

ARTICLE 19

Tajikistan: Offence of ‘false information’, the Code of Administrative Offences

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Legal analysis



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Introduction

In this briefing, ARTICLE 19 comments on the new provisions on “false information”, recently adopted in Tajikistan, and their compliance with international freedom of expression standards.

In June 2020, Tajikistan adopted amendments to the Code of Administrative Offences and introduced a new provision – Article 374(1) which proscribes dissemination of false information. More specifically, this Article penalises two conducts:

- Dissemination of deliberately false information via means of mass information, Internet or other means of electric communication when dangerous diseases are emerging and spreading or when quarantine-associated limitation measures are being imposed; and
- Dissemination of untrue statements regarding techniques and methods of protection and other measures adopted to ensure public safety under aforesaid conditions. Penalties include fines for natural and legal persons and administrative arrest of up to 15 days for natural persons.

This legislative amendment, adopted in the context of the Covid-19 pandemic, was reportedly adopted in response to publications of journalists, bloggers and civic activists about Covid-19 infection cases and unfair distribution of humanitarian assistance in the country. It raised several concerns within civil society and media organisations who feared possible abuse of the law targeting independent media and dissenting voices.¹ The provisions in question were adopted without open and accessible public consultations. Concerns raised by local civil society about potential negative consequences for freedom of expression and media freedom were ignored by the authorities.

At the time of the publication of this analysis, it is not yet clear how provisions of Article 374(1) have been implemented in practice. Nevertheless, ARTICLE 19 considers it important to analyse the respective legal provisions in the view of the impact which their adoption can have over Tajikistan’s media sector and the chilling effect it will cause on the media and critical voices in society.

ARTICLE 19 is happy to provide comments on this amendment, given our continuous work on freedom of expression and information in the region over the last 20 years, including in Tajikistan. Our work in the country aims at advancing freedom of expression, freedom of the media and access to information via the implementation of programmes and initiatives covering inter alia capacity building of media lawyers, protection of journalists and support to local advocacy initiatives. In the framework of its cooperation with the local organisations, ARTICLE 19 has also provided legal advice and analysis of Tajikistan legislation related to freedom of expression and the media, including legal assessments of the law on television and radio broadcasting in 2015² and the law on media and legislation regulating NGOs.

¹ See, e.g. CPJ, [Tajikistan parliament approves amendments imposing fines, detentions for ‘false news’ amid COVID-19 pandemic](#), 30 June 2020; or IPI, [Tajikistan passes coronavirus ‘fake news’ law](#), 7 July 2020.

² ARTICLE 19, [Legal Analysis: Tajikistan’s Law on Television and Radio Broadcasting](#), 25 August 2015.



This analysis was also produced in consultations with ARTICLE 19's local partners. It is intended to provide an overview of the international standards regulating 'disinformation' and challenges associated with this phenomenon and to assess Article 374(1) of Tajikistan's Code of Administrative Offences in light of the applicable human rights standards and international good practices of tackling disinformation. The Briefing also offers a set of recommendations for Tajikistan's authorities, civil society and media sector to design an effective positive response to the problem of disinformation around health issues and beyond.

Applicable international standards

ARTICLE 19's comments on Article 374(1) of Tajikistan's Code of Administrative Offences are informed by international human rights law and standards, in particular regarding the right to freedom of expression.

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),³ and given legal force through Article 19 of the ICCPR.⁴

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed that the scope of the right extends to the expression of opinions and ideas that others may find deeply offensive.⁵

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation meets a "three-part test". This requires that the limitation must be:

- **Provided for by law**, any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly – *requirement of legality*;
- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals – *requirement of legitimacy*;
- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat⁶ – *requirement of necessity*.

The HR Committee has made clear that, for laws pertaining to national security in particular, it is not compatible with Article 19(3) of the ICCPR to invoke limitations "to suppress or withhold from the public information of legitimate public interest that does not harm national security

³ Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

⁴ The ICCPR has 167 States parties, including Tajikistan.

⁵ HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

⁶ *Ibid.*, paras 22 and 34.

or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”⁷

Additionally, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

Regulation of “disinformation,” “false information” or “fake news”

“False information,” “disinformation,” or “fake news” are all terms that are not defined under international human rights law. Protecting persons from “false information” is not, as such, a legitimate aim for justifying restrictions on the right to freedom of expression under Article 19(3) of the ICCPR.

As four special mandates on freedom of expression cautioned in their 2017 Joint Declaration, the label of “fake news” is increasingly being used by persons in positions of power to denigrate and intimidate the media and independent voices, increasing the risk of such persons to threats of violence, and undermining public trust in the media.⁸

An important point of principle remains that “the human right to impart information is not limited to ‘correct statements’, [and] that the right also protects information and ideas that may shock, offend or disturb.” The four special mandates made clear that “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression.”⁹

⁷ General Comment No. 34, *op. cit.*, para 30.

