

Analysis of the Audiovisual Media Law, No. 26 for the Year 2015

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Executive Summary

In Jordan, as in other countries, broadcasting in the traditional sense of radio and television stations remains by far the most popular, and arguably the most influential, communications media. The public broadcaster, Jordan Radio and Television (JRTV), was a monopoly until liberalisation was first introduced by law in 2002, but the number of private broadcasters has grown rapidly since then and there are now dozens of both private FM radios and satellite television stations.

A new Audiovisual Media Law (Law or AVL) was adopted in 2015,¹ and this now governs regulation of the sector, while Bylaws are currently being drafted. Going back to 2002, regulation of the sector was put into the hands of an autonomous body, the Audiovisual Commission (AVC), now the Media Commission (MC), rather than this being done by a government ministry, in contrast to the print media. The 2015 Law introduced some important improvements, doing away with the possibility of imprisonment for breaches of the law, and providing applicants with the right to receive reasons for any refusal to provide a licence and to appeal such refusals before the courts.

At the same time, a key shortcoming of the system is that, although it is formally autonomous, the MC lacks the structural independence which, according to international standards, bodies which exercise regulatory powers over the media should have. Significantly, it does not have an independent governing board. Instead, it is run by a director who is appointed by a resolution of the Council of Ministers based on the recommendation of the Minister. The director's position is not guaranteed for any set period of time and he or she may be terminated by the Council, without any conditions being set for this, such as incapacity or a failure to discharge his or her duties properly. As a result, the director essentially serves at the pleasure of the government. The director is also not subject to other internationally recognised protections for independence such as a bar on individuals with strong political connections from being appointed and a requirement that the individual be of recognised moral character. The MC also lacks independence in financial terms, since the Minister and then Council of Ministers needs to ratify the budget.

Furthermore, the MC does not have the power to make final decisions regarding the licensing of broadcasters. Instead, final licensing authority rests with the Council of Ministers, which has discretion to grant or refuse a licence. The power to impose sanctions on broadcasters for breach of their licences, including fines and ultimately the cancellation of the licence, also vests in the Council.

¹ Audiovisual Law no. 26 for the year 2015, published in the Official Gazette No. 5343, p. 5614. Available in Arabic at: <http://www.lob.gov.jo/AR/Pages/AdvancedSearch.aspx>.

According to international standards, a key goal of broadcast regulation is to promote diversity in the broadcasting sector. There are a number of aspects to this. One is that States should put in place effective measures to prevent undue concentration of media ownership and cross-ownership. The AVL does not include any provisions limiting concentration of media ownership. Another is that States should promote diversity through the licensing process, essentially by including this among the criteria by which applications for a licence are assessed. Again, the AVL does not provide for this.

A third important means of promoting diversity in broadcasting is to ensure that all three types of broadcasters – public service, commercial and community – are represented equitably in the sector. As noted, commercial broadcasting was recognised alongside public broadcasting with the adoption of the 2002 AVL. However, the Law fails to set out any specific rules for community broadcasters, although a few such broadcasters have been licensed. In particular, better practice is to reserve a portion of the frequency spectrum for these broadcasters and to put in place less onerous licensing rules, along with lower fees, for them.

The AVL requires of a range of entities and products to obtain licences, including ‘recorded materials’ (any audio or visual or audiovisual content), and places where such materials are shown (‘show rooms’) or circulated. This essentially represents a system of prior censorship for a vast range of material which does not meet the conditions for restrictions on freedom of expression under international law and is probably not very practical in the digital era in any case. The definitions of over-the-top (OTT) and Internet Protocol television (IPTV) are also unduly broad, and would cover any website that hosted video content. This should be narrowed down to cover only services which more closely resemble broadcasters.

In terms of the licensing process, it is very important to set out clearly the conditions under which licences will be granted or refused. For competitive licensing processes, the law should establish clearly the criteria by which the competition will be judged, while for non-competitive processes, the law should set out, again clearly, the minimum standards which need to be met to obtain a licence. The AVL fails to provide for either competitive assessment criteria or minimum standards for assessing licence applications. The rules also provide limited information about the procedures according to which licence applications will be processed, contrary to better practice in this area.

Although the draft Bylaws do introduce a definition of digital terrestrial television broadcasting, the AVL fails to provide for any system for the digital transition, which will presumably at least affect the public broadcaster, Jordan Television. The Bylaws also seek to impose a number of formal conditions on who may serve as a director of a licensed broadcaster. Such conditions do not, in practice, provide any guarantee of quality and such matters are better left to be regulated by the market.

The AVL includes a number of general positive obligations on broadcasters. These include requirements to “facilitate the work” of the authorities, to cooperate with other licensees, to “give priority to Jordanian human and material resources” and to contribute to national audiovisual production industries. While these are all laudable goals, there are problems with including them as formal legal requirements. It would, for example, be almost impossible to apply these rules fairly and they could be open to abuse. A better approach might be to set clear minimum quotas for domestically and/or independently produced content. The Law also requires broadcasters to comply with instructions from the Commission during emergencies and disasters, which is also potentially open to abuse.

In terms more specifically of content, the AVL and Bylaw impose a number of both positive and negative obligations on broadcasters. The former, for example, includes obligations to respect the moral rights of others and the “pluralistic nature of expression of thoughts and ideas”. While these are worthy ethical standards for broadcasters, they are, like the more general positive obligations, both impossible to apply fairly and potentially open to abuse. The negative obligations, or prohibitions, include such things as damaging the national economy or currency, undermining relations with other countries and prejudicing the values and heritage of the nation. These are simply too vague and general to be acceptable as legal restrictions which may, furthermore, attract quite significant sanctions.

