Explanatory Memorandum on UNESCO's Amendment Proposals to the July 2021 Draft Media Law Prepared by the Parliament of Lebanon

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on behalf of UNESCO

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The Legal and Administrative Committee of the Parliament of Lebanon has been working on a new Media Law to update the current 1962 Publications Law and 1994 Radio and Television Broadcasting Law, with the latest version dating from July 2021 (draft Media Law). As part of its cooperation with the Parliament, UNESCO has, with the support of international and local legal experts, and following extensive consultations in Lebanon in September and December 2022, prepared some amendment proposals for the draft Media Law.

This Explanatory Memorandum outlines the rationale behind the key changes to the draft Media Law that UNESCO is proposing. It does not outline all of the changes in detail but, instead, highlights some of the main shifts in approach which are being suggested by UNESCO.

Focusing the Scope

Many of the different stakeholders we met with, in common with people in countries around the world, highlighted issues such as disinformation and hate speech on social media as an overriding problem in Lebanon. While some countries are seeking to regulate social media, this is not the proper subject of a media law. Furthermore, the approach taken in democracies to this is fundamentally different from how the draft Media Law sought to regulate these actors, which was somehow to bring them into the definition of media and then try to regulate them as media outlets. In democracies, on the other hand, the approach has generally been to place more systemic obligations on the larger social media platforms to address the negative impacts of their operations. Lebanon could also try to do this, albeit it would be far preferable not to do it in a media law and certainly not by trying to treat social media platforms as if they were media outlets.

The same problem manifested itself in relation to websites, which the draft Media Law also somehow sought to regulate as media outlets. Those who are responsible for operating websites should be subject to the criminal and civil law just as everyone else is, including if they disseminate illegal content (such as hate speech or child sexual abuse material). Addressing problems in this area may require investing more resources in online policing or possibly even giving the police more power to conduct effective online investigations. However, it is not legitimate, according to international law, to try to regulate all websites as media outlets (apart from the small number of them which actually are media outlets). It is also not practical, since

many of the obligations placed on media outlets – such as in relation to concentration of ownership, registration or licensing, or in terms of professional standards – cannot sensibly be applied to all websites.

For these reasons, UNESCO is suggesting that the scope of the law be narrowed to cover only the mass media, as traditionally understood, albeit extending to online actors which have the core characteristics of media outlets. This has three main types of implications for the media law. First, the definitions of different types of media – such as press publications, television and radio – need to be revised so that they are limited to covering mass media outlets in each of these areas, as traditionally understood, to the exclusion of social media and private websites. The proposed UNESCO amendments do this.

Second, online entities which actually are media outlets, such as online newspapers or newsletters, need to be treated as media outlets. Under international law, it is not generally legitimate to impose licensing requirements on these entities, unlike broadcasters, because they do not use a scarce resource and do not have the same characteristics as broadcasters. Instead, the UNESCO amendments propose to treat them in the same way as press publications, with the same obligations, including as to registration, deposits and so on. As such, there is no need for separate rules setting out the obligations of these entities, which can just refer back to the obligations of press publications. The UNESCO amendments thus do away with the separate sets of obligations for professional online newsletters and just refer back to the general obligations of press publications.

Third, beyond the definitions, any distinct rules for entities which are not mass media outlets, such as website builders or digital message service providers, have no place in this mass media law. The amendments proposed by UNESCO thus remove all of these references (and, as relevant, the original definitions which related to them).

Objectives

The draft Media Law did not include any statement of the overall objectives governing broadcast regulation, which was and remains the main focus of the document. Setting out the objectives clearly is important both to signal to citizens and those bound by the law what, in a broader sense than just the formal rules, it aims to do and to provide those tasked with interpreting the rules – including the Media Regulatory Authority (Authority), the government and ultimately the courts – with some direction as to how this should be done.

To address this gap in the existing draft Media Law, UNESCO is proposing to add a new article at the beginning of Section Two: Broadcast Media setting out the overall objectives of the law. There is quite a long list of these, which include such items as promoting freedom of expression, encouraging a robust and creative national media sector in Lebanon, and promoting accurate, informative and balanced programming, among other things.

Concentration of Ownership

International law supports the putting in place of clear and effective rules to limit concentration of media ownership as part of the wider idea of promoting media diversity, so as to enable citizens to receive a variety of information and perspectives through the media as a whole. In the draft Media Law, broadcasters needed to be established as companies and no one company could own more than one broadcaster in each of the various categories set out for radio and

television. In addition, no individual person could own more than 10% of the shares of any such company (which also covered their spouse, their parents and their descendants but not, for example, their siblings).

