



CENTRE FOR LAW  
AND DEMOCRACY

# Freedoms in Iraq: An Increasingly Repressive Legal Net

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## **I. Introduction**

Respect for basic human rights and freedoms in Iraq improved following the downfall of Saddam Hussein, and Iraq has aspirations to becoming a leader in the region in terms of democracy and human rights. An important milestone in this regard was the adoption of a new Iraqi Constitution in 2005, with generally strong rights guarantees.

At the same time, important limitations on the full enjoyment of rights remain, not only in practice, but also in terms of the legal framework. This is not just a matter of legal rules which date from the Saddam Hussein era. The Iraqi government has also adopted, or proposed, a number of legal rules which do not meet basic constitutional and international human rights standards.

In recent years, the government has introduced a barrage of legislation relating to the fundamental freedoms of expression and assembly. In some cases, this legislation appears to be well intentioned, while in other cases positive intentions are less apparent. Regardless, all of these new laws, most of which have not yet been adopted, are problematical from the perspective of constitutional and international human rights guarantees.

This Report reviews five pieces of legislation affecting the freedoms of assembly and expression that have been introduced in recent years in Iraq. Of these, only one, the Journalists Rights Law (Journalist Law), has actually been passed into law, in August 2011. The other four – the draft Commission of Media and Communication Law (draft CMC Law), the draft Informatics Crimes Law (draft Internet Law), the draft Political Parties Law (draft Parties Law) and the draft Law of Expression, Assembly, and Peaceful Protest (draft Assembly Law) – have not yet been formally adopted as laws.

Together, the five laws<sup>1</sup> cover a wide range of issues including restrictions on the content of what may be published or broadcast, whether over the airwaves or the Internet or via some other media, the establishment of political parties, how to apply to hold an assembly or demonstration, restrictions on such events, the overall system for regulating broadcasting, including the oversight body and the regimes for licensing and controlling content, and special rules for journalists.

This report assesses the rules contained in these laws against constitutional and international human rights standards, in particular relating to freedom of assembly and expression. An initial section of the Report outlines the key international standards relating to the rights to freedom of expression and assembly.

The main body of the Report is broken into two parts. The first assesses problematical provisions in the five laws, with the analysis broken down into three areas: content restrictions, government control mechanisms and other problematical regulatory tools.

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<sup>1</sup> For ease of reference, they will all be referred to in this Report as laws, even though most remain in draft form.

The second part looks at the positive measures that are required to be put in place, assessing the extent to which the five laws would provide for them. This part is broken down into four main parts – relating to the right to information, broadcast regulation, special protections for journalists and the right to assembly – along with a section assessing a number of other positive provisions under Iraqi law.

The Report is limited in scope to assessing the five laws which are its main focus. It does not assess the wider legal framework, which contains many other problematical rules affecting the rights to freedom of assembly and expression. There are a number of laws from the Saddam Hussein era which impose unacceptable restrictions on these rights – including the 1969 Penal Code, the 1968 Law of Publications and the Law on Censorship – as well as certain provisions from the Coalition Provisional Authority era, including CPA Order No. 14 on Hate Speech and Order No. 19 on Freedom of Assembly.

A key aim of the Report is to highlight the problems in the five laws from the perspective of human rights, both in their restrictive rules and insofar as they fail to put in place the positive measures required under international law for the protection of the freedoms of assembly and expression. It is hoped that, through highlighting these positive needs, attention will be brought to bear on satisfying them, rather than pushing through the problematical draft laws currently on the table.

## **II. Overview of International Standards**

### **II.1 Basic Guarantees**

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>2</sup> as follows:

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.

Article 20(1) of the UDHR guarantees the right to peaceful freedom of assembly as follows:

Everyone has the right to freedom of peaceful assembly and association.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Articles 19 and 20, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>3</sup>

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<sup>2</sup> United Nations General Assembly Resolution 217A (III), 10 December 1948.

<sup>3</sup> See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain)* (Second Phase), ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

Freedom of expression is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR),<sup>4</sup> a treaty ratified by 167 States as of December 2011, including Iraq,<sup>5</sup> also in Article 19, as follows:

- (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.
- (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 and reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of Assembly is guaranteed in Article 20 of the UDHR and Article 21 of the ICCPR, which states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Freedom of assembly and of expression are both protected in all three regional human rights treaties, specifically at Articles 15 and 13 of the *American Convention on Human Rights*,<sup>6</sup> at Articles 11 and 10 of the *European Convention on Human Rights* (ECHR)<sup>7</sup> and at Articles 11 and 9 of the *African Charter on Human and Peoples' Rights* (ACHPR).<sup>8</sup> Although the decisions and statements adopted under these systems, as well as authoritative statements adopted by regional human rights bodies, are not binding on Iraq, they do provide persuasive evidence of the scope and implications of the right to freedom of expression which are of universal application.

## II.2        Restrictions

International law recognises that the freedoms of assembly and expression are not absolute. However, international human rights law places strict conditions on any restrictions on these rights, which must comply with the provisions of Articles 19(3) and

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<sup>4</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

<sup>5</sup> Iraq ratified the ICCPR on 25 January 1971.

<sup>6</sup> Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

<sup>7</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>8</sup> Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.

21 of the ICCPR. It may be noted that these tests are almost identical. They both impose a strict three-part test for restrictions.<sup>9</sup>

First, the restriction must be provided by law or imposed in conformity with the law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the ECHR:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>10</sup>

Where restrictions are vaguely drafted, they may be interpreted in a way that gives them a range of different meanings. For the authorities, this is almost an invitation to abuse and they may seek to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be protected. For those subject to the law, vague provisions fail to give adequate notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as people steer well clear of the potential zone of application to avoid censure.

Second, the restriction must pursue one of the legitimate aims listed in Articles 19(3) and 21, which are essentially identical.<sup>11</sup> It is quite clear from both the wording of these articles and the views of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed are not valid.<sup>12</sup> It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.<sup>13</sup>

Third, the restriction must be necessary, or necessary in a democratic society, to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>14</sup>

<sup>9</sup> This test has been affirmed by the UN Human Rights Committee. See *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7. The same test is applied by the European Court of Human Rights. See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45.

<sup>10</sup> *The Sunday Times*, *ibid.*, para. 49.

<sup>11</sup> Article 21 adds public safety to the list and uses the term freedom instead of reputations of others, but the substantive differences these produce are nominal.

<sup>12</sup> See *Mukong*, note 9, para. 9.7.

<sup>13</sup> As the Indian Supreme Court has noted: “So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.” *Thappar v. State of Madras*, [1950] SCR 594, p. 603.

<sup>14</sup> See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

Courts have identified three aspects of this part of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. Second, the restriction must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, the restriction must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two factors, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected.

### **II.3        Independence of Oversight Bodies**

Ensuring respect for the freedoms of assembly and expression does not imply that the State may not engage in regulatory or oversight activities. It is, for example, widely recognised that broadcasters must be regulated, if only to ensure that the audiovisual spectrum used for broadcasting, which is a limited public resource, is distributed in a rational and fair manner which avoids interference and ensures equitable access.<sup>15</sup> Broadcast regulation is also needed to ensure plurality and diversity in the airwaves. Similarly, better practice in the area of the right to information is to establish an oversight body which can consider complaints relating to refusals to provide information.

However, if such regulatory or oversight bodies are under the control of the government, they are likely to be pressured into exercising their powers in a manner which undermines rather than promotes respect for rights. Thus, governments and businesses can be expected to want to minimise access of their critics and competitors to the broadcast media, while many public bodies would prefer not to disclose information that, if embarrassing, is not sensitive. It is thus vital that these bodies be protected, legally and practically, against political, commercial and other forms of interference.

The need for independence of broadcast regulators finds strong support in international decisions and statements. This was stressed in the 2003 Joint Declaration by the (then) three specialised mandates for the protection of freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – which stated:

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.<sup>16</sup>

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<sup>15</sup> See, for example, *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al.* No. 2, 395 U.S. 367, 389 (1969).

<sup>16</sup> Adopted 18 December 2003.

The need for protection against political or commercial interference was also noted in the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), Principle VII(1) of which states very clearly:

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.<sup>17</sup>

Within Europe, an entire recommendation of the Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector. The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

There are similar statements regarding the need for independence of oversight bodies for the right to information. Thus, the 2004 Joint Declaration by the special international mandates on freedom of expression states:

Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.<sup>18</sup>

Similarly, Principle IV(2) of the African Declaration states:

[A]ny refusal to disclose information shall be subject to appeal to an independent body and/or the courts.

Finally, Clause IX(1) of Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents states:

An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Principle VI.3 should have access to a review procedure before a court of law or another independent and impartial body established by law.<sup>19</sup>

### **III. Repressive Rules**

#### **III.1 Content Restrictions**

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<sup>17</sup> Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

<sup>18</sup> Adopted 6 December 2004.

<sup>19</sup> Adopted 21 February 2002.

One of the most problematical features of the five laws is that, taken together, they impose wide-ranging restrictions on the content of what may be published or broadcast through the media, during demonstrations, over the Internet and by political parties. These are in addition to the many content restrictions which are still found in the old 1969 Penal Code. A few issues receive particular attention in the new laws, such as public morals and moral issues, incitement, in particular to religious hatred or criticism, and, perhaps not surprisingly, public order and terrorism. Many of these fail to meet the standards of international law regarding restrictions on freedom of expression.

### Public Morals

The question of morals comes up repeatedly in the draft CMC Law. Article 43(1) of that law prohibits telecommunications and Internet service providers from withholding or cancelling services, unless, among other things, the beneficiary uses those services in a manner which is contrary to “public morals” (the other grounds are activities like causing material damage to the network, failing to pay subscription fees or breaking other laws).

Pursuant to Article 77(1) of the draft CMC Law, anyone who uses any communication medium to send immoral messages shall be imprisoned for between three months and one year and/or fined between 500,000 and three million Iraqi dinars (approximately USD430-2550). Article 77(2) makes it a crime, punishable by the same penalties, to provide a telecommunications service contrary to “the general order” or public morals.

