Memorandum

on

the Kyrgyz Mass Media Law and the Law on Journalists Activities

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

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1. INTRODUCTION

This Memorandum analyses the "Law of the Kyrgyz Republic on Mass Media" (Mass Media Law)[1] and the "The Law of the Kyrgyz Republic on the professional activity of the journalists"[2] against international standards on the right to freedom of expression.[3]

Both of these laws contain a number of positive elements – including a strong statement of the various rights that are inherent in the 'general' right to freedom of expression, such as confidentiality of sources, the right to investigate, the right to associate with others, to make recordings and to attend open meetings. While most of these rights are either inherent in the 'general' right to freedom of expression or are granted in other rights (such as the right to associate), stating them explicitly serves the useful purpose of reaffirming them. Both laws also contain a provision stating that if an international treaty contains rules that are different from those stated in the law, international rules prevail over the domestic law. To the extent that this can be interpreted to give human rights treaties precedence over incompatible domestic legislation, we welcome this provision.

However, both laws are seriously problematic in many other respects. The Mass Media Law imposes several illegitimate content restrictions, including some restrictions that are so vague that they could mean almost anything. The prohibition on publishing "unprintable expressions" is probably the best example of these restrictions. Other restrictions appear to pursue a legitimate purpose, but are stated in vague terms and are therefore easily abused for illegitimate purposes; while yet other restrictions are simply too strict and illegitimate for that reason. It is not only the restrictions that are problematic: the Mass Media Law allows for suspension of print media outlets on very broad grounds, it imposes a registration regime that is easily abused for political purposes, and both the Mass Media Law and the Journalists Law impose a range of 'journalistic duties' that are either wholly inappropriate – such as the requirement to reveal the authorship of all information or to always be 'objective' – or that are best addressed through self-regulation – such as the requirement to strive for accuracy.

The aim of any 'media law' should be to facilitate the free and independent functioning of the media and to allow the flourishing of a free, diverse and independent media. Bearing this in mind, our overall recommendation with regard to the two laws is that the positive elements of both should be brought together in a single law, while the restrictions be reviewed with an eye to remove them altogether or to move them to legislation of general application (such as the Civil Code). The end result should be the creation of a single Law on Freedom of Expression that clearly states the rights of journalists and contains only such regulations and restrictions as are legitimate under international law. The recently enacted Georgian Law on Freedom of Speech and Expression may be taken as an example.[4]

[1] Adopted by the decree of the Supreme Council of the Kyrgyz Republic on July 2, 1992, and including the amendments of May 8, 1993.
[2] Adopted on 5 December 1997.
[3] Our comments are based on an unofficial English translation of the two laws; we can take no responsibility for the accuracy of the translation.
[4] 24 June 2002.

We elaborate on these recommendations and concerns in Section 3 of this Memorandum. In Section 2 Memorandum, we outline international standards on the right to freedom of expression. This Section describes the scope of the guarantee of freedom of expression, particularly in relation to the media, the limited range of restrictions on freedom of expression that international law permits, and general principles of media regulation. The standards relied on are drawn from international law, including the International Covenant on Civil and Political Rights and the various OSCE commitments that Kyrgyzstan is party to, judgments from international human rights courts and tribunals, statements by international bodies such as the UN Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, and comparative constitutional law on freedom of expression.

2. INTERNATIONAL AND CONSTITUTIONAL STANDARDS

2.1. The Importance of Freedom of Expression

The right to freedom of expression has long been recognised as a crucial human right. It is of fundamental importance to the functioning of democracy, a necessary precondition for the exercise of other rights and, in its own right, it is essential to human dignity. The *Universal Declaration of Human Rights* (UDHR), the flagship human rights instrument adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in the following terms, at Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. [5]

The *International Covenant on Civil and Political Rights* (ICCPR),[6] a legally binding treaty which Kyrgyzstan acceded to in 1992, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also at Article 19. Freedom of expression is also guaranteed in various OSCE documents agreed to by Kyrgyzstan, such as the Helsinki Final Act,[7] Final Document of the Copenhagen meeting of the human dimension of the OSCE,[8] the Charter of Paris agreed in 1990,[9] the final document of the 1994 Budapest CSCE Summit,[10] and the Istanbul Summit Declaration.[11]

Global recognition of the importance of freedom of expression is furthermore reflected in the three regional systems for the protection of human rights, the *American Convention on Human Rights*,[12] the *European Convention on Human Rights* (ECHR)[13] and the *African Charter on Human and Peoples' Rights*,[14] all of whom guarantee the right to freedom of expression. While neither these instruments nor judgments by courts and tribunals operating under them are directly binding on Kyrgyzstan, they are important comparative evidence of the content and application of the right to freedom of expression and may be used to inform the interpretation of Article 19 of the ICCPR, which is binding on Kyrgyzstan.

