ARTICLE 19
GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

Press Council of Pakistan Ordinance, 2002

and

Press, Newspapers, News Agencies and Books Registration Ordinance, 2002

and

Defamation Ordinance, 2002

by

ARTICLE 19
Global Campaign for Free Expression

London
September 2002

I. Introduction

This Memorandum analyses the Press Council of Pakistan Ordinance, 2002 (Press Council Ordinance), the Pakistan Press, Newspapers, News Agencies and Books Registration Ordinance, 2002 (Registration Ordinance) and the Defamation Ordinance, 2002, for compliance with international standards on freedom of expression. The Ordinances were adopted on 21 August and came into effect immediately.

II. International and Domestic Obligations

II.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[1] a United Nations General Assembly Resolution, guarantees the right to freedom of expression in the following terms:

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

> 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.[2]

The *International Covenant on Civil and Political Rights* (ICCPR),[3] a formally binding legal treaty, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. Although Pakistan has neither signed nor ratified the ICCPR, is is an authoritative elaboration of the rights set out in the UDHR and hence of some relevance here.

Freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),[4] Article 13 of the *American Convention on Human Rights*[5] and Article 9 of the *African Charter on Human and Peoples' Rights*.[6]

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."[7] The UN Human Rights Committee has made clear the importance of freedom of expression in a democracy:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. … this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[8]

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

[2] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit)
[3] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[4] Adopted 4 November 1950, in force 3 September 1953.
[5] Adopted 22 November 1969, in force 18 July 1978.
[6] Adopted 26 June 1981, in force 21 October 1986.
[7] 14 December 1946.
[8] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.

> 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'.[9]

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.[10]

II.2 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."[11] 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.[12]

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 by unable to play its vital role of "public watchdog".[13]

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[9] *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.

[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, (Series A) No. 5 (1985), para. 30.

[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

[12] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.

[13] See *Castells v. Spain*, note 12, para. 43, *Thorgeirson v. Iceland*, note 11, 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.

II.3 Independence of Media Bodies

It is well-established that bodies with regulatory control over the media must be independent of government, particularly where they have a lot of power. Constitutional courts in several countries have affirmed this point. For example, the Supreme Court of Sri Lanka, faced with a Bill providing for a Broadcasting Authority, some of whose members would be government appointees, stated:

> Since the proposed authority, for the reasons explained, lacks independence and is susceptible to interference by the minister, both the right of speech and freedom of thought are placed in jeopardy…We are of the opinion [that the bill's provisions] are inconsistent with … the Constitution.[14]

It can be argued that even a mere suspicion of improper interference suffices to cast doubt on the constitutionality of the authority. As Lord Denning MR explained:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.[15]

In the hallowed phrase, "justice must not only be done, it must also be seen to be done".[16]

In December 2000, the Committee of Ministers of the Council of Europe issued a detailed Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.[17] This provides that States should "guarantee the regulatory authorities for the broadcasting sector genuine independence". Furthermore, "the procedures for appointment of their members and the means of their funding should be clearly defined in law."[18] Stipulating that its membership should be free from any political influence and that rules for dismissal should be clearly laid down by law, it recommends that "dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal."[19] These rules apply to regulatory bodies for the print media *mutatis mutandis*.

II.4 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,

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[14] *Athukorale and others v. Attorney-General*, 5 May 19978, 2 BHRC 609.
[15] *Metropolitan Properties co. (F.G.C.) Ltd v. Lannon*, [1969] 1 QB 577, at 599.
[16] For the application of this maxim see for example *Locabail (UK) Ltd v. Bayfield Properties Ltd and another*, [2000] 1 All ER 65; *A.M.&S. Europe Ltd v. the Commission*, [1983] 1 All ER 705; and *Maynard v. Osmond*, [1977] 1 All ER 64.
[17] Recommendation (2000) 23, adopted 20 December 2000.
[18] *Ibid*., Guideline 2
[19] *Ibid*., Guideline 7.

any limitations must remain within strictly defined parameters. The universally accepted standard for restrictions is set by Article 19(3) of the ICCPR,[20] a treaty ratified by 148 States. This states:

> The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This article subjects any restriction on the right to freedom of expression to a strict three-part test, requiring that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.[21]

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.[22] As has been noted:

> '[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".[23]

II.5 Constitutional Guarantees

Article 19 of the 1973 Constitution states:

> Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.

