

Memorandum

**ARTICLE 19,
the International Centre Against Censorship**

and

**The Centre for Media Freedom in the Middle East and
North Africa**

on

**the 1995 Press Law of the Palestinian National
Authority**

London, June 1999

Introduction

This memorandum concerns the 1995 Press Law of the Palestinian National Authority which ARTICLE 19 and CMF MENA understand has been endorsed by the Palestinian National Authority but has not yet been passed by the Palestinian Legislative Council.

ARTICLE 19 and CMF MENA are gravely concerned about certain provisions in this law which impose extensive restrictions and conditions on freedom of the press and which, if implemented, would seriously impede the free flow of information within and to Palestine. We are of the view that these provisions are not compatible with Palestine's international obligations to respect and protect freedom of expression.

In this Memorandum, ARTICLE 19 and CMF MENA review some of the more worrying provisions of the 1995 Press Law in light of relevant international human rights law and standards. This analysis is limited to the provisions of the law itself and does not extend to the way it has been applied in practice.

In doing so, ARTICLE 19 seeks to make a constructive contribution to the promotion and protection of freedom of expression and media freedom in Palestine. These freedoms are vitally important for the protection and promotion of other rights, and for ensuring good governance and democratic accountability.

The Palestinian government, at the highest level, has committed itself to a process of democratisation and respect for human rights. Chairman Yasser Arafat has repeatedly stated that he and his government are committed to respecting all recognised international human rights standards.¹ In its present form, the 1995 Press Law runs counter to such commitments.

ARTICLE 19 and CMF MENA urge the Palestinian authorities to give careful consideration to amending the 1995 Press Law to bring it into line with international standards, in accordance with the recommendations contained in this memorandum. This would entail establishing a new legislative and structural framework to enable the people of Palestine to exercise fully their right to freedom of expression and to facilitate media freedom, independence and plurality.

Overview

There are a number of areas where the 1995 Press Law fails meet international standards. Articles 18-21 establish a licensing regime for the printed press, including initial high capital requirements. It is quite clear under international law that

¹ For example to representatives of Amnesty International on 2 October 1993 and again on 7 February 1996.

newspapers should not be required to obtain licenses before publishing. In addition, the government exerts direct control over a number of key decisions relating to the press, including licensing, contravening the principle that any legitimate regulation of the media should be by independent bodies.

Further, the 1995 Press Law imposes a number of conditions on who may be an editor-in-chief, a responsible director and an owner of a publication. These conditions effectively limit access to these positions and therefore restricts freedom of expression. As such, they run counter to the principle that everyone has the right to express themselves freely in the medium of their choice.

The law institutes a number of sweeping restrictions on the content of what may be published, many of which are unacceptably broad and/or vague. For example, publications must not “contradict the principles of ... national responsibility” or publish material that is “inconsistent with morals” or which may “shake belief in the national currency”. These restrictions are backed up with censorship powers as publications must deposit copies with the government prior to distribution.

While the law does have provisions on access to information and the right to protect the confidentiality of sources of information, these provisions are weak and do not sufficiently protect these important rights.

Finally, the law provides for harsh sanctions for breach of its provisions, in many cases extending to jail terms. Imprisonment is clearly unnecessary to promote compliance with this law and hence cannot be justified as a restriction on freedom of expression.

International Obligations

Palestine, although not yet formally recognised as an independent State, has observer status at the UN and is arguably bound by customary rules of international law, particularly in the area of human rights.

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, legally binding as a matter of customary international law. Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Palestine has undertaken specific human rights obligations in the context of its membership of the Euro-Mediterranean Partnership, which was established in November

1995 with the adoption by the participating states of the Barcelona Declaration.² The Euro-Mediterranean Partnership is primarily oriented towards trade, politics and culture but it contains a clear human rights component, stating that members should respect fundamental rights and freedoms, and:

- act in accordance with the *United Nations Charter* and the *Universal Declaration of Human Rights*, as well as other obligations under international law, in particular those arising out of regional and international instruments to which they are party;
- develop the rule of law and democracy in their political systems, while recognizing in this framework the right of each of them to choose and freely develop their own political, socio-cultural, economic and judicial system;
- respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms, including freedom of expression, freedom of association for peaceful purposes and freedom of thought, conscience and religion, both individual and together with other members of the same group, without any discrimination on ground of race, nationality, language, religion or sex.³

Similarly, the *Agreement on the Gaza Strip and the Jericho Area* of 1994 and the 1995 *Oslo II Agreement*, at Articles XIV and XIX respectively, provide for both Israel and the Palestinian Authority to respect international human rights.

