MEMORANDUM

on

The Law of the Press of Afghanistan

by

ARTICLE 19
Global Campaign for Free Expression

London
September 2002

Introduction

On 5 September 2002, an International Seminar bringing together representatives of the Afghan government, local civil society and the international community adopted a Declaration on Promoting an Independent and Pluralistic Media in Afghanistan (Declaration). Action Point 2 of this Declaration provides:

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

Together with several provisions in the Criminal Code, the Press Law is one of the main legal instruments affecting the media and should be one of the first to be reviewed. It consists of nine chapters, which can roughly be divided into three parts: Chapters 2-6

dealing with registration and licensing, Chapter 7 on 'prohibited publications', and the remaining chapters on definitions, penalty orders and miscellaneous provisions.

This Memorandum analyses the Afghan Law of the Press, as approved by edict on February 2002 (the Press Law). It is based on the official translation issued by the Ministry of Culture and Information.[1] This Memorandum will first discuss Afghanistan's international and constitutional obligations with regard to freedom of expression. Then, it will analyse the provisions of the Press Law against international standards. Recommendations will be provided throughout.

International and Domestic Obligations

The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[2] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

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

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[3]

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

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

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

[1] In places, the translation is unclear. Where necessary, we have relied upon an unofficial translation distributed at the September International Seminar in Kabul to clarify certain provisions.
[2] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[3] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit)
[4] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[5] Adopted 4 November 1950, in force 3 September 1953.

American Convention on Human Rights[6] and Article 9 of the *African Charter on Human and Peoples' Rights*.[7]

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."[8] 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.[9]

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

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

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.[11]

---

[6] Adopted 22 November 1969, in force 18 July 1978.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] 14 December 1946.
[9] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.
[10] *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.
[11] *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.

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."[12] 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.[13]

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".[14]

The Court has also held that Article 10 applies not only to the content of expression but also the means of transmission or reception.[15]

Restrictions on the Right to Freedom of Expression

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

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

---

[12] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.
[13] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.
[14] See *Castells v. Spain*, note 13, para. 43, *Thorgeirson v. Iceland*, note 12, para. 63, *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, 14 EHRR 153, para. 59 and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65.
[15] *Autronic AG v. Switzerland,* 22 May 1990, Application No. 12726/87, 12 EHRR 485, para. 47.

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

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.[16] The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provisions on freedom of expression,[17] has developed two fundamental requirements:

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

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

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

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

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

---

[16] *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).
[17] Article 10(2) ECHR.
[18] *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, para. 49.
[19] *Ibid*., para. 59.
[20] *Handyside v. the United Kingdom*, Judgment of 7 December 1976, para. 49 (European Court of Human Rights).
[21] See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8 (Canadian Supreme Court).

Constitutional Guarantees

Afghanistan's 1964 Constitution, declared applicable by the December 2001 Bonn Agreement,[22] protects the right to freedom of expression in Article 31:

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

While the opening sentence of this Article frames the right to 'freedom of thought and expression' very broadly as 'inviolable', the following sentences fall below the standards of respect for freedom of expression required under international law in several respects. First, a number of the specific 'rights' that follow are granted to Afghans only. For example, it is stated that 'every Afghan has the right to express his thoughts in speech, writing, in pictures and by other means'. This contrasts with generally established practice in other countries as well as in international human rights instruments, which require States to guarantee human rights to all persons within their territory or jurisdiction, including immigrants and stateless persons, as well as citizens. Article 2 of the International Covenant on Civil and Political Rights, ratified by Afghanistan, states that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Some restrictions on foreigners may be legitimate – for example, it is not uncommon for countries to place limits on foreign ownership of the broadcast media – but as a matter of principle non-citizens should benefit fully from the guarantee of frreedom of expression and any restrictions specifically targetted at them need to be justified by reference to the same three-part test as other restrictions.

