



MEMORANDUM
on

The Laws in Tajikistan Regulating Mass Media

by

ARTICLE 19
Global Campaign for Free Expression

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1. Introduction

The following comments have been prepared by ARTICLE 19, Global Campaign for Free Expression, following a formal request from the OSCE office in Tajikistan. They are based on English translations of the following laws and regulations:

- the Constitution;
- the Law on Press and Other Mass Media (Media Law);
- the Resolution on Creation of Republican Data Transmitting Network of and Measures to Regularize Access to Global Information Networks (Resolution on Global Information Networks);
- the Law on Television and Broadcasting (Broadcasting Law);
- the Regulation on Procedure of Licensing in the Sphere of Television and Broadcasting;
- the Instruction on Procedure for Payment of Fees and Application of Tariff Requirements to Issuance of License for Production and Dissemination of Television and Radio Broadcasts;
- the Resolution on Fees for Issuance of License for Production and Dissemination of Television and Radio Broadcasts;
- the Criminal Code;
- the Law on Protection of Honour and Dignity of the President of the Tajik SSR;

- the Code on Administrative Offences;
- the Civil Code; and
- the Law on Information.

The laws regulating the mass media have some positive provisions, including guarantees for media freedom, a system for allocating licenses to private broadcasters, a system for accessing information held by public bodies, and legal requirements that domestic laws comply with international law.

Unfortunately, the laws also include a significant number of provisions which are in breach of international standards relating to freedom of expression and media freedom and other provisions which, while not necessarily in formally in breach of international law, are unnecessary or could be improved. ARTICLE 19 has concerns in the following areas:

- registration of the media;
- regulation of journalists;
- the regulatory regime for broadcasting;
- content issues;
- defamation;
- privacy;
- protection of sources;
- penalties; and
- freedom of information.

This report outlines the obligations of Tajikistan to promote and protect freedom of expression under international law. It describes the guarantee of freedom of expression, particularly in relation to the media, and the limited scope of restrictions on freedom of expression which international law permits, along with the test against which any restriction must be judged. It then goes on to assess the Constitution of Tajikistan and other laws affecting the media and freedom of expression against these standards, highlighting some key concerns and making recommendations on how to address them.

2. *International Standards*

2.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹ guarantees the right to freedom of expression in the following terms:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

¹ UN General Assembly Resolution 217A(III), 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR), a treaty with 148 States Parties, which Tajikistan acceded to in January 1999, imposes formal legal obligations on State Parties to respect its provisions, and elaborates on many rights included in the UDHR.² Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),³ which states:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

Guarantees of freedom of expression are also found in the two other regional human rights systems, at Article 13 of the *American Convention on Human Rights*⁴ and Article 9 of the *African Charter on Human and Peoples' Rights*.⁵

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. For example, the European Court of Human Rights has repeatedly stated:

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 ... it 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'.⁶

2.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the “the pre-eminent role of the press in a State governed by the rule of law.”⁷ It has further stated:

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

³ Adopted 4 November 1950, in force 3 September 1953.

⁴ Adopted 22 November 1969, in force 18 July 1978.

⁵ Adopted 26 June 1981, in force 21 October 1986.

⁶ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

⁷ *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

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.⁸

The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”⁹ The media as a whole merit special protection under freedom of expression in part because of their role in making public,

...information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.¹⁰

The European Court has furthermore stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas 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.”¹¹

The Court has also held that Article 10 applies not only to the content of expression, but also the means of transmission or reception.¹²

2.3 Pluralism

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished

⁸ *Castells v. Spain*, 24 April 1992, 14 EHRR 445, para. 43.

⁹ *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.

¹⁰ Note 7, para. 63.

¹¹ See *Castells v. Spain*, note 8, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, 14 EHRR 153, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, 14 EHRR 229, para. 65.

¹² *Autronic AG v. Switzerland*, 22 May 1990, 12 EHRR 485, para. 47.

unless it is grounded in the principle of pluralism.”¹³ The Inter-American Court has held that freedom of expression requires 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.”¹⁴

One of the rationales behind public service broadcasting is that it makes an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

2.4 Independence of Media Bodies

In order to protect the right to freedom of information, it is imperative that the media is permitted to operate independently from government control, so as to protect the free flow of ideas. This ensures the media’s role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

Under international law, it is well established that bodies with regulatory or administrative powers over both public service and private broadcasters should be independent and free from political interference. For example, in a preambular paragraph, the European Convention on Transfrontier Television states that Member States “[reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters”. The Council of Europe’s Committee of Ministers also considers the independence of regulatory authorities as fundamentally important. Its Recommendation on the Independence and Functions of Regulatory authorities for the Broadcasting Sector,¹⁵ states in a preambular paragraph:

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities, which clearly affirms and protects their independence.¹⁶ The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.

The Council of Europe Recommendation on the Guarantee of the Independence of Public Service Broadcasting¹⁷ provides additional guidance on this issue. This Recommendation provides that members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner¹⁸ and that the

¹³ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

¹⁴ Note 9, para. 34.

¹⁵ Recommendation R (2000) 23, adopted on 20 December 2000.

¹⁶ *Ibid.*, Guideline I.

¹⁷ Recommendation No. R (96) 10, adopted on 11 September 1996.

¹⁸ *Ibid.*, Guideline III.

rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.

2.5 Freedom of Information

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

Freedom of information is a fundamental human right and... the touchstone of all the freedoms to which the UN is consecrated.¹⁹

Its importance has also been stressed in a number of reports by the UN Special Rapporteur on Freedom of Opinion and Expression, as the following excerpt from his 1999 Report illustrates:

[T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.²⁰

The Committee of Ministers of the Council of Europe has also recently adopted a Recommendation on Access to Official Documents which states:

III

General principle on access to official documents

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.²¹

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, Japan, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom, a number of East and Central European States, and, of course, Tajikistan – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

In his 2000 Annual Report, the UN Special Rapporteur elaborated in detail on the specific content of the right to information:

¹⁹ 14 December 1946.

²⁰ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 12.

²¹ Recommendation R (2002) 2, adopted on 21 February 2002.

44. [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.²²

2.6 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet. It states:

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

²² Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

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.

Article 10(2) of the ECHR also recognises that freedom of expression may, in certain prescribed circumstances, be limited:

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 or impartiality of the judiciary.

Restrictions must meet a strict three-part test.²³ International jurisprudence makes it clear that this test presents a high standard which any interference must overcome in the strictest sense. The European Court of Human Rights has stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.²⁴

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁵ Second, the interference must pursue a legitimate aim. These are the aims listed in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.²⁶

3. The Constitution

Tajikistan is a member of the United Nations and a State Party to the *International Covenant on Civil and Political Rights* (ICCPR). As such, Tajikistan is legally bound to protect freedom of expression in accordance with international law. Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the

²³ See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.

²⁴ See, for example, *Thorgeirson v. Iceland*, note 7, para. 63.

²⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 49.

²⁶ *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.

present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Freedom of expression is protected in Article 30 of the Constitution of Tajikistan, as follows:

Every person is guaranteed freedom of speech, publishing, and the right to use means of mass information. State censorship and prosecution for criticism is prohibited. The list of information constituting a state secret is specified by law.

This provision does not define freedom of expression, unlike under international law, where it is defined to include the right to “to seek, receive and impart information and ideas of all kinds”. While the specific application of the guarantee to publishing and the mass media in the Constitution is welcome, this may give the impression that other forms of communication are not protected. It may be noted that under international law, the right is protected, “either orally, in writing or in print, in the form of art or through any other media of his choice.” Finally, international law, unlike the Constitution, protects the right, “regardless of frontiers”.

Freedom of expression is also subject to a general limitation on rights and freedoms set out in Article 14 of the Constitution, which states, in part:

In implementing rights and freedoms, limitations in the constitution and laws are allowed only to ensure the rights and freedoms of others, public order, and to safeguard the constitutional structure and the territorial integrity of the republic.