Freedom of expression is also protected, subject to certain restrictions,[15] in Article 16(2) of the Kyrgyz Constitution, which states:

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[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[7] OSCE, Helsinki, 1 August 1975.
[8] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular paragraphs 9.1 and 10.1.
[9] Charter of Paris for a new Europe, CSCE Summit, November 1990.
[10] Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paragraphs 36-38.
[11] OSCE Istanbul Summit, 1999, paragraph 27. See also paragraph 26 of the Charter for European Security adopted at the same meeting.
[12] Adopted 22 November 1969, in force 18 July 1978.
[13] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953. As of 7 July 2003.
[14] Adopted 26 June 1981, in force 21 October 1986.
[15] Article 17 of the Constitution provides that "[r]estrictions on the exercise of rights and freedoms shall be allowed by the Constitution and laws of the Kyrgyz Republic only for the purposes of guaranteeing rights and freedoms of other persons providing public safety and constitutional order. In such cases, the essence of the constitutional rights and freedoms shall not be affected." Pursuant to Article 16(1) of the Constitution, which

> Every person in the Kyrgyz Republic shall enjoy the right:
> - to free expression and dissemination of ones thoughts, ideas, opinions, freedom of literary, artistic, scientific and technical creative work, freedom of the press, transmission and dissemination of information;

International bodies and courts have made it very clear that the right to freedom of expression and information is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[16] which refers to freedom of information in its widest sense and states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. This has been echoed by human rights courts. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society. [17]

Statements of this nature abound in the case law of human rights courts and tribunals from around the world. The European Court of Human Rights has noted, for example, that "[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."[18] As this statement notes, freedom of expression is fundamentally important both in its own right and also as the cornerstone upon which all other human rights rest. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations.

2.2. Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law." [19] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[20]

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effectively incorporates international human rights treaties into Kyrgyz law, this has to be read in accordance with international law requirements regarding restrictions on freedom of expression, which are discussed below.

[16] 14 December 1946.

[17] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

[18] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

[19] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

[20] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[21]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[22] The media as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[23]

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would by unable to play its vital role of "public watchdog".[24]

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public's right to know and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

2.3. Media Regulation

In order to protect the right to freedom of expression, it is imperative that the media is permitted to operate independently from government control. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest. The primary aim of media regulation should therefore be to promote the development of an independent and pluralistic media, thus fulfilling the public's right to receive information from a variety of sources.

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect,

[21] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[22] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[23] *Thorgeirson v. Iceland*, note 19, para. 63.
[24] See *Castells v. Spain*, note 20, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[25] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[26]

The UN Human Rights Committee has stressed the importance of a pluralistic media in nation-building processes, holding that attempts to straight-jacket the media to advance 'national unity' violate freedom of expression:

> The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.[27]

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism[28] and that licensing or registration systems for individual journalists are incompatible with the right to freedom of expression. In a Joint Declaration issued in December 2003, 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 state:

> Individual journalists should not be required to be licensed or to register.
> …
> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance. [29]

2.4. Restrictions on Freedom of Expression

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim. The right to freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or

[25] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.
[26] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 22, para. 34.
[27] *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.
[28] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 22.
[29] Joint Declaration by 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, 18 December 2003, online at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument

because it challenges established doctrines. The European Court of Human Rights has emphasised that precisely such statements are worthy of protection:

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[30]

Article 19(3) ICCPR lays down the narrow parameters within which freedom of expression may legitimately be restricted. It states:

> 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.

This has been interpreted as establishing a three-part test, requiring that any restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[31] The European Court of Human Rights, ruling on the very similar clause stated in Article 10(2) ECHR, has stated that the first requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[32] This means that vague or broadly worded restrictions, or restrictions that leave excessive discretion to executive authorities, are incompatible with the right to freedom of expression. Second, the interference must pursue one of the aims listed in Article 19(3); the list of aims is an exhaustive one and thus an interference which does not pursue one of those aims violates Article 19. Third, the interference must be "necessary" to secure one of those aims. The word "necessary" has specific meaning in this context. It means that there must be a "pressing social need" for the interference;[33] that the reasons given by the State to justify the interference must be "relevant and sufficient" and that the State must demonstrate that the interference is proportionate to the aim pursued. As the Human Rights Committee has stated, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."[34]

[30] *Ibid.*
[31] See, for example, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005, para. 6.8.
[32] *Ibid.*, at para. 49.
[33] See, for example, *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40.
[34] *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

3. ANALYSIS OF THE LAWS

3.1. Aim and purpose of the laws

The Kyrgyz Law on Mass Media (Mass Media Law) consists of six Chapters, dealing with matters such as registration of mass media organisations, suspension of media outlets, the right to information and journalists' rights and duties. It also provides a number of restrictions on what may be published, such as insults to civil dignity or the publication of state secrets. The aim of the Law is to define the "general legal, economic and social basis of communications organization through mass media" and to facilitate the "free functioning" of mass media.[35] The Law on the Professional Activity of Journalists (Journalists Law) consists of a number of provisions outlining various journalistic rights and duties, and defining the concept of 'journalist'. It grants various rights, such as to gather information and to enter into associations with other journalists, and imposes various duties, such as to observe the law. The purpose of the Journalists Law is to "regulate relations, arising in connection to the professional activity of the journalist, define his or her rights and duties, provide legal and social guarantees [and] establish responsibilities for the infringement of the law on the professional activity of the journalists."[36]

Both laws contain a number of positive elements. For example, the Journalists Law explicitly elaborates many of the professional rights of journalists – to gather information from state departments, to make recordings, to attend open meetings of courts, and to enter into associations with other colleagues. While most of these rights are either inherent in the 'general' right to freedom of expression or are granted in other rights (such as the right to associate), stating them explicitly serves the useful purpose of reaffirming them. Both laws also contain a provision stating that if an international treaty contains rules that are different from those stated in the law, the international rules prevail over the domestic law.[37] To the extent that this can be interpreted to give human rights treaties precedence over incompatible domestic legislation, we welcome this provision.

At the same time, both laws also contain numerous illegitimate restrictions or regulations. For example, the registration scheme under the Mass Media Law is largely unnecessary and can easily be done away with, as can the provisions on suspension of media outlets. Many of the content restrictions in both Laws are unacceptably vague and duplicate restrictions already found in the Civil and Criminal Codes; and most of the 'duties' imposed on journalists are far better dealt with through self-regulatory rules of professional ethics.

We are strongly of the view that the aim of any 'media law' should be to facilitate the free and independent functioning of the media and to allow the flourishing of a free, diverse and independent media.[38] Bearing this in mind, our overall recommendation with regard to the two laws is that the positive elements of both should be brought together in a single law, while the restrictions be reviewed with an eye to remove them altogether or to move them to legislation of general application (such as the Civil Code). The end result should be the

[35] As stated in the preamble.
[36] Article 1.
[37] Article 21, Mass Media Law; Article 15, Journalists Law.
[38] As elaborated in Section 2.3 of this Memorandum.

creation of a single Law on Freedom of Expression that clearly states the rights of journalists and contains only such regulations and restrictions as are a. clearly worded; b. pursue a legitimate aim; and c. are truly "necessary in a democratic society". The recently enacted Georgian Law on Freedom of Speech and Expression may be taken as an example.[39] This innovative and progressive law includes a broad definition of freedom of expression, stipulates the importance of free and open debate, prohibits censorship and incorporates human rights jurisprudence into domestic legislation. The Georgian Law also sets very strict standards for restrictions on freedom of expression, akin to those developed under the First Amendment in the United States, provides specific rules on confidentiality, including the principle of journalistic confidentiality, and devises a new and progressive legislative scheme for defamation. In tandem with the introduction of the Law, criminal defamation was abolished – a step we would urge the Kyrgyz authorities to follow.

Subject to this overall recommendation, the remainder of this Memorandum discusses each of the Laws in detail, identifying positive and negative elements and making specific recommendations for improvement.

Recommendations:

- The Mass Media Law and the Journalists Law should be consolidated into a single legislative act that aims to facilitate the free and independent functioning of the media. The positive elements of both laws, such as the statement of rights, should be brought together, while the existing restrictions and regulations should be reviewed with an eye to remove them altogether or to move them to legislation of general application (such as the Civil Code). The new Law should state explicitly that it will be interpreted in line with Article 19 ICCPR and internationally recognised standards on the right to freedom of expression.

3.2. Right to publish and registration

Under Article 5 of the Mass Media Law, "State departments, public societies, labor unions and citizens of the Kyrgyz Republic shall have a right to establish the mass medium". The third paragraph states that State departments may not publish together with any other organisation or individual.

Articles 6 and 7 of the Mass Media Law detail the registration process for mass media. Mass media are required to register with "the appropriate state department" and must provide information on the founder, the "aims and tasks" of the mass medium, and its circulation and financing.

Analysis

We seriously query the limitation of the right to publish to 'citizens'. Article 19 of the UDHR provides: "*Everyone* has the right to freedom of … expression" [emphasis added] and Article 19 of the International Covenant on Civil and Political Rights similarly applies to 'everyone'. Equally importantly, Article 2 of the ICCPR requires States to ensure respect for the rights guaranteed by it for all persons "within its territory and subject to its jurisdiction", without distinction of any kind, including on the basis of national origin. This would, therefore, apply

[39] 24 June 2002.

to every person physically on the territory of a State, as well as to persons under its jurisdiction, for example on a State-owned vessel or on territory under the effective control of the State although not belonging to it. The limitation to 'citizens' deprives non-nationals such as refugees or stateless persons of the right to publish – something that cannot be justified under international law.

