



**Declaration on  
Promoting an Independent and Pluralistic Media in  
Afghanistan**

**EXPLANATORY MEMORANDUM**

by

**ARTICLE 19  
Global Campaign for Free Expression**

**London  
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**INTRODUCTION**

On 5 September 2002, an International Seminar bringing together representatives of the Afghan government, local civil society and the international community adopted a Declaration on Promoting an Independent and Pluralistic Media in Afghanistan ('the Declaration'). This Declaration, together with the Policy Directions on Reconstruction and Development of Media in Afghanistan issued by the Minister for Information and Culture on 6 June ('the Policy Directions'), constitutes the basic framework for the development of media policy in Afghanistan.

Both the Policy Directions and the Declaration are firmly rooted in international law and standards. This Explanatory Memorandum seeks to elaborate the international and comparative law basis for the Declaration, particularly relating to the guarantee of freedom of expression.<sup>1</sup> It draws on international law, as elaborated in the decisions of

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<sup>1</sup> This Memorandum updates ARTICLE 19's earlier Explanatory Memorandum on the Afghan Ministry of Information Policy Direction on Reconstruction and Development of Media in Afghanistan, published July 2002.

international courts and authoritative international statements, as well as leading national court decisions interpreting constitutional guarantees of freedom of expression. It is intended to contribute towards implementation of the Policy Directions and Declaration. Where possible, specific suggestions are made for the practical implementation of individual action points mentioned in the Declaration.

This memorandum first discusses the importance of freedom of expression in a democratic society, with particular emphasis on the special role of the media. It then provides a commentary on those issues addressed in the Declaration which are of a legal or regulatory nature, including public service broadcasting and the promotion of an independent and pluralistic media.

## **FREEDOM OF EXPRESSION: AN OVERVIEW**

### **The Guarantee of Freedom of Expression**

Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>2</sup> a United Nations General Assembly resolution, 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 is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>3</sup>

The *International Covenant on Civil and Political Rights* (ICCPR),<sup>4</sup> a treaty ratified by over 145 States which elaborates on many rights included in the UDHR, imposes formal legal obligations on State Parties to respect its provisions. Afghanistan ratified the ICCPR on 24 January 1983. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),<sup>5</sup> Article 13 of the

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

<sup>3</sup> See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit)

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

<sup>5</sup> Adopted 4 November 1950, in force 3 September 1953.

*American Convention on Human Rights*<sup>6</sup> and Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>7</sup>

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946 the UN General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."<sup>8</sup>

The Inter-American Court of Human Rights has emphasised the importance of freedom of expression as a key underpinning of democracy, noting:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.<sup>9</sup>

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>10</sup>

Freedom of expression has a double dimension; it refers not only to imparting information and ideas but also to receiving them. This is explicit in international guarantees of freedom of expression such as that found in the *Universal Declaration of Human Rights*, quoted above, and has also been stressed by international courts. The Inter-American Court of Human Rights, for example, has stated:

[T]hose to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.<sup>11</sup>

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<sup>6</sup> Adopted 22 November 1969, in force 18 July 1978.

<sup>7</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>8</sup> 14 December 1946.

<sup>9</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

<sup>10</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>11</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 9, para. 30.

## Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”<sup>12</sup> It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>13</sup>

The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>14</sup>

The media merit special protection in part because of their role in informing the public and in acting as watchdog of government. The European Court of Human Rights has made this clear in the following statement, which it has often quoted:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.<sup>15</sup>

The Court has also held that Article 10 applies not only to the content of expression but also the means of transmission or reception.<sup>16</sup>

## Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression 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;

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<sup>12</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

<sup>13</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.

<sup>14</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 9, para. 34.

<sup>15</sup> See *Castells v. Spain*, note 13, para. 43, *Thorgeirson v. Iceland*, note 12, para. 63, *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, 14 EHRR 153, para. 59 and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65.

<sup>16</sup> *Autronic AG v. Switzerland*, 22 May 1990, Application No. 12726/87, 12 EHRR 485, para. 47.

- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, as recognised by the Human Rights Committee. This test requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be ‘provided by law’, is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.<sup>17</sup> The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provision allowing limited restrictions on freedom of expression, has developed two fundamental requirements:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>18</sup>

The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed in Paragraph 3, namely the rights or reputations of others or the protection of national security, public order (‘ordre public’) or of public health or morals.

