

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **recently passed amendments to the law on "Information, Information Technologies and Information Protection" and the Code on Administrative Offenses, criminalizing "fake news" and "blatant disrespect for society, government, official government symbols, constitution or governmental bodies of Russia", as well as Amendments to the Code of Administrative Offenses on the distribution of foreign print media.**

According to the information received:

1. Law on Information, Information Technologies and Information Protection

On 6 March 2019, the Russian State Duma passed the law "On Information, Information Technologies and Information Protection" and the Code on Administrative Offenses, criminalizing "fake news" and "blatant disrespect for society, government, official government symbols, constitution or governmental bodies of Russia" (hereafter "the legislation").

On 13 March 2019, the Council of the Federation (High Chamber of the Russian Parliament) passed the legislation after its first reading.

On 18 March 2019, the President signed the legislation into law.

Under the new amendments, online news outlets and individuals may be fined up to 1.5 million rubles (approximately USD 22,900) for repeatedly spreading "fake news". News outlets found to be disseminating "fake news" or "disrespectful remarks", and that do not delete the information after the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) notifies them of the alleged violations, will have their websites blocked. The law also prohibits journalists, including journalists working for online publications, from allegedly abusing their professional roles in order to spread rumors, "under the guise of reliable messages". After receiving notification from Roskomnadzor, "registered digital mass media outlets" and "ordinary

websites”, not including “online news aggregators” are required to remove information “instantly”. The amount of time websites have to remove content before their websites are blocked may vary depending on the degree of “danger” posed by the information, which will be assessed on a case-by-case basis. With respect to “disrespectful remarks” or defamatory information, website administrators have 24 hours to delete the information before websites are blocked. Owners of websites that are not registered as media will not be notified by Roskomnadzor, which does not give them an opportunity to voluntarily remove allegedly false information.

“Fake news” under the law is defined as “unreliable socially significant information”, which again is defined as “[i]nformation disseminated under the guise of credible report which creates a threat or harm to life and (or) the health of citizens, property, the threat of mass disturbance of public order and (or) public security, or the threat to operation of life support facilities, transport or social infrastructure, credit institutions, energy facilities, industry or communications”. The dissemination of “unreliable socially significant information” is prohibited by the law on the Internet and information and telecommunications networks, generally. The determination of whether information qualifies as “fake news” lies with the Prosecutor General of the Russian Federation, while assessment of how “dangerous” the information is lies with the supervisory authority. The supervisory authority determines the degree of danger “based on the news agenda and the nature of the events around which there may be fake news waves with possible grave consequences”. If an individual “deliberately create[s] and publish[es] fake news”, then police and Roskomnadzor initiate administrative cases in court, and prosecuting authorities would initiate investigations. Prosecuting authorities are notified within 24 hours of a case being initiated and have up to a year to investigate.

The degree to which alleged offenders are penalized depends on whether they are a citizen, an official, or a legal entity, and whether they are repeat offenders. Citizens may be fined between 30 000 and 100 000 rubles for their first offense, and between 100 000 and 300 000 rubles for repeat offenses; officials may be fined between 60 000 and 200 000 rubles for their first offense, and between 300 000 and 600 000 rubles for repeat offenses; and legal entities may be fined between 200 000 and 500 000 rubles for their first offense and between 500 000 and 1 million rubles for repeat offenses.

Fines may vary depending on whether the information is found to be a “low-grade fake”, disrupt vital facilities, or is unverified and its dissemination results in death. Disseminating “low-grade fakes” may result in fines up to 100 000 rubles, disseminating information that disrupts vital facilities may result in fines up to 300 000 rubles and dissemination information that results in someone dying may result in fines up to 400 000 rubles.

The legislation also allows for fines of up to 300 000 rubles and imprisonment of up to 15 days on anyone who “disrespect authorities (including President Putin) or state symbols”. Under the law, any “expression of apparent disrespect in indecent form” or “sheer disrespect” qualifies as a violation.

Before explaining my concerns, I would like to reiterate your Excellency’s Government’s obligation to respect and protect the right to freedom of opinion and expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the Russian Federation on 16 October 1973.

