

The Legal Framework for Media in Palestine and Under International Law

By Toby Mendel and Dr. Ali Khashan

Introduction

A free, independent and pluralistic media is key to democracy and to the realisation of all human rights. This was recognised by the UN General Assembly at its very first session, in Resolution 59(I), adopted on 14 December 1946, which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”

Palestinians, like all peoples, have a right to freedom of expression, including in relation to the media. In theory, the Palestinian Basic Law, amended in 2003, guarantees freedom of expression in line with international standards and constitutional practice applied in democratic states. Several articles are relevant to this freedom, including Articles 10 and 19, as well as Article 27, which guarantees freedom of the media. Although Article 27 provides various protections for the different types of media outlets, and state authorities are prohibited from engaging in practices which breach the Basic Law, in practice this is insufficient to protect the media. The article should clearly state that it is illegal to pass any regulation or to engage in any practice that unduly restricts freedom of the press or hinders its development.

At present, authorities that violate constitutional rights do not fear sanction because the legal provisions are unclear, because no punishment is stipulated in the law and because there is no proper mechanism to enforce the Basic Law. As a result, the executive branch of government, along with the various security apparatuses, generally views journalists with suspicion and closely monitors what is published in the media. The legislative branch, for its part, enacts laws that restrict the work of journalists and that provide for harsh punishment for offenders. The judicial authorities, unwilling to oppose the executive and legislative branches, seldom take bold decisions that uphold freedom of the press and freedom of expression.

It is not just the authorities that undermine freedom of the media. Other constraints to the full realisation of media freedom include financial impediments, a lack of qualified professionals, undue concentration of ownership, and an overall lack of strategy and policy guidance for the media sector.

This may be changing. The Ministry of Information in the previous government indicated its intention to establish an independent body to govern the Palestinian Broadcasting Corporation, to promote the independence of the Palestine News Agency (Wafa), to adopt progressive legislation relating to broadcast regulation and to review the 1995 Press and Publications Law with a view to bringing it into line with international standards or to repealing it altogether.

In September 2005, a team of jurists led by one of the authors of this piece, Dr. Ali Khashan, was hired to undertake these legal reforms. The first task was to prepare new legislation on broadcast regulation, a draft law on the National Council for Audiovisual. A number of workshops were hosted, attended by Palestinian journalists and

foreign experts. The French Consulate in Jerusalem invited experts from the Supreme Council for the Audiovisual Media in Paris to assist and various academics supported the project. UNESCO also played a major role in assisting with the drafting process, inviting legal experts from the international human rights NGO, ARTICLE 19, to provide comments and assistance relating to the new broadcasting law.

The right to freedom of expression has important implications in relation to all facets of media regulation and oversight. Respect for this right should result in protection of the media from rules and regulations which unduly restrict its operations, as well as its liberation from obstacles that may hinder its efficiency. In this opinion piece, we outline some of the more important implications of freedom of expression for broadcasting, for the print sector and for public media, as well as some local practices in these areas.

Regulation of Broadcasting

Independent Regulation

It is universally accepted that broadcasting, unlike the print sector, must be regulated, if only to ensure order in the airwaves. An overriding international principle is that broadcast regulators should be independent of both political and commercial interests. It is not appropriate for these interests to exert an influence over the media, for fairly obvious reasons. The media cannot act as a watchdog of government if it is subject to government control.

Promoting independence is a complex matter and there are several ‘models’ for achieving this. Central to the idea of independence is the involvement of a range of actors in the process of appointments to the governing bodies of regulatory bodies, so as to avoid domination by any particular interest or political party. This may be achieved by involving multi-party bodies such as parliament and/or by giving civil society organisations, which normally represent a wide range of social interests, a role in appointments.

Other means of promoting independence include ensuring that the appointments process is fair and transparent, putting in place clear conflict-of-interest rules – which should apply both to political conflicts, such as prohibiting senior members of political parties from being members, and to commercial conflicts, so that those with vested interests in broadcasting cannot sit as members – and providing members with security of tenure, so that they sit on the body for a fixed period of time and cannot be removed without good cause. More details on this can be found in a publication by ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, which is available on their website, www.article19.org.

Licensing

As noted, licensing of broadcasters is necessary if only to avoid chaos in the airwaves. Indeed, in the early history of the United States, no licensing system was in place and this quickly led to chaos. There is also a perhaps more profound reason to license broadcasters and this is to promote the overall public interest in broadcasting, particularly by promoting diversity in the airwaves.

When we think of the right to freedom of expression, we most commonly think of the right of the speaker, the right to freedom of speech. But international law also protects

the right to 'seek and receive' information and ideas, the rights of the listener. These rights are the basis of the importance of promoting broadcasting diversity. And this is not about quantity but rather about quality. It may well be less satisfactory, from the perspective of the listener, to receive 10 FM music stations providing the same fare than only three stations, but which offer a range of information choices.

Another goal of licensing is to ensure that the media may be financially viable, a challenge anywhere but perhaps particularly in Palestine, given the weak economic base. Advertising is the primary source of income for the vast majority of broadcasters but advertising, as well as other sources of revenue such as donor funds, is largely, although not entirely, fixed in size. If you license 40 broadcasters, this 'pie' must be shared among them, so that the average size is one-fortieth of the whole pie. If you only license 10 broadcasters, each will, on average, get a much larger share, one-tenth of the pie. The implications of media under-funding are serious: it has a tendency to lead to low-quality, low-cost programming (e.g. music radio); journalists are underpaid leading to complications such as producing 'news' stories for cash; and many media outlets seek out a rich 'patron,' leading to all sorts of skews in terms of output based on the interest of the patron rather than the public.

In most cases, media or broadcasting laws set out in some detail the procedure by which licence applications should be processed. This should be clear, fair and transparent, and also efficient. The law should also set out clearly the criteria by which license applications will be assessed. These should include the proposed contribution of the broadcaster to diversity, financial viability, technical capacity and ownership (to avoid undue concentration of media ownership).

Content Regulation

Many broadcasting laws establish administrative systems for regulating broadcast programming. As with other regulatory functions, these should be overseen by a body which is independent of political or commercial interference.

It is very important that any content rules be clear so as to give broadcasters notice in advance of the limits on programme content. To achieve this, it is necessary to develop a detailed Code of Conduct or Programming Code which sets out the applicable standards in different areas, such as violence, protection of children, decent language, treatment of religion and so on. This Code should be developed in close consultation with interested stakeholders, in particular broadcast professionals, and it should reflect broadcasting reality, for example in the context of live transmissions.

It should be kept in mind that the purpose of this system is to set standards for broadcasters, not to punish them, which is the role of the penal law. Many of the issues the Code will deal with – such as acceptable levels of violence in programmes or what is appropriate for children – are complex matters subject to changing social values. The idea is to clarify the appropriate limits rather than to enforce clear prohibitions. As a result, sanctions should be carefully tailored to the situation. This implies the existence of a range of graduated sanctions, starting with warnings and obligations to carry messages by the regulator and, only in more serious cases of repeated failure to respect the code, possible fines.

The New Draft Broadcasting Law

The new draft law on the National Council for Audiovisual largely meets the standards outlined above. Article 4 specifically guarantees a number of internationally recognised rights and principles such as freedom of expression, respect for pluralism and cultural diversity, freedom to obtain the news irrespective of the source, and the right to distribute, publish and transmit programmes without restriction, while respecting others and reaffirming the principles of justice, equality, human rights and the sovereignty of the law.

A number of provisions protect the independence of the National Council, which is tasked with regulating the broadcasting sector. Such independence is ensured through the appointments process, as well as through ensuring the professionalism of members and protecting their tenure.

Other articles provide for independence of the editing and transmitting process for programmes intended for the public, and reaffirm the constitutional protection that the broadcast media enjoys to operate in complete freedom, as long as it operates responsibly and transparently. Article 9 gives journalists the right to keep their sources of information secret, so that they may not be required to reveal the identity of those who supply them with information on a confidential basis. Article 10 prohibits monopolisation of the broadcast media and reinforces the need for fair competition and equal treatment for all.

Stressing the need to respect international and regional conventions, Article 34 is unprecedented in Palestine by providing that the law should remain in force even in a state of emergency, with no possibility of derogating from it.

The Print Media

The print media is fundamentally different from broadcasters and, for this sector, international law calls for a very 'light touch' approach.

Registration

Registration systems for the print media are still common around the world but, at the same time, they are largely unnecessary and should be reconsidered altogether. The three special mandates on freedom of expression – at the United Nations (UN), the Organisation for Security and Cooperation in Europe (OSCE) and the Organization of American States (OAS) – have called on states to do away with registration systems for the print media. At a minimum, registration should be automatic upon provision of the required information; that is, no one should be denied registration.

