Enhancing Internet Media Freedom in Jordan
international lessons for progressive internet regulation

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1. Executive summary

Background and context

It is difficult to overstate the extent to which the development of the Internet over the past twenty years has revolutionized the way media is produced and consumed. Not only has the internet enabled a mushrooming of diverse media platforms in a field where barriers to entry have historically been high, it has led to the creation of an ever-faster paced media industry that offers citizens a wealth of media content with stories reported almost as instantly as they unfold.

That said, the clichéd conception of the Internet as an unbounded, international information superhighway is an exaggeration at best, and at worst is entirely misleading. It has become increasingly apparent that national laws and less formalized control mechanisms linked to national governments are the most fundamental controls on Internet access, activity, and functionality (Hunt, 2014).[1] In countries such as Jordan, the nation-state has played an increasingly important in restricting the way in which its citizens are able to publish and consume online media content.

Jordan's heavy-handed, centralized and government led approach to Internet media regulation contrasts sharply with progressive approaches from around the world that have been able to simultaneously protect online freedom of expression and protect against the abuses that can result from the openness of the Internet, such as the ability to easily disseminate illegal speech (e.g. libel, defamation) and the difficulties associated with holding people accountable for publishing illegal speech anonymously. This paper provides an overview of the internet control regime in Jordan and contrasts it with examples of good practice from around the world.

Analytical framework

The analytical framework employed in this paper draws on the work of various Internet governance scholars. A survey of relevant literature suggests that there are four critical components to Internet policy paradigms: governing regime type (political context), regulation model (regulatory context), ICT development goals (economic context), and the values and criteria by which policy goals are defined and recognized (normative context).[2] This paper will use these components to analyse the regulation of online media in Jordan as well as in four selected country case studies: Argentina, Brazil, Finland and South Africa.

Online media regulation in Jordan

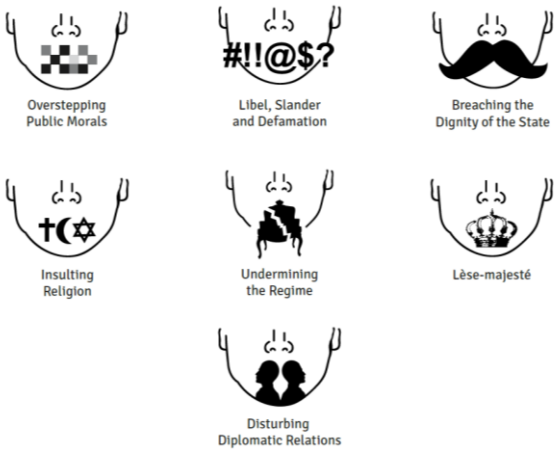
Online media in Jordan was generally regarded to be exempt from the laws regulating traditional forms of media until 2011, when legislative changes started to bring online media under the same regulatory umbrella as traditional media outlets.

Moreover, legislation was passed in 2012 requiring news websites to complete an arduous licensing process and as a result the government issued orders to block over 270 websites, as well as imposing heavy-handed controls on content such as holding the editors of news websites liable for comments posted by users on their site.

[1] Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

[2] Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

Overall, the legislative framework that regulates media freedom and freedom of expression in Jordan contains extensive restrictions of freedom of expression.



Moreover, the licensing process poses a significant threat to online freedom of expression for various reasons:

- Various Jordanian laws allow for the blocking of online content in a way which amounts to prior censorship.
- Jordanian law gives the Director of Jordan's Media Commission (MC) the discretion to decide which websites in Jordan qualify as "news websites" and require licensing. The law's vague definition of websites that require licensing, combined with the discretionary powers of the Director of the MC leave the door open for arbitrary, unaccountable and politicized decision making.
- Jordanian law requires the editor of a news website to be a member of the Jordanian Press Association. This is an onerous requirement that creates unnecessary obstacles to the operation of online media outlets.

International lessons for progressive media regulation: Argentina, Brazil, Finland and South Africa

Jordan's approach to Internet media regulation contrasts sharply with progressive approaches from around the world that have been able to protect online freedom of expression while simultaneously protecting against the abuses that can result from the openness of the Internet, such as the ability to easily disseminate illegal speech (e.g. libel, defamation) and the difficulties associated with holding people accountable for publishing illegal speech anonymously.

A robust, rights-based framework for freedom of expression

Online media regulation is not a purely technocratic endeavour related to building effective institutions and/or processes but rather involves an important normative component. The four case studies examined for this paper illustrate that a strong commitment to freedom of expression is necessary for online media freedom. It is important to note that in all of the countries studied for this paper, the constitution makes strong guarantees of freedom of expression. Moreover, Argentina, Brazil and Finland have all recently passed specific laws that ensure freedom of expression and the press remains unambiguously protected in the age of the Internet.

Such constitutional and legislative provisions provide a robust normative framework to ensure that the mechanisms for regulating online media are not abused for purposes of censorship but rather serve to protect citizens' rights, such as the right to privacy and protection against defamation.

Regulating online media

This paper presents a detailed overview of online media regulation in the four case study countries. It is worth noting that none of these countries require online media outlets to obtain a license. Some of the most notable features of these regulation systems are described below.

Blocking and takedown of illegal content – In Argentina, Brazil and Finland, it is the courts that decide whether a specific piece of online content is illegal and should be taken down.

- **Argentina**'s National Communications Commission (NCC) is a decentralized government body that can order ISPs to block illegal online content based on a court-issued injunction (Freedom House, 2014).[3]

- Under **Brazil**'s regulation system, the judicial branch is responsible for issuing takedown orders for illegal online content. (Article 19, Marco Civil da Internet). The law makes explicit reference to the importance of protecting freedom of speech and stipulates that judgements on whether content should be taken down must take into account the society's collective interest in availability of the content on the internet (Section 3, Marco Civil da Internet).

  If the contact information for the person directly responsible for the content is available, the Internet application (e.g. website) must inform him/ her of the court order with information that allows the user to legally contest and submit a defense in court, unless otherwise provided by law or in a court order (Article 20, Marco Civil da Internet).

- Under **Finland**'s regulation system, a court may order a content provider, ISP or other intermediary to release the information required for the identification of a user who has posted content online provided that there are probable reasons to believe that the dissemination of this content is illegal. However, the identifying information may be ordered to be released to the injured party only in the event that he or she has the right to bring a private prosecution for the offence. The request for identification of the user must be filed with the court system within three months of the publication of the message in question (Section 17, Freedom of Expression in Mass Media Act).

  A court may also order a publisher, broadcaster or Internet intermediary to remove or block a piece of content if publication of the content is illegal. Before issuing a takedown or blocking order, the court must give the intended addressee and the user who posted the content an opportunity to be heard, unless the urgency of the matter otherwise necessitates. The takedown or blocking order lapses unless a charge or civil suit is brought against the content within three months.

[3] Freedom House (2014) *Freedom on the Net 2014*. Washington DC: Freedom House

Intermediary liability

- In **Argentina**, a recent Supreme Court judgment has established that ISPs are free from liability for illegal content posted online by third parties. (Pavli, 2014).[4]

- In **Brazil**, the law provides a clear safe harbor for intermediaries, who will only be held liable for damages arising from user-generated content when failing to comply with a court-issued takedown order (Article 19, Marco Civil da Internet).

- In **South Africa**, members of the Internet Service Providers Association are not liable for third-party content they do not create or select, however, they can lose this protection from liability if they do not respond to take-down requests. Any person who lodges a notification of unlawful activity with a service provider knowing that the notification misrepresents the facts is legally liable for wrongful take-down (Article 77, Electronic Communications and Transactions Act).

Conclusions and recommendations

Two dimensions of policy are required in order to effectively protect online media freedom:

- A robust and progressive normative framework that protects freedom of expression.
- A progressive co-regulatory system of governance.

It is clear from the analysis conducted for this paper that neither of the abovementioned dimensions of Internet policy are in place in Jordan. Thus, it is recommended that:

- The Government of Jordan does not place onerous restrictions on the operation of online media outlets. This involves ending the licensing system for online publications and replacing it with a simple registration system. It also involves ending the onerous requirements for news website editors and replacing them with a system that merely ensures that the editor is an adult, is not bankrupt and has not had her/his competency restricted.

- The Government of Jordan undertakes legal reforms to put in place a robust and progressive normative framework that protects freedom of expression as well as citizens' right to hold others accountable for defamation, regardless of the communication medium used.

- The Government of Jordan undertakes legal reforms to ensure safe harbour for intermediaries, except where they fail to implement court-issued takedown or blocking orders.

- The Government of Jordan develops strong mechanisms to ensure that all stakeholders are involved in developing Internet policies and regulations.

[4] Pavli, D. (2014) "Case Watch: Top Argentine Court Blazes a Trail on Online Free Expression", *Open Society Foundations Voices*, Accessed online on 29.12.2014

2. Introduction

It is difficult to overstate the extent to which the development of the Internet over the past twenty years has revolutionized the way media is produced and consumed. Not only has the internet enabled a mushrooming of diverse media platforms in a field where barriers to entry have historically been high, it has led to the creation of an ever-faster paced media industry that offers citizens a wealth of media content with stories reported almost as instantly as they unfold.

That said, the clichéd conception of the Internet as an unbounded, international information superhighway is an exaggeration at best, and at worst is entirely misleading. Gone are the 1990s, when the expansion of the Internet was seen as a threat to nation-state sovereignty and prominent academics asserted that the Internet cannot be regulated, with figures such as the MIT Media Lab founder Nicholas Negroponte even going as far as to claim that "It's not that the laws aren't relevant, it's that the nation-state is not relevant." (Higgins & Azhar, 1996, Feb. 5, p. 9).[5]

Since then it has become increasingly apparent that national laws and less formalized control mechanisms linked to national governments are the most fundamental controls on Internet access, activity, and functionality (Hunt, 2014).[6] In countries such as Jordan, the nation-state has played an increasingly important in restricting the way in which its citizens are able to publish and consume online media content. Online media in Jordan was generally regarded to be exempt from the laws regulating traditional forms of media until 2011, when legislative changes started to bring online media under the same regulatory umbrella as traditional media outlets. In 2012, legislation was passed requiring news websites to complete an arduous licensing process and as a result the government issued orders to block over 270 websites, as well as imposing heavy-handed controls on content such as holding the editors of news websites liable for comments posted by users on their site.

Such attempts at centralized, government-led regulation of the Internet not only undermine the Internet's potential as a powerful tool for sharing knowledge and information, they are also inefficient, discourage innovation and are ill-suited to the technological realities of the Internet (O'Sullivan & Flannery, 2011; Frydman, Hennebel, & Lewkowicz, 2012).[7]

This approach to Internet media regulation contrasts sharply with progressive approaches from around the world that have been able to simultaneously protect online freedom of expression and protect against the abuses that can result from the openness of the Internet, such as the ability to easily disseminate illegal speech (e.g. libel, defamation) and the difficulties associated with holding people accountable for publishing illegal speech anonymously.

This paper will provide an overview of the internet control regime in Jordan and contrast this authoritarian approach with examples of good practice from around the world. This is a policy-oriented paper rather than an academic analysis. Thus, the purpose of this comparison is to highlight various regulatory alternatives that are available to the Jordanian government, alternatives that fulfill its self-proclaimed objective of guarding against illegal speech without undermining Internet media freedom.

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[5] Higgins, A., & Azhar, A. (1996, Feb. 5th) "China begins to erect second Great Wall in Cyberspace." The Guardian. Infotrac Newsstand.

[6] Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

[7] O'Sullivan, K. P. V., & Flannery, D. (2011) "A Discussion on the resilience of command and control regulation within regulatory behaviour theories." Available at the *Social Science Research Network* online repository, #1927500.
Frydman, B., Hennebel, L., & Lewkowicz, G. (2012) "Co-regulation and the rule of law." In Brousseau, E., Marzouki, M., & Méadel, C. (Eds.). *Governance, regulation and powers on the Internet* (pp. 133-150). Cambridge: Cambridge University Press.

3. Methodology

The research methodology employed by this paper is two-fold:

- A literature review of research related to online freedom of expression was conducted with a focus on Jordan, as well as four selected country case studies of representing examples of good practice.
- A desk review of relevant legislation and regulations from various countries was conducted with a focus on Jordan, as well as four selected country case studies of representing examples of good practice.

Four country case studies (Argentina, Brazil, Finland and South Africa) were selected and presented with the aim of demonstrating that:

- There are various policy options available to governments that seek to protect online media freedom while simultaneously protecting against the dissemination of illegal content.
- These policy options are applicable across a variety of contexts, both in mature democracies and transitional democracies, as well as in countries spanning a wide range of economic development levels. The feasibility of applying such policies is not limited to mature democracies or high income countries.

The country case studies were selected using an iterative process. A longlist of potential country case studies was prepared by identifying countries that scored highly on the following international indices/ global reports:

- Mapping Digital Media: Global Findings (Open Society Foundations)
- World Press Freedom Index 2014 (Reporters Without Borders)
- Freedom of the Press 2014 (Freedom House)
- Freedom on the Net (Freedom House)

Preliminary research was conducted on the longlisted countries to identify those with strong policy frameworks in the area of regulating online media. Out of these, four countries were selected with a view to representing a diversity of geographical, economic and political contexts (a conscious decision was taken to only include one country from Western Europe / North America).

