ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Presentation to the Religious and Cultural Affairs Commission of the Afghan National Assembly

by

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ARTICLE 19

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Ladies and Gentlemen:

I would like to start by thanking you for inviting me to present to you on the important topic of freedom of expression and the new media law that you are developing for Afghanistan. Your country is a new democracy and it is vitally important that an appropriate framework for freedom of expression be put in place. By an appropriate framework I mean one which, while fostering an independent, vibrant and pluralistic media does not allow abuses to take place which could undermine your new-found democracy.

I would like to touch on three issues today. First, I would like to make some general comments about the challenges facing transitional or new democracies in the area of media freedom and the need to take a long-term perspective. Second, I would like to outline some of the key principles which underpin freedom of expression. Finally, I would like to address some of the implications of these principles in terms of the draft media law you are preparing.

General Comments

Two conflicting trends can be observed in most transitional democracies, and these are also present here in Afghanistan. First, the new democratic climate leads to a flowering of new media outlets which, while much freer than before, also often lack the experience and professionalism of media in more established democracies. Alongside some very serious outlets, you find a (usually larger) number of quick-start outlets seeking either to make money in the new market or to provide a voice to their owner. Alongside some very good reporting, you find a wealth of poor reporting, whether it is 'yellow' journalism, or inaccurate or politically biased output.

Second, and running in parallel to this, you often find a backlash among officials against the criticism they now find themselves exposed to in the media. Most officials, long protected against critical reporting by repression and the absence of a free media, find it difficult to adjust to the new climate, where they find themselves in the spotlight, often being presented publicly in a negative light. A recent example of this in Afghanistan was the strong and very negative reaction of legislators to some of their number being shown asleep in the National Assembly. This sort of coverage is considered quite normal in established democracies, including in my own country. At the same time, it certainly takes some getting used to.

In an environment of this nature, it is quite common to see decision-makers reacting by seeking to put in place measures to stop what they see as 'bad' reporting. There is a great temptation to pass legislation prohibiting various categories of content which is seen as being unacceptable or unnecessary. This is understandable. At the same time, the real solution to the problem is not to impose more legal restrictions on the media – indeed there are already more than enough of these – but the longer term project of promoting professionalism and helping journalists gain experience. Building democracy is a long-term project, as you yourselves, experiencing the young new Afghan legislature, well know, and this is true in the media field as elsewhere.

There is certainly a need for regulation of the media and, in particular, the broadcast media, but there is also a need to resist the temptation to prohibit all media excesses, as this risks undermining a nascent media and a return to the old control orientation. A longer-term perspective is needed, where it is understood that in the short term, newly won freedoms for the media may lead to some unfortunate excesses but that these need to be tolerated so that, in the longer term, democracy can be fostered.

Key Freedom of Expression Principles

It is understood everywhere that broadcasters, in particular, need to be subject to some form of legal regulation. This is necessary if only to avoid chaos in the airwaves, through the unique allocation of the radio frequency spectrum. It is also needed, however, to ensure that the airwaves, which are a public resource, are used for the greater public good. Regulation is also justified on the basis that broadcasting is a powerful and highly intrusive form of media, which comes directly into your home through the television or radio.

At the same time, it is also clear that, if governments or other politically or indeed commercially motivated actors, exercise direct control over broadcasting, they will use that control to promote their own, rather than broader public, interests. Put differently, government control over broadcast regulation, even where this is necessary, will result in a situation where the media are likely to serve the interests of the government of the day, rather than of the broader public. This results in political biases and a media which is unable to inform the public and play its watchdog role, to the detriment of democracy. This is not a theoretical risk and here in Afghanistan you have experience of this in a rather extreme form in your recent history.

The key means by which democracies address the need for regulation of broadcasters without providing for government control is through the vehicle of an independent regulatory body. Such bodies are responsible for the licensing of broadcasters and for developing and applying a code of conduct. This approach strikes a balance between

the need to regulate and the need to avoid political control over the media. Regulatory bodies which operate at arms length from government can be found in countries all over the world, including my own country, Canada, but also developing countries such as South Africa, India and Indonesia.