The third condition means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessary”. The European Court of Human Rights has established that this is a very strict test:

‘[The adjective ‘necessary’] is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. [It] implies the existence of a “pressing social need”.<sup>19</sup>

Furthermore, any restriction must restrict freedom of expression as little as possible.<sup>20</sup> The measures adopted must be carefully designed to achieve the objective in question, and they should not be arbitrary, unfair or based on irrational considerations.<sup>21</sup> Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

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<sup>17</sup> *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).

<sup>18</sup> *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, para. 49.

<sup>19</sup> *Ibid.*, para. 59.

<sup>20</sup> *Handyside v. the United Kingdom*, Judgment of 7 December 1976, para. 49 (European Court of Human Rights).

<sup>21</sup> See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8 (Canadian Supreme Court).

## KEY POLICY RECOMMENDATIONS

### *Legal and Regulatory Issues*

#### **Recommendation 1: Constitutional Right to Freedom of Expression**

*It is recommended that the fundamental right of free speech and free media be included in the new Constitution.*

Under the Bonn Agreement,<sup>22</sup> a Constitutional Loya Jirga is to be established by June 2004; in the interim, Afghanistan's 1964 Constitution has been declared applicable to the extent that its provisions are not incompatible with the Bonn Agreement and with the exceptions of the provisions relating to the monarchy. A Constitutional Commission has been set up to prepare the Constitutional Loya Jirga.

It is presumed that the Constitutional Commission will take the 1964 Constitution as one of its starting points. This protects the right to freedom of expression in Article 31, which provides:

Freedom of thought and expression is inviolable. Every Afghan has the right to express his thoughts in speech, in writing, in pictures and by other means, in accordance with the provisions of the law. Every Afghan has the right to print and publish ideas in accordance with the provisions of the law, without submission in advance to the authorities of the state. The permission to establish and own public printing houses and to issue publications is granted only to the citizens and the state of Afghanistan, in accordance with the provisions of the law. The establishment and operation of public radio transmission and telecasting is the exclusive right of the state.

This constitutional guarantee falls below the standards established by international guarantees of freedom of expression in several respects and it can, therefore, be no more than a starting point. First, although the opening sentence is very widely phrased, a number of the specific 'rights' that follow are granted to Afghans only. This contrasts with international law, as well as generally established practice in other countries, which requires States to guarantee human rights to all persons within their territory or jurisdiction.<sup>23</sup> This includes, for example, refugees, immigrants and stateless persons. Second, it should be noted that this provision does not incorporate the three-part test for restrictions prescribed under international law. It merely states that the right to freedom of expression should be exercised 'in accordance with the law'. Third, Article 31 appears to provide for licensing of publications as a constitutional principle. As will be elaborated below, this is contrary to established principles of international human rights law. Fourth, Article 31 establishes a Constitutional state monopoly over broadcasting. This contradicts both the Policy

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<sup>22</sup> Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions, 5 December 2001.

<sup>23</sup> See, for example, Article 2, ICCPR.

Directions and the Declaration, as well as international law, and should be removed from the new Constitution.

The ministerial Policy Directions provide that Afghan society is to be rebuilt on the principles of Islam, democracy and human rights. Constitutional protection for the right to freedom of expression should be consistent with the International Covenant on Civil and Political Rights. It should, therefore, at a minimum incorporate the three-part test for restrictions – that restrictions be provided for by law, pursue a legitimate aim and be ‘necessary in a democratic society’ to achieve that aim.

Furthermore, the new Constitution should protect explicitly the right of access to information. It has been said that ‘information is the oxygen of democracy’,<sup>24</sup> and in a transitional democracy such as Afghanistan this is especially true. If people do not know what is happening in their society, they cannot take a meaningful part in the affairs of that society. Moreover, access to information about laws and procedures will enhance transparency and help keep public bodies accountable, an absolute prerequisite if the public is to have confidence in its government. For this reason, the right to access information is constitutionally protected in a wide range of countries, including Kazakhstan, Sweden, Thailand, and the Philippines, to name but a few.

In addition, consideration should be given to enshrining the independence and public interest remit of the public broadcaster as well as the independent broadcast authority in the new constitution. Given the key function of broadcasting in the democratic development of Afghanistan, it is crucial that these institutions receive the highest level of legal protection. An example of a country where the independent broadcast authority has been granted constitutional status is South Africa, which went through a similar period of democratic transition in the 1990s.<sup>25</sup>

## **Recommendations 2 and 3: Review of the Legal System**

*It is recommended that a thorough and time-bound review of the legal system as it affects the media begin immediately, with the goals of creating laws and procedures that promote freedom of expression, protect the rights of journalists, and guarantee their freedom to do their work in safety, including publishing critical reports and opinions.*

*It is recommended that the review include revision of criminal laws affecting speech and media to meet international standards in definition of terms to clarify the laws and provide safeguards against arbitrary prosecution and political misuse. The review should include revision of the system to move legitimate legal actions against journalists out of criminal courts and into civil ones.*

Under international law, States are required to bring their law and practice into line with international standards. Article 2 of the ICCPR, for example, states:

[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of

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<sup>24</sup> *The Public’s Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19: London 1999, Preface.

<sup>25</sup> 1996 Constitution, Section 192.

the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

For States which are making a transition to democracy, this implies that they should review all existing legislation which may infringe human rights with a view to removing any such breaches. This recommendation is a recognition of that responsibility.

A key law to be reviewed is the Press Law, adopted in February 2002. This consists mainly of a number of provisions dealing with licensing and registration of media houses, publishers and editors (Chapters 1-6) and a set of restrictions on the content of what may be published (Chapter 7). In addition, the Criminal Code currently in effect contains at least 37 separate articles creating publication, broadcast and speech crimes under which media practitioners and others can be prosecuted. This includes criminal causes of action with regard to insult, defamation and privacy.

As restrictions on freedom of expression, all these laws need to be revised to meet the three-part test prescribed by international law, as outlined above. Thus, all restrictions need to be clear in wording as well as in scope, pursue a legitimate aim and be strictly necessary and proportionate to achieve that aim. Safeguards will need to be built into the laws to prevent abuse, for example by providing independent oversight as well as fair and adequate appeals mechanisms. In the interim, the government should announce immediately that prison penalties will not be imposed for crimes of expression with the exception of certain narrowly defined incitement to hatred offences and crimes against national security. This would be a major step toward ending the self-censorship created by the possibility of prison.

The final point of action, concerning the move of legitimate legal actions out of the criminal sphere, is particularly pertinent with regard to actions related to privacy, insult and defamation. ARTICLE 19's standard-setting publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, recommends:

All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws ... As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:

- i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all elements of the offence, as set out below;
- ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh



criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.”<sup>26</sup>

#### **Recommendation 4: Licensing/Registration of the Print Media**

*It is recommended that steps be taken to [ensure] that anyone can publish newspapers and periodicals without obtaining a license. Licensing provisions in the Press Law should be suspended immediately.*

Licensing refers to a system whereby media outlets have to obtain permission before they may begin to operate while registration systems simply require media outlets to provide certain information. For the print media, licensing systems, which involve the possibility of being refused a licence except purely technical grounds, are illegitimate. Unlike for broadcasting, where limited frequency availability justifies licensing, there is no practical rationale for licensing requirements for the print media. Furthermore, licensing of the print media cannot be justified as a legitimate restriction on freedom of expression since it significantly fetters the free flow of information and does not pursue any legitimate aim or social goal.

Technical registration requirements do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in most established democracies. As the UN Human Rights Committee has noted: “Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”<sup>27</sup>

The UN Human Rights Committee has also ruled that legal provisions which require small circulation publications to register are illegitimate. In a recent case, the Committee held that the legal requirement for an author to register his publication, which had a circulation of just 200 copies, was disproportionately onerous, exerted a chilling effect on freedom of expression, and could not be justified in a democratic society.<sup>28</sup> In particular, the Committee stated:

[P]ublishers of periodicals...are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low

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<sup>26</sup> *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, Principle 4: Criminal Defamation (ARTICLE 19, London: July 2000).

<sup>27</sup> General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

<sup>28</sup> *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.

as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.<sup>29</sup>

## **Recommendation 5: Independent Broadcast Authority**

*It is recommended that work begin immediately ... to establish an Independent Broadcast Authority to license radio and television broadcasters, equitably and pluralistically, with protections against political or economic interference. Frequencies should be allocated under well-defined criteria, which are transparent and accountable.*

It is well established under international law that bodies with regulatory or administrative powers over the media should be independent of government. This applies to all public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public. These bodies exercise considerable control over the media and, if they are subject to political interference, could unduly restrict the free flow of information and ideas.