We were informed that, in practice, individuals do in fact exercise control over media companies, despite the 10% ownership limit. In many countries, the ownership rules focus on control over a media outlet rather than just ownership, given that control can exist at quite low levels of ownership. In addition, the limitation on companies to owning one broadcaster from each category would allow for quite a significant number of media holdings to be controlled by one company (i.e. this is not a very stringent limit, especially for a small country like Lebanon).

UNESCO is thus proposing to amend these rules so as to allow one individual to control, whether directly or indirectly, just one television and one radio station. This does away with the 10% rule, which is not found in other countries and which does not really make a lot of sense, but then imposes much stricter ownership concentration limits on individuals beyond this. The proposals also create a presumption of control where an individual owns 20% or more of the shares of a media company. In many cases, 20% of the shares will in fact lead to effective control. But where the individual shows that their 20% ownership of the shares does not in fact lead to control, the presumption of control will be defeated.

The draft Media Law allowed foreign ownership of companies running broadcasting stations up to 20% but restricted any individual foreign person – whether natural or legal – to just 10%. In practice, if foreigners invest in Lebanese media outlets, they would generally not be interested in doing so alongside other foreigners. Instead, they would normally be looking for a unique relationship with the Lebanese partner. To better reflect that situation, the UNESCO amendments keep the overall limit on foreign ownership at 20% but do away with the one-person 10% rule.

The draft Media Law contained a rule on transparency of the owners of media companies by requiring the names of shareholders to be published in the Official Gazette. This is positive. However, it is also important for media outlets to be transparent about their sources of funding, and UNESCO is proposing to add a rule on this.

Licensing of and Conditions on Broadcasters

The draft Media Law provided for broadcasters to be licensed by prohibiting their operation in Lebanon without a licence. This is legitimate and in line with the practice of almost every country. Where the draft Media Law diverged from accepted practice, however, was by leaving the rules and procedures governing the very important matter of licensing largely up to the discretion of the oversight body, the Authority, and to some extent up to the government.

Licensing of broadcasters, although done in almost every country, still represents a restriction on freedom of expression, albeit a legitimate restriction if done in accordance with international standards. One of these is that the main elements of any restriction should be provided by law or set out in a law. While it is appropriate for more detailed matters, as well as matters which change over time (such as licence fees), to be dealt with via regulations or rules, the overall framework for licensing should be set out in the primary legislation.

To achieve this, UNESCO is proposing to add in a new Chapter Four: Licensing of Broadcasters under Section Two, setting out the main framework of rules for licensing broadcasters. These rules envisage the Authority, after consultation with interested stakeholders, proposing a Licensing Plan for the more developed media markets in Lebanon, including the national market, and for most licensing to be done in accordance with that Plan. The Plan should set out, among other things, the target number of different types of broadcasters for the market (just as an example, it might aim for a total of 12 national television stations in the country, given its size, the size of the advertising market and so on), as well as the key types of programme content which need to be promoted in the media market (for example, more educational and children's programming).

The UNESCO proposals envisage most licensing being done on a competitive basis, in accordance with the Licensing Plan, and they set out the key criteria to be used to decide between competing licence applications. This is the overwhelmingly dominant approach taken in countries around the world. The rules also set out the basic procedures for conducting licensing competitions, such as what documents need to be submitted, the need for hearings on licensing to be public and rules on transparency of the process, and give the Authority the power to adopt additional (more detailed) procedures in advance for any particular licensing competition. Again, this is very much in line with practice in countries around the world.

An exception to the competitive approach is for licences for areas which are underserved in terms of broadcasting (such as local radios operating in cities other than Beirut) and for licences for small community broadcasters, both of which might be issued on an *ad hoc* basis (i.e. whenever someone is interested in providing such services they may submit an application). The rules establish special licensing procedures for community broadcasters, given that these are normally much smaller and less well-resourced than commercial broadcasters. This is in line with international law, which requires States to put in place special licensing procedures for community broadcasters.

Another feature of the system is that it does not allow any one legal or natural person to control both a distribution and a broadcasting (content) service, with an exception for analogue terrestrial distribution (now limited to radio). Anyone who currently offers both types of services is given two years to remedy the situation (i.e. to divest themselves of one of the services). The purpose of this separation, which is found in many countries, especially smaller countries with smaller broadcasting sectors, is to prevent someone who owns both a distribution and broadcasting service to use the former to unfairly compete with other broadcasting channels disseminated over the distribution service.