Second, and even more serious, Article 31 signally fails to incorporate the three-part test for restrictions prescribed under international law. It merely states that the right to freedom of expression should be exercised 'in accordance with the law'. As outlined above, international law requires that any restrictions on freedom of expression be not only 'in accordance with the law' but that the law itself meet certain conditions, namely that it pursues a legitimate aim and is 'necessary in a democratic society'. Article 31 fails to impose either of these latter two conditions on restrictions on freedom of expression.

[22] Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions, 5 December 2001.

Third, Article 31 appears to endorse the idea that publications should be licensed, or at least registered, as a constitutional principle. The problem with this, elaborated below, is that a licensing requirement for the print media is contrary to international human rights law and even a registration system is undesirable.

Finally, Article 31 provides for a constitutional State monopoly over broadcasting. This is contrary to international law, as recognised by both the Declaration and by the ministerial Policy Directions on Reconstruction and Development of Media in Afghanistan issued on 6 June. The new Constitution should recognise the importance of both public and private broadcasting.

Serious consideration should also be given to incorporating the right to access to information in the new constitution. It has been noted that 'information is the oxygen of democracy',[23] and in a transitional democracy such as Afghanistan this is especially true. If people do not know what is happening in their society, they cannot take a meaningful part in the affairs of that society. Moreover, access to information laws and procedures will enhance transparency and help keep public bodies accountable, an absolute prerequisite if the public is to have confidence in its government. For this reason, the right to access information is constitutionally protected in a wide range of countries, including Kazakhstan, Sweden, Thailand and the Philippines, to name but a few.

In addition, consideration should be given to enshrining the independence and public interest remit of the public broadcaster as well as the independent broadcast authority in the new constitution. Given the key role of broadcasting in the democratic development of Afghanistan, it is crucial that these institutions receive the highest level of legal protection. An example of a country where the independent broadcast authority has been granted constitutional status is South Africa, which went through a similar period of democratic transition in the 1990s.[24]

Recommendations:

- The Constitution should guarantee freedom of expression to everyone, not just citizens.
- The Constitution should incorporate the three-part test for restrictions on freedom of expression established under international human rights law.
- The Constitution should guarantee the right to publish without having to obtain a licence.
- The Constitution should recognise the importance of both public and private broadcast media.
- The Constitution should guarantee the right of access to information.
- The Constitution should guarantee the independence and public interest remit of the public broadcaster, as well as of the broadcast regulator.

[23] *The Public's Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19: London 1999, Preface.
[24] 1996 Constitution, Section 192.

Analysis of the Press Law

The Press Law was promulgated by Decree by Hamid Karzai, Chairman of the Interim Administration of Afghanistan, on 20 February 2002, without any prior public consultation. It is a fundamental tenet of democracy that the public have a right to be consulted about the development of laws, particularly those that affect human rights.

The Press Law consists of nine chapters. Chapter 1 states the aim of the Press Law and provides a number of definitions; Chapters 2-6, the larger part of the Press Law, deal with registration and licensing; Chapter 7 deals with 'prohibited publications'; Chapter 8 with Penalty Provisions and Chapter 9 concerns miscellaneous provisions.

Objective and General Rules

The February 2002 Press Law is substantially the same as the April 1965 Press Law.[25] One of the stated objectives of the 1965 Press Law was "safeguarding public security and order, the interest and dignity of the State and individuals from harms which they may be subjected to by the misuse of freedom of press."[26] This control-oriented approach is, unfortunately, indicative of much of the February 2002 Press Law as well, although its stated general objective is to "[protect] the freedom of thought and speech and [regulate] the media in the country."[27] More specific goals, listed in Article 2, are:

- "preparing the proper opportunity based on which citizens of the country can express their thoughts and feelings";
- "supporting the principles of Islam with the observance of freedom of speech and media as has been mentioned in the International Declaration of Human Rights"; and
- "helping towards the healthy development of the media in a way that this pillar of society can become an effective tool for publicising culture to the citizens of the country and at the same time reflect public opinion in an honest and beneficial way to society".