This has been widely recognised by courts and international bodies. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”<sup>30</sup>

Similarly, the Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, stating that Member States should establish “independent regulatory authorities for the broadcasting sector” and “include provisions in their legislation ... which enable them to fulfil their missions in an effective, independent and transparent manner.”<sup>31</sup>

ARTICLE 19 recently published a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.<sup>32</sup> These Principles are drawn from international and comparative law, and note that for regulatory bodies there are a number of ways of ensuring independence. The most important of these is to entrust governance of these bodies to an independent board which is itself protected against interference. Principle 10 sets out the various ways in which independence should be guaranteed:

Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

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<sup>29</sup> *Ibid.*, para. 8.1

<sup>30</sup> *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

<sup>31</sup> Recommendation (2000) 23, adopted 20 December 2000.

<sup>32</sup> ARTICLE 19 (London: April 2002).

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

## Recommendation 6: Freedom of Information

*It is recommended that Open Government laws be adopted giving the public and journalists access to information and meetings. Information produced and held by government should be available to the public and the media with narrowly defined exceptions open to appeal.*

Freedom of information, including the right to access information held by public bodies, has long been recognised not only as crucial to democracy, accountability and effective participation, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations at a number of international bodies, including the United Nations (UN), the Commonwealth, the Organization of American States (OAS) and the Council of Europe (CoE), as well as national developments in countries around the world, amply demonstrate this. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.<sup>33</sup>

The right to freedom of information as an aspect of freedom of expression has been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his annual reports to the UN Commission on Human Rights. In 1997, he stated: “The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large ... is to be strongly checked.”<sup>34</sup> His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to “develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications.”<sup>35</sup> In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....<sup>36</sup>

<sup>33</sup> Adopted 14 December 1946.

<sup>34</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31, 4 February 1997.

<sup>35</sup> Resolution 1997/27, 11 April 1997, para. 12(d).

<sup>36</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

Once again, his views were welcomed by the Commission on Human Rights.<sup>37</sup>

In recognition of the key importance of freedom of information, and the need to secure it through legislation, laws giving individuals a right to access information held by public authorities have been adopted in almost all mature democracies. In addition, many newly democratic countries – including Albania, Bosnia-Herzegovina, Mexico, Pakistan, Russia, Thailand and South Africa – have recently adopted freedom of information laws, with many other countries in transition currently in the process of adopting them.

The Declaration stresses that Open Government laws should give access to documents as well as to meetings, and that they should be guided by the principle of maximum disclosure with narrowly defined exceptions open to appeal. These are important guiding principles. ARTICLE 19 has published a key standard-setting work on the right to freedom of information under international law, *The Public's Right to Know: Principles on Freedom of Information Legislation*.<sup>38</sup> This publication, which has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression,<sup>39</sup> among others, sets out nine key principles which should underpin freedom of information legislation. The following is a synopsis of the main elements of these nine principles:

PRINCIPLE 1: MAXIMUM DISCLOSURE – FOI legislation should be guided by the principle of maximum disclosure, which involves a presumption that all information held by public bodies is subject to disclosure, and that exceptions apply only in very limited circumstances. Exercising the right to access information should not require undue effort, and the onus should be on the public authority to justify any denials.

PRINCIPLE 2: OBLIGATION TO PUBLISH – Freedom of information requires public bodies to do more than accede to requests for information. They must also actively publish and disseminate key categories of information of significant public interest. These categories include operational information, costs, information on complaints, procedures for public input, and the content of decisions affecting the public.

PRINCIPLE 3: PROMOTION OF OPEN GOVERNMENT – FOI legislation needs to make provision for informing the public about their access rights and promoting a culture of openness within the government. At minimum, the law should make provisions for public education and dissemination of information regarding the right to access information, the scope of information available, and the manner in which rights can be exercised. As well, to overcome the culture of secrecy in government, the law should require training for public employees, and encourage the adoption of internal codes on access and openness.

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<sup>37</sup> Resolution 1998/42, 17 April 1998, para. 2.

<sup>38</sup> Note 24.

<sup>39</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

PRINCIPLE 4: LIMITED SCOPE OF EXCEPTIONS – Requests for information should be met unless the public body shows that the information falls within a narrow category of exceptions, in line with a three-part test:

- The information must relate to a *legitimate aim* listed in the law;
- Disclosure must threaten *substantial harm* to that aim; and
- The harm must be *greater than* the public interest in disclosure.

Restrictions that protect government from embarrassment or exposure of wrongdoing can never be justified.