The draft Media Law provided for broadcasters to disseminate, for at least one hour per week and free of charge, various types of public interest content such as educational programmes, content relating to national holidays and cultural content. This is very limited as compared to the practice in most countries. To increase the level of focus on this sort of content, the UNESCO proposals give the Authority the power to use licensing processes to promote this sort of content in two ways. The first is by favouring the allocation of licences to applicants who propose to provide more of this sort of content, while the second is to set minimum quotas for this sort of content. This is very much in line with the practice in many other countries, and these have proven to be successful ways of promoting more public interest content.

The proposed licensing framework also sets out a number of licence conditions for all broadcasters. Some examples of this are the period of validity for different types of licence, the

requirement to retain master recordings of programmes for a set period of time and the obligation of all broadcasters to submit an annual report to the Authority. It also grants the authority the power to impose licensing conditions, including technical conditions. As an example of this, instead of setting out specific annual fees for licences, the Authority may propose such fees which will then be set through a regulation adopted by the Council of Ministers. In addition, broadcasters and distributors may propose amendments to their licences and licence conditions to the Authority, which may approve or reject such proposals. This approach to licence conditions is again in line with broad international practice.

Finally, while the requirements for broadcasters to appoint programme directors, and for Category I broadcasters (i.e. national broadcasters) which provide news services to appoint a director in charge of news, have been retained, the specific conditions on these directors – for example that they must work full time for the broadcaster – were removed. International law clearly prohibits conditions of this sort being imposed on directors, which is a restriction on their freedom of expression, and instead leaves this sort of issue up to the discretion of the broadcaster and market conditions (i.e. you need to have a good director to compete effectively).

Registration and Other Obligations of Press Publications

The rules in the draft Media Law regarding the authorisation/registration/licensing of press publications were not clear, with different terms being used in different places and the substance of the rules also not clarifying whether it was possible to refuse to register a publication and, if so, on what grounds. Under international law, technical registration systems, which do not impose unduly onerous registration obligations on print media outlets and which do not allow for discretion to refuse registration, are considered to be legitimate while regimes which go beyond that are not.

To align the rules with international standards, the UNESCO proposals move the system for registering press publications to Chapter One of Section Three (for some reason they had been in Chapter Three of Section Two, on broadcasting), and tweak the rules to make it clear that this is a technical registration process and that registration may only be refused where the requisite information is not provided or the proposed name of the press publication is the same as an existing publication. The UNESCO proposals also reduce the fees substantially so that they only cover the administrative costs of running the system. Although broadcasters may be charged for using the airwaves, a public resource, it is not legitimate to burden print media outlets in this way.

The UNESCO proposals also simplify other rules for press publications – such as the conditions on directors and what must be printed in each edition – to reflect a more modern, human rights compliant, approach to regulating this sector. Similarly, the proposals limit the rules on depositing copies to print media outlets (press publications), whereas previously they applied to a much wider range of forms of content. In addition, deposits are proposed to be required to be made only with the National Archives and the National Library, reflecting the purpose of such obligations as being to maintain a national repository of this material for historical purposes. Previously, deposits had been required to be made with the Authority and the Press Syndicate, which seemed to reflect the idea of monitoring print media outlets on a continuous basis, which is not legitimate under international law.

Reflecting the idea set out above, namely that this law should only regulate mass media outlets, the UNESCO proposals effectively do away with the separate rules governing professional electronic newsletters and instead subject them to the same regime as applies to other press publications, including as to directors, deposits and so on. Of course, as indicated above, the scope of professional electronic newsletters is now limited in scope by the definitions to proper news outlets, albeit which operate online.

Sanctions

Under international law, sanctions for breach of rules which restrict freedom of expression, which is the case with any rules on licensing, registration and related issues, must be proportionate in the sense that they are not excessive taking into account the nature of the breach. Thus, a minor infraction should be responded to with a minor sanction while a more significant or repeated infraction may attract a harsher sanction.

In some places, the draft Media Law failed to provide for a graduated regime of sanctions, which is needed so that the choice of sanction might be appropriately tailored to the nature of the offence. For example, for breach of the rules on providing and updating information for the media register, which is often a relatively minor offence, only a licence suspension was envisaged. The UNESCO proposals provide instead for warnings and then fines for such breaches, while a more graduated approach to sanctions is also proposed in other areas.