The primary aim of any press law should be to promote the right to freedom of expression, with particular emphasis on the right to publish without official constraint and of the right of those who wish to express themselves through the media to be able to do so in safety, including when they publish critical reports and opinions.[28] A press law should also guarantee freedom of investigation, collection and dissemination of information, and free access to sources of information and the free flow of information generally. It should, finally, affirm the right of media practitioners to form independent associations. The Press Law does contain two general references to the Universal Declaration of Human Rights, but Article 2 fails to specify any of these rights in detail. Instead, it refers to a number of 'obligations' on the media, to support Islam, and reflect public opinion honestly. This has important consequences for the remainder of the Press

[25] Prof. H. Rafi, 'The Historical Background of Free Press and Press Freedom in Afghanistan', presentation at International Seminar on Promoting Independent and Pluralistic Media in Afghanistan, 3 September 2002.
[26] As quoted in L. Dupree, *Afghanistan* (Princeton: Princeton University Press, 1973), pp. 608-9.
[27] Article 1.
[28] See also Action Point 2 in the Declaration of 5 September.

Law which, as has already been noted, focuses on regulation and control, rather than providing positive protection for the media.

Article 4 of the Press Law provides that only Afghan citizens may publish print media or establish and own a theatre, cinema, cinematic, music or sound recording facilities, printing house or advertising agency. Such a restriction is contrary to established practice in other countries, as well as international law, which requires States to guarantee human rights to all persons within their territory or jurisdiction. Although limits on foreign ownership of broadcast media are common, complete bans are not and, in any case, different rules apply to the print media. It should also be borne in mind that an absolute restriction of this sort acts as a serious brake on potential foreign investment in the media sector.

Recommendations:

- The Press Law should set out objectives which focus on protecting the rights of the media and media practitioners rather than controlling them.
- The restriction on foreign ownership of the print and other media, and associated enterprises, should be lifted.

Licensing

The licensing and registration regulations established under the Press Law can be described as positively labyrinthine. The Press Law requires licensing of all print publications (under Chapter Two, entitled 'printing tools'); all printing houses (Chapter Three); and all audio-visual establishments (Chapter Four). Applicants need to submit an application to the Ministry of Culture and Information indicating, amongst other things, the goal and mission of their publication, the amount invested and source of the funding, number of pages and the print run;[29] kind of printing equipment used and the amount and source of funding;[30] and the purpose and goal of the undertaking, kind of systems used and the 'quantity and quality of the machinery'.[31]

All the above means of publication must have an owner and an editor-in-chief, each of whom has to obtain a separate licence from the Ministry of Culture and Information. In order to qualify for a licence, an owner must be at least 18 years old, be an Afghan citizen, have written permission from the Ministry and not be deprived of his civil rights or be a government employee.[32] The editor-in-chief has to apply for a separate licence. In order to qualify, he or she needs to be over the age of 24, be an Afghan citizen, have at least 3 years experience in journalism or through vocational training and must not be deprived of their civil rights or be a civil servant (unless working for a State publication). Furthermore, a person can only be editor-in-chief of one publication.

[29] Article 9, with regard to print publications.
[30] Article 12, with regard to printing houses.
[31] Article 17, with regard to audio and video publications.
[32] Article 19.

If a licence is refused, the applicant can appeal to a media commission, made up of a representative of the Academy of Science, who will function as chair, a representative of the Ministry of Information and Culture and a representative of the faculty of journalism of the University of Kabul.[33] One may appeal from there to the courts. Under Article 24, upon receiving a concession the owner has to deposit a financial security with the Ministry of Culture and Information.

These provisions are all backed up by stiff penalties; under Article 33, any individual who contravenes the provisions of the Press Law will face banning of their publication(s) as well as a cash fine.

In practice, this means that an individual who wishes to start a small magazine, say on Persian poetry, with a print run of perhaps a few hundred, to be published using a small printing press or stencilling machine in a room in their house, has to apply to the Ministry of Culture and Information for a licence for the newsletter, a licence for the stencilling machine, a licence for the owner and a separate licence for the editor-in-chief. A huge mass of information is required of the applicant. At each stage, permission may be refused, for example if the person is under the age of 24, has no prior journalistic experience, holds a job as a civil servant or is not an Afghan citizen. In addition, the restriction on a person being editor-in-chief of more than one publication would bar the same individual from also publishing a specialist magazine on the poetry of Rumi, for example. It is not clear whether the Minister has further discretion to refuse a license.

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.[34] 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. Licensing of individual journalists, whether they are editor-in-chief or correspondent (and it should be noted that for small publications, these can be one and the same person), is likewise illegitimate. In an Advisory Opinion concerning a compulsory licensing scheme for journalists in Costa Rica which restricted the practice of journalism to persons with a university degree, the Inter-American Court of Human Rights clearly stated the principle:

> [T]he compulsory licensing of journalists does not comply with the (right to freedom of expression) because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.[35]

[33] Article 22.
[34] See, for example, *Gaweda v. Poland*, Application No. 26229/95, 14 March 2002 (European Court of Human Rights)
[35] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *op.cit.*, note 11, paragraph 79.

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."[36]

The UN Human Rights Committee has also ruled that legal provisions which require small circulation publications to register are illegitimate. In a recent case, the Committee held that the legal requirement for an author to register his publication, which had a circulation of just 200 copies, was disproportionately onerous, exerted a chilling effect on freedom of expression and could not be justified in a democratic society.[37] In particular, the Committee stated:

> [P]ublishers of periodicals…are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.[38]

The fact that the licensing system under the Press Law is overseen by a media commission, appeal from which lies to the courts, is irrelevant. As the European Court of 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…[39]

Recommendations:

- The requirement for media outlets and other related bodies to obtain a licence should be removed from the Press Law.

---

[36] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.
[37] *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.
[38] *Ibid.*, para. 8.1
[39] *Gaweda v. Poland.* note 34, para. 47.

- If some form of registration is imposed on media outlets, it should respect the conditions noted above and, in particular, should be overseen by a body that is independent of government.
- All licensing or registration of individuals – including for ownership, printing, publishing and editing of the print media – should be removed from the law.

Content Restrictions

Article 30 of the Press Law prohibits the publication of a number of types of material:

1. Material that could mean insult to the sacred religion of Islam and other religions;
2. Material that could mean insult to individuals or that is obscene;
3. Printing dirty articles or pictures that cause general immorality;
4. Printing material for the weakening of the army of Afghanistan.

Article 31 states that "media involvement in or media provocation of any action or a non-action that is recognised as a crime according to the laws of the state is considered a crime". Finally, Article 29 places the editor-in-chief of a publication under the obligation to 'seriously observe equal rights for the criticised and the criticiser'.

The prohibitions listed in Article 30 are highly problematic. As outlined above, restrictions on freedom of expression have to be in accordance with the law, pursue a legitimate aim and be 'necessary in a democratic society'. The requirement that a restriction be 'in accordance with the law' implies that the law is sufficiently clear and precise to enable a person to foresee the circumstances in which he or she might fall foul of its requirements. None of the four offences listed in Article 30 meet this requirement:

- The phrase 'could mean insult', used in the first two offences, is very wide indeed and almost incapable of precise definition since it is impossible to say what someone might find insulting
- The phrases 'obscene', 'dirty articles or pictures' and 'general immorality' in the second and third offences are vague and highly subjective. Furthermore, there is no need to repeat this offence in two articles.
- It is similarly unclear what is understood by an article that would 'weaken the army'. In a country such as Afghanistan, where the subject of the armed forces is understanably high on the agenda, there should be sufficient scope for a debate on its role and functioning, including strident critical remarks.[40]

Although all four prohibitions pursue legitimate aims, the second part of the test for restrictions, there are problems with the third part of the test, namely the requirement that all restrictions be necessary. It is, for example, not legitimate to prohibit all statements which are insulting. It is a maxim of international jurisprudence that:

[40] See *Grigoriades v. Greece*, 25 November 1997, Application No. 24348/94 (European Court of Human Rights).

