ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

Afghan Law on Mass Media

by

ARTICLE 19
Global Campaign for Free Expression

London
April 2004

I. Introduction

This Memorandum assesses the Afghan Law on Mass Media (the Law), recently adopted by the government of Afghanistan. Our comments are based on an English translation of the Law prepared by the Language Unit of the UN Assistance Mission in Afghanistan (UNAMA), received by ARTICLE 19 in April 2003.[1]

According to our information, the Law was signed late March 2003 by President Hamed Karzai and approved by his cabinet. There were no public consultations prior to the adoption of the Law, although we understand that official discussions regarding this had been taking place for some time. We note that it is fundamental to the democratic process that laws of this nature, trenching on matters of great public importance and dealing with fundamental human rights, be the subject of open debate prior to adoption, consistent with the established practice in democratic countries. A draft should have been released for public consultation well in advance of final adoption of the Law and it should also have been the subject of discussion in official bodies like the Loya Jirga. We regret the secretive, non-consultative manner in which the Law was adopted.

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

In terms of substance, the Law contains a number of progressive provisions, in accordance with the guarantees of freedom of expression found at Article 34 of the Constitution of Afghanistan and at Article 19 of the *Universal Declaration of Human Rights*. It also addresses, to some extent, the problems with the previous Law of the Press, which ARTICLE 19 analysed in September 2002.[2] Article 2 of the Law lists a number of progressive aims, which include promoting the right to freedom of expression and creating a positive environment for its fulfilment. Article 4 rules out censorship of the media generally, reinforced by Article 9, which provides that prior permission shall not be necessary to establish a print media outlet. The Law also establishes the right of everyone to seek and obtain information from government, subject only to national security interests. We also recognise the important development whereby broadcasting matters are dealt with by an administrative body, although we note that this body lacks the requisite independence from government.

At the same time, the Law contains a number of provisions which are either in breach of international standards of respect for freedom of expression or which give cause for concern on those grounds. The definition, in particular, of a print media outlet is extremely broad, particularly in light of the rules for such outlets. The Law retains a system of registration for the print media which is unnecessary, if not overly onerous. Some overly broad content restrictions remain in the Law which should be carefully narrowed and then moved to laws of general application. The Law provides for various bodies to undertake different regulatory functions; the most important of these, dealing with broadcasting, lacks independence, as noted above.

This Memorandum sets out ARTICLE 19's main concerns with the Law. We welcome the positive general direction signalled by the Law and the attempt to bring Afghanistan more closely into line with international and constitutional standards in this area. At the same time, we are of the view that certain provisions in the Law are in breach of the right to freedom of expression and should either be repealed or amended. The second part of the Memorandum outlines a number of key international standards in this area, while the third part outlines our concerns.

II. International Standards

II.1 The Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR)[3] 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.

[2] Our analysis is available on our website, at http://www.article19.org/docimages/1751.doc.
[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[4]

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a treaty ratified by over 145 States, including Afghanistan,[6] imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. 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 all three regional human rights instruments, at Article 9 of the *African Charter on Human and Peoples' Rights*,[7] Article 10 of the *European Convention on Human Rights*[8] and Article 13 of the *American Convention on Human Rights*.[9] The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although these are not directly binding on Afghanistan, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN 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."[10] As the UN Human Rights Committee has said:

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

II.2 Freedom of Expression and the Media

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

[4] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[5] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[6] Afghanistan ratified the ICCPR in January 1983.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] Adopted 4 November 1950, in force 3 September 1953.
[9] Adopted 22 November 1969, in force 18 July 1978.
[10] 14 December 1946.
[11] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

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]

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [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.[14]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[15] Themedia as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task ofimparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[16]

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

> 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".[17]

It may be noted that the obligation to respect freedom of expression lies with States, not with the media. However, these obligations do apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public's right to know and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

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[12] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[13] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[14] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[15] *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. 34.
[16] *Thorgeirson v. Iceland*, note 12, para. 63.
[17] See *Castells v. Spain*, note 13, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