It is also important to note that various informal policies can also play an important role in determining the freedom of online media. Case studies of Internet policy in various countries have documented informal control mechanisms that occur at arm's length from the government to assure plausible deniability. Such mechanisms include harassment and violence against online reporters and activists, online propaganda efforts and coordinated denial of service attacks against particular websites and servers. Online propaganda efforts involve the proactive manipulation of web content that renders it more challenging for regular users to distinguish between credible information and government propaganda. Specific actions include employing ''Internet brigades" to post propaganda and disinformation on blogs and websites, participation in Internet polls with an intention to skew results, disseminating false information about unfolding events, and harassing bloggers and social media users who are critical of the government or regime (Freedom House, 2014; Hunt, 2014).[8]

[8] Freedom House (2014) *Freedom on the Net 2014*. Washington DC: Freedom House; Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

To date, there has been little in the way of systematic investigation around the use of informal Internet control mechanisms in Jordan.[9] Moreover, conducting primary research on this phenomenon requires extensive fieldwork which is outside the scope of this research initiative. For these reasons, this paper will not consider the effect of informal control mechanisms on online media freedom in Jordan, although this is an important area which should be flagged as a priority for future research.

[9] A forthcoming study which will be co-published by 7iber media and the King Hussein Foundation Information and Research Center and is entitled "Digital Privacy in Jordan, Perceptions and Implications" has begun to explore these issues and provides a good starting point for research in this area.

4. Analytical framework

Internet policies relating to online media regulation are complex and multifaceted. Thus, this analysis requires a robust analytical framework that categorizes elements of these policies in a way which allows for cross-country comparison.

The analytical framework employed in this paper draws on the work of several Internet governance scholars. Rather than looking at specific online media regulations in isolation, this paper follows the approach of researchers such as Zheng (2008)[10] and Yang (2009)[11] by looking at *Internet control regimes* as a whole (in this case, those aspects of these control regimes that are relevant to online media).

It is worth noting that there is some variation in the definitions that scholars have given to the term Internet control regimes. For example, Zheng's definition refers to government agencies and policy mechanisms that function to control Internet access and activity for political and social reasons, whereas Yang's definition refers more broadly to the totality of the institutions and practices of Internet control, including the regulatory regime framework. As discussed in the previous section, informal Internet control mechanisms in Jordan are outside the scope of this research initiative. Thus, this paper will follow Zheng's conception of Internet control regimes while recognizing that a broader conception of these control regimes would add a valuable dimension to the analysis.

A survey of relevant literature suggests that there are four critical components to Internet policy paradigms: governing regime type (political context), regulation model (regulatory context), ICT development goals (economic context), and the values and criteria by which policy goals are defined and recognized (normative context).[12]

Governing regime type (political context) The political context in any given country plays a major role in determining the Internet control regime that it puts in place. This is illustrated by the fact that the Pearson correlation coefficient for Freedom House's 2013 *Freedom in the World* score and the 2013 *Freedom on the Net* score for the 60 countries receiving both is 0.85. This is a strong positive correlation, which means that high Freedom on the Net variable scores are related to good performance on standard measures of political rights and civil liberties (and vice versa).[13] Political context will be discussed in the below analysis, but it will not be an area of focus due to the fact that this is a policy-oriented paper aimed at drawing specific policy recommendations that are directly related to online media regulation, rather than broad recommendations related to democratization or reforming the governing regime.

Values and norms (normative context) This refers to the values and norms regarding media freedom and freedom of expression in any given country. Internet control regimes are typically outgrowths of older media regulatory regimes and policy language specifying the kind of prohibited Internet content is often drawn directly from existing regulations that address prohibited newspaper, radio, and broadcast media content.

[10] Zheng, Y. (2008). *Technological empowerment: The Internet, state, and society in China*. Palo Alto: Stanford University Press.

[11] Yang, G. (2009). *The power of the Internet in China: Citizen activism online.* New York: Columbia University Press.

[12] Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

[13] *Ibid.*

Regulation model (regulatory context) Three Internet regulation paradigms have been identified that provide a policy backdrop against which more targeted regulatory actions can be said to occur as per the below (Cave, Simmons, & Marsden, 2008; d'Udekem-Gevers & Poullet, 2001):[14]

- **Government regulation ("command-and-control"):** government authorities or a specialized government agency make the rules, enforce them, and punish those who breach them. Under such an arrangement, government regulators fix standards on certain activities (the command) and establish mechanisms for monitoring and enforcement (the control). It is often argued that command-and-control regulations are inefficient, inflexible and not well matched to the technological realities of the Internet (O'Sullivan & Flannery, 2011; Frydman, Hennebel, & Lewkowicz, 2012).[15]
- **Co-regulation:** Co-regulation encompasses a range of different regulatory phenomena, all involving interaction between a self-regulatory body and general legislation (i.e. legislation that sets out general guidelines rather than specific standards and enforcement mechanisms) (Marsden, 2011).[16] Co-regulation generally provides "backdrop powers" for governments to intervene in the event that rights such as freedom of expression are endangered. It also involves multiple stakeholders, including citizens, in the regulation process (Hunt, 2014).[17]
- **Self-regulation:** Private tech sector actors largely make the rules and implement them collectively with minimal public intervention.

ICT development goals (economic context) All the case studies that will be considered in this paper are from countries that promote ICT as an engine of economic development. This is in contrast to countries such as Cuba or Myanmar, for example, where governments have little interest in the economic potential of the Internet and are thus willing to place major restrictions on their population's access to the Internet. Because the case studies featured in this paper (including Jordan) promote ICT as an engine of economic development, the economic context can be considered as a broadly "fixed variable" and thus will be precluded from the analysis.

[14] Cave, J., Simmons, S., & Marsden, C. (2008). *Options for and Effectiveness of Internet Self-and Co-Regulation*. Brussels: European Commission; d'Udekem-Gevers, M., & Poullet, Y. (2001). "Internet content Regulation: Concerns from a European user empowerment perspective about Internet content regulation." *Computer Law & Security Review*, 17(6), 371-378.

[15] O'Sullivan, K. P. V., & Flannery, D. (2011) "A Discussion on the resilience of command and control regulation within regulatory behaviour theories." Available at the *Social Science Research Network* online repository, #1927500; Frydman, B., Hennebel, L., & Lewkowicz, G. (2012) "Co-regulation and the rule of law." In Brousseau, E., Marzouki, M., & Méadel, C. (Eds.). *Governance, regulation and powers on the Internet* (pp. 133-150). Cambridge: Cambridge University Press.

[16] Marsden, C.T. (2011b*). Internet Co-Regulation and Constitutionalism: Towards a More Nuanced View*. Available at SSRN: http://ssrn.com/abstract=1973328 or http://dx.doi.org/10.2139/ssrn.1973328

[17] Hunt, R. (2014) "Moving Beyond Regulatory Mechanisms: A Typology of Internet Control Regimes" Portland: Portland State University Dissertations and Theses. Paper 1801.

5. Online media freedom in Jordan

Jordan: at a glance

Political context	Normative context	Regulatory context
Semi-authoritarian	Extensive restrictions on media freedom and freedom of expression	Government regulation ("command and control")

5.1 Background

The development of the Internet landscape in Jordan is a story of tensions between official efforts to position the country as the regional hub for ICT and the regime's attempts to control the flow of information that the internet provides.

Since 2003, the Jordanian state has aspired to position the country as the ICT hub of the Middle East. Many policies and programs have been introduced with the aim of encouraging the ICT sector, including the establishment of an ICT stream in schools and universities. Indeed, over the past decade several Arabic online social platforms with regional reach have been established in Jordan, including IKBIS, Jeeran and Maktoob. By 2014, Jordan ranked 50th in the World Economic Forum's Networked Readiness Index, and 6th among Arab states (World Economic Forum, 2014).[18]

The fast increase in Internet penetration in Jordan led to the mushrooming of electronic news websites and blogs and by 2013, there were 400 news websites in the country (7iber, forthcoming).[19] In 2011, as uprisings around the region unfolded, citizens flocked to alternative news sources and Facebook use increased dramatically. By 2013, there were 2.6 million Facebook users in Jordan out of a total population of 6.5 million people (7iber, forthcoming).[20] The increased Internet penetration rate, the rise in political dissent in the region, and the increase in the number of Facebook users have had the combined effect creating more space for freedom of expression and public criticism of the Jordanian regime.

But as the open, unregulated nature of the Internet in Jordan pushed media freedom, it also created a fertile environment for irresponsible and sometimes criminal activity. Many news websites have been implicated in alleged attempts to blackmail public figures and private institutions by threatening

[18] World Economic Forum (2014) *Networked Readiness Index.* Available online: http://www.weforum.org/issues/global-information-technology/the-great-transformation/network-readiness-index
[19] 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media
[20] *Ibid.*

to publish defamatory information about them.[21] Such incidents provided a pretext for officials and parliamentarians to introduce measures aimed at restricting the online media environment.

5.2 Political context

Jordan is a semi-authoritarian regime in which political rights and civil liberties are restricted both by law and through informal mechanisms of control (e.g. Freedom House, 2014; Human Rights Watch, 2014).[22] The monarch retains extensive constitutional powers including the power to appoint and dismiss the prime minister, the cabinet, the judges of the constitutional court, the members of the upper chamber of Parliament and the chiefs of both the army and the intelligence services. He also has the authority to dissolve both chambers of Parliament at his discretion.[23] Under Article 30 of the Jordanian Constitution, the monarch cannot be held legally accountable for the exercise of these powers.

5.3 Normative context

The legislative framework that regulates media freedom and freedom of expression in Jordan is composed of various legal instruments. This section will outline the current laws governing freedom of expression and access to online information in Jordan.

Overall, the picture is one of extensive restrictions of freedom of expression. However, it is worth noting the contradictions between the restrictions outlined in Jordanian laws and the rights affirmed by international instruments that have been ratified by Jordan.

5.3.1. Right to Freedom of Expression

Constitution – The Jordanian Constitution protects the general principle that citizens have the right to freedom of expression while simultaneously allowing for legislative restrictions on this right. Article 15 of the constitution states: "every Jordanian shall be free to express his opinion by speech, in writing, or by means of photographic representation and other forms of expression, provided it does not violate the law".[24]

International obligations – The Jordanian state has ratified the International Covenant on Civil and Political Rights (ICCPR)[25] which asserts the right to freedom of expression. Article 19 of the ICCPR states that:

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

[21] See for example: Jordanian Media Monitor "Media outlets blackmail election candidates." 2 January, 2013. Available online: http://www.jmm.jo/reports/2015/02/وسائل-إعلام-تبتز-المرشحين-للانتخابات ; Qatamine, A. "Websites try to blackmail the Aqaba Economic Authority" *AlSawt*, 8, February 2014. Available online: http://alsawt.net/مواقع-الكترونية-حاولت-ابتزاز-سلطة-الع

[22] Freedom House (2015) *Freedom in the World 2015*. Washington DC: Freedom House; Human Rights Watch (2014) *World Report 2014*, New York : Human Rights Watch

[23] The Constitution of the Hashemite Kingdom of Jordan, Chapter 4, Articles 30-40.

[24] The Constitution of the Hashemite Kingdom of Jordan, Chapter 2, Article 15

[25] International Covenant on Civil and Political Rights (1966) New York: United Nations. Full text and ratification information available online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    a. For respect of the rights or reputations of others;
    b. For the protection of national security or of public order or of public health or morals.

In September 2011, the UN Human Rights Committee (HR Committee), a treaty monitoring body for the ICCPR, issued General Comment No 34 in relation to Article 19, which clarifies a number of issues relating to freedom of expression on the Internet. Importantly, it states that:

- Article 19 of ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and internet-based modes of expression.
- States parties to the ICCPR must consider the extent to which developments in information technology, such as internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world. In particular, the legal framework regulating the mass media should take into account the differences between the print and broadcast media and the internet, while also noting the ways in which media converge.

In particular, the UN Human Rights Committee noted that: Any restrictions on the operation of websites, blogs or any other internet based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; ***generic bans on the operation of certain sites and systems are not compatible with paragraph 3.*** It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government (Article 19, 2013).[26]

5.3.2. Limitations on Freedom of Expression

System of Governance – According to Jordanian law, citizens can be sentenced with one to three years in prison for *"Lese Majeste"* crimes (Penal Code, Article 195) and tried in the military-run state security court (Military Court Law, Article 3.8). The law criminalizes anyone "who is proven to have had the audacity to insult his Majesty the King" or sends a text, audio or electronic message, or image or caricature of his Majesty the King "in a way that undermines the dignity of his Majesty." The same applies to material that insults the Queen, Crown Prince, a Regent of the throne, or a member of the Regency Council.

The Penal Code criminalizes with hard labor anyone who undertakes any activity aimed at undermining the system of governance, or who undertakes an individual or collective action to change the social or economic structure of the state, or fundamental status of society (Article 149). The vagueness of the definition of an "insult" or "system of governance" grants flexibility in the legal interpretation of the law, and thus, flexibility in its application.

[26] Article 19 (2013) *Internet Intermediaries: Dilemma of Liability.* London: Article 19.

Religion – Religious content is regulated through anti-blasphemy provisions across the Penal Code and the Press and Publication Law (PPL). The Penal Code (PC) outlaws any publications that insult individuals' "religious feelings" or beliefs, and any prohibits any individual who is proven to have publicly insulted a religious prophet (PC, Articles 273, 278). While the PC specifies that these crimes can take place in any print publication, map, drawing, or a symbol. The PPL also addresses issues of blasphemy, stating that publications are prohibited to publish any content at odds with the "values of Arab and Islamic" nations (PPL, Article 5). The Law also prohibits publishing libelous, or slanderous, defamatory content against those religions "whose freedom is protected in the constitution" (PPL, Article 38/a) or content that insults a religious prophet (Article 38/b), or content that insults "religious feelings or beliefs".