The UNESCO-sponsored Sana'a *Declaration on Promoting Independent and Pluralistic Arab Media*, endorsed by UNESCO's General Conference in November 1997, also establishes relevant standards, declaring that:

Arab states should provide, and reinforce where they exist, constitutional and legal guarantees of freedom of expression and of press freedom and should abolish those laws and measures that limit the freedom of the press; government tendencies to draw limits/red lines outside the purview of the law restrict these freedoms and are unacceptable.⁴

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which 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 both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

² The participant countries are the 15 members of the European Union and Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

³ *The Euro-Mediterranean Partnership: Barcelona Declaration and Working Programme*. Nov. 1995. The European Commission, DG IB, External Relations.

⁴ UNESCO, General Conference, 29th Session, Decision No. 150 ex 3.1 part 3, Paris, Nov. 1997.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the Inter-American Court of Human Rights stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.⁵

This has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights. The following quotation of the European Court now features in almost all its cases involving freedom of expression:

[F]reedom 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.⁶

International law does permit some restrictions on the right to freedom of expression and information in order to protect various private and public interests. Such restrictions must, however, meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee⁷ and the European Court of Human Rights,⁸ requires 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 achieve secure this interest.

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.⁹ In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

Guarantees of Press Freedom in National Law

These international guarantees are further bolstered in Palestine by constitutional or basic law guarantees of freedom of expression. Article 14 of the Palestinian constitution for the transitory period provides:

[E]very Palestinian is entitled to express his opinion within the framework of law that restricts

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

⁶ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

⁷ For example, in *Mukong v. Cameroon*, No. 458/1991, views adopted 21 July 1994, 49 GAOR Supp. No. 40, UN Doc. A/49/40, para. 9.7.

⁸ *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123, paras. 28-37.

⁹ *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 62. These standards have been reiterated in a large number of cases.

slander, preserves others' rights, and protects national security.

Article 19 of the Palestinian Draft Basic Law, which has passed the third reading by the Palestinian Legislative Council but has not yet been signed into law by the President, states:

Every person shall have the right to freedom of thought, conscience and expression and publication of his opinion either orally, in writing or in the form of art or through any other form of expression, subject to observance of restrictions by law.

Finally, Article 2 of the 1995 Press Law itself states:

Freedom of the press and printing are guaranteed. Freedom of opinion is guaranteed to every Palestinian, and he can express himself in the form of speech, writing, photography or drawing, for the purposes of expression and information.¹⁰

Key Concerns

1. Licensing of the Print Media

Article 17 of the 1995 Press Law establishes a licensing regime for the print media and lists only three bodies who may be granted a license: a journalist as defined by the law, a press corporation duly established and registered, and a political party. In addition, the Minister may, upon the recommendation of the Director, grant a license to a Palestinian news agency or a foreign news agency. Article 18 sets out the information a license application must contain, including the name of the editor-in-chief, his age, residence, education and experience, and the authorised capital of the applicant body. According to Article 19, the Minister must issue a decision within 30 days of a recommendation by the Director and any decision to refuse to issue a license must be justified and can be appealed to the High Court of Justice. Pursuant to Article 20, a variety of other enterprises, including libraries, publishing houses, research centres and even advertising agencies must also apply to the Director for licenses, to be issued under the same conditions by the Minister. Article 21 requires daily publications to have at least 25,000 Jordanian Dinars of registered capital while other publications must have 10,000. Periodicals will lose their license if they do not meet strict publication deadlines (Article 23).

Purely formal registration requirements for mass-distribution periodicals do not *per se* offend guarantees of freedom of expression – as long as registration is automatic once the technical requirements, such as filing certain information, have been met and responsibility for administering the process is vested in a body which is fully independent of government. Periodicals should not be subject to a licensing regime; anyone who wishes to produce a publication should be allowed to do so without restraint. Licensing

¹⁰ All translations are unofficial and done by the authors.

requirements for non-periodical publications and associations, such as study and research centres, are similarly illegitimate.

The 1995 Press Law prescribes a system whereby the Director and Minister have the discretion to refuse to issue a license, thus breaching two key constraints international law imposes on any registration requirement. The law as it stands facilitates government control over publishing to the detriment of the exercise of freedom of expression. It may be noted that the right to appeal any refusal to issue a license to the High Court of Justice does not address these concerns. Such an appeal would be costly and time consuming and the law provides no guidance as to what might justify a decision to refuse a license.

Registration requirements which go beyond the need to supply basic information offend freedom of expression guarantees. They unnecessarily inhibit press freedom, do not serve a legitimate public interest and do not meet the strict standard of necessity required under the three-part test for restrictions on freedom of expression. In particular, the financial requirements, restrictions on whom may register a periodical and deadlines regarding publication in the 1995 Press Law are all unnecessary. The financial requirements are perhaps particularly insidious as they effectively exert a chill on the establishment of new publications.

