

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 52/9.

I am writing to share my comments regarding the proposed draft Law on Mass Media (hereafter: `the draft Law`) that is currently under consideration in Kyrgyzstan, of which on 13 May 2023 a 5th draft version was published by the Presidential Administration for consultations until 14 June 2023. The draft Law raises several questions in relation to the freedom of expression and media freedom in Kyrgyzstan, some of which I will highlight in this letter.

International legal framework

Before raising specific issues in relation to the draft Law, I would like to set out the international framework covering freedom of expression and media freedom.

Article 19 of the International Covenant on Civil and Political Rights (hereafter: ICCPR)¹, provides that “*everyone shall have the right to hold opinions without interference*” and that “*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.*” This right includes not only the exchange of information that is favourable, but also that which may criticize, shock, or offend.²

Restrictions on the right to freedom of expression must be compatible with the requirements set out in article 19 (3), that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate (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 State has the burden of proof to demonstrate that any such restrictions are compatible with the Covenant. The Human Rights Committee recalled that the relationship between right and restriction and between norm and exception must not be reversed. Furthermore, the Human Rights Committee clarified that “*penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government, can never be considered to be a necessary restriction of freedom of expression.*”³

The Human Rights Committee has held that “*a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of*

¹ Ratified by Kyrgyzstan on 7 October 1994.

² CCPR/C/GC/34 para. 7.

³ CCPR/C/GC/34, para42

opinion and expression and the enjoyment of other Covenants rights” and that it constitutes “*one of the corner stones of a democratic society*”. Free, independent and pluralistic media are also crucial to achieve sustainable development.⁴ There is a corresponding right of the public to receive media output. The press and other media should be able to comment freely on public issues without censorship.⁵ States must ensure the independence and plurality of media, both traditional and online media, including by guaranteeing editorial freedom and ensuring that funding does not undermine the media’s independence.⁶

The Human Rights Committee has held that regulatory mechanisms and legislative frameworks for the media should be adapted and tailored to different forms of media, including print, broadcast media and the internet, and that they should be in line with international standards including article 19 (3) ICCPR. Any refusal to permit the publication of certain content should fully adhere to the standards for legitimate restrictions of article 19 (3) ICCPR.⁷ Furthermore, states parties should not impose burdensome administrative and financial obstacles such as onerous licensing conditions and fees. Any such conditions should be “*reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant.*”⁸

Restrictions on internet-based outlets, including blogs and websites, should also comply with the principles set out in article 19 (3) ICCPR. The human rights committee has further clarified that such restrictions *generally should be content-specific*; and that “*generic bans on the operation of certain sites and systems are not compatible with paragraph 3,*” and that “*it is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.*”⁹ When it comes to regulation of the online space, I have cautioned in several reports that digital regulation by Government should not be used to restrict freedom of expression online beyond what is permissible under international law.¹⁰

Considering that a wide range of actors can engage in journalistic activities, including so called ‘citizen journalists’ and bloggers, generalized systems of registration and licensing of journalists are not compatible with article 19 (3). The Human Rights Committee has clarified that only limited accreditation schemes are permissible, in case this is necessary to provide journalists with privileged access to certain places and/or events and provided that such schemes are applied in a non-discriminatory manner and in accordance with article 19 and other provisions of the ICCPR.¹¹ Furthermore, in my report on media freedom in the digital age, I have noted that journalists are not above the law, but that by virtue of their function and the public interest in disclosure, they are entitled to specific legal protection. States are obliged not only to refrain from arbitrary restraints, but also put in place legislative and regulatory measures in line with international human rights standards to enable journalists to carry out their work safely and without hindrance.¹²

⁴ A/HRC/53/25, para 3.

⁵ CCPR/C/GC/34, para 13.

⁶ CCPR/C/GC/34, para 40.

⁷ CCPR/C/GC/34, para 39.

⁸ *Idem.*

⁹ CCPR/C/GC/34, para 43.

¹⁰ R CCPR/C/GC/34, , para 94.

¹¹ CCPR/C/GC/34, para 44.

¹² A/HRC/50/29, para 13.

Regarding defamation, the Human Rights Committee has underscored that defamation laws must “not serve, in practice, to stifle freedom of expression”, and that States should consider decriminalizing defamation. The Committee underlined the importance of crafting defamation laws with care, in order to ensure full compliance with article 19 (3). This includes avoiding excessive punitive measures as well as including valid defences, including the public interest in the subject matter and the defence of truth. The Committee also stressed that the application of the criminal law should only be countenanced in the most serious of cases and that imprisonment is never an appropriate penalty. I also wish to recall the United Nations General Assembly Resolution 76/173, on the Safety of Journalists and the Issue of Impunity, adopted in 2021. The resolution urges Governments to ensure that defamation laws are not misused to censor and interfere with journalists’ work and, “where necessary, to revise and repeal such laws, in compliance with States’ obligations under international human rights law”.

Article 20 (2) of the ICCPR prescribes that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. It has a high threshold as it requires the fulfilment of three components: a) advocacy of hatred; b) advocacy which constitutes incitement and c) incitement likely to result in discrimination, hostility or violence.¹³

Issues to review

In relation to the draft Law, I would like to share with you the following observations:

Overly broad and generalized application of the law

Article 9 on the **scope of application** of the draft law stipulates that the “*the mass media encompass periodical printed publications, television and radio broadcasts, websites on the internet telecommunications network and other electronic media, as well as news agencies that are registered as mass media and engage in the collection, processing, and distribution of information-based communications and materials.*”

The draft Law thus takes an all-encompassing approach and is applicable to all different kinds of media. While regulation of certain media can be fully in line with international standards, I caution against a ‘one-size-fits-all’ approach, which risks creating overly broad and vague obligations in relation to very distinct forms of media. This diminishes legal certainty and potentially opens doors for abuse of laws and far-reaching restrictions on freedom of expression. In this case the draft Law seems to equate internet websites to traditional media, introducing new registration requirements disregarding specific characteristics of the internet, such as its transnational nature. As such, the draft Law would create far reaching and disproportional powers for the Government of Kyrgyzstan to regulate the online space which could seriously undermine the free flow of information online and could impede the right of the citizens of Kyrgyzstan to access information of all kinds online. This risk is exacerbated by the fact that, in the current wording, the draft Law does not seem to be limited strictly to media outlets, but could be applied to all kinds of websites that spread any type of information.

¹³ A/67/357, para 43.

Mandatory registration of the mass media

Chapter 3 of the draft law covers the mandatory `state registration` of the mass media. Pursuant to article 16 (1), *“mass media shall carry out its activities after its state registration, unless the mass media outlet is exempt from registration requirements under this law.”* Article 16 (2) of the draft law holds that *“the website on the Internet information and telecommunications network shall be registered by the Ministry of Digital Development of the Kyrgyz Republic as an online mass media outlet in the manner prescribed by the Cabinet of Ministers of the Kyrgyz Republic.”* Article 17 (1) of the draft Law contains an extensive list of issues to be filed for the application for registration, including the form and frequency of publication, the maximum circulation of the mass media outlet, the sources of funding, information about the applicant’s status as a founder, owner, editor, publisher or distributor of other mass media outlets, as well as the possible topics and/or areas of specialization. Pursuant to article 19 (3), exempt from registration are the *“mass media established by public authorities and local self-government bodies solely for publication of their official communications and materials, normative legal acts.”*

The mandatory registration requirement for all forms of media would create undue barriers for media outlets to operate. The draft Law appears to disregard the diversity of the media, which also includes citizen-journalism, bloggers and others that conduct their journalistic activities in a more informal, unstructured, or ad hoc manner. It also appears that the issues to be filed for registration are more extensive than for other legal entities such as commercial and non-commercial organizations. The requirement to inform about the approximate subject matter, specialization, expected frequency of release, maximum volume of media outlets, sources of funding, information about which other media outlets the applicant is the founder, owner, editor-in-chief etc. would open the door to what could be considered undue government interference with the editorial work of media outlets, which could amount to censorship. Lastly, the requirement for registration of internet websites is still to be defined by the Cabinet of Ministers of the Kyrgyz Republic, which adds to the legal uncertainty and the ambiguity of the implications of this law for the online context, including with regard to its extraterritorial application and possible extrajudicial imposition of restrictions on the media/internet.

Restrictions on foreign media

Pursuant to article 49 (3), *“[d]istribution of a foreign TV channel or a foreign radio channel within the territory of the Kyrgyz Republic is permitted after it has been registered in accordance with the requirements of this Law.”* Article 49 (4) provides that distribution of products of a foreign periodical is only possible with the permission of the Ministry of Justice. Article 3 (6) contains a broad definition of `distribution` of a mass media product, including the *“sale, subscription, delivery, handing out of a periodical, audio or video recording of a program, broadcasting of a television or radio channel (television or radio broadcasting), broadcasting of a television or radio program as part of a television or radio channel, demonstration of a newsreel program, granting access to a network publication, or other methods of distribution.”*

The provisions outlined above seemingly restrict all kinds of foreign media, including foreign internet websites, from being accessible without prior approval of the Government. This could have serious consequences, for example in relation to the

accessibility of live online streaming services of foreign media in Kyrgyzstan, and risks to seriously impede the right of Kyrgyz citizen to access information from diverse sources. The draft Law seems to disregard the transnational nature of the internet potentially shutting off access to information from foreign sources for Kyrgyz citizens, undermining the free flow of information.

Severe restrictions on content

Article 5 of the draft Law prohibits the `abuse` of the freedom of expression, freedom of speech and press, and the right to receive and disseminate information.

According to article 5 (1) it is prohibited to:

- “1) *distribute materials that publicly incite violent seizure of power or violent alteration of the constitutional order of the Kyrgyz Republic;*
- 2) *propagate war, incite strife based on nationality, race, region, or religion;*
- 3) *distribute materials that publicly incite terrorist activity or publicly justify terrorism, as well as other extremist materials;*
- 4) *distribute materials that promote pornography, same-sex marriage, materials that harm the health and morality of the population, the cult of violence and cruelty;*
- 5) *distribute materials that promote discrimination against individuals based on gender, race, language, disability, ethnicity, region, religion, age, political or other beliefs, education, origin, property, or any other status;*
- 6) *infringe upon the privacy of individuals, violate their honor and dignity, and damage their business reputation;*
- 7) *disclose information about an individual’s private life without their consent, unless authorized by law or necessary to protect public interests and/or if measures have been taken to prevent unauthorized identification of third parties;*
- 8) *disclose information that constitutes a state secret or other legally protected secrets;*
- 9) *promote or disseminate information about the methods and techniques of development, production, use, and acquisition of narcotic drugs, psychotropic substances, and their precursors.*

Furthermore, pursuant to article 5 (2), “[i]t is forbidden to disseminate materials that violate the principle of the presumption of innocence of an individual.”

Article 54 introduces liability for the “abuse of freedom of speech and press” and article 55 introduces an obligation for compensation for “moral harm”. Moral harm is defined in a broad way, including defamation of their honour, dignity, business reputation, or other forms of non-material harm. Mass media, including

journalists and responsible officials are obliged to provide compensation in the amount specified by the Court if found guilty.

While I recognize that the freedom of expression is not absolute, and that it can be restricted in certain circumstances, I wish to reiterate that all such restrictions need to comply with article 19 (3) ICCPR. Furthermore, I recognize the obligation on states deriving from article 20 ICCPR to prohibit propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The restrictions on freedom of expression in the draft Law *prima facie* go beyond the permitted restrictions on freedom of expression due to the use of vague and unspecified terms such as 'terrorism' and materials that can violate 'honour and dignity' of individuals and damage their 'business reputation'. In my various reports, I have expressed my concern about the 'weaponization' of laws against journalists and that such vague and overly broad terms can easily be abused to unduly limit the freedom of expression. Such ambiguous laws also create legal uncertainty, having a chilling effect on press freedom and freedom of expression more broadly.

I have reservations about the expansion of article 5 of the draft Law to materials promoting same-sex marriages, as well as those that are harmful to the health and morals of the population. This could undermine access to information, including in the field of sexual and reproductive health and rights, and would introduce discrimination against individuals on the basis of sexual orientation and gender identity.

Restrictions on ownership of mass media

Pursuant to article 10 of the draft Law, the right to establish mass media outlets is reserved for citizens of the Kyrgyz Republic only, with paragraph 4 explicitly excluding foreigners and stateless persons from ownership. Article 50 requires that foreign media outlets and their correspondents can operate in the Kyrgyz Republic only after registration / accreditation with the authorized state entities.

This provision seems *prima facie* discriminatory and disproportionate. I wish to remind your Excellency's Government that all registration and accreditation schemes should be strictly necessary and should comply with all provisions of the ICCPR, including the prohibition of discrimination. By prohibiting the establishment of mass media by foreigners, state-less persons, the law effectively withholds a large part of the population from opportunities to engage in journalism and to express themselves, especially in light of the broad definition of 'mass media' in this law.

Definition of journalist and accreditation requirements

Pursuant to article 32 (1) and (2), only mass media outlets registered under this law have the right to request accreditation of their journalists with state or local self-government bodies. According to article 32 (4), such accredited journalists have the right to attend meetings, conferences, and other events organized by the bodies that grant accreditation, unless it has been decided to hold a closed event. Pursuant to article 32 (5) "a journalist may have their accreditation revoked if they or the editorial office of a mass media outlet have violated the established accreditation rules or disseminated false information that tarnishes the honour, dignity, or business reputation of the state or local self-government body that granted the accreditation".

Article 30 (1) of the draft Law defines the professional status of a journalists as “1) full-time employees of editorial offices engaged in editing, creating, collecting or preparing communications and materials for newspapers with large press runs and other mass media outlets whose content is distributed exclusively within one enterprise, organization or institution; 2) authors who are not connected with the editorial office by employment or other contractual relations, but are recognized by it as its freelance authors or correspondents in performing assignments of the editorial office.”

Article 32 stipulates a strict accreditation scheme that is only accessible to those labelled a ‘professional’ journalist in accordance with article 30. The draft Law introduces a narrow understanding of journalism and disregards the fact that a variety of actors can engage in journalistic activities, including citizen journalists and bloggers. The possibility to withdraw accreditation on the ground of dissemination of “false information that tarnishes the honour, dignity or business reputation of the state or local self-government body that granted the accreditation risk to be abused as sanction against those reporting critically on public affairs.” The constant fear of having one’s accreditation withdrawn on the basis of what could be understood as vague and sometimes subjective grounds could lead to self-censorship, negatively impacting press freedom and the right of the public to be informed. I also wish to reiterate the conclusion of the Human Rights Committee that general state systems for the registration and licensing of journalists are incompatible with article 19 (3) ICCPR.¹⁴

Duties and rights of journalists

Article 31 of the draft law contains a description of rights of journalists and article 33 an extensive list of ‘duties’ of journalists. The list of duties includes in article 33 (3) that journalists “in the course of their professional activities, must adhere to the Constitution and laws of the Kyrgyz Republic, while respecting the rights, legitimate interests, business reputation, honour, and dignity of citizens, officials and legal entities.”

Article 34 of the draft Law contains a prohibition of the “abuse” of rights by journalists, stating in paragraph 1 that “the rights of journalists cannot be used for the purpose of concealing or falsifying publicly significant information, spreading rumours disguised as reliable reports (fake news), or gather information on behalf of external legal entities or organizations that are not mass media outlets.” Article 34 (2) states that “the use of a journalist’s right to disseminate information with the intention of defaming individuals or specific groups based solely on their gender, age, race, regional or national origin, language, religion, profession, place of residence or work, or in relation to their official position or political beliefs is strictly prohibited.”

The draft Law appears to use broad and extensive grounds for the ‘abuse of rights’ by journalists, including on the basis of vague terms such as respecting the ‘business reputation, honour and dignity of citizens, officials and legal entities’. In order to respect the independence of the media, many of the ‘rights and duties’ described in the law could be covered through self-regulation of the media sector instead of Government imposed regulations. The draft Law also includes a prohibition of defamation by journalists, which could be mis-used to stifle freedom of expression

¹⁴ CCPR/C/GC/34, para 44.

and risks to be abused to prevent criticism of state bodies and public figures, including through strategic lawsuits against public participation (SLAPPs). I wish to reiterate that defamation laws must be drafted with care and in full compliance with article 19 (3). This entails *inter alia* avoiding excessive punitive measures as well as including valid defences, including the public interest in the subject matter and the defence of truth. As currently drafted, the law lacks precision and does not seem to meet the requirements set out in article 19 (3) ICCPR, undermining the freedom of expression.

Concluding observations

In short, the draft Law on mass media, if adopted, would have severe implications for the freedom of expression in Kyrgyzstan, some of which I have sought to highlight in this letter. I would like to urge your Excellency's Government to pause the adoption process of this law, to seek sufficient international support and expertise and ensure an inclusive consultation process. I stand ready to engage with your Excellency's Government to improve national frameworks for media and freedom of expression in Kyrgyzstan to ensure full respect for freedom of expression in line with Kyrgyzstan's international obligations.

As it is my responsibility under the mandate provided to me by the Human Rights Council to seek to clarify all matters brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis of the draft Law on mass media.
2. Please provide your observations on how the envisioned draft Law on mass media guarantees press freedom and freedom of expression in full compliance with article 19 ICCPR, including in relation to the free flow of information online and access to diverse sources of information for the citizens of Kyrgyzstan, including foreign sources.
3. Please explain how the draft law complies with other provisions of the ICCPR and international human rights standards, in particular in relation to the prohibition of discrimination, including on the ground of sexual orientation and gender identity.
4. Please explain how the Government ensures an inclusive consultation process and takes into account expertise to ensure compliance with international human rights standards.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I stand ready to provide Your Excellency's Government with any technical advice it may require in ensuring that the draft Law is fully compliant with international human rights obligations.

Please accept, Excellency, the assurances of my highest consideration.

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression