Memorandum
by

ARTICLE 19
International Centre Against Censorship

on

Algeria's proposed Organic Law on Information

London, June 1998

Introduction

The following comments are an analysis by ARTICLE 19, the International Centre Against Censorship, of the proposal by the Algerian government in May 1998 to introduce a *Loi organique relative à l'information* (Organic Law on Information – LOI).

The draft LOI was presented by the Algerian authorities as a proof of its intention to continue reforming its information policy which started with the dismantling of press censorship committees at the printing houses and the abolition of the 1994 Decree on security related news which barred journalists from reporting security matters without prior authorisation. The government also started to open up timidly the state broadcasting to legal opposition political opinions and debate. The security situation of journalists has relatively improved. There have been only a few attacks recorded by armed Islamic groups since 1997. Journalists working in the private press have enjoyed relative freedom of expression and were able to criticise government officials and policies without fear of reprisal. On the other hand, the print media is still subjected to structural state domination in three areas: all the press printing houses are state owned; the state monopolises the import and distribution of the newsprint, and the discrimination in the distribution of state companies advertisement which constitute more than 80% of the published advertising.

Regarding the draft LOI, ARTICLE 19 is concerned that it contains restrictions on freedom of expression and if adopted by the Parliament would constitute a clear government interference both directly in media regulation and indirectly in the work of the *Conseil supérieur de la communication*.

ARTICLE 19 urges the Algerian government to reconsider this draft of the proposed law and to incorporate the recommendations below.

Throughout this analysis, ARTICLE 19 has evaluated the proposed legislation in comparison with international standards for protection of freedom of expression and information in general, and media freedom in particular. Algeria ratified the *International Covenant on Civil and Political Rights* (ICCPR) in 1989 and its (first) *Optional Protocol* in 1990.

Only the most serious concerns are addressed in this memo; a number of other, less serious problems have not been noted. Should further analysis or more detailed evaluations of international standards be required, ARTICLE 19 would be available to provide these.

Summary

The Draft Organic Law on Information purports to regulate most areas of media activity. The law establishes a *Conseil supérieur de la communication* (CSC), with responsibility for implementing many of its provisions and with overall responsibility for the media. A registration regime is established for the written press, along with a number of restrictions on ownership, senior management and advertising. Public broadcasters are to be created and governed by Presidential decree while a number of

more specific obligations will be contained in their charters. Private broadcasters are allowed but subject to a strict licensing regime overseen by the Council. The law permits private press agencies but only upon authorisation by the responsible minister. The law also regulates the work of individual journalists, establishing a number of professional rules and other restrictions. Finally, separate sections set out the rules on the rights of reply and correction and defamation law.

The comments below focus on a number of key concerns ARTICLE 19 has regarding the draft law. One problem is the lack of independence of oversight bodies. Indeed, the press registration regime is administered by the prosecutor, the appointments process for the CSC is effectively under the control of the governing party and independent press agencies need to gain the approval of the responsible minister. In addition, the draft law puts in place draconian restrictions on all forms of participation by foreigners in the Algerian media. This is exacerbated by a number of conditions on journalists and other media workers which effectively restrict access to these professions. Access to information and protection of sources, while protected, are subject to wide-ranging exceptions. Finally, the law provides for a number of broad and vague restrictions on the content of what may be published.

Comments

1. Algeria's Obligation to Promote and Protect Media Freedom

Algeria has ratified the ICCPR, Article 19 of which guarantees the right to freedom of expression in the following terms:

> 1. Everyone shall have the right to hold opinions without interference.
> 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.
> 3. 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.

Further, the ICCPR, in Article 2, places a dual obligation on states to:

> [A]dopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

and to:

> [E]nsure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, ...