PRINCIPLE 5: PROCESS TO FACILITATE ACCESS – All requests for information should be processed quickly and fairly by individuals within the public bodies responsible for handling requests and complying with the law. In the case of denial, a procedure for appeal to an independent administrative body, and from there to the courts, should be established.

PRINCIPLE 6: COSTS – The cost of access to information should never be so high that it deters requests. Public interest requests should be subject to lower fees, while higher fees may be charged for commercial requests.

PRINCIPLE 7: OPEN MEETINGS – FOI legislation should establish the presumption that all meetings of governing bodies are open to the public so that the public is aware of what the authorities are doing, and is able to participate in decision-making processes. Meetings may be closed, but only where this can be justified and adequate reasons are provided. To facilitate attendance, adequate notice of meetings should be provided.

PRINCIPLE 8: DISCLOSURE TAKES PRECEDENCE – Other legislation should be interpreted in a manner that renders them consistent with the disclosure requirements of FOI legislation. In particular, in case of a conflict between the FOI law and a secrecy law, the former should prevail.

PRINCIPLE 9: PROTECTION FOR WHISTLEBLOWERS – FOI legislation should include provisions protecting individuals from legal, administrative or employment-related sanctions for releasing information on wrongdoing.

The full text of these principles can be found on ARTICLE 19's Virtual Freedom of Expression Handbook, online at <http://handbook.article19.org> under 'Key Documents'.

## **Recommendation 7: Public Service Broadcasting**

*It is recommended that work begin immediately on transforming Radio-Television Afghanistan into a public service broadcasting system. In recognition of the significant role the media will play in the debate over national reconstruction, a timetable for the conversion should be agreed to by the end of 2002 and a detailed plan initiated with the aim of significant progress towards this goal being achieved by June 2004. This should include early creation of an independent board of governors that reflects Afghanistan's diversity.*

### ***Transformation of State/Government Broadcasters***

It is now well established under international law that State or government broadcasters must be transformed into independent public service broadcasters with a mandate to serve the public interest.<sup>40</sup> These broadcasters are funded from the public purse and must serve the whole public and not simply the interests of the government of the day. This was put very clearly by the Supreme Court of Ghana as follows:

[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.<sup>41</sup>

Numerous statements by authoritative international bodies reiterate this point. One example is the *Sana'a Declaration*, adopted under the auspices of UNESCO in the city of that name in Yemen in 1997. The result of a regional conference, with particular focus on countries in that region, the *Declaration* stated: "State-owned broadcasting...should be, as a matter of priority, reformed and granted status of journalistic and editorial independence as open public service institutions."<sup>42</sup>

### ***Pluralism and Access***

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. A key aspect of the positive element of the right to freedom of expression is the obligation on governments to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to receive a variety of information.

An important aspect of States' positive obligation to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism."<sup>43</sup> One of the rationales behind public service broadcasting is that it makes an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

One aspect of pluralism is that all groups have access to the media. The Inter-American Court has held that freedom of expression requires that "the communication

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<sup>40</sup> *Op. cit.* n. 32, Principle 34.

<sup>41</sup> *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

<sup>42</sup> *Sana'a Declaration on Promoting Independent and Pluralistic Arab Media*, adopted by Arab journalists 11 June 1996 and endorsed by Arab States and the PNA during the twenty-ninth session of the General Conference of UNESCO in November 1997 (Resolution 34).

<sup>43</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, 17 EHRR 93, para. 38.

media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”<sup>44</sup> Similarly, the Zimbabwean Supreme Court observed in 1988: “Today, television is the most powerful medium for communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium.”<sup>45</sup>

### ***Independent Governing Body***

One of the key ways to ensure the independence of public broadcasters, as for regulatory bodies, is through the appointment of an independent governing board. The institutional autonomy and independence of this body should be ensured in the same way as for regulatory bodies (see above). The most important way of securing the independence of the governing board is through the appointments process, which should not be controlled by any particular political party or grouping. This process should be open and transparent and should allow for the involvement of the public and civil society. Appointments should be made by a multi-party body, not by an individual minister.