The Media Consultants Department of the CMC, which is not independent of government (see below) is tasked with developing recommendations for the CMC Board of Trustees about what legal measures should be taken against media outlets which violate public morals, among other things (Article 34(5) of the draft CMC Law). The same body may demand that the Board of Trustees take measures against media outlets that violate “regulations on public morals” (Article 34(6)).

The draft Internet Law also reflects concern with the dissemination of morally sensitive information. Article 21(3) provides for imprisonment for not less than a year and a fine of between two and five million dinars (approximately USD1710-4280) for anyone who violates in any way “moral, family, or social values” through information networks or computers. Article 22 provides for a number of offences for various moral wrongs – such as promoting gambling, pornography or images which “breach public modesty and morals”, or using computers to “relate words, images, or voices to someone else involving cursing or slander”. These activities attract fines of up to 30 million dinars (approximately USD25,500) and imprisonment for up to three years.

Finally, the draft Assembly Law includes a limit in its very definition of freedom of expression by reference to the idea of public morals. It also allows participants at a public assembly to carry banners, chant slogans and give statements to the media, as long as these do not “disrupt” public morals (Article 8(4)).

It is accepted, under international law, that freedom of expression may be limited to protect public morals. At the same time, as the European Court of Human Rights stated in a case about public morals, in a quotation that is often repeated:

[F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to "information" or "ideas" that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>20</sup>

To be legitimate, restrictions on the basis of morals must go beyond simply upsetting people and be based on the idea of harm to society. Furthermore, moral values must be widely held across different traditions before they may be considered as candidates for restrictions on freedom of expression. As the UN Human Rights Committee stated in a recent General Comment:

The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.<sup>21</sup>

A key problem with the Iraqi provisions noted above is that the laws in which they are found do not define the various terms employed, such as 'morals', 'public morals', 'family values', 'public modesty', 'the general order', 'cursing' and 'social values'. These are extremely flexible terms that may be used to prohibit a wide range of expression which is either merely offensive or perhaps even simply politically unpalatable. As such, they do not pass muster in relation to either the 'provided by law' or the 'necessity' parts of the test for restrictions on freedom of expression established under international law.

This problem is exacerbated by the heavy sanctions that may be applied for breach of these rules, which in many cases stipulate minimum prison terms. Such sentences are always problematical when imposed pursuant to restrictions on freedom of expression, but they are particularly so for breach of elastic, overbroad rules, including for the protection of so-called morals.

Special considerations apply to the media when it comes to public morals and, in particular, the broadcast media. In most countries, special codes of conduct apply to broadcasters which require them to meet higher standards of public morals, and even of taste and decency, than other forms of expression. However, in these cases, the rules are applied as an administrative matter, through specially designed systems for the development and application of these sorts of codes.

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<sup>20</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

<sup>21</sup> General comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 21 July 2011, para. 32.

In democracies, these code-based systems have several characteristics which distinguish them from the regimes described above. First, the codes elaborate in some detail what exactly is allowed and what is not. Second, the codes are developed in close consultation with interested stakeholders, including broadcasters. Third, any sanctions may be imposed only after a process which allows all parties to make representations and to be heard. Finally, and importantly, the sanctions envisaged aim to set standards rather than punish. This means that in the vast majority of cases, they involve a warning or sometimes a requirement to broadcast a message acknowledging the wrong. Only in very rare cases of serious and repeated breaches, which less serious sanctions have failed to redress, would a more serious sanction, such as a fine, be considered appropriate. These protections are not reflected in the Iraqi rules.

### Public Order

Public order and the prevention of terrorism are naturally serious concerns in Iraq and four of the five laws canvassed in this Report impose content restrictions relating to these issues. Thus, the draft Assembly Law allows participants at a public assembly to carry banners, chant slogans and give statements to the media, as long as these do not "disrupt" public order (Article 8(4)). Article 5(1) prohibits advocacy of war or acts of terrorism. The penalty for breach of these provisions is not specified in the law but breach of Article 13(1), which is substantively identical to Article 5(1), may lead to imprisonment for up to ten years.

The draft Parties Law provides for no less than ten years' imprisonment for any individual who establishes a party which, among other things, "promotes or defends terrorism" or seeks to undermine the provisions of the constitution (Article 55(2)).

Article 34(5) of the draft CMC Law tasks the Media Consultants Department of the CMC with developing recommendations for the CMC Board of Trustees about legal measures to be taken against media outlets which jeopardise "national interests", support terrorism or call for hate or violence. Article 77(1) of the same law makes it a crime to send threatening or insulting messages, or "fabricated news intending to stir up public panic". Breach of these rules may result in imprisonment for between three months and one year and/or fines of between 500,000 and three million Iraqi dinars (approximately USD430-2550).

Article 4 of the draft Internet Law is the most comprehensive and severe of all of these rules. It provides for life imprisonment and fines of between 25 and 50 million dinars (approximately USD21,360-42,720) for a range of public order and terrorism offences. These include:

- Implementing, or promoting or facilitating the implementation of "programs or ideas" which are disruptive to public order.
- Facilitating communication with members or leaders of terrorist groups.
- Promoting terrorist activities and ideologies.
- Publishing information regarding the manufacture of "any tools or materials used in the planning or execution of terrorist acts".

It is clearly open to States to prohibit incitement to public disorder and to terrorism, as well, of course, as actually engaging in these acts. However, a significant problem with these provisions, as with those relating to public morals, is that these terms are not defined. It is one thing to prohibit terrorism understood as politically motivated acts of violence that aim to inflict terror upon the population, and quite another to use this term to describe groups which use peaceful means in their quest to separate from a State, as is done in far too many countries.

Furthermore, the prohibited acts in these laws go well beyond public order and terrorism as normally understood. They also include undermining the constitution, jeopardising national interests, sending threatening or insulting messages or fabricated news, promoting terrorist ideologies (as opposed to terrorism *per se*) and publishing information about the manufacture of tools or materials used in terrorist acts.

These broad prohibitions simply cannot be justified. It is perfectly legitimate to 'undermine' (or criticise or seek to change) the constitution, as long as this is done through peaceful means. Otherwise, it would be a crime to seek to achieve any amendments to the constitution. The concept of 'national interests' is impossibly flexible. In many countries, it is a crime to make threats, but sending insulting messages is often perfectly legitimate or at worst may warrant a civil defamation suit. Similarly, promoting terrorism ideologies, whatever they may be, is not the same thing as inciting terrorism, and the narrower offence should be preferred.

It is well established that criminal prohibitions on the publication of false or fabricated news *per se* (as opposed to false and defamatory statements), even if conditioned on some negative outcome, such as fear, panic or public disorder, are not legitimate. Such rules have been struck down by leading courts in countries such as Antigua and Barbuda,<sup>22</sup> Canada<sup>23</sup> and Zimbabwe.<sup>24</sup>

Finally, publishing information relating to the manufacture of tools used in terrorist acts is also not legitimate. Terrorists, by-and-large, use tools that are used for many other purposes, some of which are perfectly innocuous, such as computers, and others of which are, if not innocuous, certainly not under a cloak of secrecy, such as guns. It is perfectly legitimate to publish information about the manufacture of these items.<sup>25</sup>

At least as serious is the low standard applied in many of these offenses. A wide range of terms is used including 'disrupt', 'advocacy', 'promotes or defends', 'seeks to', 'jeopardise', 'support', 'call for', 'promote' and 'facilitate'. Many of these contrast sharply with the intentional incitement standard under international law and in many countries. Without the requirement of a close link between the speech and the proscribed result that is

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<sup>22</sup> *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (PC).

<sup>23</sup> *R. v. Zundel* [1992] 2 731 (SC).

<sup>24</sup> *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99.

<sup>25</sup> An Internet search will immediately lead one to hundreds of posts about how to build a machine gun, including simple-to-follow instructional videos.

implied by the term ‘incitement’, there is a risk that much speech that is simply not harmful may be prohibited.

A good example of the level of tolerance required for challenging speech, even in difficult circumstances, comes from Apartheid South Africa, prior to the new democratic Constitution with its strong protection for freedom of expression and open political debate.

In *R. v. Nkatlo*, decided during the early years of Apartheid, the appellant had been convicted of promoting racial hostility on the basis of a number of comments made at an African National Congress meeting, including the following: “[T]he only hope we have to change affairs is by a revolution and a revolution means bloodshed.” The court held: “Language of this kind is liable to promote feelings of hostility between Europeans and Natives but I do not think that it leads necessarily to an inference of an intention to promote such feelings. It is at least as possible that the accused was weighing up the dangers in the present situation and issuing a warning of the dangers in the future.”<sup>26</sup>

#### Advocacy of Hatred

Protection of religion receives extensive treatment in the draft Assembly Law. Article 5 prohibits both advocacy of national, racial, religious and sectarian hatred, and denigrating or degrading religions, sects, beliefs or their followers. Articles 13(2)(a), (d), (e) and (f) substantially expand upon Article 5. They prohibit, among other things, attacking a religious belief or insulting its rituals, printing a version of a religious book which is deliberately distorted or which aims to insult a religious group’s rules or teachings, publicly insulting a religious figure or a symbol that is respected by a religious group, or publicly ridiculing a religious figure or ceremony. Breach of these rules may lead to a fine of between one and ten million Iraqi Dinars (approximately US\$845 to 8,450), and imprisonment for at least one year.

Article 55(2) of the draft Parties Law provides for at least ten years’ imprisonment for any individual who establishes a party which, among other things, “promotes or defends ... sectarian or racial cleansing beliefs”. Article 6(2) of the draft Internet Law makes it a crime to provoke religious strife.

Article 20(2) of the ICCPR calls on States to prohibit “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Article 20(2) only protects individuals, not ideas or beliefs as such. As the UN Human Rights Committee has clearly stated:

Blasphemy laws should not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>27</sup>

Article 5(1) is far broader than these international standards, prohibiting the mere denigration or degrading of religions. Indeed, none of the prohibitions noted above

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<sup>26</sup> 1950 (1) SA 26 (C), p. 36.

<sup>27</sup> Note 21, para. 50.

conform to the incitement standard under international law, pursuant to which it is perfectly legitimate to promote sectarian beliefs (which may not be rooted in hatred) or even religious strife (which is present in almost every society, and which normally does not translate into violence).

13(2) is far more problematical, protecting not only religious believers but also their religions, rituals, rules, teachings, and respected figures and symbols, along with prohibiting the mocking of religious figures or rituals through imitation. These prohibitions fall very far short of advocacy that constitutes incitement to hostility, discrimination or violence.

#### Other Problematical Rules

The draft CMC Law contains other restrictions on content which are problematical in part because of their extreme generality. Article 2(5) lists, as one of the aims of the law, to protect individuals against defamation. Article 2(10) lists another as being to promote effective mechanisms of self-censorship, and this is backed up by Article 34(1), which calls on the Media Consultants Department of the CMC to establish a media policy framework which promotes self-censorship. If the General Manager of the CMC has “sufficient reasons to believe” that a media outlet poses “a threat to public health or regulations”, he or she may, with the approval of the Board, immediately suspend that media outlet, until the Hearings and Complaints Department has the power to review the matter (Article 26).

It is not the role of a media law to provide a parallel system for addressing defamation; this should be done through the civil law. Media codes of conduct often exhort the media to strive for accuracy and provide a right of reply in certain circumstances. This is quite different from establishing a parallel defamation regime and is, in particular, linked to the very nature of media activity, making it particularly appropriate for treatment through a code.

It is not clear whether the reference to ‘self-censorship’ is a poor translation of the original or whether this is really what was intended. Regardless, it is most certainly not the role of the authorities to promote self-censorship, which is widely regarded as an unfortunate phenomenon in most societies.

The power of the General Manager to suspend a media outlet, even if for a relatively short period of time, is draconian and also quite unnecessary. If the actions of a media outlet pose an imminent and serious threat to an important public interest, this should be dealt with through the criminal law, as it would for any such activity not involving a media outlet. Suspending a media outlet is an extremely serious sanction which should be contemplated only in accordance with a procedure which respects the strict requirements of due process. Clearly giving the General Manager the power to suspend media outlets does not meet these requirements.

The draft Internet Law has a number of even more problematical content restrictions. Pursuant to Article 6(2), individuals may be sentenced to life imprisonment and fines of between 25 and 50 million dinars (approximately USD21,360-42,720) for using computers

or information networks to harm the reputation of the country, while Article 6(4) provides for the same penalties in relation to disseminating false or misleading facts with intent to weaken trust in the electronic financial or trading systems, or to damage the economy or financial trust in the State.

Article 18(2)(B) makes it a crime to use a fake website or to hide the truth behind a website with the intent to commit one of the crimes mentioned in the law. Finally, Article 21 provides broad protection for intellectual property. Pursuant to Article 21(1)(A), it is a crime, punishable by imprisonment of between two and three years and a fine of between ten and twenty million dinars (approximately US\$8,450-16,900), to publish through computers any work belonging to others and protected by international law. Fines are also provided for anyone who copies, publishes or shares “unlicensed software or information” (Article 21(2)).

It is widely recognised that States as such do not have a reputation and that to impose any penalties at all for harming their ‘reputations’ is not legitimate. Thus, in a Joint Declaration issued in 2000, the (then) three special international mandates on freedom of expression – 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 – stated:

[T]he State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions.<sup>28</sup>

Similarly, the UN Human Rights Committee has stated:

States parties should not prohibit criticism of institutions, such as the army or the administration.<sup>29</sup>

The extremely harsh potential sanctions associated with this criminal offence make it particularly troubling from the perspective of free speech.

Article 6(4) is inherently offensive to guarantees of freedom of expression. It is perfectly legitimate to engage in media reporting which aims to weaken trust in the financial system or financial management by the State. Indeed, one can hardly pick up a newspaper these days without reading such material. This crime is not rendered legitimate by the requirement that the news be false. As noted above, conditioning crimes by reference to falsity does not bring them into conformity with the right to freedom of expression. Even the very best journalists make mistakes, in part due to the need to report in a timely fashion in the public interest, and it is simply not appropriate to criminalise this behaviour. Once again, the extremely harsh potential sanctions exacerbate this problem.

The prohibition on using a fake website or hiding the truth behind a website (whatever these might mean) to commit one of the crimes in the law is problematical for the same

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<sup>28</sup> Adopted 30 November 2000.

<sup>29</sup> Note 21, para. 38.

reason. As noted, the scope of crimes in the law is far too broad and mere reference to falsity is simply not enough to prohibit an expressive activity.

It is normal to put in place rules, including criminal rules, to protect intellectual property. The problem with the Article 21 rules is that they fail to recognise the important exceptions to intellectual property which are necessary to provide an appropriate balance between safeguarding the interests of authors and owners and protecting freedom of expression. These allow for certain uses of material which is otherwise subject to intellectual property protection. For example, one may use copyrighted material for non-commercial research or for criticism and news reporting. The material remains subject to copyright protection, but these are treated as 'fair uses'. At least in translation, Article 21 does not appear to recognise any fair uses for copyrighted material.

Article 25(1) of the draft Parties Law authorises political parties to use the media to disseminate their views and programmes, while Article 25(2) prohibits media outlets from "taking sides against political parties". In many countries, the broadcast media are subject to obligations of balance and impartiality in the treatment of subjects of public controversy, which certainly includes politics and the treatment of political parties. This is justified, in part, on the basis that these broadcasters use a public resource, the airwaves, and in part on the special characteristics of the broadcast media.

It is, however, unclear whether a similar constraint would be considered legitimate in the context of the print media, where very different considerations come into play. In any case, it seems quite unrealistic to try to impose such a rule in Iraq, where a large part of the media sector is owned or controlled by political elites.

### Conclusion

Taken together, the five laws impose a wide array of content restrictions on the media, the Internet, political parties and demonstrators that do not conform to international standards. Some are expressed in unduly broad terms, some lack the necessary protections and others are simply not legitimate. The cumulative effect of these rules is to vastly limit freedom of expression. It is also a matter of some concern that certain types of restrictions are repeated across several of the laws. As a package, they reflect an unfortunate fixation on the part of the Iraqi government with trying to limit the scope of free speech in different sectors of Iraqi society.

## **III.2        Government Control Mechanisms**

A second very problematical area in the five laws is that they often allocate undue power to the government to control the exercise of rights. This takes two forms. First, in many instances the authorities are simply given excessive powers to approve or refuse, or obstruct, the exercise of freedoms such as to assemble or to engage in expressive activity. Second, beyond the substance of the rules, the systems envisaged in the five laws often fail to respect the fundamental international principle that bodies which regulate the exercise

of fundamental freedoms must be independent of government and other forms of political or commercial interference.

The draft Internet Law alone does not manifest this tendency towards excessive government control. This is mainly because it does not develop specific regulatory rules or systems, but simply defines a range of online criminal behaviour, to be applied in the normal way through the courts.

The draft Assembly Law gives the authorities undue control over the right of assembly through a number of rules. Articles 7 to 11 impose a number of limitations on the rights to public assembly, defined as a gathering in a private or public place which is open to all (Article 1(4)), and to demonstrate, defined as a gathering of individuals in public roads and squares, with the purpose of expressing an opinion or demanding a right (Article 1(5)).<sup>30</sup>

Article 7 establishes that citizens have a right to public assembly, while Article 10(1) establishes the right to demonstrate. However, those wishing to host an assembly or demonstration must obtain authorisation from “the head of the administrative unit” at least five days prior to the proposed event. The application must stipulate the subject, purpose, time, place and names of the members of the organising committee. If an administrative unit decides to reject an application to hold an assembly, the organisers shall be notified of this fact at least 24 hours prior to the proposed date of the assembly. In this case, the chair of the organising committee may lodge an appeal with the courts, which shall be dealt with on a summary basis.

The fact that the draft Assembly Law requires authorisation for the holding of any public assembly, even a very small one, is simply not legitimate pursuant to international human rights standards. The European Court of Human Rights has made it clear that the right to freedom of assembly applies very broadly to “private meetings and meetings on public thoroughfares, as well as static meetings and public processions”.<sup>31</sup>

A leading statement on international standards relating to freedom of assembly is the *Guidelines on Freedom of Peaceful Assembly, 2<sup>nd</sup> Edition*, adopted under the auspices of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) and the Venice Commission (Guidelines).<sup>32</sup> The Guidelines state quite clearly that “those wishing to assemble should not be required to obtain permission to do so” and further: “It is not necessary under international human rights law for domestic legislation to require advance notification of an assembly.”<sup>33</sup>

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<sup>30</sup> In this Report, both static and moving gatherings are referred to as assemblies.

<sup>31</sup> *Sergey Kuznetsov v. Russia*, 23 October 2008, Application No. 10877/04, para. 35.

<sup>32</sup> The Guidelines were prepared by a Panel of Experts on Freedom of Assembly operating under the auspices of ODHIR, in consultation with the Venice Commission, and were formally adopted by the Venice Commission at its 83<sup>rd</sup> Plenary Session on 4 June 2010. They are available at: [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)020-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)020-e.pdf).

<sup>33</sup> Clause 2, p. 7 and Clause 4.1, p. 9.

The European Court of Human Rights has indicated that requiring those wishing to hold public assemblies to go through a prior procedure may be legitimate only “as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering”.<sup>34</sup> The Guidelines recognise that there may be circumstances in which it is necessary for the authorities to be informed about a planned assembly, but only,

where its purpose is to enable the State to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others.

In such cases, the organisers should only be required to submit a “notice of intent rather than a request for permission.”<sup>35</sup> Furthermore, the law should make provision for ‘spontaneous assemblies’, where it is not practical to provide prior notification and, in such cases, the authorities “should always protect and facilitate” the assembly, as long as it is peaceful.<sup>36</sup>

The requirements in Article 7 of the draft Assembly Law clearly do not meet these requirements and instead give the authorities undue control over the holding of assemblies. An initial problem with Article 7 is that it applies to all assemblies, rather than only when special measures on the part of the State are required to protect either the right of assembly or public order. Furthermore, Article 7 clearly represents an authorisation process, rather than a simple notice of intent. This is clear from the fact that it envisages the authorities refusing to authorise assemblies, and even provides for a right of appeal against such refusals (Article 7(3)). The problem is exacerbated by the fact that the law fails to specify the grounds upon which an proposed assembly may be refused. These constraints do not meet international standards regarding freedom of assembly.

