

Legal Analysis

Jordan's Draft Cybercrimes Law

Introduction

On August 2, 2023, the Jordanian Parliament approved the Draft Cybercrimes law submitted by the Jordanian government on July 17, 2023. Currently, the draft law is being prepared for submission to His Majesty the King.

ICNL analyzed the draft law¹ and compared it against to the current Cybercrimes Law, international human rights law, and best practices.

ICNL is concerned that the draft would impermissibly restrict the rights to freedom of expression, freedom of association, privacy, access to information, and public participation. These comments examine the following areas of concern:

- The draft places excessive restrictions on freedom of expression by including vague and overly broad cybercrimes like assassinating his/her character.
- It does not set minimum limits and sufficient guarantees to protect the right to privacy when collecting information and investigating cybercrimes the draft does not specify the standard for authorizing an investigation or limit the scope or duration of warrants.
- The draft increases prison sentences and fines and creates different penalties for digital crimes compared to similar non-digital crimes.
- The draft fails to require intent for some crimes.
- It restricts digital fundraising, including crowd funding, burdening the freedom of association. • It requires social media platforms outside of Jordan that have more than 100,000 subscribers in the Kingdom to establish an office in Jordan, which may hinder individuals' access to these social media platforms.

International Law

The draft bill restricts rights to freedom of expression, freedom of association, privacy, access to information, and to participate in public affairs. These freedoms and rights are guaranteed by the International Covenant on Civil and Political Rights (ICCPR).²

FREEDOM OF EXPRESSION

Freedom of expression is guaranteed under Art 19 of the ICCPR, which includes the freedom to seek, receive and impart information and ideas. Although the freedom of expression is not absolute – governments can

¹ICNL used an unofficial translation of the draft amendments for this analysis.

²Jordan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1972.

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=88&Lang=EN

restrict this right – restrictions to the freedom of expression are only compatible with the ICCPR if all parts of Art 19's three-part test are met:³

1. A restriction is provided by law in a way that is clear and accessible – the legality standard. To meet this prong, it is not enough for a restriction to be written into law, it must be written with enough precision to enable individuals to understand what is expected, how to regulate their behavior, and under what circumstances they will be punished. If the law is vague, it gives law enforcement undue discretion when executing its authority, thereby failing the legality standard.
2. Restrictions must pursue a legitimate purpose – the legitimacy standard. According to Art 19, legitimate purposes are those that protect the rights or reputations of others, have national security or public order aims, or pursue the interest of public health or morals. The scope of legitimate purposes is broad, which is why it is not enough for a law to simply state one of these as a goal, it must also satisfy the legality and necessity standards to be permissible.
3. Restrictions must be necessary, and the least-restrictive means required to achieve the purported aim – the necessity standard. Laws that are broad and that attempt to restrict a wide range of behavior and speech are generally not considered necessary because they are not narrowly tailored to prevent the alleged harm. To satisfy this prong, a law that is precise and legitimate must also demonstrate that the restriction is an appropriate and proportionate response and directly related to the harm being caused by the speech. Proportionality requires that states consider “the form of expression at issue as well as the means of its dissemination” when establishing legal penalties.⁴

THE RIGHT TO PRIVACY

The right to privacy is guaranteed in Art 17 of the ICCPR, which requires that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”

The Special Rapporteur for Freedom of Expression has stated that the right to privacy should be subject to the same permissible limitations test as the right to freedom of movement, elucidated in the Human Rights Committee General Comment 27, paragraph 14:

1. Any restrictions must be provided by the law;
2. The essence of a human right is not subject to restrictions and any discretion exercised when implementing the restrictions must not be unfettered;
3. Restrictions must be necessary in a democratic society. For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims. It must be necessary for reaching the legitimate aim; and restrictive measures must conform to the principle of proportionality, must be appropriate to achieve their protective function, must be the least intrusive instrument amongst those which might achieve the desired result, and must be proportionate to the interest to be protected.⁵

³This three-part test is explained in detail in Human Rights Committee, “General Comment No. 34,” CCPR/C/GC/34 (Sept. 2011), para. 21-36.

⁴Human Rights Committee, “General Comment No. 34,” CCPR/C/GC/34 (Sept. 2011), para. 34.

