ARTICLE 19

Tajikistan: Media Law

Legal analysis

Executive summary

In this legal analysis, ARTICLE 19: Global Campaign for Free Expression, reviews the Law on Print and Other Mass Media of the Republic of Tajikistan (the Media Law), adopted in 2013. The Media Law is reviewed for its compliance with international standards on freedom of expression.

In the analysis, ARTICLE 19 appreciates a number of positive features, in particular:

- The Media Law recognises that international treaties, to which Tajikistan is a party, apply to the regulation of media;
- It proclaims that media in Tajikistan are free and that everyone has a right to seek, obtain and distribute information, express his/her convictions and distribute them in the mass media;
- It bans censorship and persecution for criticism and establishes legal liability for violations of the freedom of media.

At the same time, ARTICLE 19 finds that the Media Law includes a number of provisions that are in breach of international freedom of expression standards, in particular, the regulations dealing with:

- media registration,
- content restrictions,
- the right of reply and refutation,
- access to state information,
- the protection of confidential information,
- the accreditation of journalists,
- duties of journalists, and
- the accreditation of foreign media.

We call on the Tajikistan authorities to review the Media Law and bring it into full compliance with international freedom of expression standards. We also recommend that the authorities encourage public debate on the reform of this law and other legislation relating to freedom of expression.

Summary of recommendations

- The Media Law should provide that its **purpose** is to safeguard the right to freedom of expression and media freedom. It should stress the value of uninhibited expression, particularly in the circumstances of public debate in a democratic society concerning figures in the public and political domain;

- Content restrictions, set out in Article 6 of the Media Law, should be revised in accordance with the international standards;

- The **registration system** for media outlets in the Media Law should be abolished altogether;

- Article 30 of the Media Law should be amended. **Accreditation** should be required only if due to limited space all interested journalists cannot attend a meeting or follow the activities of a particular body. The Media Law should provide safeguards against arbitrary refusals of accreditation via clear accreditation rules. The accreditation should be overseen by an independent body, such as a journalists' union. Furthermore, journalists should be granted a right to appeal refusals for accreditations to court.

- Article 18 should provide that the **right of reply** is a remedy for infringements upon recognised rights only. The phrase "legitimate interests" should be removed. Article 19 should provide that the right of denial is a remedy for incorrect facts only;

- The Media Law should establish a reasonably short time limit for making a request for reply or denial (for example, 15 days after publication) and explicitly stipulate that disputes concerning the right of reply to the brought by a tribunal with powers to order the immediate publication of the reply;

- Articles 23 and 24 of the Media Law dealing with **access to information** should be repealed;

- The rule on **protection of sources** should be cast as a right of the media, not an obligation, and it should apply to everyone, both professional and non-professional, regularly engaged in the dissemination of information;

- Article 26 of the Media Law should provide that only courts can issue orders for the disclosure of sources and that the order for disclosure cannot be made unless:
    - the circumstances justifying the disclosure was necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime;
    - reasonable alternative measures to disclosure do not exist or have been exhausted;
    - disclosure is justified by an overriding requirement in the public interest; and
    - the circumstances are of a sufficiently vital and serious nature to justify overriding this important right;

- Article 29, setting out **professional and ethical standards for journalists,** should be repealed. An independent, self-regulatory body should set out the ethical standards in the press and an independent broadcast regulator should set out the broadcasting standards;

- The Media Law should give powers to an independent body to regulate **state financial support for the media** which should include detailed and objective criteria for the distribution of the funding.

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Introduction

In this legal analysis, ARTICLE 19: Global Campaign for Free Expression, reviews the Law on the Print and Other Mass Media (the Media Law) of the Republic of Tajikistan[1] for its compliance with international standards on freedom of expression.

Adopted in 2013, the Media Law regulates the mass media sector in Tajikistan. It sets out explicit guarantees for media freedom and includes provisions relating to the language of media communications, state support of the media, the rights and duties of journalists, the registration of media outlets, and media management and operations. It also guarantees the right of reply and refutation, copyright and the operation of foreign media outlets in Tajikistan.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have reviewed print and media laws of more than 30 countries and provided recommendations to their governments and parliaments intended to safeguard the right to freedom of expression. In Tajikistan, we analysed the legal framework on the media in 2002[2]; we also reviewed the Draft Mass Media Law in its 2002 version[3] and in its 2011 version.[4]

This analysis is intended to contribute to the public debate on media legislation in Tajikistan and to help bring this legislation into compliance with international standards on freedom of expression. We note that the need for reform has been highlighted by international and regional bodies on several occasions; for example, the UN Human Rights Committee:

> Expressed concerns that the [Media Law] subjects media organizations to undue registration conditions, that journalists are subject to threats and assaults, that there is a practice of blocking news Internet websites and social networks, and that defamation lawsuits are filed against media organizations as a means of intimidation.[5]

Similarly, the international expert, commissioned by the OSCE Representative on Freedom of the Media, concluded that the Media Law fails to meet the international standards on registration, state support to media, content limitation, accreditation and access to information.[6]

We call on the Government of Tajikistan to revise the Media Law in light of the presented recommendations. We also call on media professionals and civil society organisations to bear these recommendations in mind when campaigning for improvements to the legal framework of the media in Tajikistan.

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[1] This legal analysis is made on the basis of the Russian version of the Media Law.
[2] ARTICLE 19, Memorandum on the Laws in Tajikistan Regulating Mass Media, November 2002.
[3] ARTICLE 19, Note on the Draft Law of the Republic of Tajikistan on Mass Media, November 2002.
[4] ARTICLE 19, Comment on the Draft Media Law of Tajikistan, ARTICLE 19, June 2012.
[5] Human Rights Committee, CCPR/C/TJK/CO/2, Concluding observations on the second periodic report of Tajikistan, 22 August 2013.
[6] Organization for Security and Co-operation in Europe, Review of the Law of Republic of Tajikistan on Mass Media, 17 April 203 (available in Russian only).

International standards on freedom of expression and media freedom

The review of the Media Law of Tajikistan is made on the basis of international standards on freedom of expression and media freedom, in particular the ICCPR, General Comment No. 34 of the UN Human Rights Committee[7], comparative regional standards and the joint declarations on special mandates on freedom of expression.[8]

Right to freedom of expression

The ICCPR[9] guarantees the right to freedom of expression in the following terms:

1. Everyone shall have the right to freedom of opinion.
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.

The right to freedom of expression is not absolute; however it may only be restricted under very narrow and limited circumstances. Namely, any restrictions:

1. Must be **set out by law**: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[10]

2. Must pursue **one of the following interests**: respect for the rights or reputation of others, for the protection of national security, public order, public health or public morals. Restrictions on other grounds are not permissible under international law.[11]

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[7] In the General Comment No. 34, the Human Rights Committee interprets the standards in greater detail; CCPR/C/GC/34, adopted on 12 September 2011.

[8] Since 1999, special mandates on freedom of expression of the UN, the Organisation of Security and Cooperation in Europe, the African Union and the Organisation of American States issue annual joint declarations on in which they address specific freedom of expression issues. All declarations area available at ARTICLE 19 website.

[9] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976. Tajikistan acceded to the ICCPR in January 1999.

[10] General Comment No. 34, *op.cit.*

[11] The Human Rights Committee has expressed concerns regarding laws on such matters as disrespect for authority, protection of the reputation of monarch or heads of state, disrespect for flags and symbols as they do not pursue any of the legitimate interests set out in Article 19 (3); General Comment No. 34, *op.cit.* para. 38.

3. Must be **necessary and proportionate** to the protected aim. Legislators and law enforcement bodies must balance the right to freedom of expression against other rights and interests, and assess whether the circumstances in the given situation justify the restriction on the freedom of expression. Restrictions must not be excessive. Any restrictions must be appropriate under the particular circumstances, the least intrusive option available and proportionate to achieving the protected interest or legitimate aim.

Additionally, Article 20(2) of the ICCPR places limitations on freedom of expression and requires states to prohibit certain forms of speech, namely "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." Article 20(2) does not require states to prohibit all negative statements towards national groups, races and religions, but as soon as a statement advocates hatred in a way that it "constitutes incitement to discrimination, hostility or violence" it can be prohibited.

Freedom of expression and the media

The guarantees of freedom of expression apply with particular force to the media.[12] Regulation of the media presents particular problems. On the one hand, the right to freedom of expression requires that the government refrains from interference. On the other hand, states are obliged to adopt such legislative or other measures as may be necessary to give effect to protected human rights.[13] 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, governments are under a duty to ensure that citizens have access to diverse and reliable sources of information on topics of interest to them. A crucial aspect of this 'positive obligation' is the need to promote pluralism within, and ensure equal access to, the media.[14]

In order to promote pluralism and protect the right to freedom of expression, it is imperative that the **media operate independently of government control**. This can be secured in various ways:

- Firstly, the scope of government regulations – laws and bylaws – relating to media should be adopted only when they are necessary. For example, most established **democracies do not have specific print media laws** because - in contrast to broadcast media where there

[12] For example, the European Court of Human Rights has stressed that "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 ...it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society," *Thorgeirson v. Iceland*, 25 June 1992, Appl. No. 13778/88, para. 63. The Court has also stated that "[it is incumbent on the press] to impart information and ideas 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," *Jersild v. Denmark*, 23 September 1994, Appl. No. 15890/89, para. 31. Similarly, the Inter-American Declaration on Human Rights stipulates that "freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information," Preamble of the Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

[13] *C.f.* Article 2 of the ICCPR.

[14] European Court, *Informationsverein Lentia v. Austria*, 24 November 1993, Appl. Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

are technical constraints on the number of channels – print media provides few distinctive features which demand a regulatory response. Laws of general application (e.g. defamation laws, privacy laws, laws regulating the right of reply and the confidentiality of journalistic sources) apply to print media. As none of these matters raises concerns unique to the print media it is not necessary to dedicate a law to them only.

- Secondly, when media regulation is necessary, the laws and bylaws must include **safeguards against governmental control**. Practical guidance on the establishment and guarantee of the independence of media regulatory bodies may be found in recommendations made within the Council of Europe, although it is important to note that these are restricted in scope to broadcasting. For example, Recommendations made by the Committee of Ministers of the Council of Europe, on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector[15] includes the following guidelines:

  > Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
  >
  > The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.
  >
  > The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.[16]

- Finally, independent media professionals should develop standards for professional journalism and a code of ethics, both of which should be complied with voluntarily. Self-regulatory media bodies and press councils are responsible for ensuring the media, including journalists, comply with the law and for providing remedies to victims of violations.

[15] Recommendation (2000) 23, adopted 20 December 2000.
[16] *Ibid.*

Analysis of the Media Law

ARTICLE 19 observes that the Media Law contains a number of positive features, in particular:

- Article 2 recognises that international treaties, to which Tajikistan is a state party, apply to the regulation of the media;

- Article 3 proclaims that the media in Tajikistan is free and that everyone has the right to seek, obtain and distribute information, express his/her convictions and distribute them in the mass media;

- Article 3 sets out that the violation of the freedom of media triggers legal liability. The censorship and persecution for criticism are prohibited.

At the same time, ARTICLE 19 finds that the Media Law includes a number of provisions that are in breach of international freedom of expression standards. Problematic provisions are analysed in detail below.

Purpose of the Media Law

ARTICLE 19 notes that the Media Law does not set out the purpose of media regulation. Even though the media cannot operate in a legal vacuum, the legislator should take into account the functions of the media in a democratic society, and not treat the media like other aspects of society's life. As outlined above, states have an obligation under international law to respect the right to freedom of expression; this is central to ensuring that the media can operate freely and without censorship. The State legislator must ensure that media regulation safeguards the right to freedom of expression and media freedom.

We observe that media laws in other countries explicitly state that their purpose is to protect the right to freedom of expression and media freedom. For example Article 1 of the Finish Act on the Exercise of Freedom of Expression in Mass Media states:

> This Act contains more detailed provisions on the exercise, in the media, of the freedom of expression enshrined in the Constitution. In the application of this Act, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law.[17]

The media laws of Sweden, Georgia and Moldova also aim to protect freedom of expression.[18]

Recommendations:

[17] Act on the Exercise of Freedom of Expression in Mass Media (460/2003)
[18] See, e.g., The Freedom of the Press Act of Sweden; Law on Freedom of Speech and Expression of Georgia, and Law on Freedom of Expression of Moldova.

- The Media Law should provide that its goal is to safeguard the right to freedom of expression and media freedom. It should stress the value of uninhibited expression, particularly in the context of public debate in a democratic society and in relation to figures in the public and political domain.

Content restrictions

Article 6 of the Media Law prohibits "the distribution of information including state secrets or other secrets protected by law, information calling for forceful termination or change of the constitutional order, commission of crimes, incitement to racial, national, regional, religious and linguistic hatred, the war propaganda, violence, terrorist or extremist activists, damage to the territorial integrity and independence of the state as well as propaganda and advertisement and information of pornographic character".

ARTICLE 19 finds that the provisions of Article 6 of the Media Law fail to comply with the three-part test on the permissible restrictions on freedom of expression (see above) for the following reasons:

- The restrictions in Article 6 do not have the qualities of **legal certainty or accessibility**. They contain terms such as "state secret," "incitement to hatred," "war propaganda," "terrorist and extremist activities" or "pornography". These terms are vague, unclear and susceptible to arbitrary interpretation by law enforcement bodies and the courts. Unfortunately, the Media Law does not cross-reference other legislation in order to clarify these terms.

- The Media Law allows the right to freedom of expression to be restricted on **grounds which are not legitimate under international law**. In particular, the ban on expression damaging "territorial integrity and independence" is not one of the legitimate aims listed by Article 19(3) of the ICCPR. In a democratic society, people should be able to debate on territorial issues and the political and economic independence of the government and the state.

- The prohibition of "i**ncitement** to racial, national, regional, religious and linguistic hatred" is not specified and might fall short of the requirements of Article 20(2) of the ICCPR. ARTICLE 19 understands "hatred" to mean a state of mind characterised as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group."[19] It is clear whether the Media Law prohibitions concern themselves with such severe expression. Moreover, ARTICLE 19 notes that the use of the terms "advocacy" and "incitement" implies that only expression which intentionally advocates hatred should be prohibited, and furthermore, that such expression would be likely to and/or intended to cause hostility, discrimination or violence towards a protected group. It is not clear whether the Media Law only prohibits conduct *with intent*, and nor is it clear how these provisions relate to other legislation concerning incitement, in particular, the Criminal Law.

[19] ARTICLE 19, *Camden Principles on Freedom of Expression and Equality*, April 2009, Principle 12.1.

- The Media Law fails to stipulate that all restrictions on expression must be necessary and proportionate and in line with the third part of the test set out in Article 19(3) of ICCPR. As a result, one could be held liable in Tajikistan for expressions which would be allowed under international law.

Recommendations:

- Restrictions set out in Article 6 should be revised in accordance with international standards.

Registration of the mass media

Article 10 of the Media Law provides that all mass media organisations should be incorporated as legal entities. Article 11 obliges mass media organisations to register with an authorised state body, which is to be determined by the Government. The application for registration should include information about the founder of the mass media organisation; its name, language and type, purpose and mission; thematic focus; territories of distribution; frequency of release; source of funding; address; circulation and information whether the founders and the editorial board members are founders, directors, publishers or distributors of other mass media organisations. No timeframes are set out with respect to the procedure for obtaining the registration and grounds for its refusal or delay. According to Article 12, the registration is not necessary for the publication and distribution of official documents, textbooks and for "printing of materials which are released in less than 100 copies."

ARTICLE 19 notes that the Media Law does not specify the purpose of the registration of media outlets under Article 11. As a result it is unclear if the registration of mass media outlets is a condition for their operation. Hence, ARTICLE 19 looks at both options.

1. **Registration is a condition for the operation of media outlets**: In case the registration required under the Media Law is a condition for the media outlets to operate, it in effect amounts to licensing of print, online and broadcast media.

   ARTICLE 19 observes that under international standards, licensing requirement for the **print media** is not legitimate.[20] A licensing scheme presents a major obstacle to any publishing activity and consequently the enjoyment of the right to impart information. Such a scheme is therefore an interference with the right to freedom of expression. Even if in some cases licensing schemes may address legitimate goals, such as preventing defamation, they fail to meet the requirement of 'necessity' which implies, among other things, that the government should choose those means to achieve its goals which are least harmful to the freedom of expression. Clearly, licensing is not the least restrictive means to address defamation. Instead, complaints about offensive articles can be dealt with on a case-by-case basis after publication and, where upheld, remedied by eliciting a fine or some other sanction. Licensing schemes are particularly problematic because they

[20] See, e.g. the Human Rights Committee, *Laptsevitch v Belarus*, Comm. No. 780/1997, 20 March 2000; *Mavlonov and Sa'di v Uzbekistan*, Comm. No. 1334/2004, 19 March 2009 (in which the Committee established that non-registration of a newspaper violated both the right of freedom of expression of the newspaper owner but also the right to receive information of newspapers' readers); the African Commission, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 31 October 1998, Comm. Nos. 105/93, 128/94, 130/94; the European Court, *Gaweda v. Poland*, Appl. No. 26229/95, 14 March 2002,

may easily be abused, for example, to prevent opponents of the government from voicing their opinions.

The OSCE Representative on freedom of the media called for the abolishment of the arbitrary system of print media registration, pointing out:

> It is inappropriate for a democratic society with a free media to impose an 'approval' procedure, with its inherent arbitrariness, on the print media. The newspaper industry is a civil societal endeavour and governments should not have the power to deny the print press the right to publish. New print media should be subject only to a notification procedure which is processed by an independent body.[21]

As noted above, the arguments concerning the licensing of print media also apply to online/Internet media. Given the unlimited availability of addresses, there is no justification for the licensing of websites or online media.

By contrast, licensing of broadcasters is permitted under international law in view of the limited number of frequencies available. States are required to take steps to ensure media pluralism – the availability of a wide range of content serving the needs and interests of different groups in society.[22] At the same time, ARTICLE 19 observes that licensing of broadcasters is already regulated by the Licensing Law of Tajikistan.[23] As the broadcasters-related licensing regulation is the subject of another law, ARTICLE 19 considers that the registration requirements for broadcasts are not necessary.

In conclusion, ARTICLE 19 considers that if the registration requirements for print, online and broadcast media are a condition for their operation, they should be abolished.

2. **Registration is not a condition for the operation of media outlets:** Distinct from licensing regimes are technical registration schemes, which still exist in some established democracies. A technical registration scheme is a purely administrative requirement for publications to provide basic information about themselves to the authorities, such as the location of their offices, and the names of their owners, with no discretion on the part of the government to refuse registration. The purpose of a registration scheme is usually to ensure that individuals who intend to sue a publication for defamation can easily determine where to send their complaint.

   Registration schemes ostensibly pose less of a threat to freedom of expression than licensing schemes, because the failure to register does not prevent the media outlet from operating. Nevertheless they should also meet the three-part test for restrictions on the right to freedom of expression and include safeguards against the potential abuse of power.

[21] OSCE Representative on Freedom of the Media. Special Report: Registration of Print Media in the OSCE area Observations and Recommendations, 29 March 2006.
[22] *C.f.* European Court, *Informationsverein Lentia and others v. Austria*, op. cit.
[23] Adopted by national assembly of Tajikistan in 2004, No5.

Even if registration is not a precondition for operating a media outlet, ARTICLE 19 finds that the provisions of Articles 10 and 11 of the Media Law fails to meet international standards as they fail to include safeguards against abuse.

Other concerns

ARTICLE 19 is concerned about the following issues related to the registration:

- The Media Law provides that **the body administrating the media registration** is to be appointed by the Government; hence it fails to meet the standards of independence as outlined above. There is a risk that the Government would be able to use this power in order to intervene in the registration process and control it, for example, to prevent opponents of the government from voicing their opinions.

- The Media Law does not provide whether and on what grounds the body in charge of the registration can **refuse to register** the media outlet.

- **Deadlines** for deciding on applications for registration are not provided.

- The Media Law does not provide media outlets with a means of appealing court decisions concerning registration.

- The requirement for registration of printed materials (Article 12 of the Media Law) is also problematic. We note that the Human Rights Committee already found that the legal requirement for registration of materials published in more than 200 copies was a violation of the right of freedom of expression as it was not clear why this requirement was necessary for one of the legitimate purposes of Article 19/3 of the ICCPR.[24] Similarly, it is not clear why the printed materials released in more than 100 copes would require such registration.

Recommendations:

- The registration system for media outlets in the Media Law should be abolished altogether.

Accreditation

Under Article 30 of the Media Law, the media outlets, in coordination with State bodies and organisations, can accredit their journalists within them. Article 31 sets out that the correspondents of foreign media shall be accredited by the Ministry of Foreign Affairs.

ARTICLE 19 notes that accreditation requirements may amount to giving journalists permission to practice their profession and would therefore interfere with the right to freedom of expression.

Under international law all accreditation requirements must be necessary in view of the available place and events. In particular, the Human Rights Committee stated:

[24] Human Rights Committee, *Laptsevich v. Belarus*, *op. cit.*

> [I]ts operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary ... The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. [25]

Similar recommendations have been raised by international mandates on freedom of expression:

> 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. Accreditation should never be subject to withdrawal based only on the content of an individual journalist's work.[26]

The accreditation requirements set out by the Media Law fail to meet international standards and could impede newsgathering for the following reasons:

- They do not require assessment of the necessity of accreditation. Accreditations could be used as a work permit for journalists to cover public institutions. Journalists without accreditation from a specific intuition may not be allowed to attend its press conferences and interview its staff even when the space does not justify the exclusion.
- There are no safeguards against arbitrary refusal to grant accreditation.

Recommendations:

- Article 30 of the Media Law should be amended. Accreditation should be required only if due to limited space all interested journalists cannot attend a meeting or follow the activities of a particular body. The Media Law should provide safeguards against arbitrary refusals of accreditation, such as clear accreditation rules. The accreditation should be overseen by an independent body, such as a journalists' union and journalists should be granted a right to appeal refusals for accreditations to court.

The right of reply

The right of reply is regulated in several articles of the Media Law:

- Article 18: everyone whose rights or legal interests have been damaged as a result of a publication has a right of reply;
- Article 19: everyone has a right to request that the media issue a denial of the untrue and defamatory information which has been published/broadcast by them;
- Article 20: the media can refuse this request under Article 19 (denial) in cases when the request contains abusive language or contradicts a court order or does not contain the name and the signature of the requester.

[25] Human Rights Committee, *Gauthier v. Canada*, Comm. No. 633/1995, 7 April 1999, para. 13.6.

[26] The 2003 Joint Declaration, *op.cit.* Also, the OSCE Representative on Freedom of the Media noted that "a common misconception about the accreditation system is the notion that it has a 'permissive' function – permissive in the sense that a government or other regulatory body has the right to grant, deny or revoke a journalist's accreditation. By applying the same rules to accreditation as for a work permit, the government exercises undue control over journalists;" Special Report: Accreditation of Journalists in the OSCE Area, Observations and Recommendations,25 October 2006.

The right of reply and related rights are a highly contentious area of media law;[27] the UN Special Rapporteur on Freedom of Opinion and Expression[28] and ARTICLE 19 have suggested that the right of reply should ideally be voluntary.

For comparative reasons, we refer to the Committee of Ministers of the Council of Europe has adopted a Resolution on the right of reply which recommends that the right be recognised, but suggests that exceptions be made in the following cases:[29]

i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
iii. if the reply is not limited to a correction of the facts challenged;
iv. if it constitutes a punishable offence;
v. if it is considered contrary to the legally protected interests of a third party;
vi. if the individual concerned cannot show the existence of a legitimate interest.

The publication of the reply must be given the same prominence as was given to the information containing the facts claimed to be inaccurate.

Any dispute as to the application of the above rules shall be brought before a tribunal which shall have power to order the immediate publication of the reply.

As noted above, the Media Law contains two distinct remedies for violations of rights as the result of a publication:

- A right to demand a "denial" (Article 19) specifically in the case of the publication or broadcast of "untrue and defamatory" material; and
- A right to demand a "response" (Article 19) wherever there has been an infringement of a right or a "legitimate" interest.

ARTICLE 19 is concerned that the distinction between the right of reply and the right of denial is blurred because persons alleging that untrue and defamatory material relating to them has been published/ broadcast could exercise both a right of denial and a right of a reply. This is possible because the publication of untrue and defamatory materials can affect one's rights or legitimate interests, for example, one's reputation.

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[27] Some (e.g. in Europe) see it as a low-cost, low-threshold alternative to expensive lawsuits for individuals whose personality rights (for example to reputation or to privacy) have been harmed by the publication of incorrect or misleading statements about them; see, e.g., European Commission *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Appl, No. 13010/87; Inter-American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 29 August 1986, OC-7/86, Ser. A, No.7, Advisory Opinion. others regard it as an impermissible interference with editorial independence In the US, a mandatory right of reply for the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held: "[A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 418 U.S. 241 (1974), p. 258

[28] Report of the Special Rapporteur, Report of the mission to Hungary, 29 January 1999, E/CN.4/1999/64/Add.2, para 35; in which the Special Rapporteur stated: [if] a right of reply system is to exist, it should ideally be part of the industry's self-regulated system, and in any case can only feasibly apply to facts and not to opinions."

[29] Resolution (74) 26 on the right of reply - position of the individual in relation to the press, adopted by the Committee of Ministers on 2 July 1974, at the 233rd meeting of the Ministers' Deputies.

We observe that the right of denial is typically referred to as a right of correction in other countries. However the right to correction is afforded only in cases of publication or broadcast of untrue information. In cases of defamatory information one is normally afforded a right of reply rather than a right of correction.

ARTICLE 19 also considers that the Media Law does not include safeguards against undue and abusive intrusions of editorial autonomy in connection with the exercise of the rights of reply and of correction. In particular, we are concerned that:

- The media have no power to refuse to publish or to edit requests for reply because the Media Law does not set out exceptions with respect to this remedy. Consequentially, the media must publish replies that are clearly baseless or incorrect or of excessive length;

- There is no time limit set for replies. As a result one can request a reply a long time after the publication or broadcast of the damaging information;

- The Media Law does not provide that disputes regarding the right of reply and denial can be brought to court.

Recommendations:

- Article 18 should provide that the right of reply is a remedy for infringements upon recognised rights only. The phrase "legitimate interests" should be removed.
- Article 19 should provide that the right of denial is a remedy for incorrect facts only.
- The Media Law should set up a reasonably short time limit for making a request for a reply or denial (for example, 15 days after publication) and explicitly stipulate that disputes concerning the right of reply must brought by a tribunal with powers to order the immediate publication of the reply.

Access to public information

Article 23 of the Media Law regulates the access to information held by public bodies. Furthermore, according to Article 24, access to public information can be restricted in the cases specified in Article 6, already discussed above.

ARTICLE 19 considers that there is no need for the access to information regime set out in the Media Law because Tajikistan already has the Law on Information which also applies to the media. Moreover the latter as *a lex specialis* applies with priority over other information laws and has detailed provisions that guarantee the right of all citizens to access information held by public bodies.

We also consider that Article 24 of the Media Law, which excludes certain types of information from disclosure, is in conflict with international standards. Under international standards, any restrictions on access to information must meet the three part test, whereby a public body must disclose any information which it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and

- The harm to the protected interest is greater than the public's interest in having the information. [30]

Article 24 obviously fails to ensure that state bodies consider this standard when deciding whether to refuse information.

Furthermore, the body which refuses to provide information is not obliged to motivate its refusal. Neither is it obliged to respond to a request in a short time.

Recommendations:

- Articles 23 and 24 of the Media Law dealing with access to information should be repealed.

Confidentiality of sources

Article 26 of the Media Law sets out that, media outlets and journalists are obliged not to disclose the identity of the person who provides them with information under the condition of confidentiality, unless courts or investigators order so.

ARTICLE 19 appreciates that the Media Law awards the protection of sources, a well established principle in international law.[31] However, ARTICLE 19 finds it problematic that:

- Article 26 reverses the traditional presumption that the protection of sources is a right of journalists and turns it into a legal obligation not to disclose information. Although the matter has never been dealt with by an international court, there are potentially serious problems with imposing source confidentiality as an obligation on the media and it would be preferable for Tajikistan to follow the dominant practice in this area.

- The disclosure can be ordered not only by courts but also by investigative bodies without guaranteeing fairness and independence.

- Investigative bodies and courts have unlimited discretion in respect to requests for disclosure of sources because the Media Law does not set out criteria for disclosure.

- Furthermore, the rule should extend to "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."

Recommendations:

- The rule on protection of sources should be cast as a right of the media, not an obligation, and it should apply to everyone regularly engaged in the professional or regular dissemination of information.

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[30] *C.f.* the 2004 Joint Declaration of special mandates, 6 December 2004; or A RTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London, June 1999, Principle 4.

[31] *C.f.* the 2008 Joint Declaration of special mandates, 15 December 2008; see also Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers on 8 March 2000, at the701st meeting of the Ministers' Deputies

- Article 26 of the Media Law should provide that only courts can issue orders for the disclosure of sources and that the order for disclosure cannot be made unless:
  - the circumstances justifying the disclosure are necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime;
  - reasonable alternative measures to disclosure do not exist or have been exhausted;
  - disclosure is justified by an overriding requirement in the public interest; and
  - the circumstances are of a sufficiently vital and serious nature to justify overriding this important right.

Duties of journalists

Article 29 of the Media Law sets out journalists' duties, including to observe the editorial statute; to verify the reliability of information; before publishing an interview to make sure it has been squared with the interviewee; to satisfy the wishes of persons providing information with respect to their opinions; to respect the rights and freedoms and the legal interests of individuals, citizens and organisations; to present a certificate or other document proving its relationship with a media outlet when performing his/her professional duties; not to use the media outlets for interference with the private life, publication of false information, information insulting or debasing the honour or the reputation of the individual and legal bodies.

ARTICLE 19 is very concerned about the State's imposition of professional duties on journalists. Such legislative responsibilities imposed on journalists are contrary to international standards and best practice. In most democratic countries, journalistic ethics are matters for self-regulation. Experience has shown that legal regulation of ethical matters often leads to harassment of journalists who are critical of the government. The latter are a matter of media self-regulation. The OSCE Representative on Freedom of the Media has stated:

> True ethics standards can be made only by independent media professionals, and can be obeyed by them only voluntarily. Whether passed in good will or not, any attempt to impose standards on journalists by law will result in arbitrary limitations of their legitimate freedoms, and restriction on the free flow of information in society.[32]

Finally, ARTICLE 19 is concerned that the severe duties imposed on journalists, set out in the Media Law, would impede investigative journalism. In particular, the duties on journalists to square their interviews with interviewees before publication, or to satisfy the wishes of persons providing information or not to interfere with the private life of politicians or businessmen would prevent meaningful investigations into allegations of abuse of power and corruption.

Recommendations:

- Article 29, setting out professional and ethical standards for journalists, should be repealed. An independent self-regulatory body should establish the ethical standards for the press. An independent broadcast regulator should set out the broadcasting standards.

[32] Miklos Haraszti, The merits of media self-regulation, Balancing rights and responsibilities, in The Media Self Regulation, All questions and answers, OSCE, 2008, p. 15.

State aid

Article 5 sets out that the Government provides state aid to media outlets in accordance with the law of the Republic of Tajikistan.

Although State financial support for the media may be commended as a positive, ARTICLE 19 notes that the Media Law does not contain detailed rules on the allocation of state aid. We are concerned that this failure could result in the misuse of the state aid. For example, governments may use aid to secure media comfort and punish media who are critical of it, by limiting the aid made available to them. The misuse of state aid can be prevented by the adoption of detailed rules on the allocation of state financial support and by giving powers to an independent body/commission to organise the allocation.

Recommendations:

- The Media Law should give powers to an independent body to regulate state financial support for the media and include detailed and objective criteria for the distribution of State funding.

About ARTICLE 19

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year and Memorandums on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Tajikistan, please contact Nathalie Losekoot, Head of Europe, at Nathalie@article19.org.