CENTRE FOR LAW AND DEMOCRACY

Mongolia

Comments on the Draft Law on Freedom of the Press

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

1. Introduction

The draft Law of Mongolia on Freedom of the Press (draft Law) was prepared by the Special Advisor to the President, after a number of consultations with civil society and media groups. The motivation for preparing the draft Law appears to be a sense among key stakeholders that the current legal framework fails to provide sufficient protection for freedom of the press. This may be partly because the 1997 Law on Freedom of the Media includes only four operative provisions, which rule out laws that restrict freedom of the media, make media outlets responsible for their own content, rule out prior censorship and State control over broadcasters, and prohibit the government from setting up its own media.

The intentions behind the draft Law are no doubt positive. At the same time, many of its provisions are problematical either from a technical point of view or from the perspective of international law. It also does rather little to promote freedom of the media. It does provide protection for confidential sources of information, which is an important extension to existing protections for media freedom in Mongolia. However, its provisions on self-regulation are simply not workable or detailed enough to deliver this goal. In other areas too – such as its provisions on media freedom, on access to information and on defamation – it is too general, and too little developed, to deliver useful benefits.

It may be noted that a law which sought to protect freedom of the media might usefully include a number of elements that are largely or entirely missing from the draft Law. Such a law might, for example:

- Indicate that freedom of the media shall be respected in accordance with international standards.
- Set out a number of features of freedom of the media such as respect for editorial independence, the right to establish media outlets, the right to criticise leaders and so on.
- Provide for protection against prosecution except in accordance with a clear and pre-existing law.
- Do away with the requirement of registration of the print media, or substantially amend the existing system.
- Establish clear rules governing any restrictions on freedom of the media.

The purpose of these Comments is to help ensure that the draft Law takes into account as fully as possible international standards and better practice in other States regarding regulation of the media. They are based on an informal translation of the draft Law, provided to the Centre for Law and Democracy by the Open Society Forum.[1]

[1] CLD is unable to verify the quality of the translation and is not responsible for any errors in this regard.

2. Comments

2.1 Definitions

Article 3 of the draft Law contains the definitions. The 'media' is defined somewhat circularly as all types of radio, television, newspapers, journals and information in electronic form, that are produced by media organisations. The latter, in turn, are defined as entities that carry out "policy making with respect to, preparation of the content of, and the publishing of materials".

It may be noted that, on its face, this is an extremely wide definition. Depending on how the term "policy making" is understood, this would include any entity that disseminates information via radio, television, printed means or even the Internet. The latter would appear to cover all material produced by NGOs or other civil society entities (religious institutions, universities) that might be deemed to be a 'journal'. Even more problematically, it could cover a vast range of electronic information, such as websites, even if private in nature, as well as individual or public blogs and so on. It seems clear from the nature of the draft Law, and its attempt to establish a self-regulatory system and to provide for protection of sources, that it does not seek to apply to this wider range of disseminated information. Furthermore, it would be problematical to seek to apply some of the provisions in the draft Law, such as the rules on advertising and transparency of ownership, to this wider range of entities.

It would be better to define the print media as having a number of clear and distinct characteristics, such as appearing periodically (for example, at least once a month), under a fixed title, containing edited content, and being of general distribution and aimed at the entire public or a section thereof. The definition could also give as examples newspapers and magazines.

Broadcasters should similarly be defined by reference to general characteristics. These include the idea of disseminating broadcast programming, including through terrestrial transmitters, cable or satellite, for public consumption and for simultaneous reception, whether or not by subscription, through a radio and/or television broadcast receiver or other related electronic equipment. The definition should probably also include some exclusions, such as communications which are internal to an organisation.