II.3 Restrictions on Freedom of Expression

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

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

A similar formulation can be found in the European and American regional human rights treaties.[18] These have been interpreted as requiring restrictions to meet a strict three-part test.[19] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

> Freedom of expression … is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[20]

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[21] Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[22]

II.4 Pluralism

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in

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[18] The African Charter has a different, rather weaker, formulation.
[19] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).
[20] *Thorgeirson v. Iceland*, note 12, para. 63.
[21] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[22] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[23] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[24]

The UN Human Rights Committee has stressed the importance of a pluralistic media in nation-building processes, holding that attempts to straight-jacket the media to advance 'national unity' violate freedom of expression:

> The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.[25]

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism[26] and that licensing or registration systems for individual journalists are incompatible with the right to freedom of expression. In a Joint Declaration issued in December 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression state:

> Individual journalists should not be required to be licensed or to register.
> …
> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance. [27]

II.5 Independence of Regulatory Bodies

In order to protect the right to freedom of expression, it is imperative that the media is permitted to operate independently from government control. This ensures the media's

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[23] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.
[24] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 15, para. 34.
[25] *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.
[26] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 15.
[27] Adopted 18 December 2003. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument >.

role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

Under international law, it is well established that bodies with regulatory or administrative powers over both public and private broadcasters should be independent and be protected against political interference. In the Joint Declaration noted above, the UN, OSCE and OAS special mandates protecting freedom of expression state:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[28]

Regional bodies, including the Council of Europe and the African Commission on Human and Peoples' Rights, have also made it clear that the independence of regulatory authorities is fundamentally important. The latter recently adopted a *Declaration of Principles on Freedom of Expression in Africa*, which states:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[29]

The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which states in a pre-ambular paragraph:

> [T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector…specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.[30]

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities, which clearly affirms and protects their independence.[31] The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.[32]

II.6 Constitutional Guarantees

Freedom of expression is recognised in Article 34 of the Constitution of the Islamic Republic of Afghanistan, formally adopted in January 2004, as follows:

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[28] *Ibid.*
[29] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002. Principle VI(1).
[30] Recommendation No. R(2000) 23, adopted 20 December 2000.
[31] *Ibid.*, Guideline 1.
[32] *Ibid.*, Guideline 5.

Article 34 [Expression, Press, Media]

(1) Freedom of expression is inviolable.
(2) Every Afghan has the right to express his thought through speech, writing, or illustration or other means, by observing the provisions stated in this Constitution.
(3) Every Afghan has the right to print or publish topics without prior submission to the state authorities in accordance with the law.
(4) Directives related to printing house, radio, television, press, and other mass media, will be regulated by the law.

The right to access information held by public authorities is also specifically recognised:

Article 50 [Public Administration, Offices, Information]

…
(3) The citizens of Afghanistan have the right of access to the information from the government offices in accordance with the provisions of law.
(4) This right has no limits, unless violation of the rights of the others.

Finally, the Afghan Constitution recognises the supremacy of international law, at least over domestic legislation:

Article 7 [International Law]

(1) The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

III. Key Concerns with the Law

III.1 Definitions

The definitions section of the Law is in places both extremely overbroad and confusing. Media is defined at Article 3(1) as including drawings, pictures and even postcards, as well as audio-visual broadcasts and press agencies. The press is defined in Article 3(2) even more broadly, including booklets and even speeches and statements. The mass media is not really defined at all, simply broken down into two categories: public and private (Article 3(3)).

While there is no objection in principle to broad definitions, these become problematical in relation to a number of specific provisions. For example, Article 8 provides that citizens can establish mass media outlets, while foreigners may publish news bulletins, upon obtaining permission. Article 9 provides for citizens to establish print media outlets without needing prior permission, implying that foreigners may not do so. Formally, this could be interpreted as prohibiting foreigners from making speeches, given that these are included in the definition of the press. All print media with more than 200 copies must register (Article 25 in conjunction with Article 9) and have a proprietor and editor-in-chief (Article 13). This formally applies to both leaflets and postcards. Finally, all print media, again including postcards and even speeches, must display their name, the date of publication and so on (Article 11).