International law does permit some restrictions on the right to freedom of expression and information in order to protect the private and public interests listed in paragraph 3 of Article 19 of the ICCPR. However, both the language of the provisions guaranteeing freedom of expression and the international jurisprudence make it clear that any restrictions must meet a strict three-part test. This test, which has been confirmed by the Human Rights Committee,[1] requires that any restriction must: a) be provided for by law; b) be required for the purpose of safeguarding one of the legitimate interests noted in Article 19(3); and c) be necessary to achieve this goal. It is clear that the proper approach to evaluating a particular restriction is not to balance the various interests involved but to ascertain whether the restriction meets the strict test elaborated above.[2]

The first part of the test means that state action restricting freedom of expression that is not specifically provided for by law is not acceptable. Restrictions must be accessible and foreseeable and "formulated with sufficient precision to enable the citizen to regulate his conduct".[3] As a result, official measures which interfere with media freedom but are not specifically sanctioned by law, such as discretionary acts committed by the police or security forces, offend freedom of expression guarantees. Second, only measures which seek to promote legitimate interests are acceptable. The list of legitimate interests contained in Article 19(3) is exclusive. Measures restricting freedom of expression which have been motivated by other interests, even if these measures are specifically provided for by law, are illegitimate.

Third, even measures which seek to achieve one of the legitimate goals listed must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.[4] The government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Thus vague or broadly defined restrictions, even if they satisfy the "prescribed by law" criterion, will generally be unacceptable because they go beyond what is strictly required to achieve the legitimate aim.

2. Registration of the Press

Article 8 of the LOI provides that periodical publications must register with the prosecutor. The proposed law does not specifically note whether existing press outlets are also required to register. If so, interim measures should be provided for since registration is supposed to take place 30 days before operations begin. Article 9 provides a list of the information required to be submitted for registration. Among other things, Article 9 requires the periodical to submit the criminal record of the

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

[2] The European Court has held that in evaluating restrictions it is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted. *Sunday Times v. United Kingdom*, 26 April 1979, Series A no. 30, 2 EHRR 245, para. 65.

[3] Ibid. at para. 49.

[4] Ibid. at para. 62. These standards have been reiterated in a large number of cases.

director. Finally, pursuant to Article 19, press outlets are required to deposit one copy of each publication with the prosecutor and three with the CSC.

Technical registration requirements for the press do not *per se* offend guarantees of freedom of expression as long as they meet a number of conditions, noted below. However, ARTICLE 19 considers registration to be unnecessary and it is not, in fact, required in many countries. The Human Rights Committee, which oversees the ICCPR, 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."[5] In particular, registration regimes should respect the following conditions: the authorities should have no discretion to refuse registration once the requisite information has been provided; registration should not impose substantive conditions on the press; and the registration system should be administered by bodies which are independent of government. Registration requirements which do not respect these conditions offend freedom of expression principles because they cannot be justified on the grounds listed in the ICCPR, such as the rights or reputations of others, national security, or public order, health or morals.

It is clear from the above that it would be far better for an independent body with authority for other aspects of the media, such as the CSC, to oversee the registration process rather than the prosecutor. In addition, the law should make it clear that registration is simply a technical process and that registration may not be refused unless the information supplied is incomplete.

The requirement to submit the criminal record of the Director is unnecessary since this information both should normally be available to the authorities and is in any case irrelevant to the registration process. Article 10 additionally requires that directors have not had an "anti-national attitude". These requirements cannot be justified and are clearly sufficiently wide to be susceptible of political manipulation. A case before the Inter-American Court of Human Rights clearly held that restrictions on who may practise journalism are not acceptable as the right to freedom of expression includes the right to free access to the profession of journalism; the same reasoning is applicable to the question of directors.[6]

There can be little legitimate reason for the deposit requirements, unlike deposit requirements relating to national libraries and archives. The fact that deposit must be with the prosecutor and regulatory body is disturbing as this requirement may be abused as a vehicle for censorship. This is far from hypothetical given the history of prior censorship in Algeria.

Recommendations

- ideally, registration requirements should be removed from the legislation; otherwise, the CSC should oversee the registration process;

[5] General Comment 10 (19) in Report of the Human Rights Committee (1983), 38 GAOR, Supp. No. 40, UN Doc. A/38/40.
[6] *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.

- substantive conditions on the character of the director should be removed from the registration process;
- any requirement on the press to deposit copies of publications should apply only to national archives and libraries.