The Media Regulatory Authority

International standards are very clear in requiring any bodies which exercise regulatory powers over the media to be independent in the sense of having strong protection against the risk or possibility of political inference in their operations. Protection for independence should be reflected in areas such as appointments to the governing board, the system for allocating the budget, the power of members to run their own office and so on. There also need to be systems of accountability, such as through having an annual audit of the accounts and through reporting annually on what the body has done, ideally to parliament.

Although the draft Media Law did indicate that the Authority should enjoy "financial and administrative independence", in practice the systems for ensuring this were not as strong as are required under international law. As a result, one area where UNESCO has proposed significant changes was in terms of the composition and rules relating to the Authority. One such change was to retain the earlier system of having all members appointed by Parliament, but to have a broader range of organisations nominating members. These include, among others, the Bar Associations of Beirut and Tripoli, the Order of Engineers, the Editors' Union, civil society groups, academics and the National Council for Lebanese Women. Each nominating body proposes two candidates and Parliament then selects seven members in total from among the 14 who were nominated, ensuring gender, religious and other forms of diversity among the seven members.

Tenure of members is, as it was in the original draft, guaranteed. However, whereas removal previously was done by the Council of Ministers, upon the proposal of the Minister, following verification by a committee, the current proposal is for this to be initiated by a two-thirds majority vote of the other members of the Authority and finalised by a decision of the Council of Ministers, as is done in some other countries. The UNESCO proposals also add clearer and stronger rules on conflicts of interest not only as a bar on someone being appointed but also

where a matter involving a conflict comes before the members. The proposals also include stronger prohibitions on who may not be appointed as a member due to their political affiliations. And they also call for clear rules on compensation for members, set at one-half of the benefits received by a senior civil servant for the chairman and one-quarter for the other members.

The proposals also give the Authority the power to establish and run a Secretariat, albeit this must be in accordance with its approved budget. They also call for far more detailed rules on meetings to be included in the law, which is in line with better practice for the establishment and operation of administrative bodies. Meetings are the means by which an administrative body like this conducts its business and it is important that the rules on meetings are fair and appropriate.

The rules on the budget were also amended. In the draft Media Law, it was not entirely clear how the budget of the Authority was to be agreed. The proposals call for the Authority to propose its budget to Parliament via the Minister of Finance, with Parliament ultimately approving it. While the Authority should be independent of government, that does not mean that it is not accountable and budget accountability is an essential part of that. The proposals also call for the Authority to have its accounts audited annually by an audit firm which operates to an internationally recognised standard.

The publication of an annual report is a key accountability tool for an administrative body such as the Authority. The draft Media Law did require it to publish an annual report, but the UNESCO proposals add in far more detail as to what the report should contain. This should help ensure that the report is comprehensive and allows for both Parliament and the public as a whole to hold it to account.

Administrative Complaints

While the draft Media Law takes a primarily criminal approach to regulating media content, many countries have also put in place administrative systems to deal with complaints against the media. There are different options for this, ranging from fully self-regulatory (put in place by media actors without any official involvement) to co-regulatory (put in place by law but with significant media involvement) to statutory (put in place by law and without significant media involvement). The hallmarks of all three systems are that they involve: 1) an oversight or complaints body; 2) which usually leads on the development of a Code of Conduct or set of standards for the media (often covering both content issues and media behaviour, such as when it is legitimate to use subterfuge to collect information); 3) a system for members of the public to make complaints about breaches of the Code and for the oversight body to make decisions on those complaints; and 4) a set of sanctions or remedies, which are normally quite light-touch in nature, with the heaviest sanctions usually being fines.

Many countries are moving to a co-regulatory approach which is easier to establish and often more effective than an entirely voluntary self-regulatory approach but still ensures significant media engagement, unlike a purely statutory system. Some of the important benefits of these systems is that they are accessible to all citizens, not only those with sufficient resources to bring a legal case, that they resolve disputes quickly and simply (as compared to the courts) and that they generally promote far more stringent professional standards for the media than would be possible via the criminal or civil law.

The UNESCO proposals put in place a co-regulatory complaints system, under a new Section Seven: Administrative Complaints. The main features of this are as follows. It would be overseen by a Council of five experts appointed by the Authority. The Council would be tasked with preparing a Code of Conduct for the media, in consultation with media institutions, journalists and other interested stakeholders. The proposals list a number of issues which are to be covered by the Code, in line with established practice in this area. In some cases, dealing with an issue via the Code is treated as a trade-off with it being a media crime, in which case the criminal part was withdrawn from the law. An example of this is the criminal prohibition on fake news in the draft Media Law, which would be removed and instead be addressed as a duty to strive for accuracy in the Code.

The system also provides for members of the public to make complaints about alleged breaches of the Code and for the Council to decide on such complaints. The penalties for breach of the Code range from public warnings to requirements to publish a statement by the Council to fines. It is mandatory for media outlets to implement Council decisions. At the same time, the rules require complainants to use the co-regulatory system before bringing a legal case against a media outlet, as long as the matter in question is covered by the Code.

Content Issues

International law has very precise and developed standards on restrictions on content whether applied generally or just to the media. These start with the very text of international guarantees for freedom of expression, such as the one found in Article 19 of the International Covenant on Civil and Political Rights, which require all such restrictions to meet a three-part test. Restrictions must be set out in a law which is clear and precise, aim to protect one of a limited list of legitimate interests (namely the rights or reputations of others, national security, public order, public health or public morals), and be "necessary" to protect that interest. International courts have elaborated on the meaning of necessity in specific contexts – such as national security laws or defamation laws – setting out the limitations and requirements associated with these sorts of thematically-specific restrictions.

Many of the content rules in the draft Media Law, starting with Section Seven: Opinion Polls and including Section Eight: Media Crimes and Section Nine: The Right to Respond, do not conform to these established international standards and, as a result, the UNESCO proposals amend them so as to bring them into line with international standards. The specific UNESCO proposals are described below.

The rules on opinion polls required too much information to be published with such polls (such that this information would often be far lengthier than the actual results of the poll that were being reported). As a result, the amount of this information was limited somewhat. In addition, the prohibition on publication of "negative polls" does not align within international guarantees of freedom of expression, especially if those publishing polls are required to indicate their margins of error (which would be very high for "negative polls" as defined in the draft Media Law. As a result, the UNESCO proposals remove this prohibition.

In terms of Section Eight: Media Crimes, a rule on protection of the secrecy of journalists' confidential sources of information was added. It is well established under international law that such protection is necessary to protect the rights of citizens to receive information from the media.

The prohibition on incitement to racism and discrimination in the draft Media Law was already largely in line with international standards but it lacked a specific requirement of intent to incite to hatred, so that was added.

As noted above, the provision on fake news was removed in light of the inclusion of standards on accuracy in relation to news and current affairs content in the Code of Conduct.

Defamation is one of the content issues which has received the most attention on the part of international human rights courts and so the standards for this are particularly well developed. One of the ways these courts have sought to balance the rights to reputation and to freedom of expression is by ensuring that a number of defences are available to defendants in defamation cases. These include such defences as proving that the statements were true, that they contained reasonably held opinions or that they were a fair and accurate report of a statement made before an official body, such as a statement by a witness or lawyer in a court. These defences were added to the offence.

Some of the other elements of the crime of defamation in the draft Media Law, including the First and Second Synopses, reflected the idea that officials should receive special protection against defamatory statements. This idea is directly contrary to clear international standards which hold, instead, that such officials should be required to tolerate a greater degree of criticism than ordinary people. As a result, they were removed in the UNESCO proposals.

As regards the other crimes set out in the draft Media Law, a few were removed on the basis that they are not considered to be legitimate under international law or that they are addressed more appropriately in the Code of Conduct. Others were retained, albeit in some cases amended to bring them into line with international standards, so as to ensure that more appropriate penalties are imposed on the media should they perpetrate these sorts of crimes.

Under international law, the rights of correction and reply are seen in the light of a more speech approach to harmful speech and, as a result, they are, if cast in appropriate terms, seen positively. It is important to accompany a right of reply with a right of correction since, in many cases, the issue is simply that the media published an inaccurate statement which needs to be corrected. In this case, a right of correction is a sufficient remedy and yet it is much less intrusive and easier to apply than a right of reply.

In the draft Media Law, the right to respond arose whenever "a reference is made to a natural or legal person" who can be identified. This is far too broad and would make it impossible for the media to discuss any issue involving officials without those officials being able to respond and, in effect, to argue through the media with the position taken by the media outlet. According to international law, such a right should arise only where the publication of incorrect factual material by a media outlet breaches the legal rights of a natural or legal person. The UNESCO proposals limit the right to that context.

Some of the conditions for publishing a response, in particular the time limits given for this, were unreasonable taking into account that media outlets have the right to assess whether or not a claimed right of reply is legitimate. These procedures were tweaked to make them more realistic.