MEMORANDUM

on the draft

Egyptian Broadcast Law

London
December 2008

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · law@article19.org · http://www.article19.org

TABLE OF CONTENTS

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at law@article19.org.

Summary of Recommendations

Key Recommendations:

- Only the dissemination of broadcasting via terrestrial, cable and satellite distribution platforms should be subject to a licensing requirement. Commercial broadcasting equipment operators should not be required to obtain permits; instead, legitimate regulatory goals such as interoperability should be achieved through the setting of general and binding standards.
- The whole structure for appointing the Board of the Authority, as well as the Council of Trustees and the Board of the Fund, should be reworked so as to promote their independence from the government, as well as from commercial pressures.
- The main approach to licensing, based on a 'highest bidder' approach, should be reconsidered in favour of a system which promotes a range of public interest values.
- The law should recognise community broadcasting as a third tier of broadcasters.
- The law should set out licence periods for different types of broadcasters, which should be substantially longer than one year.
- Consideration should be given to providing enhanced guarantees for existing broadcasters that their ongoing operations will not be negatively affected by the transition to the new system.
- The various content restrictions set out in Article 2 should be removed.
- The system of content control in the draft Law should be amended to set out clearly the key issues to be addressed in the Charter (code), to make it clear that complaints will only be entertained to the extent that they address breaches of the Charter and to specify that the goal of the system is to clarify standards, not to punish.
- At least overview rules on regulating monopolies and ensuring competition in broadcasting should be set out in the primary legislation.
- A commitment should be made to adopt legislation transforming the State broadcaster into an independent public service broadcaster.
- A more carefully graduated system of administrative penalties should be put in place which, in addition to having more types of penalties, should also restrict imposition of the heavier penalties to cases of serious and repeated breaches of the rules.
- The system of criminal penalties should be revised to remove minimum prison sentences and to ensure that imprisonment may be imposed only for very serious breaches of the law.

1. Introduction

This Memorandum analyses the draft Egyptian Broadcast Law (draft Law), with particular reference to international standards on freedom of expression. The draft analysed was published on 9 July 2008 by *Almasry Alyoum*, under the headline "Full text of Al-Fiki's Bill". We understand that the government is preparing to present this to the People's Assembly.[1]

The draft Law aims to establish a new National Authority for Broadcasting Regulation (Authority) with a number of powers to regulate both broadcasting itself and trade in broadcasting equipment. These include powers to license broadcasters and to issue permits to broadcasting equipment trades, to regulate the content of what is broadcast and to impose sanctions for breach of the rules.

ARTICLE 19 welcomes the initiative to review the current system of broadcast regulation in Egypt, which does not conform to international standards in this area. At the same time, we have a number of concerns with the specific approach taken in the draft Law. In particular, the scope of the draft Law is too broad, imposing traditional broadcasting rules on the Internet, the oversight body, the Authority, is structured so as to be controlled by government, rather than being independent of it, licensing is to be done on a 'highest bidder' rather than public interest approach, and community broadcasting is not specifically recognised, the approach to content regulation is unduly rigid and harsh, and fails to respect broadcasting freedom, and the regime of penalties for breach of the law is overly heavy-handed.

This Memorandum is intended as a contribution to discussions in Egypt concerning the draft Law, with a view to ensuring that any law finally adopted adheres, as far as possible, to best international standards and national practice in this area. It relies on a wide range of binding and authoritative international standards, as well as a wealth of comparative practice. These standards are reflected in the ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles),[2] a set of guidelines based on international standards, comparative constitutional law and best practice in countries around the world. Reference will also be made to other standards, for example from regional systems for the protection of human rights, which, while not formally binding on Egypt, provide good evidence of generally accepted understandings on the nature and scope of the right to freedom of expression.

In the following sections, we elaborate on our concerns in more detail. Section II of this Memorandum briefly sets out the key international standards on freedom of expression, while Section III analyses the draft Law against those standards.