To the extent that the provisions of the Law are legitimate, they should be restricted in scope to the mass media, properly defined as print or broadcast outlets with set periodicity or hours, targeting a mass audience and covering topics of general interest.

Recommendation:
- The Law should define clearly and narrowly the mass media and then apply only to such media.

III.2 Registration

Article 25(1) provides that the proprietor for both print and broadcast media shall be required to register those media. Article 25(2) provides that if the media is already in operation at the entry into force of the Law, registration must take place within one week.

It may be noted that the broadcast media, pursuant to Chapter 5 of the Law, are already required to obtain a licence to operate. It is therefore unnecessary for them additionally to be required to register.

Article 10 of the Law sets out the rules for registration of a print media outlet, which require the following information to be provided to the Ministry of Information and Culture:

- identification details and address for the founder-applicant;
- name and place of the publication;
- the language of the publication; and
- the source of funding and size of budget.

Pursuant to Article 15, similar information, including language used for printing, is required to register a printing house. It may be noted that the permission of the Ministry of Information and Culture is also required to establish a printing house (see below under Independent Regulation).

We note that this is a very significant improvement over the previous Law of the Press, which required all media to obtain permission from the Ministry of Information and Culture before being allowed to operate. At the same time, we question whether registration is necessary.

Under international law, *license* requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them. International law does not at present rule out purely *technical registration* schemes for the print media, but they serve no purpose and can exert a chilling effect on freedom of expression and hence are increasingly being questioned. In their Joint Declaration of December 2003, the three specialised mandates for protecting freedom of expression stated:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for

> discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[33]

If such a regime is nevertheless maintained, the register should be run as a purely administrative matter, akin to company registration. The information required should be lodged with an administrative body and registration should be automatic upon the submission of the relevant documents. A technical registration scheme for mass media organisations is compatible with the guarantee of freedom of expression only if it meets the following conditions:

- the authorities should have no discretion to refuse registration once the requisite information has been provided;
- registration should not impose substantive burdens and conditions upon the media; and
- the registration system should be administered by bodies which are independent of government.[34]

The first condition would appear to be met in the Law, which states quite clearly that no prior permission is needed to establish a print media outlet. However, the information required for registration is problematical. It is not clear why the authorities need this information in the first place. Furthermore, the information may well become dated quickly, given the fact that media outlets develop over time. For example, a newspaper may well decide to expand and publish in other languages and it is to be expected that the budget and sources of funding will change regularly. At a minimum, it should be clear that it is open to newspapers simply to update their registration information when it changes, and that they are not required to re-apply for registration.

For printing houses, a requirement to provide the language of printing is unreasonable. With modern technology, printing houses can easily print in a plethora of different languages, indeed practically any language that a customer requests. There is no reason to fetter the business of a printing house by requiring it to anticipate in advance which languages it will be printing.

Finally, we note that the one-week deadline for registration of media outlets already in operation at the time the law comes into force is unreasonable. It is quite possible, for example, that a proprietor would be out of the country for longer than that, or be unaware that the Law had entered into force. A period of 2 months would be more reasonable for this requirement.

Recommendations:

- Broadcast media outlets should not be required to register in addition to having to

[33] Note 27.

[34] See, for example, *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95 (European Court of Human Rights) and *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communication nos. 105/93, 130/94, 128/94 and 152/96 (African Commission on Human and Peoples' Rights). See also the Joint Declaration by the three special mandates for the protection of freedom of expression, note 27.

obtain a licence to operate.

- Consideration should be given to doing away altogether with the registration requirement for the print media. Otherwise, the Law should provide for updating of the information required to be provided for registration by the print media outlet from time-to-time.
- The requirement for printing houses to provide the language of printing for registration should be repealed.
- Media outlets already in operation at the time the came into force should be given substantially longer than one week to register.

III.3 Content Restrictions

The Law sets out two restrictions on media content in Article 31 as follows:

> The publication of the following subjects shall not be allowed in the mass media:
> 1. Subjects that are contrary to principles of Islam and offensive to other religions and sects.
> 2. Subjects that lead to dishonoring and defamation of individuals.

It may be noted that this is a significant improvement over the previous Law of the Press, which included four broad categories of restrictions, including one which could have limited media scrutiny of the army. At the same time, these restrictions are unacceptably vague and/or broad, and they should not, in any case, be found in a media-specific law. To the extent that these prohibitions are valid, they are applicable to all forms of expression and should be found in laws of general application, not in media specific legislation. To repeat them in media specific laws sends a negative signal to the media that they are being singled out for special scrutiny, and may also lead to discrepancies in the rules applying to the media and to other forms of expression.

It is widely accepted that restrictions on freedom of expression may be imposed for religious reasons, for example to prevent incitement to hatred based on religion. However, the prohibition as phrased is unacceptably broad. At the moment, by using the term offensive, this rule effectively means that the scope of the restriction on freedom of expression is based on the subjective views of members of that religion, which is clearly open to abuse. As noted above, freedom of expression specifically protects statements which some people find offensive. It also includes the right to make religious criticisms, even if some people may find these offensive.

Rules prohibiting defamation should, like all legitimate restrictions on freedom of expression, be included in laws of general application. The reference here to defamation is far too brief and superficial to deal appropriately with this very complicated matter and is, as a result, open to potential abuse. It does not, for example, define what is considered to be defamatory, clarify what the defences to a claim of defamation might be (for example, that the matter is true or that it was reasonable to publish the matter in all of the circumstances) and so on. The reference in this provision to 'dishonouring' statements is even more vague and problematical.

Recommendations:

- Article 31 should be repealed.

III.4 Independent Regulation

The need for bodies which exercise powers over the media to be independent has been noted above. It is a principle which is well established under international law, for the very good reason that otherwise, those with power over these bodies will seek to use that power to influence their decisions, to the detriment of the free flow of information and ideas in society.

The Law fails to provide for such independence in two key ways. First, in a number of instances, the Law gives the Minister of Information and Culture, clearly not an independent person, direct decision-making power. For example, foreign agencies and international organisations may only print news bulletins after obtaining permission from the Minister (Article 8(2)). Citizens and others may establish printing houses only after having obtained a license from the Minister (Article 14). Foreigners may only make films after obtaining the permission of the Minister (Article 37).

In our view, these restrictions suffer not only from the fact that they involve a political figure, but also from being unnecessary in the first place. No permission should be required to establish a printing house; at the very most, printers should have to register (see above, under Registration). There is no reason to restrict the right of foreigners to print bulletins and the same is true of films.

Second, the Law appears to establish three regulatory bodies, the National Commission of Radio and Television Broadcast, an investigation commission and a Media Evaluation Commission. The first, established by Article 20, provides that the chairperson and the other four members shall be appointed by the president for a period of two years, to be extended as required. The Commission includes among its substantial powers the licensing of broadcasters, monitoring respect for the Law and issuing guidance to broadcasters, presumably on content.

The Law does state simply, at Article 21(2), that this body shall be independent, but it fails to provide for any structural guarantees of this independence. It is clear that the independence of a body appointed in the sole discretion of the president, without any fetters on this power of appointment, cannot be ensured. There is no provision for public consultation or for civil society or public involvement in the process of appointments, even by the Loya Jirga. The Law does not set any criteria for appointments and does not protect members against dismissal. Furthermore, the very short period of tenure, just two years, means that the President can relatively quickly remove anyone he or she wishes to. In all, the Law woefully fails to protect the independence it proclaims for the Commission.