The role of the governing body should be set out clearly in law. Its role should include, among other things, ensuring that the public broadcaster fulfils its public mandate in an efficient manner and protecting the broadcaster against interference. The governing body should be responsible for appointing the senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body. If senior management is directly responsible to political organs of government, interference is inevitable. In addition, the appointments process for senior management should be open and fair and individuals should be required to have appropriate qualifications and/or experience. Certain individuals should be prohibited from being appointed to positions in senior management, for example where they have strong political links or where they hold conflicting interests in broadcasting or telecommunications.<sup>46</sup>

However, the governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, an aspect of the principle of editorial independence.

### ***Editorial Independence***

The principle of editorial independence refers to the need for programming decisions to be made by editors and journalists, rather than governing bodies or the government, and on the basis of professional considerations and service to the public. This principle provides another layer of protection for the independence of public

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<sup>44</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 9, para. 34.

<sup>45</sup> Quoted with approval in *Belize Broadcasting Authority v. Courtenay and Hoare* [1988] LRC (Const) 276, at 284.

<sup>46</sup> Note 32, Principle 35.

broadcasters by further insulating them from political or commercial interference. Editorial independence should be guaranteed by law and respected in practice.

This principle is recognised internationally. For example, a Recommendation of the Committee of Ministers of the Council of Europe notes, in Article 1, that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters.<sup>47</sup> Similarly, the ARTICLE 19 Broadcasting Principles state, at Principle 2.1:

The principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, should be guaranteed by law and respected in practice. It should be up to broadcasters, not the government, regulatory bodies or commercial entities, to make decisions about what to broadcast....

### ***Accountability***

Public service broadcasters must be accountable to the public, while at the same time ensuring that their independence is respected. This balance is achieved by providing for formal accountability to the public through a multi-party body, such as the legislature or a committee thereof, rather than a minister or other partisan individual or body. The main accountability mechanism is the obligation for the public broadcaster to produce a detailed annual report on their activities and budgets, including audited accounts. This annual report should be published and widely disseminated.<sup>48</sup> Additional accountability mechanisms may be employed. In some countries, public broadcasters are required to keep themselves under constant public review, for example through conducting public surveys. Often, public broadcasters are subject to a complaints mechanism, whereby members of the public can lodge individual complaints if they believe a programme falls foul of established standards, for example by invading their privacy or by being excessively violent.

### ***Public Service Remit***

The remit of public broadcasters should include providing services which complement those provided by commercial broadcasters. Public broadcasters around the world are required to provide educational and developmental programming. Similarly, most public broadcasters are required to promote national cultural development. For example, the British Broadcasting Corporation is required to stimulate the arts and a diversity of cultural activity, to provide comprehensive, authoritative and impartial coverage of news and current affairs and wide-ranging coverage of sporting and other leisure interests, and to broadcast programmes of an educational nature, including a high standard of original programmes for children.<sup>49</sup>

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<sup>47</sup> Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, adopted on 11 September 1996, Articles 9-13.

<sup>48</sup> Note 32, Principles 15 and 35.

<sup>49</sup> Licence Agreement between the Secretary of State for National Heritage and the Board of Governors of the BBC, Clause 3. Available at: [http://www.bbc.co.uk/info/BBCcharter/index\\_af.htm](http://www.bbc.co.uk/info/BBCcharter/index_af.htm).



In a similar vein, Principle 37 of the ARTICLE 19 Broadcasting Principles states:

The remit of public broadcasters is closely linked to their public funding and should be defined clearly in law. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, providing a service that:

- provides quality, independent programming that contributes to a plurality of opinions and an informed public;
- includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
- provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
- is universally accessible and serves all the people and regions of the country, including minority groups;
- provides educational programmes and programmes directed towards children; and
- promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

### ***Funding Public Broadcasters***

Traditionally, public service broadcasting organisations have been largely funded through public allocations, through either the collection of a broadcasting fee or through direct government subsidies. A serious problem with direct government subsidies is that these may be abused as a means of interfering with the broadcaster. As a result, most observers recommend that public broadcasters be funded by a general charge on users, or broadcasting fee. Such a fee is relatively insulated from government interference or manipulation and provides consistent levels of funding over time. There are, however, drawbacks with a broadcasting fee. It involves collection costs, although these may be minimised by using existing service providers, such as electricity suppliers, to collect the fee. More seriously, it has often proved difficult for political reasons to introduce a broadcasting fee for the first time in countries where one has not traditionally been collected. In addition, the fee may exert some pressure on broadcasting organisations to maintain high audience levels as a way of justifying fee collection, which can undermine commitment to public service goals.