⁸ [Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda](#), adopted by the UN Special Rapporteur on Freedom of Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.

⁹ *Ibid.*

Challenges of regulating ‘disinformation’

It has been claimed that ‘viral disinformation’ has become one of the key features of the modern information space. In particular, since the US Presidential elections in 2016, it has been dominating national, regional and international discussions in the media sector.

Proliferation of ‘false’ narratives is amplified by the nature of the digital communication system and popularity of the global social media networks which business models enable so-called ‘clickbait’ articles and sensationalised news items that often contain misinformation or disinformation, or simply lack rigorous fact-checking.¹⁰ Some have also argued that this creates a problem of “information bubbles” where groups of people are constantly and exclusively exposed to information and news which correspond to their pre-existing views (while ignoring those messages which are contrary to their opinions and which they might dislike).¹¹ Studies also show a decline in the trust in mainstream media globally.¹²

ARTICLE 19 notes that the Council of Europe in its Report on ‘Information Disorder: Toward an interdisciplinary framework for research and policymaking’¹³ linked different types of ‘false information’ to two dimensions – ‘truthfulness’ and ‘harm.’ It stated that “untrue information” which spreads without intention to cause harm should be called “misinformation.” Information that is genuine but was shared to cause harm is “mal-information” (as for example, in the cases of ‘revenge porn,’ harassment etc.). Finally, information that is both false and spread with the intention to cause harm is “disinformation”. Although ARTICLE 19 maintains that restrictions on the basis of not being “true” is not a legitimate aim under international freedom of expression standards, this attempt to dissect the ongoing ‘information disorder’ into the distinct categories offers some framework for an academic discussion of the problem at hand.

The issues of disinformation and misinformation have become even more pronounced in the context of the ongoing global health crisis caused by the spread of COVID -19. Already in February 2020, the World Health Organisation (WHO) raised concerns about an “infodemic” caused by a flood of false and misleading information about COVID-19. Similarly, UNESCO called the unfolding developments “disinfodemic” about issues such as origins of the virus, its nature, prevention and treatments.¹⁴ Social media posts advancing bogus cures, conspiracy theories and inaccurate reports of the virus’s spread are viewed more often than information from authoritative sources. At times untruths creep into the reporting of traditional media outlets. In many instances, misinformation has diverted the attention of policymakers, fostered distrust in governments, and sowed confusion among the public.¹⁵

¹⁰ R. Meyer, [The Grim Conclusions of the Largest-Ever Study of Fake News](#), The Atlantic, 8 March 2018.

¹¹ See, e.g. [TED-talk by Eli Pariser](#), March 2011; C.Thi Nguyen, Associate Professor of Philosophy, Utah Valley University, [The problem of living inside echo chambers](#), The Conversation, 11 September 2019. Mostafa M. El-Bermawy, [Your Filter Bubble is Destroying Democracy](#), Wired, 18 November 2016.

¹² UNESCO, World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report – Executive Summary, 2017, Paris, p.16.

¹³ C Wardle, H Derakhshan, [Information Disorder. Toward an interdisciplinary framework for research and policymaking](#) (Council of Europe 2017) p.5.

¹⁴ UNESCO, [Combating the disinfodemic: Working for truth in the time of COVID-19](#).

¹⁵ See in particular recommendations outlined in ARTICLE 19, [Viral lies, Misinformation and coronavirus](#), March 2020.

Although disinformation has always existed and has always been a possible source of harm, studies also show that the spread and impact of online disinformation must be a subject of comprehensive research efforts.¹⁶ That is not to say that all the agitation is entirely in vain, but it should be recognised that before we can develop a genuine response to online misinformation, we need to understand what impact it is having. Even in the situation where societies are facing a novel virus, it is crucially important that our response is carefully crafted, publicly discussed and based on empirical evidence and complies with international freedom of expression and human rights standards.

ARTICLE 19 notes that States around the world have made some efforts to design positive responses to disinformation around COVID-19, such as media literacy and communication campaigns. Some countries responded with legal regulation including in the framework of emergency counter-pandemic measures. In most cases, such regulation was adopted within rushed procedures with limited (if any) public oversight. Many laws have included prohibitions with vague terminology open to abuse, and penalties introduced were disproportionate. While there is no universally accepted definition of misinformation or disinformation, legislation in many countries and ongoing public discussions often feature ambiguous and/or subjective terminology, such as 'false information' or 'untrue information' which further hampers any attempts to effectively address the problem. Flawed legal regulation consequently can impede the work of independent media, thus, obstructing essential flow of quality information and making public even more susceptible to 'conspiracy theories' and 'COVID-19 mythology.'

ARTICLE 19 would like to underline the importance and impact of positive measures to address disinformation as a preferred alternative to problematic legislative norms. Proactively providing timely, accurate and comprehensive information by the government, including on issues related to public health, is ultimately essential in times of crisis. Tajikistan should maintain and expand its transparency obligations accordingly. We also urge the government to adopt comprehensive measures on access to information and data relating to the impacts and efforts of mitigating the pandemic. These include information on health information; financial information; information beneficial to vulnerable persons, groups, and communities; governance information; human rights and law enforcement information.¹⁷ Open, honest and regular communication of the government with the society generates trust, diverts public attention from mis- and disinformation narratives and thus, helps to address the problem in a more effective way than opaque formal regulations.

¹⁶ See e.g. R. Fletcher, A. Cornia, L. Graves and R. Kleis Nielsen, [Measuring the reach of "fake news" and online disinformation in Europe](#), Factsheet, February 2018, Reuters Institute for the Study of Journalism.

¹⁷ ARTICLE 19, Report [Ensuring the Public's Right to Know in the COVID-19 Pandemic](#), May 2020, pp.10-13.

Analysis of Article 374(1)

ARTICLE 19 finds that Article 374(1) of the Code of Administrative Offences is not compatible with international freedom of expression standards for the following reasons.

Definitions

Article 374(1) contains two definitions: 'deliberately false information' and 'untrue statements'. While these terms are seemingly better than inherently superficial notion of 'fake news' that can be found in some legislation elsewhere, they are still overbroad and open to potential abuse.

For example, it is not clear whether 'deliberately false information' in the first part of Article 374(1) concerns only health-related or pandemic-related information or it could be any information about anything which is disseminated in times of COVID-19 spread and/or quarantine measures and perceived as 'deliberately false' by law enforcement authorities. Furthermore, a rather broad notion of "untrue statements regarding techniques and methods of protection and other measures adopted to ensure public safety" could be misused to penalise any criticism of the government-prescribed measures. It has a potential to be used as a censorship measure, shielding decisions and actions of public authorities from legitimate criticism and public scrutiny.

ARTICLE 19 also notes that public authorities should not be in charge of defining what is true and what is not as such 'dictate of officially approved truthfulness' could discretely lead any society towards authoritarian rule. In the case of COVID-19 related information, national public authorities may also be lacking access to the on-going research and most recent scientific developments at the international level to safely determine the ultimate truthfulness of virus-related information. Moreover, in the situations like the one surrounding the COVID-19 virus, lack of pre-existing relevant research and scientific studies resulted in official sources like the WHO and leading scientists changing their opinion on certain pandemic-related issues over the course of its advancement.

Hence, when it comes to regulatory or legislative action, it is doubtful that a definition of 'false information' could ever be compatible with international standards, unless linked to specific legitimate aim as provided in international standards (as for example in case of defamation). For these reasons, blanket bans on 'false information' are inconsistent with freedom of expression norms. Any legislative provisions which would entrust the State and, in particular, law enforcement authorities with a 'truth arbiter' function will not comply with international human rights law.

Intent

ARTICLE 19 also notes that Article 374(1) does not seem to require any intent on the side of a potential disseminator to cause harm to public health. Under these provisions, people could be penalised even if they shared certain information without any malign intent. For instance, they could share certain posts on social media as a joke or without any knowledge that the information was false at all. Such disposition favours an atmosphere of fear and could effectively suppress legitimate public conversation on important socio-political or health-related matters.

Also, in the fast-changing environment of pandemic, people often shared information about COVID-19 in good faith while this information proved to be false later on and vice versa. For instance, facial masks are currently recommended as one of the tools to contain the spread of the infection, albeit their real efficiency overall is not yet uniformly confirmed. In earlier days of the pandemic, even WHO did not recommend population wide usage of face masks. Provisions of Article 374(1) do not reflect this rapidly evolving situation and could be used to suppress information that can later be found desirable.

Focus on mass media

Article 374(1) specifically mentions mass media among others, more technical dissemination channels like the Internet and means of electric communication. It fails to appreciate the vital role of free media in a democratic society and the nature of media work, and targets journalists for doing their job of collecting, producing and imparting information. While it is generally accepted that media outlets should make a reasonable effort to provide balanced coverage and properly verify information provided to their audiences,¹⁸ any legislative requirement of absolute accurateness of media materials will have a chilling effect on freedom of expression. This will be problematic especially where it concerns investigative journalism or media publications discussing complex topics with no definitive conclusions established by the science to date (such as the case of the Covid-19 virus, its nature, prevention and treatment).

ARTICLE 19 would like to articulate that independent media and journalists carry out a fundamentally important watchdog function in any effective democracy, and it is a positive duty of national governments to create favourable legislative, economic and security conditions for free press and media pluralism.¹⁹

Proportionality

In terms of penalties, Article 374(1) establishes fines in the range of 48-96 EUR for natural persons and 712-950 EUR for legal persons. Natural persons could also be subject to administrative arrest of 10 to 15 days. Considering that an average salary in Tajikistan currently constitutes approximately 105 EUR²⁰ and that the definition of administrative violation in this provision is overbroad and deficient, ARTICLE 19 considers the penalties stipulated in Article 374(1) to be manifestly disproportionate and contrary to the international freedom of expression standards and good practices. Furthermore, penalising speech with serious limitations imposed on personal freedom, such as an administrative arrest, can be justified only in the most serious

¹⁸ See e.g. the European Court, *Axel Springer AG v. Germany*, App. No. 39954/08, 7 February 2012, para 93; or *Zarubin v. Lithuania*, App. No. 69111/17, 26 November 2019, para 58.

¹⁹ See e.g. HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 14; [OSCE Human Dimension Commitments](#), Volume 1, Thematic Compilation, 3rd Edition, OSCE/ODIHR 2011, pp. 123-130; [Recommendation CM/Rec\(2018\)1\[1\] of the Committee of Ministers to member States on media pluralism and transparency of media ownership](#), adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies, Appendix, para 1.2.

²⁰ See the average income in Tajikistan at [Take Profit](#).

cases as punishment for grave violations of speech norms, and imposition of this kind of liability should be subject to rigorous procedural safeguards.

Public discussion of policy measures

Finally, while extra measures may be undertaken to urgently address a public health crisis, any government actions adopted to protect and improve public health and security situation are, by their nature, policy measures and as such, they should be open to public discussion and public scrutiny.²¹ As our societies are steadily grappling with the fact that the pandemic will be a long-term trial rather than a one-off short-term attack, it is essential for a functioning democracy to continuously scrutinise public health protection measures in a manner in which we normally ensure transparency of government decisions and accountability of public administration. This is important not only to secure a normal course of democratic governance but also to create an environment conducive to searching for the novel, more effective ways to prevent virus transmission and treat the related diseases. By de facto penalising the views which do not comply with the current state-adopted protection strategy, Article 374(1) undermines free flow of public discussion on crucially important public matters and may, as such, impede discovery and introduction of better public health protection methods.

²¹ Council of Europe, [Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states](#), Information Documents SG/Inf (2020)11, 7 April 2020; which states that “official communications cannot be the only information channel about the pandemic. This would lead to censorship and suppression of legitimate concerns. Journalists, media, medical professionals, civil society activists and public at large must be able to criticise the authorities and scrutinise their response to the crisis.”

Conclusions and recommendations

Based on foregoing, ARTICLE 19 concludes that Article 374(1) of Tajikistan's Code of Administrative Offences does not meet the requirements of the three-part test of permissible restrictions on freedom of expression. Although it pursues a legitimate aim of public health protection, it fails to meet the requirements of legality (overbroad and vague terminology) and necessity (it precludes free debate on the issues of public interest and may be abused to target independent media and dissenting voices).

ARTICLE 19 therefore recommends that the Tajikistan Government should:

- Repeal Article 374(1) of the Code of Administrative Offences. As an interim measure, public authorities should refrain from enforcing its provisions, in particular if there is no substantial evidence of the systematic coordinated dissemination of false information with the clear intent to cause harm to public health.
- Ensure that any restrictions on freedom of expression adopted in response to the COVID-19 pandemic are narrowly defined, necessary, proportionate and time limited.
- Ensure the public have access to all relevant information on public health issues, including those related to COVID-19. The Government should organise continuous public information and communication campaigns to ensure that all of society including minorities, rural population and marginalised groups receive regular updates about prevention and treatment of COVID-19.
- Design and implement nation-wide media literacy programmes to build up societal resilience to disinformation and promote conscious information consumption. Such programmes should be developed in consultations with civil society and media actors and should cover all age groups.

ARTICLE 19 also encourages the media and journalists in Tajikistan to actively promote professional ethics standards, employ existing and if necessary, devise new, effective self-regulation mechanisms to ensure compliance with the good journalistic practices and appropriate sectoral response to mis- and disinformation, including on COVID-19 and related issues.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law and Policy Team 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 organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>.

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 and Policy team, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Europe and Central Asia, please contact Sarah Clarke, Head of ARTICLE 19 Europe and Central Asia team, at sarahclarke@article19.org.