The investigation commission established in Article 42 appears to be far more independent, providing for membership from various different sectors of society – the Academy of Sciences, the Journalism Faculty and so on – although it is not entirely clear who actually appoints those nominated. However, the chairperson of the commission, a

key position, is held by the Minister of Information and Culture. This is inappropriate for two key reasons. First, this seriously and unnecessarily compromises the independence of this body, breaching the principle noted above. Second, it is possible that some of the complaints to be investigated by this commission will be alleged to have been committed by the very ministry whose minister is chair.

Article 26 provides for a right of the proprietor to appeal to a Media Evaluation Commission whenever he or she disagrees with a decision of the Ministry of Information and Culture regarding the rejection of issuance of license. It would appear that this is yet a third administrative body and the Law fails to provide for any structure for this body. Furthermore, it is unclear what role this body might play, since the Law does not provide for the Ministry to make decisions regarding licenses in the first place. These are not needed to establish print media outlets and the National Commission of Radio and Television Broadcast is responsible for licensing broadcasters.

Recommendations:

- No permission should be required to establish a printing house or for foreigners to print bulletins or make films.
- If any registration or permission is retained for these activities, it should be overseen by a body which is independent of government, not the Minister of Information and Culture.
- The provisions relating to membership of the National Commission of Radio and Television Broadcast should be radically amended to provide effective guarantees for its independence, including in the ways suggested above. Most importantly, appointments should be made either by a multi-party body (such as the Loya Jirga) or by a representative non-political body, after open public consultations.
- The investigation commission should not include the Minister of Information and Culture as a member.
- Article 26, providing for appeals to a Media Evaluation Commission, should be repealed. Instead, appeals from a refusal of the National Commission of Radio and Television Broadcast to issue a license should go either directly to the courts or to the investigation commission.

III.5 Proprietors and Editors-in-Chief

The Law sets a number of conditions on who may be a proprietor or editor-in-chief. The former must be citizens, 18 years old and not have been "deprived of civil rights by an order of an authoritative court." (Article 24) The latter must, in addition to this, hold a certificate of professional education or have three years of professional experience, and not be a civil servant, unless they work for a State-owned publication (Article 29).

These are perhaps not particularly onerous conditions. However, they do offend a fundamental principle of freedom of expression, namely that the State may not set conditions in this way on participation of individuals in the media. Normally, a responsible media outlet would not employ as editor-in-chief someone who was younger than 18-years old or who did not have either proper qualifications or experience. However, there are certainly counter-examples and these rules would create problems, for

example, for student publications. Such rules are also unnecessary. There is no reason why such matters should not be left to market principles, as is the case for other businesses.

Article 30 provides that the editor-in-chief shall "observe the equal rights of the person criticizing and of the person being criticized in the relevant media." It is not quite clear what this means but it is quite unreasonable to suggest that a media outlet must give those criticised equal opportunity to defend themselves or even be balanced in their criticisms, subject, of course, to the law on defamation. It would be a grave impediment to press freedom if the media were not allowed, for example, to criticise the manner in which the president were running the country without allowing that person equal access to their pages.

Broadcasters are in many countries subject to requirements of political balance but this has never been understood as meaning that they must be balanced in their treatment of a specific individual. If a leading political figure is deemed to have made a mess of their public responsibilities, they should be held to account by the media; this cannot be subject to a requirement of balance.

Recommendations:

- The restrictions on who may be a proprietor or editor-in-chief should be repealed.
- Article 30, providing for balance, should be repealed.

III.6 Restrictions on Foreigners

The Law contains a number of very stringent restrictions on the participation of foreigners in the media. Article 8(1) recognises the right of citizens to establish mass media outlets, while Article 8(2) provides that foreigners may publish news bulletins only with the permission of the Ministry of Information and Culture. This clearly implies that foreigners may not otherwise establish mass media outlets. The ambiguity in the definitions as to what constitutes mass media means that the extent of this implied prohibition is unclear but it could be extremely broad.