As noted above, under international law, any restriction on freedom of expression must not only be prescribed by law and pursue a legitimate aim, but also be necessary in a democratic society. Article 14 requires that any restriction be prescribed by law and pursue a legitimate aim, but it does not require that it be “necessary in a democratic society.” The jurisprudence of international and regional human rights bodies, such as UN Human Rights Committee and the European Court of Human Rights, as well as senior courts in democratic countries clearly demonstrates that, in assessing restrictions on freedom of expression, “necessity” is often the most important part of the three-part test.

Article 10 of the Constitution of Tajikistan recognizes the superiority of international law, stating in part:

International legal documents recognized by Tajikistan are a constituent part of the legal system of the republic. If republican laws do not conform to the recognized international legal documents, the norms of the international documents apply.

Recommendations:

- Article 30 of the Constitution should be amended to define freedom of expression more broadly, including the right to “seek, receive and impart” information and idea.
- It should be clear in Article 30 that the guarantee applies “regardless of frontiers” and to all forms of communication.
- Article 14 should be amended to provide further that any limitation on rights and

freedoms must be “necessary in a democratic society.”

4. Analysis of Media Laws

The following section analyses the laws of Tajikistan in relation to international standards on freedom of expression and media freedom, noting ARTICLE 19’s main concerns and making recommendations for addressing these concerns.

4.1 Registration

Articles 9-15 of the Media Law set out the registration system for the mass media. Article 9 requires the registration of mass media before editorial offices can conduct their activities. Mass media are to be registered within one month from the day of filing an application with the local State notary office. A number of documents must be submitted, including founding documents, the Ministry of Justice’s legal opinion on the founding documents and the opinion of the Ministry of Culture. Article 11 exempts from registration certain State bodies which publish official documents and non-State bodies which publish informational materials and documents necessary for their activities. Registration is also not required for mass media with a print run of less than one hundred copies. Article 12(1) states that denial of registration is allowed if, among other things, the title of the mass media, their program goals or objectives constitute abuse of freedom of speech, as defined in Article 6.

Under international law, licensing requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing.

On the other hand, technical registration requirements do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries.²⁷ ARTICLE 19 therefore recommends that the print media not be required to register. As the UN Human Rights Committee has noted: “Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”²⁸

²⁷ For example, in Australia, Canada, Germany, the Netherlands, Norway and the United States.

²⁸ General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

In any case, the registration system established under the Media Law fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression.

First, the system imposes substantive conditions upon the press by requiring that the title of the mass media, their program goals and objectives not constitute abuse of freedom of speech. Restrictions of this sort, to the extent that they are legitimate, should be imposed through laws of general application, not the registration process. The illegitimacy of this provision is compounded by the fact that some of the “abuses” of freedom of speech listed in Article 6 are themselves illegitimate restrictions on the right to freedom of expression (see below).

Second, the system is excessively onerous, particularly the requirement that most mass media with print runs of one hundred copies or more must apply to register and may have to wait for up to one month to be registered. In a 2000 ruling, the UN Human Rights Committee considered provisions in a law in Belarus which required publishers to register with the authorities. The Committee held that the legal requirement that an author register his leaflet, which had a circulation of just 200 copies, was disproportionately onerous, exerted a chilling effect on freedom of expression, and could not be justified in a democratic society.²⁹ In particular, the Committee stated:

[P]ublishers of periodicals...are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author’s freedom to impart information.³⁰

The Tajik provisions are even more onerous than those found in the Belarusian law.

Third, the system is not administered entirely by a body which is independent of government. Although the local State notary office makes the final decision on registration, the Ministries of Justice and Culture play a significant role in the administrative process by providing “opinions”.

Finally, the registration requirement under the Media Law applies to broadcasters, as well as the print media. Given that broadcasters are also required to obtain a license pursuant to the Broadcasting Law, there is no reason to impose this additional administrative requirement on them.

Recommendations:

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
 - The requirement under Article 9 for the mass media to provide opinions of the Ministries of Justice and Culture as part of their applications to register should be deleted. The registration process should be administered solely by local State notary offices.

²⁹ *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.

³⁰ *Ibid.*, para. 8.1

- Article 12(1) should be deleted.
- The requirement to register should be limited to print media which are legally incorporated, publish regularly and have large print runs.
- Broadcasters should not be required to register in addition to obtaining a licence.

4.2 Journalists

4.2.1 Responsibilities

Article 32 sets out the “responsibilities” of a journalist, including a duty to follow professional ethics, such as verifying the fairness of information reported by him (Article 32(2)), and a duty to follow the law, for example, respecting the rights and legitimate interests of citizens and organisations (Article 32(5)).

It is contrary to international standards and best practice to legislate the responsibilities of journalists. In most democratic countries, the professional ethics of journalists are matters for self-regulation. Experience has shown that legal regulation of the behaviour of journalists by the State often leads to harassment of journalists who are critical of the government.

The reiteration in a media-specific law that journalists have to obey the law is redundant, since this is clearly already the case. It is illegitimate to give journalists a “double warning” of this sort as it suggests that journalists will be watched more closely than others in society, which is bound to have a chilling effect on media freedom.

Recommendation:

- Article 32 should be deleted.

4.2.2 Accreditation

Article 33 of the Media Law covers accreditation. Article 33(1) provides that the mass media, in coordination with State, and political and public organisations and movements, can accredit their journalists within them. Article 39 provides that the Ministry of Foreign Affairs shall accredit foreign correspondents but allows for cancellation of the opening of foreign mass media and the accreditation of foreign correspondents when their activities are contrary to the Constitution, the law or the “national interests of Tajikistan.” Article 34 of the Broadcasting Law provides that accreditation of foreign correspondents of television and broadcasting is carried out by the Ministry of Foreign Affairs, in coordination with the Ministry of Culture and Information.

As noted above, it is well established that bodies with regulatory or administrative powers over the media should be independent of government. This applies equally to

accreditation as to other matters.³¹ State bodies and government ministries are not independent bodies and so should not exercise direct control over accreditation. Furthermore, protecting “national interests” – an extremely broad, vague and potentially elastic term – is not a legitimate ground for restricting freedom of expression, including through accreditation, under international law.

Recommendations:

- Articles 33 and 39 of the Media Law and Article 34 of the Broadcasting Law should be amended to provide for an independent body to accredit journalists.
- The “national interests” of Tajikistan should be deleted as a ground for cancelling the opening of foreign mass media or the accreditation of foreign journalists in Article 39 of the Media Law.

4.3 Broadcasting

Broadcasting is regulated by the Broadcasting Law, the Regulation on Procedure of Licensing in the Sphere of Television and Radio Broadcasting and the Resolution on Fees for Issuance of License for Production and Dissemination of Television and Radio Broadcasts.

ARTICLE 19 has adopted a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, which set out standards in this area based on international and comparative law.³² In addition, the Committee of Ministers of the Council of Europe has adopted a Recommendation on the Guarantee of the Independence of Public Service Broadcasting³³ and a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.³⁴ The following analysis is drawn from those sets of principles, as well as other authoritative standards in this area.

4.3.1 Independence of Regulatory Body

Article 5.1 of the Broadcasting Law provides that State regulation and control in the sphere of television and broadcasting are exercised by the government through the Committee on television and broadcasting under the Government of the Republic of Tajikistan. As such, a State body is responsible for regulating the broadcast sector.

It is well established under international law, however, that bodies with regulatory or administrative powers over the media should be *independent* of government. The Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states that Member States should establish “independent regulatory authorities for the broadcasting sector” and “include

³¹ See, for example, the UN Human Rights Committee case holding that Canadian accreditation procedures to parliament breached the guarantee of freedom of expression. *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995.

³² ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: March 2002).

³³ Note 17.

³⁴ Note 15.

provisions in their legislation... which enable them to fulfil their missions in an effective, independent and transparent manner.”³⁵ The ARTICLE 19 *Principles* state that the institutional autonomy and independence of such bodies should be guaranteed and protected by law in the following ways:

- explicitly in the legislation which establishes the body;
- by a clear statement of broadcast policy as well as of the powers of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.³⁶

The Broadcasting Law does not provide any specific guarantee for the independence of the Committee on television and broadcasting. Indeed, it is clear from the context that this body is not intended to be independent. While specific provisions guaranteeing independence vary, the following is one option:

The Committee on television and broadcasting shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the Committee in the discharge of their duties, or to interfere with the activities of the Committee, except as specifically provided for by law.³⁷

The Broadcasting Law also fails to set out the appointments process for membership of the Committee. Members of the governing bodies of public bodies which exercise powers in the area of broadcast regulation should be appointed in a manner which minimises the risk of political or commercial interference.³⁸ The Council of Europe Recommendation stipulates that the rules governing such bodies should ensure that members “are appointed in a democratic and transparent manner.”³⁹ This means that the process for appointing members should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.⁴⁰ To ensure this, appointments should be made by a representative body, such as an all-party parliamentary committee, rather than the executive. A shortlist of candidates should be published, to ensure transparency and so that members of the public may comment upon them. Furthermore, only individuals who have relevant expertise and/or experience should be eligible for appointment and membership overall should be required to be reasonably representative of society as a whole.⁴¹

Certain “rules of incompatibility” should also apply. The Council of Europe Recommendation states:

[S]pecific rules should be defined as regards incompatibilities in order to avoid that:

- regulatory authorities are under the influence of political power;

³⁵ *Ibid.*

³⁶ *Access to the Airwaves*, note 32, Principle 10.

³⁷ *Ibid.*, Principle 11.

³⁸ *Ibid.* 5, Principle 13.1.

³⁹ Note 15.

⁴⁰ *Access to the Airwaves*, note 32, Principle 13.2.

⁴¹ *Ibid.*, Principle 13.2.

- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.⁴²

The ARTICLE 19 rules go further than this, stating that no one should be appointed who:

- is employed in the civil service or other branches of government;
- holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government;
- holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or
- has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.⁴³

Members should also be appointed for a fixed term and be protected against dismissal prior to the end of this term. Only the appointing body should have the power to dismiss members and this power should be subject to judicial review. A member should not be subject to dismissal unless he or she:

- no longer meets the rules of incompatibility, as set out above;
- commits a serious violation of his or her responsibilities, as set out in law, including through a failure to discharge those responsibilities; or
- is clearly unable to perform his or her duties effectively.

Finally, the financial independence of the regulatory body should be protected. The Council of Europe Recommendation states:

Arrangements for the funding of regulatory authorities... should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.

...

Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.

...

Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.⁴⁴

Recommendation:

- The Broadcasting Law should be amended to guarantee the independence of the Committee on television and broadcasting as set out above.

4.3.2 Public Service Broadcasting

⁴² Note 15, Guideline 5.

⁴³ *Access to the Airwaves*, note 32, Principle 13.3.

⁴⁴ Recommendation (2000) 23, note 15, Guidelines 9-11. See also *Access to the Airwaves*, note 32, Principle 17.

Articles 7-9 of the Broadcasting Law provide for State broadcasting, rather than independent public service broadcasting. The problem with State broadcasters is that they tend to operate more as a government mouthpiece than as a servant of the public interest. This is reflected in Article 23, which requires State broadcasters to allocate time, upon demand, for official speeches by the President, the Prime Minister, the Chairman of Parliament and the Chairman of the Constitutional Court.

Under international standards, State-owned broadcasters should be transformed into independent public service broadcasters with a mandate to serve the public interest.⁴⁵ The Council of Europe Recommendation on the Guarantee of the Independence of Public Service Broadcasting stresses the need for public broadcasters to be fully independent of government and commercial interests.⁴⁶ The Recommendation states that the “legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy” in all key areas, including “the editing and presentation of news and current affairs programmes.”⁴⁷

One of the most important ways of guaranteeing the independence of public broadcasters is to ensure that they are overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be ensured in the same way as for regulatory bodies, in accordance with the principles in the previous section.

Public service broadcasters should also be adequately funded by a means that protects the broadcaster from arbitrary cuts with their budgets. The Council of Europe Recommendation states:

The rules governing the funding of public service broadcasting organisations should be based on the principle that member states undertake to maintain, and where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.⁴⁸

Finally, the remit of public broadcasters is closely linked to their public funding and should be defined clearly in law. Article 9 of the broadcast law does set out a mandate for the State broadcaster, but this is excessively general and broad. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, providing a service that:

- provides quality, independent programming that contributes to a plurality of opinions and an informed public;

⁴⁵ See, for example, the Declaration of Sofia, adopted under the auspices of UNESCO by the European Seminar on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe), 13 September 1997, which states: “State-owned broadcasting and news agencies should be, as a matter of priority, reformed and granted status of journalistic and editorial independence as open public service institutions.”

⁴⁶ Note 17.

⁴⁷ *Ibid.*, Guideline I.

⁴⁸ *Ibid.*, Guideline V.

- includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
- provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
- is universally accessible and serves all the people and regions of the country, including minority groups;
- provides educational programmes and programmes directed towards children; and
- promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.⁴⁹

Recommendation:

- The State broadcaster should be transformed into an independent public service broadcaster, in accordance with the principles set out above.

4.3.3 Licensing of Private Broadcasters

The Broadcasting Law and the Regulation on Procedure of Licensing establish the framework for licensing broadcasters. Article 12 of the Broadcasting Law provides that the procedure for licensing is determined by the Committee on television and radio. The Committee approved an order bringing the Regulation on Procedure of Licensing into effect in August 2000.

Article 1 of the Regulation establishes the Committee – referred to as the “Teleradiocommittee” for the purposes of licensing – “as the licensing body.” The necessity of establishing independent broadcast regulatory bodies has already been noted. The institutional autonomy and independence of the Teleradiocommittee should therefore be guaranteed in accordance with the principles set out above.

Article 5 of the Regulation requires broadcasting organisations to submit an application with technical, program and financial information to obtain a license. Article 9 provides that the license may be denied for a number of reasons, including misreporting data, where there is no available frequency in the stated region, failing to meet technical standards, if the program goals and objectives contradict the Broadcasting Law, or when the broadcasting program “does not satisfy the national interests of the country” or “there is no need for it in the region.” The Teleradiocommittee can also deny a license based on “other grounds and reasons,” which must be explained in writing.

The Regulation fails, however, to set out the substantive criteria for deciding between competing applications. It is important that criteria for deciding between licence applications be set out to ensure fairness and to ensure that decisions are made in the public interest. The Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states: “The basic conditions and criteria governing the granting and renewal of broadcasting licences

⁴⁹ *Access to the Airwaves*, Note 32, Principle 37.

should be clearly defined in the law.”⁵⁰ The criteria should, as far as possible, be objective in nature, and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant.⁵¹

In addition, some of the grounds for denying a license conflict with the right to freedom of expression. Any restrictions on freedom of expression must be compatible with the three-part test set out under international law. Protecting “the national interests of the country” is too general to qualify as a legitimate aim for restricting freedom of expression. Furthermore, the power to deny a license on “other grounds and reasons” is too broad and vague. All grounds for denying a license should be clearly defined.

The licensing process also lacks transparency. The Council of Europe Recommendation states: “The regulations governing the broadcasting licensing procedure... should be applied in an open, transparent and impartial manner.”⁵² Secretive and unfair licensing mechanisms may result in long delays in the awarding of licences, refusal of licences on insubstantial grounds, or the granting of licenses only to supporters of the government. Licence application hearings should therefore be public, so that the merit of the application and the reasons for the authority's decisions are matters of public knowledge and debate.