The matter of coverage of media disseminated over the Internet raises special issues. On the one hand, it would seem anomalous that a newspaper could be covered by certain rules in its printed version, and yet the Internet version of the same newspaper would not be covered by those rules (and the same for broadcasters). On the other hand, as noted above, it would be problematical to seek to apply the draft Law to a wide range of

Internet information. Furthermore, even traditional media carry very different sorts of material in their on-line versions, much of it subject to less editorial control.[2]

The Council of Europe has introduced the idea of 'edited' online content. Thus, in its Recommendation Rec(2004)16 on the right of reply in the new media environment,[3] it includes the following definition:

> The term "medium" refers to any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

This has the benefit of limiting the scope of application of the rules in respect of online content. Another approach which could be considered in Mongolia would be to extend coverage of the draft Law to print and broadcast media, as defined above, as well as their online versions. This would have the advantage of being quite clear in restricting the scope of application to media outlets, as such. It would have the slight disadvantage of not capturing media outlets which only exist online, but as this sector remains little developed in Mongolia at present, perhaps this is not too serious an issue.

Another concern with the definitions of 'media' and 'media organization' is that it is not clear why separate definitions of these two entities are required. It may be noted that the draft Law itself refers, variously, to media organisations (Article 4.1, on the right to publish, Article 7, on responsibility for publications, and Article 8, on transparency of ownership), press (Article 4.3, on laws restricting press freedom, Article 9, on self-regulation, and Article 10 on defamation), media outlets (Article 5.1, on government media), and publication activities (Article 6, on protection of sources).

It seems clear that certain provisions are intended to apply to all media outlets (such as protections for the right to publish, government media, protection of sources and transparency of ownership), while other provisions seem intended to apply only to the print media (self-regulation).

Article 3.1.4 defines 'publishing', while Article 3.1.9 defines 'unpublished information'. The draft Law does refer to these concepts, for example in respect of freedom to publish information (Article 4.1), protection of sources in respect of published or unpublished work (Article 6.2), and not charging for unpublished information (Article 7.4). It is not clear why these definitions are necessary for any of these purposes. First, the underlying notions are clear (that is, it is usually obvious whether or not material is published). Second, in respect of sources, the issue is not whether the material is or is not published, but whether it identifies the source.

[2] For example, the Guardian newspaper's online Comment is Free section is subject to certain standards but less rigorous ones than the main printed version. See http://www.guardian.co.uk/commentisfree.
[3] Adopted by the Committee of Ministers on 15 December 2004.

Furthermore, the definition of 'publishing' refers to the idea of collecting information for purposes of disseminating it, "while safeguarding the sources of such facts and information". Similarly, the definition of 'unpublished information' also refers to the idea of "hiding the source". In many cases, there is no need to safeguard sources; indeed, professional journalists should identify their sources unless they have asked for confidentiality. In any case, the idea of protecting sources is not logically linked to the idea of publishing or not publishing. This is about disseminating information to the public; the question of sources is not part of the defintion, even while protection of confidential sources may flow from the intention to publish. Put differently, this introduces an unfortunate circularity into the protection of sources. And for unpublished information, this leads to the illogical result that one may not charge for it when hiding a source, but one might if the source is not confidential.

Article 3.1.3 defines the term 'self-regulated system of the press ethics' as: "a group of non-governmental public organizations which provide the means for introduction of ethical norms in the activities of the media and for the exercise of the right of public monitoring of the media content". It is not clear what this adds to Article 9, which addresses the issue of self-regulation (see below for an analysis of these proposals). It is simply too general to have a clear meaning. And yet, by the same token, it might be claimed by some as having a restrictive meaning (for example, that the public are supposed to monitor and control media content).

Article 3.1.6 defines advertising as material which "meets the general requirements for advertising and promotion" but which has not been produced by a media outlet. This is a circular definition. A better definition might be:

> Any public announcement intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser, for which space or time has been given up to the advertiser for remuneration or similar consideration.

Article 3.1.8 defines 'the source of information' as the provider of that information, including his name, address and any other information from which his or her identity may be determined. This mixes up two different ideas: an information source, and information which identifies that source. These should be separated out.