Furthermore, the procedure for registering should not be unduly onerous. In particular, only a limited amount of necessary information should be required to be provided to obtain registration.

Content Regulation

Most democratic countries do not provide for statutory regulation of the content of the print media. Instead, this is left to self-regulation, either by the sector as a whole or by individual newspapers. This has the advantage of avoiding government control and of ensuring that regulatory systems are sensitive to the needs of newspapers.

If a statutory regulatory scheme is put in place, many of the points noted above about content regulation in the context of broadcasting are also applicable here. In

particular, the law should not include ‘double-penalty’ penal provisions and, if an administrative system is envisaged, it should involve the development of a code of conduct against which performance may be assessed.

The 1995 Press and Publications Law

In principle, a press law should put in place a legal framework which helps to organise the media’s work and to provide guidance to the press. It should secure journalists’ access to information and protect the fundamental right of the individual to express his or her point of view freely through the print media.

The 1995 Press and Publications Law was enacted during the reign of the late President Yasser Arafat, at the time of the creation of the Palestinian National Authority (PNA). It was strongly influenced by the legal and political environment prevailing in neighbouring Arab countries at the time, which was based on the idea of government authority being supreme. As a consequence, the law imposes unjustifiable restrictions on the Palestinian media and its work. To date, the Palestinian Legislative Council (PLC) has not revised this Law so as to bring it in line with the Basic Law and international standards in this area.

Even a quick glance at the Press and Publications Law reveals serious concerns from the perspective of freedom of expression. For instance, although Article 4 does provide for freedom of the press and of publishing, Article 7 stipulates that it is illegal to publish anything that goes against the general system, without defining what this means. Indeed, the Law institutes a number of sweeping restrictions on the content of what may be published, many of which are unacceptably broad and/or vague. For example, publications must not “contradict the principles of ... national responsibility” or publish material that is “inconsistent with morals” or which may “shake belief in the national currency.” These restrictions are backed up with censorship powers as publications must deposit copies with the government prior to distribution, in breach of Article 27 of the Basic Law, which prohibits censorship of the media.

Articles 18-21 establish a licensing regime for the printed press, including high initial capital requirements, in clear breach of the international law standards noted above. It also imposes a number of conditions on who may be an editor-in-chief, a responsible director and an owner of a publication. These conditions effectively limit access to these positions and run counter to the principle that everyone has the right to express oneself freely in the medium of his/her choice. Article 10 bans cooperation with foreign authorities, with the exception of press correspondents, again in contradiction of international standards.

State Media

The regulation of public media is a complex matter and is normally the subject of a full and independent law. As with all forms of media regulation, the principle of independence is central to the governance of public media. In addition to protecting independence, the regulatory framework for public media should set out clearly the mandate of public media, or exactly what it is that Palestinians want these media to provide to society in the public interest. Certain key elements are found in the laws of most public broadcasters and these include the provision of a comprehensive and impartial news service, educational programming and so on. The law should also set out

the sources of funding available to public media and how they should be accountable to the public. Independence does not mean that the broadcaster is not accountable but, at the same time, accountability systems must not compromise independence. Normally, a key accountability system is the requirement to provide an annual report to a multi-party body such as parliament.

We should note that similar principles apply to all publicly-owned media. In Palestine, for example, these principles apply equally to the Wafa news agency as they do to the Palestinian Broadcasting Corporation (PBC). To provide practical guidance on the legal framework for public media, ARTICLE 19 has published *A Model Public Service Broadcasting Law*, which is available on their website.

Conclusion

The media has a key role to play in monitoring the activities of government, in revealing the truth and in underpinning democracy. Everyone in society benefits when journalists can access the information they need for their work and publish freely. Key to this is the legal framework for the media.

The current legal framework governing the media, including the Press and Publications Law of 1995, contradicts the Basic Law and international standards, and hinders the development of the media in Palestine. This legal framework needs to be reviewed with a view to doing away with the provisions on censorship, to enhancing intellectual creativity, to supporting a free and independent media and to promoting the free circulation of information.

The PLC should discharge its responsibility to ensure consistency between Palestinian legislation and constitutional and international standards protecting the rights of the media and journalists by enacting legislation that provides a proper environment for independence and freedom in the media sector. Palestinians need to work hand in hand to give more freedom to the media and to lift the prevailing climate of fear and suspicion regarding the media.

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