Further indication as to the scope of the prohibition on foreigners is provided in Article 9, which notes that citizens can establish print media which, as has been noted, is defined extremely broadly. This implies that foreigners may not establish print media outlets. All such media, barring those with a distribution of less than 200, must have a proprietor and editor-in-chief (Article 13), and both of these must be citizens (Articles 24(1) and 29(1)). The same rules apply to printing houses (see Articles 14 and 17) and to audio-visual media (Articles 19 and 23). Finally, as has already been noted, foreigners may only make films with the permission of the Ministry of Information and Culture (Article 37).

It is common to restrict foreign investment in and control over broadcasters, as part of the licensing process. However, imposing such restrictions on the print media is far more difficult to justify and ARTICLE 19 questions whether the absolute bans provided for in the Law are legitimate, particularly given the extremely broad definition of the print media. While no country would like to see its media industry controlled by foreigners,

which may undermine the democratic process, among other things, it may be noted that foreign investment and involvement often attracts scarce resources to the sector and provides valuable expertise and experience.

Recommendation:
- The harsh restrictions on foreign involvement in the media, particularly the print media, should be reconsidered.
- The restrictions on foreigners producing films in Afghanistan should be repealed.

III.7 Freedom of Information

Article 5 of the Law provides:

> Every person has the right to seek and obtain information. The government shall provide the information sought by citizens, except when the information sought is a military secret the disclosure of which would endanger national security and interests.

We welcome this recognition of the right of access to information held by public bodies, a right which is included in the right to seek, receive and impart information and ideas and which is also explicitly recognised in Article 50 of the Constitution, quoted above. We note a certain irony in the fact that the process of adopting the Law did not observe this fundamental precept inasmuch as no one was given access to the Law prior to its adoption.

We are of the view that proper implementation of the right to access information held by public bodies, often referred to as freedom of information, requires full treatment in a law specifically devoted to this issue rather than a single provision in a press law. This is a complex matter which needs detailed legislative attention. For example, the Law only provides for national security as a ground for refusing access, whereas in fact a number of other public and private interests, including commercial secrets, privacy and the prevention and prosecution of crime, all warrant some government secrecy. A full law on access to information should also set out the procedures by which access may be requested, along with time limits for responding to requests and the right to appeal any refusals to an independent body.

Recommendation:
- The authorities should make a commitment to adopted a fully-fledged law on access to information held by public authorities as a way of implementing the constitutional guarantee to this effect.

III.8 Miscellaneous

Journalists

Article 6(1) of the Law provides: "Journalists shall be protected by the law in conducting their professional activities, including publishing critical reports and views." This is probably well-intentioned but, depending on what it means, which is quite unclear, could be open to abuse. Most journalists do not want and do not receive any special legal

protection while carrying out their work, although there are certain areas where they do benefit from special privileges, such as special access to limited capacity events. In some cases, however, legal protection can be a means for official control.

Author's Signature

Article 12 of the Law provides: "The original version of a publication shall bear the identity and signature of the author." It is not clear what this means. Article 34 does allow the editor-in-chief to refuse to divulge the name of the author of an article, as long as he or she is prepared to take responsibility for it. However, there is no reason why a media outlet should not carry anonymous material, as long as they are prepared to take responsibility for it, for example through the editor-in-chief.

Mass Media Constitutions

Article 38 provides that the activities of mass media outlets shall be regulated in a constitution. It is not clear whether this requires mass media outlets to adopt their own constitutions or some other body to adopt one for all mass media but we assume it is the former. Such a requirement is both unnecessary and open to abuse. It is unnecessary to prescribe by law how media outlets should be structured; this should be left to them to determine, taking into account the competitive environment in which they operate. Such a rule is open to abuse, for example on the basis that a given constitution failed to conform to the conditions set out in the law.

Recommendations:

- Article 6(1) should either be repealed or have its meaning clarified.
- Article 12 should either be repealed or have its meaning clarified.
- Article 38 should be repealed.