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## **TRIAL OBSERVATION REPORT**

### **Concerning the prosecution of journalists from “Azamn” newspaper in Oman**

23 November 2016

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#### **Introduction**

1. This report follows a Trial Observation mission conducted from 4 to 7 November 2016 in Muscat, Oman on behalf of a coalition. The author is a practising barrister, called to the Bar of England & Wales, with experience of criminal defence, media law and human rights.
2. The coalition of rights groups which monitored the trial was composed of the Gulf Centre for Human Rights (GCHR), the Arabic Network for Human Rights Information (ANHRI), Front Line Defenders, Reporters Without Borders (RSF), FIDH and the World Organisation Against Torture (OMCT) within the framework of the Observatory for the Protection of Human Rights Defenders.
3. Given the political conditions in Oman, the author was necessarily restricted in the access that could be sought of state and prosecuting officials. The analysis offered below reflects the author’s observation of the Defendants’ Appeal Court hearing on 7 November 2016, coupled with research and investigation in the field. The identities of interviewees are not disclosed.

## **Background**

4. Until the prosecution of three of its journalists in the summer of 2016, and a closure ordered by the Ministry of Information, “Azamn” (meaning “The Time”/ “The Age” in Arabic) was Oman’s leading opposition newspaper, publishing both in print and online. It had three offices in the country and over 80 staff, including 15 journalists.
5. On 26 July 2016 it published a story which reported that government officials had placed pressure on Ishaq Bin Ahmed Al-Bousaidi, the chief magistrate of the Omani Supreme Court, to overturn an Appeal Court decision in an inheritance case.
6. The article suggested that Al-Bousaidi had succumbed to pressure and/or corruption, leading to procedural irregularities in the enforcement of an Appeal Court judgment. The article included a photograph of Al-Bousaidi with a headline which read: “*Higher authorities tie the hands of justice*”. There was accompanying commentary challenging the government to live up to promises made around the time of the Arab Spring to reform and liberalise the State.
7. The case in question related to a long-running inheritance dispute (often referred to as the “Rashmi case”) between two branches of a family, one of which is reported to have significant economic interests and political networks in Oman. The Appeal Court had found in one side’s favour but the judgment had remained unregistered, and unenforced, for over 12 months. There was already public speculation about the case’s existence – and outcome - before the “Azamn” story but without details or commentary.
8. A subsequent ban on further reporting of the story led to “Azamn” printing a “blank” front page in protest on 1 August 2016.
9. On 7 August 2016, “Azamn” published an interview with Ali Salem Al-Noumani, the Deputy Head of the Supreme Court, second only to Al-Bousaidi, in which Al-Noumani openly accused senior judges of corruption and supported the original story as justified.

10. The Director of Public Prosecutions, Husain Al-Hilali, pursued charges against three “Azam” journalists: Editor in Chief Ibrahim Al-Maamari, Deputy Editor Youssef Al-Haj, who conducted the interview with Al-Noumani, and local news editor Zaher Al-Abri, who had sent two tweets commenting on the detention of his colleagues. One of those stated “*The prison bars are dark*”, a reference to Al-Maamari’s imprisonment, while another criticised the Journalists’ Association for failing to support one of its members.

11. The final charges were as follows:

**Al-Maamari**

- Disturbing public order (Article 25, Press and Publications Law)
- Use of the internet in a way that “may undermine religious values and public order” (Article 19 Cybercrimes law)
- Publishing details of a civil/family law case (Article 29 Press and Publications Law)
- Undermining the prestige of the state (Article 135 Penal Code)

**Al-Haj**

- Disturbing public order (Article 25, Press and Publications Law)
- Use of the internet in a way that “may undermine religious values and public order” (Article 19 Cybercrimes Law)
- Publishing details of a civil/family law case (Article 29 Press and Publications Law)
- Undermining the prestige of the state (Article 135 Penal Code)
- Breach of a reporting restriction (Article 32 Press and Publications Law)
- Defamation/Slander (Article 182 Penal Code)

**Al-Abri**

- Use of the internet in a way that “may undermine religious values and public order” (Article 19 Cybercrimes Law)

12. A summary of the Court hearings at First Instance is set out in the chronology below. Presided over by Muscat Primary Court Judge Saeed Ambusaidi, the trial was spread

over a number of mornings, leading to conviction and sentencing on 29 September 2016.

13. Al-Maamari was convicted of the four charges against him and sentenced to three years in prison. Al-Haj was convicted of all six charges against him and also sentenced to three years. Al-Abri was convicted of the one charge and sentenced to one year in prison.
14. The Omani criminal justice system provides for a right of appeal following a First Instance decision.
15. The Appeal Court hears that appeal as a full “re-hearing”, ie. proceedings are not limited to a challenge to an error of law by the lower Court judge but can encompass full examination of witnesses and the consideration of fresh evidence.
16. The Omani system is a hybrid of inquisitorial and adversarial. While both the Prosecution and Defence are represented by advocates, it is common – and expected – that Judges will take the lead in proceedings.
17. Following a decision of the Appeal Court, a Defendant would only have recourse to the Supreme Court.
18. In the present case, following conviction by the Court of First Instance, the three Defendants exercised their right to an Appeal Court re-trial. Under Omani law, the sentence of the Court of First Instance is suspended pending an Appeal Court hearing and so the Defendants were later granted bail by the Appeal Court.
19. On 10 October 2016, the Appeal Court held its first hearing into the case during which the Prosecution re-stated its case against the three Defendants.
20. On 7 November 2016, it was the turn of the Defence to present its case before the Judges retired for consideration. This hearing was subject to the Trial Observation mission.

### **Summary of trial observation**

21. The defence team faced significant procedural obstacles in the Appeal Court re-trial, ranging from a refusal by Judges to call relevant witnesses of fact, denial of disclosure and an apparent failure to place the criminal burden of proof on the Prosecution. This led to a trial of all three defendants, on a cumulative 14 charges, being completed in just two morning sessions.
22. In any event, and more fundamentally, the substantive laws under which Al-Maamari and Al-Haj are being prosecuted, including charges of “disturbing public order”, “undermining the prestige of the state” and criminal defamation, are ill-defined, arbitrarily enforced and constitute a disproportionate interference with freedom of expression. They were effectively denied a "public interest" defence.
23. It is of particular concern that Al-Maamari and Al-Haj were held in solitary confinement in a police intelligence facility for 60 days over the summer with access to their lawyer only after the first trial had begun. Zahir Al-Abri, charged under Article 19 of Oman’s Cybercrime law, faces a year in jail for two tweets commenting on his colleagues’ detention. Al-Abri was himself held in solitary for 20 days before being granted bail.
24. “Azamn” remains closed by Order of the Ministry of Information. There are separate ongoing proceedings in the Administrative Court challenging that Order.
25. The Appeal Court judgment will be handed down on 12 December 2016.

### **Chronology**

**26.7.2016** “Azamn” publishes story.

**28.7.2016** Al-Maamari detained.

**3.8.2016** Al-Abri detained.

**7.8.2016** “Azamn” publishes an interview with Al-Noumani conducted by Al-Haj.

**9.8.2016** Ministry of Information orders closure of the paper. Al-Haj detained.

**15.8.2016** First Court appearance at First Instance.

**21.8.2016** Second hearing.

**29.8.2016** Third hearing.

**7.9.2016** In separate proceedings, the Administrative Court lifts the ban on the paper. The ban is then re-imposed by the Ministry.

**29.9.2016** Court of First Instance convicts and sentences all three Defendants.

**10.10.2016** First Appeal Court hearing. Bail granted and reduced from 50,000 OMR (approx. USD\$130,000) to 2,000 OMR (approx. USD\$5200).

**7.11.2016** Second Appeal Court hearing. Trial Observation.

**17.11.2016** Appeal Court due to rule on conviction and sentence.

### **The charges under Omani law**

26. The material provisions of Omani law applied against the Defendants area as follows:

#### *Press and Publications Law, 1984*

Article 25: It is forbidden to publish anything that defames implicitly or explicitly the person of his Majesty the Sultan or of the members of his royal family, by insinuation or verbal or caricature statements. **It is also forbidden to make any provocation or offense against the ruling**

**system in the Sultanate or to cause harm to the Public Order or to embrace or promote any matters contrary to the principles of the true Islamic religion.**

...

Article 35: Without prejudice to any more severe penalty, anyone who violates Article 25 shall be punished by imprisonment for a period not exceeding three years, or a fine not exceeding OMR 2000, or by both.

...

Article 29: **It is prohibited to publish the details of investigations or trials pertaining to family matters or others, which the courts prohibits the publication thereof.** It is also prohibited to, deliberately with bad intention, misstate what happens in hearings and court deliberations.

...

Article 32: **It is prohibited to publish any news, picture, or document the publication of which is banned by a decision of the Minister of Information,** until the ban is removed by the same.

...

Article 36: Any violation to Articles (26-34) shall be punished by imprisonment for a period not exceeding two years, or a fine not exceeding OMR 2000, or by both.

