



CENTRE FOR LAW
AND DEMOCRACY

Outline of Rules Affecting Freedom of Expression

May 2010

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

This Outline is intended to give guidance to civil society and other stakeholders in Kyrgyzstan as to how to design a legal framework for freedom of expression that is consistent with international standards. It focuses only on the most important issues, and is not intended to be a comprehensive guide to law and regulation in this area.¹ An overview table of this outline is provided below.

Content Rules

This section highlights the key restrictions on content that are commonly found in democracies, along with a short description of the appropriate scope of these restrictions. Under international law, restrictions on freedom of expression must be provided for by law, serve a legitimate interest (namely protection of the rights or reputations of others, national security, public order (ordre public), or public health or morals), and be necessary to protect that interest. Necessity implies that restrictions:

- are clearly and narrowly defined and respond to a pressing social need;

¹ For this purpose, the following publication is recommended: Steve Buckley, Kreszentia Duer, Toby Mendel, and Sean O'Siochru, *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation* (2008, Ann Arbor, University of Michigan Press).

- are the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression;
- are not overbroad, in the sense that they are not unduly wide and do not go beyond the scope of harmful speech and rule out legitimate speech; and
- are proportionate in the sense that the benefit to the protected interest is greater than the harm to freedom of expression.

Criminal Rules

- Hate speech

Most countries have criminal prohibitions on spreading hate speech and this is actually required under international law. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) provides:

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

As with all restrictions on freedom of expression, it is important to achieve an appropriate balance between protecting other legitimate interests and not unduly restricting free speech. Limiting hate speech rules to the scope set out in Article 20(2) of the ICCPR is a good way of doing this.

- National Security/Public Order

Protection of national security and public order are both interests that may come into conflict with freedom of expression. While it is legitimate to impose some restrictions on freedom of expression to protect these interests, at the same time these are often abused to unduly limit free speech. A good balancing is provided in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted by ARTICLE 19 in 1995. Section 6 provides:

Subject to Principles 15 and 16 [which further limit restrictions], expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

- Obscenity

Most countries place some sort of limit on the circulation of materials deemed to be obscene. At one level, this can involve restrictions designed to prevent minors from accessing this sort of material, such as requiring pornographic publications to be displayed in a way that ensures children cannot see their contents.

In most countries, certain types of obscene materials are absolutely prohibited. Child pornography, for example, is almost always illegal but most countries go further than this. Once again, the challenge is how to strike an appropriate balance,

since it is not legitimate to subject everyone to the whims of more prudish members of society. Indeed, the right to freedom of expression extends to information and ideas which shock and offend, as well as those that are widely accepted, and so in principle protects sexually explicit materials which some might find offensive.

- Protection of the judiciary

In many countries, criminal rules are in place which restrict freedom of expression with a view to protecting the integrity of the judicial process. These have two aims, namely to ensure that the administration of justice is fair and operates without constraints, and to protect the institution of the judiciary, as such. Under the former category, one finds, among others, rules prohibiting the intimidation or biasing of witnesses, rules against perjury and rules prohibiting the disruption of court proceedings. If appropriately phrased, these are legitimate.

More controversial are rules designed to prevent the judiciary from criticism. In the past, such rules have been justified on the basis that there is a need to ensure respect for the judiciary so that citizens will accept their role as final arbiters of disputes in society. More recently, however, democracies are finding that it is not necessary to prevent statements about the judiciary to this end and that, in fact, the larger need is to allow open criticism of the judiciary, as for all public officials and bodies, to promote greater accountability.

- Blasphemy and False News Rules

Many countries still have blasphemy laws on the books, although these are problematical from a free speech perspective. Even the UN Special Rapporteur on Freedom of Religion or Belief has called on States to consider repealing their blasphemy laws. In many countries, these laws are discriminatory, and only the main religion is protected. Furthermore, such laws almost always protect religion itself against criticism as opposed to the legitimate sensitivities of believers. Almost all such laws discriminate against atheists and non-theists, and they are often used to repress religious minorities, dissenting believers, atheists and non-theists.

An increasing number of democracies have repealed their blasphemy laws and provide for protection of religious believers against attack only through hate speech laws. At a minimum, blasphemy laws need to be very carefully circumscribed so as to avoid breaching the right to freedom of expression.

Some countries also have false news provisions, which criminalise the dissemination of false statements, *per se*, even if they are not defamatory in nature. Accurate reporting is, of course, an important professional aspiration for journalists. At the same time, there are serious problems with blanket false news provisions, and they have been struck down by leading courts in a number of countries. They exert a chilling effect on journalists, who have a professional obligation to report in a timely manner on matters of public interest, and they may be abused to elevate

widely-held views to the status of 'facts' or to limit the expression of unpopular opinions.

Civil Rules

- Defamation

Every country has in place some system of rules to prevent unwarranted attacks on reputation, otherwise known as defamation laws. An increasing number of countries are doing away with criminal defamation laws, historically justified by reference to public order but increasingly being recognised as a breach of the right to freedom of expression.

Civil defamation laws must respect a number of standards if they are to be legitimate as restrictions on freedom of expression. First, they should only protect actual reputations – for example of individuals or entities with the right to sue and be sued – and not be used to protect objects – such as State or religious symbols, flags or national insignia – or public bodies.

Various defences should be available against a charge of defamation, including that the impugned statement was true, that it was an opinion, or that it was reasonable in all of the circumstances to make the statement, even if it ultimately proves to be inaccurate. Statements made in the course of proceedings before legislative bodies or courts, and fair and accurate reports on those statements, should be protected, as should good faith statements made in the performance of a legal, moral or social duty or interest.

Finally, remedies for defamation should aim to redress the harm done, not to punish the party who made the statement. Non-pecuniary remedies, such as rights of correction or reply, should be prioritised and any monetary awards should be strictly proportionate to the harm done. Consideration should be given to putting an overall cap on the monetary damages that may be awarded.

- Privacy

Most countries have civil laws providing protection for privacy, just as they do for reputation. This is legitimate as long as these laws are appropriately circumscribed and provide for adequate protection against abuse. Courts have identified four different types of privacy interest worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one's name or likeness, publicity which places one in a false light and unreasonable publicity given to one's private life.

Two constraints on these laws are necessary to ensure that they are not used to unduly restrict free speech. First, they must be limited in application to situations in which an individual has a reasonable expectation of privacy, taking into account all of the circumstances. Second, where the overall public interest is served by

dissemination of a statement, this should prevail over the privacy interest. This might be the case, for example, where an invasion of privacy disclosed evidence of corruption or of a threat to life or safety.

- **The Right to Information**

It is now widely recognised that everyone has a right to access information held by public bodies, subject only to a limited set of exceptions to protect overriding public and private interests. This right must be implemented through legislation. Such legislation should: establish a broad presumption in favour of access to all information, held by all public bodies; place an obligation on public bodies to disclose a wide range of information of public interest on a proactive basis; put in place a clear procedure for making requests for information; detail a clear and narrow set of exceptions to the right of access; and provide for an independent appeals mechanism to contest refusals to grant access.

Media Regulation

This section outlines the key features and options regarding regulation of the media in a democracy, consistently with the right to freedom of expression. It is divided along the lines of key media entities, namely journalists, the print media, the broadcast media and public service broadcasters.

Three key principles underpin media regulation:

- **Freedom:** the rules should not unduly restrict the freedom of the media either in terms of the establishment and operation of media outlets, or in terms of content.
- **Independence:** the rules should as far as possible prevent State, in particular political, as well as commercial, interference in the media.
- **Pluralism:** the rules should promote pluralism and diversity so as to ensure the widest possible access to the media, and that the media serve the needs and interests of all groups in society.

Independence of Regulatory Bodies

It is very well established under international law that bodies which exercise regulatory powers over the media – whether this be over licensing, accreditation or allocation of subsidies – should be independent in the sense that they are protected against interference of a political or commercial nature. Indeed, as noted above, this is a fundamental principle of media regulation. The reasons for this are fairly obvious. Absent such protection, the decisions of these bodies will be influenced by political or commercial considerations, rather than freedom of expression and the public interest. The lack of protection for independence is one of the most serious threats to freedom of expression in many countries.

The question of how to protect independence in practice is a difficult one, and the specific modalities of doing this depend on the local political and institutional context. As a general principle, involving a greater range of players – including the

legislature and civil society – in the process of appointing the governing members of such bodies helps to bolster independence. Protection for the tenure of members, and against removal once appointed, is also important.

Commercial Issues

Undue concentration of media ownership undermines freedom of expression in various ways. It has a strong tendency to undermine diversity, as uniform perspectives are promoted within the ownership group and as the same programmes are syndicated among different media in the group. As a result, international law requires States to put in place measures to prevent concentration of media ownership, both within a given sector – such as print or broadcast media – and between different media sectors.

It may be noted that while general anti-concentration measures are aimed primarily at ensuring a competitive market, for which two real competitors is normally enough, anti-concentration measures for the media have a far more lofty and challenging goal, namely diversity. It is, therefore, recognised that special, more stringent, anti-concentration measures are needed within the media sector than what is needed simply to ensure competition.

In many countries, public advertising represents a very significant part of the overall advertising market, and thus an important source of revenue for the media. If the allocation of this advertising is not insulated against political interference, it can be a potent force for exercising control over the media. It is thus important that systems be put in place to prevent this, including by ensuring that the placement of public advertising is based on fair and objective criteria, including market conditions.

Journalists

Licensing of journalists, whereby they have to go through a process of applying to practise their profession, is not a legitimate restriction on their freedom of expression. Unlike other professions – such as medicine, law and engineering – the practice of journalism is a fundamental human right, so that restrictions on access to the profession cannot be justified. Indeed, even registration schemes for journalists will fail to pass muster as restrictions on freedom of expression since interests such as reputation can be protected through bringing action against the media outlet responsible for dissemination of the statements.

On the other hand, international law requires States to provide protection for the right of journalists and others who publish information in the public interest to refuse to disclose their confidential sources of information. The rationale behind this is not that journalists have special rights which ordinary citizens do not. Rather, the reasoning is that such protection is necessary to ensure the right of everyone to receive information on matters of public interest. Absent such protection,

confidential sources are unlikely to come forward with information, and so the general public will be denied access to it.

Privileged access of journalists to certain venues – such as parliament and the courts – is premised on the same principle of serving the wider right of the public to receive information on matters of public interest. Accreditation is the primary means by which journalists are guaranteed privileged access to these venues. Accreditation should not, therefore, be confused with, or abused to create, a system of registration or licensing of journalists. As with all regulatory powers, accreditation should be overseen by a body which is protected against political or commercial interference.

Print Media

In many countries, the print media are not subject to any special form of regulation, over and above the general rules which apply to the legal form in which they are established (such as a corporation). It is established that licensing of the print media, as with licensing of journalists, whereby one must apply for permission to establish a print media outlet, is not legitimate. Even technical registration systems for the print media are considered to be unnecessary, and may be abused, and hence should be avoided. Such systems will only be legitimate where they meet certain conditions, namely:

- there is no discretion to refuse registration, once the requisite information has been provided;
- registration does not involve substantive conditions, other than that the name being proposed for the media outlet is not already being used;
- the process of registration is not excessively onerous; and
- the system is administered by a body which is independent of government.

Rights of correction and reply, if appropriately framed, can provide redress against wrongs such as defamation and invasion of privacy which is less intrusive than the redress provided by the civil law and yet is somehow more effective (particularly for defamation, since these remedies directly address the misleading statement). Self-regulatory systems for providing these rights are preferable, since they are less open to abuse.

To conform to international standards, any mandatory rights of correction and reply must be appropriately circumscribed. Given that it is a less intrusive remedy, a right of correction should be the preferred remedy, whenever it will effectively redress the wrong done. A right of reply should be provided only in the context of a breach of a legal right of the claimant which cannot be redressed through a correction.

In some countries, bodies – such as a press council – are established by law to provide those who feel they have been wronged by material disseminated through the print media with an opportunity to complain. Where an effective self-regulatory complaints body exists, one should not be imposed by law. Any statutory complaints

body should, as with all regulatory bodies, be independent. Furthermore, complaints should be judged against a pre-established code of conduct, which has been developed in consultation with all stakeholders, and the only sanction should be a requirement to print a message acknowledging the wrong.

Private Broadcasters

Unlike the print media, it is necessary to licence broadcasters, at least inasmuch as they use the radio spectrum to disseminate their products, if only to ensure orderly use of the airwaves. However, the airwaves are a limited public resource and it is accepted that regulation may also ensure that they are used in the public interest. In many countries, regulation comprises both licensing of broadcasters and oversight of content.

As always, the regulator should be protected against political and commercial interference. Ideally, a planning process should be undertaken to chart the most appropriate use of available broadcasting frequencies, a sub-set of all frequencies, taking into account existing uses and foreseeing an equitable division of these frequencies among public, commercial and community broadcasters.

The licensing process should be in accordance with the frequency plan. In higher population density areas, where demand for spectrum resources is expected to exceed supply, licences should be offered on a tender basis, allowing for competing bids. In lower density areas, an open bidding system may be employed. The process of assessing applications, whether pursuant to a competitive tender or open bidding, should be fair and transparent, and allow for public input. Applications should be assessed against criteria which are published in advance, and which include the goal of promoting diversity.

To promote diversity, the ownership structure of licence applicants should be included as part of the application, along with an overview of the programming proposed to be provided. Where granting an applicant would either increase concentration of media ownership or fail to ensure a greater range of diverse material is available to the public, this should be taken into account in deciding whether or not to issue the licence.

It is common to impose minimum programme standards, or a code of conduct, on broadcasters by law, but where an effective self-regulatory system is in place, this is not necessary. Where a statutory system is imposed, it should be based on an established code of conduct, developed in consultation with all stakeholders, as with any code for the print media. Sanctions should be graduated, starting with a warning and then a requirement to broadcast an acknowledgement of breach, and the goal should be to establish clear standards, rather than to punish. More severe sanctions should be imposed only for serious and repeated breaches, which lighter sanctions have failed to remedy.

Public Service Broadcaster

As with other areas of media regulation, control by the government or political interests of a public broadcaster represents a breach of the right to freedom of expression. The governing boards of public broadcasters should be protected against such interference in the same way as other regulatory bodies.

A key goal of public service broadcasting is to complement and enrich the broadcasting provided by commercial broadcasters. To do this, they need to be able to operate relatively free of commercial pressures, and this requires that they receive public financial support. Such support should be adequate to enable them to fulfil their mandates, and yet it needs to be protected against the possibility of being used to exert political pressure. The best way to do this is to fund public broadcasters through a direct public levy, for example on an electricity bill or based on television set ownership.

It is also important that public broadcasters have a clear mandate set out in law, both to clarify what is expected of them and to provide for an accountability framework. The precise details of this mandate will depend on the country and context, but they are normally expected to fulfil such functions as providing a comprehensive and quality news service, giving voice to and satisfying the information needs of all sectors of society, developing national culture and programming, and providing educational programming.