Under the proclamation of emergency, Provisional Constitution Order No. 1 of 1999,[24] the Constitution is held in abeyance but the Order also stipulates that, "notwithstanding the abeyance of the provisions of the constitution [the country] shall, subject to this order and any other orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the constitution." Furthermore, the Order states that, "the fundamental

[20] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[21] For an elaboration of this test see *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123 (European Court of Human Rights), paras. 28-37.
[22] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.
[23] *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, para. 59 (European Court of Human Rights).
[24] Issued on 14 October 1999.

rights conferred by Chapter I of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any order made thereunder from time to time, shall continue to be in force." As a result the guarantee of freedom of expression, like all fundamental rights, is available to citizens but only to the extent that it is not in conflict with the President's orders.[25] To put it another way, the President has effectively equipped himself with the power to abridge the right to freedom of expression. In a judgment in 2000 upholding the military take-over, the Supreme Court ruled that while 15 of the 21 fundamental rights set out in the Constitution would remain in force, the executive could derogate from the other six, including freedom of expression.[26]

In any event, the constitutional guarantee fails adequately to protect the right to freedom of expression. As currently drafted, it subjects the right to freedom of expression and freedom of the press to "any reasonable restrictions imposed by law".[27] This falls below the international guarantee which requires any restriction to be 'necessary' rather than merely 'reasonable'. Furthermore, some of the grounds for restricting freedom of expression under the Constitution, such as friendly relations with other States, are not permitted under international law.

Recommendations:

- Provisional Constitutional Order No. 1 of 1999 should be amended so that it does not put the human rights provisions of the Constitution in abeyance and does not allow the president to override these provisions by decree.
- The Constitution should be amended to make it clear that the president does not have the power to abridge it by executive order. Amendments should be possible only after ensure wide consultation and with very broad public support.
- The Constitution should incorporate the full three-part test for restrictions on freedom of expression, in particular by limited the grounds for restrictions to those recognised under international law and by requiring any restriction to be 'necessary in a democratic society'.

[25] This effectively circumvents Article 8 of the Constitution, which provides that any law that abridges constitutional rights shall be considered void.
[26] See also Article 233 of the Constitution.
[27] It is unclear whether the restriction relates to the right to freedom of expression, or the 'freedom of the press' which is mentioned separately. However, international law guarantees 'freedom of the press' as part and parcel of the right to freedom of expression, rendering the debate semantic.

III. The Press Council Ordinance

Overview of the Ordinance

The Press Council Ordinance sets up a Press Council for Pakistan whose purpose is to maintain the professional standards of all journalists, to help maintain the independence of the media and to monitor and review national developments that might impact on the free flow of information in Pakistan. The Ordinance includes a complaints mechanism, allowing members of the public to submit to the Council complaints regarding an Ethical Code of Practice, which is set out in a Schedule to the Press Council Ordinance. The Council also has jurisdiction to hear complaints lodged by the media against government authorities who restrict the free flow of information.

The purpose of the Ethical Code of Practice, as stated in the preamble, is to allow the press to function "in accordance with the canons of decency, principles of professional conduct and precepts of freedom and responsibility, to serve the public interest by ensuring an unobstructed flow of news and views to the people envisaging that honesty, accuracy, objectivity and fairness shall be the guidelines for the press while serving the public interest". Its seventeen sections deal with issues such as morality, plagiarism, fairness and accuracy, privacy, sensationalism, confidentiality and privilege.

The implementation of the Code will be supervised by the Press Council. Section 3 of the Ordinance states: "There shall be established a Council by the name of the Press Council of Pakistan to implement the Ethical Code of Practice … and to perform such other functions as are assigned to it under this Ordinance or the rules and regulations made thereunder." The Council will be an independent corporate entity, with its own staff, secretariat and budget.[28] It will be financed through an annual governmental grant-in-aid as well as other grants and donations and such fees as it may levy from registered newspapers and news agencies.[29] Section 8 lists its functions in detail, including:

> (i) [to] act as a shield to freedom of the press [including by receiving] a complaint by a newspaper, a journalist or any institution or any individual concerned with a newspaper against … government or … any organization including political parties for interference in the free functioning of the press;
> (ii) [to] maintain highest professional and ethical standards of newspapers and news agencies with a view to making them more responsive to the issues and concerns of the society in Pakistan;
> (iii) to help newspapers and news agencies to maintain their independence;
> (iv) to keep under review any development likely to restrict the dissemination of news of public interest and importance;
> (v) to revise, update, enforce and implement the Ethical Code of Practice;
> (vi) to receive complaints about the violation of the Ethical Code of Practice;
> (…)
> (xi) to make regulations; and

[28] Section 5.
[29] Section 4.

(xii) to undertake all research relating to the newspapers, including the study of foreign newspapers, their circulation and their impact.[30]

It thus has a broad remit, dealing not only with violations by the press of the Code of Practice but also acting to defend the interests of the press and undertaking research on matters affecting the development of the press in Pakistan.