---

[1] Our comments are based on an informal translation of the draft Law produced by Arab Media & Society, available at: http://www.arabmediasociety.com/countries/index.php?c_article=165 (accessed on 19 December 2008). The original Arabic version is available at: http://www.almasry-alyoum.com/article2.aspx?ArticleID=112614. ARTICLE 19 takes no responsibilities for errors based on translation.

[2] (London: March 2002). Available at: http://www.article19.org/pdfs/standards/accessairwaves.pdf.

2. International and Constitutional Standards

2.1 Freedom of Expression in International Law

The right to freedom of expression has long been recognised as a fundamental human right. It is of crucial importance to the functioning of democracy and a necessary precondition for the exercise of other rights and freedoms. The *Universal Declaration of Human Rights* (UDHR), the flagship international statement of human rights, adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in its Article 19 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.[3]

The right to freedom of expression has been guaranteed by a number of international treaties. The *International Covenant on Civil and Political Rights* (ICCPR),[4] a legally binding treaty ratified by Egypt on 14 January 1982, again in its Article 19, guarantees the right to freedom of opinion and expression in terms similar to the UDHR. Freedom of expression is also protected at Article 9 of the *African Charter on Human and Peoples' Rights*,[5] ratified by Egypt in March 1984. The meaning of this article was elaborated upon in a *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002.[6]

The two other regional human rights instruments also provide protection for freedom of expression, at Article 10 of the *European Convention on Human Rights*[7] and Article 13 of the *American Convention on Human Rights*.[8] The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although these are not directly binding on Egypt, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

The *Arab Charter of Human Rights* was adopted by the Council of the League of Arab States, of which Egypt is a member, on 22 May 2004, and came into force on 15 March 2008. Article 32 of the Charter largely mirrors Articles 19 of the UDHR and ICCPR. Another important document of a regional character is the *Sana'a Declaration on Promoting Independent and Pluralistic Arab Media*, which was adopted by Arab journalists in 1996 and subsequently endorsed by the General Conference of UNESCO, of which Egypt is a member, in 1997.[9] Among other things, the Sana'a Declaration calls upon Arab States to enact, revise or abolish laws, as necessary, with a view to implementing media freedom.

[3] UN General Assembly Resolution 217A(III), adopted on 10 December 1948.
[4] UN General Assembly Resolution 2200A (XXI), adopted on 16 December 1966, in force since 23 March 1976.
[5] Adopted 26 June 1981, in force 21 October 1986.
[6] Adopted at the 32nd Session, 17-23 October 2002. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.
[7] Adopted 4 November 1950, in force 3 September 1953.
[8] Adopted 22 November 1969, in force 18 July 1978.
[9] *Sana'a Declaration on the Promoting Independent and Pluralistic Arab Media*, adopted 11 June 1996,

2.2 The Importance of Freedom of Expression

It is difficult to overestimate the importance of freedom of expression to the wellbeing of a society. Where information and ideas are not permitted to flow freely, good government and social progress are not possible. A government cannot help its subjects improve their lives if it does not know what their concerns and problems are. If citizens can speak their minds without fear, and the media can report what is being said without interference, the government will have an opportunity to adjust its policies to meet the concerns of the public.

Respect for the right to freedom of expression necessitates the occasional toleration of critical, nonsensical and even offensive speech. Citizens sometimes expect the impossible from their government or voice unfair criticism of its policies. In a State where such ideas are voiced in the public arena, the government can respond to them and explain why it is unable to achieve a certain goal or has chosen to follow a particular course of action. In States where people are discouraged from speaking their minds, false rumours, spread by word of mouth, cannot be refuted.

International bodies and courts have made it very clear that the right to freedom of expression is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[10] which refers to freedom of information in its widest sense and states:

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

As this resolution notes, freedom of expression is fundamentally important both as an individual right and as indispensable to the exercise of all other rights. This interpretation has been upheld by international human rights bodies. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society. [11]

Statements of this nature abound in the case law of human rights courts and tribunals around the world. The European Court of Human Rights has noted, for example: "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."[12]

2.3 Broadcasting Freedom

Because of their pivotal role in informing the public, the guarantee of freedom of expression is of particular importance to the broadcast media, whether private or public. Without due protection for the broadcast media's rights, the public cannot fully realise its own right to receive information.