3. Restrictions on Private Broadcasters

Article 26 excludes private broadcasters from "activities inherent in national television coverage". There are a number of problems with this. It is very vague and might breach the requirement that restrictions on freedom of expression must be "provided for by law" which implies a certain degree of clarity. In any case, blanket exclusions on private broadcasters of this sort represent a serious infringement of freedom of expression and are clearly unacceptable even if clear.[7] Article 30 provides that a license agreement to be signed between the CSC and the private broadcaster should include detailed information about such matters as the time and money to be devoted to promotion of the national culture and educational programme. Such agreements should not include other than very general information about the nature of overall programming – private broadcasters should retain complete editorial independence as regards specific programmes and scheduling matters.

Recommendations

- The legislation should impose no general restrictions on the ambit of activities of private broadcasters;
- License agreements should provide only for very general guidelines relating to overall programming.

4. Private Press Agencies

Article 47 of the FOI permits private press agencies only with the agreement of the Minister of Information. It is now clear that under international law, governments may not maintain public monopolies over services which provide information to the public.[8] In any case, authority over matters like this should not rest with a government minister since the risk of political interference represents a threat to freedom of expression. Instead, any such authority should rest with an independent administrative authority like the CSC.

Recommendation

- Article 47 should be repealed and private press agencies should be permitted.

5. The Right of Reply

[7] See *Informationsverein Lentia and Ors v. Austria*, 24 Nov. 1993, 17 EHRR 93.
[8] *Ibid.*

Article 48 of the FOI gives a special right of reply to those invested with public authority. The director is bound to carry, in the next issue, any corrections addressed to him by such individuals. Article 49 provides for a right of reply for ordinary citizens where imputations capable of harming their honour have been published. Article 58 provides for the same right in respect of the broadcast media. It is quite clear that public figures must tolerate a greater degree of criticism than ordinary citizens, rather than benefit from special protection as is the case here.[9] In any case, the standard established even by Article 49 is too low. A reply should only be available where a publication has breached one's civil rights, as provided for in laws of general application. The law should, in addition, provide for a procedure for claiming a right of reply which ensures that media outlets may appeal decisions to independent courts.

Recommendations

- Article 48 should be removed from the legislation;
- Articles 49 and 58 should be amended to make it clear that a right of reply is only available where the material in question represents a breach of a law of general application.

6. Conditions on Professional Journalists

Article 65 of the LOI provides that professional journalists are those whose regular profession is journalism and who derive most of their income from this activity. Article 66 provides that at least one-third (or some proportion, the draft law is unclear here) of the staff of general media outlets must be professional journalists. It has already been noted that international law does not permit conditions to be placed on the practice of journalism. Indirect controls, such as these, are equally unacceptable.

Recommendation

- Article 66 should be removed from the legislation.

7. Access to Information

Article 71 provides for access by professional journalists to certain government information. There are two problems with this provision. First, there is no reason to restrict access to information to professional journalists; other journalists and indeed the public at large should be able to access information held by government, as is increasingly being recognised. Second, access is only provided to information not otherwise classified or protected by the law. Although some restrictions on access are legitimate, these should be narrowly construed and subject to review by an independent authority. In general, access to government-held information should be

[9] See the European Court of Human Rights case *Lingens v. Austria*, 8 July 1986, Series A, No. 103, 8 EHRR 407. This has been confirmed by national courts in a number of jurisdictions. See, for example, the Indian case, *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC).

facilitated by an independent administrative authority, with which the public may lodge complaints in case of a refusal to disclose.

Recommendation

- Article 71 should be replaced with a comprehensive regime founded on freedom of information and the principle of maximum disclosure. This system should reflect the following principles:

  i) The government should only be permitted to classify specific and narrow categories of information which need to be withheld for the protection of legitimate, overriding interests including those relating to national security. Broad and ambiguous expressions should be avoided.
  ii) Not all information "relating to national security" may be withheld from the public. Classification should be restricted to information whose disclosure poses a genuine risk of endangering national security.
  iii) An administrative structure should be established for receiving and deciding upon requests for access to information. This body should be independent of government and have the power to order any government body to release information; all procedures should be accessible, simple and quick. The "public interest" in the information should be a primary consideration in all decisions on requests for information.
  iv) The authorities should be required to specify in writing, within fixed time limits, their reasons for denying any request for information.
  v) Judicial review should be available for all decisions regarding access to information.