The draft CMC law manifests the second type of problem noted above, namely a failure to ensure that regulatory bodies undertaking even appropriate tasks are sufficiently insulated from government control. The key oversight body established by this law is the Board of Trustees of the Communications and Media Commission (CMC). Article 11 provides for the nine full-time members of the Board to be nominated by the cabinet and appointed by the parliament, with at least four members having some kind of specialisation in telecommunications. Pursuant to Article 12(2), members may not hold any “governmental, legislative or judicial post” or be a member of a political party. Strong conflict of interest rules are contained in Article 14. Article 15 protects the tenure of members of the Board, once appointed, although a member may be terminated by a two-thirds vote of the other members (Article 15(8)).

These measures provide a reasonable level of protection against interference in the CMC Board, but they do not fully meet international standards in this area, or better practice in other countries. One issue is that there is no requirement for the process of appointments

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<sup>34</sup> *Ibid.*, para. 42.

<sup>35</sup> *Ibid.*, Clause 4.1, p. 9.

<sup>36</sup> *Ibid.*, Clause 4.2, p. 10.

to be open and no opportunity for public input. This could be provided for in various ways, such as by allowing civil society groups to nominate members, by holding public hearings at parliament and/or by publishing a shortlist of candidates. Even more serious is that fact that the members are nominated exclusively by cabinet. This poses a real risk of political interference or control over them. Appointments should instead either be made directly by parliament or through some other means that ensures the involvement of a greater range of players (for example by allowing civil society to nominate members).

Other bodies which form part of the overall CMC structure are also insufficiently protected against political interference. Pursuant to Article 18 of the draft CMC Law, the Board recommends the General Manager, but he or she is appointed by parliament. Removal of the General Manager requires a two-thirds vote of the Board, but must be approved by Cabinet. It is unnecessary for parliament and the cabinet to be involved in the process of appointing or removing the General Manager and this creates possible opportunities for political interference.

The Radio Frequency Consultants Department is the part of the CMC which “provides consultancy to the CMC in allocating radio frequencies”, a key function of the organisation. The head of this Department is chosen by the CMC Board, while the deputy head comes from the National Telecommunications Ministry. Other members include a representative of the armed forces appointed by the Joint Chiefs of Staff, a representative of the security services appointed by the Minister of Interior and four experienced individuals, “chosen by the department upon the recommendation of the head of the department” (Article 32(1)-(2)). It is not clear from the draft Law which department this refers to, and this needs to be clarified.

The precise role of the Radio Frequency Consultants Department in relation to frequencies is not clear from the draft CMC Law. If its role is simply to make recommendations, which are then substantively reviewed by the Board, then the issue of its independence is not as serious. If, on the other hand, its recommendations are likely to be rubber stamped by the Board, then the need for independence is much greater. In any case, it is not clear why the government should feel the need to exert such direct powers over this body, with at least three members, and perhaps more, being appointed directly by ministries.

A related issue is the development of a National Radio Frequency Allocation Plan, provided for by Article 61. This is to be coordinated by the Radio Frequency Consultants Department, with “relevant ministries, regional governments and private operating companies”. There is no mention of wider public involvement or of consultation with civil society groups, despite the important public interest in such a plan.

The Media Consultants Department plays a very important role in relation to broadcasting content, as it develops and applies codes of conduct for the media (see below). The deputy head of this body is to come from the Ministry of Culture, while the other eight members are appointed by the Board (Article 33). Given the sensitive role of this body over media content, even one member from a ministry is too many.

Several provisions of the draft CMC Law relate to the development and application of a code of conduct for the media. Article 2(10) stipulates, as an aim of the law, the development of an “effective mechanism to be used by media organizations for self censorship”. Article 16(6) calls on the CMC to approve the media codes of conduct developed by the Media Consultants Department, while Article 34(2) gives that Department the task of developing codes, in consultation with broadcasters, to address a range of content issues such as accuracy, respect for morals, neutrality, diversity, and refraining from incitement to hatred and violence. Pursuant to Article 34(7), these codes should be guided by Article 19 of the *UN Declaration on Human Rights* and of the *International Covenant on Civil and Political Rights*.

Broadcast regulators in many countries are required to develop and apply codes of conduct for the broadcast media. The draft Law does not explicitly limit the scope of the codes to the broadcast media and the reference to codes in the plural form may be taken as a suggestion that different codes will apply to different media sectors. The idea of a statutory code of conduct for the print media is very controversial. Furthermore, better practice dictates that any codes of conduct be developed in close consultation with not only broadcasters but also a wider range of stakeholders, including members of the general public, who the codes are intended to protect. There is no requirement for this in the draft CMC Law.

It is not clear from the draft CMC Law exactly which body is responsible for applying these codes. The Hearings and Complaints Department specialises in receiving complaints about “cases of serious breaches and violations in codes of conduct and regulations set by the CMC”, which it is authorised to decide (Article 23). This would appear to include the codes to be developed by the Media Consultants Department. Pursuant to Article 34(5), however, the Media Consultants Department is tasked with developing “recommendations against any media organization crossing the lines of codes of conduct”, which it shall present to the Board for action. One possible resolution of this apparent contradiction is to understand the mandate of the Hearings and Complaints Department as being limited to very serious breaches, while the Media Consultants Department is expected to look after more mundane breaches.

The law fails to stipulate what sorts of sanctions the Board may impose when it holds that a licensee has breached a code developed by the Media Consultants Department. However, in the context of a finding of breach by the Hearings and Complaints Department, a range of sanctions are provided for, including suspension of the licence (Article 27). The range of sanctions is appropriately wide, but it is problematical that the law does not place conditions on the application of the more serious sanctions (such as that the problem has not been remedied by the previous application of less onerous sanctions).

The draft CMC Law does not set out any procedural rules in relation to the formulation of recommendations by the Media Consultants Department for the Board in response to breaches of the codes. This may be contrasted with the strong procedural protections which are put in place for complaints before the Hearings and Complaints Department. At a

minimum, media being investigated for a breach of the code should have the right to take advantage of basic procedural protections, such as the opportunity to be heard.

The draft Parties Law also includes some provisions which might open the door to excessive government control over political parties. Article 19 calls for the establishment of a dedicated unit within the Ministry of Justice, the Political Parties Affairs Department, to focus on political parties issues. Among other things, this department will monitor the extent to which parties respect the law, investigate any breaches and lodge lawsuits where the law has been violated. This may involve lodging cases before the administrative court for the dissolution of a party (Article 40(1)), and calling on the court to suspend the activities of a party (Article 40(2)). Parties are legally obliged to inform this department of any “activities and relations” they have with non-Iraqi parties and political organisations (Article 26(9)).

The same department plays a significant role in party funding. It is tasked with making recommendations to the Ministry of Finance on the total amount of funding that should be provided to parties (Article 19). Pursuant to Article 49, parties must obtain the permission of this department before accepting gifts of cash from anyone, including local individuals, or sending funds to others, subject to a penalty of between one and three years' imprisonment (Article 59).

It is not inappropriate for the authorities to take action where political parties breach the law, as they would do when any other actor in society operates outside of the law. It is, however, a matter of concern that the draft Law seeks to establish a dedicated unit within the Ministry of Justice for this purpose. There would seem to be no reason why such breaches should not be dealt with in the normal way, in other words through an independent prosecutors office. The requirement to inform this department of any relations with non-Iraqi parties is similarly problematical. Many political parties have relations of various sorts with foreign entities and there is nothing wrong with or suspicious about this.

The obligation on parties to obtain prior approval from the Political Parties Affairs Department before receiving any funding is neither legitimate nor practical. It is appropriate for the law to establish rules regarding funding for political parties which are in line with international standards and the draft Parties Law does this. But prior approval implies a very high degree of control, exercised by a government ministry, which is thus wide open to abuse and quite unnecessary to ensure compliance with the regime for funding set out in the law. It would also seem to be impractical, as parties would need to obtain permission in advance of anyone being able to make a donation.

In a far more subtle way, the Journalist Law could also be criticised for attempting to extend government control, in that case over journalists. On its face, the law does not appear to do that but, rather, it extends certain rights and benefits to journalists. However, previous versions of the law sought to extend these rights and benefits only to journalists who were members of the Journalism Syndicate. Seeking to establish *de facto* or *de jure* mandatory journalists' associations is a key way that repressive governments around the

world, and in particular in the Middle East, have sought to exercise control over journalists. This was, for example, an important part of the strategy of the Egyptian government under Mubarak and his predecessors.<sup>37</sup>

More generally, whenever journalists receive special benefits directly from the State, this tends to undermine their independence. There is a natural tendency not to want to bite the hand that feeds you. This does not, of course, apply to the vesting of rights in journalists, such as the right to protect the confidentiality of their sources of information. But providing special financial benefits to journalists, such as the disability payments provided for in Article 11 of the Journalist Law, does risk undermining their independence.

As the analysis above demonstrates, the five laws provide for a number of vehicles of government control over the media, over assemblies, over political parties and even, in a more subtle way, over journalists. While perhaps not so egregious as the content restrictions canvassed in the previous section, these rules are still very problematical. It may be noted that while content restrictions, even if unacceptably vague, will still normally only apply to a relatively small range of expression, whereas even one vehicle for exerting control can seriously undermine bodies and systems that should operate freely in society.

### **III.3        Other Problematical Regulatory Tools**

The five laws also establish a number of other problematical regulatory rules which are difficult to group into categories, as they are quite varied in nature. The most intrusive rules relate to the right of assembly and, in particular, to the establishment of political parties. But the rules also impinge on freedom of expression, through the licensing system envisaged for broadcasters and other forms of communication, as well as the rules for journalists.

#### Freedom of Assembly

The draft Assembly Law imposes a number of unwarranted substantive conditions on the holding of assemblies. Thus, pursuant to Article 7, public assemblies must have an organising committee, composed of a president and at least two other members. This committee is responsible not only for managing the assembly, but also for protecting it. It is not the business of the State to impose conditions like this on the organisers of assemblies. It is also not realistic to expect such a committee to be responsible for managing every aspect of assemblies.