The Council will consist of nineteen members, to be nominated as follows:[31]

- a chair, by the President, from among retired Supreme Court judges or persons qualified to occupy such a position;
- three by the All Pakistan Newspapers Society;
- three by the Council of Pakistan Newspaper editors;
- three by professional journalists associations;
- one by the Bar Council;
- one "eminent educationist" each from the four Provinces, to be nominated by the Governor;
- one each by the Leader of the House and of the Opposition in the National Assembly;
- one by "any renowned human rights organisation having not less than ten years' standing"; and
- one to be nominated by the National Commission on the status of women in Pakistan.

All members serve three-year terms and the Chair cannot hold office for more than two consecutive terms.[32] Members may be removed by a two-thirds vote of the Council, on grounds of misconduct, incapacity, impropriety or moral turpitude.

The complaints procedure is outlined in Sections 10 and 13. If a case is decided in favour of the complainant, the Commission may direct a correction and/or apology to be published, issue a warning or reprimand or make any other direction it considers appropriate. In case of a contravention of such an order, the Council or Commission may request other newspapers to publish the decision and recommend that the appropriate authorities suspend or cancel the publication.

In hearing complaints, the Council may appoint separate Inquiry Commissions consisting of three members, chaired by a retired Judge of the High Court or someone qualified to occupy that position. The other two members will be nominated by the All Pakistan Newspapers Society and the Council of Pakistan Newspaper Editors (one each). Members of an Inquiry Commission need not be Council members and the Council may appoint as many Inquiry Commissions as may be necessary (for example, to work in different regions). An appeal lies to a committee of five Council members. Complainants are barred from simultaneously pursuing a case through the courts as well as before the

[30] Section 8, paragraphs 1 and 2. Other functions listed are of a more administrative nature, such as managing the Council's funds and properties, and control and audit funds of the Council.
[31] Section 6.
[32] Section 7.

Council.[33] Both the Council and Commission may summons witnesses, receive evidence and enforce the attendance of any person,[34] although publishers, editors and journalists have a right not to disclose their sources.[35]

Regardless of whether a complaint has been submitted to it, the Council may warn, admonish or censure a newspaper, news agency or individual journalist or editor whenever it has "reason to believe that [it] has offended against an provision of the Code of Practice", although it is barred from initiating proceedings on any matter which is pending in a court of law.[36] The newspaper or news agency concerned must be given the opportunity to be heard and any newspaper may be required to publish the Council's findings or "any particulars relating to [the] inquiry".[37]

Analysis

Statutory Councils

First and foremost, it must be stressed that few democratic countries have a statutory Press Council or Ethical Code of Practice to regulate the print media. It is generally recognised that it is not appropriate for the media to be 'policed' by government-appointed regulatory bodies. Courts in some countries have ruled that a statutory system breaches the guarantee of freedom of expression.[38]

The test of necessity, discussed in the section on international and constitutional standards above, means that where the government interferes with the right to freedom of expression, it should choose the least restrictive means available. Self-regulation, which is one of the least restrictive forms of media regulation, has proved highly successful in a large number of countries. It is not only less restrictive for freedom of expression, but it promotes a more positive and promotional approach to ethics, and so is actually more effective. A self-regulatory approach tends to ensure a smoother functioning of the sector by establishing a climate of dialogue, openness and trust in dealings with media practitioners. In Pakistan, a self-regulatory system is clearly a possibility. A voluntary Code of Ethics was adopted in 1972, by the General Assembly of the Committee of the Press; there appears to be no reason why either this could not be updated or a different voluntary system put in place.

Scope of the Code

For any statutory code of conduct for the print media to be compatible with the right to freedom of expression, it has to be precise and unambiguous in its wording.[39] The Ethical Code of Practice prescribed by the Press Council Ordinance meets neither of these standards. A number of its provisions are excessively vague and open to abuse, while

[33] Section 12 (a).
[34] Section 14(1).
[35] Section 14(2).
[36] Section 19(3).
[37] Section 19(1).
[38] See, for example, *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59 (High Court of Zambia).
[39] A statutory code of conduct is a restriction on freedom of expression and, as such, must meet the three-part test for such restrictions.

others contain moral obligations that cannot be enforced by law. For example, several provisions require the press to 'strive' to achieve certain standards, such as to disseminate accurate information.[40] While this is an important aspiration for all media, it cannot be enforced by law: the requirement that the press should 'strive' is incapable of sufficiently precise interpretation. This is most apparent in Section 1, which requires the press to 'strive to uphold standards of morality'. The concept of 'morality' in itself is vague and open to different interpretations; coupled with the requirement that the press should 'strive to uphold' it the provision becomes incapable of precise interpretation and is open to abuse on political or other grounds. Other provisions are similarly vaguely worded, requiring the press to 'avoid' biased reporting or sensationalism or violence, for example, or to rectify 'harmful inaccuracies'.[41] The prohibition on 'biased reporting' in itself is also problematic to the extent that it may be interpreted as banning reporting that is critical of the government.