⁵Human Rights Committee, General Comment No. 27: Freedom of Movement (Art 12), para. 15, UN Doc #

The freedom of expression and the right to privacy are interrelated, as “the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression.”⁶ Limitations or restrictions to one of these rights impact the enjoyment of the other. Just as a restriction to the freedom of expression must pass the three-part cumulative test derived from ICCPR Art 19 to be lawful, a restriction to the right to privacy is only lawful if it passes the test articulated in General Comment 27.⁷

THE RIGHT TO FREEDOM OF ASSOCIATION

According to Art 22 of ICCPR Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are:

1. prescribed by law;
2. are necessary in a democratic society; and
3. in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

1) Excessive restrictions to the freedom of expression

Issue: Many of the cybercrimes listed in draft law are vague and overly broad, which could lead to impermissible restrictions on the freedom of expression. For example, the draft law prohibits using information networks, information technology, information systems, websites, or social media platforms to:

- Send, re-send, or publish data that involves false news, slander, or insult to any person;⁸ • Intentionally spread information, contribute to spreading information, unlawfully attribute acts to a person or contribute to unlawfully attributing acts to a person that may assassinate his/her character;⁹
- Publish sedition or strife, undermine national unity, incite hatred, or call for or justify violence or contempt of religions...¹⁰
- Publish a recording, image, or video of what a person is keen to preserve or hide from the public with the intention of defamation, offense or obtaining any benefit as a result thereof, even if he/she has legitimately obtained those photos, recordings, or videos...”

Discussion: Restrictions on the freedom of expression are lawful only when such restrictions pass Article 19’s three-part, cumulative test. While Art 19 of the ICCPR includes protection of the rights and reputation of others as a legitimate aim, the restrictions must also meet the legality and necessity standards.

The “provided by law” requirement is not met just because a law or regulation is officially enacted. Restrictions must be predictable, transparent, and formulated with sufficient precision to enable both the individual and those charged with its execution to conform their conduct to the law. Terms such as false news, insult, strife, national unity, contempt of religions, and assassination of character, are vague and ambiguous terms that fail to meet the “provided by law standard.” It is impossible for the public to know in

CCPR/C/21/Rev.1/Add.9 (1999); United Nations Human Rights Council, A/HRC/23/40, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” April 17, 2013, para. 29. ⁶United Nations Human Rights Council, A/HRC/23/40, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” April 17, 2013, para. 24.

⁷United Nations Human Rights Council, A/HRC/23/40, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” April 17, 2013, para. 29.

⁸Art 15

⁹Art 16

¹⁰Art 17

advance what conduct or speech is permissible and what speech is illegal. The UN Special Rapporteur has confirmed that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression...and should be abolished.”¹¹ In addition, phrases such as “character assassination”¹² could be used to limit criticism of a public figure and stifle dissent. In addition, broad prohibitions on publishing an item that a person is “keen to preserve or hid from the public” could chill all expression about alleged crimes or wrongdoing, even if a recording or video proves the truth of the allegation, because the alleged culprit will always be keen to hide this information. For example, this could result in a journalist or activists facing not less than 3 months jail sentence and a 40,000 JD fine for reporting on a politician’s affair, or reporting on a crime that violated public morals, such as a domestic violence conviction. This is information that clearly is the public’s right to know yet appears to be prohibited under the Draft, International experts on the freedom of expression have stated that “anti-fake news” laws violate the freedom of expression: “General prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression...and should be abolished.”¹³ From a policy perspective, laws that criminalize “false” news or “false” content, like these Bills, will stifle independent media, especially those outlets and reports that are critical of government policies; create a chilling effect on public debate; undermine government and public accountability because the presentation of critical views is criminalized; result in less information on community needs being available to government decision-makers, thereby impeding government ability to solve problems; and weaken democracy. Ironically, laws seeking to prohibit false news may actually result in the suppression of “true news,” including the presentation of non-partisan, objective analysis, especially where such analysis challenges a government policy or position.

Furthermore, these proposed cybercrimes fail to meet the necessity standard because there are other ways to address the issues that the draft law is attempting to address. For example, an individual who believes that a photo or video violates his or her privacy and who wants to request its removal can file a removal request with the relevant social media company. Moreover, these proposed cybercrimes are not the least-restrictive means required to achieve the purported aim. “[I]mprisoning individuals for seeking, receiving, and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under Art 19, paragraph 3, of the [ICCPR].”¹⁴ There are less intrusive ways to protect the

¹¹ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on “Fake News”, Disinformation and Propaganda*, para. 2(a) (March 3, 2017).

¹² Based of experts “Character assassination” is a practice in which a deliberate and sustained effort is made to damage the reputation or credibility of an individual.

¹³ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on “Fake News”, Disinformation and Propaganda*, para. 2(a) (March 3, 2017). Joint declarations by these mandate holders are considered as very persuasive interpretations of existing international human rights law on the topics addressed, see, Toby Mendel, *The UN Special Rapporteur on Freedom of Opinion and Expression: Progressive Development of International Standards Relating to Freedom of Expression*, in T. McGonagle and Y. Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives*, Cambridge University Press, p. 251-257 (2015).

¹⁴ United Nations Human Rights Council, A/HRC/17/27, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” May 16, 2011, para. 36; United Nations Human Rights Council, A/71/373, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye” September 6, 2016, para. 33; United Nations Human Rights Council, A/HRC/7/14, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo” February 28, 2008, paras. 39-43.

rights and reputation of others and protect the inviolability of private or family life. For example , a person who is threatened or harassed through the posting of private or intimate photos or videos can report inappropriate content or harassment to the relevant social media companies. Countries also have civil defamation, libel, and slander laws, which allow for the protection of the rights and reputation of individuals without criminalizing expression.

Recommendation: Remove Arts 15, 16,17 and 19.

2) Investigation standards and safeguards

Issue: The draft law requires the investigative authorities to obtain a warrant from the judge of jurisdiction or the prosecutor¹⁵ and this warrant permits law-enforcement officers to issue orders to examine hardware, tools, software, operating systems, information network ,save computer data, and to order service providers to provide subscription and traffic data, to intercept, monitor, and censor data, and to impound computers.¹⁶ However, the draft does not specify the standard for authorizing an investigation or limit the scope or duration of warrants. Nor does it include adequate safeguards to protect the freedom of expression and privacy.

Discussion: In addition to prior judicial authorization of investigation powers, a set of safeguards needs to be in place to ensure that the system for confiscation of data and equipment complies with the ICCPR. “Safeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, and the kind of remedy provided by the national law.”¹⁷

While the Draft requires investigative authorities to obtain a warrant prior to accessing information or data, or prior to searching computers and other electronic communications, which reflects best practices, it does not provide a threshold that must be proven before a judge issues a warrant. Presumably this is articulated in the Code of Criminal Procedure, but the threshold should be clearly defined in the law and should be reasonably high to avoid violations to the right to privacy. For example, low thresholds, such as “reasonable grounds to believe,” amounts to a *de facto* approval of law enforcement requests, which may lead or contribute to an impermissible restriction on the freedom of expression.¹⁸ The threshold should be high enough to amount to meaningful judicial oversight.

In addition, warrants for the search of records should be narrow in scope and only for a certain, defined duration. These safeguards are not included in Art 32. International human rights law requires that periods of interception should be limited, and not extended indefinitely, and with a continued showing of the interception’s necessity, which is also not addressed in the Draft. The amount of information that can be intercepted, searched, seized, and disclosed pursuant to Art 32 likely violates the right to privacy because it allows for the collection of overly broad categories of private information such as examining hardware, tools, software, operating systems, information network and means that evidence indicates. Investigatory warrants should limit the type of information surveilled to information that directly pertains to the act being investigated.

¹⁵ Art 32

¹⁶ Art 33

¹⁷ United Nations Human Rights Council, A/HRC/23/40, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” April 17, 2013, para. 81.

¹⁸ United Nations Human Rights Council, A/HRC/23/40, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” April 17, 2013, para. 56.

Art 32 contains very few requirements that the investigative authorities must follow when carrying out search and seizure of electronic equipment. Art 32 does not require that the equipment or data be returned or destroyed once the investigation and subsequent criminal case, if any, is concluded. This raises significant fears that any private data left in the authorities' hands could be exposed.

Recommendation: Revise Arts 31 and 32 to specify a sufficiently high legal threshold for a warrant to be issued to guarantee meaningful judicial oversight; include adequate safeguards regarding the scope and duration of these investigatory powers; and include additional requirements about the use and disposal of collected information and data.¹⁹

3) Intent Requirement

Issue: The Draft criminalizes eavesdropping, interception, or deliberately accessing a website or computer systems without permission from the relevant authority. However, it does not include an intent element and a person violating this provision may face up to 3 years²⁰ imprisonment and up to 25000 JD fine.²¹

Discussion: The Budapest Convention on Cybercrime,²² the only major treaty addressing cybercrimes, includes provisions requiring states to criminalize illegal access, illegal interception, and data and system interference. However, these provisions require the act to be "**committed intentionally.**" For example, to qualify as illegal access, the access to the computer system must be without right and occur "with the intent of obtaining computer data or other dishonest intent."

Article 4(1) of the Draft seeks to address crimes like hacking, unauthorized installation of malware, and other malicious tracking software. However, the provision is so broad that it could be used to target legitimate, good faith actions by whistleblowers who might access computer systems and data without authorization to expose government or private sector wrongdoing as well as journalists who rely on the information from whistleblowers to report on the wrongdoing.²³ In order to protect whistleblowers and legitimate journalistic activity, Article 4(1) should be amended to require proof that the perpetrator intended to cause injury or serious harm. This standard of intent is narrower and better protects against the criminalization of good faith acts that do not harm the underlying computer system. The provision also authorizes the imposition of up to three years imprisonment and a fine, which is a particularly disproportionate penalty in the absence of a narrowly tailored intent requirement. .²⁴

Recommendation: Amend Art 4 (1) to include intent to cause injury or serious harm.

¹⁹ Some legal experts also warned that this article stipulates the right for filing a civil lawsuit requesting compensation, which adds to the laws chilling effect.

²⁰ Many legal experts noted that insisting on high imprisonment sentences is deliberate to allow for pretrial detention, many articles allow for the detention of the defendant, following a complaint, regardless of whether the court finds the defendant innocent or not responsible.

²¹ Art 4 (1)

²² Jordan has not yet signed the Convention and the Convention. However, the standards set forth in the Convention represent an emerging minimum consensus, including among the 75 States that have signed or ratified the treaty. For a list of signatories and ratifications, please see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=DOzYeqZn.

²³ United Nations Human Rights Council, A/HRC/23/40, "Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue" April 17, 2013, para. 84.

²⁴ See e.g., The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration December 6, 2004, p. 4 (2004).

4) Penalties for electronic crimes should be comparable to the penalties of the same crime using non-digital means.

Issue: The draft law imposes criminal liability, including imprisonment of 2 months - 5 years and fines of up to 50,000 JOD for violations including illegal accessing of data, illegal interception of data, theft of electronic cards, solicitation of prostitution, publication, distribution, sale or purchase of pornography or child pornography, and threats or extortion of another person.

Discussion: Jordan's penal code provides for criminal penalties for sanctions for similar crimes such as theft, extortion, child pornography, and solicitation of prostitution etc. Individuals should not face higher criminal sentences or fines simply because the crime is committed online. For example, the penalty for slander or insult in the draft law is up to three years and a fine of up to 20,000 JOD,²⁵ while the penalty for the same offense in the Penal Code may be up to six months and a fine of 50 JOD. The draft includes fines unprecedented in Jordanian laws. When comparing the fines contained in the draft, we find that they equal or exceed the fines for serious crimes; for example, the fine for drug trafficking²⁶ is between 10.000 and 20.000 JOD, while the fine for whoever refuses to implement the orders of the Public Prosecutor or the competent court or violates them is fifteen thousand JODs to thirty thousand JOD²⁷.

Recommendation: The drafters should review the criminal penalties and fines set forth in the draft law to ensure they are comparable to the penalties set forth in the criminal code and other existing laws and proportionate to the offense in question.