Recommendations:

- The definitions of 'media' and 'media organization' should be replaced by appropriately narrow definitions of the print media and broadcasters, and then media outlets in general should be defined as comprising these two.
- The scope of the law should be restricted to the online versions of media outlets (or to periodic and edited online material intended for general public consumption).
- Consideration should be given to removing the definitions of 'publishing' and 'unpublished information' from the law. If these definitions are retained, the

notion of protection of a confidential source should be removed.
- Consideration should be given to removing Article 3.1.3, defining a self-regulatory system, from the definitions or to making it far more clear and precise.
- The definition of advertising should be revised so that it is not circular, along the lines suggested above.
- The definition of a source of information and the definition of information which may identify a source (of information) should be separated out.

2.2 General Protections

The draft Law includes a number of general protections. Article 4 lists three protections, namely that media outlets have the right to seek and publish information, that officials shall not control or censor them and that the State Great Hural shall not pass laws restricting freedom of the press.

The intention behind these provisions is positive. At the same time, they could be improved. Article 4.1 provides for the right of media outlets, freely and independently, to "obtain, seek, disseminate, verify, investigate, and publish information". While positive, this is also very general in nature. Furthermore, it does not address the real issue, which is under what conditions restrictions on these rights, which are not absolute, might be imposed. It would be preferable, for example, if the law were to set out limitations on the restrictions which may be imposed on these rights. Thus, the law might spell out that restrictions must be set out in a clear and accessible law, that they must serve one of a list of overriding interests (such as national security or the rights of others) and so on.

Article 4.2 states that officials shall not control (or subject "to censorship") the content of disseminated information, or organise any kind of investigation. By terms, this would prohibit the police from investigating an allegation of dissemination of hate speech or of material that incited to crime or that undermined national security. Clearly this is excessive. Furthermore, this provision is not even limited in scope to the media. It would be preferable if this provision simply made it clear that the media may not be subject to prior censorship.

Article 4.3 seeks to prevent the State Great Hural from passing any law that would restrict freedom of the press. Although this expresses an admirable sentiment, it has no legal relevance. First, the constitution already guarantees press freedom and other laws are, at least in principle, supposed to respect this. Second, this is merely a piece of legislation passed by the State Great Hural. They would be entitled to pass another piece of legislation repealing this provision. As with Article 4.1, it would be preferable simply to outline in some detail the conditions under which restrictions on freedom of the press might be imposed. This could be presented as an official interpretation of the principles expressed in the constitution, and hence something that should be respected in other legislation. Of course a future State Great Hural might amend or repeal it, but unless or

until that happened, it would provide a useful tool for judges, police and others tasked with interpreting the scope of this freedom.

Article 5 prohibits public bodies from maintaining their own media outlets, although they may produce periodic compilations and websites for purposes of disseminating government information, as well as media that disseminate information on Mongolia abroad.

Article 5.2 stipulates that public bodies and officials shall make public all information relating to their activities except for complaints filed by citizens and entities, and "confidential information". This is useful but it does not replace the need for a fully fledged right to information law, which would set out clearly the scope of this right, procedures for making requests, exceptions to the right and how refusals to disclose might be appealed.

Article 7 indicates that media outlets are responsible for their own publications or broadcasts, but that liability for advertising shall be borne by those who have commissioned them. Media outlets are required to differentiate between advertising and other types of content. Finally, media outlets are prohibited from charging for material that has not been disseminated (Article 7.4). It is unclear what problem this last provision seeks to address. Normally, this is a matter that should be left to be sorted out on a commercial basis between media outlets and advertisers. For example, it might be that an advertiser pulled an advertisement at the last minute, making it impossible for the media outlet to find alternative material to fill that slot. In such cases, it would be appropriate for the media outlet to charge the advertiser.

Article 8 requires media outlets to be transparent about their shareholders, in particular as to shareholding by officials, political parties, foreigners and businesses operating in the telecommunications sector. Instead of listing different categories of shareholders, the law should provide that any shareholding over a minimum threshold, say of two percent, must be made public. First, it is not appropriate to limit transparency in this area to certain kinds of shareholdings. Second, this undermines the basic principle of openness of media ownership and could lead to problems, for example with media outlets trying to pretend that certain owners did not fall into the listed categories.

Recommendations:

- Consideration should be given to replacing Articles 4.1 and 4.3 with a detailed elaboration of the conditions under which press freedom might be restricted, so as to provide guidance to judges, police, other officials and the media on this important issue.
- Consideration should be given to limiting Article 4.2 to a simple but clear statement that prior censorship of the media shall be prohibited.
- The inclusion of Article 5.2, requiring public bodies and officials to be open, does not replace the need for a proper right to information law, setting out in detail the scope and application of this right.

- Article 7.4 should be removed from the draft Law and the issue of charging for advertisements should be left up to media outlets and their clients.
- The rules on transparency of media outlets should apply to all shareholders over a certain minimum, for example of two percent ownership.

2.3 Confidential Sources

The rules on protection of confidential sources of information are set out in Article 6 of the draft Law. Any "participant in publication activities" may refuse to disclose a source of information where the information was provided on an agreement of confidentiality and where the participant considers that to disclose the source would be harmful to the "life, health, reputation, honor, and business reputation of others". It is prohibited to require the participant to disclose "the origin, the sources, and the ways of obtaining his or her published or unpublished information", or to harass him or her for refusing to do so.

The right of media workers and others to refuse to disclose their confidential sources of information is included within the right to freedom of expression. It is, therefore, very welcome that such protection is being proposed for Mongolia. At the same time, the rules could be amended slightly to bring them better into line with international standards in this area. First, the scope of protection is not clear. The rules refer to participants in 'publication activities', but only 'publishing' is defined in the draft Law.

It might be preferable to extend protection to anyone involved in the regular dissemination of information to the public. The Council of Europe's Recommendation No. R (2000) 7 on the Right of Journalists Not to Disclose Their Sources of Information extends protection to:

> [A]ny natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.[4]

Second, protection is contingent upon the media worker deciding that disclosure of the source would be harmful to various interests, such as the life, health, reputation and so on of others. This is not appropriate. Confidential sources provide information to journalists on the understanding that their identity will not be disclosed. It is not for the journalist to second-guess this and to protect the source only where he or she feels that one of the other interests listed may be harmed.

Third, the list of items which a media worker may not be required to disclose – including the way in which he or she has obtained the information – is both too broad and too narrow. The media worker should be allowed to refuse to disclose any information which

[4] Adopted by the Committee of Ministers on 8 March 2000.

would allow the source to be identified, but only such information (how the information was obtained will not necessarily identify the source, for example).

Recommendations:

- The right to protect sources should extend to everyone who is regularly or professionally engaged in dissemination of information to the public.
- The right should apply whenever the source has requested confidentiality, regardless of whether or not the media worker is of the view that identification of the source will cause other problems.
- The right should apply to all information which would allow the source to be identified, but only to this information.

2.4 Self-Regulation

Article 9 of the draft Law purports to establish some sort of system of self-regulation. It provides that the "press shall have its own self-regulated ethics system which is responsible for self discipline, self management, and ethics regulation", which shall be transparent. Citizens or entities may lodge a complaint in relation to a media outlet, journalist or media content, and shall be entitled to receive a response. Where a citizen has made a complaint relating to these bodies to a court, prosecutor or the police, that comlaint shall be referred, with the consent of the complainant, to the self-regulatory body (Article 9.3).

Self-regulation is an excellent way to protect the rights and interests of the public while at the same time respecting freedom of the media. Such systems are, therefore, to be encouraged. It may be noted that in many democracies, the print media is entirely self-regulating, while broadcasters are often subject to a statutory code of conduct. This reflects the very different nature of these media, and the fact that broadcasters are subject to more intensive regulation, in part because they make use of a scare public resource, the airwaves.

Despite the positive reference to self-regulation, there are a few problems with the system proposed in the draft Law. Perhaps the most important problem is that the draft Law neither leaves it up to the media to establish their own system nor does it put in place a practical mechanism for establishing such a system itself. All it does is say that the media shall have such a system. For such a system to work, at least two conditions are necessary. First, the system has to ensure that all media outlets participate in implementing it. Second, the system has to be able to provide adequate redress to complainants.

Until now, the media in Mongolia has not been able to establish its own self-regulatory system for various reasons and it is unclear how this one provision in the draft Law will get around this problem. Alternatively, various civil society bodies might try to establish self-regulatory systems which did not have the confidence of the media, or which were

competing with each other. It is also unclear how this system would be able to provide redress to complainants, where this was warranted.

Given past practice in Mongolia, it is very hard indeed to see how this very general rule in the draft Law will lead to the establishment of a unitary and effective self-regulatory body. Two realistic options are available to decision-makers in Mongolia. The first is to give the media more time to establish its own self-regulatory system, without providing for this by law. This might potentially be accompanied by some sort of statement that makes it clear to the media that if they do not put in place a self-regulatory system, the government will establish one by law.

Second, a media council could be established by law and be given a mandate to develop a detailed code of practice for the media. If this were done, it would be important that the independence of the council were well protected in the legislation. This could be done, for example, by making sure that there were no officials on the governing board of the council, which should instead be comprised of media workers and representatives of the general public. Furthermore, the powers of the body to order sanctions should be limited, so that its ability to control the media is limited. Such powers could, for example, be limited to requiring the print media outlet to carry a statement recognising, in appropriate cases, that it had operated in breach of the code.

Furthermore, there are problems with Article 9.3. It is not legitimate to bar individuals from bringing civil cases before the courts, even if they have not taken advantage of self-regulatory complaints systems. Any such failure might, however, be taken into account when considering damages, so that a refusal to use self-regulatory systems would result in lower damages being awarded. Furthermore, the rule does not recognise that there may be cases where a complainant does not agree to have the matter dealt with by a self-regulatory body, in which case it becomes unclear how the matter will be resolved.

Recommendations:

- The whole approach to self-regulation in the draft Law should be revisited. The law should either give the media more time to establish its own true self-regulatory system, or it should establish a proper complaints system directly.
- In any case, complainants should have the right to refuse to take a case before the self-regulatory system and instead go straight to court for redress, although in such cases this may be taken into account when awarding damages.

2.5 Defamation

Article 10 of the draft Law includes some provisions on defamation. It provides that any person complaining that the press has harmed his or her reputation shall bear the onus of proving that the information was false and the extent of any damages suffered. Furthermore, public bodies and political parties may not file defamation lawsuits, and

officials or leaders of these parties may only file a defamation lawsuit in their own names.

Articles 110 and 111 of the Criminal Code (revised) also deal with protection of reputation. Article 110 provides for the crime of "wilful humiliation" of a person's honour or dignity in the mass media, which is punishable by a fine of between 20 and 50 minimum salaries or imprisonment for between one and three months. Pursuant to Article 111.1, the same punishment applies to the spreading of false statements which defame someone. Where this is done in the mass media, or where it constitutes a second offence, the sanction is increased to a fine of between 51 and 150 minimum salaries or imprisonment for between three and six months. Finally, defamation consisting of accusing someone of committing a "serious or grave crime" is punishable by a fine of between 151 and 250 minimum salaries or imprisonment for between two and five years.

A key problem with Article 10 of the draft Law is that its relationship with the defamation provisions in the Criminal Code is not clear. It is, in particular, unclear whether or not Article 10 is intended to amend the Criminal Code. If Article 10 does not purport to amend the Criminal Code, its purpose and relevance is unclear.

If Article 10 does seek to amend the Criminal Code, it does not seem to be very well tailored to this end. Thus, Article 10 seems to assume that defamation cases will only be based on allegations of fact, which may be proven to be true or false, whereas it is clear that Article 110 of the Criminal Code envisages non-factual allegations against an individual. Perhaps even more important, Article 10 does not decriminalise defamation, or transform it into a civil matter, as required under international law. It does not even do away with imprisonment for defamation, considered to be highly problematical under international law.

Recommendation:

- The law should make it clear that Article 10 is intended to amend the Criminal Code provisions on defamation.
- Article 10 should be expanded to make it clear that only false statements of fact may attract liability for defamation. It should also transform defamation into a civil offence, or at the very minimum, do away with imprisonment for defamation.