will, among other things, protect the right to freedom of expression.²

While the inclusion of the right to freedom of expression in the new Fundamental Law is an important first step, it is not in itself sufficient. A significant number of existing Iraqi laws seriously impinge on the right to freedom of expression, contradicting both international guarantees and, presumably, any future constitutional guarantee.³ In

¹ Gallup Survey in Iraq, Government "A", 11 November 2003: <http://www.cpa-iraq.org/audio/20031118_Gallup-basic-freedoms.pdf>.

² The Fundamental Law will function as Iraq's interim constitution until a new and final Constitution is adopted. "Agreement on Political Process", 15 November 2003: <http://www.cpa-iraq.org/audio/20031115_Nov-15-GC-CPA-Final_Agreement-post.htm>.

³ Under the provisional arrangements set up in Iraq, all laws that were in effect as of 16 April 2003 will remain in effect, unless amended or repealed by the Coalition Provisional Authority: Coalition Provisional

addition, the CPA has itself issued Orders and Regulations that restrict rather than promote freedom of expression. Therefore, in order to make freedom of expression a lasting reality for everyone, the entire legal framework in Iraq as it affects freedom of expression must be critically reviewed. A number of laws will need to be repealed or amended as necessary to bring them into line with international standards. In addition, a cultural change is needed to sensitise Iraqi politicians and other public figures to the practice of independent and critical reporting, which will expose them to intense scrutiny and sometimes harsh criticism.

This Note, which is released as an advance executive summary of a forthcoming analysis of the Iraqi media law landscape, examines a number of existing laws that affect freedom of expression.⁴

I.1 International Standards on Freedom of Expression

The right to freedom of expression is set out at Article 19 of the *Universal Declaration on Human Rights* (UDHR),⁵ widely regarded as binding on all States as a norm of customary international law. This right was given explicit legal form at Article 19 of the *International Covenant on Civil and Political Rights*,⁶ which was ratified by Iraq in January 1971.⁷ Article 19 of the ICCPR states:

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

Paragraph 3 of this provision holds the key to the implementation of this right. It recognises that the right to freedom of expression is not absolute, but requires that any restrictions remain within strictly defined parameters. It sets a strict three-part test, requiring any restriction to be (1) prescribed by law, (2) pursue one of the legitimate aims listed and (3) be necessary in a democratic society. International jurisprudence makes it clear that this test presents a high standard which any restriction must overcome. The requirement that a restriction is ‘prescribed by law’ will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁸ Second, the restriction must pursue one of the legitimate aims listed in Article

Authority Regulation Number 1, CPA/REG/16 May 2003/01, Section 2.

⁴ Translations of the relevant laws have been provided by Index on Censorship: <http://www.indexonline.org/>.

⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

⁶ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁷ The ICCPR first came into force in March 1976, so this was its effective in force date for Iraq.

⁸ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, para. 49.

19(3). Third, the restriction must be necessary to secure one of those aims. This means that there must be a “pressing social need” for the restriction, that the reasons given to justify the restriction must be “relevant and sufficient” and that the restriction must be “proportionate to the aim pursued.”⁹

II. Overview of Iraqi Laws Affecting the Media

A large number of laws exist in Iraq – or have been introduced by the CPA – that restrict freedom of expression beyond the extent permitted under international law. The following sections summarise the most important of these laws, providing a brief analysis and recommending amendment or repeal, as necessary.

II.1 Criminal Content Restrictions

The Penal Code of Iraq contains a large number of draconian restrictions on what may be published in Iraq. With the exception of two provisions criminalizing the instigation of constitutional change and insulting the President that were suspended by the CPA (Articles 200(2) and 225),¹⁰ all remain in force.¹¹ In our view, all of the provisions noted below breach the right to freedom of expression as protected under international law, in many cases flagrantly so.

The various offences may be summarised under the following headings:

- **Insult and Defamation:**
 - Article 202 makes it a crime, punishable by up to 10 years’ imprisonment, to insult the Arab nation, the Iraqi people, a group of Iraq’s population or the national flag.
 - Article 227 makes it a crime, punishable by up to 2 years’ imprisonment, to publicly insult a foreign country, flag or national emblem, or an international organization with an office in Iraq, including its head or representatives.
 - Article 229 makes it a crime to insult a public servant or body in the course of their duty.
 - Article 433 makes calumny a crime (accusing someone of having committed a crime or bringing them into serious disrepute).
 - Article 434 makes it a crime, punishable by up to 1 year’s imprisonment, to direct abuse at others which has the effect of compromising their honour or status, or that offends them.
- **Publication of False News:**
 - Article 210 makes it a crime to broadcast or to intend to broadcast false and ill-intentioned news, statements or rumours or to disseminate inciting propaganda if this disturbs public security, intimidates people or inflicts harm on public interest.