---

endorsed in Resolution 34 of the twenty-ninth session of the General Conference of UNESCO, 12 November 1997.

[10] 14 December 1946.

[11] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

[12] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

The special significance of the media, including broadcasters, has been widely recognised by national and international courts and tribunals. In the words of the Inter-American Court of Human Rights: "It is the mass media that make the exercise of freedom of expression a reality."[13] 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."[14] 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 […] free political debate […].[15]

Ensuring the freedom of broadcasters, although key to the guarantee of freedom of expression, does not imply that the broadcast media should be left unregulated. A wholly unregulated broadcast sector would in fact be detrimental to free expression, since the audiovisual spectrum used for broadcasting is a limited resource and the available bands must be distributed in a rational manner to avoid interference. The problem was summarised by the US Supreme Courts in the following terms:

> If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the [guarantee of freedom of expression], aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[16]

Two principles are key to effective broadcast regulation. First, the airwaves are a public resource and they must be used for the benefit of the whole public, including people with minority views or interests. Therefore, the available frequencies must be distributed in a manner which maximises the diversity of broadcasting, both in terms of programme content and station ownership. Second, due to the universally observed tendency of governments and businesses to want to minimise access of their critics and competitors to the broadcast media, it is vital that all bodies with regulatory powers in this area are protected, legally and practically, against political, commercial and other forms of interference.

2.4 Independent Regulatory Bodies

The importance of regulatory independence in the broadcast sector has been recognised in international instruments, the practice of States and in ARTICLE 19's Principles. The need for protection against political or commercial interference was, for example, stressed in a recent Joint Declaration by the three specialised mandates for the protection of freedom of expression of the UN, OSCE and OAS, which stated:

---

[13] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5, para. 34.
[14] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[15] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[16] *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al. No. 2*, 395 U.S. 367, 389 (1969).

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[17]

Factors which are regarded as key to the independence of regulatory bodies include an open appointments process designed to promote pluralism, guarantees against dismissal, and rules on conflict of interest.[18] Principle 10 of *Access to the Airwaves*[19] enumerates a number of ways in which the independence of regulatory bodies should be protected:

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

2.5 Pluralism

The broadcast media are a key vehicle through which the public exercises its right to freedom of expression. As discussed above, governments have an important obligation not to impede the work of the media. But mere non-interference is often not enough to guarantee the public access to a wide variety of sources of information. Positive measures are necessary, for example to prevent monopolisation of the airwaves by one or two players. Article 19 of the ICCPR mandates the implementation of such measures, a point stressed by the United Nations Human Rights Committee in its General Comment on that article:

> [B]ecause of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.[20]

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. 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."[21] 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

[17] Adopted 18 December 2003.
[18] Articles 3-8 of the Council of Europe Recommendation No. (2000)23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, adopted by the Committee of Ministers on 20 December 2000; Principle 13 of *Access to the Airwaves*.
[19] See note 2.
[20] Human Rights Committee, General Comment 10, Article 19, adopted 26 June 1983, U.N. Doc. HRI\GEN\1\Rev.1 at 11 (1994).
[21] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.

such media."[22] This implies that the airwaves should be open to a range of different broadcasters representing a fair cross-section of the different groups and viewpoints in society. At the same time, these measures should be carefully designed so that they do not unnecessarily limit the overall growth and development of the sector.

2.6 Restrictions on 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;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

A similar formulation can be found in the European and American regional human rights treaties.[23] These have been interpreted as requiring restrictions to meet a strict three-part test.[24] First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[25] Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[26]

3. Analysis of the Draft Law

3.1 Breadth of the Draft Law

Overview

The draft Law provides for the issuance by the Authority of both licences, which are to undertake broadcasting activities, and permits, which are for commercial activities relating to broadcasting equipment. The regulation of broadcasting activities applies to 'traditional' (terrestrial, satellite and cable), as well as Internet forms of broadcast dissemination (Article

[22] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.
[23] The African Convention uses a different formulation.
[24] See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).
[25] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[26] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

1(4)). Article 13 gives the Authority several powers in relation to activities covered by permits, including to regulate the importation, trading, manufacturing and assembly of broadcasting equipment.