Other provisions contain restrictions that are in themselves illegitimate. For example, Section 9 states that "[t]he press shall avoid printing … any material which may bring into contempt Pakistan or its people". This is not an appropriate restriction on media reporting, even of an ethical nature, and is open to abuse on political grounds. As such, it will have a chilling effect on legitimate and even important public debate in Pakistan, for example concerning the position of the government. Section 4 is also illegitimate, posing privacy as an absolute right by stating that the press "shall do nothing which tantamounts to an intrusion into private, family life and home". This would restrict investigative reporting, for example where a reporter is using undercover techniques to research allegations of corruption. In other countries, restrictions on freedom of expression to protect privacy are subject to a public interest override. Section 6 provides yet another example, requiring the media only to disseminate information that is "true and accurate".[42] This is far too stark a prohibition to be included in a legally binding code. Journalists, like everyone else, are fallible and some scope must be left for honest mistakes. For this reason, other countries posit as accuracy as a goal to be attained in voluntary codes.

Independence of Council

It is now well established that any body with regulatory powers over the media must be independent and protected against government or economic interference. Although the Ordinance does imply that the Council is to be independent of the government – indeed, one of its stated functions is to act as a 'shield to freedom of the press' in complaints against government bodies – it fails adequately to guarantee the independence of the Council or of its members. The Ordinance does not contain a specific guarantee that the Council members should be free to carry out their work without economic or political interference. In other countries legislation establishing broadcast regulators, which similarly need to be protected against interference, often has such a specific guarantee.

[40] Section 2.
[41] Sections 3, 13 and 11. Sections 7 and 9 contain similar wording.
[42] This is in addition to Section 2 requiring journalists to strive to be accurate.

Furthermore, the fact that the chair of the Council will be appointed by the President while another four members are to be appointed by Governors of the Provinces clearly taints its independence. With the quorum set at nine,[43] this means that government-appointed members could dominate proceedings, including by censuring newspapers[44] without the approval of independent members. That this is problematic is self-evident, particularly in cases where a complaint is brought against a newspaper because it has published reports that are critical of the government, or in cases brought by newspapers against the government.

Finally, the Council is dependent on a government grant-in-aid for funding, a mechanism which is not protected against interference. It would be preferable, for example, if funding were voted by the Parliament.

Penalties

The penalty provisions of the Ordinance are also problematical. Section 15 states: "Whoever publishes or circulates any matter in contravention of the Ethical Code of Practice or directions of the Commission or Council may … recommend to the competent authority to suspend the publication." This extremely severe sanction is not provided for elsewhere in the Ordinance and should be deleted. ARTICLE 19 considers that suspension is never a legitimate sanction for the print media but, in any case, it is clearly inappropriate for breach of an ethical code. Furthermore, this provision allows for both the complaints mechanism and the *ex officio* censuring mechanism provided by Section 19 to be bypassed completely, so that the due process guarantees these procedures provide can be ignored. Serious sanctions should only be imposed by the courts, after a full hearing on the merits.

Recommendations:

- The government should re-consider the statutory Press Council and Code of Practice in favour of allowing the print media to establish a self-regulatory system.
- If a statutory system is to be retained, the Ordinance should be amended in accordance with the following:
  - the Code of Practice must be clear, precise and narrow; all restrictions which violate international guarantees of freedom of expression should be repealed;
  - adequate guarantees for the independence of the Press Council, including through the appointments process, should be included in the Ordinance; and
  - Section 15 should be repealed; no publication should be suspended for violation of the Code.

[43] Section 17(2).
[44] Section 19.

