



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

**LAW OF MONGOLIA
ON FREEDOM OF MEDIA**

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February 2015

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Summary of Key Points

The revised draft of the Law on Freedom of Media (“the Law”) must be read in conjunction with the Mongolian constitutional provision on freedom of expression. The constitution¹ only protects the right to “seek and receive” information, but not to “impart” information as is required under the provisions of Article 19(2) of the International Covenant on Civil and Political Rights (“ICCPR”).² The Law seeks to redress this deficiency, by extending the right to impart information to all citizens,³ which is to be commended. Overall, this draft of the Law represents a considerable improvement on both the existing law of 2008 and the draft prepared in 2013.

Where the Law could be improved is by widening the scope of “journalists” and “media organisations” that it covers. As defined, most of the provisions in the Law only apply to media organisations that are legal entities and journalists who are contracted to work for them; it does not appear to apply to media organisations that do not have contractual relationships with journalists. In this digital age, this omission is serious, given the growth of “citizen journalism” and bloggers as well as community media organisations that might rely entirely on volunteers.

The ICCPR additionally extends the right to freedom of expression “regardless of frontiers”. The Law is silent on its jurisdiction. The Law provisions should make it clear that it only applies to those media organisations that are legally established in the country. Given that the scope of the Law extends to online digital publications, the lack of clarity could have serious repercussions, for example, accusations that Mongolia is seeking to apply regulation to foreign-based media.

The provisions relating to the Media Council have been clarified and improved since the last iteration of the draft Law. However, there is still room for improvement. In particular, regional representation on the Media Council should be mandated.

Finally, the section on sanctions needs to be carefully reviewed as the Article numbers referred to do not necessarily match up with Articles in the Law.

¹ Article 16.17: “The citizens of Mongolia shall be guaranteed the privilege to enjoy the following rights and freedoms: ...

Right to seek and receive information except that which the State and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to defend the State national security and public order, secrets of the State, individuals, or organizations which are not subject disclosure shall be defined and protected by law.”

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.”

³ See Article 4 of the Law

Specific Recommendations

- *The Law sets out the rights and protections offered to “media outlet organisations”. No jurisdiction is defined, so it is not clear whether the Law applies only to Mongolian-owned media organisations, or any media organisation operating or receivable in Mongolia. This is an important omission, not least as the Law purports to cover publications distributed on the internet. Therefore, the Law must clarify its jurisdiction as being only those media organisations established (or registered) in Mongolia and the journalists who contribute to them.*
- *The Law should be clear that it applies to all media organisations regardless of their status as employing or contracting bodies. It should widen the definition of “journalist” to include anyone who performs the functions of journalism, whether or not they have a contractual labour relationship with a media organisation. The provisions relating to protection of journalistic sources and participation in the Media Council should be accessible to everyone, regardless of their status as a contracted worker.*

The following recommendations are explained in more detail in the detailed analysis below:

- *The definition of “media outlet organisation” should be amended to clarify that it only applies to media where an editorial body exercises editorial decisions.*
- *The definition of “journalist” should be extended to anyone who undertakes journalistic activities, regardless of any contractual relationship with a media organisation.*
- *Article 4.2 should be amended to delete the last few words “independently within the law impartially.” However, the rest of the article would be useful to be incorporated within the Definitions segment of the Law to define the activities which are covered by the Law, regardless of the contractual or other relationship between a journalist and a media organisation.*
- *The right to protect sources is absolutely integral to the proper functioning of journalism in a democratic society. To comply with best international practice, the reasons for suspending the right to protect sources should be limited to the prosecution of a serious crime or for the defence of an accused person. Investigation of crime and the protection of property are very low-level excuses which should not be used to force journalists to reveal their sources.*
- *It is recommended that provision is made for a degree of regional representation on the Media Council, with at least one representative of each of the journalists and media organizations coming from the regions. This is because the issues for journalists working in the large expanses with mostly nomadic populations differ considerably from those working within Ulaan Baatar, particularly in relation to news gathering and conflicts of interest.*

- *With regular rotation of Media Council members, care must be had to ensure that there is a good degree of consistency and predictability about the ethical rules for both media organisations and the public.*
- *It would be sensible to increase the democratic responsibility of the Media Council, rather than leaving matters to be decided by the “membership” as a whole. The Media Council should have a duty to consult with members before approving the ethical rules (or any changes to them), its own operating rules, and its annual budget. This consultation should be done through the Journalists’ Union and the Media Owner’s Association and any other person or body who has registered a genuine interest with the Media Council (to take account of citizen journalists, for example, who may not be in a union). Consultation can be done in writing to avoid the expense and time spent on organising large meetings.*
- *It is assumed that the Media Council will hold the media organisations to account for any breaches to the ethical rules, but this should be clarified.*
- *It would be helpful to state which government body will have responsibility for receiving submissions from the Media Council and to mandate that they will be taken into consideration for possible legislative change, if appropriate.*
- *Funding of the Media Council could be clarified by adding that 60% of funding of the Media Council’s budget shall be formed from journalist and media organisations according to a formula which will be decided by the Media Council after consulting with its members. Contributions from foreign NGOs may be paid to the Media Council and any such contributions will be used to reduce the overall funding from journalist and media organisations on a pro rata basis.*
- *The provisions on sanctions require careful review as they may be ineffective in some cases, and lack clarity in others.*
- *A breach of the Law by the Government itself should be unthinkable. As well as removing an official from his or her position, I would recommend the sanction should include removing the head of the relevant department from his or her position.*