Recommendations

- All licensing provisions should be removed from the law.
- Anyone should be allowed to produce a periodical or specialised publication.
- There should be no restrictions on the right to freely establish bodies such as libraries, libraries, publishing houses, research centres and advertising agencies.
- Financial requirements for publications, including minimum capital requirements, should be removed from the law.

2. Restrictions on Personnel

Article 11 of the 1995 Press Law provides that an editor-in-chief of a newspaper must be a journalist, have a good command of the language, not accept any other job in the media field, live in Palestine and not have been convicted of an immoral crime, felony or misdemeanour. Similar restrictions apply to an editor-in-chief of a specialised publication (Article 13).

Directors of publication houses, research centres, libraries, advertising agencies and other related bodies must be Palestinians or have served with the PLO and not be convicted of an immoral crime, felony or misdemeanour. Directors must also hold either a university degree or a high school diploma, along with appropriate experience, depending on which sort of institution they direct (Article 14) and not direct more than one institution (Article 15).

Finally, owners of newspapers must be Palestinians and reside in Palestine or otherwise have the consent of the Minister of the Interior. Owners should also not have been

convicted of a felony or misdemeanour pertinent to immorality or dishonesty.

Restrictions on who may engage in various media professions have long been considered to breach international guarantees of freedom of expression and association. Freedom of expression includes the right both to impart and to receive information and ideas. The press has a role in respect of both these aspects of freedom of expression. Conditions on media professionals impede the ability of those who do not meet the requirements to impart information and ideas and hence breach their right to freedom of expression. More importantly, the right of the public to receive information is also breached by such requirements as they inhibit the development of a vibrant, independent and pluralistic press without which the public's right to receive information and ideas is compromised.

The Inter-American Court of Human Rights has considered precisely this issue, holding that mandatory requirements for journalists breach international guarantees of freedom of expression:

[A] law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the [right to freedom of expression].¹¹

The same principles apply to conditions on other media professionals. The right to freedom of association prohibits in a similar fashion restrictions on who may occupy certain positions in associations. Restricting access to these positions, denies the freedom of expression rights both of those who do not meet the criteria and of the general public, by impeding the ability of the sector to develop in a dynamic, pluralistic fashion.

Recommendation

- Restrictions on who may be an editor-in-chief, direct institutions or own newspapers should be removed from the law.

3. Government Control and Censorship

The 1995 Press Law establishes a number of areas in which the government has direct decision-making power over the media. These include licensing (described above), permission to own a publication for non-resident Palestinians (Article 16) and, most importantly, the requirement to deposit four copies of each publication with the Publishing Department of the Ministry prior to distribution (Article 33). It is inherent to the very concept of freedom of the press that the government should not have direct decision-making power over the media. As noted above in relation to registration, any

¹¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5. A "colegio" is a journalists' association.

such powers should be exercised by bodies independent of government.

The requirement of pre-distribution deposit is, however, far more problematical due to the role it plays in facilitating censorship. Censorship is one of the most extreme ways of restricting freedom of expression. In recognition of this, Article 13(2) of the Inter-American Convention on Human Rights expressly prohibits all prior restraint. The European Court of Human Rights has indicated that it regards even specific instances of prior censorship with great suspicion. In *Observer and Guardian v. the United Kingdom*, the European Court held that an injunction against publication of a book, purportedly for reasons of national security, breached the guarantee of freedom of expression:

[T]he dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.¹²

National courts have also noted the dangers inherent in any system of prior restraint.¹³

The deposit requirement established by the 1995 Press Law is insidious. Being required to provide four copies of every publication to the Ministry can be expected to act as a significant disincentive to editors and publishers. The message to these individuals is clear; you are being monitored and may be subject to prosecution. The chilling effect this exerts on the free flow of information cannot be overestimated.

Recommendation

- The prior deposit requirements should be removed from the law.

4. Access to Information Held by Public Authorities

Article 4c of the 1995 Press Law grants a right to seek information from various sources and to comment within the limits of the law. Article 6 adds that officials should facilitate the mission of journalists by advising them of anticipated programmes and projects.

These provisions do not go nearly far enough in establishing a right to access information held by public authorities, a right now recognised in almost all democratic countries. In particular, the law should establish a presumption that all information held by public authorities should be disclosed to journalists and other individuals upon request. Clearly some information, for example about private matters or national security, may legitimately be withheld, but it should be up to public officials to justify any refusals to disclose.

Recommendation

¹² 26 November 1991, 14 EHRR 153, para. 60.

¹³ The United States Supreme Court, for example, has stated that any system of prior restraints bears a heavy presumption against its constitutional validity. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

- The provisions on access to information should be significantly strengthened, in particular by establishing a presumption in favour of disclosure and by requiring officials to justify any decision to withhold information.