IV. The Registration Ordinance

Overview of the Ordinance

Pursuant to the Registration Ordinance, all books, pamphlets and single-sheet publications as well as all news agencies, newspapers and periodicals are required to register with the local or provincial authorities. Additionally, all books and newspapers must bear publication data, all printing presses have to be registered and free copies of all publications must be delivered to the authorities. Failure to register or to provide correct details is punishable with a monetary fine as well as imprisonment (up to six months).[45]

The registration procedure is slightly different for each of the different categories of publication. Under Section 4 of the Ordinance, all owners of printing presses have to submit a Declaration to the local District Co-ordination Officer giving their names and particulars as well as the type of press owned. The Co-ordination Officer must then authenticate the Declaration unless the registered name has already been taken by someone else or the applicant has been involved of an offence involving moral turpitude during the past five years. Section 6 provides the procedure for printers and publishers of newspapers and news agencies. A Declaration has to be made specifying the name of the newspaper or news agency as well as the source of funding and particulars of the bank account. Under Section 10, the Co-ordination Officer may not authenticate a Declaration if, among other reasons, the applicant has been convicted of a criminal offence. Section 19 provides that a Declaration may be cancelled at any time if, among other reasons, it appears that the newspaper has contravened the Ordinance or the title of the newspaper is similar to that of another newspaper. Whenever the Co-ordination Officer is minded to refuse or cancel registration, s/he must give the affected party the opportunity to be heard and present their views. Section 20 provides that any person who has been refused authentication or whose declaration has been cancelled may appeal to the High Court.

In addition to registration as an entity, newspapers are also required to register an individual as 'Page-in-charge' who will, 'in the supervision and superintendence of editor be responsible for checking the contents of the pages and ensure due satisfaction of the material sent to the printer and publisher for publication'.

Under Part III of the Ordinance, all publishers are under an obligation to deliver copies of their publications to the central authorities. One copy of every book printed is to be delivered to the local Information Department,[46] which the government may dispose of from time to time. Under Section 24, newspapers are similarly required to lodge copies of every edition with the provincial authorities. From the information provided, the government will compile a central register of all books and newspapers published or printed in the country.[47]

[45] See Part IV: Penalties.
[46] Section 21.
[47] Parts V and VI of the Ordinance.

Failure to register or to deliver copies of publication to the authorities is punishable by a fine or imprisonment of up to six months.

Section 11 the Ordinance restricts foreign ownership of the print media to no more than 25% of the total proprietary interest and Section 7 restricts all ownership, publishing, printing and editing of newspapers to individuals aged 18 years and over.

Analysis

International Standards

Under international law, it is well-established that any licensing system for the print media which involves the possibility of being refused a license except on purely technical grounds, is illegitimate.[48] 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 for media corporations, as opposed to a licensing requirement in which approval needs to be obtained, 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."[49]

The UN Human Rights Committee has 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.[50] 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

[48] See, for example, *Gaweda v. Poland*, Application No. 26229/95, 14 March 2002 (European Court of Human Rights)

[49] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

[50] *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.

> imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.[51]

Scope of the Registration Requirement

It is immediately clear from the above that the scope of the Ordinance is excessive, inasmuch as it extends to low-circulation publications and pamphlets. The fact that printers, in addition to publications, need to obtain registration is also problematic and there can be no justification for this.

The requirement that all newspapers register a 'page-in-charge' to be responsible for content and ensure 'due satisfaction' is similarly unjustifiable. Owners, publishers, editors and/or individual writers are already legally liable for the content of newspapers, for example with regard to potentially defamatory material. To reiterate these obligations, and possibly to extend them, is unnecessary and is likely to exert a chilling effect on freedom of expression.

The Registration System

The registration system does not conform to the standards noted above in particular because it imposes substantive conditions on registration. Registration for printing presses may be refused if the applicant has been convicted of an offence involving 'moral turpitude' and registration of a publication may be refused or cancelled when the applicant has been convicted of a criminal offence, or where the name of the publication is 'similar' to the name of another publication. None of these are legitimate restrictions. As noted above, imposing substantive conditions through a registration system is not legitimate. Being convicted of a criminal offence, or even a crime of moral turpitude, is no reason to be denied the right to publish. This is particularly problematical, given the continued existence of criminal libel laws in Pakistan

The second ground, prohibiting publications that bear names which are 'similar' to existing publications is unnecessary. This matter should be dealt with at the point of initial registration, not afterwards. In any case, this phrase is excessively vague and therefore cannot pass the test of being 'provided by law'. For example, it could be interpreted to shut down a publication entitled 'Daily Times' on the grounds that there already is a 'Times'.

The amount of information required for registration of newspapers and news agencies is disproportionate. Unlike printers, who merely provide their name and address, publishers and owners of newspapers and news agencies are required to specify financial details including the source of funding. There can be no justification for this and the requirement should be removed from the law.