Similarly, we query whether it is appropriate to ban joint publications by State departments and other organisations, such as NGOs. It is not inconceivable that, in a progressive-minded society, a ministry of justice might want to publish a guide to guide its citizens on the use of freedom of information legislation together with an NGO that specialises in this field. We see no reason why this should not be allowed.

The registration scheme under Articles 6 and 7 is also highly questionable. In *Laptsevich v. Belarus*,[40] the Human Rights Committee held that the imposition of a registration regime on small publications constituted a violation of their right to freedom of expression, stating that "by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information."[41] In that case, the respondent State did not provide any justification for the regime. We note that the registration regime under the Mass Media Law applies to small publications also, which raises serious questions about its legitimacy.

Beyond this very basic concern, we also question why it would be necessary to submit information regarding the publication's tasks and aims, its periodicity and its circulation. The requirement that a mass medium's "aims and tasks" be identified in the registration application provides the possibility of content-based discrimination in granting or declining to grant registration. The fact that the regime will be administered by a State department also raises serious concern in this regard.

Under international law, purely technical registration requirements may not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.[42]

However, registration of the print media is unnecessary and may be abused,[43] and, as a result, is not required in many countries.[44] ARTICLE 19 therefore recommends that the print media not be required to register. As the UN Human Rights Committee has noted: "Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[45]

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[40] 20 March 2000, Communication No. 780/1997.
[41] *Ibid*., para. 8.1.
[42] Joint Declaration by 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, 18 December 2003.
[43] *Ibid*.
[44] For example, in Australia, Canada, Germany, the Netherlands, Norway and the United States.
[45] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

Recommendations:

- Article 5 of the Mass Media Law should be amended to make it clear that everyone has the right to publish, in association with any group or individual of their choice.
- The registration regime in Articles 6 and 7 of the Mass Media Law is unnecessary and should be repealed. If the need for a limited and purely technical registration regime can be demonstrated, then its substantive elements should be based on the principles outlined above.

3.3. Suspension of media outlets

Under Article 8 of the Mass Media Law, "[t]he functioning of a mass medium may be terminated or suspended by decision of its founder or by a court of law in case of violence of this law." Under Article 9, such a decision can be appealed in court.

Analysis

As with the registration provisions, the provisions governing the termination or suspension of a registration do not provide any standards by which the decision to terminate or suspend a registration should be made. Article 8 dictates that the decision whether to terminate or suspend a registration may be made only by the founder of the mass media outlet or by a court, and not by the state department(s) responsible for granting a registration. Article 9 permits an appeal of the decision to suspend or cease a registration to a court of law. While it is reassuring that at the very least the Law does not provide a mechanism whereby the State can terminate or suspend a registration without any possibility of judicial review, the lack of clarity governing the registration process provides considerable potential for misuse and abuse of the ability to suspend or terminate a registration so as to muzzle the independent media.[46] In theory, even the smallest violation of the Mass Media Law, such as a failure to print a newspaper's price on the front page, may lead to closure of the media outlet. This would be a highly disproportionate measure and would constitute a grave violation of the right to freedom of expression.

We note that the problem of closure of media outlets in Kyrgyzstan is a very real one. In its 2000 report on the implementation of the ICCPR in Kyrgyzstan, the UN Human Rights Committee expressed "its concern about the closing of newspapers on charges of tax evasion and in order to secure the payment of fines".[47] Since then, there have been numerous other reports of the (threat of) closure of many media outlets.[48] The closure of a media outlet is an extreme measure which we do not believe can ever be legitimately imposed on a print media outlet.[49] Suspension is, second only to an outright ban, the most serious penalty that can be imposed on a media outlet. Given the timeliness of news, even a brief suspension, seriously affects the operations and credibility of a media outlet. ARTICLE 19 is of the view that the print media should never be subject to suspension.[50]

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[46] *See*, in this regard, the judgment of the European Court of Human Rights in *Gaweda v. Poland*, where it noted that despite judicial review the applicant's newspaper had still be refused registration without a just cause (14 March 2002, Application No. 26229/95).

[47] Concluding observations of the Human Rights Committee: Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ.

[48] For example, the saga surrounding the 2003 closure of the Moya Stolitsa newspaper.

[49] Broadcasting activity may be regulated more strictly.

[50] *See* the judgment of the European Court of Human Rights in *The Observer and Guardian v. the United*

Recommendations:
- Articles 8 and 9 of the Mass Media Law should be repealed.

3.4. Accreditation

Article 10 of the Journalists Law provides that journalists may be accredited to cover the activities of State departments or associations. Accreditation may be withdrawn if a journalist violates the law, or pursuant to a specific decision by the State department or association concerned. Under Article 12 of the Journalists Law and Article 22 of the Mass Media Law, all foreign journalists in Kyrgyzstan must be accredited through the Ministry of Foreign Affairs, "in the order prescribed by the State authorities of the Kyrgyz Republic".

Analysis
As an interference with the right to freedom of expression, any accreditation scheme must pass the three-part test in order to be lawful. In particular, the scheme should pursue a legitimate aim, it should be provided by law and it should be necessary in a democratic society. While a system of accreditation may be necessary to restrict access for security reasons or space constraints, and to control public access in order to enable the media to do their job, it should not be susceptible to political interference. It should impair the right to freedom of expression as little as possible; accreditation should be an automatic procedure, and the number of accredited journalists may be limited only when there are real and demonstrable problems in terms of accommodating the number of journalists.

In a recent case, the UN Human Rights Committee considered the complaint of a Canadian journalist who had been refused a permanent pass to the Canadian Parliamentary Press Gallery. Without the pass, he was unable to report fully on Canadian parliamentary affairs. While the Committee recognised that, in some cases, States may be entitled to regulate access to the parliamentary press gallery, any limitations imposed have to be compatible with the provisions of the Covenant. In particular, the Human Rights Committee made it clear that the operation and application of any accreditation scheme "must be shown as necessary and proportionate to the goal in question and not arbitrary."[51] This was not exclusively a matter for the State Party to determine, and the Committee set some clear parameters within which any accreditation scheme should operate:

1. accreditation schemes should be compatible with the provisions of the ICCPR, and should not illegitimately restrict the enjoyment of other rights;[52]
2. accreditation schemes should set out criteria which are specific, fair and reasonable;[53] and
3. the application of accreditation schemes should be transparent.[54]

In addition, the Committee emphasised that under article 2(3) of the ICCPR, States Parties are under an obligation to ensure that everyone whose rights have been breached should have an effective remedy and that any person who claims a remedy should have this claim determined

Kingdom, note 24.
[51] *Gauthier v. Canada, op cit.*, para. 13.6.
[52] *Ibid.*, para. 13.4.
[53] *Ibid.*, para. 13.6.
[54] *Ibid.*, para. 13.6.

by the competent authorities.[55] Accordingly, the State Party is under an obligation to provide a procedure for independent review of any refusal of accreditation.

In light of these considerations, we recommend that Articles 10 and 12 of the Journalists Law and Article 22 of the Mass Media Law should be amended to incorporate the following principles:

i. An independent body responsible for accreditation should be established;
ii. There should be a right to appeal accreditation decisions;
iii. The third paragraph of Article 10 of the Journalists Law should allow withdrawal of accreditation only as a matter of last resort, in response to a serious violation of the institution's internal rules relating to the maintenance of order. It should make clear that accreditation may not be removed in response to critical reporting or defamation.

The requirement on foreign journalists to obtain accreditation is easily abused for political purposes and serious consideration should be given to its repeal.

Recommendations:

- Articles 10 and 12 of the Journalists Law and Article 22 of the Mass Media should be amended along the lines suggested above.

3.5. Freedom of information

Article 15 provides that state agencies, public associations and officials "shall" provide information in response to the inquiries of editorial offices, and "create conditions to study the appropriate documents."

While the spirit of this provision is positive, it cannot be a substitute for a fully-fledged 'freedom of information' regime, designed to realize the right of everyone to access information held by a public body. Under international law, freedom of information, including the right to access information held by public authorities, is guaranteed as an aspect of freedom of expression.[56] Any restrictions on the right to freedom of information – for example, to protect national security or privacy – must be narrowly interpreted and convincingly established as necessary in a democratic society.

ARTICLE 19 has published a key standard-setting work on this topic: *The Public's Right to Know: Principles on Freedom of Expression Legislation.*[57] This work has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Annual Report.[58] It elaborates a number of principles, which may be summarized as follows:

1. **Maximum disclosure:** Freedom of information legislation should be guided by the principle of maximum disclosure.

[55] The ECHR contains a similar provision in Article 13.
[56] E.g. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1995/31, 14 December 1995, para. 35.
[57] (London: June, 1999).
[58] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.

2. **Obligation to publish:** Public bodies should be under an obligation to publish key information of their own motion.
3. **Promotion of open government:** Public bodies must actively promote open government.
4. **Limited scope of exceptions:** Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests.
5. **Processes to facilitate access:** Requests for information should be processed rapidly and fairly, and any refusal to disclose should be subject to an appeal to an independent body.
6. **Costs:** Individuals should not be deterred by excessive costs from making requests for information.
7. **Open meetings:** Meetings of public bodies should be open to the public.
8. **Disclosure takes precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
9. **Protection for whistleblowers:** Whistleblowers – individuals who release information on wrongdoing – should be protected, from any legal, administrative or employment-related sanctions.

Article 15 of the Mass Media Law represents an apparently well-intentioned attempt to legally ensconce the principle of government openness but, as with the law as a whole, its brevity and superficiality prevent it from providing any meaningful guarantee of he right to freedom of information. The majority of the principles outlined above are not addressed at all. We recommend that this provision be removed in favour of the introduction of a fully-fledged freedom of information regime, which may provide for a expedited processing of information requests made by the mass media.

Recommendations:

- Article 15 of the Mass Media Law should be repealed and replaced with a fully-fledged freedom of information law, conform with the principles outlined above.

3.6. Content restrictions

The Mass Media Law contains a number of restrictions on the content of what may be published. Under Article 18, no mass media may publish any "data" regarding an official judicial inquiry; nor may any information be published regarding an offender who is under age, unless the consent of his or her legal representative has been obtained. Article 23 contains a long list of content restrictions, prohibiting publication of the following:

"
- divulging information making up a state or commercial secret;
- calling for the violent seizure or change of the existing constitutional system, break of the sovereignty and territorial integrity of Kyrgyz Republic or any other state;
- Propagating war, violence and cruelty, fanning national, religious intolerance or strife to other nations or people;
- Insult civil dignity of the people;
- Insult religious feelings of faith believers and cult serves;
- Spread of pornography;
- Use unprintable expressions;
- Distribution of materials, violating norms of civil and national ethics, insulting attributes of state symbols (flag, hymn, emblem);

- Encroachment on the dignity and honor of the person;
- Presentation of the wittingly false information."

Article 26 lists a number of circumstances under which a mass media outlet will not be held liable for the content of information published by them, such as when they quote from official reports, when the information was received from an official news agency or when the information is a literal reproduction of (fragments of) a public speech.

Analysis

We have a number of concerns with regard to the content restrictions in the Mass Media Law. Our overriding concern is that most if not all of these restrictions repeat existing prohibitions under civil or criminal law: the prohibitions against publication of hate speech, pornography, defamation and materials that violate the right to privacy, for example. From a purely legal point of view, repeating these provisions in the Mass Media Law creates a highly confusing situation. Additionally, repeating the prohibitions sends a signal to the media that they are being singled out for special scrutiny, which is likely to have an illegitimate chilling effect on their right to freedom of expression. This concern is particularly valid given the extremely vague nature of many of the restrictions.

Our second concern is that some of the restrictions are so broadly phrased that they are very easily abused for political purposes. While freedom of expression is not an absolute right, restrictions on it must pass the three part test described in Section 2.4 of this Memorandum: they should be clearly and narrowly stated in law, pursue a legitimate aim and be "necessary in a democratic society". As stated in Section 2.4, vague and broadly worded restrictions constitute an illegitimate interference with the right to freedom of expression. It is also important that restrictions are not themselves stated in absolute terms and strike at the heart of the right to freedom of expression. Virtually all of the restrictions in Article 23 fail these international law tests:

- The prohibition on divulging state or commercial secrets and on the publication of materials that impinge on a person's private life should allow for publication of these materials when it is in the public interest – for example, when they reveal corruption;
- A call for the change of the existing constitutional system, break of the sovereignty and territorial integrity of Kyrgyz Republic or any other state is a legitimate exercise of the right to freedom of expression, so long as the call does not incite violence;
- The prohibition on publication of materials that 'fan' national, religious intolerance or strife to other nations or people is very vague and easily abused for political purposes;
- The prohibition on insulting people's 'civil dignity' or religious feelings, or norms of civil or national ethics is likewise very vague and easily abused, and fails to take into account the right of every person to publish material that is offensive;[59]
- The prohibition on the use of "unprintable expressions" is so vague that it could apply to almost anything;
- The prohibition on the publication of wittingly false information fails to take into account the right of every activist, satirist of comedian to use a certain degree of hyperbole and exaggeration to make a political point – or simply to make a joke.[60]

[59] E.g. *Castells v. Spain*, 23 April 1992, Application No. 11798/85 (European Court of Human Rights), para. 42.
[60] E.g. *Steel and Morris v. the United Kingdom*, 15 February 2005, Application No. 68416/01 (European Court of Human Rights), para. 90.

We have similar concerns with regard to the restrictions on the publication of "any" information regarding an under-age offender, which may be interpreted to prohibit even the mere mention that an offence has been committed, and the absolute prohibition on the publication of court papers, even when it reveals corruption or malfeasance in the judicial system.

Finally, while we welcome the limitation of liability in the circumstances indicated in Article 26 of the Mass Media Law, we note that there are many other circumstances outside those mentioned in which a mass media outlet should have no liability for the content of materials published by them. For example, the reporting of statements made in court or in Parliament should be protected, as well as statements made before other public bodies.[61]

Recommendations:

- The various content restrictions in the two laws should be critically reviewed, along the lines suggested above, and, to the extent that they are justifiable as "necessary in a democratic society" to protect a legitimate interest, be moved to laws of general application (such as the Civil Code or Criminal Code).

3.7. Rights and duties of journalists

Chapter IV of the Media Law defines "journalist" and details the rights and duties of a journalist. Article 19 defines the term "journalist" as a "creative worker" who collects, edits and prepares information for mass communication. Journalists may work independently, freelance, or be affiliated with a mass media outlet. Article 3 of the Journalists Law defines the term "journalist" in similar terms.

Both laws include an explicit prohibition on any form of censorship.[62]

Article 20 spells out the following rights of journalists:

- to collect and distribute information;
- to be appointed as an official in keeping with the professional activities of the journalist;
- to make recordings with the use of necessary technical equipment, with the agreement of the respondent;
- to visit specially protected places of natural disasters, to attend meetings and demonstrations, on producing as soon as required the identity card of a journalist;
- to turn to the specialists to check the facts and circumstances, relating to the received material;
- to refuse to prepare under his or her signature materials inconsistent with his or her convictions;
- to remove his or her signature put under the material whose content was distorted in the process of editing;

[61] See, for example, *Bladet Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 (European Court of Human Rights), para 66; *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 and *Nikula v. Finland*, 21 March 2002, Application No. 31611/96.
[62] Article 4, Journalists Law; Article 1, Mass Media Law.

- to decline the assignment given to him by the editor-in-chief, if its fulfillment involves the infringement of law;
- to preserve the confidential character of information and (or) its source;
- to demand, in a court order, a compensation of moral and material damage caused by the actions of the editor, who committed arbitrary distort of author's material.

The principle of confidentiality of sources also features in Article 18 of the Mass Media Law, in relation to editors; this provision provides that an editor may be forced to divulge a source upon a court order.

Article 5 of the Journalists Law contains a similar list of rights, adding a right to publish anonymously. Article 9 of the Journalists Law elaborates on the right of a journalist to investigate, adding that "[n]o provision shall be made for confiscation or examination of the materials and documents of the journalist, received during journalistic investigation, but in a court order."

The rights in the Journalists Law are reinforced through Article 13 of that Law, which renders State officials individually liable for any act of censorship, hindrance of journalistic activities, unjustified refusal of accreditation, harassment of journalists, confiscation of journalistic materials and providing false or misleading information to a journalist.

At the same time, Article 20 of the Mass Media Law also enumerates several journalistic duties:

- to verify the authenticity of the information he or she supplies;
- to satisfy the requests of the persons who submitted information concerning the indication of its authorship.

Article 7 of the Journalists Law also lists these duties, adding requirements to respect the law, the presumption of innocence, human rights generally and personal honour and dignity, and only to provide objective information. Article 14 of the Journalists Law requires that journalists "shall bear responsibility for [the] authenticity of the prepared and [disseminated] information and materials in keeping with the law".

Analysis

We welcome the clear statement of rights in both laws. While many of these rights have been recognised under international and comparative constitutional law as inherent in the right to freedom of expression, an express statutory statement to this effect serves to emphasise the importance of the right. It is important that the definition of 'journalist' is understood to apply to every person who uses the right to freedom of expression to publish information to a larger audience – including human rights defenders, for example, and non-governmental organisations. We note that the various rights stated in the laws are drawn from the general right to freedom of expression as stated in Article 19 ICCPR, which is a right that belongs that every person.

We also recommend that the privilege of confidentiality of sources and the privilege against search and seizure of journalistic materials be strengthened. As currently stated, in Articles 5 and 9 of the Journalists Law and Articles 18 and 20 of the Mass Media Act, both privileges may be interfered with upon a court order. While we appreciate that this offers protection against arbitrary action by the police or other executive agencies, we recommend that the Law should also limit the circumstances in a court can order confiscation or that sources be

divulged. The Committee of Ministers of the Council of Europe has issued a helpful Recommendation on these matters which, while not formally binding on Kyrgyzstan, should nevertheless be taken as an authoritative elaboration of the requirements of freedom of expression in this regard. Recommendation 2000(7) states that sources should not be disclosed unless:

> *i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
>
> *ii.* the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
>
> - an overriding requirement of the need for disclosure is proved,
> - the circumstances are of a sufficiently vital and serious nature,
> - the necessity of the disclosure is identified as responding to a pressing social need.

Principle 4 of the Declaration states that disclosure of sources may not be ordered in defamation proceedings:

> In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

We suggest that similar standards should be applied to seizure of journalistic materials.[63]

While we welcome the statement of rights, we doubt whether the various statements of journalistic duties are appropriate. For example, while no-one would dispute that the media should strive for accuracy, in practice this is a matter that is best addressed through self-regulation. The duty, under the last bullet point of Article 20 of the Mass Media Act, to divulge the name of the author of a piece of information is even more problematic, and goes against the principle that every person has the right to publish anonymously if he or she so wishes – itself protected in Article 5 of the Journalists Law. The duties under the last two bullet-point of Article 7 of the Journalists Law to 'respect' individual honour and dignity, and to 'support' the principle of the presumption of innocence are phrased in very vague language and are easily abused against investigative journalists. The requirement on every journalist to only provide 'objective' information is not only easily abused for political purposes, but also illegitimate: as stated, it would prohibit the publication of any campaigning or party-political magazine.[64]

Finally, the mention in Article 14 that every journalist bears full responsibility for the authenticity of materials published by them may be understood as a prohibition on the publication of any report that is not fully accurate – particularly when read together with the requirement that journalists should strive for accuracy. This would be a violation of international law, which recognises that even the best journalists sometimes make mistakes. To leave them open to punishment for every false allegation would be to undermine the public

[63] E.g. *Roemen and Schmidt v. Luxembourg*, 25 February 2003, Application No. 51772/99 (European Court of Human Rights).
[64] This applies to print and Internet-based media outlets. It is recognised that broadcast media may be required to be fully objective.

interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has held:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[65]

Recommendations:

- The statements of rights in both laws goes to the heart of freedom of expression and should be retained. The privilege of confidentiality of sources and against seizure of journalistic materials should be strengthened by limiting the circumstances in which a court may issue an order to divulge secrets or produce journalistic materials.
- Serious consideration should be given to removing all statements of journalistic duties in the law in favour of a self-regulatory regime. In any event, none of the duties should be so stringent as to infringe the right of every journalist to publish critically and anonymously, if he or she so wishes.
- Article 14 of the Journalists Law should be amended to make clear that this does not impose a strict prohibition on the publication of any material that is not fully accurate.

3.8. Miscellaneous

Right of reply

Article 17(1) of the Mass Media Law provides a right to demand "disproof" of any information that is not truthful and that "denigrates" a person's "honour and dignity". Article 17(2) provides the right to demand publication of a "refutation" of any information that "denigrates [a person's] rights and legal interests." The refutation or reply must be published in a special segment of the periodical, in the next issue or within one month of publication, whichever is quicker.

We have commented in detail on this provision in a separate Memorandum analysing Kyrgyzstan's defamation laws, and we refer to that Memorandum for a more extensive analysis of this provision.[66] In brief, our concerns with this provision, and with parallel provisions in the civil code, are the following:

- Efforts should be made for this to be addressed in a self-regulatory regime, rather than a heavy-handed statutory regime. If there is to be statutory regulation, it should be contained in a single act.
- Article 17(2) allows for a reply to truthful information;
- There is no requirement that the response or refutation be proportionate to the impugned statement; and
- A reply should not be available when a refutation suffices to repair the harm done.

Recommendations:

- Efforts should be made to establish a self-regulatory regime through which a right of

[65] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.
[66] Obtainable through the ARTICLE 19 or OSCE FOM websites: http://www.article19.org and http://www.osce.org/fom.

reply may be realised. If this is not possible, the right to reply or refutation should be addressed in a single statute, not in two separate ones, and incorporate the following minimum principles:

- A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.
- A reply should not be available where a correction or refutation suffices.
- A reply should receive similar, but not necessarily identical prominence to the original article.
- The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
- The media should not be required to carry a reply which is abusive or illegal.
- A reply should not be used to introduce new issues or to comment on correct facts.

Provisions that are overly regulatory or otherwise unnecessary

A number of the provisions found in both laws are unnecessarily prescriptive or overly regulatory in spirit. Articles 2 and 3 of the Mass Media Law, for example, lay down unnecessary provisions on the internal structure of mass media organisations and on the various ways in which income may be obtained. Article 10 requires a range of information to be printed on the front page of every printed publication, regardless of size, such as its total circulation, postal index, and the name of the founder and editor in chief. These are all matters that are left to mass media outlets to decide for themselves – not to be decided by legislation. We also note that many of these requirements are wholly inappropriate in regard to small publications.

Article 11 of the Mass Media Law requires free copies of al periodicals to be sent to the State Library and Book Chamber, as well as to other "institutions and organizations according to the list, approved by the Government, editor and editorial office". While a requirement to deposit a copy of every publication with the State library can be justified as helping to preserve the country's national cultural heritage, this is not true of a requirement to deposit with other, unspecified, organisations. We stress that it can never be legitimate to require copies to be deposited with State departments such as the ministry of information, or the police; these are classic forms of illegitimate State control of publications.

Article 13 of the Mass Media Law provides that "Mass information shall be spread after appropriate permission of the mass medium editorial office … Mass information spread shall be ceased or prohibited on the decision of the court only." We are unsure what this provisions means – the English translation is ambiguous – but insofar as it prohibits bodies such as the police interfering with the circulation of mass media, its effect may be positive. This needs however to be clarified. If, on the other hand, it is read as a justification for the closure of newspapers, even by courts, then we raise serious questions with regard to its legitimacy.

Recommendations:

- Articles 2, 3 and 10 of the Mass Media Law should be repealed.

- Article 11 of the Mass Media Law should not require any copies to be deposited other than with the national library.
- The purpose of Article 13 should be clarified.