The rule that the committee is responsible for protecting assemblies is oppressive; this is the job of the authorities. This is clear from the OSCE Guidelines, which state: "The

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<sup>37</sup> See, for example, Mendel, Toby, *Assessment of Media Development in Egypt* (UNESCO, Cairo, 2011). Available at: [http://www.unesco.org/new/en/cairo/about-this-office/single-view/news/unesco\\_releases\\_its\\_new\\_publication\\_assessment\\_of\\_media\\_development\\_in\\_egypt\\_based\\_on\\_unescos\\_media\\_development\\_indicators/](http://www.unesco.org/new/en/cairo/about-this-office/single-view/news/unesco_releases_its_new_publication_assessment_of_media_development_in_egypt_based_on_unescos_media_development_indicators/).

organisers should not be liable for the actions of individual participants nor for the actions of non-participants or *agents provocateurs*.<sup>38</sup>

Pursuant to Article 8 of the draft Assembly Law, public assemblies may not be held on public roads and may not continue after 10pm, while demonstrations may only take place between 7am and 10 pm (Article 10). Pursuant to Article 9, public assemblies may not be held in various locations, including places of worship, schools or universities, unless the subject matter of the assembly concerns these institutions. It is prohibited to carry firearms, sharp tools or any other materials that are harmful during an assembly.

These limitations on assemblies cannot be justified. It is completely illegitimate to prohibit public assemblies on public roads and in democracies, they often do take place precisely in such locations. The OSCE Guidelines make this quite clear: “Assemblies are as much a legitimate use of public space as commercial activity.”<sup>39</sup> This is supported by the jurisprudence of the European Court of Human Rights, which has stated:

[A]ny demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention [guaranteeing freedom of assembly] is not to be deprived of all substance.<sup>40</sup>

It is also not legitimate to prohibit assemblies in certain locations, such as places of worship or universities, at least to the extent that these are public places. In such cases, the only reason to prohibit assemblies in them would be a serious risk of harm to an overriding interest, such as the rights of others or public order. The same applies to the various time limits on assemblies, which might be justified in a residential area where there were children, but not in a commercial district.

The draft Parties Law also contains a number of problematical regulatory rules. A number of conditions are placed on founders of parties. They must be 25 years or older (Article 9(2)). This is discrimination on the basis of age, as well as a breach of the right to participate in public affairs. Furthermore, there is no justification for such a rule; there is no reason to seek to exclude young adults from participating fully in the political process.

Pursuant to Article 11(1)(a), to be registered a party must have 2000 founding members residing in at least six Iraqi governorates, with at least 100 members in each of those governorates. While some degree of discretion rests with the authorities in setting the precise rules in this area, and most countries have at least some minimum requirements, this is excessive. In Canada, in contrast, although it is a vast country with a larger population than Iraq, parties only need to have 250 members. The requirement of a strong cadre of members in at least six governorates is particularly oppressive. This is all the more so in light of Article 11(2)(e), which requires parties to submit a copy of the criminal

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<sup>38</sup> Clause 5.7, p. 12.

<sup>39</sup> Clause 3.2, p. 9.

<sup>40</sup> *Sergey Kuznetsov v. Russia*, note 31, para. 44.

records of all founding members, a huge barrier as assessed against the need for 2000 members. In any case, the prohibitions that this entails – including that one might not have been convicted of such crimes as moral turpitude or financial wrongdoing – cannot be justified. There is no reason for imposing these restrictions on every one of the 2000 founding members of a political party.

The draft Parties Law also seeks to impose substantive conditions on the programmes of political parties. A recurring theme here is that parties should not only not contest the idea of national unity, but that they should actively promote it. Article 5(2) prohibits parties founded on “ethnic or national bases”, while Article 6(1) goes further, requiring parties to “participate in developing political, social and economical affairs on the bases of national unity”. This is reinforced by Article 8(1)(c), which requires parties’ goals not to conflict with national unity, Article 26(3), which requires parties and their members to commit to protecting national unity, and Article 40(1)(c)(1), which allows any party which has ‘jeopardised’ national unity to be dissolved.

Article 8(4) goes even further and prohibits individuals who call for ideas that are in conflict with the “general principles stated in the Constitution” from founding parties. Article 8(1)(a) prohibits parties from having goals which are in conflict with the Constitution. Harsh penalties await anyone who fails to respect these rules. Pursuant to Article 55(2), imprisonment for at least ten years will be imposed on anyone who illegally founds a party which, among other things, seeks to undermine the provisions of the Constitution.

These restrictions are not legitimate. As long as a party does not advocate violence, or other direct breaches of the law, it is perfectly legitimate to criticise or seek to change the constitution. Indeed, this can serve as an important means of positive change, as recent events in Tunisia and Egypt have demonstrated. In many countries, citizens groups and political parties have advocated for changes to constitutional rules that they consider to be illegitimate or inappropriate, often to the benefit of society as a whole. Not so long ago, the Labour government in the United Kingdom implemented its longstanding plans to fundamentally restructure the constitutional arrangements in that country. Under the draft Parties Law, it would have been illegal for them to even promote this policy.

Parties even have a right to expound political platforms that challenge the very unity of the State, again subject to their seeking to achieve this peacefully. In a series of cases involving Turkey, the European Court of Human Rights has upheld the right to parties to challenge the structure of the State. Thus, the case of *Socialist Party and Others v. Turkey* involved the dissolution of a political party by the Constitutional Court on the basis that its activities, specifically statements by senior officers, included advocating for a Kurdish-Turkish federation, to the detriment of the unity of the Turkish State.<sup>41</sup>

In holding that this was a breach of the right to freedom of assembly, the European Court of Human Rights stated:

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<sup>41</sup> Application No. 21237/93, 25 May 1998 (European Court of Human Rights).

Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.<sup>42</sup>

As far as the substance of the calls by Socialist Party leaders, the Court stated:

In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.<sup>43</sup>

Given that the Court found in the statements "no trace of any incitement to use violence or infringe the rules of democracy", there had been a breach of the right to freedom of assembly.

Article 13 of the draft Parties Law allows a court to register or reject an application for political party status, but it fails to set out the grounds upon which a refusal might be based. This opens up the possibility of political interference in this process or inappropriate rejection of an application. Something as important the grounds for refusing to allow a political party should be spelt out clearly in law.

The draft Parties Law also imposes very intrusive and onerous conditions on how parties must be organised and function. Pursuant to Article 28(2), all documents of a political party must be notarised. It is not clear what the scope of this is, but it is not legitimate to require this except, perhaps, for some key constitutional party documents.

Article 31 prescribes the structures of parties, which shall include the General Board, the General Assembly or General Conference, the Executive Bureau, the Administrative or Political Bureau, Party Branches and Party Committees. The following articles spell out in some detail how each of these should function. Chapter 6 of the draft Law stipulates very precise rules regarding its statutes. These must, among other things, describe the roles of the "General Board" of the party, its executive office, its branches and its committees, including by indicating which body is responsible for decisions regarding mergers with other parties and for representing the party in its relations with the government, and numerous other issues such as choosing the leader, the formation of the different party structures, finances and so on (Article 30(2)). Finally, Articles 36-38 prescribe rules for how mergers and alliances may take place, including such details as agreement on the name, slogan and motto of allied parties. These rules are supplemented by Article 8(3), which prohibits parties from taking a military or semi-military form, or being linked to the armed forces, breach of which will, pursuant to Article 56, attract a penalty of imprisonment for at least six years.

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<sup>42</sup> *Ibid.*, para. 45.

<sup>43</sup> *Ibid.*, para. 47.

It is totally inappropriate for the State to impose these sorts of detailed requirements on parties. In most countries, parties receive certain benefits, for example financial benefits, and it is thus appropriate to require them to be carrying on the legitimate functions of a party (i.e. putting forward candidates for election) and to be operating in accordance with certain minimum financial standards. Most countries also place restrictions on foreign funding for political parties, which is justified under international law, which allows States to restrict the political activities of aliens. Monitoring of financial conditions can be achieved by requiring parties to have annual audits, which is adequately catered to by other provisions of the law.

There is nothing in the provision of benefits to parties, or even in the wider social role that they play, that would justify the State dictating to them how they should be internally structured and function. To give a specific example in response to the prohibition on military structures, an ex-military person organising a party may be most familiar with military forms of organisation. There is no reason why he or she should not employ them in the structure of his or her party.

The law also provides for the dissolution of a party on far too flimsy grounds, which include activities that violate the rights of others, no matter how superficially, or that are deemed to harm Iraq's national interests. The latter is far too flexible a term to warrant even the judicial dissolution of a party. Furthermore, according to Article 65 (numbered as the second Article 64 in the draft on file), the belongings of a dissolved party shall be given to another party. Given that, for the most part, parties compete against each other, this seems a very odd provision, which could be open to abuse (for example, by one party trying to get the assets of another). Unless the leadership of the dissolved party has specifically requested such a transfer, the assets should normally revert to the State.

The draft Law also contains some peculiar provisions regarding legal suits. Pursuant to Article 26(10), parties are required to make a commitment to file suits against any member that violates the parties law. This is backed up by Article 62, which waives punishment for parties reporting such crimes under certain conditions. While political parties may wish to report crimes as concerned citizens, it is not appropriate to require them to do so.

### Telecommunications Licensing

A key problem with the draft CMC Law is that it seeks to impose licensing requirements on far too wide a range of players. It is accepted that broadcasters and commercial telecommunications providers need to be licensed, in part because the airwaves are a public resource. The draft CMC Law, however, attempts to impose a far wider range of licensing obligations. For example, it formally imposes licensing requirements on a vast range of Internet service providers, basically any business which provides communications services to its customers, which would theoretically even include Internet cafes (see the definitions in Article 1 and Article 52). It also requires anyone seeking to provide voice services, including via the Internet, to obtain permission from the CMC (Article 6(13)). The law would also require amateur radio users to obtain a licence (Article 65), and even URLs need to be registered with the CMC (Article 6).

It is legitimate to require top-level Internet service providers to be licensed, among other things for technical reasons, and to ensure appropriate competition and prevent the development or abuse of dominant positions. However, these requirements do not apply to the vast array of services that would be subject to licensing under the draft CMC Law. A particularly good example of this is the prohibition on providing telephone call services, which would make it impossible for companies like skype, which are in popular use around the world, to operate in Iraq.

The nature of the draft CMC Law suggests that the drafters simply extended broad licensing requirements to other actors, building on a traditional telecommunications model, instead of considering what services really need to be licensed and how. This is apparent from the rules on licensing which are applied to broadcasting. While it is accepted that broadcasters do need to be licensed, this cannot be done simply through extending a licensing regime designed for telecommunications. However, careful analysis of the licensing rules in Chapter 7 of the draft CMC Law suggests that this is exactly what has been done. For example, none of the particular needs of broadcasting, which include rules designed to promote diversity and to ensure that a wide range of different players and types of players are present on the airwaves, are reflected in the licensing regime. Indeed, there are no specialised criteria for awarding broadcasting licences, over and above general criteria about customer service, competition and fair treatment of customers, all of which are aimed at telecommunications providers.

Another example of the failure of the draft CMC Law to tailor its rules to the wide variety of services it brings within its regulatory remit is the rules on user devices, set out in Articles 7-9. It is clearly appropriate, indeed necessary, for the regulator to impose conditions on certain user devices, for example to protect consumers and to ensure inter-operability. But Article 7 requires the CMC to develop the “entire set of technical criteria for the ITC sector and end user devices”, and no equipment which does not pass these criteria may be used or sold. Once again, we see the *ad hoc* extension of rules beyond any legitimate public interest.

The problem of randomly extending telecommunications rules to a variety of other players and services is exacerbated by the very severe sanctions envisaged for breach of the law. Thus, Article 75 provides for imprisonment for the illegitimate use of communications systems without paying fees (which could include using skype to make a telephone call), while Article 76 does the same for using illegal media for communications purposes without paying fees. Article 80 is harsh, providing for a minimum sentence of three months’ imprisonment for anyone who operates a public communication network in breach of the law (i.e. without a licence). Article 82 imposes a minimum sentence of six months’ imprisonment for using radio waves without a licence.

### Other Issues

The Journalist Law, for example, defines a journalist in Article 1(1)(1) as an individual with a “full time journalism job”. This would exclude anyone who practised journalism part time and could even be read so as to exclude freelancers or other journalists who worked on a consultancy basis. It is also not clear whether this definition would include journalists working for new media, such as bloggers or writers for online publications.

The sorts of benefits that are provided in the Journalist Law, to the extent that they are mandated under international law, should be provided to all of these individuals and perhaps even a wider set of players. For example, the Council of Europe Recommendation on protection of sources applies to ‘journalists’. However, a journalist is defined as any “natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.<sup>44</sup>

These problems are exacerbated by the definition of a media outlet, which is any organisation “related to press and media and is registered in accordance to law”. This definition is circular inasmuch as it defines media as media. Furthermore, it is highly problematical to limit the definition of media to entities which are legally registered. Rather, the definition should focus on what organisations actually do, rather than some formal structure.

As noted above, the draft Internet Law is mostly concerned with establishing crimes relating to the use of the Internet or computers. It does, however, include a few provisions relating to investigation of these crimes and some of these are problematical. Article 26(1), in particular, gives judges extremely wide powers to issue orders relating to investigations and evidence, without imposing any conditions whatsoever on these powers. Thus Article 26(1)(A) allows a judge to issue orders for third parties to save computer data, whenever that information may be changed or lost, but this is the only condition for making such orders. Everyone who runs an active email account would fall into this description. Article 26(1)(E) allows judges to seize computers and transfer them to the relevant authorities to have them analysed, again without any conditions being imposed on this power.

### Conclusion

Once again, we see in the collective approach of the five laws a dramatic lack of respect for the fundamental human rights to freedom of assembly and expression. In most cases, these rules seek to impose unwarranted restrictions on the exercise of these rights. Taken together with the broad content restrictions, as well as the undue degree of government control over the exercise of these rights, the five laws would impose very severe constraints indeed on basic human rights.

## **IV. The Way Forward: Positive Measures**

International law places various obligations on States to create an environment which fosters the free flow of information and ideas, and supports the right to assembly. To some extent, this is done by not placing constraints on the exercise of these rights. Thus, the content restrictions noted in section III.1 of this Report need to be either repealed entirely or at least amended to bring them into line with international standards.

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<sup>44</sup> Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the Right of Journalists not to Disclose Their Sources of Information, 8 March 2000, Definitions.

But international law also places an obligation on States to take positive measures to promote these rights. Specifically, States are required:

- to adopt legislation giving effect to the right to access information held by public bodies;
- to ensure a diverse broadcasting sector, reflecting the views and perspectives of all groups in society;
- to put in place certain protections for journalists; and
- to create a facilitating environment for freedom of assembly.

The five laws canvassed in this Report do include some positive measures which are responsive to these obligations. However, they signally fail to do what is required under international law in this area. The few scattered provisions on access to information fall far short of a fully fledged right to information law, the draft CMC Law fails to provide strong support for diversity, the protections for journalists are very limited and the draft Assembly Law is far too restrictive.

This section of the Report outlines what would be required to meet the positive obligations under international law regarding freedom of expression and assembly.

#### **IV.1        The Right to Information**

As noted above, the right to access information held by public bodies is a fundamental human right, which has been recognised by the United Nations,<sup>45</sup> as well as all three regional bodies for the protection of human rights, in Europe,<sup>46</sup> the Americas<sup>47</sup> and Africa.<sup>48</sup> Detailed legislation is required to give effect to this right, and right to information laws have now been adopted in some 90 countries around the world.<sup>49</sup> Iraq has not yet adopted such legislation, and this should be done on an urgent basis.

The five laws do contain some very rudimentary provisions on the right to information. For example, Article 6 of the Journalist law provides that journalists have the right to access reports, information and official releases, and public bodies must facilitate this, unless the disclosure of the material is harmful to public order and is in conflict with the law. Journalists also have the right to attend conferences and public meetings. Article 62(3) of the draft CMC Law provides for limited access to the register of licences for parties that have a “considerable legal interest” in it.

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<sup>45</sup> General comment No. 34, note 21, para. 18.

<sup>46</sup> *Társaság A Szabadságjogokért v. Hungary*, 13 November 2008, Application No. 37374/05.

<sup>47</sup> *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, (Inter-American Court of Human Rights). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc).

<sup>48</sup> *Declaration of Principles on Freedom of Expression in Africa*, 32<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights, 17-23 October 2002, Banjul, The Gambia. Available at: [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).

<sup>49</sup> See [www.RTI-Rating.org](http://www.RTI-Rating.org).

A slightly broader, but still very limited, set of rules is provided for in the draft Assembly Law. Article 1(2) defines the “right of access to information” as the “right of citizens to obtain information from official institutions in accordance with the law”, with a particular focus on information relating to the work of these institutions and on decisions and policies affecting the public. Article 3(1) authorises public institutions to establish open databases of information and to publish information on their work. Article 3(2) gives the High Commissioner for Human Rights the power to hear complaints from citizens regarding denials of access to information and, where appropriate, to request public bodies to provide the information sought.

This is clearly not a proper framework for the right to information and, even on its own terms has serious problems. Thus, public authorities are authorised to establish databases of information, rather than required to do so. The right to obtain information is only “in accordance with the law”, so absent enabling legislation on the right to information this means very little. Without a clearer framework for the right of access, it is unclear how the High Commissioner for Human Rights would respond to a complaint.

These are useful statements but they do not begin to provide the detailed legislative scheme that is necessary to ensure respect for this right. They are, among other things, unduly restrictive and unclear as to scope, they do not place positive obligations on public bodies to publish information, they fail to establish any procedures for making requests or a clear set of exceptions to access, the right of appeal is at best described only in most cursory terms, they do not provide protection for good faith disclosures or sanctions for obstruction of access and there are no promotional measures.

What is really needed is a detailed and dedicated law on the right to information, which gives effect to this right in accordance with international standards. Such a law should cover seven main areas, as follows:<sup>50</sup>

#### 1. RIGHT OF ACCESS AND SCOPE

The law should clearly establish that everyone has a right to access information held by public authorities, subject only to a narrow and clearly drafted regime of exceptions. It should apply to all information held by, or accessible to, public authorities. Public authorities should be defined clearly to include all three branches of government – the executive but also the legislature and the judiciary – operating at all levels – including regions, governorates and also municipalities – statutory and constitutional bodies, State-owned or controlled corporations, bodies which are owned, controlled or substantially funded by the State, and bodies which carry out public functions.

#### 2. REQUESTING PROCEDURES

Detailed procedures should be set out in the law for making requests for information. These should cover, among other things, how to lodge a request – which should include by

<sup>50</sup> For a detailed list of the requirements of these areas see the RTI Legislation Rating Methodology Indicators prepared by the Centre for Law and Democracy and Access Info Europe. Available at: <http://www.rti-rating.org/Indicatorsfinal.pdf>.

mail, fax, email and personal delivery, including orally – the obligation to provide assistance to requesters as needed, the absence of any requirement for requesters to provide reasons for their requests, clear timeframes for responding to requests, the right of requesters to stipulate the form in which requests shall be satisfied – for example by inspecting the record, by receiving a physical copy or by receiving an electronic copy – and any fees for accessing information.

### **3. DUTY TO PUBLISH**

The right of individuals to request information should be supplemented by an obligation on public authorities to disseminate key information on a proactive basis. This should include information about the public authority, including financial information, information about key policies and other guiding documents relevant to the public authority, detailed information about its programmes and activities, and information about the information it holds and how to access it.

### **4. EXCEPTIONS**

The law should include a comprehensive list of the grounds for refusing a request for information (the exceptions). These should identify protected interests – such as privacy, national security, law enforcement and commercial competitiveness – and allow for requests for information to be refused only where disclosure of the information would cause harm to those interests. The law should also provide for a public interest override, so that information should be disclosed even where this would cause harm to a protected interest, where the overall public interest in the disclosure is greater than that harm. Finally, the right to information law should make it clear that, in case of conflict with another (secrecy) law, its provisions dominate.