The fact that the registration system is supervised by regional authorities, and that an appeal lies to the courts, does not mitigate these problems. As the European Court of

[51] *Ibid.*, para. 8.1

Human Rights observed in a recent case where a court ruled that a publication in Poland could not be registered:

> [The Court] acknowledges that the judicial character of the system of registration is a valuable safeguard of freedom of the press. However, the decisions given by the national courts in this area must also conform to the principles of [freedom of expression]. The Court observes that in the present case this in itself did not prevent the courts from imposing a prior restraint on a printed media in a manner which entailed a ban on publication of entire periodicals…[52]

Other Requirements and Restrictions

The requirement for all publishers to lodge a complementary copy with the authorities could be justified as helping build up the collection of the National Library of Pakistan, inaugurated in 1993. This could help the Library develop into an important socio-historical and cultural resource, to be used for generations to come. However, Section 23 of the Ordinance does not provide for copies to be sent to the Library and, furthermore, provides that the government may, from time to time, dispose of complementary copies. This implies that the purpose of the provision is control-oriented. It should either be amended to make it clear that copies should go to the National Library or be repealed.

The sanctions regime provided for in the Ordinance is excessively focused on criminal sanctions, providing for heavy fines and even imprisonment. The regime even extends to newsstands, which may be fined or whose owners may be imprisoned if they are found to be selling publications that are not registered.[53] This is clearly excessive.

Finally, the restrictions on foreign ownership as well as the age restrictions on who may edit newspapers or other publications should be reconsidered. It is not uncommon in other countries to encounter restrictions on foreign ownership of broadcast media but such restrictions for the print media are unusual and normally considered unnecessary. They may also have unintended effects. For example, this restriction may make it illegal for Afghan refugees in Peshawar to own and publish their own newspapers. The age restriction is similarly unnecessary. It renders it illegal, for example, for youth groups to publish newsletters.

Recommendations:

- The imposition of a registration system on the print media should be reconsidered.
- If some form of registration is imposed on publications, it should conform to the following:
  - only mass distribution print media, not individuals or printing presses, should be required to register;
  - registration should be automatic upon submission of the relevant information; in particular, no one should be refused registration on the grounds that individuals connected with the publication have been convicted of a criminal offence;
  - financial information should not be required for registration; and
  - any system for preventing name duplication should apply at the point of initial

[52] *Gaweda v. Poland.* note 48, para. 47.
[53] Section 30.

registration, not afterwards.

- The requirement to deposit complimentary copies of all publications should either operate in favoru of the National Library of Pakistan or be repealed.
- The sanctions regime should be revised and the threat of imprisonment, particularly for those who merely distribute publications, repealed.
- All age restrictions as well as the limitation on foreign ownership of print media should be repealed.

V. The Defamation Ordinance

Overview of the Ordinance

The Defamation Ordinance, 2002, revises the law of defamation in Pakistan. It applies to defamatory publications published orally or by print, broadcast or Internet media, and defines 'defamation' as "[a]ny wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike, contempt or hatred".[54]

A number of defences are provided. Under Section 5, it is a defence if the person can show that he or she was not the author, editor, publisher or printer of the statement, the matter commented on was in the public interest and was published in good faith, the statement was based on truth and made for public good, the plaintiff gave its assent for the publication, the author offered to publish a proper apology, contradiction or denial but was refused by the plaintiff or the matter complained of was privileged, either absolute or qualified.[55]

Section 4 states that "[t]he publication of defamatory matter is an actionable wrong without proof of special damage to the person defamed and where defamation is proved, damage shall be presumed." In terms of remedies, Section 9 provides that compensatory damages may be ordered with a minimum of 50,000 Rupees (around US$900) or three months imprisonment in addition to any special damage that has been incurred by the plaintiff. The Court may also order an apology to be made and published.

Section 10 preserves all existing criminal defamation laws, stating that "[n]othing in this Ordinance shall prejudice any action for criminal libel or slander under any law for the time being in force".

Analysis

International Standards

Under international law, freedom of expression may be restricted for the purposes of protecting reputation. However, any such restrictions must meet the three-part test outlined in the section on international standards, above. Building on international law and comparative jurisprudence from around the world, ARTICLE 19 has published a set of principles setting out the appropriate balance between these two interests, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.[56] These Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom

[54] Section 1.

[55] Section 6 defines absolute privilege as statements made in Parliament, in court or under the authority of government. Section 7 defines qualified privilege as "[a]ny fair and accurate publication of parliamentary proceedings, or judicial proceedings which the public may attend and statements made to the proper authorities in order to procure the redress of public grievances".

[56] ARTICLE 19 (London: July 2000).

of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[57]

According to the ARTICLE 19 Principles, any restrictions on freedom of expression to protect reputations must have the genuine purpose and demonstrable effect of protecting a legitimate reputation interest. Furthermore, a restriction cannot be justified unless it can be convincingly established that it is necessary in a democratic society. In particular, it cannot be justified if:

i. less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or
ii. taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.[58]

Criminal libel

The ARTICLE 19 Principles state, as a fundamental principle, that criminal defamation laws are *per se* inconsistent with the guarantee of freedom of expression.[59] The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal measures when restricting fundamental rights. International organisations have made similar calls. For example, the UNESCO sponsored *Declaration of Sana'a* declared, "Disputes involving the media and/or the media professionals in the exercise of their profession…should be tried under civil and not criminal codes and procedures."[60]

In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. For these reasons, we are concerned that the current Ordinance expressly preserves criminal libel laws in Pakistan and we urge the government of Pakistan to repeal all remaining criminal defamation laws.

Defences

The Ordinance provides for a number of progressive defences in Section 5, for example relating to publications that are in the public interest or the offer to tender an apology. At the same time, these defences, cumulatively, fail to provide adequate protection for freedom of expression.

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[57] See International Mechanisms for Promoting Freedom of Expression, Joint Declaration, 30 November 2000.
[58] Note 56, Principle 1.
[59] *Ibid.*, Principle 4.
[60] *Declaration of Sana'a*, 11 January 1996, endorsed by the General Conference by Resolution 34, adopted at the 29th session, 12 November 1997.

Under 5(c), the defence of truth is apparently limited to statements made in the public good. It is uncontroversial that truth is an absolute defence to a defamation charge, regardless whether it was made 'for public good'. As has frequently been noted, one cannot defend a reputation one does not have and, if the statement is true, there is no harm to a reputation legitimately held. To limit the defence in this way unduly and unjustifiably restricts freedom of expression.[61]

It appears that for all defences, the burden of proof is on the defendant. In a number of countries, requiring the defendant to prove that defamatory statements are true has been held to place an unreasonable burden on the defendant, at least in relation to statements on matters of public concern,[62] on the basis that it exerts a significant chilling effect on freedom of expression. Therefore, in all cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.[63] It should also be recognised that journalists have a right not to reveal their sources.[64]

Finally, ARTICLE 19 is of the view that no one should be liable for the expression of an opinion.[65] The precise standard to be applied in defamation cases involving the expression of opinions – referred to by a variety of names such as value judgements or fair comment – is still evolving but it is clear from the jurisprudence that opinions deserve a high level of protection. It is also necessary to clarify what constitutes an expression of opinion. Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one. The ARTICLE 19 Principles define an opinion as a statement which either (i) does not contain a factual connotation which could be proved to be false or (ii) cannot reasonably be interpreted as stating actual facts given all the circumstances including the language used.[66]

Remedies

As drafted, the Ordinance provides for a heavy-handed sanctions regime. Although the possibility of ordering an apology is provided for, the Ordinance prescribes a minimum level for compensatory damages of 50,000 Rupees – a third of the annual per capita GDP

[61] Invasion of privacy is another matter, but should be kept entirely separate from defamation.
[62] The term 'matters of public concern' includes all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.
[63] *Defining Defamation*, note 56, Principle 7.
[64] This is recognised in the Press Council Ordinance: Section 14(2).
[65] *Defining Defamation*, note 56, Principle 10.
[66] *Ibid.*

as calculated by UNDP – or three months imprisonment, while allowing for special damages to be added.

International law recognises the chilling effect excessive sanctions have on freedom of expression. In *Tolstoy Miloslavsky v. the United Kingdom*, the European Court of Human Rights ruled that excessive damages for defamation violated the right to freedom of expression, holding that "an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."[67] While recognising the seriousness of the libel, the Court in this case found that the damages awarded were excessive.[68] The ARTICLE 19 Principles recommend that compensatory damages should be subject to a fixed ceiling; the Ordinance does the opposite, instead prescribing a fixed minimum. This will have a serious chilling effect on freedom of expression and cannot be justified.

For the same reason, the Ordinance should also be amended to remove all possibility of imprisonment for defamation. A number of international bodies have now condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views. Two UN Special Rapporteurs on freedom of expression have seriously called into question the imposition of custodial sanctions for expression related matters.[69] Since 1994, the UN Human Rights Committee has expressed concern about the possibility of custodial sanctions for defamation in a number of countries including Iceland, Norway, Jordan,[70] Tunisia, Morocco,[71] Mauritius[72] and Iraq.[73] In its annual resolution on freedom of expression, the UN Commission on Human Rights regularly expresses concern at the use of detention, "including through the abuse of legal provisions on criminal libel" against persons who exercise the right to freedom of expression.[74]

Public Bodies and Officials

The Ordinance fails to limit the ability of public bodies to sue. In many countries, national courts increasingly recognise that it is necessary to limit governmental abuse of defamation laws by restricting the scope of who may sue in defamation. Courts in the UK, for example, have held that public bodies do not have the right to bring an action for defamation. The House of Lords stated in relation to a county council that, as an elected

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[67] Judgment of 13 July 1995, Application No. 18139/91, para. 49.
[68] *Ibid.*
[69] *The Right to Freedom of Opinion and Expression: Update of the preliminary report prepared by Mr. Danilo Turk and Mr. Louis Joinet, Special Rapporteurs*, Submitted to the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub/2/1991/9, para.100.
[70] *Annual General Assembly Report of the Human Rights Committee*, 21 September 1994, Volume I, No.A/49/40, paras. 78, 91 and 236, respectively.
[71] *Annual General Assembly Report of the Human Rights Committee*, 3 October 1995, No. A/50/40, paras. 89 and 113, respectively.
[72] *Annual General Assembly Report of the Human Rights Committee*, 16 September 1996, No. A/51/40, para. 154.
[73] *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee on Iraq*, 19 November 1997, No. CCPR/C/79/Add.84, para.16.
[74] See Resolution 1999/36, para. 3.

body, it "should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."[75] The Indian Supreme Court followed this in *Rajgopal v. State of Tamil Nadu*, finding that "the government, local authority and other organs and institutions exercising governmental power" cannot bring a defamation suit.[76] A similar position has been taken in the United States.[77]

ARTICLE 19 takes the position that public bodies should not be able to bring defamation actions, as reflected in its Principle 3:

> Public bodies of all kinds – including all bodies which form part of the legislative, executive or judicial branches of government or which otherwise perform public functions – should be prohibited altogether from bringing defamation actions.

The rationale for restricting the ability of elected bodies to sue is threefold. First, criticism of government is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. Second, defamation laws are designed to protect reputations. Any reputation elected bodies might have would belong to the public as a whole, which on balance benefits from uninhibited criticism. In any case, elected bodies regularly change membership so, as the House of Lords has noted, "it is difficult to say the local authority as such has any reputation of its own."[78] Finally, the government has ample ability to defend itself from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers money, one which may well be open to abuse by governments intolerant of criticism.

The Ordinance should also recognise that public officials should not be able to claim damages for statements about their work which are connected to their public functions. In the case of *Rajagopal*, the Indian Supreme Court held that public officials could not as a matter of principle recover damages with regard to acts carried out in their public capacity. Discussing with approval a number of leading authorities, including the US Supreme Court's landmark *Sullivan* decision,[79] it held:

> In the case of public officials ... the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official established that the publications was made (by the defendant) with reckless disregard for truth.[80]

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[75] *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All ER 1011 at 1017
[76] (1994) 6 Supreme Court Cases 632, p. 650.
[77] The Supreme Court, in *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923), p. 601, ruled a city could not sue a newspaper for defamation. It said, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence."
[78] *Op. cit.*, at 1020
[79] *New York Times Co. v. Sullivan*, 376 US 254 (1964)
[80] O*p. cit.*, p. 650.

Limitation of Intermediaries' Liability

The Ordinance expressly mentions that its scope extends to defamatory material published on the Internet but it fails to take specifically into account the special position occupied by Internet Service Providers (ISPs, the intermediaries through whom a connection is made to the Internet). ISPs provide access to a large number of users, usually as a purely commercial service. As a rule, they are unaware of the content published by each of these users and, for this reason, in many countries they are expressly excluded from liability for any defamatory material their users may publish through their servers.[81]

Recommendations

- All criminal defamation laws should be repealed and, where necessary, replaced with appropriate civil defamation laws.
- Proof of truth should be a complete defence in a defamation action; it should not be necessary, in addition, to prove the statements were made for the public good.
- In cases involving statements of public interest, the burden should rest with the plaintiff to prove the falsity of any statements alleged to be defamatory.
- No one should be liable for the expression of an opinion, defined broadly.
- The Ordinance should recognise the right of journalists not to reveal their sources in defamation cases.
- The Ordinance should impose a maximum ceiling for damages, not a minimum level.
- No custodial sentence should be able to be imposed for defamation.
- Public bodies should be prohibited from bringing defamation actions and public officials should not be able to recover damages for defamatory statements related to their public functions.
- Internet Service Providers whose sole role in relation to a statement is providing technical access to the Internet or transporting data across the Internet should not be held liable in defamation for that statement.

[81] See Section 230 of the US Communications Decency Act and Section 5(3) of the German Information and Communications Services Act.