> [The right to freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock and disturb. Such are the demands of pluralism, tolerance and broad-mindedness, without which there is no "democratic society".[41]

All societies have defamation laws, but these need to balance the right of the public to information, especially about public officials, and the need to protect reputations. This is a complicated matter and requires far more detailed consideration than that found in the Press Law.[42] There is similarly a need to balance the need for respect for religion and the right to debate openly religious issues.

The rule set out in Article 29 about providing for equal rights for the 'criticiser' and the 'criticised' is an ethical obligation normally dealt with in self-regulatory codes set up by voluntary associations. While it is a legitimate aspiration, it has no place in a Press Law.

Finally, the prohibitions in both Article 31 and Article 32 are matters that should apply to everyone, not only the media. As a result, they should be included in laws of general application rather than in media-specific laws. It is universally accepted, for example, that States should prohibit incitement to hatred but such laws should be applicable to all citizens and not specifically to the media. Similarly, narrowly-tailored defamation laws serve a legitimate aim but should be applicable to all, not just the media. To repeat them in media laws places the media under a double obligation and sends a negative signal that the media are singled out for particular scrutiny. This tends to have a chilling effect on freedom of expression and serves no legitimate State interest.

Recommendations:

- The prohibitions listed in Articles 31 and 32 should, to the extent that they are legitimate, should be removed from the Press Law and placed in laws of general application.
- In any case, Article 31 is excessively vague; if it is to be retained, it should should be amended and made much more precise and narrow.
- The rules on insult should be removed and replaced with appropriate civil defamation provisions.
- Consideration should be given to removing the prohibition on publications that 'weaken the army'; alternatively it should be reworked into a narrowly tailored offence and incorporated into existing criminal laws.
- Article 29 should be removed from the Press Law and left up to professional associations to deal with.

[41] *Tammer v. Estonia*, 6 February 2001, Application No. 41205/98 (European Court of Human Rights), para. 59.

[42] See the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, July 2000) which set out in some detail international standards in this complex area.

Penalty Provisions

Chapter Eight sets out the rules on sanctions for contravention of the Press Law. Article 33 provides the general rule, stating that contraventions will be published with either a ban or a cash fine, while Article 39 states that where no specific penalty is provided, punishment will take place in accordance with general principles of Hanafi Islamic Shari'ah law. These rules are very unclear and, in particular, provides little indication of the circumstances in which a person would face a fine, a ban or punishment under Shari'ah law. One exception to this is Article 37, which applies in case of a 'violation of the conditions of the statement,'[43] in which case a reprimand is to precede suspension or a total ban, both extreme measures.

Further detail is needed with regard to the question which penalties apply to which provisions of the Press Law. In addition, the penalties provided for are excessively harsh, with suspension and/or banning frequently available. In general, suspension or prohibition of a mass media outlet is an extreme penalty which should be applied, if ever, only after strict procedural and substantive safeguards have been observed. It is certainly not legitimate for a one-off contravention of the provisions relating to obscenity, for example, to lead to banning of the offending publication. All sanctions, like any restriction on freedom of expression, must be proportionate. This implies that the authorities should have at their disposal a range of graduated sanctions for breach of the law, so that any sanction applied corresponds to the nature and level of the breach.

Recommendations:

- The Press Law should clearly state which penalties apply to which provisions.
- A range of graduated penalties should be available and sanctions should always be proportionate to the offence.
- Due process guarantees must be observed.

[43] It is not clear what this means.