5) Depriving individuals and CSOs of digital funding opportunities

Issue: The draft law imposes criminal liability, including imprisonment of three months to one year with a fine of not less than three thousand JODs and not more than five thousand JODs, on any person who uses websites, social media platforms, manages an electronic wallet or any electronic means to advocacy or promotion of fundraising or charity without a permission from the competent authorities or in contravention or in excess of the permission.²⁸

Discussion: In Jordan some activists and CSOs request in-kind and material support from the public via email, CSO websites, and social media platforms. Online fundraising is often successful, especially if the appeal is made by trusted CSOs or credible media outlets. It is also common to organize emergency relief fundraising and seasonal fundraising campaigns during the winter, Ramadan, and other holidays in order to meet the needs of the poor and the less fortunate.

While permits are required for some types of digital fundraising, the process for obtaining a permit is time consuming and the instructions for obtaining a permit are complex, and the requirements for obtaining a permit do not apply to individuals and non-charity CSOs. There are also examples of emergencies when an individual or CSO must issue an urgent fundraising appeal.

The ability to "seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources" is integral to the right to freedom of association under international law.²⁹ The requirement of government approval for foreign aid, donations, or grants online fundraising is not a permissible restriction to this right because it fails the "necessary in a democratic society" test under ICCPR

²⁵ Art 15

²⁶ Narcotic Drugs and Psychotropic Substances Act -Art 19-A- Any person who commits any of the following acts with the intent of trafficking shall be punished by temporary hard labor for a period of not less than fifteen years and a fine of not less than ten thousand dinars and not more than twenty thousand dinars, etc.

²⁷ Art 33

²⁸ Art 22

Art 22, which requires restrictions to be the least-intrusive means to achieve one of four permissible aims. As noted by the UN Special Rapporteur:

“For associations promoting human rights, including economic, social and cultural rights, or those involved in service delivery (such as disaster relief, health-care provision or environmental protection), access to [financial] resources is important, not only to the existence of the association itself, but also to the enjoyment of other human rights by those benefitting from the work of the association. Hence, undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.”³⁰

Recommendation: The drafters should delete Arts 22 and 23 in the draft law and organize the online crowd funding process through clear and understandable instructions.

6) Requiring social media platforms to establish offices in Jordan

Issue: The draft law requires social media platforms outside the Kingdom with more than one hundred thousand subscribers in the Kingdom, to establish an office inside the Kingdom to deal with requests and notices issued by judicial and official authorities.³¹

Discussion: The right to freedom of expression includes the right to seek, receive, and impart information of all kinds and formats. One of the primary means of seeking and imparting information is through the internet. For this reason, the Human Rights Council has repeatedly condemned government measures that “intentionally prevent or disrupt access to or dissemination of information online” because they do not comply with the necessity standard of Article 19’s three-part test. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has said that overly broad laws that “block, censor and chill online speech and shrink civic space” are disproportionate measures.³²

The draft law requires social media platforms to register and open offices in Jordan, and if these platforms do not comply platforms will be notified by the Telecommunications Regulatory Authority of the obligation to comply. If they fail to respond, then the government can ban advertisements on those platforms in the Kingdom and reduce bandwidth of Internet traffic for these platforms up to 75%.

Many individuals in Jordan increasingly rely on social media platforms to seek, receive, and impart information. For example, as of March 2022, there were **7,332,500** Facebook users in **Jordan**,³³ which accounted for **67.6%** of its entire population. Some social media platforms, particularly smaller ones, may decline to register or establish local offices, which will reduce users’ access to these platforms, further shrinking online space and preventing individuals from seeking, receiving, and imparting information through a potentially large number of online resources. For this reason, mandatory registration or establishing offices requirements for social media platforms is considered disproportionate and does not comply with Article 19 of the ICCPR.

Recommendation: The drafters should delete Art 37, and the government should find alternative ways to communicate with social media platforms and notify them of requests and notices issued by judicial and official authorities.

³¹ Art37

³² U.N. Human Rights Council, “Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Irene Khan, A/HRC/47/25 (April 2021), para. 83-85. ³³ <https://napoleoncat.com/stats/facebook-users-in-jordan/2022/03/#:~:text=There%20were%207%20332%20500.them%20were%20men%20%2D%2055.2%25>.