While there have been no official cases against journalists, activists, or citizens for publishing "religiously harmful" content online, Jordanian laws have been used to indict the international search engine Google for providing access to the controversial movie "Innocence of Muslims" in Jordan. In February 2014,[27] the court of first instance issued an order compelling Google to block links to pages that host the video on YouTube.[28] The lawyer filing this suit argued that "by hosting the video on YouTube, Google violated numerous Jordanian laws that prohibit insulting the messengers of God identified in the Koran." In an interview, the lead lawyer of the case believed the intermediary should be held responsible for making the film accessible to people "knowing" that it carried hate speech.[29] The charges listed against Google in the lawsuit filed in March 2014 included "inciting religious hate and racism, insulting Muslims' religious feelings, insulting the Prophet, and defaming Islam."[30] Although the case is not closed as the time of writing this paper, the lawsuit raises the possibility that Jordanian laws will be applied to international companies that host content.

Defamation, Libel and Slander

– Jordanian law covers crimes of defamation, libel, and slander across both the PC and PPL. The PC provides detailed definitions as to what constitutes defamation, libel, and slander. Importantly, punishments vary depending on the targeted party. Libel, slander, or insults towards regular citizens can result in up to three months, six months, or one month in prison respectively. However, one can be charged with up to two years in prison for defaming public figures identified as the Parliament or one of its members, official institutions, courts, public administrations, the army, or their members on duty (PC, Article 191). The same punishment is given for public defamation, slander, libel of a president, ministers or representatives of a foreign country. Insulting or defaming the King, the Queen, the Crown Prince, or a Regent of the throne can lead to sentences of up to three years in prison. Insulting a public official can lead to up to one year of imprisonment, and up to two years if the official is a judge (Articles 193 and 196). Insulting the national flag, symbols, or the flag of the League of Arab Nations can result in up to three years in prison (Article 197).

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27 *Al-Ghad Newspaper* "Court Order Obliges Google to Delete Anti-prophet Film." 19 February, 2014. Available online: http://www.alghad.com//articles/504291

28 Ghazal, M. "Google blocks access to Anti Islam Film Trailer in Jordan," *Jordan Times Newspaper*, 22 September, 2012. Available online: http://jordantimes.com/google-blocks-access-to-anti-islam-film-trailer-in-jordan.

29 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media

30 *Al-Ghad Newspaper* "Court Order Compels Google to Delete Anti Islam Film" 19 February 2014. Avaialble online: http://www.alghad.com//articles/504291.

These PC provisions apply to all crimes of defamation regardless of the medium through which the crime was committed (Article 198). It allows defamation only if it is based on "correct information" *and* if its publication will benefit the "public good" without identifying what constitutes these terms. These provisions apply to all offending citizens, including journalists.

The PPL adds another provision that prohibits the publication of material that involves "slander, libel, or insult" against any individual or affects their personal freedoms (PPL, Article 38.b).

Public Morals – Jordanian law forbids activities or speech that offend public morals without specifying what constitutes these morals. The relevant laws in this regard are the Information Systems Crimes Law, Penal Code and Telecommunications Law. The PC criminalizes any individual "who has sold, or possessed with an intention of selling or distributing, or printed or reprinted any printed obscene material, or a drawing, a photo, a sketch, a module, or any other thing that may lead to the corruption of morals." Any individual who participates in these activities or any others that involve the public display, distribution or trade of any of these "obscene" or morally "corrupt materials" can be sentenced to up to three years in prison (Penal Code, Article 319).

The Information Systems Crimes Law allows for the detention of up to three months of any individual who intentionally attempts to approach any person under the age of 18 with sexual material that is published, sent or produced through information systems or information networks. According to the Director of the Department of Electronic Criminal Investigation, "moral" crimes are at the forefront of crimes committed online although there is no clear legal definition of what constitutes a "moral" crime (7iber, forthcoming).[31]

Foreign Countries – The Penal Code penalizes, with up to five years in prison, anyone undertaking actions, speech or writings that are unauthorized by the government and subject the Kingdom to hostile acts or that harm relations with foreign countries (Article 118). Another article criminalizes insulting a foreign country, its military, flag, or national symbol with up to two years in prison (Article 122).

Terrorism – Passed in 2006, the Anti-terrorism Law criminalizes any expression of support for what can be considered terror on the Internet. Amendments to this law passed in May 2014 state that:

> "use of information systems, or the information network, or any other publishing or media tool, or establishment of a website to facilitate the conduct of terrorist acts or support terrorist groups, or an organization or a charity that performs acts of terrorism or market its ideas or funds it, or conducts any acts that subject Jordanians or their property to acts of hostility or reprisals."[32]

It is important to note that "support" is not clearly defined and could be applied to the basic use of symbols and signs, and the sharing of content that is considered to be supportive of terror. Moreover, the definition of what constitutes a terror act is very broad and includes "any act that damages the

[31] 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media

[32] Al-Masri, R. "Jordan's Anti-Terrorism Law: A Choice between Security or Speech", *7iber,* 30 April, 2014". Available online: http://www.7iber.net/2014/04/anti-terrorism-draft-law-a-choice-between-security-or-speech

environment, or disrupts public life." Not only does this criminalize protest, it could also criminalize actions such as sharing a Facebook event calling for a protest.

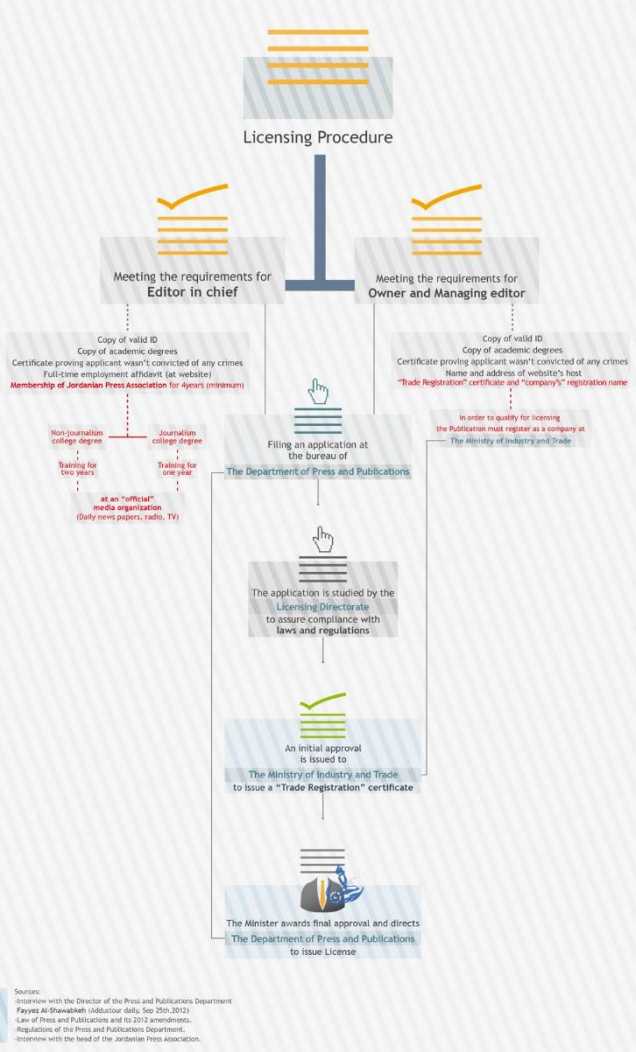
Compatibility with commitments under international law – The ICCPR allows for specific restrictions on freedom of expression as long as they are codified in law and are ***necessary*** to protect the rights or reputations of others or to protect national security, public order, public health or morals. Jordan's restrictions are indeed codified in law and most of them could arguably fit within the scope of the abovementioned "legitimate restrictions" set out by international law. However, the vagueness of these laws and the harsh penalties set out in them such measures are clearly not ***necessary*** to serve the aims of "legitimate restrictions." For example, it is well-documented that the criminalization of defamation has a chilling effect on freedom of expression. The same applies to the use of broad and vague terminology in legal restrictions on free speech. Jordan's restrictions on freedom of expression are clearly in violation of its international commitments in this area.

5.3.3. Provisions specific to online media

Press and Publications Law – Until 2011, online media was generally regarded to be exempt from the provisions of the PPL.[33] However, amendments made to the law in 2011 officially added news websites to the definition of press publications. In 2012, further amendments to the PPL solidified the government's grip over those online spaces that "publish news, investigations, articles, or comments, related to the internal or external affairs of the Kingdom", requiring these websites to complete an arduous process (see Figure 1 below). According to the PPL, the decision as to whether a specific website fits this definition is left to the discretion of the Manager of the Media Commission (MC). The PPL also offers more flexible registration requirements for specialized publications or websites, although the implementation of this aspect of the law has been highly problematic (see section 5.4.1).

[33] The first incident of the Press and Publication Law being used against an electronic news website was in 2010 in a lawsuit filed by a newspaper owner against two electronic websites for slander and defamation. The Court of Cassation (Supreme Court) in Jordan issued an order that classified an electronic news website as a publication in accordance with the general definition listed in the Press and Publication Law. This order canceled the first ruling of the Court of First Instance and Court of Appeal to not hold the plaintiffs responsible for what they have published given that the Press and Publication Law does not cover electronic websites. The case was eventually ruled in favor of the newspaper owner citing the anti-defamation articles from the Press and Publication Law (source: 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media).

Figure 1 – Procedure for Licensing Online Publications in Jordan



Information Systems Crimes Law – Passed in 2010, the Information System Crimes Law was set to regulate crimes committed in cyberspace of online fraud, identity theft, and underage sexual abuse. It also regulates illegal access to "websites" and "information systems" without defining what "legal access" is. The law penalizes users who use any information system within a/the network to facilitate terrorist activities, give support to a group or an organization that conducts terrorist activities, or promote its ideologies (Article 10). The law also gives legal courts the authority to release a request to block or stop a website or an information system if it is used to violate any of the provisions in the law.

5.4 Regulatory context

Jordan's approach to online media regulation fits squarely in the government regulation paradigm (also known as the "command-and-control" paradigm), whereby government authorities make the rules, enforce them, and punish those who breach them. It is also worth noting that governmental internet

controls in Jordan are typical of what Deibert and Rohozinski (2010)[34] describe as *second generation Internet controls.* According to Deibert and Rohozinski, second generation controls have an overt and a covert track. The overt controls aim to normalize and legalize content controls by specifying the conditions under which access to particular content can be denied (or said content can be remove from servers). The covert controls establish procedures and technical capabilities that allow content controls to be applied immediately and effectively before and during critical moments (e.g. periods of political unrest). Second generation controls identified by Deibert and Rohozinski include:

- Compelling Internet sites to register with authorities, and using noncompliance as justification for removing ''illegal'' content.
- Strict criteria pertaining to what is ''acceptable'' within the national media space, and the strategic de-registration of sites that do not comply from the national domain.
- Expanded use of defamation and ''veracity'' laws to deter bloggers and independent media outlets from posting material critical of the government or specific government officials.
- Evoking national security concerns—especially at times of civic unrest—as the legal justification for blocking or removing specific Internet content and services.
- Formal and informal requests to ISPs and OSPs to remove material, backed by the threat of serious sanctions.

5.4.1 Role of government agencies

Media Commission – The Media Commission (MC) is the key government agency responsible for regulating/ censoring online media. Jordanian law gives the Director of the MC the discretion to decide which websites in Jordan qualify as "news websites" and will be required to complete an arduous licensing process. The only formal legal criteria which the Director is required to abide by in making this decision except that websites that require licensing are those which "publish news, investigations, articles, or comments, related to the internal or external affairs of the Kingdom." This vague definition combined with the discretionary powers of the Director of the MC leave the door open for arbitrary, unaccountable and politicized decision making. As mentioned above, the PPL offers more flexible registration requirements for specialized publications or websites. The definition of specialized publications is also vaguely defined. According to the Director of the MC, "specialized" websites are simply websites that do not publish any political content on Jordan, but stick to specialized topics like "sports, parliamentary, and social issues" (7iber, forthcoming).[35] The Director's strange assertion that parliamentary issues are not political is a clear illustration of the dangers of giving individuals ill-defined and discretionary powers.

Telecommunications Regulatory Commission – The Telecommunications Regulatory Commission (TRC) at the Ministry of Information and Communications Technology plays a secondary role in the regulation/ censorship of online media. Once the DPP issues a blocking order for a given website, it is sent to the TRC which in turn sends a request to ISPs to filter the listed websites. Importantly, there is no legal basis for

[34] Deibert, R. & Rohozinski, R. (2010). "Control and subversion in Russian cyberspace." In Deibert, R. (Ed.). *Access controlled: The shaping of power, rights, and rule in cyberspace* (pp. 15-34). Cambridge, Massachusetts: MIT Press.

[35] 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media.

the TRC to issue such orders to ISPs. The official mandate of the TRC specified in the Telecommunications Law does not give the commission the power to issue blocking orders to ISPs.

Despite the lack of a legal basis for this request, ISPs have complied with TRC blocking orders. It is worth mentioning that the License agreement between the TRC and the ISPs states that the licensee should collaborate at all times with the TRC or their authorized representatives in practicing the assigned functions of the TRC listed in the Telecommunications Law. However, as mentioned above, issuing orders to filter online content is not among these functions. This function was included in the proposed amendments to the Telecommunications Law that preceded the passing of the new PPL, but the amendments have yet to be passed.

The lack of accountability and lack of implementation of formal procedures in the blocking process is also illustrated by the experience of a court case brought against the government by the online magazine 7iber. The High Court of Justice dismissed 7iber's case against the blocking order against it because the blocking order came through an "unofficial email" and was not listed in the initial official blocking order.