Article 19 protects everyone’s right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Also ideas and expressions that are “incorrect” are protected by Article 19 of the ICCPR.

The Human Rights Committee has emphasized that “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.” Moreover, international human rights law provides States’ responsibility to ensure an environment in which a diverse range of political opinions and ideas can be freely and openly expressed and debated. Freedom of expression also includes sharing one’s beliefs and opinions with others who may have different opinions. In the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, my mandate together with other regional freedom of expression experts stressed that the “human right to impart information and ideas is not limited to “correct” statements, and “protects information and ideas that may shock, offend, and disturb”.

Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be “provided by law”, and necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

To satisfy the requirements of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Restrictions must additionally be sufficiently clear, accessible and predictable (CCPR/C/GC/34).

The requirement of necessity implies and assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons”. The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34). The Human Rights Committee has moreover stressed that, in assessing proportionality, the “value placed by the Covenant upon inhibited expression is particularly high in the

circumstances of public debate in a democratic society concerning figures in the public and political domain” (CCPR/C/GC/34).

The Plenum of the Supreme Court of the Russian Federation made a similar statement in resolution No. 11 of 28 June 2011, “On judicial practice in criminal cases on extremist crimes” where the court found that the limits of permissible criticism of government officials and politicians by the media are broader than for individuals generally. Additionally, the Supreme Court of the Russian Federation asserted that “Public officials may be criticized in the media for how they perform their duties, as this is necessary to ensure the public and [for the] responsible execution of their power” and that “it is incumbent upon officials to accept the fact that they will be subject to public scrutiny”.

In light of these standards, the Joint Declaration on Freedom of expression and “Fake news”, my mandate together with other regional freedom of expression experts concluded that “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information” are incompatible and should be abolished”.

The requirement that website owners remove content “immediately” is particularly ambiguous and therefore problematic. According to one of the co-authors of the law, Mr. Lenonid Levin, Roskomnadzoe will determine the amount of time a media outlet has to “instantly” remove content before their website is blocked on a case-by-case basis and will depend on how “severe” officials from Roskomnadzor determine the allegedly “fake news” to be.

The Presidential Council for the Development of Civil Society and Human Rights (“the Council” of the Russian Federation found the provision that news sources would be blocked only because “unreliable information” was found on their website without first considering the intent of the distributor to be especially problematic. The Council found the provision to be an overly broad ban on the dissemination of information and found that it implied that state control authorities, Roskomnadzor and prosecutors had knowledge of absolute truth. The Council also identified the term “immediately” to discriminate against sites based on the https protocol by allowing blocks not only to allegedly problematic content but entire websites.

Another problematic feature of the legislation identified by the Council is the difficulty of establishing that a particular piece of information caused any of “the socially dangerous consequences listed in the law”, which include “a threat of harm to life and (or) the health of citizens, property, the threat of mass disturbance of public order and (or) public security, or the threat operation of life support facilities transport or social infrastructure, credit institutions, energy facilities, industry or communications”. The Council applies Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and notes that even if the information is “unreliable” that this alone is not enough to warrant restricting speech since it is unclear whether this creates the threats noted in the legislation.

I share the concerns raised by the Council.

Since Roskomnadzor has the ability to block and severely penalize media outlets without proving that online content is “socially dangerous” before blocking the site, the government is at liberty to force Russian media companies out of the media landscape without giving them the opportunity to defend themselves or show why disseminating the content at issue is in the best interest of the public. As such, the provisions of the law requiring media outlets to choose between removing content flagged by authorities as either “socially dangerous” or “disrespectful” or have their website blocked effectively allows the government to determine the makeup of the media landscape. This is especially problematic for owners and editors of websites not registered as media who have no way under the law to defend themselves since under the law, they receive no notice from Roskomnadzor before their websites are blocked. Overall, there appears to be no opportunity to contest the Prosecutor General’s determination on whether content qualifies as “fake news” before recognized media outlets are forced to remove content or risk blocking which, together with crippling monetary penalties, appears to be disproportionate to protecting the vaguely defined interests in the law.

The lack of clarity concerning how the legislation would operate, coupled with the threat of criminal and civil sanctions raises the danger that your Excellency’s Government will become arbiters of truth in the public and political domain. Accordingly, I am concerned that the legislation would disproportionality suppress a wide range of expressive conduct essential to a democratic society, including criticism of the government, news reporting, and the expression of unpopular, controversial and minority opinions.

2. Amendments to the Code of Administrative Offenses on the distribution of foreign print media

On 2 April 2019, deputies in the State Duma, the lower chamber of the Russian parliament, considered amendments to the Code of Administrative Offenses (the Code). One of the amendments proposed concerns the current text of article 13.21 of the Code, and would, if adopted in its current form, introduce fines on individuals and companies for distributing print from foreign outlets without permission from Roskomnadzor.

The text of the amendment to article 13.21 of the Code introduces provisions regarding violating the procedure for producing and disseminating unregistered mass media products, or mass media products which have not been re-registered. The current provision foresees fines for private individuals (1.000 – 1.500 rubles, equivalent of USD 23), public officials (2.000 – 3.000 rubles, USD 46) and legal entities (20.000 – 30.000 rubles, or USD 460) and confiscation of the media product in question. The requirement for licensing of such distribution (i.e. obtaining permit for distribution) was introduced almost two years ago. The amendment would affect unregistered mass media products, or mass media products whose registration has not changed, regarding the founder, co-founders, name, language, approximate subjects, and/or specialization of

mass media, territories of distribution of mass media, the domain name or Internet website information; as well as the type and form of periodical distribution of mass information, or the distribution of products of a foreign periodical print publication without permission.

While a requirement to register for a license to permit distribution was introduced previously, the current amendments would impose a fine on individuals and companies for distributing print media from foreign outlets without permission from Roskomnadzor. This would affect print media sold within the country, as well as printed materials brought into Russia by individuals, and would give the authority to Roskomnadzor to confiscate the print media products besides levying a fine.

The terms of the proposed amendments are unclear and overly broad, and the content of “other means of distribution” is not defined.

For the amendments to become law, they would have to pass two more readings in the Duma, and subsequently be approved by the Parliament’s upper chamber, before being signed into law by the President of the Russian Federation. The amendment, if adopted, would further increase the powers of Roskomnadzor in controlling not only online media outlets, but also the distribution of print mass media, which in effect could amount to effectively censoring content of print media products before or after distribution.

In light of these concerns, I urge your Excellency’s Government to revise the law and withdraw the amendments to limit restrictions on speech and to consider alternative measures to prohibiting speech such as the promotion of independent fact-checking mechanisms, State support for independent, diverse and adequate public service media outlets, and public education and media literacy, which have been recognized as less intrusive means to address disinformation.

In light of these concerns, I urge your Excellency’s Government to revise the law and withdraw the amendments to limit restrictions on speech and to consider alternative measures to prohibiting speech such as the promotion of independent fact-checking mechanisms, State support for independent, diverse and adequate public service media outlets, and public education and media literacy, which have been recognized as less intrusive means to address disinformation.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please clarify how your Excellency’s Government will assess whether content threatens “life and (or) health of citizens, property, the threat of

mass disturbance of public order and (or) public security, or the threat to operation of life support facilities, transport or social infrastructure, credit institutions, energy facilities, industry or communications”.

3. Please clarify at what point in the “fake news” content removal process are media outlets and individuals allowed to challenge the Prosecutor General’s determination on whether content qualifies as “fake news”.
4. Please clarify the criteria used to prove whether someone intended to spread “fake news”.
5. Please clarify how your Excellency’s Government will assess whether a particular source of information is unreliable or disrespectful.
6. Please indicate how the law is consistent with the requirements of legality, necessity and proportionality under Article 19(3) of the ICCPR.
7. Please provide information about the measures and laws used to provide individuals who wish to appeal the government’s determinations with a mechanism to do so.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression