ARTICLE 19

# Kyrgyzstan:
# **Reform of the media laws**

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MEDIA DIALOGUE

ИНСТИТУТ МЕДИА ПОЛИСИ

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ARTICLE 19
Free Word Centre
60 Farringdon Road
London EC1R 3GA
UK
www.article19.org

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# Table of contents

# Introduction

This briefing paper is designed to assist national stakeholders in Kyrgyzstan in their current efforts to promote the reform of media laws in the country. It has been produced by ARTICLE 19 in partnership with the Media Policy Institute, a Kyrgyzstan-based NGO focused on freedom of expression and freedom of the media, whose expert research and analysis provided the foundation for its content.

At the request of the Media Policy Institute, the analysis of existing legislation included in this briefing paper is largely confined to the 1992 Law on Media (Media Law). The Media Law purports to establish a general framework for the operation of all national media. It is complemented by other, more narrowly specialised laws which focus on the rights of journalists, audio-visual media, and public service broadcasting. The free and independent functioning of the media in Kyrgyzstan is also directly affected by various laws that are not specifically concerned with media. Those include a law on access to information and the defamation related provisions of the Civil Code. Extensive anti-terror and "counter-extremism" legislation imposes severe and highly problematic restrictions on freedom of expression and, therefore, media content.

This briefing paper focuses on regulatory areas that are relevant to all media. For present purposes, they are mainly discussed insofar as they relate to particular provisions of the Law on Media.

ARTICLE 19 recommends that in the medium- to long-term, national stakeholders consider whether a framework law aimed at regulating all forms of media is a useful legislative tool. There is no doubt that the Media Law in its current form is deficient in many respects. In Kyrgyzstan's current context, ARTICLE 19 understands that a short-term resolution of these deficiencies with the aim of providing suitable protection to media organisations and journalists may be to reform the current legislation. However, we believe that ultimately, a more effective strategy for media law reform would be to focus on developing or improving more specialised legislation dedicated to specific types of media (e.g. broadcasting) or specific media-related issues (e.g. conditional liability for Internet intermediaries) as well as non-media specific legislation dealing with cross-cutting issues of particular relevance to media (e.g. defamation or content restrictions).

In addition, ARTICLE 19 recommends that national law- and policymakers:

- Adopt a differentiated approach to media regulation, focusing on developing separate regulatory regimes for print media, broadcast media and online media;

- Only broadcast media should be subject to statutory regulation, however to the extent strictly necessary and with minimal intervention, while leaving the media's internal working methods and media responsibilities (at least, in part) to self-regulation. This also involves recalibrating media regulation from restricting and directing media and media workers to protecting and enabling their institutional independence, safety and freedom of expression;

- Develop legislative measures to ensure media pluralism, especially by means of regulating media ownership through competition law. This should include requirements in respect of transparency of media ownership and financing and the protection of the media's editorial independence vis-a-vis their owners;

- Adopt additional legislative measures to protect media's ability to fulfil its public watchdog function. This includes a considerably more stringent mechanism of protection of sources than the one currently provided in the Media Law. It also involves additional protections from defamation suits in regard of statements on matters of public interest;

- Abolish all media-specific content restrictions, while substantially revising the restrictions on expression that currently exist in non-media specific legislation (e.g. the Criminal Code and the Law on Countering Extremist Activity). All restrictions must meet the strict proportionality test under Article 19(3) of the ICCPR;

- Ensure that suspensions and closures of media outlets can be used only as a last resort in the most exceptional circumstances and only for particularly egregious unlawful conduct.

These general recommendations are fleshed out in the analysis below. However, the sheer breadth of the issues involved does not allow this briefing paper to do full justice to the complexity of some of them. ARTICLE 19 stands ready to provide additional in-depth analysis of specific aspects of media regulation on an as-needed basis.

# Applicable international freedom of expression standards

Media legislation engages a number of international human rights standards that form the basis of the legal analysis included in this briefing.

The right to freedom of expression is guaranteed in international human rights law, in particular in the **Universal Declaration of Human Rights** (UDHR)[1] and given legal force in the **International Covenant on Civil and Political Rights** (ICCPR) which imposes legally binding obligations on State Parties to respect a number of the human rights set out in the UDHR.[2] Having ratified the ICCPR, Kyrgyzstan is obliged to give effect to its provisions through national legislation.

Freedom of expression is further guaranteed in various documents of the Organisation for Security and Cooperation in Europe (OSCE) agreed to by Kyrgyzstan, such as the Helsinki Final Act,[3] the Final Document of the Copenhagen meeting of the human dimension of the OSCE,[4] the Charter of Paris agreed in 1990,[5] the Final Document of the 1994 Budapest CSCE Summit,[6] and the Istanbul Summit Declaration.[7]

Similar guarantees of freedom of expression are found in regional human rights treaties.[8] Although the decisions and authoritative statements adopted by regional human rights bodies are not binding for Kyrgyzstan, they provide important comparative evidence of the content and application of the right to freedom of expression that can be used to inform the interpretation of Article 19 of the ICCPR.

## Limitations on the right to freedom of expression

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. However, the right to freedom of expression is not absolute. Under Article 19(3) of the ICCPR, expression may be restricted in limited exceptional circumstances as long as any restrictions are:

- **Provided by law** - which requires that relevant legislation is formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim**: the list of legitimate aims is exhaustive, and it includes respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), and the protection of public health or morals;
- **Necessary and proportionate in a democratic society**: if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.[9]

Additionally, Article 20(2) of the ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. inciting violence is more than just expressing views that people disapprove of or find offensive.[10] "Advocacy" should be understood in this context as an intention to promote hatred publicly towards the protected group. Only advocacy that reaches the level of incitement is prohibited under Article 20(2), which in turn implies the speaker's intent to incite others to commit acts of discrimination, hostility or violence. While the proscribed outcome need not in fact occur, the term "incitement" strongly implies the advocacy of hatred must create "an imminent risk of discrimination, hostility or violence against persons belonging to [the target group]."[11] The Human Rights Committee has explained that restrictions imposed under Article 20 must be compliant with the three-part test set out in Article 19(3). The Office of the High Commissioner for Human Rights (OHCHR) within the United Nations (UN) developed the Rabat Plan of Action to set out six criteria that needs to be taken into account when implementing speech restrictions under Article 20(2) ICCPR.[12]

## Media regulation

The guarantee of freedom of expression applies with particular force to the media. International human rights bodies have repeatedly emphasised the "pre-eminent role of the press in a State governed by the rule of law"[13] and the essential role of the press in a democratic society.[14]

Regulation of the media presents particular problems. On the one hand, the right to freedom of expression requires that the government refrain from interference, while on the other hand, 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 also to take positive steps to ensure that rights, including the right to freedom of expression, are respected.

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently of 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. This has important implications for regulatory models of the media.

# General observations

## Need for a differentiated approach

From the outset, ARTICLE 19 notes that it is debatable whether there is any particular merit in a single law that is designed to provide a general regulatory framework for all forms of media. In our experience, laws that regulate all types of media in one piece of legislation are often a tool for governments to excessively restrict, rather than protect, the right to freedom of expression and information. Such laws are not typical of countries with strong progressive media legislation.

With the exception of broadcast media, media outlets are viewed as ordinary commercial activities that should not be regulated separately but through laws of general application, such as the civil and commercial codes. This does not mean that there are no restrictions at all on what the press can publish. For example, prohibitions on content that incites to violence or discrimination, sexually exploits minors or infringes a trademark can be found in virtually every country. But these rules are usually found in laws of general application rather than in specific legislation. Given the instrumental importance of the press in a democratic society, it stands to reason that journalists and their publications should not be subject to greater restrictions on the right to express themselves than ordinary people.

Important differences between print media, broadcast media, and online media necessitate a different regulatory regime for each of those categories.[15] As a starting point, media regulation should be based on the principles of strict necessity and minimum intervention.[16] For print media (and, more broadly, text-based media) this means that self-regulation is the preferred model, leaving it to the industry to develop, and hold itself accountable for, ethical media standards. Accordingly, legislation on print media should be largely confined to enabling self-regulation.

Broadcast media (i.e. television and radio) have been typically subject to stricter state regulation, since the broadcasting spectrum is a limited public resource. Here, the State needs to ensure that the spectrum is used and managed in the public interest for diverse and plural programming. This is primarily achieved by establishing an independent, transparent and accountable regulatory body to allocate broadcast frequencies in a fair and transparent manner, according to a broadcast policy designed to maximise media pluralism and diversity. However, the arguments that justify regulation and licensing of broadcasters are far less relevant to the print media; there are no technical limits to the number of publications that can exist concurrently, and newspapers and magazines are not as pervasive as the broadcast media.

Online media is similar to print media in the sense that there are no limits to the numbers of Internet websites that can exist alongside each other, so there is no justification for a regulatory regime for digital media that is based on licensing. Nevertheless, digital media should not be regulated by simply extending already existing regulatory regimes applied to other types of media.[17] It requires a tailored approach that takes account of the unique ways in which information is disseminated on the Internet. This is particularly important for Internet intermediaries that are instrumental in the functioning of online media but do not

amount to media themselves, i.e. technical service providers (such as search engines or media sharing platforms) that enable the dissemination of content by online media but do not exercise editorial control over that content.

Another unique feature of the Internet that must be reflected in its regulation is that the boundaries between media and non-media actors are exceptionally fluid and often blurred. This makes it impractical and counterproductive to set down a rigid definition of media for regulatory purposes, especially in the context of protecting journalistic prerogatives, rights and privileges and establishing responsibility for unlawful content.

The need for a differentiated approach to media regulation is borne out by Kyrgyzstan's own legislation. In addition to the Media Law, two separate laws regulate broadcast media and public service broadcasting respectively. There is no comparable legislation dedicated to digital media. However, as has been shown above, this gap cannot be adequately addressed by simply extending the application scope of the Media Law (currently, digital media is not covered by the law's definition of "media").

## Cross-cutting issues

There are certain issues that cut across all types of media. However, some of them are not exclusive to media, so they can and should be, and usually are, addressed in non-media specific legislation. The chief among them are defamation (and protection against the misuse of defamation laws to silence legitimate criticism), content restrictions such as criminal and civil-law measures against hate speech, the right to access information, and protection of source confidentiality. While, in a limited way, the Media Law touches on all four topics, they are primarily regulated in other legislation (with the exception of protection of sources).

Other cross-cutting issues are more specific to media (in its boards meaning). While they are essential for the proper function of all types of media in equal measure, some adaptation may be necessary or advisable for each type. These issues revolve around rights, privileges and prerogatives (which enable media to perform its public watchdog function in a free and independent manner), media ownership and media responsibilities. More specifically, they include:

- Protection of editorial independence (which requires effective separation between ownership or control over media and decision-making relating to content);
- Special protections relating to media's ability to investigate;
- Ensuring media pluralism and diversity of content, including through media ownership regulation;
- Media responsibilities, such as respect for people's privacy, protection of the presumption of innocence and the integrity of criminal proceedings, and provision of remedies to third parties who have suffered prejudice because of media activities.

The Media Law touches upon some of these issues in a limited and flawed manner. However, most of them are left entirely unaddressed.

## Long-term limited utility of the Media Law

In its current form, the Media Law fails to convince that it is a useful, let alone indispensable, tool for media regulation. With a few exceptions, its content falls into one of these categories:

- Issues that are specific to media but also addressed in other media-specific laws, often in greater detail;
- Issues of particular relevance but not specific to media that are also addressed in non-media specific legislation in a more detailed and comprehensive manner;
- Issues of particular relevance but not specific to media that are not sufficiently regulated anywhere in national legislation but that should be addressed in non-media specific laws;
- Issues related to the internal working methods of the media that should not be regulated by law and should be to the media to determine;
- Provisions that are redundant because they are too general or trivial to produce any specific legal consequences.

Moreover, certain issues of critical importance to media regulation, such as ownership transparency and ensuring the pluralism and diversity of media, are not addressed by the Media Law at all.

ARTICLE 19 recognises that the numerous flaws and gaps of the national media legislation demand urgent attention, which national stakeholders are seeking to address through reform of the current legislation. However, ARTICLE 19 reiterates that in the long-term, attempts to address them in a single comprehensive piece of legislation will be both impractical and damaging to the media's ability to perform its public watchdog function. Each of the major categories of media (i.e. print media, broadcast media, and online media) has its own regulatory needs and requires its own regulatory regime. At the same time, cross-cutting issues that are relevant to all media can - and, in most cases, should - be addressed in non-media specific laws.

## Freedom of expression law: an alternative

As a way of creating a universal basis for the free and independent functioning of the media, we encourage Kyrgyzstani policymakers to consider an alternative to a law on media in the form of a freedom of expression law.

An excellent example of the latter is Georgia's 2004 Law on Freedom of Speech and Expression.[18] Designed to concretise the constitutional protection of freedom of expression, that innovative law provides 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. It sets very strict standards for restrictions on freedom of expression, akin to those developed under the ICCPR, provides specific rules on

confidentiality, including the principle of journalistic confidentiality, and devises a new and progressive legislative regime for defamation.

## Definition of the media

**Article 1** of the Media Law 'defines' media by providing a closed list of actors, services and products that are considered as "media." Specifically, it refers to "newspapers, magazines and their supplements, digests, books, bulletins, one-off publications designed for public dissemination" as well as "televisual and radio broadcasting, film and video studios, audio-visual recordings and programmes that are issued by state bodies, news agencies, political, civil and other organisations, and private individuals."

The Media Law's definition of 'media' elides specific types of publications, broad media categories, means of production, services, and media content, without evincing any discernible underlying criteria for their inclusion other than public dissemination. Some of the included items should not be referred to as media, either because they are just specific forms of content generated by media (e.g. radio and TV programmes) or because they do not involve periodic or regular content renewal and update (e.g. books and other one-off publications). At the same time, some of the new media such as blogs or YouTube channels are left out. In fact, it is doubtful that the definition covers any digital media at all, as it does not appear that the reference to "newspapers" and "magazines" was meant, or is currently interpreted, to include publications that exist in online format only.

Irrespective of issues raised by specific components included in the above 'definition', ARTICLE 19 stresses that any attempt to define media through listing its specific forms is fundamentally misguided. Instead, a more flexible and nuanced approach to conceptualising media should be adopted. Any working definition for the purpose of providing protection to the media freedom should centre on criteria and indicators rather than nomenclature, while references to specific types of media actors or services should only be included in a non-exhaustive manner by way of illustration.

From a comparative perspective, ARTICLE 19 notes that the Council of Europe's Recommendation CM/Rec(2011)7 on a new notion of media provides the best and most detailed guidance for a contemporary definition of media. It recommends that media should be understood to cover:

> All actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents.[19]

However, the practical value of providing a general definition in legislation is limited, given that the boundaries between media and non-media actors and media and non-media content are fluid and often blurred in the age of Internet. The recommendation sets forth six criteria that are designed to assist national policy-makers in determining if particular activities,

services or actors should be regarded as media for regulatory purposes. Three of them are seen as essential (i.e. the absence of either of them will typically disqualify a service from being treated as 'media'). They are:

- The media's purpose and underlying objectives, namely "the provision or dissemination of content to a broad public and the provision of a space for different interactive experiences." One of the important additional indicators is the periodic or regular renewal or updating of content;

- Editorial control (i.e. media's own editorial control or oversight over content and responsibility for editorial decisions);

- Outreach and dissemination to a large audience. While there is no single or common understanding of what constitutes large/mass audience, it is recommended that, in addition to the actual level of outreach and dissemination, consideration should be given to the size of the market, potential audience or user base, and potential impact.

The absence of the other criteria may not automatically disqualify a service from being considered as media, but, when present, they carry considerable weight. They include:

- Intent to act as media. Intent can manifest itself through self-labelling as media, adopting working methods typical for media, committing to professional media standards, or making practical arrangements for mass communication. However, intent alone is not sufficient for treating an actor or its services as media;

- Adherence to professional standards. This criterion is manifested in professional values formulated in declarations, charters and codes, in internal codes of practice, staff regulations and instructions, accountability mechanisms such as complaint procedures, and in the actor's desire to benefit from protections and privileges offered to media;

- Public expectations as to availability, pluralism and diversity of content, reliability, professional and ethical standards, and accountability and transparency.

All of the above criteria need to be applied in a flexible manner, depending on specific situations in the context of rapidly evolving communication technologies.

# Areas requiring specific attention

In this section, ARTICLE 19 examines the extent to which the key cross-cutting themes mentioned above are addressed in the Media Law. It also explains how the legislative regulation of those issues should be approached in principle. The Media Law's provisions are discussed selectively, only to the extent they are relevant to the issue at hand. Hence, the omission of certain parts of the Law in the analysis below does not in any sense imply their endorsement.

## Diversity and pluralism

Freedom of expression is not just about requiring the State to refrain from unnecessary interference. The State is also required to take positive action to protect and promote this freedom. One of such positive obligations is promoting media pluralism and diversity of media content. As the Human Rights Committee has explained, Article 19 of the ICCPR implies that:

> The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.[20]

Media pluralism and diversity of content are achieved through a combination of policies and institutional solutions. At the legislative level, it is chiefly addressed by means of ownership regulation (in media-specific legislation as well as other legislation, such as competition law).

ARTICLE 19 notes that the notions of 'owner' or 'ownership' are absent from the Media Law. However, Article 5 defines who has the right to found a media outlet. Those include "states bodies, civil society associations, employee collectives, and citizens of the Republic of Kyrgyzstan." Article 5 further states that media outlets can be established jointly by several founders, with the exception of state bodies that are not allowed to found media outlets jointly with non-state actors. ARTICLE 19 understands that in practice "founding" a media organisation is synonymous with owning it and, apparently, vice versa (i.e. when a media outlet is acquired by new owners, the latter are considered as its new 'founders'), though none of that is spelled out in the law.

Several other provisions of the Law refer to 'founders' (i.e. owners), touching on the issues of financing, transparency and rights and responsibilities but falling well short of the degree of regulation required:

- **Article 3** lists founders as one of the possible sources of financing media outlets (along with profits from paid services, sponsorship and "other contributions"), but no further elaboration on the question of media financing is included in the Law.

- **Article 7** lists founder(s) among the information that must be provided as part the registration process.

- **Article 10** includes founder details among the information that media outlets are required to make public (by including it in printed copies or disclosing it in other ways appropriate to the relevant medium).

- **Article 16** provides that a media outlet cannot be compelled by a third-party to publish material that has been rejected by the editorial board or the founder(s). It does not, however, shed any further light on the extent the founder/owner can influence editorial policies and decisions.

- Finally, **Article 25** provides, in somewhat cryptic language, that founders "as represented by the head [of the media outlet]" are among individuals who "can be held responsible for violations of the present Law". The legal significance of this provision is entirely unclear, since the Law does not explain what form such individual liability may take and the only sanctions envisaged in it are those aimed at media outlets as a whole (i.e. suspensions and closures).

Useful comparative guidance for appropriate regulation of media ownership for the purpose of pluralism and diversity can be found in the body of standards developed by the Council of Europe. Recommendation CM/Rec(2018)1[1] on media pluralism and transparency of media ownership calls on States "to develop and implement a comprehensive regulatory framework that takes particular account of media ownership and control and is adapted to the current state of the media industry."[21] Key elements of this regulatory framework include:

- Use of competition-law provisions on mergers and acquisitions to prevent individual actors from acquiring significant market power in the overall national media sector or in a specific media market or sector; [22]

- Promotion of a regime of transparency of media ownership.

Transparency requirements "should be specific and include a requirement for media outlets operating within State jurisdiction to disclose ownership information directly to the public on their website or other publication and to report this information to an independent national media regulatory body or other designated body, tasked with gathering and collating the information and making it available to the public."[23]

The recommendation also emphasises that high levels of transparency are necessary with regard to the sources of funding of media outlets in order to provide a full picture of the sources of potential interference with their editorial and operational independence. To this end, it recommends that States "adopt and implement legislation or other equally effective measures that set out the disclosure of information on the sources of the media outlet's funding obtained from State funding mechanisms (advertising, grants and loans)."[24]

None of those issues are reflected in the Media Law, with the exception of transparency which is partially addressed by Article 10. The lack of any measures aimed at protecting the editorial independence of state-owned media from the control or interference by their

owners/founders is particularly troubling. Again, the Council of Europe's recommendation sets out useful guidance on this issue:

> Given that the key democratic tasks of the media include holding authorities to account and promoting transparency, ownership of media outlets by political parties or individuals actively involved in politics, and especially by anyone in elected office, should be subject to reinforced checks and balances, such as a self-regulatory system, aimed at ensuring editorial independence and transparency of ownership. The exercise of editorial decision making should be incompatible with the exercise of political authority. The incompatibility of these functions should be recognised as a matter of principle. The criteria of incompatibility and a range of appropriate measures for addressing conflicts of interest should be set out clearly.[25]

## Protection of sources

One of the most important functions of potential media legislation is to protect the media's public watchdog role and thus its ability to investigate matters of public significance. At the heart of this protection is a right not to disclose a source's identity (in other words, protection of source confidentiality). It is broadly derived from the right to seek, receive and impart information that is guaranteed in Article 19 of the International Covenant on Civil and Political Rights.[26] A journalist can be compelled to reveal the identity of their sources only in genuinely exceptional circumstances (investigations of the most serious crimes or prevention of serious harm to the physical integrity of other persons) and only on the basis of a judicial decision.

Effective protection of source confidentiality further requires auxiliary protections in the context of surveillance and searches and seizures. The Committee of Ministers of the Council of Europe recommends that interception and surveillance should not be applied if their purpose is to circumvent protection of source confidentiality.[27] This approach is supported by practices at the national level.[28] National laws also provide for additional safeguards in respect of searches of journalists and their homes or offices, including their papers, hard drives and other digital devices. Those tend towards protecting journalists from searches and seizures of their work product.[29]

Protection against compelled disclosure of sources should be not be limited to the immediate reporting person, but should also apply to editors, publishers and others engaged in the work. This protection (just as any other journalistic privileges and rights) should not be made available to professional journalists only. Rather, it should be applied functionally, covering any person or entity "regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."[30]

The Media Law provides some useful protection of journalists' ability to perform their work, but it is far from complete. Protection of sources is briefly addressed in **Article 18**, which states that a media organisation is "not allowed to identify a person who has provided information on condition of anonymity, except for situations where this has been demanded by court." Thus, the law approaches protection of source identity as the media's obligation rather than a right. This is not problematic per se. In fact, it usefully extends protection directly to the source so they do not need to rely on the journalist's good will to conceal their identity. However, the provision is seriously deficient in other ways.

First, it applies to media organisations but not to journalists individually. It may be quite beneficial in situations where the reporting journalist is formally employed by a media organisation, insofar as it covers both the journalist (as a staff member) and the organisation as a whole. However, it excludes freelance journalists or other individuals who are not formally employed in media but must be able enjoy this protection because of the nature of their work. It is imperative that this privilege is expressly extended to individual journalists/ media workers regardless of their professional affiliation.

Second, Article 18 allows for compelled disclosure whenever it is "demanded by court". While the mandatory involvement of the judiciary is an essential safeguard, it is not sufficient if the law does not specify circumstances in which the court can make such a demand. As was mentioned above, confidentiality of sources can be overridden only in very serious and exceptional circumstances. Under international and regional human rights standards[31] and in comparative national laws,[32] any demand to obtain protected information should be strictly limited to situations that meet the following criteria:

- The information is necessary to prevent imminent serious bodily harm, or to prove the innocence of a party;
- The information is absolutely necessary for a central issue in the case, relating to guilt or innocence, and the request for such information is limited in scope;
- The information is unavailable by other means, where gaining access has already been tried by the relevant authorities, and they must prove that they have exhausted all other possible means of obtaining the information;
- The request is made by the primary party to the case – that is an individual or body with a direct, legitimate interest; and
- The judge finds that public interest in the disclosure of the source far outweighs the public interest in the free flow of information.[33]

In the same fashion, Kyrgyzstan's law should be clear and precise about grounds for compelling disclosure, limiting them, at the very least, to serious crimes and serious threats to physical integrity of persons. The law should also envisage additional protection of source confidentiality in the context of surveillance and searches.

## Rights and duties of journalists

**Article 20** of the Law on Media addresses "the rights and duties" of journalists. While, generally speaking, the statement of the rights of journalists is a positive, some of the 'rights' included in this provision do not carry any legal value as they refer to routine elements of journalistic work which journalists are free to perform without being expressly authorised and which are not backed up by any corresponding obligations on third parties.

The genuinely useful rights contained in this article that meaningfully support journalists' ability to investigate are related to freedom of movement (the right to access to crisis areas

and areas where public assemblies are taking place), access to information (the right to be received by public officials in connection with journalistic work), and personal protection (the author's right to conceal their identity).

It is doubtful whether the Law's statement of journalistic duties is appropriate. Those duties (to verify the accuracy of information and to credit sources when so requested by them) refer to journalistic working methods. While no-one would dispute that the media should strive for accuracy, in practice this should be a matter for self-regulation rather than being prescribed by law. ARTICLE 19 notes that a more extended list of duties is provided in the Law on the Protection of the Professional Activities of the Journalist. In this regard, serious consideration should be given to removing all statements of journalistic duties from the legislation in favour of a self-regulatory regime. In any event, the duties should be so stringent as to infringe on the right of journalists to be critical in their reporting or publish anonymously, if they so wish.

## Prohibited content

**Article 23** of the Media Law lists types of expression that media are not allowed to disseminate. This wide-ranging list partly duplicates restrictions that are provided for in other legislation, including the Criminal Code, but it also includes additional categories of restricted content. The latter include, among others, expression "insulting the civic honour of peoples" and "offending the religious feelings of believers or clerics." They also include "knowingly false information" without requiring any specific harm caused by the dissemination of such information.

Most of these restrictions, both those that are duplicated elsewhere in national law and those that are unique to this provision, are not compliant with intentional standards. Some of them are purposefully designed to target legitimate, albeit potentially shocking or offensive, expression (including the examples mentioned above). Others purport to target speech that can be legitimately restricted under international law but are formulated in an overly broad manner, thus failing to meet the necessary criteria.

The restrictions are made even more problematic by the fact that a media organisation can be permanently closed for being found in breach of any of them (Article 8 allows forcible closure of a media organisation as a penalty for any violation of the Law on Media). This fact by itself makes most of those restrictions disproportionate and therefore incompatible with the right to freedom of expression, irrespective of any separate issues raised by their substantive scope.

Content-based restrictions on expression are one of the most problematic areas of Kyrgyzstani law in terms of freedom of expression, and they have profound negative effect on the free and independent functioning of the media. However, it is not necessary to provide a detailed examination of them for the purposes of the present analysis. Suffice it to say that all content restrictions should be removed entirely from media-specific legislation, including the Media Law. There should not be content restrictions that are specific to media. Nor should general restrictions existing in other legislation (e.g. prohibition of hate speech inciting violence or discrimination) be duplicated in media laws. As the special freedom of expression mandated holders pointed out in their 2003 Joint Declaration, "[m]edia-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse."[34]

## Suspension or closure of media outlets

**Article 8** of the Media Law provides that a media outlet can be forcibly suspended or terminated by court decision if it is "in violation of the requirements of the present law." The law does not include any further criteria for the application of those sanctions - or any other clarifications that might assist in determining when those sanctions would be appropriate. Nor does it provide for any other possible penalties.

Suspension and termination are the most severe sanctions that can be imposed on a media organisation. To comply with the proportionality test embodied in Article 19(3) of the ICCPR, they must be allowed only in the most exceptional circumstances involving very serious unlawful conduct where less restrictive measures would not be sufficient. However, the Media Law does not provide for any less restrictive alternatives, while apparently affording the State complete discretion in deciding whether to suspend or terminate a media outlet for violating any of the requirements contained in it, no matter how trivial - as well as in choosing between the two measures. With discretion so broad, the mandatory involvement of the judiciary cannot serve as a meaningful safeguard against the provision's arbitrary or disproportionate application.

It should be mentioned that, while they are outside the scope of this analysis, sanctions against media organisations are also envisaged in other legislation (most notably, the Law on Countering Extremist Activity). Sanctions under Article 8 of the Media Law, however, are exclusively for violations of the Media Law itself. Requirements that the Media Law imposes on media outlets are limited to content regulation, including the content restrictions under Article 23, the regulation of what is in effect internal working methods, and similar provisions aimed at restricting rather than protecting media work. Since, for reasons discussed above, it is recommended that those requirements be removed from media legislation, the same recommendation logically extends to any sanctions envisaged for their violation.

Where, however, the inclusion of sanctions is appropriate, it is important that the least intrusive alternatives are envisaged and prioritised, with closures, suspensions and similarly onerous measures being allowed only as a last resort. The law must also ensure that sanctions are appropriate and proportionate to the gravity of the violation committed, with general preference given to measures based on self-regulation.

## Defamation

To be regarded as defamatory, a statement must meet several criteria at once. It must be false. It must be of a factual nature. It must cause damage. That damage must be to the reputation of the person concerned, which in turn means that the statement in question must have been read, heard or seen by others.

In Kyrgyzstan, the key legislative provision on the issue of defamation is Article 18 of the Civil Code. While that provision does not spell out all the essential elements of a defamatory statement listed above, they have been read into it by courts.

## Need for enhanced protection in matters of public interest

Defamation law can be easily weaponised by public officials and other powerful individuals to punish intrusive journalists and to stifle honest reporting. It can have a significant chilling effect on the media's ability to act as a public watchdog. This is why it is essential that statements on matters of public concern should be afforded heightened protection against defamation suits. Such enhanced protection manifests itself in the allocation of burden of proof and the so-called defence of reasonable publication.

When a statement involves a matter of public concern, the burden of proving that it is defamatory, including proving its factual falsity, should be placed on the plaintiff rather than the defendant. This principle is well established in many national jurisdictions, and it has been endorsed by the three special international mandates for promoting freedom of expression in their Joint Declaration of 2000.[35] It is also included in an authoritative set of Defamation Principles that were developed by ARTICLE 19 and other international experts on the basis of an extensive analysis of international law and best practice.[36]

Even if a statement on a matter of public concern has been proven to be factually false, the defendant should be able to benefit from the defence of reasonable publication. That is, the defendant should not be held liable if they had good reasons to believe that the statement was true at the time of its publication.[37] The standard of reasonable publication is employed in various national jurisdictions, including Japan, South Korea, India, and South Africa. It has also been recognised by the European Court of Human Rights.[38]

Such enhanced protection for statements on matters of public concern is currently missing from Kyrgyzstani law. However, it will be more appropriate to address this issue in the framework of defamation law rather than confining it to media legislation. The purpose of an enhanced protection is to protect open public discourse rather specific categories of speakers. Examples of other contexts in which it may be equally relevant include academic research and civil society activism. Consequently, this protection be made available to anyone.

## Other exemptions from liability

**Article 26** of the Law on Media does provide for certain other exemptions from the media's liability for disseminating factually incorrect statements. Those exemptions apply to:

**(i)** statements derived from official documents and announcements;

**(ii)** information received from news agencies and the press services of state bodies or non-governmental organisations;

**(iii)** "word-for-word" reproduction of public speeches; and

**(iv)** statements made by third parties during live broadcasts.

The exemptions under Article 26 roughly correspond to two well-established categories of exemption from liability under defamation law, namely, privileged statements and words of others. However, they are worded too narrowly and restrictively. In particular, they are

far too restricted in terms of source material, context, and the manner in which third-party statements are reported. The exemptions available under Article 26 should be broadened up to cover:

- Any fair and accurate reporting (i.e. not necessarily "word-for-word") of statements made in any 'privileged' settings (i.e. settings in which speakers enjoy immunity from liability under defamation law), including statements made in the proceedings of legislative bodies, judicial proceedings, and formal public inquiries; statements contained in official reports of certain public bodies, etc.;

- Any fair and accurate reporting of material where the official status of that material justifies the reporting, such as official documents issued by foreign courts or legislature or by a foreign organisation, etc.;

- Reporting or reproducing third-party statements on matters of public interest where those statements are not endorsed by the reporting individual(s) and it is made clear that they were originally made by someone else.

ARTICLE 19's Defamation Principles provide useful guidance on the exact scope of the above exemptions.[39] However, as with the issue of enhanced protection in matters of public concern, the relevance of such exemptions is not confined to the media. Their regulation should not be limited to media-specific legislation but should be included in the general framework of defamation law.

## The right to correction and the right of reply

**Article 17** of the Law on Media establishes a right to correction of factually inaccurate information. In fact, however, it includes two distinct rights: the right of correction and the right of reply. While it is important to provide for non-pecuniary remedies against defamatory statements, in their current form they do not meet the proportionality requirement under Article 19 of the ICCPR.

First of all, the right of correction guaranteed in this provision is unduly broad in its scope of application. It extends not only to defamatory statements of fact (i.e. false statements that are damaging to one's reputation) but also to any factually inaccurate information - even, it would seem, when the contested information has no specific connection to the person or entity wishing to exercise the right of correction. Instead, the right of correction should only be available to those whose rights have been harmed by erroneous statements.

Second, the Media Law leaves the choice between requesting a correction and requesting the publication of a reply at the discretion of persons wishing to exercise those rights. Instead, the right of reply should only apply when the right of correction is not sufficient to redress the damage suffered.[40]

Finally, the right of reply is formulated in a way that is both too restrictive in respect of media obligations (e.g. it requires that the reply must be published on the same page and in the same font as the original statement) and too broad and unspecific in terms of

what the replying person is entitled to (e.g. it does not establish any limits on the scope and length of the reply). In this regard, ARTICLE 19's principles of defining defamation provide useful guidance:[41]

- A reply should only be available to respond to incorrect facts or in case of a breach of a legal right, not to comment on opinions that the reader/viewer does not like or that present the reader/viewer in a negative light;
- The 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.

# Conclusions

The Media Law falls well short of establishing a comprehensive framework for the free and independent functioning of the media in Kyrgyzstan. Many of its provisions are unduly restrictive and, therefore, not compliant with international requirements. At the same time, most of the key guarantees and protections that the media needs to fulfil its public watchdog role are insufficiently addressed or missing altogether (not only in the Media Law itself but in other legislation, too).

The Media Law is based on an outdated and conceptually unsound understanding of media which does not allow to capture the complexity of the modern media landscape and appears to exclude digital media completely. Determining what is media for regulatory purposes should be based on the flexible of application of various criteria, including, in particular, the media's purpose and underlying objectives, editorial control, and outreach and dissemination to a large audience.

Print media, broadcast media, and online media have their own separate regulatory needs and so require different approaches – in particular print and online media should not be subject to statutory regulation. There are, however, several cross-cutting issues that are crucial for all media. They include media ownership, protection of sources, protection against misuse of defamation, content restrictions, and media responsibilities. None of these issues are addressed in the Media Law (or, for that matter, other legislation) in a manner that would be both comprehensive and compliant with freedom of expression. In this briefing paper, ARTICLE 19 has highlighted main flaws and gaps in the current legislation in these areas and proposed the direction for improving media laws and other media-related legislation in light of international and comparative standard and best practices.

Finally, it is worth reiterating that, while ARTICLE 19 understands the necessity of reforming existing legislation in the current context, we believe that in the long-term, Media Law reform focusing on developing or improving specialised legislation dedicated to specific types of media and/or specific media-related issues is a more effective approach than an attempt to address all or most of those topics in a single law. ARTICLE 19 stands ready to provide further advice on concrete aspects of media legal reform on an as-needed basis.

# About ARTICLE 19 and the Media Policy Institute

**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 Europe and Central Asia team at europe@article19.org.

**Media Policy Institute** has been operating in Kyrgyzstan since 2005 as an independent non-profit organization in the field of freedom of speech, expression and information and contributing to the development of the rule of law. Media Policy Institute's expert lawyers analyse initiatives and proposals for national legislation regulating freedom of speech and the media, as well as access to information. On the basis of the materials developed, the Media Policy Institute conducts campaigns to promote the rights of journalists and the media, as well as the development of national media legislation to bring it into conformity with Kyrgyzstan's international obligations. Media Policy Institute lawyers defend the interests of journalists and the media court and advise citizens on various issues related to freedom of speech and access to information through its regularly-published articles, analyses and research pieces.

# Endnotes

1 Adopted by the United Nations (UN) General Assembly on 10 December 1948, Resolution 217A(III).

2 UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

3 OSCE, Helsinki Final Act, 1 August 1975.

4 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990; see in particular paras 9.1 and 10.1.

5 Charter of Paris for a New Europe, CSCE Summit, November 1990.

6 Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paras 36-38

7 OSCE Istanbul Summit, 1999, para 27 and the Charter for European Security, para 26, adopted at the same meeting.

8 See Article 9 of the African Charter on Human and Peoples' Rights (African Charter), 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Article 13 of the American Convention on Human Rights, 22 November 1969; and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), 4 November 1950.

9 UN Human Rights Committee, *Velichkin vs Belarus*, Comm. No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).

10 *C.f.* the European Court for Human Rights (the European Court), *Handyside vs the UK*, 6 July 1976, para 56.

11 ARTICLE 19, Camden Principles on Freedom of Expression and Equality, Principle 12.1.iii

12 OHCHR, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 2012. In particular, it clarifies that regard should be had to six part test in assessing whether speech should be criminalised by states as incitement.

13 See, e.g. European Court, *Thorgeirson vs Iceland*, 25 June 1992, para 63; or *Castells vs Spain*, 24 April 1992, para 43.

14 European Court, *Dichand and others vs Austria*, 26 February 2002, para 40.

15 See, e.g. Human Rights Committee, General Comment No. 34 on Article 19 of the ICCPR (Freedoms of opinion and expression), 12 September 2011, UN Doc. CCPR/C/GC/34, para 39. See also Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Minsters to member states on a new notion of media, 13 May 2013, para 59.

16 *Ibid*. CM/Rec(2011)7, para 59

17 See Joint declaration on freedom of expression and the internet, 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, 22 May 2011.

18 See, e.g. ARTICLE 19, Guide to the Law of Georgia on Freedom of Speech and Expression, commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe, April 2005.

19 Recommendation CM/Rec(2011)7, *op.cit*.

20 General Comment No. 34, *op.cit.*, para 40.

21 Council of Europe, Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership, annex, para 3.1.

22 *Ibid*., paras 3.3-3.10.

23 *Ibid*., para 4.4.

24 *Ibid*., para 4.7.

25 *Ibid*., para 3.6.

26 See 2015 Annual Report of the Special Rapporteur on promotion and protection of the right to freedom of opinion and expression, A/70/361, para 15.

27 Council of Europe, Committee of Minsters Recommendation R(2000)7, appendix, Principle 6(a).

28 See 2015 Report of the Special Rapporteur on freedom of expression, *op. cit*,, para 23.

29 *Ibid*., para 24.

30 Recommendation R(2000)7, *op.cit.*, definition (a).

31 See, e.g. ARTICLE 19 Response to the Special Rapporteur Consultation on Protection of Journalists' Sources and Whistle-blowers, July 2015; the Joint Declaration on Defamation of Religions and anti-terrorism and anti-extremism, legislation, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, 15 December 2008; Recommendation No. R (2000) 7 of the Committee of Minister, *op. cit*.

32 At the national level, over 100 countries around the world have given journalists specific legal rights to protect their sources. See the comprehensive international survey of source protection, Privacy International, Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources, 2007; ARTICLE 19, *Ed Moloney and Anthony McIntyre, Petitioners, vs United States*, 19 December 2012.

33 ARTICLE 19's submission to the UN Special Rapporteur, *op.cit*.

34 Joint Declaration on the Regulation of the Media and on the Restrictions on Journalists, 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.

35 Joint Declaration: Current Challenges to Media Freedom, 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, 30 November 2000.

36 ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, Revised version, 2017, Principle 7(b). The Principles have been endorsed by, among others, the United Nations Special Rapporteur on Freedom of Opinion and Expression and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media.

37 *Ibid*., Principle 12.

38 See, e.g., European Court, *Bladet Tromsø and Stensås v. Norway*, 9 July 1998.

39 Defining Defamation, *op cit*., Principles 14 and 15.

40 *Ibid.*, Principle 18(c)

41 *Ibid*., Principle 18(d)

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