On a more positive note, the AVL provides for the creation of an expert committee to review complaints about media content. In practice, the committee decides complaints based on a code of ethics adopted on a voluntary basis by broadcasters, as well as principles of justice and equity, although there is nothing in the Law to this effect. Again as a matter of practice, the sanctions applied by the committee where it finds a breach of the rules are to order the media outlet to provide a correction, reply or apology, or delete the material. The Bylaws would add some limited procedural rules and render the decisions of the committee formally binding.

This is a very interesting development inasmuch as it represents a co-regulatory system for addressing complaints. It could be improved by formalising some of the rules, for example regarding the standards to be applied by the committee, the procedures it should follow when deciding complaints and the sanctions that it may apply. It would also be useful to develop more formal rules regarding the membership of the committee, to guarantee its expert nature and also to ensure that it represents key stakeholder groups in the country. It would also be useful for it to serve as a means of replacing many of the vague both negative and positive obligations placed on broadcasters in the current version of the law.

Introduction²

In Jordan, as in most countries around the world, broadcasting in the traditional sense of radio and television stations remains by far the most popular, and arguably the most influential, communications media. The number of private broadcasters has grown rapidly since liberalisation was first introduced by law in 2002, supplementing the public broadcasting provided through Jordan Radio and Television (JRTV), and there are now dozens of both private FM radios and satellite television stations. Although there are no private terrestrial television stations, since 2010 over 98 percent of the population has had access to satellite television, meaning that this form of distribution has essentially leapfrogged terrestrial distribution.³

Prior to 2002, broadcasting was a State monopoly in Jordan but the adoption of the Audiovisual Media Law⁴ that year heralded in important legal changes and, in particular, an opening up to private broadcasters. Although these changes were perhaps late by global standards, in many ways Jordan was in this area, as in the area of access to information, something of a regional leader.⁵

Unlike in the print media sector, where the law and regulations have been in an ongoing state of evolution, regulation of broadcasting has remained relatively constant albeit with a new Audiovisual Media Law (Law or AVL) having been adopted in 2015.⁶ The Law is positive inasmuch as it recognises the importance of private broadcasting as part of the overall broadcasting ecology and establishes an autonomous body to regulate this sector, rather than leaving this in the hands of a government ministry. The new Law also introduced some important improvements over the 2002 version, such as doing away with the possibility of imprisonment for breaches of the law and providing applicants with the right to receive reasons for any refusal to provide a licence and to appeal such refusals before the courts.

² This Analysis is based on a translation of the Audiovisual Media Law, as amended, provided by UNESCO.

³ See UNESCO, *Assessment of Media Development in Jordan: Based on UNESCO's Media Development Indicators*, July 2015. Available at: <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/assessment-of-media-development-in-jordan/>.

⁴ Provisional Law for Audiovisual Media no. 71 for the year 2002, published in the Official Gazette No. 4576, p. 5941. Available in Arabic at: <http://www.avc.gov.jo/echobusv3.0/SystemAssets/f6197c07-5802-491b-b09d-14b39fc7d0c0.pdf>.

⁵ See Mendel, T., *Assessment of Media Regulation in the Southern Mediterranean Region*, MedMedia, 2015. Available at: http://www.med-media.eu/wp-content/uploads/2015/05/MEDMEDIA_REGULATION_COLLECTED_02_FINAL.pdf.

⁶ Audiovisual Law no. 26 for the year 2015, published in the Official Gazette No. 5343, p. 5614. Available in Arabic at: <http://www.lob.gov.jo/AR/Pages/AdvancedSearch.aspx>.

At the same time, it could be further enhanced in a number of ways, including by bolstering the independence of the regulator and giving it full responsibility for licensing broadcasters, by putting in place stronger systems for promoting broadcasting diversity, by limiting the scope of regulation to broadcasters, *per se*, by further developing the rules relating to licensing, and by putting in place a more developed and robust system of co-regulation to address complaints against the media.

This Analysis provides an assessment of the 2015 Audiovisual Media Law, along with the Bylaws.⁷ It highlights the strengths and weaknesses of the legal framework for broadcasting and makes specific recommendations for reform as needed to bring it more fully into line with international standards and better practice. The Analysis refers to a number of leading international sources, including UNESCO's *Assessment of Media Development in Jordan: Based on UNESCO's Media Development Indicators*,⁸ the 2011 General Comment No. 34 by the UN Human Rights Committee,⁹ the series of Joint Declarations by the special international mandates (special rapporteurs) on freedom of expression,¹⁰ the regional declarations on freedom of expression adopted by the African Commission on Human and Peoples' Rights¹¹ and the Inter-American Commission on Human Rights,¹² relevant Council of Europe recommendations,¹³ and the UNESCO publication, *Tuning into Development: International Comparative Survey of Community Broadcasting Regulation*.¹⁴

1. Independent Regulation

It is well-established under international law that bodies which exercise regulatory powers over broadcasting, including the all-important function of licensing broadcasters, should be independent of the government and this is also reflected in the practice of democratic States. The reason for this is clear: if the government exercises regulatory powers, and especially the power of licensing which is a crucial gate-keeping function (i.e. since it determines who can participate in the sector), there will inevitably be a bias, or at the very least a risk of bias, in favour of applicants which are more friendly towards government rather than decisions being made on the basis of the wider public interest. This undermines

⁷ For the earlier law, these were Bylaws on the Radio and Television Broadcasting and Rebroadcasting Licence and Fees Collected No. (163) of 2003. So far, new Bylaws have not been formally adopted although a set of proposed Bylaws is available.

⁸ Note 3.

⁹ Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en.

¹⁰ Available at: <http://www.osce.org/fom/66176>.

¹¹ 2002. Available at: <http://www.achpr.org/sessions/32nd/resolutions/62/>.

¹² 2000. Available at: <https://www.cidh.oas.org/declaration.htm>.

¹³ Available at: <http://www.coe.int/en/web/freedom-expression/adopted-texts>.

¹⁴ 2013. Available at: <http://unesdoc.unesco.org/images/0022/002246/224662e.pdf>.

respect for freedom of expression in the sense both of who gets to express themselves through broadcasting and of the right of the public to receive a wide range of information and ideas through broadcasting.

Numerous authoritative international statements have been made along these lines. The 2003 Joint Declaration of the special international mandates on freedom of expression includes the following, general statement about independence:

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.¹⁵

They reiterated this idea in their 2015 Joint Declaration, stating: “Administrative measures which directly limit freedom of expression, including regulatory systems for the media, should always be applied by an independent body.”¹⁶

The UN Human Rights Committee made a similar statement in its September 2011 General Comment No. 34, with a specific focus on broadcast regulators:

It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses. [references omitted]¹⁷

All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also referred to the need for media regulators to be independent.¹⁸

The system in place in Jordan somehow represents a halfway house in terms of international standards relating to independence. On the one hand, regulation is undertaken by a formally autonomous body – the Audiovisual Commission (AVC), now the Media Commission (MC), established by Article 3 of the Law – rather than directly by a government ministry, as is the case in some countries. This conforms to the call in the Human Rights Committee’s General Comment No. 34 for States to establish such bodies. On the other hand, the independence of the regulatory system is undermined in two ways:

¹⁵ 18 December 2003, note 10.

¹⁶ 4 May 2015, clause 4(a), note 10.

¹⁷ Note 9, para. 39.

¹⁸ See Principle VII(1) of the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and People’s Rights at its 32nd Session, 17-23 October 2002, note 11; Principle 13 of the *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission on Human Rights at the 108th Regular Session, 19 October 2000, note 12; and Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers of the Council of Europe on 20 December 2000, note 13.

limits in the structural independence of the MC; and limitations on the powers actually exercised by the MC.

In terms of the first issue, Article 3 establishes the MC as a body which “shall enjoy financial and administrative independent juristic personality”, i.e. as a body which is formally autonomous in the sense that it is not part of a ministry or a core government body. However, it also indicates that the MC is “under the jurisdiction of the Minister”, which seems to contradict the idea of its being administratively independent. Furthermore, there are key ways in which, from a structural point of view, the MC lacks independence.

A key indicator in this regard is the governing structure of the body, as well as manner in which the individuals which exercise key governing roles on the body are appointed. It is normal for broadcast regulators to be run, at least administratively, by a director, and this is also the case in Jordan. However, in most cases regulators are overseen by a board of governors which, in addition to appointing and then overseeing the work of the director, also serves to provide a layer of protection against political interference in the work of the body. The MC lacks such a governing board.

In terms of the manner in which the director is appointed, according to Article 6, he or she is appointed “by a resolution of the Council of Ministers, based on the recommendation of the Minister” and termination takes place in the same way, without any conditions at all being imposed on this. Only minor conditions are placed on who may be appointed. Article 7 provides that the director should be a Jordanian citizen, have a university degree, have “adequate experience and competence” and not have been “convicted of a crime or misdemeanour violating honour or honesty”. Aside from these rather formal technical conditions, the director essentially serves at the pleasure of the government, and the implications in terms of independence are clear.

International standards recognise both that independence is a relative rather than perfect quality and that a number of different appointments models may serve to protect independence in different contexts. Broadly speaking, there are four main models for this globally. First is a model whereby different sectors of society – such as media bodies, civil society, the bar society, academics – nominate members of the governing board (which, as noted above, then appoints the director). Second is an adaptation of this whereby different sectors of society form an appointments committee which then nominates members of the board. This model could also be used to nominate the director, if a governing board approach were not adopted. A third model has a committee of parliament – a multi-party, representative body – nominating members but subject to procedural protections, such as the ability of civil society groups to propose members for consideration and the publication of a shortlist of names for purposes of public consultation. Finally, some countries are moving to a more professional model of appointments, whereby individuals, who are nominated or who nominate themselves, are shortlisted or even selected via a competitive

process which resembles a job selection process and which is overseen by an independent professional body. In all of these models, formal appointment as a final, usually purely formal, step is often done by a leading political figure – such as the president or prime minister – or perhaps by the King in the Jordanian context.

These appointment processes are accompanied by rules protecting the tenure of those who are appointed, normally for a period of between five and seven years. In exceptional cases, where an individual is clearly failing to discharge his or her duties, he or she may be removed, but again protections are put in place to prevent this being done for political or any other non-professional reason. For a governing board, for example, grounds for dismissal may be a failure to attend meetings without justification, incapacity to discharge functions (for example on grounds of mental disability), or being convicted of certain types of crimes (for example of dishonesty or serious crimes). Individuals may also withdraw from the position and obviously death will also bring the appointment to an end.

A number of other legal provisions can help bolster the independence of a board or director. One is a formal statement of independence in the law (i.e. an operative provision in the law stating that the individual or individuals, and/or the body, are independent). In addition to the positive requirements set out in Article 7, many laws limit these positions to individuals who are generally respected in society for their high moral standards, integrity, impartiality and competence. While these are ‘soft’ requirements, they are still useful as benchmarks to assess candidates. It is also useful to include in the legislation a clear set of purposes of regulation, and then to hold the regulator to the goals of advancing those purposes.

Most laws also include prohibitions or incompatibilities for members of the board and/or directors, both to protect independence and to prevent conflicts of interest. Article 9 requires the director, prior to actually starting work, to notify the Minister that neither he or she nor his or her immediate family or relatives has any interest in the broadcasting sector (similar systems are in place for senior executives). Presumably an appointee who did have such an interest would have to divest him- or herself of it prior to taking up the position. There is also the prohibition in Article 7 relating to crime. Better practice, however, is to go beyond this and to include prohibitions relating to strong political connections, for example for individuals who are office-bearers or employees of political parties, civil servants or elected officials.

Funding is another key area where independence needs to be safeguarded because control over funding can often be a lever for control over the body. The rules on funding are set out mainly in Articles 10-13. According to Article 10, the sources of funding for the MC are funds allocated from the General Budget and, subject to the approval of the Council of Ministers, donations and grants. Any fees obtained through licensing or fines, and even fees for services provided by the MC, shall be returned to general public revenues (Article 12).

Article 8(h) provides that the rate of charges and fees for services provided by the MC shall be approved by the Council of Ministers, upon the recommendation of the Minister. The Commission shall have its own budget which shall be prepared by the director for the approval of the Minister and finally ratification of the Council of Ministers (Articles 8(g) and 11(a)). As a public body, the MC shall enjoy the “exemptions and facilities” granted to ministries (Article 13(a)). Finally, the MC shall be subject to the rules and control of the Audit Bureau and may appoint a certified auditor for this purpose (Article 13(b)).

It is positive that the MC has its own budget but ultimately this remains under the control of the government, mainly due to the power of the Council of Ministers both to ratify the budget (and the power of the Minister in the same area) and to approve (or not) any grants and donations. Better practice in this area is to allow the regulator to propose its own budget and then to require this to be approved as part of the general process of approval of the general budget (which is normally voted on by parliament). It also seems counter productive for the Commission not to be able to retain fees for services, other than its core functions under the Law, absent which there will be almost no motivation for it to provide any such services in the first place. Finally, as a matter of cash flow, in many countries broadcast regulators retain licensing fees, in accordance with their budget (so that any excess is remitted to general revenues while any shortfall is covered from those revenues).

Another provision which affects the independence of the MC is Article 4(l), pursuant to which it must undertake any other task assigned to it by the Council of Ministers. For its part, Article 8(m) provides the same in relation to tasks assigned by the Minister, but these must be relevant to the implementation of the Law.

The second area affecting the independence of the regulatory system is the fact that the MC's powers are limited to making recommendations in the area of licensing, with final authority resting with the Council of Ministers. According to Article 8(d), the director is responsible for making “recommendations to the Minister on the granting, renewal, modification and cancelation of broadcasting licenses”. According to Article 16(c), the Minister shall then make a recommendation in this regard to the Council of Ministers, which shall decide the matter. For the avoidance of any doubt, Articles 18(a) and (b) make it clear that the Council of Ministers may approve or refuse to grant a broadcasting licence, while providing reasons in the latter case (which also gives rise to a right on the part of the applicant to appeal the refusal to the courts). After obtaining the approval of the Council of Ministers, the licence agreement shall be concluded between the MC and the applicant (Article 20). In case of a repeated or ongoing breach of the agreement by a licensee, and upon a final court verdict, the Council of Ministers may cancel a licence (Article 29(b)(2)). Pursuant to Article 18(d), it is also the Council of Ministers that imposes fines on licensees for breach of their licence conditions. Finally, the Council of Ministers may, upon the recommendation of the Minister, based on the recommendation of the director, waive the

licence fees of “governmental departments and institutions and others”, as long as they do not broadcast advertisements (Article 22).

As a result of these rules, no matter how independent the Commission might be, ultimately it does not itself undertake the key decision-making processes relating to broadcast regulation. It may be noted that, in democracies, broadcast regulators are granted full powers to oversee the licensing process right through to deciding upon and granting licences (and suspending or revoking them in appropriate cases). Although this is a significant power, the fact that decisions are subject to judicial review helps limit the risk of abuse or unfair decisions.

There are also practical reasons beyond the overriding imperative of independence that suggest that proper licensing powers should be granted to the regulator. Experience in other countries suggests that, absent such powers, regulators will not be taken seriously by broadcasters and their ability to deliver on other parts of the regulatory framework – such as monitoring frequency usage, implementing technical standards relating to equipment or compliance with other licence terms and conditions – will be undermined.

Recommendations:

- The following measures to enhance the structural independence of the MC should be considered:
 - Providing for an independent governing board for the Commission.
 - Putting in place systems to safeguard the independence of the appointments process, along the lines suggested above.
 - Providing for a system of protection of tenure, along the lines suggested above, once individuals are appointed.
 - Formally guaranteeing the independence of the board, board members and/or the director in the text of the law.
 - Providing for a clear set of purposes for regulation to guide the MC.
 - Adding a positive requirement of being a respected individual to Article 7.
 - Adding prohibitions on individuals with strong political connections from being appointed.
 - Providing for the MC to put forward its own budget for adoption by the parliament as part of the general budget.
 - Allowing the MC to retain fees for any services it provides which are outside of its core functions under the Law.
 - Allowing the MC to retain fees for licensing in accordance with its approved budget (i.e. as a matter of cash flow).
 - Only allowing the Council of Ministers to impose tasks on the MC which are in pursuance of its responsibilities under the Law.

- The MC should be responsible for all decision-making in relation to the regulatory functions set out in the Law, including the full licensing process, rather than having the Council of Ministers making final decisions in this regard.

2. Promotion of Diversity and a Three-Tier System of Broadcasting

While the principle of independence governs the manner in which broadcast regulation should take place, the principle of diversity defines a key goal of such regulation. Under international law, the right to freedom of expression protects not only the speaker but also the listener,¹⁹ and the principle of diversity is derived from this. A key aspect of this is to place a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. In terms of broadcasting, and taking into account scarce frequencies and the licensing systems that are in place in most countries, this means using the licensing process and rules to promote diversity.

The idea of diversity is reflected in most of the key international statements on media freedom. Thus, the idea is found in the very title of UNESCO's leading statement in this area, the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic Media.²⁰ In its 2011 General Comment, the UN Human Rights Committee stated:

As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.²¹

Within Europe, the Council of Europe's Recommendation 2007(2) on Media Pluralism and Diversity of Media Content²² is entirely devoted to the question of media diversity and measures to promote it. The *Declaration of Principles on Freedom of Expression in Africa* states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.²³

¹⁹ Article 19 of the *International Covenant on Civil and Political Rights*, for example, protects not only the right to impart, but also to seek and receive information and ideas. UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

²⁰ Available at: http://www.unesco.org/webworld/fed/temp/communication_democracy/windhoek.htm.

²¹ Note 9, para. 14.

²² Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

²³ Note 11, Principle III.

And the Inter-American Court of Human rights has recognised that the right to seek and receive information and ideas requires the existence of a free and pluralistic media:

It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its 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.²⁴

The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression identified three distinct aspects of broadcast diversity: content, outlet and source.²⁵ Diversity of content, which suggests the provision of a wide range of content that serves the needs and interests of different members of society, is in many ways the most obvious and most important form of diversity. Diversity of content, in turn, depends on the existence of a plurality of types of media, or outlet diversity. Specifically, democracy demands that the State create an environment in which different types of broadcasters – namely public service, commercial and community broadcasters – can flourish. Source diversity imposes an obligation on the State to combat the threat of undue concentration of media ownership.

The need to prevent undue concentration of media ownership and cross-ownership (i.e. between different media sectors) is well established under international law. As the UN Human Rights Committee stated in its 2011 General Comment:

The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”. The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views. [references omitted]²⁶

There are different ways to do this, but the licensing process for broadcasters is both a logical one and the one that is most commonly used in democracies. This requires rules prohibiting ownership concentration above certain levels, which may then be applied through the licensing process (i.e. if an owner is already at the maximum level, he or she will not be granted any additional licences).

²⁴ *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. See also *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application no. 38433/09 and *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90 (both European Court of Human Rights).

²⁵ Adopted 12 December 2007. Note 10.

²⁶ General Comment No. 34, note 9, para. 40.

The AVL does not include any provisions on concentration of ownership or cross-ownership. It does, however, require applicants for a broadcasting licence to provide a list of shareholders and their share of the company's capital, although it does not appear to require them to keep this information updated over time (Article 16(b)(5)). This information could provide a basis for regulating undue concentration of media ownership.

The AVL also does not include any means to promote diversity in broadcasting through the licensing system. It is common in democracies to include an assessment of the contribution a proposed service would make in terms of enriching the variety and diversity of content being provided through the broadcasting system as a whole. This is done through making this one of the criteria for deciding on licence applications. No such provision is found in the AVL.

In terms of diversity of outlet, it is recognised that, absent effective regulatory measures, it is likely that public and commercial broadcasters will dominate because of the limited ability of community broadcasters to compete with these more powerful players, for example for frequencies or in licensing competitions.²⁷ The 2007 Joint Declaration of the special international mandates calls for a range of measures to promote diversity of outlet, stating: "Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms." To achieve this, it calls for the reservation of sufficient space on different broadcasting platforms for all three types of broadcasters. It also makes the following statement, specifically in relation to community broadcasting:

Community broadcasting should be explicitly recognised in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other licence criteria, should benefit from concessionary licence fees and should have access to advertising.²⁸

The point is quite clear: special, less onerous licensing procedures and requirements need to be put in place to encourage and support community broadcasting.

The AVL does not include any specific reference to community broadcasters and so does not conform to these requirements. However, Article 22 does allow the Council of Ministers, on the recommendation of the Minister, in turn on the recommendation of the director, to waive licensing fees for "governmental departments and institutions and others", as long as they do not broadcast advertisements. This is an important provision, given the high rate of fees charged to radio stations in particular in Jordan. This provision could, at least

²⁷ See, generally, UNESCO's main publication on the regulation community broadcasting is Mendel, T., *Tuning into Development: International Comparative Survey of Community Broadcasting Regulation*, UNESCO, 2013, note 14.

²⁸ Note 25.

theoretically, be applied to eliminate fees for community broadcasters, although this has not happened yet.²⁹ However, under international standards lower licensing fees for community broadcasters should not be conditional upon them not carrying any advertisements, without which they could hardly be expected to survive. It may also be noted that the set of proposed Bylaws being put forward by the Commission, when they waive fees, do not include the term “others” as in the Law, and so may need to be amended to add this (see Articles 5(b)(1)(f) and 5(b)(4)(b)).

Recommendations:

- Consideration should be given to adding rules on undue concentration of media ownership and cross-ownership into the Law, to be applied, among other things, through the licensing process.
- One of the criteria for deciding on licence applications should be the contribution the proposed service would make to the diversity of content being offered through broadcasting.
- Proper rules and procedures should be put in place to support community broadcasters including by reserving a portion of the frequency spectrum for community radios and by establishing less onerous licensing procedures and fees for this category of broadcaster.

3. Licensing Procedures

Under the AVL, a wide range of broadcasters and related bodies are required to obtain a licence to operate. In addition to broadcasters, *per se*, Articles 4(d) and 8(f) also task the Commission with approving recorded materials – defined as any audio or visual or audiovisual content recorded by any technical means, such as tapes, records and compact disks – and granting licences for their display (show rooms) and circulation (distribution). These rules are elaborated upon in more detail in Articles 26 and 27, which prohibit the importation of recorded materials for purposes of circulation or the display or circulation of recorded materials without first obtaining the approval of the Commission.

This is problematical for two reasons. First, as regards the material itself, this is essentially a system of prior censorship for a vast range of content. Not only is this not legitimate as a restriction on freedom of expression, it is very unlikely to be effective given the growing prevalence of the Internet as a way of accessing this sort of material. Such controls are not imposed in democracies. Instead, content in any form, including recorded materials, may

²⁹ See UNESCO, *Assessment of Media Development in Jordan: Based on UNESCO's Media Development Indicators*, note 3, pp. 108-110.

attract liability, *post facto*, under laws which prohibit certain types of content such as obscene materials, hate speech and so on.

Second, outside of the question of whether or not the material is objectionable (whether this is established via a regime of prior censorship or the application of *post facto* liability), it is unclear why there would be a need to regulate, especially via a system of licensing, those who display and/or circulate this material.

It is reasonably clear from the definitions section of the AVL, and, in particular, the definitions of audiovisual media and broadcasting, that the Law is intended to cover the distribution of audiovisual content via the Internet and mobile phone technologies. This becomes even clearer when viewed in light of the set of proposed Bylaws being put forward by the Commission, which integrate OTT (over-the-top) and IPTV (Internet Protocol television) into the licensing framework.

There are some arguments for bringing certain types of content providers using Internet or mobile phone technologies into the framework for regulating broadcasting, especially inasmuch as they are providing services that compete with more traditional broadcasting services. At the same time, this needs to be done very carefully to avoid imposing unduly onerous regulations on the Internet, as well as going beyond the practical or technical regulatory reach of a regulatory (without putting in place very repressive control systems).

The definitions of audiovisual media and broadcasting in the main legislation, and the proposed definitions of OTT and IPTV in the draft Bylaws, are all very broad indeed and signally fail to strike the careful balance noted above. For example, OTT would cover any service that provides audio or video or audiovisual content via the Internet independently of the Internet access provider (commonly referred to as the Internet service provider or ISP). This would include not only Netflix, but also YouTube and, indeed, any website that hosted video content (which could be any private website).

According to Article 4(f), the MC is responsible for licensing technical equipment used for broadcasting, in coordination with the Telecommunications Regulatory Commission (TRC). Article 5(c) calls on the MC to grant permits for the importation of this sort of equipment and to monitor its use. Finally, Article 21(e) prohibits a licensee from using his or her equipment for any purpose not defined in the licence.

It is appropriate for broadcast and/or telecommunications regulators to set technical standards and parameters for broadcasting equipment for various reasons, including to ensure that efficient use is made of the frequency spectrum and that common technical protocols can be implemented. It does not, however, make sense to licence specific pieces of equipment as these provisions suggest the Commission should do. Rather, broadcasters should be responsible for conforming to the rules, including as regards technical

specifications for equipment, and there should be systems of sanctions for those who do not. Finally, there is no warrant for limiting the use licensees make of their equipment. The Law already prohibits one from engaging in broadcasting without a licence, and that is sufficient. There is no reason why a licensee should not use his or her equipment to produce a family video or an advertisement for a commercial company, which could then try to place that advertisement wherever it wanted to.

Broadly speaking, Articles 15-25 of the Law set out the rules relating to licensing of broadcasters. It is not the intention of this Analysis to assess in any significant depth the compliance of these rules with international standards or better national practice, as this is being done elsewhere. However, this Analysis does point to some weaknesses in the licensing system, in particular relating to omissions.

In most countries, licensing of broadcasters is done on a competitive basis, with the limits being dictated either by frequency scarcity or the commercial carrying capacity of the market. In the latter case, the regulator limits the number of players allowed into the relevant market (for example, national television stations), on the basis that the commercial size of the market can only support that number of quality players and that to licence more would lead to a proliferation of low-quality content and the inability of higher-quality players to survive, to the overall detriment of the public. There is a strong rationale for such a system, although modern technologies are fundamentally transforming the broadcasting environment in ways that present challenges for this approach.

Where a competitive system is in place, it is essential, among other things, to maintain fairness, to have clear criteria against which competing applications can be assessed. Better practice is to set out the main criteria in the primary legislation, and then to allow for these to be elaborated upon through the call for tenders in the context of any particular licensing competition. Even if competition is not the main approach towards licensing, and instead every applicant which complies with certain minimum standards is given a licence, there is still a need to set out clearly what those minimum standards are. This is fair vis-à-vis the applicant and also provides shape and consistency to the assessment exercise for the regulator.

The AVL does not include any such set of competitive assessment criteria or minimum standards. Article 16(b) does provide a list of documents/information that must be provided as part of a broadcasting licence application, and one might infer that this is related to the criteria for assessing the application, but this is not the same thing as setting these out clearly in the rules.

It is also better practice to include at least a general framework of rules relating to the procedures for processing broadcast licence applications in law. The Law does include certain elements of this, such as the list of documents to be provided, in Article 16(b),

referred to above. But it is limited in nature and would benefit from being expanded. The rules might, for example, refer to the right of the applicant to be heard in relation to the application, the right of members of the public to be informed about the application and also to make representations, and so on. The obligation of the regulator to adopt more detailed rules in relation to any particular licensing process should also be set out in law.

Finally, the Law fails to provide for any real system regarding the digital transition. The proposed Bylaws do start to address this issue, for example by adding in a definition of digital terrestrial broadcasting and adding some provisions on this to the rules, for example on fees. But no real system which takes into account the fundamentally different nature of digital broadcasting has been put in place. Perhaps there is a sense that, at least for the private sector, distribution of television signals will remain based in satellite technology, but if there is any intention of offering any digital terrestrial television licences, this issue needs to be addressed. There is also a need to transition JTV from analogue to digital terrestrial transmission systems.

In terms of the rules regarding licensees in the Law, a few of the positive obligations may be questioned. For example, Article 20(d) calls on licensees to “facilitate the work” of the authorities, while Article 20(f) calls on them to cooperate with other licensees. It is not the role of broadcasters to facilitate the work of public bodies; rather, the media should act as watchdog over them. Licensees are in competition with each other and, while they should behave in a civil fashion towards each other, they should not be required by law to cooperate.

Article 20(h) calls on licensees, whenever possible, to “give priority to Jordanian human and material resources”, while Article 20(m) calls on them to “contribute to the development” of national audiovisual production industries. These are less problematical than Articles 20(d) and (f), but it may be questioned whether it is necessary to include them as legal requirements in the Law and their vagueness leaves them potentially open to being abused. Employment rules are presumably in place which already promote the hire of citizens over foreigners. A more practical approach to developing local production capacity, in place in some countries, is to require broadcasters to carry certain minimum percentages of local content and/or to include a minimum percentage of independently produced content in their programme schedules.

Article 21(j) requires licensees to follow any instructions the Commission issues during emergencies and disasters. Such provisions, once common in broadcasting laws, are now understood as an unacceptable restriction on freedom of expression. The important role played by broadcasters during emergency and disaster situations is clear, but achieving this objective does not require draconian measures such as giving regulators the power to issue orders to broadcasters. Indeed, in most countries, broadcasters naturally do their best to

provide good coverage of emergencies, because it is the right thing to do but also because it makes good business sense (i.e. this sort of coverage attracts audiences).

Article 9 of the proposed Bylaws requires licensees to have a full time executive director who has “at least four years of experience and competency”, has relevant language skills and has not been convicted of a “crime or misdemeanour violating honor or morality”. These sorts of regulatory conditions are unnecessary and unduly intrusive. It is up to broadcasters, as part of their competitive success, to make sure they hire appropriate people to lead their organisations and this should not be required of them by law.

Recommendations:

- Consideration should be given simply to doing away with the system of regulating recorded materials. At a minimum, the system of prior censorship of these materials should be abolished.
- Careful consideration should be given to the proper scope of the Law in terms of Internet or mobile phone technology based forms of content distribution, and the definitions should be adjusted to limit the regulatory reach of the Commission to that.
- The MC, in collaboration with the TRC, should set standards for broadcasting equipment and impose those standards as a legal requirement on broadcasters through the licensing process, but not otherwise issue permits or licences for individual pieces of equipment.
- Licensees should be able to use their equipment for whatever otherwise legal purpose they see fit.
- A set of broadcast licence application assessment criteria – whether for competitive or minimum standards purposes – should be added to the Law.
- The procedures in the Law for processing broadcast licence applications should be reviewed and consideration should be given to elaborating in more detail on them, in line with the recommendations above.
- Consideration should be given to putting in place a proper system for licensing digital terrestrial television and for the transition of JTV’s terrestrial transmission system from analogue to digital.
- Consideration should be given to repealing or amending Articles 20(d), (f), (h) and (m) and Article 21(j), or to replacing them with alternative and more effective measures to achieve the same goals, along the lines suggested above.
- Article 9 of the proposed Bylaws should not be adopted.

4. Content Regulation and Promoting Professionalism

The Law includes a few rules relating to content issues and professionalism. Article 4(i) includes a general reference to the MC “organizing media activities to elevate the status of media profession”, giving as examples training, studies and research, conferences, festivals and the like, which is a positive role for it.

In terms of rules relating to content, Articles 20(k) and (l) of the Law, along with Article 8 of the proposed Bylaws, contain a number of specific content obligations and restrictions, as part of the terms and conditions to be included in the licence agreement. These include the following positive provisions:

- Respecting the moral rights of others.
- Respecting the technical and intellectual property rights of others.
- Respecting the human dignity, personality, freedom and rights of others.
- Respecting the “pluralistic nature of expression of thoughts and ideas”.

In terms of the prohibitions, these include the following:

- Not disseminating content which may “incite hatred or terrorism or violence, or incite sectarian or racial disputes”.
- Not disseminating content which “may damage the national economy, national currency or undermine the national and social security”.
- Not disseminating any false content which may “undermine the relations of the Kingdom with other countries”.
- Not disseminating content, including commercials, which “promotes sorcery and which might mislead public, blackmail and deceive them”.
- Not disseminating content which abuses Allah and religious beliefs.
- Not disseminating content which prejudices the values and heritage of the nation.
- Not disseminating content which violates public decency or morals, including pornography or violence.

In general, Article 18(d) provides for the Council of Ministers, in accordance with a regulation, to impose fines on broadcasters that violate their licence conditions. A more specific rule for breach of the rules in 20(l), which covers most of the both positive and negative rules listed above, is found in Article 29(b), which provides for fines of between JD 5,000 and 30,000, as well as paying compensation for any damages resulting from the breach. For repeated or recurring violations, the fines are doubled and there is also a possibility, following a court verdict, of the licence being cancelled. According to Article 8(o), in exceptional cases, the Commission may suspend any broadcast that is harmful to national security or the community, or that contains pornographic material.

Both the positive and the negative sets of rules here are problematical inasmuch as they are cast as obligations for broadcasters which might attract rather significant fines or worse. It is legitimate to require broadcasters to respect the intellectual property rights of others. However, imposing vague obligations like respecting the dignity and freedom of others is problematical. There are certain rights which are protected by very specific legal regimes, such as the rights to reputation and privacy. If a broadcasting law wants to provide for a parallel (and less onerous) system for protecting these rights, that is legitimate. The problem with the provisions as they are cast now is that they are too broad and vague, and could, as a result, be the subject of abuse. Calling on broadcasters to respect pluralism of expression is even more problematical because it is entirely unclear what this might actually mean. Does it require broadcasters, for example, to let someone who has a different perspective on a news story participate in a panel discussion about it?

The prohibitions are also problematical, essentially for the same reason, namely that they are simply too vague and unclear to be applied properly. One of the conditions under international law for restrictions on freedom of expression is precisely that they be clear and unambiguous, so that individuals know what is being prohibited. Some of the rules are reasonably clear, like inciting hatred, but others - like violating public decency, damaging the national economy and undermining relations with other countries - are not. In terms of the latter, for example, would criticising the diplomatic behaviour of a neighbouring country - otherwise a perfectly legitimate exercise of the right to freedom of expression - be covered?

Article 4(j) calls on the MC to establish a committee of experts to review complaints about media content and recorded materials from the public or another media outlet. In parallel to this, Article 8(j) calls on the director to refer complaints against licensees from the public or other licensees to the committee. Complaints between broadcast licensees and telecommunications operators, other than about financial issues, on the other hand, are to be dealt with directly by the MC, presumably on the basis that these are likely to involve technical or frequency related matters. In practice, the committee decides complaints based on a code of ethics adopted on a voluntary basis by broadcasters,³⁰ as well as principles of justice and equity. In practice, where the committee finds a breach of the rules, it issues a recommendation to the media outlet to do one of the following: provide a correction or reply; issue an apology; or delete the material which formed the subject matter of the complaint. The proposed Bylaws would add some limited procedural rules to this system and make the decision of the committee formally binding (Article 24).

Article 4(j) is a very interesting development - it was added as part of the 2015 amendments to the Law - inasmuch as it represents a sort of co-regulatory approach towards dealing with complaints, with experts deciding on these complaints rather than

³⁰ This was adopted on 26 April 2010. Available in Arabic at:
<http://mc.gov.jo/Pages/viewpage.aspx?pageID=22>.

officials. There has been a lot of discussion in Jordan about complaints systems and how to move forward on this issue, and this is a useful first step. Furthermore, this system could avoid the need for the vague both positive and negative rules discussed above, since the problems those rules aim to resolve could instead be addressed through complaints.

At the same time, there are a number of ways in which the system could potentially be improved. First, in line with the idea that restrictions on freedom of expression need to be clear and unambiguous, better practice in this area is to require complaints bodies to use codes of conduct setting out what is expected of media outlets and what is prohibited. This gives notice to both media outlets and the public regarding this important issue, and helps ensure that decision-making processes around complaints are fair and consistent. In most cases, such codes are developed by the complaints body in consultation with interested stakeholders, including of course the media.

As noted, the committee is currently relying on the voluntary code of ethics adopted by broadcasters. Under the AVL, and in particular in accordance with Article 8(l), one of the roles of the director of the Commission is to issue “instructions of programs, advertisements and commercials”. It is not entirely clear but this would seem to suggest that one of the roles of the Commission is to issue codes of conduct in these areas which broadcasters are bound to follow. We are not aware whether or not any such ‘instructions’ have yet been issued. Broadcasters are generally required to comply with any instructions issued by the Commission (Article 20(c)) and specifically required to follow the Article 8(l) instructions (pursuant to Article 21(l)). Such instructions could serve as the code of conduct for the complaints system, although there are important advantages to using broadcasters’ own code, including that it is likely to have the respect of those being regulated.

Second, better practice is to set out in the legislation or regulations the sanctions that might be applied by the co-regulatory body. Once again, this provides clarity, most importantly for the media but also for complainants. It can also help ensure that only limited and lighter sanctions are in fact applied, most commonly a warning or a requirement to publish or broadcast a statement acknowledging a breach of the code. As noted, the committee applies three types of sanctions, but this is not enshrined by law.

Third, at the moment, the composition of the committee is left entirely to the discretion of the Commission, which might change the members whenever it wished to. Better practice would be to provide some guidance in the text of the legislation, or in regulations, as to the composition and conditions of membership. Ideally, this should ensure that a reasonable proportion of the members come from the media sector and should also provide members with some protection of tenure.

Finally, the committee should be required to adopt at least a framework of procedures for dealing with complaints. These could, for example, make it clear that both the complainant

and the media outlet had a right to be heard, clarify whether complaints would normally be heard in person or simply via documentation, indicate that a decision would be provided in writing and so on. The proposed Bylaws would make it incumbent on the complainant to provide a copy of the media content to which the complaint related (Article 24(b)). This is not reasonable in respect of broadcasters – it would often not be possible for the complainant to capture that material – and it is also unnecessary given that broadcasters are already, under the Law, required to preserve their content for six months (Article 21(c)).

Recommendations:

- Both the positive obligations for broadcasters and the restrictions on content in Articles 20(k) and (l) of the Law and Article 8 of the proposed Bylaws should be reviewed and either removed or redrafted in clear and unambiguous terms.
- Consideration should be given to further developing the co-regulatory system based on the committee of experts, taking into account the following:
 - The need to clarify the standards which the committee is supposed to apply, which might suggest a need to repeal Article 8(l) if this is not going to be used.
 - The need to provide a legal basis for the sanctions that the committee applies when it finds that a media outlet has operated in breach of the code.
 - The need to put in place at least basic rules regarding the membership of the committee.
 - The need for the committee to adopt at least a framework of rules regarding the manner in which it will process complaints (including abolishing the idea of a requirement for the complainant to provide the media content to which the complaint relates).

- Ends -