Analysis

Modern technological developments mean that broadcasting is now starting to be disseminated over the Internet, as well as via more traditional means. At the same time, use of the Internet for broadcasting purposes remains limited and somewhat specialised, even in those countries where access to high speed Internet is widespread. Put simply, it will be some time before the traditional television in the living room is replaced with an Internet-based device.

More importantly, from a freedom of expression perspective there are very serious problems with simply applying general broadcast regulatory rules to the Internet, or even Internet broadcasting. It is, among other things, extremely difficult to provide an appropriate definition of what constitutes Internet broadcasting. The draft Law defines broadcasting as the provision of voice or images that are not private correspondence. This would effectively capture most websites, or at least websites which provide even short voice or video clips, many of which would be personal or commercial business websites which it would be wholly inappropriate to subject to the licensing and other regimes set out in the draft Law.

There are other problems with simply applying a general broadcasting regime to the Internet. For example, the draft Law proposes to issue licences on a tender basis to the highest bidder and to charge LE1000 for submitting a licence application (see Article 20). Both of these approaches do not work for the Internet, where the idea of restricting the number of licences and giving them only to the highest bidder simply does not make sense, while to require payment of such a large fee would exert a massive chilling effect on the development of the Internet as a tool for communications and development.

It is appropriate for broadcast regulators to set minimum technical standards for broadcasting equipment. Indeed, this is becoming an increasingly important aspect of public interest regulation given the proliferation of technologies and the need to ensure interoperability so that consumers are not taken advantage of.

At the same time, the extremely wide approach taken in the draft Law of requiring every operator involved in the development and distribution of broadcasting equipment is oppressive and unnecessary, and would allow for political or commercial interference in this sector (including where such interference is motivated by corruption). It is quite possible to set general standards for equipment without requiring every manufacturer, importer and distributor to obtain a permit. Indeed, this is a far better approach since it is more likely to ensure consistency of standards, including technical standards, than the piecemeal approach of issuing permits.

Recommendations:

- The scope of the requirement to obtain a licence for undertaking broadcasting activities should be restricted to the dissemination of broadcasting via terrestrial, cable and satellite distribution platforms.

- Instead of imposing permit requirements on commercial broadcasting equipment operators, the law should empower the Authority to set general and binding standards in this area, as needed to achieve legitimate regulatory goals such as interoperability.

3.2 Independence of the Authority and its Constituent Bodies

Overview

It is very clear from the structure of the Authority that, while it is to have independent legal personality, it is still very much intended to be under the control of the government. Article 3, providing for the establishment of the Authority, provides that it shall be "affiliated with the minister concerned". Overall administrative oversight powers regarding the Authority are vested in a Board of Directors (Board), which is chaired by the competent minister and which counts, among its approximately 17 members,[27] 10 members representing government bodies, including the State Council, National Security Agency, Ministry of Interior and Ministry of Foreign Affairs.

Of the six general members, only four are not civil servants or employees of public companies. It is not clear how these how these six general members will be appointed, but the draft Law provides for a Prime Ministerial decree to be issued on the appointment of the members of the Board. The Chief Executive Officer of the Authority is also to be appointed by Prime Ministerial Decree, upon the suggestion of the competent minister. The draft Law is silent as to the removal of member of the Board and the CEO.

The Authority has a wide range of potential funding sources, including State appropriated funds and the fees it collects for licences and permits (Article 7). In terms of accountability, the Authority is required to present an annual report to the Cabinet Presidency on its "activities and operations" (Article 17).