⁹ *Lingens v. Austria*, 8 July 1986, Application No.9815/82, paras. 39-40.

¹⁰ Coalition Provisional Authority Order No. 7, CPA/ORD/9 June 2003/07, Article 2.

¹¹ The authority of the CPA is required for prosecution of the some offences. These include Articles 156-189 (offences against the external security of the State), Articles 190-195, 198-199, 2001-219 (offences related to internal security), Articles 223-224, 226-228 (offences against public authorities), and Article 229 (offence of insulting a public figure).

- Public Order and National Security:
 - Article 201 makes it a crime, punishable by up to life imprisonment, to promote Zionist and masonry ideologies, including by joining such institutions, or by promoting these ideologies morally or in any other way.
 - Article 208 makes it a crime, punishable by up to seven years' imprisonment, to possess materials that incite constitutional change or that promote banned ideologies with the aim of publishing them.
 - Article 214 makes it a crime, punishable by up to one year's imprisonment, to shout or sing in a manner that provokes dissent.
 - Article 215 makes it a crime to possess, with the aim of publication, materials that disturb public security or tarnish the country's reputation.
- Other Offences:
 - Article 228 makes it a crime to publish proceedings of secret sessions held by the national assembly or dishonestly and ill-intentionally publishing proceedings of the assembly's open sessions.
 - Article 437 makes it a crime, punishable by up to two years' imprisonment, to divulge secrets, except when the aim is to report or prevent a crime.
 - Article 438 makes it a crime, punishable by up to two years' imprisonment, to invade privacy where this causes offence.

Additional restrictions are found in the Law of Publications.¹² Articles 16-21 of this Law ban the publication of a number of materials, including anything that is offensive to the government, anything that would violate general moral values or anything that runs counter to Iraqi policies. Other materials may be published only with official permission, including any statements 'attributed to' government figures, minutes of closed court sessions or decisions of the council of ministers. Violations of the Law of Publications may be punished by licence suspension or revocation, while the owner and/or editor may be sentenced to a maximum of thirty days' imprisonment.

The Coalition Provisional Authority has actually extended the range of prohibited material, enacting further media offences. CPA Order No. 14, entitled "Prohibited Media Activity",¹³ prohibits the publication of any material that incites violence, civil disorder, rioting or damage to property or making statements on behalf of the Iraqi Ba'ath Party, amongst other things. The Iraqi Governing Council has threatened to use these provisions to ban broadcast outfits it deems to 'incite violence'. So far, it has banned *Al Arabiya TV* from using official Iraqi satellite uplinks, while in September 2003, both *Al Jazeera TV* and *Al Arabiya TV* were banned from entering official premises for two weeks as punishment for broadcasting footage of masked individuals who threatened to kill members of the Governing Council.¹⁴

¹² Law No. 206 of 1968.

¹³ CPA/ORD/10 June 2003/14.

¹⁴ 'Iraqi leaders ban Arab TV network', BBC-Online, 24 November 2003: <http://news.bbc.co.uk/1/hi/world/middle_east/3233876.stm>; 'Arab stations in Iraq face curbs', BBC-Online, 23 September 2003, <http://news.bbc.co.uk/1/hi/world/middle_east/3131152.stm>.

The large number of criminal offences that can be brought to bear on the media, both under previously existing criminal laws and under the newly introduced CPA Order, provide the authorities with a formidable arsenal with which to harass any media whose output they do not find to their liking. ARTICLE 19 considers that use of the criminal law to restrict freedom of expression should generally be limited to clearly and narrowly delineated offences that protect legitimate national security or serious public order concerns.

ARTICLE 19 has a number of specific criticisms of these provisions. First, the provisions on defamation are in clear breach of the right to freedom of expression. The use of criminal defamation laws to protect reputation or privacy is illegitimate. Reputation and privacy can adequately be protected through civil law, as demonstrated in practice in many jurisdictions and this implies that use of the criminal law is unnecessary. The Special Rapporteurs on freedom of expression of the United Nations, the Organisation for Security and Cooperation in Europe and the Organisation of American States have called on States to repeal all criminal defamation laws in favour of civil defamation laws.¹⁵ There are a number of other problems with the Iraqi defamation laws, including the special protection they provide to public officials, the protection they provide to groups of people and to States and symbols, and their vaguely defined scope.

Second, restrictions on publishing ‘false news’ have been ruled by constitutional courts around the world to be incompatible with the right to freedom of expression.¹⁶ They fail to take into account the daily pressure that journalists are under to report news under constant time-pressures, which will inevitably lead to mistakes being made, and are frequently abused to stifle critical reporting. The absolute prohibition of publishing ‘false news’ is therefore incompatible with international standards.

Third, laws restricting freedom of expression to protect public order and national security are legitimate only if carefully tailored to prevent abuse. Such restrictions should be unambiguously worded and narrow in scope. They should be engaged only in the context of a clear and close nexus between the expression in question and the national security or public order risk. The various provisions in Iraqi law dealing with this issue fail to meet this standard. The threat of the use of CPA Order No. 14 against certain TV stations illustrates this: the nexus between their reporting of dissenting voices and any public disorder is unclear at best, and a clear attempt to silence legitimate voices at worst. Certain provisions in the Penal Law are particularly opaque. The offence of ‘shouting to provoke dissent’ could be committed by anyone who participates in a demonstration. It is hard to ascertain what risk promoting Zionism might pose to Iraq but the dangers of similar provisions in the region being abused to prevent reporting about Israel are far from theoretical.

¹⁵ Joint Declaration, 11 December 2002: <www.unhchr.ch/hurricane/hurricane.nsf/0/2D8D8FAD6977D4A5C1256C8C00493AF7?opendocument>.

¹⁶ E.g. *R v. Zundel*, [1992] 2 SCR 731 (Supreme Court of Canada); *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000 (Supreme Court of Zimbabwe).

Fourth, the various other restrictions noted above are all problematical from a freedom of expression perspective. It is fairly obvious that journalists should not need official permission to quote public officials and that they should not be prohibited from publishing anything deemed offensive to the government. The rule against reporting that runs counter to Iraqi policies, as well as the prohibition on making statements on the Ba'ath Party, appear to be attempts, respectively, to impose or ban certain ideologies, clearly unacceptable in a democracy.

Recommendations:

- All criminal defamation and insult provisions should be repealed and replaced, as necessary, with appropriate civil defamation laws.
- All national security and public order offences should be redrafted in clear and unambiguous language, restricting only expressions that directly and imminently incite violence or serious illegal disorder.
- The prohibition on the publication of 'false news' should be repealed.
- The various other restrictions on the media and journalists noted above should be reviewed and amended or repealed to bring them into line with international guarantees of freedom of expression.

II.2 Print Regulation

Under the Law of Publications,¹⁷ all owners of "political periodicals" must be over the age of 25, have Iraqi nationality and possess a government-approved 'merit certificate' issued by the journalists' union. All publications must be licensed by the Ministry of Information. A licence application may be refused on 'public interest' grounds; refusals may be appealed to the Council of Ministers. When a chief editor resigns, the publication must reapply for its licence.

A non-Iraqi may publish only with the approval of both the foreign ministry and the authorities of the country of which s/he is a national. Non-nationals may not import any material into the country that can be regarded as 'interfering in Iraq's internal affairs' or 'infringing on Iraq's foreign policy'. All foreign correspondents must be licensed by the Ministry of Information. Violations of the Law of Publications may be punished by licence suspension or revocation, while the owner and/or editor may be sentenced to a maximum of thirty days imprisonment.

International human rights courts have held that licensing requirements for individual journalists are incompatible with freedom of expression,¹⁸ while purely administrative registration regimes are legitimate only when they are restricted in application to mass media organisations, they are administered by an independent body and the regime does not pose any substantive restrictions on the right to freedom of expression. In particular, it should not allow for registration to be refused or suspended based on the content of the publication. The regime provided under the Law of Publications signally fails to meet

¹⁷ Note 12.

¹⁸ *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.

these standards: it is administered by a government department; registration may be refused on vague undefined grounds of ‘public interest’; and the regime restricts the rights of non-Iraqis and under-25s to publish.

The restrictions imposed on foreign publications and non-nationals are equally incompatible with international standards on freedom of expression. The system of permissions ensures that full government control over foreign media activities and the restrictions regarding material deemed to interfere in internal affairs or infringe on Iraq’s foreign policy are extremely vague and open to abuse on political grounds.

Recommendations:

- The idea of requiring the print media to register should be reconsidered. If a registration system is retained, it should be administered by an independent body and should be purely administrative in nature, in accordance with the standards articulated above.
- The restrictions on ownership of the print media, which bar under-25s and impose political limits on non-Iraqis, should be repealed.
- Importation of foreign publications should be limited only where such publications breach legitimate laws of general application.

II.3 Broadcast and Film Regulation

The Law on Telecommunications¹⁹ establishes the State Post, Telegraph and Telephone Company as the pivotal body in the communications sector, licensing broadcasters and other telecommunications providers. The Law provides that licensing policies are determined by the Board of Directors but provides little further detail. Broadcasting without a licence is punishable by two years’ imprisonment or a 1,000 dinar fine. Pursuant to CPA Order No. 11, on Licensing Telecommunications Services and Equipment,²⁰ it appears that these functions have now been assumed by the Ministry of Transport and Communications.

The Law on Censorship of Classified Material and Cinema Films²¹ designates the Ministry of Information as the agency responsible for censoring all films produced or imported into Iraq. Article 2 of this Law states that films shall be banned if they:

- advocate atheism, sectarianism, the corruption of morals or crime;
- promote acts of subversion or the use of violence;
- affect public order and internal security;
- encourage the consumption of intoxicating substances, drugs or gambling;
- promote reactionary, chauvinist, racist, anti-Arab or regional ideas;
- favour defeatism;
- serve imperialism, Zionism and their “props”;
- do not serve the aims, interests and aspirations of the masses;
- harm the Arab nation, its aims or fateful causes;

¹⁹ Law No. 159 of 1980.

²⁰ CPA/ORD/8 June 2003/11.

²¹ Law No. 64 of 1973.

- offend friendly states or discredit and offend national liberation movements in the world;
- are of such a poor intellectual and artistic standard as to offend good taste and to fail to tackle a useful theme; or
- are not dubbed or sub-titled into Arabic, excluding scientific, medical, training, documentary, musical, sports and animated films.

Films produced by the Ministry of Defence are exempted from Ministry of Information censorship, as are films produced by the State broadcaster, provided they have been examined by an internal committee. Violations of the law may be punished by up to six months' imprisonment.

Under international law, it is well-established that any regulatory bodies in the communications sector should be independent of the government and any other political or economic interests. The two regimes described above, being administered by government departments, clearly fail to meet this key condition. The transfer by the CPA of responsibility for broadcasting to the Ministry of Transport and Communications equally clearly fails to address this serious problem. Moreover, the broadcasting regime lacks the detail required to ensure that licensing processes are fair and that they promote pluralism in the use of the radio spectrum, a key obligation under international human rights law.

Furthermore, the censorship regime for films seriously breaches international standards on freedom of expression. The Law on Censorship employs extremely vague terms which make it possible to ban practically any film. Examples of such terms include restrictions on material that 'favours defeatism', 'offends good taste' or that fails to 'serve the aims, interests and aspirations of the masses'. International law regards prior censorship regimes with suspicion, although they have been accepted in certain limited circumstances, for example to protect minors. It does not, however, recognise as legitimate prior censorship regimes which effectively grant wide discretion to the government to ban material based on extremely vague and subjective standards.

Recommendations:

- The whole regulatory approach for the communications sector should be reformed to provide for an independent regulatory body and an open, clear licensing system designed to promote freedom of expression and a pluralistic broadcast sector.
- There should be no prior censorship of films; some sort of classification scheme to protect minors may be instituted.

II.4 The Ministry of Culture and Information

The Ministry of Culture and Information carries out a number of regulatory functions in the communications field, such as the licensing of print media (discussed above) and musical recordings, censoring films and publishing a variety of print titles through the Jamaheer press house, as well as through the State film and theatre enterprises.

Article 1 of the Law on the Ministry of Culture and Information²² sets out the ‘aims and objectives’ of the Ministry of Culture and Information. This includes a number of vague aims that are not compatible with a commitment to freedom of expression and to a free, independent and pluralistic media. This Ministry includes among its functions an obligation to:

- “popularize, deepen and cement the thought and principles of the Arab Baath Socialist Party in the country and the Arab homeland”;
- “seek unification of the information fundamentals of the Arab media as an expression of the Arab homeland’s intellectual and cultural unity”;
- “cultivate culture and arts in all their spheres and to develop them according to the principles of the Arab Baath Socialist Party and goals of the great 17-30 July revolution”;
- “combat colonialist, Zionist, racist, reactionary, capitalist and anti-Arab trends”;
- “cultivate and develop Iraqi national culture and arts of the various ethnic communities in accordance with the principles of the Arab Baath Socialist Party and within a notion of unity of national culture and arts”; and
- “interact with world culture and arts through the humanitarian view of the Arab Baath Socialist Party and the great 17- 30 July revolution.”

It is normal for ministries of culture to promote cultural activities, for example through granting financial subsidies to cultural groups. However, the role of the Ministry of Culture and Information goes far beyond this, functioning as an arm of the State system of propaganda and information control. This is not an appropriate function for a ministerial department in a modern democracy. It should therefore be reformed into a modern government cultural department, with no control over the public media or over regulatory functions in the media and communications field.

Recommendations:

- The Ministry of Culture and Information should not have any aims that run counter to the promotion and protection of freedom of expression. It should not have a statutory mandate to promote or obstruct any one political party or ideology.
- The State broadcaster should be transformed into a public service broadcaster. All other State media enterprises, including film and broadcasting, should either be privatised or transformed into independent bodies.
- The Ministry of Information should be stripped of any regulatory functions in the media and communications field.

²² Law No. 94 of 1981.