In addition to the government blocking requests discussed above, there is a recorded case in 2001 in which the government requested that ISPs to block access to the US-based newspaper, the *Arab Times,* without a legal framework. This was triggered by controversial articles about Jordan's monarchy and government published in the newspaper (7iber, forthcoming).[36]

4.3.2 Role of content providers

Under the Jordanian regulation/ censorship model, media content providers are legally required to play a central role in controlling media content published online.

News or specialized websites which have been required to obtain licenses are subject to all the restrictions and legal liabilities placed on print publications, including the legal responsibility of the editor for all articles published on the website.

In addition, readers' comments on news pages are considered to be part of the article, and the owner and editor-in-chief of the site are legally accountable in cases where comments violate Jordanian law. Illegal comments aside, a news/specialized website is also banned from publishing comments considered to be "unrelated to the topic of the article" (Press and Publications Law, Article 49). Banning comments that are "unrelated to the topic of the article" seems needlessly restrictive, though it does provide the MC with a useful pretext to request the takedown of legal but "undesirable" comments. It is also worth noting that the owner and editor-in-chief of the site are still legally accountable for comments even when the author of the comment has him/herself been held legally accountable. The regulations related to comments constitute a major restriction on the participative nature of online media.

Finally, licensed news/ specialized websites are required to participate in Internet user surveillance. According to the PPL, these websites must keep a record of all published comments that includes "all the information related to the sender of the comment and the content of the comment" for a period of at least six months (Press and Publications Law, Article 49).

[36] 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media.

As a result of the regulations related to user comments, a number of popular news websites have disabled the comments feature on their sites because they are unwilling to play an active role in government surveillance (personal communication with Sawsan Zaydeh, 15/12/2014), a development which clearly demonstrates the chilling effect of these regulations on online freedom of expression.

4.3.3 Role of Internet service providers

The key role of Internet service providers (ISPs) in terms of online media regulation/ censorship has been to implement blocking requests sent to them by the TRC.

However, it is important to note that responding to such blocking orders is not the only documented instance of ISP filtering of online media. In January 2011, the main telecom company, Orange blocked a satirical blog criticizing the Jordanian regime under a "provocative" name without a formal blocking order. The Orange decision to block was not backed by an official governmental request, unlike the aforementioned case involving the Arab Times (see page 16). There is no law that expressly prohibits ISPs from practicing this kind of censorship. Moreover, the Telecommunications Law criminalizes the provision of telecommunications services which contravene public order or public morals (Article 75).

The Telecommunications Law also allows Internet Service Providers (ISPs) to suspend or disconnect the Internet or communication services of a user if the user is using these services in an unlawful manner or in a way that offends "public morals". This is reiterated in ISPs' terms and conditions. These suspensions do not require a court order, decisions to suspend or disconnect users are left to the discretion of ISPs (Al-Masri, 2013).[37]

Details on the terms of usage for Internet services are listed in the terms of conditions on the back of any broadband Internet contract. Across all terms of conditions, criteria of "acceptable usage" starts at the official line of the widely defined conditions as stated in the Telecommunications Law. For example, most ISPs state their authority to completely stop the customer's service for security and public safety needs, or if the user attempt to use the network for "fraud" or in a way that harms "public morals", using the criteria from the Telecommunications Law. However, some ISPs have expanded the definition of violations that may lead to service suspension without a court order:

> "Sending, receiving, uploading or/and downloading or/and using or/and reusing material which is abusive, indecent, obscene, menacing, or in breach of any copyright, confidence, privacy or any other rights and send or procure the sending of any unsolicited or promotional material."[38]

It is worth drawing attention to the fact that these conditions are vague and loosely defined.

4.3.4 Jordan Press Association

[37] Al-Masri, R. "Do you agree to the terms and conditions of the contract? Are you sure?" *7iber,* 11 June 2013. Available online: http://www.7iber.com/2013/06/terms-of-service/

[38] Umniah Terms and Conditions, cited in 7iber (forthcoming) *Mapping Faces of Digital Control in Jordan.* Amman: 7iber media.

The Jordan Press Association (JPA) is an official professional association which operates pursuant to the Jordan Press Association Law. In order for a news website to be licensed, it is necessary to have a full time Editor-In-Chief who has been a member of the JPA for at least four years (Press and Publications Law, Article 23). Journalists who are critical of the government have sometimes been excluded from JPA membership (Freedom House, 2014)[39] and membership applications to the JPA are often faced with extensive delays (personal communication with Sawsan Zaydeh, 15/12/2014). Thus, the JPA membership requirement can be conceived of as an indirect mechanism of control on the operation of online media in Jordan.

[39] Freedom House (2014) *Freedom of the Press 2014*. Washington DC: Freedom House

6. International lessons for progressive media regulation: Argentina, Brazil, Finland and South Africa

For this paper, examples of international good practice in the field of online media regulation were documented through detailed case studies of four countries: Argentina, Brazil, Finland and South Africa. The countries featured were selected as examples of good practice that reflect a diversity of political, institutional, geographic and cultural contexts.

A detailed country note was prepared for each of these case studies and this section of the report presents a synthesis of the findings from all four country notes. The full country notes are included in the appendices to this report.

6.1 Political context

Although the examples of good practice presented in this paper are all liberal democracies, it is worth noting that of these countries, only Finland can be described as a mature democracy. Democratization in Argentina, Brazil and South Africa is relatively recent, with all three of these countries transitioning to liberal democratic systems of governance at the end of the 20th century.

The diversity in the systems of governance in these countries is worth noting because it demonstrates that a progressive approach towards online media regulation is not the preserve of mature democracies and/ or countries with high levels of educational attainment and income.

6.2 Normative context

Online media regulation is not a purely technocratic endeavour related to building effective institutions and/or processes but rather involves an important normative component. The four case studies examined for this paper illustrate that a strong commitment to freedom of expression is necessary for online media freedom.

It is important to note that in all of the countries studied for this paper, the constitution makes strong guarantees of freedom of expression (see Box 1 below).

Box 1 – Constitutional Guarantees of Freedom of Expression

- The constitution of **Argentina** guarantees freedom of expression (Section 14) and freedom of the press (Section 32) and prohibits prior censorship (Section 14). Section 43 of the constitution guarantees the right of journalists to protect their sources. It is worth noting that the Argentine Constitution explicitly gives international treaties precedence over domestic legislation (Section 75). This is relevant here because Argentina has ratified the International Covenant on Civil and Political Rights which guarantees freedom of expression.

- The constitution of **Brazil** guarantees freedom of expression (Sections 5.4 & 5.9), although anonymity in exercising these rights is forbidden (Section 5.4). It also guarantees citizens the right to reply to statements published about them in proportion to any offense committed, as well as compensation in the event of damages, whether reputational or material (Section 5.5). Sections 5.14 and 5.33 guarantees the right of access to information and the right of journalists to protect their sources. It is worth noting that the Brazilian Constitution explicitly gives international treaties precedence over domestic legislation (Section 5.88). This is relevant here because Brazil has ratified the International Covenant on Civil and Political Rights which guarantees freedom of expression.

- The constitution of **Finland** guarantees freedom of expression and prohibits prior censorship (Section 12). It also guarantees the right of access to information (Section 12).

- The constitution of **South Africa** provides for freedom of expression, freedom of information, freedom of the press and other media (Sections 18 and 32). It includes constraints on "propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm" (Section 18).

In addition, Argentina, Brazil and Finland have all recently passed specific laws that ensure freedom of expression and the press remains unambiguously protected in the age of the Internet.

- In **Argentina**, several laws have also been passed to ensure that citizens have the liberty to express their views without fear of censorship or reprisal on the Internet. In 1997, a legal Decree was passed affirming that the Internet is a medium protected by the provisions of the Constitution related to freedom of expression and, as such, shall not be subject to prior censorship or restriction (Decree 1279/97). In 2005, constitutional protection was also extended to "the search, reception and dissemination of ideas and information of all kinds via Internet services" (Law 26032). Moreover, net neutrality is guaranteed by Resolution 5/2013, issued by the Ministry of Communications, which mandates that providers "guarantee access to every user, that in no way distinguishes, blocks, interferes, discriminates, hinders, degrades or restricts arbitrarily the reception or sending of information."

- In April 2014, **Brazil**'s Marco Civil da Internet (Civil Rights Framework for the Internet) came into force. The law governs the use of the Internet in the country through setting out a comprehensive set of principles, guarantees, rights and duties for Internet users as well as setting out guidelines

for state action. Hailed as a groundbreaking development in the field of Internet governance, it establishes a strong assertion of rights and principles for Internet media regulation in Brazil. The law stresses the importance of the right to freedom of expression and the right to exercise citizenship through digital media, describing access to the Internet as "essential to the exercise of citizenship." It also asserts principles such as importance of preserving the participative nature of the network. Taken as a whole, these rights and principles express a strong commitment to an open, collaborative and democratic space for online media.

- In 2004, **Finland**'s Freedom of Expression in Mass Media Act, which came into force. It provides medium-neutral regulation of freedom of speech, including detailed provisions as to the practice of freedom of expression in the media as enshrined in the Constitution. The Act places much emphasis on the importance of freedom of expression, and opens with the article

  > *"In the application of the Act, interference with the activities of the media are legitimate only insofar as they are unavoidable, taking due note of the importance of the freedom of expression in a democracy, subject to the rule of law." (Article 1)*

  One of the main aims of the new law was to create legislation that regulates freedom of expression across all media regardless of the technology that the content is transmitted through and is relevant to the era of the Internet (Salovaara-Moring, 2009).[40] The Finnish model emphasizes the importance of right to reply and right to correction.

Constitutional and legislative provisions such as those outlined above provide a robust normative framework which ensures that the mechanisms for regulating online media are not abused for purposes of censorship but rather serve the purpose of protecting internationally agreed-upon human rights, such as the right to privacy and protection against defamation.

6.3 Regulatory context[41]

Blocking and takedown of illegal content

- **Argentina**'s National Communications Commission (NCC) is a decentralized government body that can order ISPs to block illegal online content based on a court-issued injunction. The NCC operates within the Ministry of Communications and the Ministry of Federal Planning, Public Investment and Services. ISPs are required to comply with NCC orders to block illegal content based on court-issued injunctions.

- Under **Brazil**'s regulation system, the judicial branch is responsible for issuing takedown orders for illegal online content. The court order must include, under penalty of being null, clear

[40] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

[41] For purposes of economy, this section of the paper does not list all aspects of regulation in each of the four case studies. Rather, it presents a selection of the most effective and relevant good practices. For interested readers, further details on each country are available in the country notes in the appendices of this paper.

identification of the specific content identified as infringing allowing the unquestionable location of the material (Article 19, Marco Civil da Internet).
The law makes explicit reference to the importance of protecting freedom of speech and stipulates that judgements on whether content should be taken down must take into account the society's collective interest in availability of the content on the internet (Article 19, Marco Civil da Internet).

If the contact information for the person directly responsible for the content is available, the Internet application (e.g. website) must inform him/ her of the court order with information that allows the user to legally contest and submit a defense in court, unless otherwise provided by law or in a court order (Article 20, Marco Civil da Internet).

The only exception to the above is for cases relating to private 'sexual' content or content containing images/videos of nudity. In such cases, the intermediary could be held secondarily liable for damages, if failing to take the content down upon user notification (Article 21, Marco Civil da Internet).

- Under **Finland**'s regulation system, a court may order a content provider, ISP or other intermediary to release the information required for the identification of a user who has posted content online provided that there are probable reasons to believe that the dissemination of this content is illegal. However, the identifying information may be ordered to be released to the injured party only in the event that he or she has the right to bring a private prosecution for the offence. The request for identification of the user must be filed with the court system within three months of the publication of the message in question, and the court may reinforce the order by imposing a threat of a fine. Identifying information may also be ordered to be released on the request of the authorities of a foreign state, if the provision of the relevant message to the public would constitute an offence in Finland under the prevailing circumstances, or if the release is based on an international agreement or on some other international obligation binding on Finland. The intermediary is entitled to compensation from state funds for the reasonable direct costs arising from the release of the identifying information. However, the injured party shall bear these costs when the information is being released to him or her in accordance with a court order (Chapter 5, Freedom of Expression in Mass Media Act).

  A court may also order a publisher, broadcaster or Internet intermediary to remove or block a piece of content if publication of the content is illegal. Before issuing a takedown or blocking order, the court must give the intended addressee and the user who posted the content an opportunity to be heard, unless the urgency of the matter otherwise necessitates. The takedown or blocking order lapses unless a charge or civil suit is brought against the content within three months (although this period can be extended to up to six months) (Chapter 5, Freedom of Expression in Mass Media Act).

- In **South Africa**, the Electronic Communications and Transactions Act of 2002 (ECTA) requires ISPs to respond to take-down notices regarding illegal content such as child pornography, defamatory material, or copyright violations. Any person may lodge a notification of unlawful activity with a service provider, but if a person lodges such a complaint knowing that the notification misrepresents the facts, he/she becomes legally liable for wrongful take-down (Article 77, Electronic Communications and Transactions Act).

Intermediary liability

- In **Argentina**, a recent Supreme Court judgment has established that ISPs are free from liability for illegal content posted online by third parties. The ground-breaking judgment was issued on October 28 2014 and involved Maria Belén Rodriguez, an Argentine fashion model, who sued Google and Yahoo! Argentina in connection with search results that linked her to several pornographic websites. The claimant argued that even though it was the third-party sites that had violated her reputation, privacy, and image rights, the search engines had contributed to such primary violations by including links to those sites in their search results. The case, the first of its kind to be decided by the highest court in Argentina, rejected the claims of Belén Rodriguez in their entirety stating that there could be no general duty for intermediaries to police the legality of third-party communications. The judgment issued is noteworthy for the relatively high level of protection that it provides for the free flow of information and ideas online. The court noted that search engines play a "key role in the global dissemination" of online content by greatly facilitating access to and identification of data relevant to billions of users (Pavli, 2014).[42]

- In **Brazil**, the law provides a clear safe harbor for intermediaries, who will only be held liable for damages arising from user-generated content when failing to comply with a court-issued takedown order (Article 19, Marco Civil da Internet). The exception to this is for cases relating to private 'sexual' content or content containing images/videos of nudity, when the intermediary could be held secondarily liable for damages, if failing to act upon user notification (Article 21 of Marco Civil de Internet).
  In order to ensure freedom of expression and prevent censorship, a content provider can only be subject to civil liability for damages resulting from content generated by third parties if it does not comply with a court-issued takedown order. Other responsibilities of content providers are:
    - Where a piece of content has been referred to the courts for consideration of takedown and contact information for the user who posted the content is available, content providers must inform him/ her with information that allows him/ her to legally contest and submit a defense in court (Article 20, Marco Civil da Internet).
    - If so requested by the user who created a banned piece of content, content providers must replace the banned content with a note of explanation about its removal or with the text of court-issued takedown order (Article 20, Marco Civil da Internet).
    - To maintain their access logs under confidentiality, in a controlled and safe environment for six months. These logs can be accessed by government agencies with a court order (Article 15, Marco Civil da Internet).

  ISPs are also required to maintain their access logs under confidentiality, in a controlled and safe environment for one year. These logs can be accessed by government agencies with a court order (Chapter 3, Marco Civil da Internet).

- In **South Africa**, members of the Internet Service Providers Association are not liable for third-party content they do not create or select, however, they can lose this protection from liability if they do not respond to take-down requests. ISPs often err on the side of caution by taking down content to avoid litigation since there is no incentive for providers to defend the rights of the

[42] Pavli, D. (2014) "Case Watch: Top Argentine Court Blazes a Trail on Online Free Expression", *Open Society Foundations Voices*, Accessed online on 29.12.2014

original content creator, even if they believe the take-down notice was requested in bad faith. There is no existing appeal mechanism for content creators or providers (Freedom House, 2014).[43] Any person who lodges a notification of unlawful activity with a service provider knowing that the notification misrepresents the facts is legally liable for wrongful take-down (Article 77, Electronic Communications and Transactions Act).

Requirement for the operation of online media outlets

- According to **Finland**'s laws, criminal liability for an offence arising from the publication of a message lies with the person who created the message. If the responsible editor intentionally or negligently fails in an essential manner in his or her duty to manage and supervise editorial work, and the failure leads to the publication of illegal content, the responsible editor shall be convicted of editorial misconduct and sentenced to a fine (Section 13, Freedom of Expression in Mass Media Act). Publishers are required to define the editor-in-charge of a publication, who supervises and makes decisions regarding the content of the publication. The editor-in-charge does not necessarily have to be the editor-in-chief; s/he can come from middle management or be a general journalist (Salovaara-Moring, 2009).[44] Finnish law places some restrictions on qualifying as an editor-in-charge. The editor-in-charge:
    - Must have attained the age of 15 years
    - Must not be bankrupt
    - Must not have had her/his competency restricted

  The publisher must also ensure that published material contains information on the identity of the publisher, the responsible editor and the year of issue. If several responsible editors have been designated for a given publication or programme, the piece of media content in question shall contain information on which part of the publication or broadcast each of them is responsible. Everyone has the right to be informed of the identity of the responsible editor (Chapter 2, Freedom of Expression in Mass Media Act).

Self-regulation and handling of media complaints

- In **Finland**, the Council for Mass Media monitors good journalistic practice on the basis of a voluntary ethical code of "good journalistic practice" that should be known to all journalists. However, the code is not grounds for criminal or indemnification liability. It concerns professional status, obtaining and publishing information, the rights of interviewer and interviewee, corrections and the right of reply, as well as what can be defined as private and public. In addition, it includes a clause on transparency when reporting on issues that pertain to the owners of the media in question (Salovaara-Moring, 2009).[45]
  The Council operates on a self-regulatory basis, agreed on by the parties involved, without special legislation. It consists of twelve members, a majority of whom are from the media. Other Council members come from academia and there are four independent members who represent the

[43] Freedom House (2014) *Freedom on the Net 2014*. Washington DC: Freedom House
[44] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.
[45] *Ibid.*

public and are appointed by the Council after an open advertisement. The Council's chief sanction is its requirement to publish a decision to uphold breach of its code (Fielden, 2012).[46] Though this sanction may seem weak, there is a strong culture among Finnish journalists of abiding by the Council's journalistic guidelines.

> "It is very important here in Finland that the press in reliable… The [media] really think that they cannot afford to have very many [upheld decisions] per year, that's very important. That's why our system functions in my opinion, quite well without financial punishment."
>
> – Risto Uimonen, Chairman, Council for Mass Media (Fielden, 2012)[47]

The Council for Mass Media receives approximately 50 to 70 complaints annually. In 2007 there were 64 complaints, 50 of which led to an acquittal. Many recent complaints have focused on the blurred line between privacy and the right to publish, online journalism and incorrect information (Salovaara-Moring, 2009).[48]

With regard to privacy, the Finnish guidelines for journalists state that "The human dignity of every person must be respected" and "Highly delicate matters concerning people's lives may only be published with the consent of the person in question, or if such matters and of considerable public interest."

Importantly, the Council recently extended its code by adding an annex of rules in relation to media websites. These rules were subject to broad discussion among journalists and wider organizations. Drafting this document took an entire year and involved 160 different people (Fielden, 2012).[49]

Moreover, all media outlets that have a significant presence on the Internet must publish the Council's decisions to uphold a complaint against them online in full. The council has twelve members. Eight, including the chair, have "media expertise", including journalists, editors and academics. Four independent members represent the public and are appointed by the council after an open advertisement (Fielden, 2012).[50]

- The Press Council of **South Africa** (PCSA) is a voluntary, independent co-regulatory system. The Council itself is composed of thirteen members who oversee its operations: six press representatives, six representatives of the public and a retired judge appointed by the Chief Justice of South Africa (PCSA, 2012).[51]

[46] Fielden, L. (2012) *Regulating the Press: A Comparative Study of International Press Councils*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford.
[47] Fielden, L. (2012) *Regulating the Press: A Comparative Study of International Press Councils*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford.
[48] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.
[49] Fielden, L. (2012) *Regulating the Press: A Comparative Study of International Press Councils*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford.
[50] *Ibid*.
[51] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.

Press complaints are handled by two PSCA bodies: the Press Ombudsman and the Press Appeals Panel. Complaints are submitted to the Press Ombudsman who may choose to conduct a hearing in order to rule on the complaint. Conducting a hearing involves convening an Adjudication Panel composed of the Ombudsman, a press representative and a representative of the public. The rulings of the Ombudsman can be appealed to the Press Appeals Panel, in which case the complaint is heard by the Council's Chair of Appeals (a senior legal official) who must appoint one press representative and up to three representatives of the public to hear the complaint with her/him (PCSA, 2012).[52]

All media organizations which are members of the Press Council of South Africa must accept its jurisdiction to rule on press complaints. Media organizations which are not members can also choose to accept the PCSA's jurisdiction (PCSA, 2012).[53] PSCA's code covers the online publications of its members and the PSCA regularly hears complaints against online media outlets (PCSA, 2014).[54]

The PSCA's sanctions involve ordering media outlets to issue corrections, apologies and/or to give the complainant a specified amount of space in the publication for right of reply. Monetary fines are not imposed as a penalty for content, however, they may be imposed as sanctions for a respondent's failure to appear for adjudication hearings and repeated non-compliance with the rulings of the adjudicatory system (PCSA, 2012).[55]

Self-regulation is also widely practiced for online content. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications in under the ECT Act. This means that ISPA members have the right to self-regulate, according to a code of conduct adopted in 2008. In order to qualify for immunity from liability in terms of the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifications of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their communications. However, internet users can send a take-down notice to ISPA, requesting that material considered unlawful be removed (ISPA, 2008). [56] If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down (Article 77, Electronic Communications and Transactions Act).

The Interactive Advertising Bureau South Africa (IABSA) is the industry body for digital publishers, and also has a code of conduct that sets out the expected standards of professional practice of its members. The code is intended to enable the self-regulation of IABSA members in the public interest, it is binding on all members and compliance with it is a condition of IABSA membership. The Code of Conduct of IABSA is unduly restrictive of freedom of expression and uses vague and subjective criteria in its definition unacceptable online content. For instance, members are barred

[52] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.
[53] *Ibid.*
[54] Press Council of South Africa Rulings. Available online: http://www.presscouncil.org.za/Ruling?page=1
[55] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.
[56] Internet Service Providers Association (2008) *Code of Conduct*. Noordwyk: Internet Service Providers Association. Available online: http://ispa.org.za/code-of-conduct/

from publishing content that "encourages… any person to engage in dangerous practices" or "causes grave or widespread offense". However, the only sanction that IABSA can impose on members is to suspend or expel the offending member from IABSA (IABSA, 2014).[57]

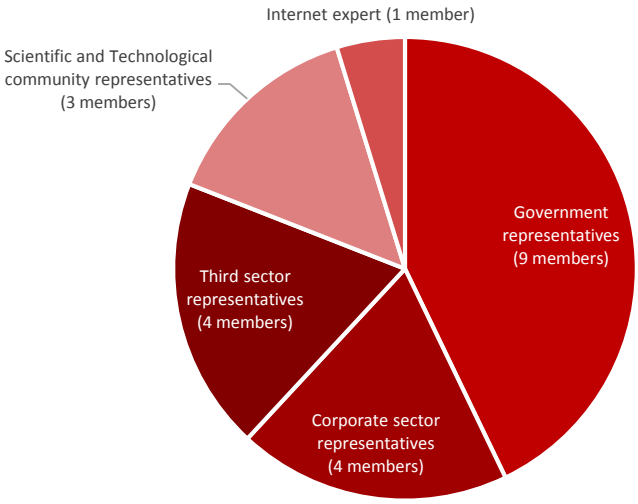
Governance bodies and co-regulatory mechanisms

- In **Argentina**, responsibilities for Internet regulation are somewhat scattered, with one agency responsible for protecting data, another for infrastructure, and another for domain registration (Marty, 2014).[58] Partly as a response to this, the government has established the Argentina Internet Policy Commission (CAPI) within the Ministry of Communications (Resolution 13/2014). CAPI is meant to provide structure for organized communication between all actors responsible for the proper function of the Internet and to establish a clear public policy in this regard. CAPI key areas of responsibility include improving the technical standards of the Internet, protecting the privacy of Internet users, tackling cybercrime and ensuring net neutrality (Marty, 2014).[59]
- The establishment of CAPI is a move in the direction of co-regulation with the secretariat defining its new role as "the development and implementation by government, the private sector, and civil society of principles, rules, norms, decision-making procedures, and common programs that shape the evolution and use of the Internet" (Marty, 2014).[60] At the time of writing, CAPI was in the process of undertaking stakeholder consultation in order to develop its regulatory plan.
- **Brazil**'s Marco Civil da Internet sets out a comprehensive vision for Internet regulation characterized by an emphasis on the importance of:
    - Multi-stakeholder governance that is transparent, cooperative and democratic, with the participation of government, the private sector, civil society and academia
    - Free enterprise, free competition and consumer protection
    - The participative nature of the network

  The result fits squarely within the co-regulation model of regulation with legislation that sets out general guidelines rather than specific standards and enforcement mechanisms, "backdrop powers" for government to intervene in the event that rights are endangered, and involving a variety of stakeholders.
  Government representatives comprise the largest single group on the Brazilian Internet Steering Committee although importantly they do not comprise a majority of committee members (see figure 2 below).

[57] Interactive Advertising Bureau South Africa (2014) *Code of Conduct*. Johannesburg: Interactive Advertising Bureau South Africa.
[58] Marty, B. (2014) "Argentina: New Commission Brings Internet Governance, Net Neutrality into Crosshairs" *PanAm Post*, April 24, 2014. Available online: http://panampost.com/belen-marty/2014/04/24/argentina-new-commission-brings-internet-governance-net-neutrality-into-crosshairs/
[59] *Ibid.*
[60] *Ibid.*

Figure 2 – Composition of Brazilian Internet Steering Committee[61]



Whereas the Marco Civil da Internet sets out the broad guidelines and principles for Internet policy, this steering committee develops the specific mechanisms for implementing these guidelines and principles. The key responsibilities of the committee are:

- Proposing policies and procedures regarding the regulation of Internet activities;
- Recommending standards for technical and operational procedures for the Internet in Brazil;
- Establishing strategic directives related to the use and development of the Internet in Brazil;
- Promoting research on and technical standards for network and service security in the country;
- Coordinating the allocation of Internet addresses (IPs) and registration in the <.br> domain;
- Collecting, organizing and disseminating information on Internet services, including indicators and statistics.[62]

- **Finland**'s regulation model fits squarely in the co-regulation model with legislation that sets out general guidelines rather than specific standards and enforcement mechanisms, and "backdrop

[61] Detailed breakdown: One government representative for each of the following: 1) Ministry of Science, Technology and Innovation, 2) Ministry of Communication, 3) Presidential Cabinet, 4) Ministry of Defense, 5) Ministry of Development, Industry and Foreign Trade, 6) Ministry of Planning, Budget and Management, 7) National Telecommunication Agency; 8) National Council for Scientific and Technological Development; 9) National Council of State Secretariats for Science, Technology and Information Issues – CONSECTI. One corporate sector representative for each of the following: 1) Internet access and content providers; 2) Telecommunication infrastructure providers; 3) Hardware, telecommunication and software industries; 4) Enterprises that use the Internet. Four representatives from the third sector; Three representatives from the scientific and technological community; One Internet expert.

[62] Brazilian Internet Steering Committee: Responsibilities. Available online: http://www.cgi.br/pagina/veja-as-atribuicoes-do-cgi-br/109

powers" for government to intervene in the event that rights are endangered. As described above, self-regulation by the press plays an important role in the Finnish model.

- **South Africa**'s regulatory system combines self-regulatory and co-regulatory systems. The result is an online media environment that is generally free and open, in which Internet content platforms are largely free from government censorship and interference. Despite this, the experience of self-regulation in South Africa does point to some of the potential risks of overreliance on self-regulation, as outlined above.
  Although self-regulatory mechanisms are less susceptible to state capture, they are susceptible to industry capture and as a result can adopt an overly cautious approach towards controversial speech. ISPA's take-down notification procedure does not make any provision for representations to be made by the alleged infringer before the take-down takes place, and there is no in-built right of appeal, which makes the procedure vulnerable to accusations of procedural unfairness and which has led intellectual property lawyer Reinhardt Buys to argue that the take-down procedures are unconstitutional. Furthermore, in terms of the ECT Act, a service provider is not liable for wrongful take-down, which acts as a disincentive to scrutinise requests for take-downs carefully; rather liability rests with the lodger of the notice. However, if ISPs do not implement take-down notices they could be liable for hosting illegal content. This incentivises them to err on the side of caution and "take down first and ask questions later", irrespective of the legitimacy of the complaint (Duncan, 2011).[63]

Distinction between private individuals and journalists

- **Finland**'s Freedom of Expression in Mass Media Act distinguishes between private individuals publishing content online and online media publications. Private individuals are only subject to some provisions of the law: those related to criminal liability for defamation, responsibility for damages caused by the publication of illegal content, the right to maintain confidentiality of sources and the requirement to abide with takedown orders. The decision regarding whether a piece of online media content is considered to have been published by a private individual or a media publication is at the discretion of the judicial system (Section 3, Freedom of Expression in Mass Media Act).

[63] Duncan, J. (2011) "Monitoring and defending freedom of expression and privacy on the internet in South Africa" In *Global Information Society Watch Report: Internet Rights and Democratisation*. The Hague/ San Francisco: Hivos / Association for Progressive Communications. Available online: http://www.giswatch.org/ru/node/913

7. Conclusions and Recommendations

The analysis conducted for the paper illustrates that two dimensions of policy are required in order to effectively protect online media freedom:

1. **A robust and progressive normative framework that protects freedom of expression.** Such a framework can be generic and applicable to all mediums of expression as is the case in South Africa. Alternatively, it can have specific provisions designed to elaborate on what freedom of expression means in the era of the Internet, as is the case in Argentina and Brazil. In the case of Finland, the ostensibly medium-neutral Freedom of Expression in Mass Media Act applies to all types of media, however, its details make many provisions related to changes in mass media that have resulted from the rise of the Internet. Thus, the Finnish model is actually closer to the model seen in Argentina and Brazil. The best practice examples reviewed in this study are those from Brazil and Finland.
2. **A progressive co-regulatory system of governance.** Such a system:
    - Ensures safe harbour for intermediaries;
    - Involves various stakeholders in the mechanisms for developing policies and regulations;
    - Does not place onerous restrictions on the operation of online media outlets;
    - Requires court-issued orders for takedown and blocking;

    Again, the best practice examples reviewed in this study are those from Brazil and Finland, although the voluntary mechanism for press regulation in South Africa is also worth studying. Moreover, the planned Internet governance reforms in Argentina seem promising and are worth monitoring over the coming several years.

It is clear from the analysis conducted for this paper that neither of the abovementioned dimensions of Internet policy are in place in Jordan. Thus, it is recommended that:

- The Government of Jordan undertakes legal reforms to put in place a robust and progressive normative framework that protects freedom of expression that takes into account changes in mass media that have resulted from the rise of the Internet (whether through an 'Internet Bill of Rights' as in Brazil, or generic legislation that is sensitive to the realities of modern media as in Finland).

- The Government of Jordan undertakes legal reforms to ensure safe harbour for intermediaries, except where they fail to implement court-issued takedown or blocking orders.

- The Government of Jordan develops strong mechanisms to ensure that all stakeholders are involved in developing Internet policies and regulations. Relevant stakeholders include ISPs, content providers, representatives of journalistic professions, academics, internet experts and representatives of the public. Importantly, clear and transparent procedures and criteria must be put in place for selection of stakeholder representatives. The most inclusive and transparent method for selecting specialists and representatives of the public would be an open advertisement for applications to these positions, combined with a selection process based on publicly available, predetermined criteria.

- The Government of Jordan does not place onerous restrictions on the operation of online media outlets. This involves ending the licensing system for online publications and replacing it with a simple registration system. It also involves ending the onerous requirements for news website editors and replacing them with a system that merely ensures that the editor is an adult, is not bankrupt and has not had her/his competency restricted.

8. Appendices

Appendix 1: Argentina country note

Argentina: at a glance

Political context	Normative context	Regulatory context
Liberal democracy	Strong legal protections for freedom of expression	Government model, transitioning to co-regulatory model

1. Political context

Argentina is a multiparty democracy in which elections are generally free and fair and voting is mandatory Argentina's two largest and oldest parties, the Peronist Party (Partido Justicialista—PJ) and the Radical Civic Union (Unión Radical Cívica—UCR) dominate competition for executive offices and have typically won the largest shares of legislative seats at all levels of government (Freedom House, 2012).[64]

Argentina has signed every major international human rights treaty. The Argentine Constitution gives these treaties precedence over domestic legislation (Section 75.22).

2. Normative context

2.1 Freedom of expression

Freedom of expression is guaranteed by the Argentine Constitution (Section 14) and the international human rights treaties which have been ratified by Argentina. The Argentine Constitution gives international treaties precedence over domestic legislation (Section 75).

In November 2009, the legislature decriminalized defamatory statements referring to matters of public interest (Freedom House, 2014). But although there are no specific laws that criminalize online expression related to political or social issues, recent cases have detracted from the ability of reporters to cover the arrest of an elected official—an event that is arguably a "matter of public interest." [65]

[64] Freedom House (2012) *Countries at the Crossroads 2012*, Washington DC: Freedom House.
[65] Freedom House (2014) *Freedom on the Net 2014*, Washington DC: Freedom House

Provisions specific to online media

Several laws have also been passed to ensure that citizens are free to express their views on the Internet without fear of censorship or reprisal. In 1997, a legal Decree was passed affirming that the Internet is a medium protected by the provisions of the Constitution related to freedom of expression and, as such, shall not be subject to prior censorship or restriction (Decree 1279/97). In 2005, constitutional protection was also extended to "the search, reception and dissemination of ideas and information of all kinds via Internet services" (Law 26032).

Moreover, net neutrality is guaranteed by Resolution 5/2013, issued by the Ministry of Communications, which mandates that providers "guarantee access to every user, that in no way distinguishes, blocks, interferes, discriminates, hinders, degrades or restricts arbitrarily the reception or sending of information."

There are no restrictions on anonymity for internet users, users are able to post anonymous comments freely in a variety of online forums and bloggers are not required to register with the government (Freedom House, 2014).[66] Any website ending in ".ar," however, must be registered with NIC Argentina, an office of the Ministry of Foreign Affairs. Registered domain names, as well as the names of those registering them, are regularly published in Argentina's Official Gazette (Boletín Oficial). Registration of any domain ending in ".com.ar" requires an annual fee of 65-450 Argentine Pesos (US$ 8-53) per year. The average monthly wage in Argentina is 7,500 Argentine Pesos (US$877). The rationale behind this change is to deter people from registering for domain names they are not going to use (Freedom House, 2014).[67]

On October 28 2014, the Supreme Court of Argentina issued a ground-breaking judgment on the question of intermediary liability for search engines. Maria Belén Rodriguez, an Argentine fashion model, sued Google and Yahoo! Argentina in connection with search results that linked her to several pornographic websites. The claimant argued that even though it was the third-party sites that had violated her reputation, privacy, and image rights, the search engines had contributed to such primary violations by including links to those sites in their search results. The case, the first of its kind to be decided by the highest court in Argentina, rejected the claims of Belén Rodriguez in their entirety stating that there could be no general duty for intermediaries to police the legality of third-party communications. The judgment issued is also noteworthy for the relatively high level of protection that it provides for the free flow of information and ideas online. The court noted that search engines play a "key role in the global dissemination" of online content by greatly facilitating access to and identification of data relevant to billions of users (Pavli, 2014).[68]

3. Regulatory context

3.1 Role of government agencies

[66] Freedom House (2014) *Freedom on the Net 2014*, Washington DC: Freedom House
[67] Ibid.
[68] Pavli, D. (2014) "Case Watch: Top Argentine Court Blazes a Trail on Online Free Expression", *Open Society Foundations Voices*, Accessed online on 29.12.2014

The National Communications Commission (NCC) is a decentralized government body that can order ISPs to block illegal online content based on a court-issued injunction. The NCC operates within the Ministry of Communications and the Ministry of Federal Planning, Public Investment and Services. It is responsible for regulation, monitoring and policy implementation in the fields of telecommunications services and postal services, including the Internet.[69]

As mentioned above, an office of the Ministry of Foreign Affairs (NIC Argentina) is responsible for the registering websites with the domain .ar. Indeed, responsibilities for Internet regulation in Argentina are somewhat scattered, with one agency responsible for protecting data, another for infrastructure, and another for domain registration (Marty, 2014).[70] Partly as a response to this, the government has established the Argentina Internet Policy Commission (CAPI) within the Ministry of Communications (Resolution 13/2014). CAPI is meant to provide structure for organized communication between all actors responsible for the proper function of the Internet and to establish a clear public policy in this regard. CAPI key areas of responsibility include improving the technical standards of the Internet, protecting the privacy of Internet users, tackling cybercrime and ensuring net neutrality.

The establishment of CAPI is a move in the direction of co-regulation with the secretariat defining its new role as "the development and implementation by government, the private sector, and civil society of principles, rules, norms, decision-making procedures, and common programs that shape the evolution and use of the Internet". CAPI is currently in the process of undertaking stakeholder consultation in order to develop its regulatory plan (Marty, 2014).[71]

3.2 Role of content providers

Content providers and creators do not play a role in the regulation of online media under the current regulatory system, although this is likely to change with the launch of CAPI new regulatory framework in which all stakeholders are expected to have a voice in determining Internet policy.

There is a high-profile journalistic association in Argentina, named the Forum of Argentine Journalists (FOPEA) which is involved in advocating for freedom of expression. However, it does not play a regulatory role by receiving and handling complaints about media coverage (as is common for high level media/ journalism associations in co-regulatory / self-regulatory systems around the world).

3.3 Role of Internet service providers

A recent Supreme Court judgement has established that ISPs are free from liability (see section 2.1 above) for illegal content posted online by third parties. However, they do have to comply with NCC orders to block illegal content based on court-issued injunctions.

ISPs do not any other role in the regulation of online media under the current regulatory system, although this is likely to change with the launch of CAPI new regulatory framework in which all stakeholders are expected to have a voice in determining Internet policy.

[69] Comisión Nacionale de Comunicaciones: Acerca de la CNC http://www.cnc.gob.ar/institucionales_p33

[70] Marty, B. (2014) "Argentina: New Commission Brings Internet Governance, Net Neutrality into Crosshairs" *PanAm Post*, April 24, 2014. Available online: http://panampost.com/belen-marty/2014/04/24/argentina-new-commission-brings-internet-governance-net-neutrality-into-crosshairs/

[71] *Ibid.*

Appendix 2 - Brazil country note

Brazil: at a glance

Political context	Normative context	Regulatory context
Liberal democracy	Strong legal protections for freedom of expression, including online	Co-regulatory model

1. Political context

Brazil is a multiparty democracy in which elections are generally free and fair and there is vigorous competition between rival parties. While the Workers' Party (Partido dos Trabalhadores) has been in power for 12 years, no single force has been able to dominate both the executive and legislative branches in recent years (Freedom House, 2014).[72]

It is worth noting however, that there are significant levels of official corruption in the country. Brazil was ranked 69 out of 175 countries and territories surveyed in Transparency International's 2014 Corruption Perceptions Index (Transparency International, 2014),[73] and large-scale corruption scandals surface on a regular basis (Antunes, 2013).[74] It is also worth noting that journalists—especially those who focus on organized crime, corruption, or human rights violations committed under the military governments that ruled Brazil prior to 1985—are frequently the targets of violence. At least 25 journalists were attacked by police during the first two weeks of the protests in June 2013 (Freedom House, 2014)[75] and five journalists were assassinated in 2013 (Reporters Without Borders, 2014).[76]

2. Normative context

[72] Freedom House (2014) *Freedom in the World 2014*. Washington DC: Freedom House.
[73] Transparency International (2014) *Corruption Perceptions Index 2014.* Berlin: Transparency International
[74] Antunes, A. "The Cost Of Corruption In Brazil Could Be Up To $53 Billion Just This Year Alone" *Forbes Magazine*, 28 November, 2013. Available online: http://www.forbes.com/sites/andersonantunes/2013/11/28/the-cost-of-corruption-in-brazil-could-be-up-to-53-billion-just-this-year-alone/
[75] Freedom House (2014) *Freedom in the World 2014*. Washington DC: Freedom House.
[76] Reporters Without Borders "Two Journalists Gunned Down in Past Four Days" 17 February, 2014. Available online: http://en.rsf.org/brazil-two-journalists-gunned-down-in-17-02-2014,45879.html

2.1 Freedom of expression

The constitution guarantees freedom of expression, and both libel and slander were decriminalized in 2009 (Freedom House, 2014).[77] A bill stipulating educational degree requirements for journalists passed the Senate in 2012 but has yet to pass in the House of Representatives (Freedom House, 2014).[78]

2.2 Provisions specific to online media

In April 2014, Brazil's Marco Civil da Internet (Civil Rights Framework for the Internet) came into force. The law governs the use of the Internet in the country through setting out a comprehensive set of principles, guarantees, rights and duties for Internet users as well as setting out guidelines for state action. Hailed as a groundbreaking development in the field of Internet governance, it establishes a strong assertion of rights and principles for Internet media regulation in Brazil. The law stresses the importance of the right to freedom of expression and the right to exercise citizenship through digital media, describing access to the Internet as "essential to the exercise of citizenship." It also asserts principles such as importance of preserving the participative nature of the network. Taken as a whole, these rights and principles express a strong commitment to an open, collaborative and democratic space for online media.

3. Regulatory context

The Marco Civil da Internet sets out a comprehensive vision for Internet regulation characterized by an emphasis on the importance of:

- Multi-stakeholder governance that is transparent, cooperative and democratic, with the participation of government, the private sector, civil society and academia
- Free enterprise, free competition and consumer protection
- The participative nature of the network

The result is fits squarely in the co-regulation model of regulation with legislation that sets out general guidelines rather than specific standards and enforcement mechanisms, "backdrop powers" for government to intervene in the event that rights are endangered, and involving a variety of stakeholders.

3.1 Role of government agencies

Takedown of illegal content – Under the Brazilian regulation system, the judicial branch is responsible for issuing takedown orders for illegal online content. The court order must include, under penalty of being null, clear identification of the specific content identified as infringing allowing the unquestionable location of the material (Article 19, Marco Civil da Internet).

The law makes explicit reference to the importance of protecting freedom of speech and stipulates that judgements on whether content should be taken down must take into account the society's collective interest in availability of the content on the internet (Article 19, Marco Civil da Internet).

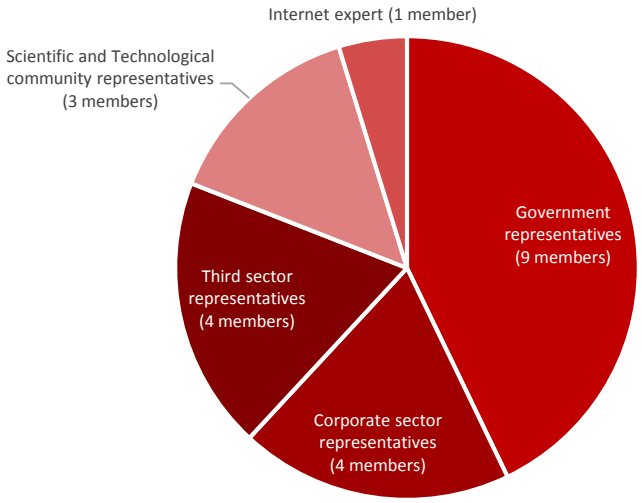
[77] Freedom House (2014) *Freedom in the World 2014*. Washington DC: Freedom House.
[78] *Ibid.*

If the contact information for the person directly responsible for the content is available, the internet application (e.g. website) must inform him/ her of the court order with information that allows the user to legally contest and submit a defense in court, unless otherwise provided by law or in a court order (Article 20, Marco Civil da Internet).

The only exception to the above is for cases relating to private 'sexual' content or content containing images/videos of nudity, as will be discussed further in section 3.3 below.

Brazilian Internet Steering Committee– Government representatives comprise the largest single group on the Brazilian Internet Steering Committee although importantly they do not comprise a majority of committee members (see figure 1).

Figure 1 – Composition of Brazilian Internet Steering Committee[79]



Whereas the Marco Civil da Internet sets out the broad guidelines and principles for Internet policy, this steering committee develops the specific mechanisms for implementing these guidelines and principles. The key responsibilities of the committee are:

- Proposing policies and procedures regarding the regulation of Internet activities;
- Recommending standards for technical and operational procedures for the Internet in Brazil;

[79] Detailed breakdown: One government representative for each of the following: 1) Ministry of Science, Technology and Innovation, 2) Ministry of Communication, 3) Presidential Cabinet, 4) Ministry of Defense, 5) Ministry of Development, Industry and Foreign Trade, 6) Ministry of Planning, Budget and Management, 7) National Telecommunication Agency; 8) National Council for Scientific and Technological Development; 9) National Council of State Secretariats for Science, Technology and Information Issues – CONSECTI. One corporate sector representative for each of the following: 1) Internet access and content providers; 2) Telecommunication infrastructure providers; 3) Hardware, telecommunication and software industries; 4) Enterprises that use the Internet. Four representatives from the third sector; Three representatives from the scientific and technological community; One Internet expert.

- Establishing strategic directives related to the use and development of the Internet in Brazil;
- Promoting research on and technical standards for network and service security in the country;
- Coordinating the allocation of Internet addresses (IPs) and registration in the <.br> domain;
- Collecting, organizing and disseminating information on Internet services, including indicators and statistics.[80]

Net neutrality – The Marco Civil da Internet establishes the general principle that net neutrality should be guaranteed, and further regulated by a presidential decree drafted with inputs from both the Brazilian Internet Steering Committee and ANATEL, the national telecommunications agency (Chapter 3 / Section 1, Marco Civil da Internet; Moncau & Mizukami, 2014).[81]

3.2 Role of content providers

The role of content providers under the Brazilian regulation system is minimal. In order to ensure freedom of expression and prevent censorship, a content provider can only be subject to civil liability for damages resulting from content generated by third parties if it does not comply with a court-issued takedown order. Other responsibilities of content providers are:

- Where a piece of content has been referred to the courts for consideration of takedown and contact information for the user who posted the content is available, content providers must inform him/ her with information that allows him/ her to legally contest and submit a defense in court (Article 20, Marco Civil da Internet).
- If so requested by the user who created a banned piece of content, content providers must replace the banned content with a note of explanation about its removal or with the text of court-issued takedown order (Article 20, Marco Civil da Internet).
- To maintain their access logs under confidentiality, in a controlled and safe environment for six months. These logs can be accessed by government agencies with a court order (Article 15, Marco Civil da Internet).

3.3 Role of Internet service providers

The previously existing legal scenario created some level of uncertainty for intermediaries as to their liability for user-generated content, with different judicial interpretations arising out of the country's many courts. Before the passing of the Marco Civil da Internet, Brazil was one the leading countries in

[80] Brazilian Internet Steering Committee: Responsibilities. Available online: http://www.cgi.br/pagina/veja-as-atribuicoes-do-cgi-br/109

[81] Moncau, L. & Mizukami, P. "Brazilian Chamber of Deputies Approves Marco Civil Bill" Infojustice.org, 25 March, 2014. Available online: http://infojustice.org/archives/32527

terms of takedown requests and lawsuits, according to companies such as Google and Twitter (Spinola, 2014).[82]

The law now provides a clear safe harbor for intermediaries, who will only be held liable for damages arising from user-generated content when failing to comply with a court-issued takedown order (Article 19, Marco Civil da Internet). The exception to this is for cases relating to private 'sexual' content or content containing images/videos of nudity, when the intermediary could be held secondarily liable for damages, if failing to act upon user notification (Article 21 of Marco Civil de Internet).

ISPs are also required to maintain their access logs under confidentiality, in a controlled and safe environment for one year. These logs can be accessed by government agencies with a court order (Chapter 3, Marco Civil da Internet).

[82] Spinola, D. "Brazil leads efforts in Internet governance with its recently enacted "Marco Civil da Internet." What's in it for intermediary liability?" Stanford Center for Internet and Society, 30 April, 2014. Available online: http://cyberlaw.stanford.edu/blog/2014/04/brazil-leads-efforts-internet-governance-its-recently-enacted-marco-civil-da-internet

Appendix 3 - Finland country note

Finland: at a glance

Political context	Normative context	Regulatory context
Mature liberal democracy	Strong legal protections for freedom of expression, including online	Co-regulatory model

1. Political context

Finland is a mature multiparty democracy in which elections are free and fair. The country excels on standard measures of political rights, civil liberties and transparency (Freedom House, 2014).[83]

2. Normative context

Finland regularly ranks among the most free media environments in the world, both with regard to online and offline media. The Finnish media system is an exemplar of the Nordic tradition, where the basic objective of media policy is freedom of speech supported by legislation, public subsidy and taxation (Salovaara-Moring, 2009).[84]

2.1 Freedom of expression

Freedom of expression is protected by the Finnish Constitution and in the Exercise of Freedom of Expression in Mass Media Act, which came into force in 2004. The latter provides medium-neutral regulation of freedom of speech, including detailed provisions as to the practice of freedom of expression in the media as enshrined in the Constitution. The Act places much emphasis on the importance of freedom of expression, and opens with the article

> *"In the application of the Act, interference with the activities of the media are legitimate only insofar as they are unavoidable, taking due note of the importance of the freedom of expression in a democracy, subject to the rule of law." (Section 1)*

[83] Freedom House (2014) Freedom in the World 2014. Washington DC: Freedom House

[84] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

One of the main aims of the new law is to regulate freedom of expression across all media regardless of the technology that the content is transmitted through (Salovaara-Moring, 2009).[85]

It is worth noting that the Finnish model emphasizes the importance of right to reply and right to correction. According to Finnish law:

- A private individual, who has a justified reason to consider that a message contained in a periodical, network publication or a comparable program that is broadcast on a repeated basis is offensive, has the right to have a reply published in the same publication or program.
- A private individual, a corporation, a foundation and a public authority have the right to have erroneous information on them or their operations contained in a periodical, network publication or program corrected in the same publication or in a program by the broadcaster in question, unless such correction is manifestly unnecessary owing to the minor significance of the error.
- The responsible editor shall publish a reply or correction, free of charge and without undue delay, appropriately extensively and in the same manner as the message on which the demand for a reply or correction is based. The contents of the reply or correction shall not be illegal or offensive. Where necessary, the responsible editor shall assist in the technical realisation of the reply.
- The demand for a reply or correction shall be presented to the responsible editor within 14 days of the publication of the message on which the demand is based. The demand shall be presented in writing or electronically so that its contents cannot be unilaterally altered and so that it remains accessible to the parties. If the demand for a reply or correction is rejected, the rejection and the reasons for it shall be notified to the person presenting the demand within seven days of the reception of the demand. Upon request, the reasons for the rejection shall be provided in writing. The person presenting the demand has the right to submit the issue of whether the preconditions for the right of reply or correction have been met for consideration by the District Court of his or her domicile, or by the District Court of Helsinki, no later than 30 days after the reception of the written notification of the reasons for the rejection. In the event that the District Court orders the responsible editor to comply with his or her duties under section 10, the court may reinforce the order by imposing a threat of a fine. The court order on the imposition of the threat shall be open to appeal as a separate matter (Freedom of Expression in Mass Media Law).

3. Regulatory context

The Finnish model fits squarely in the co-regulation model with legislation that sets out general guidelines rather than specific standards and enforcement mechanisms, with "backdrop powers" for government to intervene in the event that rights are endangered. Self-regulation by the press plays an important role in the Finnish model.

3.1 Role of government agencies

Takedown of illegal content – Under the Finnish regulation system, a court may order a content provider, ISP or other intermediary to release the information required for the identification of a user who has posted content online provided that there are probable reasons to believe that the dissemination of this content is illegal. However, the identifying information may be ordered to be released to the injured party

[85] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

only in the event that he or she has the right to bring a private prosecution for the offence. The request for identification of the user must be filed with the court system within three months of the publication of the message in question, and the court may reinforce the order by imposing a threat of a fine. Identifying information may also be ordered to be released on the request of the authorities of a foreign state, if the provision of the relevant message to the public would constitute an offence in Finland under the prevailing circumstances, or if the release is based on an international agreement or on some other international obligation binding on Finland. The intermediary is entitled to compensation from state funds for the reasonable direct costs arising from the release of the identifying information. However, the injured party shall bear these costs when the information is being released to him or her in accordance with a court order (Chapter 5, Freedom of Expression in Mass Media Act).

A court may also order a publisher, broadcaster or Internet intermediary to remove or block a piece of content if publication of the content is illegal. Before issuing a takedown or blocking order, the court must give the intended addressee and the user who posted the content an opportunity to be heard, unless the urgency of the matter otherwise necessitates. The takedown or blocking order lapses unless a charge or civil suit is brought against the content within three months (although this period can be extended to up to six months) (Chapter 5, Freedom of Expression in Mass Media Act).

Council for Mass Media – The Finnish government provides thirty percent of the funding of the Finnish media's self-regulatory body, the Council for Mass Media, which will be described in further detail in section 3.2.

3.2 Role of content providers

Liability of editors and journalists for content – According to Finnish law, criminal liability for an offence arising from the publication of a message lies with the person who created the message. If the responsible editor intentionally or negligently fails in an essential manner in his or her duty to manage and supervise editorial work, and the failure leads to the publication of illegal content, the responsible editor shall be convicted of editorial misconduct and sentenced to a fine (Section 13, Freedom of Expression in Mass Media Act).

Publishers are required to define the editor-in-charge of a publication, who supervises and makes decisions regarding the content of the publication. The editor-in-charge does not necessarily have to be the editor-in-chief; s/he can come from middle management or be a general journalist (Salovaara-Moring, 2009).[86] Finnish law places some restrictions on qualifying as an editor-in-charge. The editor-in-charge:

- Must have attained the age of 15 years
- Must not be bankrupt
- Must not have had her/his competency restricted

The publisher must also ensure that published material contains information on the identity of the publisher, the responsible editor and the year of issue. If several responsible editors have been designated for a given publication or programme, the piece of media content in question shall contain information

[86] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

on which part of the publication or broadcast each of them is responsible. Everyone has the right to be informed of the identity of the responsible editor (Chapter 2, Freedom of Expression in Mass Media Act).

Council for Mass Media – In Finland, the Council for Mass Media monitors good journalistic practice on the basis of a voluntary ethical code of "good journalistic practice" that should be known to all journalists. However, the code is not grounds for criminal or indemnification liability. It concerns professional status, obtaining and publishing information, the rights of interviewer and interviewee, corrections and the right of reply, as well as what can be defined as private and public. In addition, it includes a clause on transparency when reporting on issues that pertain to the owners of the media in question (Salovaara-Moring, 2009).[87]

The Council operates on a self-regulatory basis, agreed on by the parties involved, without special legislation. It consists of twelve members, a majority of whom are from the media. Other Council members come from academia and there are four independent members who represent the public and are appointed by the Council after an open advertisement. The Council's chief sanction is its requirement to publish a decision to uphold breach of its code (Fielden, 2012).[88] Though this sanction may seem weak, there is a strong culture among Finnish journalists of abiding by the Council's journalistic guidelines.

> "It is very important here in Finland that the press in reliable… The [media] really think that they cannot afford to have very many [upheld decisions] per year, that's very important. That's why our system functions in my opinion, quite well without financial punishment." – Risto Uimonen, Chairman, Council for Mass Media (Fielden, 2012).[89]

The Council for Mass Media receives approximately 50 to 70 complaints annually. In 2007 there were 64 complaints, 50 of which led to an acquittal. Many recent complaints have focused on the blurred line between privacy and the right to publish, online journalism and incorrect information (Salovaara-Moring, 2009).[90]

With regard to privacy, the Finnish guidelines for journalists state that "The human dignity of every person must be respected" and "Highly delicate matters concerning people's lives may only be published with the consent of the person in question, or if such matters and of considerable public interest."

Importantly, the Council recently extended its code by adding an annex of rules in relation to media websites. These rules were subject to broad discussion among journalists and wider organizations. Drafting this document took an entire year and involved 160 different people (Fielden, 2012).[91]. Moreover, all media outlets that have a significant presence on the Internet must publish the Council's decisions to uphold a complaint against them online in full.

[87] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

[88] Fielden, L. (2012) *Regulating the Press: A Comparative Study of International Press Councils*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford.

[89] *Ibid.*

[90] Salovaara-Moring, I. (2009) "Mind the gap?: press freedom and pluralism in Finland". In A. Czepek, M. Hellwig & E. Nowak (Eds.), *Press freedom and pluralism in Europe: concepts and conditions.* Bristol: Intellect Ltd, pp. 213-227.

[91] Fielden, L. (2012) *Regulating the Press: A Comparative Study of International Press Councils*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford.

The council has twelve members. Eight, including the chair, have "media expertise", including journalists, editors and academics. Four independent members represent the public and are appointed by the council after an open advertisement (Fielden, 2012).[92]

3.3 Role of Internet service providers

The role of ISPs is minimal. They are required to comply with court orders to remove illegal content and to identify users who post content that has been challenged as illegal.

3.4 Distinction between private individuals and journalists

Importantly, the Freedom of Expression in Mass Media Act distinguishes between private individuals publishing content online and online media publications. Private individuals are only subject to some provisions of the law: those related to criminal liability for defamation, responsibility for damages caused by the publication of illegal content, the right to maintain confidentiality of sources and the requirement to abide with takedown orders. The decision regarding whether a piece of online media content is considered to have been published by a private individual or a media publication is at the discretion of the judicial system (Section 3, Freedom of Expression in Mass Media Act).

[92] *Ibid*.

Appendix 4 - South Africa country note

South Africa: at a glance

Political context	Normative context	Regulatory context
Liberal Democracy	Solid legal protections for freedom of expression	Co-regulation

1. Political context

South Africa is a multiparty democracy in which elections are generally free and fair, although the political landscape has been dominated by the African National Congress (ANC) since the end of the apartheid era in 1994. The Independent Electoral Commission (IEC) is largely independent, although allegations of corruption in awarding construction tenders for new headquarters has slightly weakened perceptions of the institution's integrity (Freedom House, 2014).[93]

2. Normative context

2.1 Freedom of expression

The South African constitution provides for freedom of expression, freedom of information, freedom of the press and other media (Sections 18 and 32). It also includes constraints on "propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm" (Section 18). The judiciary in South Africa is independent and has issued several rulings to protect online freedom of expression in recent years (Freedom House, 2014).[94]

Online media in South Africa is regulated by the Films and Publications Amendment Act. In September 2012, the Constitutional Court upheld a ruling that pre-screening publications (including Internet content) as required by the 2009 amendments to the Films and Publications Act is an unconstitutional limitation on freedom of expression (Freedom House, 2014).[95]

[93] Freedom House (2014) *Freedom in the World 2014*. Washington DC: Freedom House
[94] Freedom House (2014) *Freedom on the Net 2014*. Washington DC: Freedom House
[95] *Ibid.*

The Promotion of Equality and Prevention of Unfair Discrimination Act, otherwise known as the "Equality Act", was passed in 2000 and prohibits unfair discrimination and harassment. It prohibits hate speech, which is defined as "…speech that is or could be reasonably construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred". Concerns have been expressed about the constitutionality of this provision as it adopts a broader definition of hate speech than what the constitution allows for (Duncan, 2011).[96]

The common law of defamation can also impact on online content. Defamation in South Africa is defined as the wrongful and intentional publication of a statement which has the effect of injuring a person's reputation. Apartheid-era defamation law gave maximum protection to the plaintiff, and imposed strict liability on the defendant; since then defamation law has been revised in the light of the constitutional guarantee of freedom of expression, and holds that in the case of media defendants, a publication cannot be considered unlawful even if it is incorrect, providing there were reasonable grounds for publication. Defamation is not a criminal offense in South Africa (Duncan, 2011).[97]

2.2 Internet specific provisions

The Electronic Communications and Transactions Act of 2002 (ECTA) requires ISPs to respond to take-down notices regarding illegal content such as child pornography, defamatory material, or copyright violations.

3. Regulatory context

The South African system combines self-regulatory and co-regulatory systems. The result is an online media environment that is generally free and open, in which Internet content platforms are largely free from government censorship and interference. Despite this, the experience of self-regulation in South Africa does point to some of the potential risks of overreliance on self-regulation.

3.1 Role of government agencies

Internet content falls within the regulatory framework of the Film and Publications Board, which was set up in 1996 to replace the apartheid-era Publications Control Board. The Film and Publications Board falls under the remit of the Ministry of Home Affairs. The essential difference between the old Board and the new one is that while the old Board acted as a censorship board, particularly of political content that challenged the legitimacy of the apartheid regime, the new Board is meant to confine its role to content classification, with a very narrow range of content being restricted or prohibited (Duncan, 2011).[98]

[96] Duncan, J. (2011) "Monitoring and defending freedom of expression and privacy on the internet in South Africa" In *Global Information Society Watch Report: Internet Rights and Democratisation*. The Hague/ San Francisco: Hivos / Association for Progressive Communications. Available online: http://www.giswatch.org/ru/node/913

[97] *Ibid.*

[98] *Ibid.*

The Electronic Communications and Transactions Act (ECTA) requires ISPs to register with the Film and Publications Board. The registration requirements are not unreasonably onerous, though failing to register is an offence that may be subject to a fine, six months of prison, or both (Freedom House, 2014).[99]

Where an ISP has failed to comply with a take-down notice, the government holds it legally liable for any illegal content transmitted through it (Electronic Communications and Transactions Act).

3.2 *Role of content providers*

The Interactive Advertising Bureau – South Africa (IABSA) is the industry body for digital publishers, and also has a code of conduct that sets out the expected standards of professional practice of its members. The code is intended to enable the self-regulation of IABSA members in the public interest, it is binding on all members and compliance with it is a condition of IABSA membership. The Code of Conduct of IABSA is unduly restrictive of freedom of expression and uses vague and subjective criteria in its definition unacceptable online content. For instance, members are barred from publishing content that "encourages… any person to engage in dangerous practices" or "causes grave or widespread offense". However, the only sanction that IABSA can impose on members is to suspend or expel the offending member from IABSA (IABSA, 2014).[100]

3.3 *Role of Internet service providers*

Under the Electronic Communications and Transactions (ECT) Act of 2002, ISPs are required to respond to and implement take-down notices regarding illegal content such as child pornography, defamatory material, and copyright violations. Members of the Internet Service Providers Association are not liable for third-party content they do not create or select, however, they can lose this protection from liability if they do not respond to take-down requests. ISPs often err on the side of caution by taking down content to avoid litigation since there is no incentive for providers to defend the rights of the original content creator, even if they believe the take-down notice was requested in bad faith. There is no existing appeal mechanism for content creators or providers (Freedom House, 2014).[101]

Self-regulation is also widely practiced for online content. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications in under the ECT Act. This means that ISPA members have the right to self-regulate, according to a code of conduct adopted in 2008. In order to qualify for immunity from liability in terms of the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifications of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their communications. However, internet users can send a take-down notice to ISPA, requesting that material considered unlawful be

[99] Freedom House (2014) Freedom on the Net 2014. Washington DC: Freedom House.
[100] Interactive Advertising Bureau South Africa (2014) *Code of Conduct*. Johannesburg: Interactive Advertising Bureau South Africa.
[101] Freedom House (2014) *Freedom on the Net 2014*. Washington DC: Freedom House

removed. If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down (Article 77, Electronic Communications and Transactions Act).

Although self-regulatory mechanisms are less susceptible to state capture, it is susceptible to industry capture and as a result can adopt an overly cautious approach towards controversial speech. ISPA's take-down notification procedure does not make any provision for representations to be made by the alleged infringer before the take-down takes place, and there is no in-built right of appeal, which makes the procedure vulnerable to accusations of procedural unfairness and which has led intellectual property lawyer Reinhardt Buys to argue that the take-down procedures are unconstitutional. Furthermore, in terms of the ECT Act, a service provider is not liable for wrongful take-down, which acts as a disincentive to scrutinise requests for take-downs carefully; rather liability rests with the lodger of the notice. However, if ISPs do not implement take-down notices they could be liable for hosting illegal content. This incentivises them to err on the side of caution and "take down first and ask questions later", irrespective of the legitimacy of the complaint (Duncan, 2011).[102]

There are also issues related to some ISP user policies. For example, the acceptable use policy of the ISP MWEB (one of South Africa's largest ISPs) states that it prohibits use of the IP services in a way that is "… harmful, obscene, discriminatory … constitutes abuse, a security risk or a violation of privacy … indecent, hateful, malicious, racist … treasonous, excessively violent or promoting the use of violence or otherwise harmful to others". Most of the quoted grounds are vague and would cover speech that would ordinarily receive constitutional protection.[103]

3.4 Independent regulation

The Press Council of South Africa (PCSA) is a voluntary, independent co-regulatory system. The Council itself is composed of thirteen members who oversee its operations: six press representatives, six representatives of the public and a retired judge appointed by the Chief Justice of South Africa (PCSA, 2012).[104]

Press complaints are handled by two PSCA bodies: the Press Ombudsman and the Press Appeals Panel. Complaints are submitted to the Press Ombudsman who may choose to conduct a hearing in order to rule on the complaint. Conducting a hearing involves convening an Adjudication Panel composed of the Ombudsman, a press representative and a representative of the public. The rulings of the Ombudsman can be appealed to the Press Appeals Panel, in which case the complaint is heard by the Council's Chair of Appeals (a senior legal official) who must appoint one press representative and up to three representatives of the public to hear the complaint with her/him (PCSA, 2012).[105]

[102] Duncan, J. (2011) "Monitoring and defending freedom of expression and privacy on the internet in South Africa" In *Global Information Society Watch Report: Internet Rights and Democratisation*. The Hague/ San Francisco: Hivos / Association for Progressive Communications. Available online: http://www.giswatch.org/ru/node/913

[103] MWEB Legal Notices. Available online: http://www.mweb.co.za/legalpolicies/GeneralPage/AcceptableUsePolicy.aspx

[104] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.

[105] *Ibid.*

All media organizations which are members of the Press Council of South Africa must accept its jurisdiction to rule on press complaints. Media organizations which are not members can also choose to accept the PCSA's jurisdiction (PCSA, 2012).[106] PSCA's code covers the online publications of its members and the PSCA regularly hears complaints against online media outlets (PCSA, 2014).[107]

The PSCA's sanctions involve ordering media outlets to issue corrections, apologies and/or to give the complainant a specified amount of space in the publication for right of reply. Monetary fines are not imposed as a penalty for content, however, they may be imposed as sanctions for a respondent's failure to appear for adjudication hearings and repeated non-compliance with the rulings of the adjudicatory system (PCSA, 2012).[108]

[106] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.
[107] Press Council of South Africa Rulings. Available online: http://www.presscouncil.org.za/Ruling?page=1
[108] Press Council of South Africa (2012) *The South African Press Code, Procedures and Constitution*. Parktown: Press Council of South Africa.