### **5. APPEALS**

The law should provide for a right of appeal where a requester has been refused information or other provisions of the law have not been respected. This should include a right to appeal to a higher authority inside the same public authority (internal appeal), a right of appeal to an independent administrative oversight body (external appeal) and a right of appeal to the courts. Ideally, the law should establish a dedicated independent administrative oversight body (i.e. information commission(er)) to serve as the external appeal body.

### **6. SANCTIONS AND PROTECTIONS**

The law should also establish a system of sanctions and protections. There should be sanctions for wilful obstruction of the right of access, for example for destruction of documents, for refusing to cooperate with oversight bodies or for failing to respect the obligations of disclosure established in the law. There should also be protections for good faith disclosures, whether these are pursuant to an obligation in the law or involve the disclosure of information about wrongdoing.

### **7. PROMOTIONAL MEASURES**

The law should also put in place a number of promotional measures. Examples of this include an obligation on all public authorities to appoint dedicated officials (information

officers) to lead on implementation of the law, including by receiving requests, an obligation on a central body to undertake public educational measures, a system for putting in place minimum record keeping standards, an obligation to provide appropriate training programmes to staff and an obligation to prepare an annual report on what has been done to implement the law.

## **IV.2      Independent Regulation of Broadcasting**

A second key pillar of a democratic system for the regulation of the fundamental freedoms of expression and assembly is the establishment of an independent system for the regulation of broadcasting, along with an appropriate set of rules for managing radio frequencies (the airwaves).

The draft CMC Law is a start in this direction, but it fails to reflect international standards in key respects. As noted, key problems are that it does not provide sufficiently robust guarantees for the independence of the oversight body and its constituent parts, that it fails to put in place a proper regime for licensing of broadcasters, and that the content regulation system it envisages fails to protect broadcasters and others against unreasonable and excessive sanctions.

The key international standards in this area are as follows:

### **1. INDEPENDENT REGULATION**

As noted above, international law requires strict compliance with the rule that any regulatory authorities exercising power over the media should be protected against political and commercial interference (i.e. should be independent). In the case of the CMC, this applies to both the main body of the CMC and its constituent structures, to the extent that they exercise autonomous powers. There is no one formula for ensuring independent, and this depends on the institutional structures and socio-political situation in each country. However, there are a number of recognised principles and systems for promoting independence. First, the law should explicitly recognise the independence of the body. Ideally this recognition should also be found in the constitution, and this is the case in Iraq.<sup>51</sup>

Second, the law should contain a clear and detailed statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body. This is only partially the case with the draft CMC Law which, as noted, is largely focused on telecommunications to the detriment of broadcasting.

Third, the appointment of the members of the regulator should be done in a manner which protects them against interference. The weaknesses in the draft CMC Law in this regard are discussed in detail above. Fourth, the body should be accountable to the public through the legislature and its funding should be protected against interference. This is largely true in

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<sup>51</sup> See Article 103.

the case of the CMC, which is accountable to the parliament for its funding (Article 36). It is not entirely clear, however, from the draft CMC Law whether the CMC is accountable in all respects to the parliament.

## 2. PROCESS FOR PLANNING FREQUENCY ALLOCATIONS

It is frequently stated that the airwaves are a public resource and that they should be managed in the public interest. In democracies, a global planning process is put in place regarding the management of these frequencies, with a view to achieving this end. Wide consultations are held with interested stakeholders to ensure that the planning process responds to public needs and interests. This is missing in the draft CMC Law, which appears to allocate power over frequency planning to the Radio Frequency Consultants Department, subject to the power of the CMC itself to make final decisions.

## 3. LICENSING

The process for obtaining a broadcasting licence should be set out clearly in the law, as supplemented by secondary legislation. This should include details about how to apply for a licence, and guarantees that the process will be fair and transparent. An important part of this is that the criteria for deciding between competing licence applications should be set out in law in advance. It is possible to locate the detailed criteria in regulations, but the main criteria should be included in the primary legislation.

The draft CMC Law does largely conform to these standards. However, there are no guarantees of transparency for the licensing process. Furthermore, the criteria for deciding between licence applications are, as noted above, not tailored to broadcasters but are, rather, designed primarily to accommodate telecommunications providers. In particular, there is no concept of the idea of diversity in the airwaves, in the sense in which this is intended in the broadcasting context (which does not just mean the existence of commercial competition).

It is quite clear under international law, at least, that States are required to promote diversity in the airwaves, including through the licensing system. The special international mandates for the protection of freedom of expression of the UN, OSCE, OAS and African Commission adopted a Joint Declaration in 2007 on Diversity in Broadcasting.<sup>52</sup> It refers to three key attributes of diversity, namely diversity of outlet, diversity of source and diversity of content.

The first type of diversity refers to the need to ensure that the State promotes the existence of all three types of broadcasters, public, commercial and community. All three types should benefit from “equitable access to all available distribution platforms”. This might, among other things, require the “reservation of adequate frequencies” for public and community broadcasters. The African Declaration also calls for an equitable allocation of frequencies between different types of broadcasters, and the particular promotion of

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<sup>52</sup> Adopted on 12 December 2007.

community broadcasting “given its potential to broaden access by poor and rural communities to the airwaves”.<sup>53</sup>

The second type of diversity is plurality, which requires that positive measures be put in place to prevent monopolisation of the airwaves. As the 2007 Joint Declaration notes: “[S]pecial measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical.” The Inter-American Court has also stressed the need for such measures:

[T]he conditions of [the media's] use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.<sup>54</sup>

Finally, various measures may be put in place to promote diversity of content, including support “for the production of content which makes an important contribution to diversity” and “measures to promote independent content producers”.<sup>55</sup> The precise measures may vary depending on the context. The African Declaration, for example, stresses the need for the promotion of the use of local languages.<sup>56</sup>

#### 4. CONTENT REGULATION

The main outlines of a democratic system for the regulation of broadcasting content are described above. These include the development of a code of conduct, in consultation with all stakeholders, the application of this code, including through complaints, by an independent oversight body, and the establishment of a graduated system of sanctions, with guarantees that the weightier sanctions will be applied only where less intrusive sanctions have failed to redress the breach. The draft CMC Law only partially respects these rules, as noted above.

### IV.3      **Special Protections for Journalists**

The Journalist Law establishes a number of special protections for journalists. Some of these consist of vague promises of support of one sort or another to journalists. Article 2 states, as the aim of the law, to promote the rights of journalists and to “ensure their protection”. Article 3 calls on all public bodies and other entities to facilitate the work of journalists in a manner that preserves their dignity. Article 7 states that the “tools of journalistic work should not be intercepted” except in accordance with the law. Article 8(1) provides that journalists should not be questioned for their work, unless their actions were contrary to the law, while Article 8(2) requires arrest warrants for journalists to state a “convincing reason” for the arrest. These provisions are simply too vague to be of practical use.

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<sup>53</sup> See Principle V.

<sup>54</sup> *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.

<sup>55</sup> 2007 Joint Declaration.

<sup>56</sup> Principle III.

Some of the benefits provided by the Journalist Law are more concrete in nature. Pursuant to Article 10, journalists may only be questioned in relation to their work where a court order has been issued to this end. The court must inform the Journalists Syndicate or the media outlet where the journalist works of any charges against him or her, and the head of the Syndicate or outlet, or their representative, may be present during any questioning of the journalist and the trial. Article 11 provides for payments to be made to the families of martyred journalists, and to journalists who have been disabled in the course of performing their duties. Article 12 provides that journalists who are injured in the line of duty shall receive free health care.

The Journalist Law also provides certain special labour protections for journalists. Article 13 requires media outlets to sign contracts with journalists, in accordance with a form set by the Journalists Syndicate, while Article 14 prohibits the wrongful termination of journalists.

Finally, Article 4 provides that journalists have a right to obtain information from their sources and to publish it. Furthermore, they have the right to “protect the confidentiality of their sources”.

From the perspective of international law, States are only required to provide two types of privilege to journalists (see below). They may, of course, provide any special privileges and benefits that they may wish to, as long as these do not breach human rights and, in particular the right to freedom of expression. But they are not required to. In practice, in the vast majority of States, journalists do not receive any special benefits or payments from the State, and nor do they receive any special protection in relation to their employers under labour laws.

As noted above, there are potential pitfalls to receiving special direct benefits from the State, as this may lead to dependency and also a reluctance to engage in open criticism either out of concern of losing the benefits or from a sense of not wanting to appear ungrateful (biting the hand that feeds you). In many cases, such special benefits might be questioned by other members of society, for there would appear to be little rationale for privileging journalists in this way. Thus, in the context of Iraq, several other professions – such as the military, the police, health care workers and even teachers – would appear to have a similar claim to benefits arising from death or injury relating to their work, or to free health care. Finally, one must always be suspicious of the reasons why the government would wish to provide such benefits to journalists.

Roughly similar arguments can be made regarding special labour protections for journalists. One exception is what is sometimes referred to as a ‘conscience clause’, whereby journalists may by law have a right to refuse to engage in reporting which is against their beliefs and values, whether due to the content (for example, reporting in a politically motivated manner) or the method (for example, using surreptitious means to gather information). This form of protection relates directly to the nature of the work of journalists, and is sometimes also accorded to other professionals, such as medical

workers. Otherwise, however, there is little rationale for providing special labour protection to journalists and in most countries this is not done.

The two areas where international law does call for special privileges to be provided to journalists, or more properly a wider range of social communicators, are in relation to protection of sources and accreditation. Thus, in relation to protection of sources, the European Court of Human Rights has stated:

Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.<sup>57</sup>

In other words, it is necessary to allow journalists to protect the identity of their confidential sources of information, even when others would not be able to keep this information confidential, for example in the context of a legal case. This right has also been recognised by other international human rights bodies.<sup>58</sup> The main reason for this is that, without such protection, those sources be deterred from coming forward in the first place, to the detriment of the free flow of information to the public.

Similarly, international human rights courts and other bodies have recognised the need to provide special access for journalists to limited space venues through the vehicle of accreditation. In a case from Canada, the UN Human Rights Committee implicitly recognised the importance of accreditation systems, stating:

[T]he Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal.<sup>59</sup>

Because of the important role of journalists in informing the public, it is appropriate to provide them with privileged access to certain venues, such as parliament, and most democracies operate some sort of system to this end.

In general, international law on the right to freedom of expression does not distinguish between journalists and ordinary individuals, providing the same level of protection to all. The question of protection of sources and accreditation thus appear to be exceptions to this general rule as they are applicable only to journalists and other social communicators. This is, however, misleading. The purpose of providing this sort of special protection to journalists is not to protect journalism *per se* but, rather, to protect the right of the public to receive information, which is explicitly protected under international guarantees of

<sup>57</sup> *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

<sup>58</sup> See, for example, the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, available at: [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html), Principle XV.

<sup>59</sup> *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.6.

freedom of expression.<sup>60</sup> In this way, we could say that while the direct benefits are provided to journalists, the real beneficiary (i.e. the rights holder) is the general public.

The Journalist Law does not establish a system of accreditation for journalists. While it does provide for protection of sources, this protection is very general in nature and it may not be very useful in practice. For example, although the protection appears to be absolute, under international law, and in almost all countries, certain interests, such as the right of an accused person to a full defence, will override this right. Instead of leaving this entirely up to the discretion of the courts, it would be far preferable to indicate in the law when and under what conditions the right might be overridden. The nature of the right could also usefully be elaborated on in a number of other ways. Thus, the scope of the right, which should extend to all information which would identify the source, could be described, along with the different circumstances in which journalists may assert the right (i.e. not only in front of a court but also in the face of questioning by the police or an attempt to search premises containing source identifying information).

#### **IV.4        Freedom of Assembly**

The fundamental guiding principle of international law regarding freedom of assembly is that the law should establish a strong presumption in favour of allowing assemblies, which might be overcome only where necessary in a democratic society to protect the list of interests indicating under international law. Linked to this is a requirement that the extent of regulation of assemblies should be kept to a minimum. Furthermore, the authorities always have an obligation to protect and facilitate assemblies.

The draft Assembly Law claims to protect this interest, but in fact fails to do so by permitting assemblies only where prior authorisation has been obtained, regardless of issues such as the size or location of the assembly. This is exacerbated by the fact that, pursuant to this law, the right to assemble may be refused, on unspecified grounds.

Under international law, it is not legitimate to require permission for assemblies. A system of notification may be put in place for such assemblies as may require the involvement of the authorities either to provide protection to the assembly – for example from external actors opposed to the message of the assembly – or to ensure that the assembly can take place smoothly – for example for purposes of diverting traffic from a public road during the assembly. In other words, the purpose of notification is to facilitate the assembly, rather than to exercise control over it. As a result, a blanket requirement of notification cannot be justified; rather, notification should be provided where such facilitation is desired or needed.

Where measures are necessary to protect or facilitate an assembly, the costs of this should be borne from the public purse rather than by the organisers. Ideally, these measures

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<sup>60</sup> As noted above, Article 19 of the UDHR protects the right to impart, but also to seek and receive information and ideas.

should be discussed and agreed with the organisers in advance, while allowing the necessary flexibility during the assembly to achieve the desired ends.

The type of notification system that is acceptable under international law is not a permission system but, rather, a notice system (i.e. its purpose is to provide the authorities with notice of the assembly, rather than to give them an opportunity to assess whether or not to allow it). The oversight body, if there is one, should be clearly identified in the law.

At the same time, the authorities do have the right to impose limited restrictions on assemblies, where this is necessary to protect an overriding interest recognised under international law. Any such restrictions must be strictly proportionate, and represent the least intrusive means of protecting the interest. Furthermore, the process by which they are assessed and decided should be fair and reasonable. Organisers should be informed of any restrictions as soon as possible, along with the reasons for the restriction, and be given a chance to respond, including by proposing changes to the plan for the assembly. They should also be given an opportunity to appeal against any proposed restrictions, and such appeals should be decided on an urgent basis by an independent body.

In principle, those conducting assemblies have the right to use public spaces and to be close enough to the target of the assembly that they may be seen and heard from that location. When imposing any time and place restrictions, the authorities should take into account both the importance of respecting the right to demonstrate and the fact that, in most cases, a large number of options for both mitigating any risk of harm and for making alternative assembly arrangements are available to them. Thus, in most cases, traffic may be diverted around or away from an assembly in a high traffic density area.

The same rules apply to counter assemblies – assemblies which aim to challenge other assemblies – and these should in principle be allowed to take place while respecting the rule on being seen and heard. This is also the case with impromptu assemblies or assemblies which take place without it having been practical to inform the authorities in advance.

Restrictive measures may be imposed on assemblies where this is necessary to avoid an imminent risk of violence. However, the authorities should make all reasonable efforts to prevent violence and restrictions should be contemplated only where such efforts are unable to secure this objective. Thus, where violence, for example from a counter assembly, is expected, larger contingents of law enforcement personnel should be provided.

The use of force by law enforcement agents should be regulated by law, which should clearly indicate the circumstances in which this may be justified. The law should also indicate a range of measures for dealing with assembly-related problems, with a view both to avoiding the use of force except where this is strictly necessary and limiting any use of force to what is strictly necessary. Law enforcement agents who operate outside of this legal framework should be subject to the relevant civil and criminal law rules, as well as appropriate disciplinary measures.

It is clear that the draft Assembly Law does not conform to these standards not only in its central failure to establish a true presumption in favour of assemblies but also in relation to the types of restrictions it imposes, and allows to be imposed, on assemblies, as well as the procedures by which restrictions are imposed.

#### **IV.5        Other Positive Measures in Iraqi Law**

The five laws canvassed in this Report contain a number of other positive measures which seem designed to support the rights to freedom of expression and assembly. For example, Article 15 of the Journalist Law provides that newspapers cannot be banned or confiscated “except by judicial order”. This is helpful, but it does not go far enough. For example, it fails to impose any conditions on the exercise by the judiciary of the power to ban newspapers or to indicate when such an order might be appropriate.

The draft CMC Law includes several positive aims from the perspective of freedom of expression among the many aims that are provided for in Article 2. These include promoting education and cultural diversity (Article 2(2)), encouraging the development of the media for the people of Iraq (Article 2(6)), promoting and protecting media freedom and supporting media organisations in developing professional standards (Article 2(8)), and making a commitment to constitutional and international principles regarding freedom of expression. The draft Law also commits the CMC to adhering to the text of Article 19 of the UDHR and ICCPR when carrying out its tasks (Article 6(10)). These are all positive, if rather general, provisions.

Like the draft CMC Law, the draft Assembly law proclaims as its aims the protection and implementation of freedom of expression, the right to information and the freedoms of assembly and peaceful protest (Article 2). It also provides protection to freedom of scientific research (Article 4), as well as to hold private assemblies (Article 6(1)) and to conduct election assemblies (Article 6(2)). Once again, these are positive provisions, but they remain very general in nature.

The draft Parties Law provides a number of protections to political parties. These include rules prohibiting party headquarters from being “accessed or searched” or party documents from being searched or monitored, except by judicial order in accordance with the law (Article 22). The draft Law grants parties the right to participate in elections and political life, and to demonstrate (Article 23). Parties may also issue a newspaper and use other communications tools (such as a website) (Article 24). These are, by-and-large, positive protections.

While these various protections for rights are all welcome, they tend to be rather vague in nature and they do relatively little to mitigate the many problematical provisions in the five laws canvassed in this Report. At least as importantly, they do not begin to put in place the kinds of legal regimes that are required in a democracy, as outlined above.

## V. Conclusion

With the downfall of Saddam Hussein and his repressive regime, Iraq was presented with a unique opportunity to rebuild its political and social structures in a manner that was democratic and that ensures respect for human rights. In many ways Iraq has made great steps forward. Certainly the situation today is a far cry from that which prevailed in 2003. At the same time, far more could be done to promote democracy and to protect human rights. Instead of moving forward on these issues, Iraq is looking backwards, as this Report clearly demonstrates.

This is perhaps particularly true in the areas of freedom of assembly and expression. In the most recent Freedom House press freedom survey,<sup>61</sup> Iraq scores just 65 points, giving it a Not Free rating, and placing it in a tie with Moldova for 144<sup>th</sup> place out of 192 countries. This score rates it 7<sup>th</sup> out of 19 countries in the Middle East, behind, among others, Kuwait, (pre-revolutionary) Egypt and Jordan.

The five laws assessed in this Report include a number of positive provisions which seek to give effect to constitutional and international protections for freedom of expression. Thus, they seek to establish a largely independent oversight body for broadcasting, they provide for general guarantees of the rights to freedom of expression and assembly, they recognise the right of journalists to protect their confidential sources of information and they seek to establish a democratic system for the establishment of political parties.

Even in these positive attempts, however, the laws almost always fail to conform fully to constitutional and international standards, and in many instances they fall quite far short of these standards. Thus, there are insufficient protections for the independence of the oversight body for broadcasting, the guarantees for freedom of assembly and expression remain aspirational statements, which lack concrete means to give effect to them, the protection of sources is too narrow and the laws place undue constraints on the establishment of political parties.

At least equally serious are the wide-ranging restrictions on these freedoms found in the five laws. These signal fail to respect constitutional and international guarantees and, if put into effect, would represent a major rolling back of respect for these rights in Iraq.

Finally, the laws do not even begin to address certain positive obligations on Iraq, such as the need to put in place a framework for the right to information. The other frameworks established by these laws – including for political parties, the exercise of freedom of assembly and broadcast regulation – all fall well short of the requirements of constitutional and international standards in these areas.

If Iraq were to move ahead with the adoption of the five laws assessed in this Report,<sup>62</sup> this would represent a massive backsliding in terms of respect for the freedoms of assembly

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<sup>61</sup> *Freedom of the Press 2010: Broad Setbacks to Global Media Freedom.*

<sup>62</sup> One, the Journalist Law, has already been adopted but the other four are still in draft form.

and expression. In this scenario, Iraq would fall well behind the more progressive countries in the region, and its progress towards democracy would be halted. This would be more than unfortunate. It would be a denial of the progress for which the Iraqi people have struggled for so long, and to which they are eminently entitled.