8. Restrictions on Publication

Article 72 forbids journalists from publishing material on a wide range of subjects including rights and liberties, national security and national unity. Blanket restrictions of this sort can never be justified, particularly where the topics listed are capable of such broad interpretation. Indeed, ARTICLE 19 has serious reservations as to whether denying the right to publish on any topic – a severe and general prior restraint on freedom of expression – may ever be justified.

Recommendation

- Article 72 should be removed from the legislation.

9. Protection of Journalists' Sources

Protection of journalists' sources, subject only to very limited exceptions, is clearly provided for by international law.[10] Such protection is provided for in Article 74 of the draft LOI but is subject to a number of exceptions. Some of these, for example

[10] See the European Court of Human Rights case *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123.

that journalists may be required to disclose their sources whenever issues of economic secrecy or information concerning minors is involved, go beyond what is permitted under international law which provides that the right of non-disclosure may only be removed where "justified by an overriding requirement in the public interest."[11]

Recommendation

- The exceptions in Article 74 should be strictly limited to cases where source disclosure is justified by an overriding requirement in the public interest.

10. Independence of the CSC

Article 89 provides that the CSC is to be independent and lists a number of very positive goals of the CSC. The manner of appointment of members of the CSC, however, does not sufficiently guarantee this independence. The nine members are to be appointed in equal proportion by the Presidents, respectively, of the Republic, Assemblée Populaire Nationale (National Assembly) and the Conseil de la Nation (Senate). Although this is the model adopted by France, Algeria lacks the institutional, social and historical guarantees of freedom of expression that contribute to the functioning of this system in France despite its structural shortcomings. In particular, it suffers the grave shortcoming of precluding the participation of opposition and minority parties and interested members of the public and gives the ruling party too much control. A number of better models are available. At a minimum, the law should provide for a number of conditions on CSC members, for example that they should be representative of the society as a whole and selected for their professional expertise rather than for political reasons.

Recommendation

- The process for appointments to the CSC should be open and transparent and ensure the independence of that body. Adequate provision should be made for input from groups broadly representative of society as a whole, to ensure that the CSC is truly independent and representative.
- Conditions on CSC membership should also be explicitly provided for, in particular to prevent conflicts of interest and to preclude the appointment of individuals too closely associated with political parties or groupings.
- Security of tenure of CSC members should be protected to help ensure their independence while undertaking regulatory activities.

11. Restrictions on Foreigners

Perhaps the most restrictive provisions of the LOI relate to foreigners. Any participation by non-Algerians in media enterprises on their territory, and indeed any participation by Algerians in foreign media enterprises, is subjected to strict control by either the relevant minister or the CSC. Article 10 provides that only Algerians can be directors of press outlets. Article 13 prevents foreigners from participating in the

[11] *Ibid.*, para. 39.

financing of the press, unless authorised by the CSC and also allows foreigners to establish press outlets only with ministerial authorisation. No conditions on the exercise of these discretionary powers are established. Importing, publishing, printing and distributing foreign publications is allowed only with ministerial authorisation, pursuant to Article 18. Similarly, Article 34 provides that only local broadcasters may be licensed while Article 35 provides that the capital of such broadcasters must be held exclusively by Algerians, unless foreign involvement has been authorised by the CSC. Finally, professional Algerian journalists working for foreign media enterprises need ministerial accreditation, which may be withdrawn by the same minister.

The international right to freedom of expression applies "regardless of frontiers". These restrictions represent an almost absolute prohibition on any foreign participation in the Algerian media and cannot be justified. In addition, the fact that any participation is subject to either ministerial or CSC discretion, rather than laws which set out in advance rules to be applied, suggests an illegitimate motive.

Recommendations

- All restrictions on foreign participation in the Algerian media should be removed.
- If any such restrictions are retained, they should be set out clearly in the law and applied in an objective and non-discriminatory manner, rather than being under the control of essentially political organs.