The draft Law also provides for the appointment of two other bodies with specified regulatory powers. The first is the Council of Trustees, which is responsible, among other things, for developing a Charter of Honor for media work. The CEO of the Authority is the Chair of the Trustees, along with up to 20 other members appointed by Prime Ministerial Decree upon nomination by the responsible minister (Article 11). The second is the Board of Directors of the Overall Service Fund, who shall be appointed in accordance with a decision of the Board of the Authority, to be issued after that Board is appointed (Article 14). The Fund Board is responsible for oversight of the Fund, which is itself also established by a decision of the Board of the Authority.

Analysis

It is very clear from the whole structure that it was not intended that the Authority and its various bodies should be independent of government. Specifically, the members of the main Authority Board are appointed by the government (the Prime Minister or a minister), the draft Law is silent as to the grounds upon which they might be removed, so that they lack protection of tenure, and a majority of them directly represent government bodies and

[27] The precise number is not clear from the text.

ministries. Furthermore, the Board reports to the Cabinet rather than a wider elected body, such as the People's Assembly. The other governing bodies similarly lack independence. It is not clear from the draft Law whether and to what extent the Authority will be dependent on funding coming directly from government to undertake its work, another key independence consideration. This is in breach of clear international standards in this area, as well as comparative best practice, pursuant to which bodies with regulatory powers over the media must be protected against interference.

Recommendation:

- The whole structure for appointing the Board of the Authority, as well as the Council of Trustees and the Board of the Fund, should be reworked so as to promote their independence. Consideration should be given to ensuring independence not only through the appointments process (including protection of tenure), but also directly through a statement to that effect in the law, as well as through accountability to a multi-party elected body and clear funding mechanisms which are protected against political interference.

3.3 Licensing Procedures and Rules

Overview

The Authority is the body which is responsible for licensing broadcasters and granting permits for trading in broadcasting equipment (Article 5(10) and (11)). Pursuant to Article 20, licensing shall be by tender and licences shall be awarded to the highest bidder. A fee of LE1000 (approximately USD180) shall be paid along with the application. Licence applications must be submitted on the appropriate forms and shall be decided upon within 90 days of submission (Articles 21-22), while permits shall be decided upon within 60 days (Article 23). The Authority shall set the duration of the licence, provided that it shall not be less than one year (Article 26(3)).[28]

Existing broadcasters "shall have to readjust their conditions within one year from the effective date", which presumably means that they have to bring themselves into line with the new system within one year (Article 20(5)).

Analysis

This approach to licensing fails to promote the public interest or diversity in broadcasting, contrary to international and best practice standards. Although some countries have opted for a 'highest bidder' approach, this effectively deprives the regulator of the power to make decisions in the public interest. In most democratic countries, the 'highest bidder' approach has been rejected, given the very important role broadcasting plays in society. Instead, an approach is adopted whereby the broadcasting law sets out a number of key goals or interests to be served by broadcasting, such as promoting diversity, providing educational programming, ensuring access to voice for all groups and communities in the country and so on. Competing licence applications are then assessed for their contribution to these goals, as well as against technical criteria such as financial and technical viability. This

[28] This is not entirely clear from the text and this is our best interpretation of the provision.

gives the regulator the power to make decisions about who should receive a licence that are based on wider public interest considerations rather than simply buying power.

The draft Law also fails to recognise the importance of different types of broadcasters, including commercial and public but also community broadcasters. The main body of the draft Law is oriented towards commercial broadcasters, while public broadcasters are recognised in Article 32. Community broadcasters are not mentioned in the draft Law, which also fails to take into account their special needs, specifically in terms of licensing. It is clear that community broadcasters will never, or almost never, get access to a system which is based on a 'highest bidder' approach, due to their non-commercial structure. Furthermore, experience in other countries shows that the whole approach to licensing needs to be adapted to allow for 'lighter' licensing processes for community broadcasters (for example, as regards the licence application fee).

The draft Law is excessively rigid as regards the licence application fee. While it is not inappropriate to charge a national television or large city radio applicant LE 1000, this is excessive for smaller proposals and, as noted, inaccessible for most community broadcasters. Put differently, it does not make sense to have the same fee for all applications, given the enormous difference between them in terms of markets, capitalisation and so on. This is also illogical, since more complex applications will take more Authority time to process.