As an alternative to full public funding, most public service broadcasting organisations now look to commercial activities, mainly advertisements but also spin-off industries such as videos and books, to generate supplementary revenue. At the moment, advertisements are largely restricted to public television services, in part because production costs are far higher for television than for radio.

While there is nothing *per se* wrong with allowing some commercial advertising on the public airwaves, it does carry some risks. The most serious is the risk that commercial imperatives will result in public service broadcasting organisations that simply mimic the private sector and base their programming choices on popularity rather than quality. This can only lower the quality and diversity of public service

broadcasting, undermining the whole rationale for it in the first place. At the same time, financial imperatives and dwindling public resources in many countries mean that public service broadcasting organisations cannot maintain levels and quality of programming unless they are allowed to supplement their income with outside revenue. A balance can be found by allowing a limited amount of commercial advertising while ensuring that most of the resources come from public sources of funding.

There are also a number of less common sources of funding which may be considered. In some countries, the fee paid by private broadcasters to occupy a frequency is used to subsidise the public broadcaster. Alternatively, private broadcasters may be required to pay a portion of their advertising revenues to the public broadcaster. Consideration has even been given to imposing a tax on the use of mobile phones to help fund the public broadcaster.

The two most important considerations in relation to funding are that the public broadcaster should receive enough funding to allow it to fulfil its mandate and that funding mechanisms should not be able to be abused as a means of interfering with the public broadcaster. Principle 36 of the ARTICLE 19 Broadcasting Principles states:

Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets, in accordance with Principle 17.

The relevant portions of Principle 17 state:

- 17.1 ...The framework for funding and for decisions about funding should be set out clearly in law and follow a clearly defined plan rather than being dependent on ad hoc decision-making. Decisions about funding should be transparent and should be made only after consultation with the body affected.
- 17.2 Funding processes should never be used to influence decision-making by regulatory bodies.

## **Recommendation 9: Independent Media**

*It is recommended that the international community continue to provide financial as well as technical assistance to promote the development of independent pluralistic media. At the same time, it is recommended that media should strive to become financially independent.*

It has long been acknowledged that an independent pluralistic media is essential to fulfilling the public's right to know. Therefore, an important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media.<sup>50</sup> As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of

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<sup>50</sup> This positive obligation derives from Article 2, ICCPR.

pluralism.”<sup>51</sup> The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”<sup>52</sup>

Within the Council of Europe, the Committee of Ministers adopted a Recommendation in 1999 outlining various different measures that can be taken to support and enhance media pluralism.<sup>53</sup> First, various legislative and regulatory measures can be taken, including indirect financial incentives, such as tax breaks. Measures of this type are generally considered to be useful to enhance media pluralism and diversity and serve to counteract market distortions and failures. Direct financial support measures, for example in the form of subsidies, can also be used. However, to prevent discrimination or other unfair interference, it is essential that objective criteria are established in advance for the granting of direct support or subsidies. The amount, duration and structure of the support measure should be clearly defined in advance and a fair process should be employed to decide between applicants. A body which is independent of local political and commercial forces should oversee the system. At present, the international community can be expected to contribute most direct subsidies to Afghan media and these principles apply equally to international public actors as they do to the Afghan government.

## **Recommendation 10: Professional Associations and Licensing of Journalists**

*It is recommended that journalists form associations to advocate policies and actions favourable to free and independent media and to the public's right to receive information and opinion freely. That includes participating in the drafting of laws favourable to the public's right to know.*

The freedom to form independent professional associations is an important part of the development of a strong and thriving media sector. As the Declaration notes, one of the aims of such an association would be to advocate in favour of laws and regulations that promote freedom of expression; this is further elaborated in action point 14 which recommends that journalists should work with the Ministry of Information in its implementation.

It is illegitimate, however, to *require* journalists to join professional associations, as this is, in effect, a form of licensing, which is prohibited under international law. The Inter-American Court of Human Rights has issued an Advisory Opinion noting that a compulsory licensing system for journalists which “denies any person access to the full use of the news media as a means of expressing themselves or imparting information” violates the guarantee of freedom of expression.<sup>54</sup> The case came before the Court when a journalist challenged his conviction for having violated a Costa Rican law requiring journalists to be licensed. The law prohibited individuals who

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<sup>51</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

<sup>52</sup> Note 14, para. 34.

<sup>53</sup> Recommendation R (99) 1 on measures to promote media pluralism, 19 January 1999.

<sup>54</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 9.

were not members of a journalists' association from engaging in the remunerated practice of journalism.

The Court recognised that in virtually every country certain professionals, such as doctors and lawyers, are required to be members of a professional association. The Court, however, reasoned that journalists are different:

The problem results from the fact that Article 13 expressly protects freedom to seek, receive and impart information and ideas of all kinds.... The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.

This is not true of the practice of law or medicine, for example.<sup>55</sup>

The Court acknowledged that the goals the government sought to achieve by the restriction – promoting high ethical standards, independence and high quality journalism – were legitimate and would promote the “general welfare” and “public order”. However, it reasoned that compulsory membership in a journalists' association was not necessary to ensure those goals:

[T]he compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.<sup>56</sup>

Freedom of association is also directly protected in Article 22 of the ICCPR, which states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

As such, journalists, like others in society, have a right to join and form associations independently from any government-sponsored associations. Similarly, the European Commission of Human Rights has defined the right to associate as the capacity of all persons to “join without interference by the State in associations to attain various ends.”<sup>57</sup>

## **Recommendation 11: Self-regulation**

*It is recommended that journalists associations should make self-regulatory codes of ethics and conduct to promote and ensure professionalism and professional integrity. Associations should consider forming councils to hear and resolve complaints from the public.*

Under international law, journalistic ethics should be a matter for self-regulation by professional bodies, rather than regulation by the government. Furthermore, for the print media sector, it is widely recognised that self-regulation is both more effective

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<sup>55</sup> *Ibid.*, para. 72.

<sup>56</sup> *Ibid.*, para. 79.

<sup>57</sup> *Association X v. Sweden*, Application No. 6094/73, 6 July 1977.

and less open to abuse than statutory systems. As a result, in most established democracies, standards in the print media sector are overseen by private, voluntary bodies which develop and apply their own codes of conduct.<sup>58</sup> In these countries, print media outlets set up their own press councils, which draft press codes, hear and decide cases of individual complaints against the press, and sometimes contribute to public policy debates and make representations to the government on issues relating to freedom of expression and the press.

The codes applied by these bodies differ but they normally address most or all of the following:

1. A duty of honesty and fairness, including a duty to seek the views of the subject of any critical reporting in advance of publication; a duty to correct factual errors; and a duty not to falsify photographs or to use them in a misleading fashion.
2. The appearance as well as reality of objectivity. For example, some press codes prohibit members of the press from receiving gifts.
3. Respect for privacy.
4. A duty to distinguish between facts and opinions.
5. A duty not to discriminate or to inflame hatred on grounds of race, nationality, religion or gender. Some codes call on the press to refrain from mentioning the race, religion or nationality of the subjects of news stories unless relevant to the story.
6. A duty not to use dishonest means to obtain information.
7. A duty not to endanger people.
8. General standards of decency and taste.
9. A duty not to divulge confidential sources of information.
10. A duty not to prejudice the guilt of an accused, and to publish the dismissal of charges against or the acquittal of anyone about whom the paper previously had reported that charges had been filed or that a trial had commenced.

Most press councils include not only journalists but also members of the public. Some press councils have lawyers as members who assist in improving the consistency of judgments and in promoting the clarification of standards through the development of a body of “case law”. In deciding on a complaint, most press councils hold oral hearings at which the parties may present evidence. Most press councils only apply a limited range of sanctions, the primary one being an obligation for the offending newspaper to publish any decision finding it to be in breach of the code.

## **Recommendation 12: Transforming Bakhtar into an Independent Body**

*It is recommended that steps be commenced to make Bakhtar Information Agency a public entity independent of government authority, to compete with independent, privately owned news agencies.*

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<sup>58</sup> For example, Australia, Austria, Germany, the Netherlands, Norway, Sweden and the United Kingdom all have national press councils.

The principles elaborated above in relation to public broadcasters also apply to State or government news agencies and, indeed, all public media. Bakhtar Information Agency should, as a result, either be privatised or be transformed into an independent public service body with a mandate to serve the public interest. The *Sana'a Declaration*, adopted under the auspices of UNESCO in 1997, states: “[N]ews agencies should be, as a matter of priority, reformed and granted status of journalistic and editorial independence as open public service institutions.”<sup>59</sup>

Independence is best guaranteed, as for public broadcasters, through the establishment of an independent governing body which is appointed by and accountable to a multi-party body, such as the legislature, rather than a individual minister.

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<sup>59</sup> Note 42.