Text and analysis

International standards

The right to freedom of expression underpins all other rights, finding strong endorsement in both global and regional treaties on human rights such as the ICCPR, to which Mongolia is a party. The media is a key means of exercising the right to freedom of expression from the perspective of both imparting and seeking/receiving information and ideas.

In the 1999 OSCE Charter for European Security the role of free and independent media as an essential component of any democratic, free and open society is stressed.

The Mandate of the OSCE Representative on Freedom of the Media is, based on OSCE principles and commitments, to observe relevant media developments in all participating States and advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media.

Although each country has the right to determine the details of its media landscape and the content of its media legislation, such legislation must respect the principles included in international commitments on freedom of expression. International best practice has been developed to guide the implementation of the right to freedom of expression in practice.

The right to freedom of expression is not, however, absolute: restrictions apply as set out in Article 19(3) of the ICCPR: “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order or of public health or morals.”

To assess whether a restriction is admissible, a three-part test has been developed. It must:

1. be provided by law. This can include a regulation, common law, or even a code of conduct issued by a regulator. The law must be accessible, clear, reasonably precise and publicly available;
2. have a legitimate aim. These are limited to the rights or reputations of others, national security and public order, public health or morals;
3. be necessary in a democratic society. Any restrictions must be necessary to protect the legitimate interest and they must be proportionate.

The principles of freedom of expression apply in full to the internet. At the OSCE, the Permanent Council declared that the internet strengthened democratic freedoms and:

“Decides that: (1) Participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights, and to foster access to the Internet both in homes and in schools;⁴

In recent years further declarations have been issued about the special relationship of the internet with regard to freedom of expression. In June 2011, the Special Rapporteurs and the Representative on Freedom of the Media⁵ issued a Joint Declaration on Freedom of Expression and the Internet. They said,

“General Principles

a. Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the ‘three-part’ test).

b. When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

c. Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.

d. Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet.

e. Self-regulation can be an effective tool in redressing harmful speech, and should be promoted.

f. Awareness raising and educational efforts to promote the ability of everyone to engage in autonomous, self-driven and responsible use of the Internet should be fostered (‘Internet literacy’).”

The spread of the internet has changed the face of journalism and requires new thinking about not only how, but who disseminates information.

“Is there a common universal definition of who is a journalist?”

No. And there shouldn’t be one. Everyone is entitled to freedom of expression, the right to seek, receive and impart information regardless of frontiers – which is the basic job description of a journalist. To define, beyond this fundamental right, who qualifies as a “journalist” and who doesn’t

⁴ 12th Meeting of the OSCE Ministerial Council, Permanent Council Decision No. 633 Promoting Tolerance and Media Freedom on the Internet, Sofia, 2004

⁵ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States(OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

is a subjective judgment or merely a description of a person's gainful occupation. Basically, it is of no relevance for the exercise of the right to freedom of expression or the production and publication of content on the Internet."⁶

This point has been specifically addressed by Dunja Mijatovic, the OSCE Representative on Freedom of the Media who issued the following recommendations on Open Journalism to participating States:

“• The participating States need to acknowledge that journalism has irreversibly changed and that new actors are contributing to the public debate through the media.

•The participating States need to refrain from trying to define who is a journalist. It was difficult to define who is a journalist 25 years ago; it is even more complex today.

• The new media actors need to enjoy at least some of the protection and privileges that were in the past only granted to traditional media.”⁷

Detailed analysis

Definitions

Article 3.1.1 defines “media outlet organisations” which includes digital (i.e. online) publications which “process...publish...and disseminate” information. There is no attempt to limit the application of the Law to those publications where an element of editorial control is exercised, at least in determining what content is published. The definition as it stands could include social media sites where all content is user-generated. ***The definition of “media outlet organisation” should be amended to clarify that it only applies to media where an editorial body exercises editorial decisions.***

Radio and television companies are also covered by this Law. There is no explanation of how the provisions of this Law may apply in relation to the Public Service Broadcaster, MNB (which applies its own editorial principles through its Programme Council and is required to deal itself with complaints from the audience), or the CRC which, although there is no broadcasting law, appears to exercise a degree of control over content-related matters.