Recommendations:

- The licensing process should be administered by an independent body.
- The Regulation should set out the substantive criteria for deciding between license applications, including promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership.
- The following grounds for denying a license should be deleted from Article 9 of the Regulation:
 - it does not satisfy the national interests of the country; and
 - other grounds and reasons.
- The Law or the Regulation should provide that license applications hearings are public.

4.4 Content Issues

4.4.1 Abuses of Freedom of Speech

Articles 6 and 22 of the Media Law prohibit abuses of freedom of speech, including “pornography”, publishing a secret protected by the law, committing other penal actions and publication or dissemination of information calling for “racial, national, religious distinction or intolerance.” Similar provisions are found in the Broadcasting Law (Article 28) and the Resolution on Global Information Networks (Article 2).

⁵⁰ Note 15.

⁵¹ *Access to the Airwaves*, note 32, Principle 21.2.

⁵² Note 15.

Existing Prohibitions

Several of the provisions in Article 6 simply repeat prohibitions that are already established by law. This is the case, for example with the prohibition on revealing legally protected secrets and calling for the commission of illegal acts. The problem with repeating matters already prohibited by law in a media-specific law have already been referred to above.

Pornography

Article 6 also prohibits “pornography”. This term is excessively vague and, as noted above, a restriction does not satisfy the “prescribed by law” part of the three-part test for restrictions if it is so vague that a person cannot reasonably predict what the requirements of the law are.

Instead of relying on vague terms, some legislators and courts in democratic countries have tried to provide more detailed definitions of precisely what is prohibited. For example, in *Miller v. California*, the United States Supreme Court set down what it deemed to be the appropriate standard in relation to “obscenity”:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵³

Courts in many jurisdictions have distinguished *offensive* material from material that is actually *harmful*, only allowing restrictions which have as their objective the prevention of harm. The European Court of Human Rights, for example, has stated that freedom of expression is applicable “to ‘information’ or ‘ideas’ that... offend, shock or disturb the State or any other sector of the population.”⁵⁴

To give effect to this distinction, the Canadian Criminal Code, for example, defines obscene material as follows:

For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.⁵⁵

The Supreme Court of Canada has held that the meaning of “undue exploitation” in this section is a community standards one, but “it is a standard of tolerance, not taste... not what Canadians think is right for themselves to see [but] what the community would [not] tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.”⁵⁶ The Court distinguished between three types of sexually explicit material, classifying each in terms of the test for “undue exploitation”:

⁵³ *Miller v. California*, 413 US 15, 24.

⁵⁴ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, Para. 49.

⁵⁵ S.163(8) of the Criminal Code, RSC 1985, c. C-46.

⁵⁶ *R. v. Butler* [1992] 1 SCR 452, 477, 485.

[T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.⁵⁷

The Canadian Supreme Court has specifically held that the State could not restrict expression simply because it was distasteful or did not accord with dominant conceptions of what was appropriate. It upheld the legislation, however, on the basis that it was designed to prevent harm to society, by rooting out material which undermined basic human rights, such as equality between men and women:

[Earlier legislation on obscenity's] dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered inherently undesirable, independently of any harm to society.... [T]his particular objective is not longer defensible in view of the Charter.... [T]he overriding objective of S.163 is not moral disapprobation but the avoidance of harm to society.⁵⁸

ARTICLE 19 believes that the law should only restrict sexually explicit materials which can be shown to be harmful and which lack serious literary, artistic, political, or scientific value.

Hate Speech

The prohibition against hate speech is too broad and may be subject to abuse. Under international law, it is recognised that in some circumstances the right of a person to express him- or herself may conflict with the rights of others, such as the right to equality and to be free from discrimination, violence and hostility. In recognition of this, Article 20(2) of the ICCPR explicitly calls on States to prohibit hate speech in the following terms:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This provision is more narrow and precise than the prohibition on hate speech in the laws of Tajikistan, which refers simply to national or racial distinction or intolerance.

Recommendations:

- Articles 6 and 22 of the Media Law, Article 28 of the Broadcasting Law and Article 2 of the Resolution on Global Information Networks should be amended as follows:
 - All restrictions referring to other laws should be deleted.
 - The prohibition on “pornography” should be deleted and replaced with a prohibition on “sexually explicit material which is harmful and lacks serious literary, artistic, political or scientific value.”
 - The prohibition on information calling for “racial, national, religious distinction or intolerance” should be replaced with a prohibition on “advocacy of racial, national or religious hatred that constitutes incitement

⁵⁷ *Ibid.*, 485.

⁵⁸ Note 56, 492-3.

to discrimination, hostility or violence.”

4.4.2 “Must-Carry” Requirements

Articles 21 and 23 of the Broadcasting Law require State broadcasters to transmit official reports and speeches of the President, Prime Minister, Chairman of Parliament and Chairman of the Constitutional Court. Article 21 also requires all broadcasters to allow bodies and officials who are authorised to take decisions under emergency circumstances, to use television and broadcasting to disseminate reports on emergencies.

Requiring private broadcasters to carry certain types of messages is both unnecessary and may be abused. Public messages are a matter for editorial decision-making and should not be imposed as a legal requirement. Such requirements are very rare in other countries and yet media coverage of matters of public importance is perfectly adequate. The best way to ensure such coverage is by promoting a diverse, independent broadcast media, not by imposing obligations on the media.

Furthermore, positive obligations of this sort are open to abuse. Independent broadcasters may be harassed, and even closed, for allegedly failing to fulfil these vague requirements. In addition, public bodies may abuse their right to have messages carried in the broadcast media.

Even in relation to public service broadcasters, the Committee of Ministers of the Council of Europe has voiced concern over “must-carry” requirements, stating:

The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.⁵⁹

Recommendation:

- The “must carry” requirements in Articles 21 and 23 should be deleted.

4.4.3 Administration of Justice

Articles 29(2) and (3) of the Media Law protect the administration of justice. Article 29(2) provides that editorial offices and journalists do not have the right to disclose the data of a preliminary examination without the written permission of the prosecutor, investigator or person conducting the examination. Article 29(3) provides that editorial offices and journalists do not have the right to predetermine in their reports the outcome of the hearing of a specific case or otherwise influence a court prior to a decision or sentence taking effect.

Under international law, freedom of expression may be restricted narrowly to protect the administration of justice. The “rights of others” referred to in Article 19(3) of the

⁵⁹ Note 17.

ICCPR and Article 10(2) of the ECHR undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence.⁶⁰ Article 10(2) of the ECHR goes even further, explicitly providing that freedom of expression may be restricted as is necessary in a democratic society for “maintaining the authority and impartiality of the judiciary.”

Two possible interests are involved here, the authority of the judiciary and the right to a fair trial, or the impartiality of the judiciary. As regards the first, the European Court of Human Rights has speculated that prejudicial media coverage of pending legal proceedings may lead to a loss of public respect for and confidence in the courts:

If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.⁶¹

By contrast, in the United States, the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a “clear and present danger” to the administration of justice.⁶² The test requires that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”⁶³ In practice, this has allowed the media to report on pending judicial proceedings with little or no restriction.

The American experience appears to contradict the speculation by the European Court of Human Rights that long-term exposure to the “spectacle of pseudo-trials in the news media” will result in a loss of public respect for and confidence in the courts and the rejection of the courts as “the proper forum for the settlement of legal disputes.” The American public has now been subject to such exposure for decades, but there is no evidence to suggest that people have lost confidence in the court system and are rejecting the courts as the proper forum for settling legal disputes. In fact, Americans continue to be perhaps the most litigious people in the world.

ARTICLE 19 therefore believes that it is not legitimate to restrict media reporting on pending legal proceedings for purposes of maintaining public confidence in the judicial system. This should, rather, be maintained through the performance of the system and through application of the rule of law.