#### *The Prevention of Cybercrimes Law, 2011*

Article 19: It is a crime punishable by imprisonment of a period not less than a month and not more than three years and a fine of not less than OMR 1000 and not more than OMR 3000, or by either of the two, to **use the information network or information technology means to produce, publish, disseminate, purchase, or possess anything that may undermine religious values and public order.**

#### *The Penal Code*

Article 135: It is a crime punishable by imprisonment of a period not less than three months and not more than three years and a fine of not less than OMR 100 and not more than OMR 500, anyone who **deliberately instigate or broadcast or publish inside or outside false or ill-**

**intentioned news, information, or rumors or spread provocative propaganda, which may undermine the prestige of the State or the trust in its financial status.** The punishment shall be imprisonment for a period not exceeding 10 years if the crime is committed at the time of war.

Article 182: The person who commits the following acts shall be considered a **slanderer** and punished by imprisonment for a period not less than 10 days and not more than 3 years and a fine from OMR 10 to OMR 500 or by ...

... **Published by any means the news that a crime was committed, which in fact was not, when he/she knew that such crime did not take place**, or reported a crime to the concerned authorities when he/she knew that the reported crime did not take place, or he/she was a direct reason behind the investigation of such crime by fabricating evidence.

27. Against the background of these provisions lies the Omani Basic law (or Statute), promulgated in 1996, which, while originally not envisaged as a directly applicable source of constitutional rights, nonetheless purports to embody the fundamental principles of the state which may serve as an interpretive tool.

28. These include:

Article 17

All Citizens are equal before the Law and share the same public rights and duties. There shall be no discrimination amongst them on the ground of gender, origin, colour, language, religion, sect, domicile, or social status.

...

Article 20

No person shall be subjected to physical or psychological torture, inducement or demeaning treatment

Article 22

**The accused is innocent until proven guilty in a legal trial in which the essential guarantees to exercise his right of defence in accordance with the Law are guaranteed.** It is not permissible to harm an accused either bodily or mentally.



Article 24

Any person who is arrested or detained shall immediately be informed of the reasons for his arrest or detention. He has the right to contact whomever he wants to inform him of what has taken place or to get his assistance in the manner regulated by the Law, and he shall be promptly informed of the charges against him. He or his representative shall have the right to petition the court against the action restricting his personal freedom. The Law shall regulate the right of petition in a manner which ensures that the disposal of the petition will be within a specified period, failing which he must be released.

Article 29

**The freedom of opinion and expression thereof through speech, writing and other means of expression is guaranteed within the limits of the Law.**

Article 31

The freedom of the press, printing, and publishing is guaranteed according to the terms and conditions prescribed by the Law. Anything that leads to discord, affects the security of State, or prejudices human dignity or rights, is prohibited.

Article 60

The judiciary shall be independent, its authority shall be exercised by the courts in their different types and hierarchies, and their judgements shall be rendered in accordance with the Law.

Article 61

There shall be no power over judges in their ruling except for the Law. They shall be irremovable except in circumstances specified by the Law. It is not permissible for any party to interfere in lawsuits or affairs of justice, and such interference shall be considered a crime punishable by Law. The Law shall determine the conditions to be satisfied by those who exercise judicial functions, the conditions and procedures for appointing, transferring and promoting judges, the guarantees accorded to them, the circumstances where they cannot be removed from office and all other provisions relevant to them.

Article 63

The hearings of the courts shall be in public, except when the court decides to hold them in camera in the interest of

the public order or morals. In all circumstances, the pronouncement of judgement shall be in open hearing.

Article 79

**Laws and procedures which have the force of law shall conform to the provisions of the Basic Statute of the State.**

29. The degree to which Article 79 could be said to create a space for Judges to soften the harsher edges of the penal code is moot in the absence of a body of constitutional law.

### **Political background and the judicial system**

30. Oman has been ruled by Sultan Qaboos Al-Said since 1970. Political and press freedom is highly circumscribed. Freedom House commented in 2013 that “Oman’s 1984 Press and Publications Law is one of the most restrictive statutes of its kind in the Arab world, and serves to create a highly censored and subdued media environment.”
31. A nascent political movement in the period after the Arab Spring was subject to a severe crackdown and the space for opposition has continued to narrow.
32. This is reflected in the Prevention of Cybercrimes Law promulgated in 2011 designed to close down the internet as a forum for independent critical commentary.
33. On the other hand, “independent” private newspapers had been tolerated (and directly subsidised, including “Azamn”) within certain constraints and have been granted licences even after run-ins with the authorities. “Azamn” itself had previously attracted adverse attention, with Al-Haj and Al-Maamari convicted of defamation in 2011 for an article alleging corruption in the Ministry of Justice. In January 2012, their five-month prison sentences were upheld but suspended by the Appeal Court.
34. There appears to have been a deterioration in press freedom in 2016. “Azamn” has been closed down. “Al-Balad”, an independent online news site, ceased operation in

October 2016 following the arrest and interrogation of its Editor. The Editor of “Al-Falaq” was subject to questioning in the summer. Bloggers have faced harassment.

35. While the reasons for the recent shift in dynamics in the country lie beyond the scope of this report – and appear to include, *inter alia*, anxiety over the Sultan’s health, concerns about succession and war in neighbouring Yemen - the political context in which the media laws are being applied does matter. The law does not operate in a vacuum; nor do Judges make decisions without an eye on wider pressures.
36. The Royal Office and Diwan, the Sultan’s personal offices, maintain control over the security forces. While decisions on prosecutions are nominally made by an institutionally separate office of Public Prosecutions, the Royal Office is widely understood to use formal and informal means of initiating or preventing legal action in particular cases.
37. Although the law provides for an independent judiciary, the Sultan makes all judicial appointments and has the power to dismiss judges.
38. The Sultan may act as a court of final appeal and exercise his power of pardon as chairman of the Supreme Judicial Council, the country’s highest legal body, which is empowered to review all judicial decisions.
39. Moreover, the head of the Supreme Court is institutionally bound to the governing structures of the state, not least through his role on the Council which will ultimately manage succession to the Sultan.

**The Appeal Court hearing of 7 November 2016 which was subject to direct observation by the international lawyer**

40. At a first hearing in the Appeal Court on 10 October, the state prosecutor had laid out the case in a morning session, with the case adjourned until 7 November 2016 for the Defence case to be presented by their advocate, Yaqoob Al-Harhi.

41. On 7 November 2016, the hearing in Court 8 of the Court Complex in Muscat was presided over by a panel of three judges: taking the lead in proceedings was Al-Mukhtar Al-Harhi, with Musa Al-Azri and Husain Al-Gharibi as support.
42. The prosecuting advocate was Ahmed Al-Rawahi.
43. There had been an expectation that Ahmed Al-Akhzami, the head of the Appeal Court, would preside. The Defence had previously made an application to the Court that Al-Akhzami recuse himself. The original “Azamn” article had in part grounded its allegation of impropriety in procedural irregularities following resolution of an inheritance dispute in the Appeal Court (ie. in effect, an attempt to overturn the result *post facto*), that those irregularities were – according to Al-Noumani - due to external pressures on the Judges of that Court and that Al-Akhzami was in a position to be aware of these.
44. Although the application for Al-Akhzami to recuse himself, and indeed for him to give evidence, had been denied in earlier hearings, he did not ultimately become part of the panel of three hearing the “Azamn” case.
45. Court 8 was open to the public. Family members, colleagues and journalists were permitted entry to observe. The Defendants’ cases were dealt with in turn, with Al-Maamari appearing first, standing beside his advocate throughout and, consistent with Omani procedure, entitled to address the Court himself at the close.
46. Judge Harhi began the hearing by reminding those present that no details of the trial were allowed to be published.
47. The Defendants’ advocate advanced a number of arguments, which included a critique of the decision and reasoning of the Court of First Instance. These are listed here so as to give an indication of the nature of the defence. (It should be stressed that I do not seek to evaluate the merits of each of the arguments – particularly those relating to the underlying veracity of the story which was published - but I will, below, highlight those aspects of the trial, both procedural and substantive, which fell below international standards.)

48. Yaqoob Al-Harhi argued on behalf of the Defendants that:

- i. The right to a proper defence had been denied them in circumstances where requests for disclosure and witnesses had been unreasonably denied, both in the Court of First Instance and in the Appeal Court;
- ii. The article that was originally published was argued to be true. The Defendant chose to report an abuse of power and the Basic Law protects the right both to communicate with public authorities and to engage in freedom of expression;
- iii. In cases of defamation involving public officials, the Defendant should be allowed, and given the opportunity, to prove his case;
- iv. It was in any event on the Prosecution to show that, as the charges were worded, “false information” had been intentionally published in order to undermine the state. The burden of proof has instead been imposed on the Defendants;
- v. There is no evidence that the information published is false;
- vi. The Court of First Instance accepted that there was a need to show a motive/special intent on the part of the Defendant to undermine the state and/or judiciary and this had not been made out;
- vii. The Primary Court/Court of First Instance took the view that the provisions under which the Defendants were charged does not allow for an investigation of the allegations published – if this is a correct reading of the law, it leads to injustice;
- viii. The Appeal Court has no jurisdiction over breaches of the publication law. The media law envisages a special commission to try such offences;
- ix. The charge under Article 29 of the Press and Publications Law is procedurally flawed because it was not properly brought by the Prosecutor but only emerged during the first trial;

- x. In any event, Article 29 does not ban the publication of Family law trials unless there is a Court order to that effectively;
  - xi. As regards Al-Haj, the Defendant took reasonable precautions to check the facts of the allegations published – the lower Court had simply refused to consider that the source of the story, Al-Noumani, was himself Al-Bousaidi’s deputy. If Al-Haj had committed criminal slander in publishing the interview, it was striking that Al-Noumani had not been charged, as per Article 94 of the Penal Code;
  - xii. The Judgment of the Court of First Instance did not even specify the phrase or phrases which are meant to constitute the criminal slander in Al-Haj’s case;
  - xiii. Article 182 of the Penal Code requires that special intent be proved in criminal slander, namely that the Defendant must know that the crime he is accusing someone of is false – the Prosecution haven’t dealt with this at all;
  - xiv. As regards the charge against Al-Abri, the prosecution file does not contain anything to substantiate the charge. The mere fact that Al-Abri accepts sending the tweets is not sufficient to establish that these were comments that “may undermine religious values or public order”; further, they were tweets sent in a personal capacity;
  - xv. The convictions, it was submitted, were not safe.
49. The Prosecutor replied that these “points” had been dealt with in the lower Court, that the article in question was self-evidently accusing the judiciary of corruption and, as such, this undermined the state. Motive could be effectively imputed by the effect of the action.
50. As regards Al-Abri, the Prosecutor argued that purpose of the tweets was to raise doubts about integrity of the state and Al-Abri is known to be a journalist linked to Al-Maamari.

51. It was then the turn of the Defendant(s) to have the final word. They were permitted to address the Judges themselves. Al-Maamari stated that, contrary to what occurred in the lower Court, this was his first opportunity to freely speak. He defended the actions of the newspaper, argued that it was in the interests of the state for corruption to be publicised and quoted at length from the Qur'an on the relationship between injustice and the demise of the state.
52. Al-Maamari argued that the information as to improper pressure being placed on Judges came from a senior member of the judiciary and that the facts had been checked.
53. He complained of the restrictions he faced when he was in solitary confinement, the lack of access to a lawyer, the conduct of the lower Court judge and the unfairness of the charges as a whole.
54. Judge Harthi eventually interrupted him and brought the address to a close after 20-30 minutes.
55. Al-Haj used his address to argue that, in conducting the interview with Al-Noumani, and publishing the quotes without comments, he had merely been reporting the words of a senior and well-connected member of the judiciary. Al-Noumani had come to the "Azamn" offices in a government car and Al-Haj had reasonably taken the view that Al-Noumani was acting with the knowledge and support of the Sultan in airing these concerns.
56. The paper had retained recordings of all that was said. Nothing had been embellished. Al-Noumani had said that he had orders from the Sultan. Al-Haj added that there is no evidence to support the contention that he knew the allegations were false.
57. Al-Haj continued to argue that "no court can achieve justice without looking at evidence and having witnesses".
58. Judge Al-Harthi intervened on more than one occasion to challenge the Defendant, stating that the Defence file contained no proof of bribery by Al-Bousaidi or any other

Judge. The Judge also asked “Why did you publish? What was your goal?” When Al-Abri addressed the Judges, he said that his period in detention had been very difficult. The Judge asked him how long he had been detained and he replied “20 days”.

59. Judge Al-Harthi announced that the judgment would be handed down on Thursday 17 November 2016. The Defendants remain on bail.

### *Procedural unfairness*

60. The Appeal Court hearing(s) and the lower Court trial which preceded it were characterised by procedural obstacles to a full and fair defence. The challenges in the Court of First Instance appear to have largely been replicated by decisions of the Appeal Court, in particular the failure to place the criminal burden of proof on the prosecution to the necessary degree.

61. Moreover, the charge brought by the Prosecution directly accused Al-Maamari and Al-Haj of publishing “false information” but this was never evidenced or established during either hearing. Instead, it was repeatedly put to the Defence that they had not shown the article to be true.

62. Significantly, repeated requests for disclosure were made both for the original trial and the appeal. The Defence wanted to obtain the registers both of the Appeal and Supreme Court and the file regarding the inheritance dispute case, so that the substance of the original article could be substantiated – namely, that an Appeal Court judgment in one party’s favour in that inheritance dispute had been subject to blocks on execution due to external pressures on the judiciary.

63. The Defence wished to call witnesses: notably, Al-Noumani, in addition to the secretary of the Appeal Court (who had allegedly failed to stamp/execute the Appeal Court order in the inheritance case), the head of the Appeal Court and the lawyer for



one of the inheritance dispute parties (Hamidi Habsi acted for the Rashmi family and was himself detained for 9 days).

64. The refusal to grant these requests directly links to the substantive content of the law (see below) because the judicial view, explicitly stated by the lower Court Judge, and impliedly continued by the Appeal Court panel, appeared to be that the terms of Penal Code and Press and Publications Law did not allow for examination of the underlying veracity of the original article.
65. On that logic, any attempt to mount a defence of the article(s) as “true” was deemed “irrelevant” to the charges. And yet the failure to show that the allegations were not true was simultaneously being held to establish that they were “false” for the purposes of the charges.
66. The Prosecution position, seemingly shared by the lower court judge, and echoed by the Appeal Court, is that the offences, in particular under Article 25 of the Press and Publications Law, Article 19 of the Cybercrimes Law and Article 135 of the Penal Code, were structurally concerned only with effects (ie. whether or not the state had been impugned) rather than justification.
67. Other obstacles included limited or no access to the Defendants by their lawyers in the critical period before and during the first trial.
68. That first trial featured conduct by a Judge likely to call into question his impartiality. While, in an inquisitorial system a Judge will be expected to question witnesses forcefully, Primary Court Judge Saeed Ambousaidi is reported to have told Al-Haj that it was a “shame he is a journalist” and repeatedly asked him why the article was published when the inevitable effect would be to call the judiciary into disrepute.
69. This led to two hearings in the Appeal Court in which the Defence unsuccessfully sought to have Ambousaidi removed from Al-Haj’s case.

70. The Defence team were not granted a copy of the Prosecution file but were instead required to copy the file by hand under the supervision of government officials over a three-day period.

71. Finally, the conditions of detention in which the Defendants were held raise considerable cause for concerns, with reports of solitary confinement in a police intelligence facility. Al-Maamari and Al-Haj did not see their lawyer until their Court appearances and were not permitted visits. The cells did not contain beds or windows. Guards refused to inform the Defendants of the time. Al-Maamari and Al-Haj were held for 60 days before transfer to a prison and then a grant of bail. They appear to have been interviewed only once during that time.

*Challenges posed by the substantive law*

72. It is a striking feature of the “Azam” prosecutions that the most significant charges being brought, as contained in the Press & Publications Law 1984, the Prevention of Cybercrimes Law 2011 and the Penal Code contain provisions which i) offend the principle of legality – the offences created by the law are ill-defined and, in the absence of restrained and judicious interpretation, constitute a disproportionate interference with freedom of expression; ii) effectively apply a law of criminal defamation without adequate safeguards and iii) introduce a broad subjective evaluation – with no clear arbiter – of “damage to the interests of the state”.

73. Article 19 of the International Covenant on Civil and Political Rights states:

*Article 19*

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

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 (*ordre public*), or of public health or morals.

74. While freedom of expression can be restricted by law, that is subject to the principle of necessity and proportionality.
75. Relevant laws restricting freedom of expression must meet certain standards of clarity and accessibility. The law must be formulated with sufficient precision that it is possible to foresee in advance what is being prohibited.
76. Article 25 of the Press and Publications Law 1984 states that “*it is forbidden to make any provocation or offence against the ruling system in the Sultanate or to cause harm to Public Order or to embrace or promote any matters contrary to the principles of the true Islamic religion*”.
77. Article 135 of the Penal Code prohibits “*deliberate instigation*” of “*false or ill-intentioned news... which may undermine the prestige of the state*”.
78. Article 19 of the Prevention of Cybercrimes Law replicates the language of the Penal Code in prohibiting the “*use of the internet to publish... anything that may undermine religious values and public order*”.
79. Not only is the language impermissibly broad, the law itself introduces a threshold of “may undermine” – therefore the mere *potential* for something to “undermine public order”, however that is to be defined, is sufficient to ground criminal liability.
80. This has the likely effect of discouraging free expression by the media and absolves the Prosecuting authority of even having to prove deleterious effect or damage.
81. While Article 135 at least imports a requirement of specific deliberate intent, it was a repeated feature of the “Azam” trial that no such “intent” was evidenced by the Prosecution.

82. Further, Article 182 of the Code, containing a charge of criminal defamation brought against Al-Haj, also appears to require specific intent (“...when he/she knew that such crime did not take place...”). In other words, recklessness by Al-Haj in publishing the interview with Al-Noumani would not be sufficient to ground criminal liability on the terms provided by Omani law. In the absence of any evidence of specific intent aside from that offered by Al-Haj himself – namely that he published in good faith an interview with a senior member of the judiciary – it is difficult to see how a rational fact-finding tribunal could conclude that Al-Haj positively knew that the allegations were untrue.

83. In any event, criminal defamation is itself inherently problematic and imposes a greater restriction on freedom of speech than civil defamation owing to the severity of the sanctions applied.

84. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has repeatedly called for an end to the use of criminal defamation laws<sup>1</sup>:

... the Special Rapporteur remains concerned that defamation remains classified as a criminal offence rather than a civil tort in many countries around the world. As he has emphasised on many occasions, criminal defamation laws are inherently harsh and have a disproportionate chilling effect on free expression. Individuals face the constant threat of being arrested, held in pre-trial detention, subjected to expensive criminal trials, fines and imprisonment, as well as the social stigma associated with having a criminal record.

85. The provisions of Omani press and defamation laws cited above go beyond the legitimate purpose of protecting individual reputations, instead broadly prohibiting criticism of the state itself, without adequate safeguards, including public interest defences.

86. As explored below, the “fairness” of the “Azamn” trial cannot be evaluated without consideration of the substantive laws being applied against the Defendants.

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<sup>1</sup> Report of the Special Rapporteur to the Human Rights Council, 2012.

## **Fair trial standards**

87. In light of the analysis above, it is the observer's view that in a number of respects the Appeal Court hearing, and the lower Court trial which preceded it, fell short of fundamental fair trial standards. Those normative standards include rights embedded within the International Covenant on Civil and Political Rights (to which Oman is not a signatory), principally within article 14. The various elements of the right to a fair trial codified in the ICCPR are also to be found within the Universal Declaration of Human Rights, customary international law norms and other international treaties, including treaties pertaining to international humanitarian law and international criminal law.

88. In similar (though less detailed) terms to Article 14 of the ICCPR, the right to a fair trial is guaranteed Article 13 of the Revised Arab Charter on Human Rights which reads:

“Everybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations. State Parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights.”

**89. In the following respects, it is the observer' view that the appeal trial of the “Azamn” journalists, regardless of the outcome due on 17 November 2016, has fallen below international fair trial standards:**

- a. Where the functions and competences of the judiciary and the executive are not clearly distinguishable, this is incompatible with the principle of an independent and impartial tribunal.<sup>2</sup> Omani judges lack reliable**

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<sup>2</sup> Human Rights Committee, Views of 20 October 1993, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, para. 9.4; See also: Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/11.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

**institutional independence and this calls into question the fairness of a trial in which political/state interests are at stake;<sup>3</sup>**

- b. Pre-trial detention of the three Defendants in the summer of 2016 was arbitrary, disproportionate and arguably not necessary; initial bail being set at 50,000 OMR (approx. USD\$130,000) by the Court of First Instance – and reduced to 2,000 OMR (approx. USD\$5,200) by the Appeal Court – is indicative of a disproportionate approach<sup>4</sup>; and conditions in solitary confinement constituted inhuman and degrading treatment<sup>5</sup>;**
- c. Deprivation of liberty is arbitrary when detention, including pre-trial detention, is based on criminal offences that are vaguely or ambiguously defined (see analysis below on the material provisions of the Penal Code and other laws)<sup>6</sup>;**
- d. Anyone who is arrested or detained has the right to be assisted by a lawyer without delay<sup>7</sup> – the Defendants were forced to wait until their opening Court hearings before meeting their lawyers for the first time.**

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<sup>3</sup> Human Rights Committee: *Concluding Observations of the Human Rights Committee: Liechtenstein*, CCPR/CP/81/Lie, 12 August 2004, para. 12; *United States of America*, CCPR/C/79/Add.50 paras. 266-304, paras. 288 and 301; *Armenia*, CCPR/C/79/Add.100, 19 November 1998, para. 8; and European Court of Human Rights, Judgment of 2 September 1998, *Lauko v. Slovakia*, Application No. 26138/95, para. 64. For further information, see *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners' Guide No. 1*, International Commission of Jurists, Geneva 2007, p. 47 *et seq.*

<sup>4</sup> Human Rights Committee: Views of 23 July 1990, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, para. 5.8. See also, Views of 5 November 1999, *Aage v. Norway*, Communication No. 631/1995, para. 6.3; Views of 21 July 1994, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.8; Views of 3 April 1997, *A [name deleted] v. Australia*, Communication No. 560/1993, para. 9.2.

<sup>5</sup> Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 6; Committee against Torture Reports A/54/44, paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182; and Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez v. Honduras*, Series C No. 4, para. 156 and Judgment of 12 November 1997, *Suárez Rosero v. Ecuador*, Series C No. 35, paras. 90-91.

<sup>6</sup> See: United Nations Working Group on Arbitrary Detention, *Fact Sheet No. 26: Working Group on Arbitrary Detention*; and United Nations Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/1998/39/Add.1, para. 129.

<sup>7</sup> Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and Principle 7 of the *UN Basic Principles on the Role of Lawyers*. See also: Human Rights Committee: *Concluding Observations of the Human Rights Committee: Georgia*, CCPR/C/79/Add.75, 5 May 1997, para. 27; *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 23 August 2003, para. 13; and *Report of the Special Rapporteur on Torture*, A/57/173, 2 July 2002, para. 18 and E/CN.4/2004/56, 23 March 2004, para. 32.

**The right to a defence applies at all stages of criminal proceedings, including the criminal investigation phase and the trial hearing;**

- e. Public authorities have a duty to refrain from prejudging the outcome of a trial, for example, by refraining from making public statements affirming the guilt of the accused<sup>8</sup> - at least one public statement from the Ministry of Information after the charges had been brought reflected a clear view that the accused were being brought to account for crimes committed;**
  
- f. The right to be presumed innocent until proven guilty according to law is an absolute right, which can never be derogated from, restricted or limited – the presumption of innocence places the burden of proof on the prosecution and guarantees that guilt cannot be found unless proved beyond reasonable doubt<sup>9</sup>; the rules of evidence and conduct of the trial should ensure that the burden of proof rests with the prosecution throughout the trial. The Appeal Court hearing, both in procedure and conduct, fell short of this.**
  
- g. The accused has the right to examine, or have examined, any witnesses against them and have witnesses appear and testify on their behalf under the same conditions as the witnesses who are testifying against them; each party to the proceedings shall have the procedural opportunity to refute and contest all the arguments and evidence adduced by the opposing party<sup>10</sup>; instead, the entire re-hearing, concerning 14 charges and three Defendants, took no longer than 3 and a half hours over two morning sessions. No Prosecution witnesses were called, notwithstanding that damage to the State was being asserted, key potential defence witnesses were not permitted to be called (most notably, Al-Noumani) and the**

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<sup>8</sup> Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 30.

<sup>9</sup> Human Rights Committee, Views of 24 July 2006, *Francisco Juan Larrañaga v. The Philippines*, Communication No. 1421/2005, para. 7.4.

<sup>10</sup> Human Rights Committee, Views of 3 April 2001, *Jansen-Gielen v. The Netherlands*, Communication No.846/1999, para. 8.2, and Views of 24 October 2001, *Äärelä and Näkkäläjärvi v. Finland*, Communication No.779/1997, para. 7.4.

**Defendants themselves were subject to only cursory and limited questioning by the Judges.**

- h. The principle of legality (*nullum crimen sine lege*) of criminal offences means that, in order to be termed a criminal offence, the specific type of behaviour to be punished needs to be strictly classified in law as an offence and the definition of all criminal offences must be precise and free of ambiguity. Definitions of criminal offences that are vague, ambiguous and imprecise contravene international human rights law and the general conditions prescribed by international law<sup>11</sup>. The central charges brought against the Defendants act as a broad and unpredictable tool for state action against the media and, by their wording, pose a significant obstacle to successfully mounting a defence.**

90. Within the constraints of the Omani system, it should be noted that certain aspects accorded with international standards.

91. For example, the Defendants were represented by an independent lawyer of their choosing and were afforded an opportunity to address the panel of judges in the Appeal Court hearing. The hearing was held in public, albeit subject to a reporting restriction.

## **Conclusion**

92. The future of an independent media in Oman is critically dependent on there being a legal environment in which freedom of expression is protected and, where justified

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<sup>11</sup> UN Special Rapporteur on the Independence of Judges and Lawyers, UN Document E/CN.4/1998/39/Add.1, para. 129. See also, Human Rights Committee: *Concluding Observations of the Human Rights Committee: Portugal (Macau)*, CCPR/C/79/Add.115, 4 November 1999, para. 12; *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/ Add.23, 9 August 1993, para. 8; *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. See also: the Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al v. Peru*, Series C, No. 52, para. 121; and the Inter-American Commission on Human Rights, *Annual Report of the Inter-American*

*Commission on Human Rights, 1983-1984*, p.85, para. 7, and the *Second report on the situation of human rights in Peru*, doc. cit. 76, para. 80.



constraints are imposed by the law, that these be proportionate and consistent with public interest journalism. The legal provisions under which three “Azam” journalists have been prosecuted offend basic principles of international law and, by their wording and application, placed significant barriers to the Defendants mounting a successful defence.

93. These concerns have been compounded by procedural unfairness in the Court system itself. The lack of independence of the judiciary in “political” cases, the use of disproportionate pre-trial detention and the apparent absence of procedural safeguards (not least in failing to place the evidential burden of proof firmly on the Prosecutor) all combine to undermine the principle of “equality of arms” between Defence and Prosecution.
94. In a sense, the hearing that was observed was more an extra-legal plea to senior judges and/or the Sultan to intervene/show clemency rather than a strict exercise in criminal procedure with any reliable expectation of fair adjudication. This was reflected in the relative informality and brevity of the proceedings and the marked lack of evidential examination.
95. The Appeal Court ruling was due to be handed down on 17 November 2016 but was then delayed until 12 December 2016 (for unknown reasons). There is scope (and indeed precedent) for the panel of judges to uphold the convictions but suspend the sentences.
96. In the alternative, should the prison sentences be upheld, it may be that a Royal pardon is granted. The Defendants can also seek to appeal to the Supreme Court but they will be serving their sentences in the interim.