On the other hand, leaving the duration of licences to the discretion of the Authority, and for a period which is potentially as little as one year, is unfortunate and may invite abuse. In many countries, licence periods are set out in the main legislation for different categories of broadcasting (for example for ten years for television, seven years for radio and three years for a community radio). This ensures equality and fairness among broadcasters in different categories, guards against the possibility of political interference and ensures stability. In any case, a licence period of just one year is probably unrealistic for any broadcaster and is certainly too short for larger operations, such as television. These require more substantial investment, and hence larger guaranteed periods during which that investment might be recouped.

The rules for existing broadcasters are unduly brief and do not provide a clear and stable framework for these broadcasters to transfer into the new system. These broadcasters should have some reassurance that their existing licence agreements will be respected and that they will be able to operate in a similar fashion under the new licensing system.

Recommendations:

- The main approach to licensing, based on a 'highest bidder' approach, should be reconsidered. Instead, a revised system, which allows for consideration of a range of public interest values, set out in the main legislation, should be put in place.
- The law should recognise community broadcasting as a third tier of broadcasters, and it should put in place licensing systems which are appropriate for this sector.
- Instead of charging a flat fee to everyone applying for a broadcasting licence, the fee should be adapted to the market niche of different types of applications.
- The law should set out licence periods for broadcasters, preferably specified according to the broadcasting sector, which should be substantially longer than one

year.
- Consideration should be given to providing enhanced guarantees for existing broadcasters that their ongoing operations will not be negatively affected by the transition to the new system.

3.4 The Proposed Regime for Regulating Content

Overview
Article 2 of the draft Law sets out a number of general content rules for broadcasters, including that they should respect the right of the "masses to obtain correct information", that they should provide an "all-embracing service to the public" and that they should avoid "negatively impacting social peace, national unity, citizenship, public order and public moral codes".

The draft Law also provides for a more general system of content control. Pursuant to Article 5(5), the Authority is responsible for elaborating "controls and codes", including in relation to the Media Charter of Honor and advertising. It is also required to deal with complaints from the public and consumers, as well as disputes between permittees and licensees (Article 5(16) and (17)). Article 11 specifically tasks the Council of Trustees with the responsibility of developing a Charter of Honor and for setting standards relating to the importation of foreign material.

Analysis
It is not clear from the draft Law how the content restrictions in Article 2 will be understood. If they are taken to mean that individual broadcasters must provide correct content and provide comprehensive services, then they are inappropriate. While broadcasters should always strive to be accurate, this is not always possible in practice and even the very best media make mistakes. The scope of services should depend on the broadcaster in question. Some may indeed attempt to provide reasonably comprehensive services, while others will instead wish to appeal to a niche audience (such as classical music aficionados). This is perfectly appropriate, as long as the system as a whole caters to the interests of all viewers and listeners.

The problem with the rule against 'negatively impacting' various social values is that it is simply too wide and general to be legitimate as a restriction on broadcasters. Broadcasters have a duty, for example, to report the news, even though this might impact negatively on social peace. This might be the case, for example, for reporting on local (or even international) ethnic tensions, which upset the communities involved. Instead, the approach should be to adopt a detailed code of conduct which is tailored to the realities of broadcasting, as elaborated below.

In many countries, an independent regulatory body develops a code of conduct (or Charter of Honor) for broadcasters, as provided for in the draft Law. However, the draft Law fails sufficiently to elaborate on the system for developing and applying these rules. Best practice suggests that the primary legislation should set out key issues to be addressed through such a code, and that it should be required to be developed in close consultation with broadcasters. It should be clear from the law that any complaints against broadcasters

will be considered against the provisions in the code; it is important that both broadcasters and the public have a clear set of standards against which to measure performance. Furthermore, the rules should make it clear that due process will be respected in relation to complaints, with both the broadcaster and the complainant being given a full opportunity to be heard and to make their case.