Article 3.1.6 defines “journalist” as someone who is subject to a full or part-time labour contract with a media organisation. This is a very limited definition and excludes anyone who provides “journalism” without payment. Given that the Law applies to online media organisations, this excludes “citizen journalists from the protection offered by the Law and excludes community media reliant on volunteers from participation in the Media Council. ***The definition of “journalist” should***

⁶ P.20, The On-line Media Self-Regulation Handbook, published by the Office of the Representative of Freedom of the Media, OSCE, Vienna 2013

⁷ Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media Dunja Mijatović, Communique 05/2014. Recommendations by OSCE Representative on Freedom of the Media

be extended to anyone who undertakes journalistic activities, regardless of any contractual relationship with a media organisation.

Guarantees for free and independent media

Article 4.1 The extension of the right to freedom of expression to all citizens to impart, as well as seek and receive information, is to be commended.

Article 4.2 This is a rather strange provision and does not belong in a general law supporting freedom of expression as it seeks to require media organisations and journalists to be “independent” and “impartial”, which in itself is a restriction on freedom of expression. Media organisations and journalists have a right to a point of view and legal restrictions on being able to express their point of view are only justifiable in the case of public service media or where there are justifiable limits on the number of media outlets. Neither is the case here. ***Article 4.2 should be amended to delete the last few words “independently within the law impartially.” However, the rest of the article would be useful to be incorporated within the Definitions segment of the Law to define the activities which are covered by the Law, regardless of the contractual or other relationship between a journalist and a media organisation.***

Articles 6.1-6.3 It is not clear how enforcement of these provisions would take place in practice. Under Article 10.6.4, it would appear that the Media Council deals with complaints about interference with journalistic independence, yet Article 19.1.3 suggests that these are matters that fall within the jurisdiction of the court where fines can be applied. I assume therefore that in any individual case, the matter can be taken to both the Media Council and the Court, or to either.

Protection of Confidential Information Sources

Article 7.2 It is very commendable that the Law is to be amended to provide a right to protection of journalistic sources which can only be overturned by order of the Court. ***The right to protect sources is absolutely integral to the proper functioning of journalism in a democratic society. To comply with best international practice, the reasons for suspending the right to protect sources should be limited to the prosecution of a serious crime or for the defence of an accused person. Investigation of crime and the protection of property are very low-level excuses which should not be used to force journalists to reveal their sources.***

Transparency and Accountability of Media Organisations

Article 10 Media Council

The revised provisions relating to the Media Council are an improvement on the last version of the draft Law, but greater clarification on some points is required. As a general point, ***it is recommended that provision is made for a degree of regional representation on the Media Council, with at least one representative of each of the journalists and media organizations coming from the regions. This is because the issues for journalists working in the large expanses with mostly nomadic***

populations differ considerably from those working within Ulaan Baatar, particularly in relation to news gathering and conflicts of interest.

It is sensible that the Media Council itself is given responsibility for approving the ethical rules but it must be noted that the Council members will rotate on a regular basis. This will provide the opportunity for a regular review and update of the Rules, which is not necessarily a bad thing, but ***care must be had to ensure that there is a good degree of consistency and predictability about the ethical rules for both media organisations and the public.***

It would be sensible to increase the democratic responsibility of the Media Council, rather than leaving matters to be decided by the “membership” as a whole. The Media Council should have a duty to consult with members before approving the ethical rules (or any changes to them), its own operating rules, and its annual budget. This consultation should be done through the Journalists’ Union and the Media Owner’s Association and any other person or body who has registered a genuine interest with the Media Council (to take account of citizen journalists, for example, who may not be in a union).

Article 10.6.5 Who are the relevant authorities to whom the Media Council can submit its evaluation of the implementation of the Law? ***It would be helpful to state which government body will have responsibility for receiving submissions from the Media Council and to mandate that they will be taken into consideration for possible legislative change, if appropriate.***

Article 11 Funding of the Media Council is to be 60% from journalist and media organisations and 40% from the State budget. Given the likely cost of running the Media Council, it is helpful that the State will contribute to the funding and that the funding will be less than 50%. This should avoid any undue influence being brought on the Media Council by government interests. Furthermore, it is good that the State does not have representation in concluding the Media Council’s budget.

It would be helpful to add a few words on how the 60% funds will be calculated. ***A suggestion is to add that 60% of funding shall be formed from journalist and media organisations according to a formula which will be decided by the Media Council after consulting with its members.***

Contributions from foreign NGOs may be paid to the Media Council and any such contributions will be used to reduce the overall funding from journalist and media organisations on a pro rata basis.

Miscellaneous

Article 12.1 This is probably a translation error, but it is hard to see how breaches of any of the provisions in the Law should attract a criminal sanction.

Article 12.1.1 ***A breach of the Law by the Government itself should be unthinkable. As well as removing an official from his or her position, I would recommend the sanction should include removing the head of the relevant department from his or her position.***