Ensuring independence of a regulator is complex and different models for achieving this exist. One model is for a multi-party body such as a parliamentary committee to play a key role in appointing members of the regulator. In South Africa, a nascent democracy like Afghanistan, for example, the legislature proposes the names of the members of the regulator to the president. The president may refuse to appoint the individuals proposed by the legislature, but he or she may not replace them with his or her own nominees. This system thus ensures a role for both the legislature and the president in the appointments process. The independence of the system is further enhanced by a requirement that the process be transparent, and that civil society have an opportunity to provide input, either in the form of proposing candidates or commenting on individuals long-listed by the legislature.

The principle of independence from government and from private commercial interests applies equally to the public media, in this case Radio-Television Afghanistan (RTA). As an important player in the media field, government control over the public broadcaster would, like government control over the regulator, lead to biases in favour of government, to the detriment of democracy.

Governments sometimes claim that they need to control the public broadcaster to ensure that they have a means of communicating with the public. Experience shows, however, that the public are far better informed about government where the public broadcaster is independent, albeit operating under a clear public interest mandate. Take as an example a situation in which the government is putting forward a new environmental policy. A government-controlled broadcaster might simply give airtime to the minister of the environment to promote the policy. The information received by the public will be more of propaganda than an informed analysis of the proposals. A public broadcaster, on the other hand, might put together a panel of experts to discuss the proposed policy. This might include the minister, but also, for example, an environmental expert, a member of the opposition and/or a representative of the business community. Such a discussion would be far more informative for the public than simply hearing the government's perspective without anyone to challenge it.

As with independent regulators, arms length governing boards, some more independent than others, oversee public broadcasters established as separate legal entities in Canada, South Africa, India and Indonesia.

A second key principle of freedom of expression is that regulation should serve the overall public interest by promoting greater diversity in the airwaves. Indeed diversity – of content, of ownership of the media and of types of media – is a key policy goal of regulatory systems in most democracies. Diversity can be achieved in a number of ways. It should be an explicit licence requirement, so that a broadcaster proposing to provide new programming would win out over one which is proposing simply to duplicate what is already been provided by another broadcaster. The regulatory system should seek to ensure the presence of all three types of broadcaster – public,

commercial and community – in the system. There should also be provisions that prevent undue concentration of ownership of the media.

A third key principle is that, while restrictions on what may be broadcast are needed, the system for developing and applying such restrictions should be designed to ensure an appropriate balance between the freedom of broadcasters and the need to protect certain overriding public and private interests. An important implication of the guarantee of freedom of expression is that some 'bad' content be tolerated. The reasons for this are captured poetically in the following quotation by James Madison:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[1]

In many democracies, the system for ensuring quality and protecting against harmful broadcasting is overseen by the independent regulator. In these countries, the law sets out categories of potentially harmful content – such as undue violence, protection of children and privacy, and so on – but the actual rules relating to these categories are provided in a code of conduct developed by the independent broadcast regulator, in close consultation with broadcasters and other stakeholders. This allows for far more detailed rules, which can treat difficult topics with greater precision than would be possible in primary legislation, and also for adaptation of those rules over time (for example, as new technologies change broadcasting or as new issues arise). The code is applied by the regulator, both through public complaints and direct monitoring. The primary goal is to clarify the boundaries of what is acceptable, not to punish those who operate outside of what are often quite unclear limits. In line with this, the vast majority of cases are resolved through a simple warning, although heavier sanctions may be applied for repeat or flagrant breaches.

A fourth key principle, which goes beyond media regulation and applies to everyone, is that government does not hold information for itself but on behalf of the public which, subject to certain limitations, has a right to access this information. This right – often referred to as the right to know, the right to information or freedom of information – is in most democracies given effect through specific legislation. Such legislation provides for this right but also sets out in some detail the manner in which the right may be exercised. This includes, among other things, clear procedures and timelines relating to requests for information, clear and narrowly drawn exceptions to the right, and how to lodge appeals against any refusal to grant access to information.

Application of these Principles to the Draft Afghan Media Law

The version of the draft Media Law reviewed (provided to ARTICLE 19 in an informal translation in March 2007) contains a number of very positive features, including the reference, in the very first article, to constitutional and international guarantees of freedom of expression. It recognises a number of key media rights, including to seek, receive and impart information and ideas, to operate without government censorship, to seek and receive information from public bodies, and to protect confidential sources of information (see, generally, Articles 1-6).

[1] *Near v. Minnesota*, 283 US 697 (1931), pp. 718.

At the same time, the draft Media Law fails to respect the international principles outlined above in certain key ways. The most important of these are outlined below under five headings: independence, institutional structures, public service broadcasting, content restrictions and the right to information.

Independence

As noted above, a key international law principle is that regulation of the media be overseen by bodies which are independent of government. The draft Media Law does establish a number of bodies which operate at arms length to government, comments on which are provided just below. However, key regulatory functions are allocated to the Minister of Information and Culture. In particular, pursuant to Article 46, while the Media Affairs' Commission makes recommendations regarding the grant of licences to broadcasters, it is the Minister who makes the final decision on this.

There is some confusion in the draft Media Law regarding registration of newspapers. Pursuant to Article 11, publications must register with the Ministry within two weeks of commencing publication. This obligation is repeated in Article 36. Pursuant to Article 50, any changes in activity must be notified to the Ministry. Books must also be registered with the Ministry and two copies each must be provided to the Ministry and Public Library (Article 52). However, the Media Affairs' Commission makes recommendations regarding 'licence' applications for print media to the Ministry (Article 46). Furthermore, proprietors may file a lawsuit against the Ministry if they are of the view that a refusal to register or to issue a licence was improper. The scheme, taken as a whole, is unclear as to whether registration/licensing may be refused, contrary to international standards, which permit only technical registration regimes for the print media. We are unaware of any established democracy which requires even technical registration of books.

The Ministry also has a number of other regulatory functions. International political and intergovernmental organisations, and local NGOs, must obtain permission from the Ministry before they may publish materials in their respective areas of work (Article 12). A similar permit is required to establish a printing house, journalist training organisation, translation centre or advertising company, or to engage in film production (Article 15). The prior authorisation of the Ministry is required before foreigners may produce films in the country (Article 49), and foreign media outlets and news agencies must also obtain authorisation from the Ministry to operate and to receive a special journalists' card (Article 51).

In most democracies, these bodies are not required to obtain any formal permission to engage in publication, film production or the other activities listed. Even formal registration is rarely required and, when it is, it is simply a matter of filing basic information with a formal registration body such as the registrar of companies.

Pursuant to Article 19, the public broadcaster, RTA, shall conduct its activities 'within the framework of the Ministry'. To ensure the independence of this body, it should, as noted above, be established as a separate legal entity, operating under a governing board. This issue is dealt with below, under Public Service Broadcasting.

Recommendations:

- The MAC, not the Minister, should issue licences to broadcasters.
- It should be clarified that registration of newspapers is purely technical in nature and that no one may be refused registration upon submission of the appropriate information.
- The other registration/permission/authorisation requirements should either be abolished or transformed into technical registration regimes, perhaps administered by the registrar of companies or similar body.

Institutional Structures

The March 2007 version of the draft Media Law establishes two bodies with an oversight role in relation to media: the High Media Council (HMC) and the Media Affairs' Commission (MAC). Pursuant to Article 45, the former consists of twelve members as follows: representatives of three ministries (Information, Justice and Religious Affairs), three elected representatives (one from the Upper House and two from the National Assembly), a representative of the Supreme Court, the head of the journalism faculty, two representatives of journalists' unions and two representatives of civil society. It is not absolutely clear who formally appoints this body but presumably the bodies listed nominate the members who represent them. The functions of the HMC are to plan and approve long-term media policy and to nominate members of the MAC.

Pursuant to Article 46, the MAC consists of seven members with relevant professional experience and representing a cross-section of society. It is not clear from the draft Media Law who formally appoints members, although they are nominated by the MAC. It has a number of functions, including:

- to make recommendations regarding broadcasting licences and the licensing of print media and related organisations;
- to monitor the performance of the media and to provide technical assistance; and
- to 'deal' with media complaints and offences and to refer infringements of the law to the relevant court.

Provision for a governing board for the public broadcaster, RTA, found in earlier versions of the draft Media Law, is absent from the present draft. This is addressed below, under Public Service Broadcasting.

This institutional structure provides some measure of guarantee for the independence of both the HMC and the MAC. It may be noted that independence is of particular importance regarding the latter, given the direct regulatory role envisaged for it (and the even more direct role proposed for it in these recommendations). At the same time, these guarantees could be substantially enhanced. For example, the tenure of members could be strengthened by specifying their term of membership and by allowing for removal only in limited cases; the openness of the process could be improved, for example, by giving the National Assembly a role and/or by providing for civil society input; restrictions could be introduced for individuals with clear political connections and/or conflicts of interest due to ownership of the media; reimbursement of members could be linked to existing established civil service salaries; and budget oversight and approval could be done through the National Assembly instead of (apparently) the Ministry.

The MAC undertakes functions which are analogous to similar bodies in other countries. At the same time, its role in relation to these functions is either limited or unclear. In relation to licensing, as noted above, it is restricted to a recommendatory role, whereas broadcast regulators in other countries have the power to issue licences. In relation to content, it is not clear what is meant by the term 'dealing' with complaints. In particular, it is not clear whether the MAC has the power to resolve complaints directly or simply to refer those which it deems worthy to the courts. In most countries, the broadcast regulator has the power to resolve complaints, including by imposing various sanctions on broadcasters (see below, under Content Restrictions for more detail on how this works).

Recommendations:

- The precise system for appointing members of the HMC and MAC should be made clear in the law.
- The independence of these bodies, and in particular of the MAC, should be substantially enhanced.
- The functions of the MAC should be clarified and strengthened, as noted above and in line with the powers of broadcast regulators in other countries.

Public Service Broadcasting

Article 19 of the draft Media Law provides that RTA belongs to the Afghan people and shall conduct its activities 'within the framework of the Ministry of Information and Culture'. In cases of emergency, it shall operate under the supervision of the President (Article 23). Articles 21-22 provide the outlines of a mandate for RTA, although they are a bit confusing, at least in translation. They require RTA to produce programming that respects the principles of Islam and the values of the Afghan people. In its cultural, language, religious and sectarian programming, it should reflect Afghan reality and its programming generally should respect and promote security, good manners and psychological well-being.

As noted above, international standards require public broadcasters to be established in a manner which protects them against political or commercial interference. As noted above, a key mechanism for this in democracies is to establish these broadcasters as separate legal entities under the oversight of an independent governing board which, in turn, normally reports to parliament. This classical model applies to the BBC, but also to public broadcasters in countries such as South Africa, India and Indonesia. As with the broadcast regulator, this provides a balance between accountability and independence.

The rules in Articles 21-22 are directed more towards conditioning the programming of RTA than towards instructing it as to the focus of that programming. Although they refer to such things as intellectual, cultural, religious and economic programming, they do not actually require RTA to produce such programming, or give any indication of how important its focus on these types of programming should be. Rather, they require any such programming to respect certain values, such as the principles of Islam and good manners.

The public broadcaster is funded, at least in part, from the public purse and it should be required to serve specific public interests. These might include such things as educational programming for children, promoting national values and unity,

innovative programming that serves the interests of the whole population, and/or comprehensive and balanced news and current affairs programming covering both national and international events. Such direction is absent from the draft Media Law.

The draft Media Law is also silent on a number of matters which are central to the functioning of a public broadcaster and which, in most countries, are found in the primary legislation. These include such things as sources of funding, scope of operations (for example, minimum number of channels to be carried, and the right to use other media such as publishing and Internet), and direct public accountability mechanisms (such as an in-house complaints system).

Recommendations:

- RTA should be established as a separate entity rather than operating out of the Ministry of Information, and provision for an independent governing board for RTA should be reintroduced into the media law.
- Specific direction as to mandate of RTA should be set out in the law.
- Consideration should be given to enhancing the provisions in the primary legislation on RTA, clarifying some or all of the matters noted above.

Content Restrictions

The main content rules in the draft Media Law are found at Article 47, which lists some nine categories of banned material, including material contrary to the principles of Islam or offensive to other religions, propagation of religions other than Islam, material which is humiliating, offensive or libellous to others, material which affects national security, false information which 'disrupts public's minds', disclosing the identity of victims of violence or rape in a manner which damages their reputation, and material which harms the wellbeing of people, especially children. Article 26 further provides that broadcasters must observe the principles of Islam, and the national and spiritual values of the Afghan nation.

For the most part, these restrictions all serve legitimate public or private interests, although it may be noted that restrictions on false information of the sort found in Article 47 have been comprehensively rejected by leading courts in countries such as Canada and Zimbabwe. At the same time, they all suffer from three problems.

The first is that they are all vague and potentially overbroad. The truth may well be humiliating, for example to someone who has been involved in illegal or immoral activities. But this is not a sufficient reason to ban it. The recent exposure of sexual abuse by Catholic priests in many countries may be considered by some to be offensive to that religion, but this again is no reason to ban it. Children do need to be protected against harmful material, but there is wide debate about what exactly is harmful to children.

Second, these provisions, at least in some cases, duplicate existing criminal and/or civil rules. To the extent that this is the case, they place the media under potential double jeopardy, perhaps under different, even conflicting, rules. They also somehow imply that the media are under a special obligation not, for example, to undermine national security. Furthermore, there is simply no need to have rules in the media law which duplicate those already found in either the criminal or civil law.

Third, the manner in which these rules are to be applied is unclear, although it would seem likely that the intention is for them to be applied through the criminal courts. The lack of clarity about the role of the MAC in applying these rules has already been noted.

It is widely recognised that certain media, in particular broadcasters, based on the facts that they utilise a public resource – the airwaves – that they come directly into the home in a way that the print media do not, and that they are in many ways a more powerful medium than the print media, should be subject to special rules regarding programming content. At the same time, a careful balance needs to be achieved between the need to respect freedom of expression and independence, and the need to protect against harmful content. As noted above, special approaches have been put into place in democracies to achieve this balancing. These systems are characterised by oversight by the broadcast regulator rather than the far more 'heavy' approach of going to court, by the development of detailed rules in the form of a code of conduct, again by the broadcast regulator but in close consultation with interested stakeholders, and by the availability of a range of sanctions, designed primarily to set standards through warnings, rather than to punish though fines or more intrusive measures.

Recommendations:

- The prohibition on disseminating false information should be removed from the law.
- The whole system for regulating media content established by the draft Media Law should be reconsidered. In particular, consideration should be given to replacing it with a system along the lines described above. At a minimum, the specific rules listed should be clarified and narrowed to appropriate limits.

The Right to Information

Article 5 of the draft Media Law provides that everyone has the right to seek and receive information from the government and that the government shall provide this information unless it is confidential on the basis that it endangers security, national interests, territorial integrity or the rights of others.

This is an extremely welcome provision, which recognises the fact that government holds information not for itself but on behalf of the public. The right to access this information is widely recognised among democracies, with some 70 countries worldwide having adopted specific right to information laws. Policies on access to information have also been adopted by many intergovernmental organisations and international financial institutions, such as the UNDP and World Bank.

At the same time, the right to information is a complex matter which requires more detailed legislative treatment than simply one provision in a media law. Indeed, as noted, in most countries it is the subject of a separate piece of legislation. Issues which need to be addressed through law include the scope of application – for example, which public bodies are covered by the obligation of disclosure – procedural questions – for example, what time limits apply to the provision of information, what fees may be charged, what notice needs to be provided in case of a refusal to provide the information – detailed rules relating to exceptions – spelling out more precisely the circumstances under which access to information may be refuse – and the possibility of appeal from any refusal. The law could also usefully address issues such

as proactive disclosure (i.e. even in the absence of a request), systems for managing information, promotional measures and protection for whistleblowers.

Recommendation:

- Consideration should be given to expanding significantly on the existing access to information provision, as detailed above.