Furthermore, it should be implicit in the system of content regulation that its primary aim is to set clear standards for broadcasters, not to punish those who breach the rules. The normal sanction for breach of the rules should thus be a warning, accompanied by a clear statement of what the nature of the breach was for educational purposes. Only in cases of repeated breaches should more serious sanctions be applied (see below).

Recommendations:

- The various content restrictions should be removed from Article 2.
- The system of content control in the draft Law should be amended and elaborated upon to bring it into line with the above. In particular, the law should set out the key issues to be addressed in the Charter, it should be clear that complaints will only be entertained to the extent that they address breaches of the Charter and that the overall goal of the system should be to clarify standards, not to punish those who cross the line.

3.5 Other Concerns

Article 25 provides for the Authority to set rules to regulate competition and to prevent the emergence of monopolies. This is an important power which is needed to promote diversity in the broadcasting sector in the public interest. At the same time, it would be preferable if this power were circumscribed by setting out the main directions for such regulation in the primary legislation. This will help limit the power of the Authority and the risk that it might abuse its powers for illegitimate purposes.

Article 29 provides for the establishment of a register to include all broadcasting applications and licences, fees received by the Authority and charges levied, and other information relevant to broadcasting. It also provides that anyone can peruse this information upon payment of a fee to be set by the Authority, which should not exceed LE1000 (approximately USD180). It is very welcome that this information will be publicly available. At the same time, members of the public should be able to inspect such publicly held documents for free and certainly for far less than the maximum stipulated. Where copies of documents are requested, reasonable copying charges may be levied.

Article 32 of the draft Law refers to the establishment of new Egyptian State-owned companies to take over activities from the current Radio and TV Union State broadcaster. Reference is made in this article to an Executive Regulation and to ministerial decisions. International standards require State broadcasters to be transformed into independent public service broadcasters operating at arms length from government and producing programming in the public interest. This requires full treatment in primary legislation to achieve.

Recommendations:

- The main policy approaches for regulating monopolies and ensuring competition in broadcasting should be set out in the primary legislation.
- Members of the public should be able to inspect the registry of the Authority for free and to obtain copies of documents for reasonable copying charges.
- A commitment should be made to adopt legislation transforming the State broadcaster into an independent public service broadcaster.

3.6 The Regime of Sanctions

Overview

The draft Law provides for two types of sanctions. Administrative sanctions are set out in Article 31, and include a warning, suspension, in whole or in part, and licence revocation or termination.

There is a detailed regime of criminal sanctions. Article 33 provides generally that, unless another law provides for a stricter sanction, violations of the rights of the Authority or licensees in breach of the law will be sanctioned by imprisonment or a fine of between LE10,000 and 50,000 (approximately USD1,800 and 9,000). Other provisions provide for imprisonment, sometimes of a minimum duration, as well as fines for a variety of offences, such as operating without a licence or permit, destroying broadcasting equipment or operations, or transferring a licence without authority.

Analysis

It is well established under international law that even where some sort of penalty is warranted, excessive penalties, of themselves, represent a breach of the right to freedom of expression. As noted above, there should be a graduated system of administrative sanctions ranging from a warning to a requirement to broadcast a message to fines, and providing for licence suspension, which is an extreme penalty, only in the very most serious cases of repeated and grave breaches which other forms of sanction have failed to address.

Criminal penalties should be applied only in the very most serious cases of individual responsibility for breaches of the law. Minimum periods of imprisonment cannot be justified for breaches of a law of this nature. Any imprisonment should be imposed only for very serious breaches. Fines are sufficient, for example, to address almost all situations of operating without a licence.

Recommendations:

- A more carefully graduated system of administrative penalties should be put in place which, in addition to having more types of penalties, should also restrict imposition of the heavier penalties to cases of serious and repeated breaches of the rules.
- The system of criminal penalties should be revised to remove minimum prison sentences and to ensure that imprisonment may be imposed only for very serious breaches of the law.