5. Protection of Sources of Information

Article 4d. of the 1995 Press Law grants journalists a right to protect confidential sources of information unless a court orders otherwise in order to maintain security, prevent a crime or promote the interests of justice. This is a crucially important right for journalists which the European Court of Human Rights has described as “one of the basic conditions for press freedom”, which should be respected unless disclosure is “justified by an overriding requirement in the public interest.”¹⁴ On this standard, Article 4d. does not go far enough. It should, for example, make it clear that courts should never order disclosure where the information sought could be obtained by other means and even where it cannot, disclosure should not be ordered unless it is necessary to protect a significant interest.

Recommendation

- Article 4d. should be strengthened to reflect the importance of the right to protect confidential sources of information to a free press.

6. Restrictions on Content

A number of articles in the 1995 Press Law establish sweeping restrictions on the content of what may be published. Many of these provisions are worded in vague language which renders them susceptible of very wide application. Others duplicate provisions which should apply to all forms of expression, not simply press publications.

Article 7 prohibits the publication of material which may contradict the principles of freedom, national responsibility, human rights and the respect of truth. Article 8 imposes a number of ethical obligations on journalists, including to respect constitutional freedom and private life, to present material in an objective and balanced form and to strive for accuracy, integrity and objectivity.

These are clearly positive goals to which journalists should aspire but they are more properly the subject of ethical self-regulation than of a press law. They are by definition broad goals which need to be encouraged rather than enforced. For example, a requirement that the presentation of news be accurate is an important professional goal but as a legal restriction it exerts an unacceptable, chilling effect on freedom of expression. The media’s role is to provide the public with timely

¹⁴ *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123, para. 39.

information but even the very best journalists will occasionally make mistakes. It is unacceptable to penalise these journalists, particularly where they have acted professionally and in good faith. As the Privy Council noted in a case from Antigua and Barbuda:

[I]t would on any view be a grave impediment to the freedom of the press if those who print, or *a fortiori* those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.¹⁵

Instead of imposing rules on journalists which inhibit their ability to undertake investigative journalism, the authorities should provide more funding for professional training and for the other activities of professional bodies.

Article 37 includes a number of broad content restrictions, such as material harmful to religious doctrines, that harms national unity, which shakes belief in the national currency or which is inconsistent with morals. Restrictions on content, like all other restrictions on freedom of expression, are only permissible under international law if they are justified by reference to legitimate interests and a strict standard of necessity. These restrictions do not serve overriding legitimate public interests, as required by the test for restrictions on freedom of expression, noted above.

Other restrictions established by Articles 8 and 37, such as incitement to crime or violence, should be put in laws of general application rather than in media-specific laws. These are things which are prohibited to the whole population, not just journalists, and press publications should not be under a special obligation in respect of them.

Finally, Article 37 restricts the publication of any secret information about the police, armed forces, Palestinian National Council or Council of Ministers of the Palestinian National Authority. It is legitimate to prohibit the publication of certain secret information, for example in the interests of national security, but these rules, like all restrictions on freedom of expression, should be narrowly drawn and apply only in the context of a serious risk of real harm to the protected interest.

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* were adopted by an international group of experts in 1995 and have been noted with approval on several occasions by the UN Commission on Human Rights.¹⁶ Principle 12 states:

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 16 adds:

¹⁵ *Hector v. Attorney General of Antigua* [1990] 2 A.C. 312, p. 318.

¹⁶ Res. 1997/27.

No person may be subjected to any detriment on national security ground for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

The restrictions in the 1995 Press Law clearly do not conform to these standards.

Recommendations

- The restrictions on content found at Articles 7, 8 and 37 of the law should be comprehensively reviewed and amended. In particular, the law should not contain any restrictions that:
 - do not serve a legitimate public or security interest;
 - are excessively vague or overbroad;
 - effectively require publications to conform to excessively high standards of truth;
 - are more appropriately the subject of self-regulation; or
 - should be found in laws of general application

7. Sanctions

Several of the articles imposing sanctions provide for imprisonment for breach of certain provisions of the law. For example, Article 44 provides for imprisonment of up to one month for breach of Article 25 or 26. Article 45 provides for imprisonment of a minimum of four months and a maximum of six months for breach of Article 9.

The guarantees of freedom of expression and association require not only that the substance of restrictions be proportionate but also that any sanctions for breach of those restrictions be proportionate.¹⁷ In other words, even when the substance of a restriction is legitimate, the imposition of too severe a sanction by itself breaches these international guarantees.

ARTICLE 19 and CMF MENA are of the view that compliance with all of the legitimate restrictions in the 1995 Press Law can be adequately secured by a system of fines. Imprisonment is an excessively harsh sanction for these provisions and is itself therefore an illegitimate restriction on freedom of expression.

Recommendation

- Imprisonment as a sanction should be removed from the law and replaced with a system of fines where restrictions in the law are in conformity with international standards.

¹⁷ See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, 20 EHRR 442.