Organization for Security and Co-operation in Europe

The Office of the Representative on Freedom of the Media

COMMENTARY ON THE DRAFT LAW OF THE KYRGYZ REPUBLIC

"On Amendments and Addenda to the Kyrgyz Republic 'Law on the Mass Media'"

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Having analyzed the proposed Draft Law of the Kyrgyz Republic "On Amendments and Addenda to the Kyrgyz Republic Law 'On the Mass Media'" (referred to hereafter as "the Draft Law") in the context of the Constitution and current legislation of the Kyrgyz Republic, and international norms on freedom of expression and freedom of the media, the expert, commissioned by the Office of the OSCE Representative on Freedom of the Media, has arrived at the following conclusions:

BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS

The right to freely express one's opinions and the right to freedom of the media are guaranteed by documents of the United Nations and the Organization for Security and Cooperation in Europe, which the Kyrgyz Republic has stated it shall comply with.

Having analyzed the proposed Draft of the Kyrgyz Republic Law "On Amendments and Addenda to the Kyrgyz Republic Law 'On the Mass Media'" in the context of the Constitution and current legislation of the Kyrgyz Republic, and international norms on freedom of expression and freedom of the media, the expert has arrived at the general conclusion that the above Draft Law, despite certain obvious merits, contains provisions dangerous to the development of media freedom in the Kyrgyz Republic, and requires additional revision in consideration of the below recommendations, which are based on international law. Both the Constitution of the Kyrgyz Republic and the Republic's obligations as a member of the OSCE demand this.

An important feature of the Draft Law is the insertion of the article "Basic Concepts Used in This Law" (Article 1). The insertion of this article with **definitions** of the law's main categories allows it to be interpreted clearly and unambiguously. The new definition of "mass media," which allows it to be applied in legal practice, deserves praise in particular. At the same time, certain basic concepts formulated in the Draft Law evoke fears that they might lead to restrictions of media freedom, especially the freedom of private individuals to act independently as media founders, agents, and publishers. One positive aspect is that the concept of unacceptable **censorship** is examined in detail. At the same time, despite the positive effect that the adoption of this provision should have, we must consider its divergence from the corresponding provisions of the Kyrgyz Republic Law "On Protecting the Professional Activities of Journalists." This is, unfortunately, far from the only instance of a lack of coordination between the provisions of two fundamental laws in the area of journalistic activity.

The Draft Law introduces unwarranted **prohibitions on the founding** of media by foreign individuals and legal entities, and by individuals who are stateless. In addition, these individuals and entities are forbidden to own, use, or possess and/or control more than 49% of the stock (common or capital shares) of a legal entity that is a media proprietor. Such restrictions run contrary to international law and create doubts as to their usefulness.

The Draft Law perpetuates the current system of media **registration**. Although a proposal is made to abolish registration for publications with a circulation of fewer than 1,000 copies, the expert believes that the system of registration called for in the Draft Law with regard to the press should be abolished altogether. It is objectionable because it creates grounds for abuse of the law and would lead in practice to illegal restriction of the right to issue periodic publications.

From the point of view of observing the norms of international law with regard to freedom of speech, such forms of amenability as **suspension and termination of media operations** must be abolished. The closing down of a media outlet is an excessive form of amenability. The forcible termination (or suspension) of a media outlet's operations, even by ruling of a court, is a

procedure that is unacceptable in a democratic society. In those cases where restrictions on media freedom are legal and necessary, they should be formulated in commonly applied legislation, e.g., in the civil or criminal code. Journalists, editors-in-chief, or the owners of media outlets can bear one sort of liability or another; this liability must, however, be just and in proportion to the violation of the law.

The Draft Law introduces a provision regarding **the right of media outlets to obtain information** that deserves approval. It is formulated much better than the provisions of the current law "On the Mass Media," since it assigns to state agencies the obligation to provide information upon the request of journalists, rather than the right (as things stand now). The right of journalists to obtain information, however, remains declarative, and the Draft Law contains no parameters for special procedures for handling media (journalist) requests, e.g., setting time limits and dealing with complaints. Also unspecified is the penalty for violating this right. A number of other journalists' rights, aimed at assisting the public in obtaining information, also remain declarative.

The Draft Law is not in line with international standards as regards the right to **confidentiality of sources**: according to the Draft Law, any court shall have the right under any circumstances and on any grounds to issue a ruling to reveal a source. This violates the minimum standards established by human rights courts and regional human rights agencies.

Certain doubts arise from some categories of **information not subject to public dissemination**. Among these are prohibitions on "hate propaganda," "insulting the civil honor of peoples," "the use of obscene expressions," and "dissemination of materials that violate standards of civil and national ethics." These concepts are quite vague and ambiguous in terms of law. The prohibition on disseminating knowingly false information does not seem lawful either.

The main recommendations in regard to the text of the Draft Law are as follows:

1. *The Draft Law should contain no restrictions on the rights of editorial staff and media outlet owners to become parties in any form to a legal relationship, or of ordinary citizens to independently issue (publish) print media. It would be better to leave the question of the forms that parties to a legal relationship may take in the area of the media, and of the freedom to enter into agreements, to the discretion of the KR Civil Code.*

2. *There should be no restrictions whatsoever on the right to express one's opinion through the media on grounds of statelessness or of having a conviction record. The limitation on the percentage of foreign ownership could deprive the media sector of the foreign investment and expertise it so badly needs, and needs to be reconsidered.*

3. *The regime requiring the special listing (registration) of media outlets is excessive, limits the freedom of public information, and ought to be abolished.*

4. *The possibility of forcible termination (or suspension) of a media outlet's activity should be excluded from the Draft Law.*

5. *Journalists' rights to obtain information should be reformulated in such a way that they are not merely declarative. This entails the need to define the liability for violating these rights, establishing clear procedures for exercising these rights, and removing all ambiguity from the Draft Law.*

6. *All definitions of information not subject to public dissemination that are unclear or ambiguous should be eliminated from the Draft Law.*

7. *The prohibition on the dissemination of false information introduced in the Draft Law should be removed as regards operations of all types of media.*

The main aspects of the Draft Law that are cause for concern are discussed in more detail below, following a brief review of the Kyrgyz Republic's international and constitutional obligations with respect to freedom of expression.

On the whole, we express doubt as to whether the law "On the Mass Media" is really needed in its present form: most of its provisions, just like those of the Draft Law, are either unnecessary or detrimental to freedom of expression and freedom of the press in Kyrgyzstan, while others have already found expression in the law "On Protecting the Professional Activities of Journalists" and in the civil and other codes of the Kyrgyz Republic.

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INTRODUCTION

At the request of the OSCE Representative on Freedom of the Media, this assessment was prepared by Andrei Rikhter, Doctor of Philology. Dr. Rikhter is the director of the Media Law and Policy Institute and a professor at the Lomonosov Moscow State University Faculty of Journalism. He is a member of the International Commission of Jurists (ICJ, Geneva), and of the International Council of the International Association of Mass Communication Researchers (IAMCR).

This assessment contains an analysis of the Kyrgyz Republic Draft Law "On Amendments and Addenda to the Kyrgyz Republic Law 'On the Mass Media,'" from the point of view of its correspondence to international standards with regard to the right to freedom of expression and to freedom of the media. This Draft Law is essentially a new edition of the Kyrgyz republic law "On the Mass Media" (No. 938-XII, dated 2 July 1992 and later revised as Kyrgyz Republic Law No 1228-XII, dated 8 May 1993).

Section I of this assessment is devoted to the international obligations of the Kyrgyz Republic in the areas of freedom of information and freedom of the media. It also contains a description of international standards concerning the right to freedom of expression. These standards are well established in international law, e.g., in the International Covenant on Civil and Political Rights, and in various agreements between participating States of the OSCE, to which the Kyrgyz is Republic (KR) a party; in the decisions of international courts and tribunals on human rights; in declarations by representatives of international agencies, e.g., the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media; as well as in the comparable KR Constitutional law on issues of freedom of thought, speech, and press.

Section II contains an analysis of the Kyrgyz Republic Draft Law "On Amendments and Addenda to the Kyrgyz Republic Law 'On the Mass Media'" in consideration of the above standards and in the context of the current Kyrgyz Republic laws "On the Mass Media" and "On Protecting the Professional Activities of Journalists."

I. INTERNATIONAL AND CONSTITUTIONAL STANDARDS IN THE AREA OF FREEDOM OF EXPRESSION

1.1. International Recognition of the Importance of Freedom of Expression and Freedom of the Media

The freedom of expression has long been recognized as one of the fundamental human rights. It is of paramount importance to the functioning of democracy, is a necessary condition for the exercising of other rights, and is in and of itself an indispensable component of human dignity.

The Kyrgyz Republic is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Cooperation in Europe (OSCE). It has therefore assumed equivalent obligations as all other member states.

The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to free expression of one's convictions in the following wording of Article 19:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*[1]

In 1994, the Kyrgyz Republic ratified the International Covenant on Civil and Political Rights (ICCPR)[2], a UN treaty of binding judicial force. It is worth noting that the ICCPR also contains guarantees as to the right to freedom of expression, as can be seen from the text of its Article 19:

> 1. *Everyone shall have the right to hold opinions without interference.*
>
> 2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Let us also recall that Article 12.3 of the Constitution of the Kyrgyz Republic proclaims the country's adherence to the generally recognized norms of international law:

> *International treaties and other norms of international law, which have been ratified by the Kyrgyz Republic, shall be a constituent and directly applicable part of the Legislation of the Kyrgyz Republic.*[3]

In addition, Article 17.1 of the KR Constitution confirms the need to observe all rights and freedoms generally recognized around the world:

> *The freedoms and rights established by this Constitution are not exhaustive and shall not be interpreted as a denial or derogation of other generally recognized freedoms and human rights.*

When speaking of documents adopted by the United Nations, one cannot ignore Resolution 59 (I), adopted by the UN General Assembly at its very first session in 1946. In reference to the freedom of information in the broadest sense of the concept, the resolution states:

> *Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.*[4]

In this and in all subsequent resolutions, the supreme body of the United Nations understood "freedom of information" as implying "the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world." From the point of view of this UN General Assembly resolution, a "basic discipline" of freedom of information is "the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent." As follows from Resolution 59 (I), freedom of information is thus of fundamental importance in and of itself, and serves as the foundation for the enjoyment of all other rights.

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[1] Resolution 217A (III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39–42. See the full English text at http://www.un.org/en/documents/udhr/.

[2] International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text on the UN website http://www2.ohchr.org/english/law/ccpr.htm.

[3] The English text of the constitution can be found at http://missions.itu.int/~kyrgyzst/Constitut.html.

[4] United Nations 65th Plenary Session. 14 December 1946. The official English text can be found on the UN website: http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=R&Area=RESOLUTION.

The UN Human Rights Committee, meeting alternately in New York and Geneva, is responsible for the monitoring and proper observation of the International Covenant on Civil and Political Rights. The committee's experts are empowered to review petitions from private individuals claiming to have been victims of violations of the rights enunciated in the Covenant, including the rights covered by Article 19. The UN Human Rights Committee has established that:

> *The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.*[5]

Free media, as the UN Committee on Human Rights has stressed, play a vital role in the political process:

> *[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*[6]

Declarations of this sort are also characteristic of regional conventions on human rights and the decisions of various international human rights courts, and serve as precedents in international law and its establishing of generally recognized principles and norms. Note that the worldwide recognition of the importance of freedom of public information and freedom of expression is reflected in three regional systems for the protection of human rights: the American Convention on Human Rights[7], the European Convention for the Protection of Human Rights (ECPHR)[8], and the African Charter on Human and Peoples' Rights[9]. While neither these documents nor the decisions of courts and tribunals have any direct binding force for Kyrgyzstan, they do contain generally recognized principles of international law. They therefore serve as important reference benchmarks of meaningful content and the application of laws on media freedom and freedom of expression. They may be used in particular when interpreting Article 19 of the ICCPR, which is binding on the Kyrgyz Republic.

The European Court of Human Rights, created to monitor observation of basic freedoms and the Convention for the Protection of Human Rights, adheres, for instance, to the position that

> *Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.*[10]

As was noted in the cited judgement, freedom of expression is of fundamental importance both in and of itself and as the foundation for all other human rights. Genuine democracy is possible only in societies where the free flow of information and ideas is allowed and guaranteed.

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[5] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998. Case No. 628/1995, pt. 10.3. See the official text at http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf.

[6] General Comment No. 25 of the Human Rights Committee (pt. 25), 12 July 1996. See the official text at: http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/d0b7f023e8d6d9898025651e004bc0eb?Opendocument.

[7] Adopted 22 November 1969, entered into force 18 July 1978.

[8] Adopted 4 November 1950, entered into force 3 September 1953.

[9] Adopted 26 June 1981, entered into force 21 October 1986.

[10] *Handyside v. the United Kingdom*, 7 December 1976. Application No. 5493/72, para. 49. See the official text of this judgement on the ECHR website: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Handyside%20%7C%20v.%20%7C%20the%20%7C%20United%20%7C%20Kingdom&sessionid=37224643&skin=hudoc-en.

Freedom of expression is also of decisive importance in discovering and exposing violations of this and other human rights, and in combating such violations.

The European Court of Human Rights has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law."[11] It has noted in particular that

> *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*[12]

For its part, the Inter-American Court of Human Rights believes "It is the mass media that make the exercise of freedom of expression a reality."[13]

The European Court of Human Rights has also stated that the mass media bear a responsibility to disseminate information and ideas concerning all areas of the public interest:

> *Although [the press] must not overstep various bounds set, inter alia, for [protecting the interests enumerated in Article 10 (Para. 2) of the European Convention on Human Rights*[14]*], it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."*[15]

1.2 Obligations of the OSCE Participating States with Respect to Freedom of the Media

The right to freely express one's opinions is inseparably bound to the right of freedom of mass communication. Freedom of mass communication is guaranteed by various documents of the Organization for Security and Cooperation in Europe (OSCE) to which the Kyrgyz Republic has given its assent.

The Organization for Security and Cooperation in Europe is the world's largest regional security organization and comprises 56 states of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Cooperation in Europe (1975), the organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of preventing, settling, and dealing with the aftermaths of conflicts. The defense of human rights,

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[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63. See the official text of this judgement on the ECHR website: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson%20%7C%20v.%20%7C%20Iceland&sessionid=37224643&skin=hudoc-en.

[12] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43. See the official text of this judgement at the ECHR website: http://www.medialaw.ru/article10/6/2/11.htm.

[13] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

[14] Article 10 (Para. 2) of the ECHR states: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[15] See *Castells v. Spain*, note 25, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65).

the development of democratic institutions, and the monitoring of elections are among the organization's main methods for guaranteeing security and performing its basic tasks.

The Final Act of the Conference on Security and Cooperation in Europe (CSCE) in Helsinki[16] states "[T]he participating States will act in conformity with the purposes and principles of the … Universal Declaration of Human Rights."[17]

The Helsinki Final Act also proclaims

> *The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.*
>
> *They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.*[18]

The Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE also conveys the assurance of the OSCE member states that

> *… everyone will have the right to freedom of expression…. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.*[19]

In the OSCE Charter for European Security, one reads

> *We reaffirm the importance of independent media and free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.*[20]

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE, the member states unanimously agreed that they

> *… reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.*

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[16] Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the complete official text at http://www.osce.org/item/4046.html?lc=ru and in extracts concerning freedom of expression at http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm.

[17] Section VII of the 1975 Helsinki Final Act.

[18] Ibid.

[19] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Points 9.1 and 10.1. The full official text is available at http://www.osce.org/fom/item_11_30426.html.

[20] See Point 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at http://www.osce.org/documents/mcs/1999/11/17497_en.pdf.

The Final Document of the Moscow Meeting also states the member states of the OSCE

> *… consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards.*[21]

1.3. Permissible Restrictions on Freedom of Expression

The right to freedom of expression is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary to the well-being of a democratic society.[22]

The right cannot be restricted simply because a particular statement or thought is considered offensive, or because it casts doubt on accepted dogmas. The European Court of Human Rights has therefore stressed that such statements are worthy of protection:

> *Freedom of expression … is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."*[23]

The limits to which legal restrictions on freedom of expression are permissible are established in Point 3 of the above Article 19 of the ICCPR:

> *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Note that we are speaking here not of the *need* or *incumbency* of states to establish appropriate restrictions on this freedom but only of the *admissibility* or *possibility* of doing so while

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[21] Points 26 and 26.1, Final Document of the Moscow Meeting of the Conference on the Human dimension of the CSCE. See the official text at the OSCE website: http://www.osce.org/fom/item_11_30426.html. The obligation to impose restrictions on the freedom of mass communications within the law and in accordance with international standards was also reaffirmed by all members of the OSCE in Point 6.1 of the Final Document of the Symposium on the Cultural Legacy of CSCE Member States (July 1991). See ibid.

[22] See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at the OSCE website: http://www.osce.org/fom/item_11_30426.html.

[23] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. See the official text of this judgement at the ECHR website: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Handyside%20%7C%20v.%20%7C%20the%20%7C%20United%20%7C%20Kingdom&sessionid=37224643&skin=hudoc-en.

continuing to observe certain conditions. This norm is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate aim, and (3) are necessary in a democratic society.[24] This international standard also implies that vague and imprecisely formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of mass communication, the interference must serve one of the purposes enumerated in Article 19 (Point 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has special meaning in this context. It signifies that there must be a "pressing social need" for such interference[25]; that the reasons for it adduced by the state must be "relevant and sufficient," and that the state must show that the interference was proportionate to the aims pursued. As the UN Committee on Human Rights has declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."[26]

Restrictions imposed with observation of the above conditions must be proportional to the goal of the pursued legitimate aim.

Note here that Article 18 (Section 2) of the Kyrgyz Republic Constitution states

> *Restrictions on freedoms and human rights are allowed by the Constitution and by law only to ensure the freedoms and rights of others, public safety and order, territorial integrity, and defense of the constitutional order. In doing so, the core of constitutional freedoms and rights must remain inviolable.*

Article 14 (Sections 3 and 6) of the Kyrgyz Republic Constitution in turn protect the right to freedom of information, conscience, speech, and press in the following way:

> *Everyone has the right … to freely collect, store, and use information, and to disseminate it orally, in written form, or in another manner….*
>
> *Everyone has the right to freedom of conscience, speech, and press, and to freely express these thoughts and convictions. No one can be compelled to express his thoughts and convictions.*

Developing this position, Article 36 of the KR Constitution proclaims

> 1. *… the mass media are free.*
> 2. *The state … shall concern itself with and create the necessary conditions for the development … of the mass media…."*

[24] See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, № 1128/2002, 18 April 2005: http://humanrights.law.monash.edu.au/undocs/1128-2002.html.

[25] See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricovSlovakia200704.htm.

[26] See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

1.4. Regulating Media Operations

To protect the constitutional rights to freedom of expression, speech, and the press, and to free expression of these thoughts and convictions, it is vital that the media are afforded the opportunity to carry out their activities independently of government control. This ensures their functioning as a public watchdog and the people's access to a broad spectrum of opinions, especially on issues affecting the public interest. The primary aim of regulating the operations of the media in a democratic society ought therefore to be facilitating the development of independent and pluralistic media, guaranteeing thereby the exercising of the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns UN member states the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means member states are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are *de facto* obliged to create conditions in which a variety of media can develop, ensuring the public's right to information. The provisions of Part II, Article 36 of the Kyrgyz Republic Constitution also contain similar demands (see above).

An important aspect of the states' positive obligations to help bring about freedom of expression and freedom of the media is the need to develop pluralism within the media themselves and to guarantee equal access to the media for each and every person. The European Court of Human Rights has noted

> *"[The imparting] of information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism...."*[27]

The Inter-American Court of Human Rights states that freedom of expression demands that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[28]

The UN Committee on Human Rights has stressed the role of pluralistic media in the process of nation building, noting that attempts to compel the media toward propaganda of "national unity" violate the right to freedom of expression:

> *[T]he legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.…*[29]

The obligation to promote the development of pluralism also implies that there should be no system of licensing registration (a compulsory regulation for registering and reregistering) for the media, since it can easily become an object of abuse in suppressing media freedom. In a joint declaration made in December 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Special Rapporteur of

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[27] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application No. 13914/88 and 15041/89, para. 38). The text of this Judgement can be found at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Informationsverein%20%7C%20Lentia%20%7C%20Others%20%7C%20v.%20%7C%20Austria&sessionid=37224643&skin=hudoc-en.

[28] Recommendation on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Note 27, Para. 34).

[29] See the judgment in the case of *Womah Mukong v. Cameroon*, 21July 1994, № 458/1991, paragraph. 9.7: http://www1.umn.edu/humanrts/undocs/html/vws458.htm.

the Organization of American States (OAS) for Freedom of Expression noted in regard to freedom of expression that

> *Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.*[30]

Note here that this is universally recognized today: any agency empowered with the authority to regulate in the media field ought to be fully independent from government agencies and protected from interference by political and business circles. Otherwise, any system for regulating the media can easily become an object of abuse for political or commercial purposes. The three special representatives stated with respect to this

> *All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*[31]

In addition, the OSCE Representative on Freedom of the Media especially emphasized in his own special report the dangers that registration requirements pose.[32]

The practice of registering the media was particularly condemned in the Resolution on the Persecution of the Press in the Republic of Belarus, adopted by the Parliamentary Assembly of the Council of Europe (PACE) in 2004. For the first time in such a high-level document, it was declared that registration of the print media *in principle* contradicts Article 10 of the European Convention on Human Rights ("Freedom of Expression"). The Council of Europe demanded that the state's government amend the appropriate articles in its law on the media.[33]

The Parliamentary Assembly recognizes the need for a number of principles in respect to freedom of the media to be observed in every democratic society. A list of such principles can be found in PACE Resolution No. 1636 (2008), "Indicators for Media in a Democracy." This list helps in objectively analyzing the state of the environment for the media in one country or another from the point of view of observation of media freedom, and in identifying problem issues and potential weaknesses. This allows the authorities to discuss matters on the European level in respect to possible actions for resolving such issues. The Parliamentary Assembly proposed in its resolution that national parliaments regularly conduct objective and comparative analyses in order to reveal shortcomings in legislation and media policy, and to take the measures needed to correct them. In the context of the Draft Law under analysis, let us note the following principles:

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[30] See http://www.osce.org/documents/html/pdftohtml/27439_en.pdf.html.

[31] Ibid.

[32] See "Registration of Print Media in the OSCE Area: Observations and Recommendations" at the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/documents/rfm/2007/03/23735_en.pdf.

[33] See Parliamentary Assembly of the Council of Europe. Resolution 1372 (2004). Persecution of the press in the Republic of Belarus. paragraphs 5 and 14(iv) at the official Council of Europe Website: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/eres1372.htm.

8.2. [s]tate officials shall not be protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty. Journalists should not be imprisoned, or media outlets closed, for critical comment;

8.8. the confidentiality of journalists' sources of information must be respected;

8.18. media ownership and economic influence over media must be made transparent. Legislation must be enforced against media monopolies and dominant market positions among the media. In addition, concrete positive action should be taken to promote media pluralism;

8.24. government, parliament and the courts must be open to the media in a fair and equal way.[34]

[34] The full text of the resolution can be found at the Council of Europe website: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm

II. ANALYSIS OF THE KYRGYZ REPUBLIC DRAFT LAW "ON AMENDMENTS AND ADDENDA TO THE KYRGYZ REPUBLIC LAW 'ON THE MASS MEDIA'"

The Draft Law under analysis contains 6 sections and 33 articles. Below is a commentary with pertinent recommendations for bringing the text of the Draft Law into better alignment with the international commitments of the Kyrgyz Republic; with the generally recognized principles and norms of international law with respect to freedom of expression, speech, and the press; and the right to unfettered expression of one's opinions and convictions. Note too the commentary issued earlier by the Office of the OSCE Representative on Freedom of the Media in regard to Kyrgyzstan's laws on the mass media.[35]

2.1. Basic Concepts and Area Covered by the Law

One important feature of the Draft Law is the insertion of the article "Basic Concepts Used in This Law" (Article 1). The insertion of an article defining the law's main categories makes its interpretation clear and unambiguous. An article of this type, used in conjunction with the provisions of Article 6 ("Relations associated with media operations shall be regulated by this law, and by other legislative acts of the Kyrgyz Republic.") allows such definitions to be applied in subordinate legislative acts regulating media activities.

The definition of media as "periodically printed publications; radio, television, video, and cinema newsreel programs; and other periodically disseminated mass communications" deserves special attention. This definition is more operational than the current definition of media as, e.g., "television and radio broadcasts, film and video studios, and audiovisual recordings and programs." At the same time, the need to list cinema newsreels (which, as far as the expert knows, are not shown whatsoever in Kyrgyzstan today) as being among the media is surprising.

Certain provisions of Article 1 ("Basic Concepts Used in This Law") evoke fears that they will lead to restrictions of media freedom.

Point 7 of the article, for instance, suggests that media editors can be either private individuals or a creative team that must in turn be a structural division of a legal entity. The creation by editorial staff of an independent legal entity of its own is thereby prohibited. We also have doubts as to the provision in Article 3 of the Draft Law stating that "mass media outlets" may operate only as legal entities. If the media are treated as both agencies and citizens involved in the public dissemination of information, why can private citizens not act as agencies, for example editorial boards? If they can, then what is the sense of this restriction?

Article 1.11 states that the founder (proprietor) of a media outlet is "a private individual or legal entity that has founded a media outlet and assumed the obligations involved in maintaining it, and has created an organization engaged in the issuing of the given medium of information or entered into an agreement with a private individual or a legal entity for its issuing." According to this provision, founders are essentially required either to create an organization or to sign an agreement with a third party in order to issue a mass medium. A collision of interests is thereby created with the same Draft Law's provisions on the right of a private individual to independently issue media, and with those of the KR Civil Code on the right to create a legal entity in any form, and not just in the form of an organization.

[35] See, e.g., Memorandum on the Kyrgyz Mass Media Law and the Law on Journalists' Activities (2005) at the OSCE website: http://www.osce.org/documents/rfm/2005/11/16884_en.pdf.

Finally, Article 1.12 of the Draft Law defines "publisher" as "a legal entity, regardless of the form of property carrying out the preparation and issuing of a printed product." The possibility of a media outlet publisher being a private individual is therefore denied, restricting the right of those who wish to independently issue media. There is also a collision of interests with Point 11 of the same article of the Draft Law, according to which the founder (proprietor) of a media outlet has the right to act as a private individual and engage in issuing the medium, and with Article 8 as well. The expert believes these provisions of the Draft Law unjustifiably narrow the opportunities for citizens and legal entities to exercise the right to freedom of opinion and freedom of conviction, and to their free expression, all of which are guaranteed in the Kyrgyz Republic's international obligations and in the Constitution.

The insertion of an article in the Draft Law stipulating the inadmissibility of censorship deserves approval. The country's new Constitution lacks such a prohibition, and in the current KR Law "On the Mass Media" it is formulated much too briefly: "Censoring of the mass media is not allowed" (Article 1). The Draft Law (Article 2) contains the following provisions:

> *Censoring of mass communications, i.e., the requirement by government officials, agencies, organizations, and other public establishments and associations that media editors shall coordinate their reports and materials (except in cases where government officials are the authors of the material or the subjects of interviews) prior to dissemination, together with prohibiting the dissemination of reports and materials or excerpts there from, shall not be allowed.*
>
> *The creation and financing of organizations, establishments, agencies, or posts whose tasks or functions include the censoring of mass communications is prohibited.*

Despite the positive impact the adoption of such a provision should have, we should note its divergence from the provisions of Article 4 ("Inadmissibility of Censorship") of the Kyrgyz Republic Law "On Protecting the Professional Activities of Journalists" (of 5 December 1997, No. 88):

> *In the Kyrgyz Republic, censorship in the sphere of mass communication is prohibited. No one has the right to demand that a journalist coordinate his reports and materials prior to publication, or to demand that a text be altered or that material or a report be removed entirely from a publication (or broadcast). The access of a journalist to information of public interest and concerning the rights, freedoms, and legitimate interests of the people cannot be restricted.*

Uniformity of law presumes compatibility of the provisions of different laws. In this case, it would be desirable to expand Article 2 of the Draft Law to include provisions from Article 4 of the law "On Protecting the Professional Activities of Journalists." At issue here are such Article 4 items as prohibiting demands to alter a text, equating censorship with restrictions on a journalist's access to information, and expanding the range of subjects not liable to censorship.

Recommendations:

The concept of censorship contained in the Draft Law should be widened using elements of the definition of censorship taken from the KR Law "On Protecting the Professional Activities of Journalists."

The restrictions contained in the Draft Law with respect to the rights of editors and outlet founders to assume the form of any entity permitted by law, and of citizens to independently issue (distribute) printed media, are inadmissible. It would be wise to leave the matter of the forms of legal entity in the media field, and that of freedom to enter into agreements, to the discretion of the KR Civil Code.

2.2. Media Founder and Editor Rights

The Draft Law (Article 7) contains a prohibition on foreign private individuals and legal entities, as well as stateless individuals, founding media outlets. In addition, foreign private individuals and legal entities and stateless persons are prohibited from owning, using, possessing and/or controlling more than 49% of the stock (common or capital shares) of the legal entity proprietor of a media outlet in the Kyrgyz Republic.

Article 9 ("Mass Media Editors") contains a prohibition on individuals having a conviction record that has not been expunged or annulled in a manner prescribed by law at the time of their appointment from serving as editors-in-chief.

It should be recalled that Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights mention the right of *everyone* to freedom of conviction and to the free expression of same (see Section 1.1 of this commentary). It is of no less importance that Article 2 of the ICCPR (see Section 1.4) requires a state to guarantee respect for the rights enumerated in it "within its territory and subject to its jurisdiction" without any discrimination whatsoever, including discrimination based on national origin. Provisions that apply only to "citizens" *de facto* deprive non-citizens (e.g., refugees or stateless individuals) of the right to publish information, and this is not permitted under international law.

Similar considerations have force in respect to citizens with a conviction record as well. Such a record can be due to reasons that have nothing to do with the areas of virtue or morality (which apparently served as the grounds for this provision). Inflicting additional punishment on a convicted (punished under law) citizen amounts to double jeopardy for one and the same offense, which the KR Criminal Code strictly forbids.

Also doubtful is the desirability of the suggested restriction limiting the foreign ownership of a media outlet to 49% of its stock. Although some restrictions on foreign property still exist in the laws on television and radio broadcasting, this prohibition of the Draft Law applies to *all* the media. Broadcasting is a special form of mass communication in which strict standards are sometimes justified, due primarily to the fact that the frequency spectrum is a limited recourse capable to accommodate a very limited number of broadcasters (although digital broadcasting will allow the current number of terrestrial broadcasting channels to be expanded considerably in the future). The argument of a limited spectrum would seem to be invalid in the case of print media, however. The advisability of limiting the proportion of foreign ownership even in the television and radio broadcasting sector is, incidentally, doubtful from the point of view of

gaining much needed foreign investment and expertise in the area of organizing mass media operations.

The processes of the globalization of the world economy cannot help but include a trend toward globalization of the media, including the pooling and absorption of publishers and broadcasting organizations. The development of new technologies (e.g., the Internet and satellite TV) that operate over and above national rules and regulations make the aforementioned prohibitions partially senseless: foreign citizens are still able to make their influence felt in the area of Kazakhstan's public communications. Because of this, it is considered that these restrictions on the media freedom have no future at all.

Recommendation:

There should be no restrictions on freedom of expression that are based on lacking citizenship or having a conviction record. The restriction on the proportion of foreign ownership could deprive the media sector of much needed foreign investment and expertise and should be reviewed.

2.3. Media Outlet Registration and Certification

Articles 11–13 of the Draft Law cover the registration procedure for media outlets. Outlet registration forms and other required documents are submitted to the appropriate government agencies and are subject to their review. Outlets are prohibited from operating until they are registered and have received a certificate of registration. Outlets may be denied registration without explanation of the grounds. Once he (or it) has received his certificate of registration, the proprietor must begin media operations within six months. The founder, name, language, and location of the outlet must be given in the registration application, along with a statement on its mission and purpose, the supposed periodicity of its communications, its maximum media output, and its sources of financing. A media outlet is subject to reregistration if there is a change in ownership or changes in its organizational or legal status, a renaming of the outlet, the language of publication or broadcasting, or the periodicity of communication.

A procedure is introduced for the registering and reregistering of media outlets that is not contained in the current KR Law "On the Mass Media." Even if "registration" is understood to mean the already existing registration of media outlets, the requirement for reregistration could exacerbate the situation as regards freedom of the mass media in Kyrgyzstan.

Articles 11–13 are *de facto* prolonging the practice of registration (and reregistration) in offices of the Ministry of Justice. The need for registration has long been doubted by OSCE experts. In their remarks on the media laws of Kyrgyzstan and other countries in the region, they have repeatedly called for reexamination of the registration regime, since it presents opportunities for abuse by registration agencies in pursuit of political aims. Despite the Draft Law's positive step of abolishing registration for print outlets with circulations of less than 1,000 copies, the requirement for special registration applicable to print media is excessive and will lead to abuse (see Section 1.4).

It is worth repeating the earlier recommendation that the system of registration and certification provided for under the Draft Law be abolished. It is objectionable because it creates opportunities for abuse and will in practice lead to unlawful restrictions on the issuing of periodical publications (including, e.g., restrictions for refugees and stateless persons; see also Section 2.2).

Along with this fundamental problem, questions also arise as to why providing information on mission and purpose, language, size, and frequency of communication is needed, and why repeating registration in exactly the same manner is needed in cases where the organizational or legal form of the proprietor or the language of communication has changed. This creates additional bureaucratic hurdles for future founders (proprietors). In establishing these, the Draft Law did not even envisage using the registration application to enforce the prohibition on foreign private individuals and legal entities, and stateless persons, directly and/or indirectly owning, using, disposing of, and/or controlling more than 49% of a media outlet's proprietary shares. The Draft Law contains no provisions prohibiting monopolization of the media, so questions as to the form of property and the source of financing also serve no useful purpose. If registration and certification is purely a technical procedure, all that is necessary for registration is the full name of the outlet founder (be it a person or an organization) and his/her (or its) contact information. The requirement that detailed information as to the content of the publication be presented, along with all the bureaucratic hurdles this entails, strongly indicates that the registration regime will be used to oversee the media. The registration procedure is therefore licensing, rather than merely notifying in nature.

At the same time, it is noted that a report by the Kyrgyzstan Media Commissioner Institute states that "there have been no difficulties with registration or obtaining certificates."[36]

Recommendation:

The regime for special certification (registration) of the media is excessive, limits media freedom, and should be abolished.

2.4. Suspension or Termination of Mass Media Operations

Article 14 of the Draft Law provides for suspending or terminating the operation of a media outlet by judicial decision in cases where the requirements of the KR Law "On the Mass Media" have been violated (repeating the provisions of Article 8 of the current law).

Although freedom of speech is not an absolute right, restrictions on it must meet the threefold criterion mentioned in Section 1.3 of this commentary: they must be clearly defined by law, they must serve a legitimate purpose, and they must be necessary in a democratic society. As was noted in the above section, imprecise and excessively broad formulations of restrictions are unjustified violations of freedom of expression.

The Draft Law is in this matter far from meeting the three criteria. For example, it does not indicate precisely in which cases a court has the right to order suspension and in which cases it may order termination of media operations when provisions of the KR Law "On the Mass Media" are violated. What is a legitimate aim in applying such sanctions to any violation of any provision of the KR Law "On the Mass Media"? None are given, yet sanctions may be imposed even for such violations as failing to give all the initials of an editor-in-chief, the time of a printing deadline, and other imprint data (Article 16). Violating the requirements of this article is a breach of the law, and legal grounds for a court to suspend (terminate) media operations.[37]

[36] See http://medialaw.asia/document/633-637.

[37] It is, incidentally, not clear how a television broadcast is capable of meeting the requirement of Article 16 in regard to giving the addresses of the editorial board, publishing house, and/or print shop "in appropriate form" if it *has* no print shop.

It seems that the provisions of Article 14 of the Draft Law are associated with the violation of not just any regulations, but those of Article 29 only ("List of Information Not Subject to Public Dissemination"), even though the Draft Law contains no direct indication of this.

The closing down of a media outlet is an extreme form of liability. Forcible termination (suspension) of media operations, even if this is done under a court order, is a procedure that is inadmissible in a democratic society. While restrictions of media freedom are legitimate and necessary, they must fall into the category of commonly applied law, e.g., that of the civil or criminal code. Journalists, editors-in-chief, and outlet proprietors can all bear one form of liability or another for violating the law, but such liability must be fair and in proportion to the violation.

The possibility of terminating (suspending) media operations is, curiously, at variance with another provision of the Draft Law. Article 31 stipulates that "for violating the provisions of this law, a media outlet may be held liable as represented by the outlet director and the person providing the informational material." In other words, no liability is envisaged for the media outlet itself, not even that of suspending (terminating) its operations.

In the full text of the Draft Law, special note should therefore be taken of the need to consider the provision of its preamble, which is particularly important to understanding the essence of the law:

> *The law is aimed at ensuring the free functioning of the mass media, except for the restrictions provided for by the Kyrgyz Republic laws on the mass media.*

The Draft Law's provisions for the termination (suspension) of media operations are in fact aimed at limiting the free functioning of the mass media except in cases provided for by the Kyrgyz Republic's laws on the media.

Recommendation:

The possibility of forcible suspension (termination) of media operations should be eliminated from the Draft Law.

2.5. Journalists' Rights

The Draft Law contains a provision (Article 20) in respect to the right of the media to obtain information. It stipulates that government agencies, public organizations, and government officials shall provide information (data) upon the request of media workers, and that conditions for becoming acquainted with the corresponding documents shall be created, on the basis of the laws of the Kyrgyz Republic.

This provision is formulated much better than those of Article 15 of the current Kyrgyz Republic Law "On the Mass Media," since government agencies would have the duty, rather than the right (as they do now), to provide information upon the request of journalists. It is formulated better than the provision of Article 5 of the Kyrgyz Republic Law "On Protecting the Professional Activities of Journalists," which mentions the right to obtain "information of public importance" only, with no criteria given for this. If rights are mentioned, however, they must not be merely declarative but described in detail in the law, and parameters for procedures (e.g., time limits and appeals), liability for violations of the law, and other such details must be prescribed. The Draft Law provides for none of these.

The same may be said in respect to the purely declarative right of a journalist to be received by government officials in connection with the performing of professional journalistic duties (Article 25). Where does it specify the obligations of a government official to receive a journalist in connection with the performance of professional journalistic duties? There are no such provisions.

A journalist's right to take records, using whatever technical means are necessary, also remains purely declarative, since this right is conditional upon the consent of the "respondent" (Article 25). First of all, it is not clear who the respondent is, since the law does not define this concept. In what sense does someone "respond"? Does this mean to answer questions? To pose for photographs? To take part in an event? Second, by what is the need to obtain consent motivated? Any citizen can record a conversation with the consent of his/her interlocutor; this is not specifically a journalist's right. It can be supposed that the authors had in mind the need to inform the other person that the conversation is being recorded, e.g., as when doing a telephone interview.

The Draft Law allows a journalist to be present in areas of natural disasters, at rallies, and at demonstrations upon presentation of his/her credentials (Article 25). This right is truncated, however, without the right to be present in zones of military operations, or at public events such as rallies and demonstrations, guaranteed by the Kyrgyz Republic Law "On Protecting the Professional Activities of Journalists."

Also dubious is a journalist's right to bring legal suit in cases of moral or material damage caused by the actions of an editor-in-chief who willfully distorted the original material in information supplied by the journalist (Article 25). It is hard to imagine how the editing of journalistic material could cause material damage to the journalist. An editor is essentially a representative of the journalist's employer. Editing implies the possibility of publication, i.e., the receipt of fees, salary, and so on. A journalist should have no other material interest in publishing his/her works in the media other than those declared in his/her profession per se; otherwise, there is a conflict of interests. In light of the above arguments, this provision is illogical.

Recommendation:

The journalists' rights aimed at obtaining information should be formulated in such a manner that they are not merely declarative. This entails the need to determine the liability for violating these rights, to establish clear procedures for executing this right, and to eliminate ambiguity from the Draft Law.

2.6. Restricting the Rights of Journalists and Media Outlets

Article 23 ("Cases of Nondisclosure of Information") of the Draft Law prohibits a media outlet from naming a person who supplies information on condition of confidentiality, except in cases where this is demanded by a court of law, and from making public any information regarding a juvenile offender without the consent of his/her legal representative. These provisions are essentially safeguards for the legal interests of minors and of sources of confidential information. They are not, however, devoid of considerable shortcomings.

It is these shortcomings that are responsible for the Draft Law's divergence from international standards as regards the confidentiality of sources of information: according to the Draft Law, any court under any circumstances and on any grounds has the right to issue an order requiring the identity of a source of information to be revealed. This violates the minimum standards established by human rights courts and regional human rights agencies. Under international

rules, a court may oblige journalists to reveal a source of information as an extreme measure, i.e., only if it is necessary for the investigation of a serious crime or for the defense of someone involved in a criminal proceeding. It is worth noting that the Draft Law's provision prohibiting disclosure of the source of information by a *media outlet* is not supplemented by a provision on the right of a *journalist* to keep secret his/her source of information, since the demand to reveal the source could fall on the journalist and not the media outlet (this is partially covered in the prohibition on exacting from a journalist "information of any kind obtained in the performance of his/her professional duties," contained in the KR Law "On Protecting the Professional Activities of Journalists.")

With regard to protecting the rights of minors, international law prohibits the disclosure of not just any information on them, but only the information that allows children and adolescents to be identified.

Article 26 of the Draft Law permits a journalist to be stripped of his/her accreditation if he/she or the editorial board has disseminated information at odds with reality and tarnishing the honour or dignity of the organization accrediting the journalist. Article 33 of the Draft Law establishes the liability of the media should they disseminate information contrary to fact that tarnishes the honour or dignity of an organization. Meanwhile, the Civil Code of the Kyrgyz Republic (Article 18) does not recognize the right of organizations (legal entities) to honour and dignity, but only their right to a professional reputation. These norms are thereby devoid of any legal sense and should therefore be changed.

The Draft Law (Article 29) contains a list of information not subject to public dissemination. Some of the provisions of this list give reason for doubt. In particular, para (c) of Article 29 prohibits "hate propaganda"; para (d), "insulting the civic pride of peoples"; para (h), "the use of expressions considered obscene"; and para (i), "the distributing of materials that violate norms of civil and national ethics."

These concepts are vague and ambiguous in terms of law. There is no definition of hate *propaganda*, and it is impossible to establish it in court. The boundaries of the concept of *obscene* expressions are blurred, especially in light of the legal prohibition on censorship. There are no established norms of either *civil* or *national* ethics. The ethics of which nation is referred to here? That of the citizens of Kyrgyzstan?

Article 29.1 prohibits the dissemination of information known to be false. The inclusion in the Draft Law of such a principle as reliability of disseminated information in the activities of the media is seriously doubtful. It must be remembered that the system of media in contemporary society consists not only of quality media but of publications and programs of a scandalous, tabloid, or "yellow" character. These are prone to exaggeration, sensationalism, provocation and scandal. The inclusion of a mandatory prohibition on false information for all sectors of the media, even if it does not entail restrictions on one category of rights or another, amounts to an unfounded sequestering of a large segment of the media. Even without legal prohibitions, readers and viewers regard scandalous materials with a fair degree of skepticism, and view them as an entertainment element of the media.

Such materials nevertheless can (and in practice do) spark public discussion of important social issues of one sort or another. In its decision on the famous case of *The New York Times v. Sullivan* (1964)[38], the US Supreme Court ruled that malicious libel is not protected by the

[38] The complete text of the US Supreme Court decision can be found at: http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=376&invol=254.

Constitution, no matter how important the right to make misstatements is to freedom of speech. The Court did, however, introduce and delimit two concepts: "libel as a result of a fair comment" and "libel per se." It ruled that "libel per se" is libel for the sake of libel, and is in fact not protected by the Constitution. At the same time, the free discussion of socially important issues is important to the nation and must be protected.

In addition, the above provision could be in contradiction to the well-known requirement (from a judgment by the European Court of Human Rights) that "shocking" information be protected (see Section 1.3).

Recommendations:

The provision on the right to confidentiality for sources of information should be brought into better alignment with international standards.

Provisions for protecting the honour and dignity of legal entities should be scrapped as incompatible with civil law.

Imprecise and legally ambiguous definitions of information not subject to public dissemination should be removed from the Draft Law.

The Draft Law's prohibition on dissemination of false information should be removed for all types of media.

Commentary on this case (in Russian) can be found in Rikhter, A.G. *Pravovye osnovy zhurnalistiki* [Legal Foundations of Journalism]. Moscow, 2009. Pp. 381–388.