As regards the second interest, protecting the right to a fair trial, the European Court has emphasised that in criminal proceedings media coverage may undermine this right:

⁶⁰ The right to a fair trial and the presumption of innocence are protected in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights guarantees to any person charged with a criminal offence or involved in proceedings to determine his or her civil rights and obligations, the right “to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

⁶¹ Note 25, para. 63.

⁶² *Bridges v. California*, 314 US 252 (1941); *Pennekamp v. Florida*, 328 US 331 (1946); *Craig v. Harney* 331 US 367 (1946); *Wood v. Georgia* 370 US 375 (1962).

⁶³ *Bridges, Ibid.*, p. 263.

This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice.⁶⁴

It is universally accepted that this is a legitimate ground for restricting freedom of expression but the degree of harm is a matter of some debate. As noted above, in the United States the degree of harm must be extremely high. By contrast, in some common law jurisdictions such as Australia and New Zealand, the common law test is still applicable: a real risk or tendency to interfere with the administration of justice, that is, to prejudice a fair trial.⁶⁵ In response to a case before the European Court of Human Rights,⁶⁶ the United Kingdom largely replaced the common law test with a more stringent statutory one requiring a substantial risk that the course of justice in the proceedings in question will be “seriously impeded or prejudiced.”⁶⁷ It therefore appears that, under international law, serious harm is required.

It is important to note that the risk of prejudice to the right to a fair trial is related primarily to jurors or lay judges, rather than professional judges. It is generally accepted that, because of their training, professional judges are not susceptible to being influenced by prejudicial publications. Media coverage of an ongoing trial may, of course, cause serious harm to the administration of justice in other ways, for example, if a publication abuses or pressures a witness to such an extent that he or she is deterred from attending court.

Articles 29(2) and (3) are not compatible with these standards. Article 29(2), which protects the investigative process, lacks a serious harm test. Furthermore, it is not legitimate to put decision-making power over whether or not a matter may be published into the hands of an official such as the public prosecutor. Article 29(3), which prohibits predetermining the outcome of a trial also cannot be justified, particularly since trials in Tajikistan are conducted by professional judges, rather than juries or lay judges.

Recommendations:

- Article 29(2) and (3) should be amalgamated into one provision which prohibits disclosure of information that causes serious harm to the administration of justice.

4.5 Defamation

Articles 5 and 42 of the Constitution protect the honour and dignity of every individual. Under international law, freedom of expression may be subject to narrowly drawn restrictions, including to protect reputations. As such, any legislation which restricts freedom of expression in order to protect the reputation of others must have the genuine purpose and demonstrable effect of protecting a legitimate

⁶⁴ *Worm v. Austria*, 29 August 1997, 25 EHRR 454, para. 50.

⁶⁵ See, for example, *Duffy, ex p. Nash* [1960] 2 All ER 891, p. 896; *Glennon* (1992) 173 CLR 592.

⁶⁶ *The Sunday Times v. United Kingdom*, note 25.

⁶⁷ Contempt of Court Act 1981, Section 2(2).

reputation interest. Furthermore, a restriction cannot be justified unless it can be convincingly established that it is necessary in a democratic society. In particular, it cannot be justified if:

- i. less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or
- ii. taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.⁶⁸

ARTICLE 19 has adopted a set of principles on defamation, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*,⁶⁹ which set out standards in this area based on international and comparative law. These Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media. The following analysis is drawn from that set of principles, as well as other authoritative standards in this area.

4.5.1 Legitimate Purpose of Defamation Laws

Articles 6 and 22 of the Media Law prohibit publication or dissemination of information defaming the honour and dignity of the “State and President” and the use of mass media to infringe the honour and dignity of “citizens”. A similar provision is found in Article 2 of the Resolution on Global Information Networks.

Under international law, defamation may only be applied to protect the reputations of “others”, in other words, the reputation of individuals or entities with the right to sue and be sued. As such, it is not legitimate to protect the reputation of entities such as the “State”.⁷⁰ This is confirmed in Articles 5 and 42 of the Constitution, which refer to protecting the honour and dignity of the “individual” and/or “others”. As will be discussed in more detail below, it is also illegitimate to provide special protection for public officials such as the President.

Recommendation:

- The prohibition on “defaming the honour and dignity of the State and President” in Articles 6 and 22 of the Media Law and Article 2 of the Resolution on Global Information Networks should be deleted.

4.5.2 Criminal Defamation

Reputations are protected in the Criminal Code. Articles 135 and 136 provide general protection against libel and insult and Articles 137 and 330 provide for special protection for the President and other public officials.

⁶⁸ ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: July 2000), Principle 1.

⁶⁹ *Ibid.*

⁷⁰ *Defining Defamation*, note 68, Principle 2.

Illegitimacy of Criminal Defamation Provisions

Articles 135 and 136 of the Criminal Code prohibit libel and insult, which are subject to range of punishments, including a fine, term of correctional labour or imprisonment, depending on the gravity of the offence.

Criminal defamation laws are inconsistent with the guarantee of freedom of expression. The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. In many countries, the protection of one's reputation is treated primarily or exclusively as a civil matter interest and experience in these countries shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations.

In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. For these reasons, the criminal defamation laws in Tajikistan should be repealed.

If criminal defamation laws remain in force, they should conform fully to the following conditions, set out in Principle 4(b) of *Defining Defamation*:⁷¹

- i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

Public Officials

The Criminal Code also provides specific protection for public officials. Article 137 protects the President from insult or libel and Article 330 protects representatives of State Authority from insult. The Law on Protection of Honour and Dignity of the President provides similar exceptional protection for the President. The penalties for defaming such officials are higher than those set out for ordinary citizens in Articles 135 and 136 of the Criminal Code.

⁷¹ *Ibid.*

Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. It is now well established in international law that such officials should tolerate more, rather than less, criticism.⁷² It is therefore clear that the special protection for public officials in the Criminal Code and the Law on Protection of Honour and Dignity of the President falls foul of this rule.

Recommendation:

- Articles 135, 136, 137 and 330 of the Criminal Code and the Law on Protection of Honour and Dignity of the President should be repealed. If they remain in force, they should be amended to conform fully to the conditions set out above.

4.5.3 Civil Defamation Laws

Reputations are also protected in the Civil Code. Article 174 protects honour, dignity and business reputation and provides remedies, including a right of refutation (in conjunction with Articles 24 and 26 of the Media Law) and compensation for moral damages (in conjunction with Articles 171, 172, 1115 and 1116 of the Civil Code and Article 38 of the Media Law).

Defences

Article 174(1) presumes that defamatory information is false, subject to proof by the defendants that such information is true. In a number of countries, requiring the defendant to prove that defamatory statements are true has been held to place an unreasonable burden on the defendant, at least in relation to statements on matters of public concern,⁷³ on the basis that it exerts a significant chilling effect on freedom of expression. As such, in cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.⁷⁴

Furthermore, even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication.⁷⁵ This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.

⁷² See, for example, the rulings of the European Court of Human Rights in *Lingens v. Austria*, note 26, para. 42 and *Thorgeirson v. Iceland*, note 7, paras. 63-64.

⁷³ The term 'matters of public concern' includes all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.

⁷⁴ *Defining Defamation*, note 68, Principle 7.

⁷⁵ *Ibid.*, Principle 9.

The media, in particular, are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

Finally, no one should be liable for the expression of an opinion. An opinion should be defined as a statement which either (i) does not contain a factual connotation which could be proved to be false or (ii) cannot reasonably be interpreted as stating actual facts given all the circumstances including the language used. Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are clear examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one.

The precise standard to be applied in defamation cases involving the expression of opinions – also referred to as value judgements – is still evolving but it is clear from the jurisprudence that opinions deserve a high level of protection. In some jurisdictions, opinions are afforded absolute protection, on the basis of an absolute right to hold opinions.

Recommendations:

- Article 174(1) of the Civil Code should be amended as follows:
 - in cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory;
 - even where a statement of fact on a matter of public concern has been shown to be false, the defendant should benefit from a defence of reasonable publication; and
 - no one should be liable for the expression of an opinion.

Right of Refutation

Articles 174(2)-(5) of the Civil Code provide for a right of refutation in defamation cases. Articles 174(2) and (3) state that a citizen whose reputation or a legal entity whose business reputation has been defamed has the right to free publication of his response disproving the false information in the same mass media body. Articles 174(4) and (5) state that if the mass media body denies publication or fails to publish within one month, the court has the right to impose a fine on the violator. Articles 24 and 26 of the Media Law provide for a similar right of refutation, but with more details on procedures and conditions. In the print media, the disproof or response must be published under a special heading or in the same column and with the same font as the information to be disproved. In the broadcast media, the disproof or response must be read by the radio or television anchorman in the same program or broadcast cycle.

A mandatory right of reply is a highly disputed area of media law. In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.⁷⁶ In Europe, by contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe.⁷⁷ In many Western European democracies, the right of reply is provided by law and these laws are effective to a varying extent. The purpose of a right of reply is to provide an individual with an opportunity to correct inaccurate facts which interfere with his or her right to privacy or reputation. In most countries that recognise a right of reply, the offended party may seek a court order if the media outlet refuses to publish it.⁷⁸ Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- the reply should only be in response to incorrect facts, not to comment on opinions that the reader or viewer doesn't like;
- it should receive similar prominence to the original article or broadcast;
- it should be proportionate in length to the original article or broadcast; and
- it should be restricted to addressing the incorrect or misleading facts in the original text. It should not be taken as an opportunity to introduce new issues or comment on other correct facts.

Recommendation:

- Article 174(2) and (3) of the Civil Code and Article 24 of the Media Law should be amended to ensure that any reply:
 - only addresses incorrect facts, not opinions, other correct facts or unrelated issues; and
 - is proportionate in length to the original article or broadcast.

Other Remedies

Article 171 provides that if “moral detriment” is inflicted on a citizen, the court can order the violator to pay financial compensation. A similar provision, which is applicable when the mass media is the violator, is found at Article 38 of the Media Law. Regarding defamatory statements, Article 174(6) of the Civil Code specifically states that, along with disproof of information, the citizen has a right to demand compensation for moral detriment. Articles 171 and 1116(2) provide that, in determining the amount of compensation, the court must take into account the extent of the moral suffering of the victim and the violator’s guilt (when guilt is the basis for compensation) as well as principles of reasonableness and fairness. Article 172(3) further provides that compensation may be claimed for infringement of personal non-property rights “regardless of the guilt” of the violator and Article 1115(2) states that moral detriment is compensated “regardless of the guilt of the inflicting person if... detriment is inflicted by disseminating information defaming honour, dignity and business reputation.”

International standards require that the following principles be followed in awarding pecuniary damages, as set out in Principle 15 of *Defining Defamation*:

⁷⁶ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁷⁷ Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).

⁷⁸ This is the case in France, Germany, Norway and Spain.

- (a) Pecuniary compensation should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.
- (b) In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.
- (c) Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.
- (d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.
- (e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.⁷⁹

The provisions in the Civil Code fail to meet these standards. First, Article 174(6) should clearly state that moral damages can only be awarded where the publishing or broadcasting of a refutation is insufficient to redress the harm caused by the defamatory statement(s). Second, Articles 171 and 1116(2) fail to require the court to take into account the potential chilling effect on freedom of expression when assessing the quantum of moral damages. Third, the quantum of moral damages is not subject to a fixed ceiling. And fourth, in regards to Articles 172(3) and 1115(2), no should be required to pay moral damages without a finding of guilt.

Recommendation:

- Articles 171, 172, 174, 1115 and 1116 of the Civil Code and Article 38 of the Media Law should be amended to conform to the conditions set out above.

4.6 Privacy

There is special protection in Article 176 of the Civil Code against the unauthorized use of pictures or other images of individuals. Article 176(1) provides that no one has the right to use the picture of a person without his consent, and in case of death, without the consent of his successors. Article 176(2) further provides that publication, reproduction and dissemination of fine art works (picture, photography, film, etc.), where another person's image is used, is allowed only with his consent, and upon his death, with the consent of his children and living spouse. No such consent is required if it the taking of the picture is protected by law or the depicted person has been paid to pose.

Ownership of one's image has been recognised by courts in several countries but, where it does exist, it is much narrower than in the Civil Code of Tajikistan. In

⁷⁹ Note 68.

particular, the right to privacy must be subject to an override where a greater public interest is served.

In the United States, the Supreme Court has acknowledged that the collection or dissemination of information about an individual may be limited, recognising four aspects of this aspect of the right to privacy, one of which is the right not to have one's name or likeness "appropriated" for commercial purposes.⁸⁰ However, this right is subject to the constitutional guarantee of freedom of expression and to strict limits.

French courts have recognised that everyone has an absolute right to his or her image, including politicians.⁸¹ In these cases, however, the use of the images was purely commercial. In a case where the images were used as part of a story about a famous photographer, thus arguably engaging the public interest, the court weighed the competing interests carefully. In holding that pictures taken while the plaintiff was on a yacht violated a privacy interest, the Court noted that the boat was not on a port or near a beach, so that its occupants had a reasonable expectation of privacy.⁸²

A Canadian case, *Aubry v. Éditions Vice-Versa Inc.*,⁸³ involved a claim based on the right of an artist to publish photographs without the consent of the subject. In that case, the photograph was of an unknown 17-year old in a public place. The majority of the Supreme Court noted:

The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the expectation of privacy is reduced in certain cases. ... Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the public's right to information can justify dissemination of a photograph taken without authorisation.⁸⁴

The Court noted a number of circumstances in which freedom of expression might prevail, including where the subject is a public figure or "whose professional success depends on public opinion," where a previously unknown individual is called upon to play a high-profile role and where the individual is accidentally or incidentally included in a photograph, for example as part of a crowd.⁸⁵ In the circumstances of the case, it would have been relatively simple for the photographer to have obtained the consent of the subject, perhaps by paying her, so the privacy interest prevailed.

Germany is one of the few countries with special statutory protection for privacy. Section 22 of the Law for the Protection of Copyrights in Art and Photography of 1907 provides that pictures of a person may be published only with his or her consent. Exceptions apply, however, for photographs of public figures and people attending public gatherings. Court decisions have distinguished between "absolute" public figures, such as politicians and sportsmen, and "others", such as defendants in criminal trials, who are only of public interest because of their involvement in a

⁸⁰ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 & nn. 7&8 (1977).

⁸¹ See *Pompidou v. L'Express*, 4 April 1970, *Dorléac v. Sté Presse Office*, 14 May 1975 and *d'Estaing v. M. Ways*, 15 October 1976, all decided by the Paris Court of Appeal.

⁸² *Schneider v. Sté Union Editions Modernes*, 5 June 1979, Paris Court of Appeal.

⁸³ [1998] 1 SCR 591.

⁸⁴ *Ibid.*, paras. 57 and 61.

⁸⁵ *Ibid.*, paras. 58-9.

particular event. Even “absolute” public figures, however, have right to privacy in their homes, or even in an otherwise public place where they have removed themselves from public scrutiny to a sphere of privacy (for example, to a table in a dark corner of a restaurant).⁸⁶ Pictures of “others” – those who are public figures for limited purposes – in public places may only be published if the public interest outweighs other interests.⁸⁷

ARTICLE 19 believes that restrictions on freedom of expression to protect ownership of one’s image should be limited and subject to a public interest override, so that they do not apply where the public interest in seeing the image of an individual outweighs the privacy interest involved. In addition, any protection for individuals in public places should have exceptions for:

- public figures;
- people attending public gatherings;
- individuals depicted in news reports;- and
- individuals who are of public interest.

Recommendation:

- Article 176 of the Civil Code should be amended to incorporate the test set out above.

4.7 Protection of Sources

Article 29(1) of the Media Law states that editorial offices of a mass media and journalists do not have the right to mention a person who has provided information on the condition that his name not be disclosed, except in cases where it is demanded by a court.

Under international law, it is well established that the public’s right to receive information, including through the media, is a key aspect of the right to freedom of expression. If journalists cannot protect their confidential sources, those sources will be reluctant to provide information and the flow of information to the public will, as a result, suffer. As the European Court of Human Rights has stated:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁸⁸

⁸⁶ See the decision of the Federal Supreme Court in *Caroline von Monaco II*, BGH NJW 1996, at 1128-29, which was affirmed in part on constitutional grounds by the Federal Constitutional Court.

⁸⁷ 35 FCC 202 (1973) (Lebach).

⁸⁸ *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123, para. 39.

This issue was considered so important that the Committee of Ministers of the Council of Europe adopted a specific Recommendation on the Right of Journalists not to Disclose Their Sources of Information, elaborating on the scope of this right. This Recommendation notes that an order for disclosure should not be made unless it can be convincingly established that:

- i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
- ii.* the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
 - an overriding requirement of the need for disclosure is proved,
 - the circumstances are of a sufficiently vital and serious nature, [and]
 - the necessity of the disclosure is identified as responding to a pressing social need....⁸⁹

There are two problems with Article 29(1). First, it reverses the traditional presumption that protection of sources is the *right* of journalists and turns it into a legal *obligation* not to disclose information. Second, it fails to specify the conditions that must be met before a court can order disclosure.

Recommendations:

- Article 29(1) should be deleted.
- Article 31 (Rights of Journalists) should incorporate the right of journalists not to disclose information identifying a source except when ordered by a court.
- Article 31 should make it clear that a court order for disclosure cannot be made unless:
 - reasonable alternative measures to disclosure do not exist or have been exhausted;
 - disclosure is justified by an overriding requirement in the public interest; and
 - the circumstances are of a sufficiently vital and serious nature to justify overriding this important right.

4.8 Penalties

Article 14 of the Media Law provides that the activities of mass media can be terminated for a number of reasons, most significantly, where there is abuse of freedom of speech pursuant to Articles 6 and 22 of the Media Law. The prosecutor or the Ministry of Culture must officially warn the offender of a violation of the law and, where there is “repeated violation”, appeal to the court to terminate the activities of the mass media in question.

Article 12 of the Broadcasting Law also provides that the license of a broadcaster can be suspended for six months if the holder “abuses his rights” or revoked if the holder “does not comply with the requirements of this Law.” More details can be found in the Regulation on Licensing. Article 22 states that the Teleradiocommittee has the right to suspend a license for six months if there is deviation from program goals and objectives and, in the event of “repeated violation”, to revoke the license. Article 23 states that if there is deviation from technical quality standards, the

⁸⁹ Recommendation No. R (2000) 7, adopted 8 March 2000, Principle 3.

Teleradiocommittee has the right to suspend or revoke a license, depending on the nature of deviation and extent of technical quality deterioration.

4.8.1 Independence of Regulatory Bodies

As set out elsewhere in this analysis, it is well established that bodies with regulatory or administrative powers over the media should be independent of government. Neither the Ministry of Culture, which has the power to seek a court order to shut down a mass media outlet, nor the Teleradiocommittee, which has the right to suspend or revoke the license of a broadcaster, is independent.

4.8.2 Proportionality

Sanctions, like other restrictions on freedom of expression, must be proportionate. This implies that the authorities should have at their disposal a range of graduated sanctions for breach of the law, so that a sanction corresponding to the nature and level of the breach may be applied. For this reason, the Committee of Ministers of the Council of Europe has recommended that broadcasting regulatory bodies should have the following powers:

A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.⁹⁰

The penalties set out in the above laws fail to meet these standards. In Article 14 of the Media Law, the only two available sanctions are warning and termination. Other possible sanctions, such as the requirement to publish a decision recognising the breach or fines, are not available. The penalties set out in Article 12 of the Broadcasting Law and Articles 22 and 23 of the Regulation on Licensing are even less graduated. The only two available sanctions are suspension or revocation of a broadcaster's license. Even a warning is not available as an initial sanction.

Furthermore, the threshold for terminating the activities of a mass media outlet or revoking a broadcaster's license is too low. "Repeated violation" could be as little as two violations. Termination and revocation are very harsh sanctions, which should only be applied, if ever, in extreme cases of repeated and gross abuse of the law.

The problems noted above are compounded by the fact that several of the "abuses" of freedom of speech listed in Articles 6 and 22 of the Media Law are either illegitimate grounds for restricting freedom of expression (for example, "defaming the honour and dignity of the State and President") or excessively broad or vague (for example, publishing or disseminating information calling for "racial, national, religious distinction or intolerance," or "pornography"). As a result, it is probably relatively easy for the government to abuse its powers and shut down mass media outlets under Article 14 of the Law.

⁹⁰ Note 15, Guideline 23.

Recommendations:

- Article 14 of the Media Law, Article 12 of the Broadcasting Law and Articles 22 and 23 of the Regulation on Procedure of Licensing should be amended as follows:
 - An independent body should regulate and administer the system of sanctions.
 - A more graduated regime of sanctions should be established, including warnings, mandatory publishing or broadcasting of decisions recognising the breach, fines, suspension and termination. Termination of the activities of a mass media outlet or revocation of the license of a broadcaster should only be available in extreme cases of repeated and gross abuse of the law.

4.9 Freedom of Information

The Law on Information guarantees the right to access information held by public bodies and establishes a system for access and disclosure. Articles 5 and 27 of the Media Law also provide specific guarantees for the mass media.

ARTICLE 19 has adopted a set of principles on the right to information, *The Public's Right to Know: Principles on Freedom of Information Legislation*, which set out standards in this area based on international and comparative law.⁹¹ In addition, the Committee of Ministers of the Council of Europe has adopted a Recommendation on Access to Official Documents.⁹² The following analysis is drawn from those sets of principles, as well as other authoritative standards in this area.

4.9.1 Scope

The Law on Information is not clear about who has the right to access information held by public bodies. The preamble states that the Law “fixes the right of citizens” to information and Article 28 states that the “citizen” has the right to apply to State bodies and require the provision of any official document. Article 5, however, states that “foreign citizens” and “persons destitute of citizenship” can also be agents of information-based relations.

As discussed above, international law requires that States guarantee the right of *everyone* to seek, receive and impart information.⁹³ The Council of Europe Recommendation also clearly states:

Member states should guarantee the right of *everyone* to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.⁹⁴
[Emphasis added]

⁹¹ ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999).

⁹² Recommendation No. R (2002) 2 on Access to Official Documents, adopted 21 February 2002.

⁹³ See Article 19(2) of the International Covenant on Civil and Political Rights.

⁹⁴ Note 92, Principle III.

Recommendation:

- The preamble, Article 28 and other relevant provisions in the Law on Information should be amended to guarantee the right of everyone to access information held by public bodies.

4.9.2 Definitions

Article 1 of the Law on Information defines information as “reports on persons, subjects, events, developments and processes, irrespective of the form of their presentations.” The basic types of information are then set out in Articles 15-22.

The definition of “information” is too narrow. “Information” should be defined to include all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production.⁹⁵ The Council of Europe Recommendation states:

‘[O]fficial documents’ shall mean all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation.⁹⁶

The definition of “public body” in the Law on Information is also too narrow. Article 1 defines information of “bodies of the State authority system” as officially documented information which is created during the current activities of “legislative, executive and judicial authorities, and bodies of local authority.” Article 28 also states that citizens may submit requests to respective bodies of “legislative, executive and judicial authorities and archival institutions and their officials.”

The definition of ‘public body’ should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).⁹⁷

Furthermore, private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health,⁹⁸ or is required for the exercise or protection of a right. The South African Constitution and Promotion of Access to Information Act,⁹⁹ for example, include this sort of latter provision. Article 32(1) of the South African Constitution states:

Everyone has the right of access to – ...

⁹⁵ *The Public’s Right to Know*, note 91, Principle 1.

⁹⁶ Note 92, Principle I.

⁹⁷ *The Public’s Right to Know*, note 91, Principle 1.

⁹⁸ *Ibid.*

⁹⁹ Act No. 2, 2000.

- c. any information held by the state; and
- d. any information that is held by another person and is required for the exercise or protection of any rights.

Recommendations:

- The definitions of “information” and “public body” should be amended as set out above.
- The Law on Information should further provide for a right to access information held by private bodies if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health, or is required for the exercise or protection of a right.

4.9.3 Regime of Exceptions

Article 33 of the Law on Information sets out the regime of exceptions. Official documents are not subject to access if they contain:

- secret information;
- confidential information;
- information on operational and investigation-related work of inquest bodies and courts when its disclosure can harm operative measures, preliminary investigation or inquest, break the human right to a fair trial or endanger the life or health of a person;
- information concerning the personal lives of citizens;
- documents constituting intra-departmental service correspondence which are connected to the process of decision-making and precede their adoption;
- information of financial institutions that is prepared for auditing financial agencies; and
- information which is not subject to disclosure according to regulatory and legal acts.

Article 1 defines “secret information” as information containing a State secret whose disclosure, according to “The List of Information Containing State Secret”, causes detriment to the security of the State. “Confidential information” is defined as information which is possessed, used or disposed of by natural persons or legal entities and is classified as a State secret based on the request of the possessor.

Under international standards, a refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test:

- (1) the information must relate to a legitimate aim listed in the law;
- (2) disclosure must threaten substantial harm to that aim; and
- (3) the harm to the aim must be greater than the public interest in having the information.

The Council of Europe Recommendation states:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
 - i. national security, defence and international relations;

- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to *harm* any of the interests mentioned in paragraph 1, unless there is an overriding *public interest* in disclosure.¹⁰⁰ [Emphasis added]

It is not sufficient that information simply falls within the scope of a legitimate aim listed in the law. The public body must also show that the information would cause *substantial harm* to that legitimate aim. In some cases, disclosure may both internally benefit and harm that aim. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim. In addition, even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the public interest benefits of disclosure outweigh the harm. In such cases, the harm to the legitimate aim must be weighed against the *public interest* in having the information made public.

Without the “harm” and “public interest” components of the test, public authorities will have wide discretion to deny requests for information and the underlying objective of the law could be defeated.

The list of aims listed in Article 33 are legitimate, apart from the exceptions relating to “confidential information” and “information which is not subject to disclosure according to regulatory and legal acts.” Listing “confidential information” as a category of protected information is problematic for two reasons. First, protecting personal/private information is already listed as an aim, which means that confidential information refers to something more narrow, presumably information on commercial and other economic interests. Second, Article 1, which defines confidential information, allows any information held by an individual or a legal entity to be classified as a State secret “based on the request of the possessor.” Allowing a category of exempted information to be defined on a subjective, rather than an objective, basis is an invitation for abuse since individuals and legal entities will obviously request that information revealing corruption or other wrongdoing be classified as “confidential”.

Excepting “information which is not subject to disclosure according to regulatory and legal acts” is also problematic as it effectively renders the Law on Information inferior to other legislation. This is particularly problematical in a State in transition to democracy, which may be expected to have in place excessively broad secrecy laws. A freedom of information law should provide for a comprehensive regime of exceptions, which should not then be allowed to be expanded or extended by other laws. It should therefore be clear that, in matters relating to disclosure of information,

¹⁰⁰ Note 92, Principle IV.

the Law on Information takes precedence over other legislation and that other laws must be brought in line with it.¹⁰¹

Article 33 fails to fully incorporate a “harm” test, the second part of the test for exceptions. Harm is required in relation to only two of the categories of exceptions – secret information and information on operational and investigation-related work of inquest bodies and courts. The Law on Information also lacks a “public interest” override.

Recommendations:

- Article 33 should be amended so that “confidential information” and “information which is not subject to disclosure according to regulatory and legal acts” are deleted as exceptions to the right to access information. The category “confidential information” should be replaced with a narrowly defined exception relating to “information on commercial and other economic interests.” The definition of “confidential information” in Article 1 and references to it in other parts of the law should be deleted.
- Article 33 should incorporate a “harm” test and “public interest” override for all exceptions.

4.9.4 Costs

Article 32 provides that the requesting person should completely or partially compensate the costs associated with the implementation of the request for official documents and providing written information, and that the amount of payment should not exceed the real cost of implementation.

This provision is in accordance with international law, but it could include more details to facilitate access. Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing information. The latter is waived or significantly reduced for requests for personal information or for requests in the public interest. In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

Recommendation:

- Article 32 should be amended to ensure that the cost of gaining access to information is not so high as to deter potential applicants and that fees are low for requests for personal information and requests in the public interest.

4.9.5 Appeals

¹⁰¹ *The Public's Right to Know*, note 91, Principle 8.

Article 31 sets up a system for appealing a denial or deferment of a request for access to official documents. The system provides for a two-stage appeal, first to a superior body and then to the court.

This system is in accordance with international law, but it could be improved. A better system of accessibility is a three-tier system of appeals, first within the public body, then to an independent administrative body, and finally to the courts.¹⁰² An appeal to an independent administrative body is normally less complicated, and substantially quicker and less costly than an appeal to a court, which facilitates appeals, especially by less-educated and poor individuals. In addition, an administrative body can provide an independent and expert overview of the functioning of the freedom of information law, as well as performing other useful functions, such public education and the production and submission of annual reports to Parliament.

The independent administrative body could be one specifically set up for the purpose, or an existing body such as an Ombudsman or a Human Rights Commission. In either case, the independence of the body should be guaranteed, both formally and through the process by which staff are appointed. In order to ensure independence, such appointments should be made by representative bodies, such as an all-party parliamentary committee and the process should be open and allow for public input and nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.

The administrative body should have full powers to investigate any appeal, including the ability to compel witnesses and require the public body to provide it with any information or record for its consideration, *in camera*, if necessary. The administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust the charges levied by the public body, to fine the public body for obstructive behaviour, and to impose costs on public bodies in relation to appeals.

Recommendation:

- The law should provide for an individual right of appeal to an independent administrative body in accordance with the above recommendation.

4.9.6 Omissions

The Law on Information is missing some key elements that would strengthen access to information and the public's right to know.

Protection for Whistleblowers

Civil servants and other individuals in the public sector sometimes have access to information which may expose official wrongdoing, but they are afraid to release it because they may face legal or employment-related sanctions. The law should therefore provide protection for "whistleblowers" – individuals who release information on official wrongdoing.

¹⁰² *Ibid.*, Principle 5.

“Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious mal-administration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation.

In some countries, protection for whistleblowers is conditional upon a requirement to release information to certain individuals or oversight bodies. Protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even the media. The “public interest” in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.¹⁰³

Promotional and Educational Activities

The experience of countries which have introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow process, which can take ten years or more. As such, the law should provide for promotional and educational activities, targeting both public bodies and society-at-large, including:

- the training of civil servants on the scope and importance of freedom of information, the procedures for disclosing information, and how to maintain and access records;
- incentives for public bodies which effectively apply the law;
- the submission of an annual report to Parliament on the progress (achievements and problems) implementing and applying the freedom of information law; and
- a public education campaign on the right to access information, the scope of information available, and the manner in which a person’s rights may be exercised under the new law.¹⁰⁴

Recommendations:

- The Law on Information should include provisions on protection for whistleblowers and promotional/educational activities, in accordance with the commentary above.

¹⁰³ *Ibid.*, Principle 9.

¹⁰⁴ *Ibid.*, Principle 3.