ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

Laws of the Republic of Kyrgyzstan relating to the Protection of Reputation

London
September 2005

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

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1. INTRODUCTION

ARTICLE 19 has been asked to comment on certain laws in force in the Republic of Kyrgyzstan that limit the right to freedom of expression, purportedly to protect reputation and dignity, generically referred to herein as defamation laws. Specifically, this Memorandum considers provisions from the Criminal Code, Civil Code and, to a limited extent, the Mass Media Act. This analysis is restricted to those parts of the laws under consideration that specifically address the question of reputation and dignity. Our comments are based on English translations of the original provisions.[1]

Our overall recommendation is that the criminal defamation provisions should be repealed, and that the civil law must be extensively amended so that it becomes the means through which defamation actions can be settled fairly. The existing criminal defamation provisions are unnecessarily harsh, with imprisonment as a possible sanction, and have been used in the past by politicians to harass journalists who write critically about them. The UN Human Rights Committee, the body established to oversee implementation of the International Covenant on Civil and Political Rights, the most important human rights treaty to which Kyrgyzstan is party, has expressed serious concern about "the use of libel suits against journalists who criticize the Government", noting that "[s]uch harassment is incompatible with the freedom of expression and of the press". One of the most important means by which this concern can be addressed is by reforming Kyrgyzstan's defamation laws so that they can no longer be used in this manner. International law places Kyrgyzstan under a legal obligation to protect journalists and human rights activists from harassment, and it should ensure that journalists can perform their profession without fear of being subjected to prosecution and unwarranted libel suits.[2]

If decriminalisation is not possible in the short term, a number of amendments need to be brought to the criminal law. Most importantly, the sanction of imprisonment should be removed and any monetary fine should be required to be proportionate to the harm caused by the impugned statement. Second, it should be made completely clear that the burden for proving the defamation lies with the prosecution. In particular, the prosecution should be required to show at least the following elements: that the impugned statement was false; that it was made in the knowledge that it was false, or with reckless disregard for the truth; and that it was made with a specific intention to cause harm to the party claiming to be defamed. Third, public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official. Fourth, a defendant should have several defences available, including that he or she acted in good faith and in compliance with rules of professional ethics and that the impugned statement concerned a matter of public interest. Finally, no-one should be liable for the expression of an opinion, no matter how offensive that opinion is. Liability should occur only for the publication of a false factual statement that causes real harm to a person's reputation. It follows that Article 128 must be repealed immediately.

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] See Concluding observations of the Human Rights Committee: Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ.

Parallel to the process of decriminalisation, a large number of amendments need to be brought to the Civil Code so as to allow it to be used to settle defamation claims fairly. As it stands, the civil defamation regime is entirely inadequate.

The action of defamation itself needs to be redefined to include only statements which cause harm to reputation through the publication of a false statement of fact. There should be no right to sue on behalf of deceased persons. Defendants should benefit from several defences, including, at a very minimum, the defence of reasonable publication and the defence of truth. It should be clear that in cases involving statements on matters of public concern, the plaintiff should bear the onus of proving the statements are false, rather than the defendant being required to prove they are true. Certain statements, such as those made in court or parliament, should be protected against liability because of the overall public interest in their being made or disseminated, and bodies whose function is to provide technical access to the Internet (ISPs) should not attract liability for information to which they provide access, unless they can be said to have adopted the statement in question as their own. The Civil Code also needs to be more precise on compensation and other remedies that may be awarded. As a rule, non-financial remedies should be prioritised. Monetary remedies should be awarded only where non-monetary remedies do not suffice to repair the damage done, and should always be proportionate to the damage done. There should be a legally defined maximum level. Finally, the right to a refutation or reply, currently included in the Civil Code and Mass Media Act, should ideally be provided through a self-regulatory regime. If this is not possible, the right of reply or refutation should be dealt with in a single statute – preferably the Civil Code. The substance of the current provisions should be reformed to ensure that a reply is possible only in response to untruthful information, and that it will be proportionate to the impugned statement.

We elaborate on these recommendations in Section 3 of this Memorandum. In Section 2, we briefly describe international standards for freedom of expression and the nature of Kyrgyzstan's obligations under international law to protect and promote of freedom of expression. Section 2 also sets out the test for legitimate restrictions to the right to freedom of expression under international law. Our analysis draws upon the jurisprudence of international bodies, including the UN Human Rights Committee and the European Court of Human Rights, in the area of defamation. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (*Defining Defamation*),[3] to which we frequently refer. These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[4]

[3] London: ARTICLE 19, 2000.
[4] See their Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument .

2. INTERNATIONAL AND CONSTITUTIONAL STANDARDS

2.1. The Importance of Freedom of Expression

The right to freedom of expression has long been recognised as a crucial human right. It is of fundamental importance to the functioning of democracy, a necessary precondition for the exercise of other rights and, in its own right, it is essential to human dignity. The *Universal Declaration of Human Rights* (UDHR), the flagship human rights instrument adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in the following terms, at Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. [5]

The *International Covenant on Civil and Political Rights* (ICCPR),[6] a legally binding treaty which Kyrgyzstan acceded to in 1994, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also at Article 19. Freedom of expression is also guaranteed in various OSCE documents agreed to by Kyrgyzstan, such as the Final Document of the Copenhagen meeting of the human dimension of the OSCE,[7] the Charter of Paris agreed in 1990,[8] the final document of the 1994 Budapest CSCE Summit,[9] and the Istanbul Summit Declaration.[10]

Global recognition of the importance of freedom of expression is furthermore reflected in the three regional systems for the protection of human rights, the *American Convention on Human Rights*,[11] the *European Convention on Human Rights* (ECHR),[12] and the *African Charter on Human and Peoples' Rights*, all of which guarantee the right to freedom of expression.[13] While these treaties and judgments delivered by the various courts established to supervise their implementation are not directly binding on Kyrgyzstan, they are authoritative as to the nature and content of the freedom of expression guarantee found in the ICCPR and in the Kyrgyz Constitution.

Freedom of expression is also protected, subject to certain restrictions,[14] in Article 16(2) of the Kyrgyz Constitution, which states:

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[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[7] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular paragraphs 9.1 and 10.1.
[8] Charter of Paris for a new Europe, CSCE Summit, November 1990.
[9] Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paragraphs 36-38.
[10] OSCE Istanbul Summit, 1999, paragraph 27. See also paragraph 26 of the Charter for European Security adopted at the same meeting.
[11] Adopted 22 November 1969, in force 18 July 1978.
[12] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953.
[13] Adopted 26 June 1981, in force 21 October 1986.
[14] Article 17 of the Constitution provides that "[r]estrictions on the exercise of rights and freedoms shall be allowed by the Constitution and laws of the Kyrgyz Republic only for the purposes of guaranteeing rights and freedoms of other persons providing public safety and constitutional order. In such cases, the essence of the constitutional rights and freedoms shall not be affected." Pursuant to Article 16(1) of the Constitution, which

> Every person in the Kyrgyz Republic shall enjoy the right:
> - to free expression and dissemination of ones thoughts, ideas, opinions, freedom of literary, artistic, scientific and technical creative work, freedom of the press, transmission and dissemination of information;

International bodies and courts have made it very clear that the right to freedom of expression and information is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[15] which refers to freedom of information in its widest sense and states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. This has been echoed by human rights courts. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society. [16]

Statements of this nature abound in the case law of human rights courts and tribunals from around the world. The European Court of Human Rights has noted, for example, that "[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."[17] As this statement notes, freedom of expression is fundamentally important both in its own right and as the cornerstone upon which all other human rights rest. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations.

2.2. Restrictions on Freedom of Expression

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim. The right to freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or because it challenges established doctrines. The European Court of Human Rights has emphasised that precisely such statements are worthy of protection:

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[18]

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effectively incorporates international human rights treaties into Kyrgyz law, this has to be read in accordance with international law requirements regarding restrictions on freedom of expression, which are discussed below.

[15] 14 December 1946.

[16] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

[17] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

[18] *Ibid.*

Article 19(3) ICCPR lays down the narrow parameters within which freedom of expression may legitimately be restricted. It states:

> 3. 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 (ordre public), or of public health or morals.

This has been interpreted as establishing a three-part test, requiring that any restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[19] The European Court of Human Rights, ruling on the very similar clause contained in Article 10(2) ECHR, has stated that the first requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[20] Second, the interference must pursue one of the aims listed in Article 19(3); the list of aims is an exhaustive one, and thus an interference which does not pursue one of those aims violates Article 10. Third, the interference must be "necessary" to secure one of those aims. The word "necessary" has specific meaning in this context. It means that there must be a "pressing social need" for the interference;[21] that the reasons given by the State to justify the interference must be "relevant and sufficient" and that the State must demonstrate that the interference is proportionate to the aim pursued. As the Human Rights Committee has stated, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."[22]

3. ANALYSIS OF THE LAWS

Laws that aim to protect the reputation of individuals, usually grouped together under the collective name 'defamation' laws, pursue the legitimate aim of 'protecting the rights of others'. As such, they tend to satisfy one of the three tests for restrictions on freedom of expression. However, at the same time, defamation laws are sometimes drafted or applied in a way that is vague or overbroad, and as such fail to satisfy the 'provided by law' hurdle set out in Section 2.2 above, or they are unnecessarily harsh, thereby failing the 'necessary in a democratic society' requirement.

Kyrgyzstan's defamation laws fail to pass muster in both respects. The criminal defamation regime, under which a person may be fined or imprisoned for up to three years, is disproportionately harsh. It should be abolished in its entirety and replaced with an adequate civil regime for defamation. The existing civil regime is not sufficiently well-developed to pass the 'provided by law' hurdle set by Article 19(3) ICCPR, and it is also disproportionately harsh, for example by failing to provide adequate defences. It needs to be amended to clearly

[19] See, for example, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005, para. 6.8.
[20] *Ibid.*, at para. 49.
[21] See, for example, *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40.
[22] *Rafael Marques de Morais v. Angola*, note 19, para. 6.8.

set out the tort of defamation, provide adequate defences, and ensure that any compensation that may be awarded is proportionate to the harm caused by the impugned publication. The right of reply and correction regime in the Civil Code and Mass Media Act also needs amending, primarily to ensure that a reply is not available to the publication of true information, but also to ensure that the form of the reply or correction is broadly proportionate to the original information.

The following paragraphs elaborate on these recommendations.

3.1. Criminal Defamation

The Kyrgyz Criminal Code contains two provisions that criminalise 'defamation'. Article 127 criminalises 'slander', defined as "dissemination of wittingly false information, defaming honor and dignity of other entity or undermining his reputation." 'Ordinary' slander is punishable with a fine ranging from 50 to 100 minimum monthly wages; slander through the media is punishable with 100 to 1000 minimum monthly wages; and a slanderous accusation of a grave or very grave crime may be punished with up to three years imprisonment. Article 128 criminalises "deliberate humiliation of honor and dignity of other person expressed in an indecent form"; this is punishable with a fine ranging from 20 to 50 minimum monthly wages. If the offence is committed through the mass media or in a public speech, the fine ranges from 50 to a 100 minimum monthly wages.

Analysis
Consistent with evolving international standards in this area, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but rather should be subject only to civil or administrative sanctions, or be dealt with through self-regulatory mechanisms.

There is a strong and growing body of law in support of the principle that criminal defamation is itself a breach of the right to freedom of expression. The UN Special Rapporteur on Freedom of Opinion and Expression, in his Report in 2000, and again in 2001, called on States to repeal all criminal defamation laws in favour of civil defamation laws.[23] Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "abuse of legal provisions on defamation and criminal libel".[24]

The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, ratified by Kyrgyzstan, has repeatedly expressed concern about the possibility of criminal sanctions for defamation.[25] In its 2000 Concluding Observations regarding the implementation of the ICCPR in Kyrgyzstan, the Committee seriously questioned the use of criminal defamation laws in Kyrgyzstan by the government and called for all journalists currently imprisoned in contravention of Article 19 ICCPR to be released.[26]

[23] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.
[24] See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).
[25] For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).
[26] Concluding observations of the Human Rights Committee, Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ.

In a similar vein, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they have issued a joint Declaration addressing various freedom of expression issues. In their Joint Declarations of November 1999, November 2000 and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[27]

The European Court of Human Rights has never actually ruled out criminal defamation and there are a small number of cases in which it has allowed criminal defamation convictions.[28] Nonetheless, the Court has clearly recognised that there are serious problems with criminal defamation; it has frequently reiterated the following statement, taken from the case of *Castells v. Spain*, involving a charge of criminal defamation:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[29]

Even where sanctions have been financial, the Court has still held these to be, in a number of cases, illegitimate restrictions on freedom of expression. In the very first defamation case brought before it, *Lingens v. Austria*, the Court stated:

> [T]he penalty imposed on the author…amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in the future…In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[30]

The principal concern expressed by these bodies, as well as by various national courts, with respect to criminal defamation is the chilling effect of criminal penalties, which are disproportionate to any harm incurred. Additionally, given that defamation is already subject to sanction under the civil laws of most countries, and that these laws are effective in redressing harm to reputation, there is no need for parallel criminal provisions. It may be noted that countries around the world have taken steps to formally abolish criminal defamation laws – recent examples include Argentina, Sri Lanka and Ghana – while in many more countries these laws have effectively become obsolete, reflecting their undemocratic nature. In the UK, for example, there has been no public prosecution for criminal defamation

[27] Joint Declaration of 10 December 2002. Available at: http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.
[28] In the case of *Prager and Oberschlick v. Austria*, 16 April 1995, Application No. 15974/90, the Court upheld a criminal conviction, although the sanction imposed was a fine of approximately US$1,700. In the case of *Tammer v. Estonia*, 6 February 2001, Application No. 41205/98, the conviction and fine of one day's wages was upheld by the Court on the ground that the defamatory comments published by the applicant served no public purpose.
[29] 24 April 1992, 14, Application No. 11798/85, para.46.
[30] 8 July 1986, Application No. 9815/82, para. 44.

since the 1970s and all recent private prosecutions have been refused permission to proceed or otherwise blocked.

Based on the foregoing, our principal recommendation is that the defamation provisions in the Criminal Code be repealed altogether. If criminal defamation laws remain in force, however, they should be amended so as to minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice. We elaborate on the minimum amendments necessary in the following paragraphs.

First, like with all criminal offences, it should be absolutely clear that the burden of proof of the offence of 'defamation' rests on the party bringing the case; there should be a clear requirement that all elements of the offence of 'defamation' be proved on the criminal standard of beyond a reasonable doubt. Furthermore, again consistent with general criminal law, liability should depend on mental guilt, or *mens rea*, which, in this case, should include knowledge of the falsity of the statements and a specific intention to harm the person who has been defamed.

Second, the sanctions presently available – particularly that of imprisonment – are clearly disproportionate to the offence. We are particularly concerned that both Article 127 and Article 128 envisage tougher sanctions for the media, creating an additional chilling effect. The threat of criminal sanctions necessarily inhibits healthy public debate, thus seriously undermining democracy by stifling important political speech. Furthermore, the deprivation of liberty – as contemplated by the provisions – is a very severe penalty. We recall that the UN Human Rights Committee has demanded the release of any journalist currently serving a sentence of imprisonment for defamation.[31]

Third, public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation case, regardless of the status of the party claiming to have been defamed. This means that a senior public official or government minister should not be able to use the prosecutorial machinery to pursue a complaint.

Fourth, as we will elaborate in the following section in relation to civil defamation law, defendants should benefit from a range of defences. At the very least, defendants should have a defence of truth available to them, and a defence of 'reasonable publication': that a journalist acted in accordance with journalistic ethics and that it was reasonable in the circumstances to publish the impugned statement.

Fifth, the information available to us does not indicate whether there is a limitation period for the offence of defamation. We recommend that it should be made clear that an action for defamation has to be instituted within one year of publication or when the claimant became aware of the impugned statement, or could have become aware of it, absent exceptional circumstances. This is because it can be impossible for a defendant to defend him or herself against defamation actions relating to publications made longer ago than one year. This follows the approach taken in numerous other jurisdictions where special time limits, shorter than for litigation generally, are set for the initiation of defamation cases.[32]

[31] Concluding observations of the Human Rights Committee, 24 July 2000, UN Doc. CCPR/CO/69/KGZ.
[32] See, for example, the Report of the Legal Advisory Group on Defamation in Ireland, published in March 2003. Available at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY. See also *Defining Defamation*, note 3, Principle 5.

In the case of Internet publications, it may be harder to determine when a claimant can be expected to have acquainted themselves with the contents, particularly if the impugned information was published first on an obscure website or email discussion forum but was gradually circulated to a higher number of people (for example, because other websites copied the information). A possible remedy here would be for courts to constructively apply an overall time limit, for example of one year after the publication was uploaded, after which defamation cases would be absolutely barred.

Finally, Article 128 of the Criminal Code is open to specific additional criticism on two grounds. First and foremost, it penalises expressions of opinion, which are granted special status under both international law and the laws of many national jurisdictions.[33] Defamation laws are legitimate only insofar as they seek to limit statements of false fact that degrade a person's reputation. As stated in *Defining Defamation*:

> Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals – or entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.[34]

In contrast, Article 128 criminalises any statement – not just statements of fact – that deliberately "humiliates" honour or dignity and is "indecent". Second, the provision contains a number of elements that are vague or subjective, such as the notions of "indecency", "humiliation", "honor" and "dignity". All are vague legal concepts that cannot be used to justify a restriction on a fundamental right. We suggest that for these reasons, the provision should be repealed immediately.

Recommendations:

- Defamation, defined as the publication of a false statement that causes harm to a person's reputation, should be fully decriminalised. If this is not immediately achievable, the following amendments should be brought to Article 127 of the Criminal Code as a matter of urgency:
    a. It should be absolutely clear that the burden for proving the defamation lies with the prosecution, including the following elements:
        i. that the impugned statement was false;
        ii. that the impugned statement was made in the knowledge that it was false, or with reckless disregard for the truth; and
        iii. that the impugned statement was made with a specific intention to cause harm to the party claiming to be defamed;
    b. Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
    c. There should be no possibility of imprisonment for defamation, and any monetary fine should be required to be proportionate to the harm caused

[33] E.g. *Dichand and Others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.
[34] Note 3, Principle 2(a).

by the impugned statement.

d. A defendant should have several defences available, including that he or she acted in good conscience and in compliance with rules of professional ethics and the impugned statement concerned a matter of public interest.

- No-one should be liable for the expression of an opinion, no matter how offensive that opinion is. Liability should occur only for the publication of a false factual statement that causes real harm to a person's reputation. It follows that Article 128 must be repealed immediately.

3.2. Civil Defamation

The Civil Code contains four provisions that are relevant to defamation. Article 16 sets out the general principle that compensation may be obtained for any action resulting in 'moral harm'. Article 18 defines the tort of 'defamation', providing both a right of response or refutation and an entitlement to compensation for moral harm. The relevant clauses state:

> 1. A citizen or legal entity shall be entitled to demand refutation in court of information discrediting his honor, dignity, or business reputation, if the person publishing such information can not prove that it is true. On the demand of interested persons, a citizen's honor, dignity may be protected after his death.
> …
> 5. The citizen or legal entity whose rights were violated by the publishing of information discrediting his honor, dignity or business reputation, is entitled to claim indemnification for losses and compensation for moral harm caused by the publication, in addition to refutation of information.

Article 1027 provides that 'moral harm' must be compensated 'regardless of the guilt of the injurer', and that it shall be compensated in monetary form. Under Article 128, the amount of compensation should be commensurate with "the nature of physical and moral sufferings inflicted to the injured as well as the extent of guilt of the injurer"; and that "requirements of reason and fairness must be considered." The substance of this provision is repeated in Article 27 of the Mass Media Law. Article 26 of the Mass Media Law provides a limited set of defences to a defamation claim, stating that a mass media outlet, journalist or editor is absolved from responsibility for anything said by a guest in a live radio broadcast, or for information found in official documents or reports, from official news agencies or information that was a literal reproduction of a fragment of a public speech.

Analysis

These provisions do not constitute an even remotely satisfactory civil defamation regime. They do not adequately define defamation, fail to provide proper defences, do not provide exemptions for certain forms of expression and fail to provide guidance on damages. In the following paragraphs, we elaborate on these concerns.

3.2.1. Defining defamation

Article 18(5) provides that a person may claim compensation if damage is suffered through the publication of "information discrediting his honor, dignity or business reputation". It does

not further delineate the tort of defamation. Article 18(1) states that "a citizen's honor [or] dignity may be protected after his death".

ARTICLE 19 does not consider that this is an appropriate provision to protect reputation. First, it opens the door for compensation claims for true statements that damage honour - for example, an allegation made against a government minister of abuse of State funds, proven to be true. This is not a proper use of defamation law. Principle 2 of *Defining Defamation*, states that "defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit … In particular, defamation laws cannot be justified if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption."[35]

Second, as remarked upon in Section 3.1 of this Memorandum in relation to the criminal defamation provisions, defamation laws need to distinguish between statements of fact and statements of opinion. It is internationally recognised that statements of opinion deserve a high degree of protection. For example, in *Feldek v. Slovakia*, the European Court of Human Rights disagreed that the use by the applicant of the phrase "fascist past" should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a 'fascist past' could fairly be made.[36]

Third, as also noted above in Section 3.1, the terms "honor" and "dignity" are capable of unduly broad interpretation as including the esteem in which someone holds themselves. A preferable term, consistent with international instruments, would be 'reputation'.

Finally, Article 18(1) allows an "interested" individual to sue on behalf of a deceased person. We do not believe this is appropriate. The harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events.

Recommendations:
- The tort of defamation needs to be narrowly defined to include only statements which cause harm to reputation through the publication of a false statement of fact.
- There should be no right to sue on behalf of deceased persons.

3.2.2. Defamation defences

Article 18(1) provides that, when faced with a demand for a reply or refutation, a media outlet only has a defence of truth available to it. Under Article 18(5), through which a claimant may claim compensation, it seems that there are no defences available at all. This fails the criterion recognised under international law as well as under the national laws of most countries in the

[35] Note 3.
[36] 12 July 2001, Application No. 29032/95.

world that defendants in a defamation claim should have a number of defences available to them. At least two defences in particular are necessary to ensure that defamation laws are consistent with the guarantee of freedom of expression: the defence of 'reasonable publication', and the defence of truth. In addition, the civil law should make it clear that there are a number of circumstances in which the publication of a false statement does not lead to liability.

Truth

The defence of truth is a simple one: in every defamation case, a defendant should have the opportunity to demonstrate the truth of what was published.[37] As commented above, only untrue allegations should be actionable under defamation law. If the case concerns a matter of public interest, then the burden should shift to the plaintiff to prove the falsehood of the impugned statement. This follows the general principle developed by constitutional courts, including the US Supreme Court, that placing the burden of proof on the defendant will have a significant chilling effect on the right to freedom of expression. In delivering the judgment of that court in the seminal case of *New York Times v. Sullivan*, Brennan J commented:

> Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.[38]

The European Court has agreed that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it will be unfair to require them to prove the truth of their statements.[39] This is particularly so where the publication concerns a matter of public concern. However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.[40]

Reasonable Publication

Defendants should benefit from a defence of reasonable publication so that even statements which are false do not attract liability where the circumstances otherwise justify publication. A rule of strict liability for all false statements is particularly unfair for the media, who are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes, and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when

[37] E.g. *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005 (UN Human Rights Committee), par. 6.8.
[38] *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.
[39] See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99 (European Court of Human Rights), para. 65.
[40] *McVicar v. the United Kingdom*, 7 May 2002, 46311/99, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 (European Court of Human Rights), para 66.

they are topical, particularly when they concern matters of public interest. In a case in which ARTICLE 19 intervened, the European Court held:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[41]

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[42]

Applying these principles in the case of *Tromsø and Stensaas v. Norway*, the European Court of Human Rights placed great emphasis on the fact that the statements made in that case concerned a matter of great public interest which the plaintiff newspaper had covered overall in a balanced manner.[43] This follows the line taken by constitutional courts of various countries which have recognised the principle that, where the press have acted in accordance with professional guidelines, they should benefit from a defence of reasonable publication.[44]

The ARTICLE 19 Principles summarise this defence as follows:

> Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.[45]

Protected Statements

Internationally, it is recognised that certain kinds of statements should never attract liability for defamation. Generally speaking, this is where it is clearly in the public interest that people be able to speak freely without fear or concern that they may be liable for what they have said. This would apply, for example, to statements made in court, in the legislature and before various official bodies, as the European Court of Human Rights has made clear.[46] Equally, fair and accurate reports of such statements, in newspapers and elsewhere, should be protected.[47]

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[41] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.
[42] *Bladet Tromsø and Stensaas v Norway*, note 40, para 65.
[43] *Ibid*.
[44] See, for example, *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625 (House of Lords); *National Media Ltd and Others v. Bogoshi*, [1999] LRC 616, p. 631 (Supreme Court of Appeal of South Africa).
[45] Defining Defamation, note 3, Principle 9.
[46] See, for example, *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (members of the legislature should enjoy a high degree of protection for statements made in their official capacity) and *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (statements made in the course of judicial proceedings should receive a high degree of protection).
[47] See, for example, *Bladet Tromso and Stensaas v. Norway*, note 40 (media and others should be free to report,

Principle 11 of *Defining Defamation* details the types of statements that should attract such protection as follows:

> (a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
>
> i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
> ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
> iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
> iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
> v. any document ordered to be published by a legislative body;
> vi. a fair and accurate report of the material described in points (i) – (v) above; and
> vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.
>
> (b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.[48]

It may be noted that the list of protected statements in the Mass Media Law only extends to some of these items – and that it only applies to statements made by or through a mass media outlet.

Exemptions from Liability

Finally, there should be exemptions for certain types of information carriers. Under the current regime, it is not inconceivable that an Internet Service Provider (ISP) could attract liability by unwittingly providing access to insulting or defamatory information published through the Internet. This would not be appropriate because ISPs cannot be regarded as the 'authors' of such information. Additionally, there is an important risk of 'censorship by proxy': given their potential liability, many ISPs will simply remove statements from the Internet as soon as they have been challenged as defamatory, regardless of the legitimacy of the challenge.

As a result, it has been recognised that special protection in defamation law is necessary in relationship to the Internet. This is reflected in Principle 12(b) of *Defining Defamation*, which states, in relevant part:

> Bodies whose sole function in relation to a particular statement is limited to providing technical access to the Internet, to transporting data across the Internet or to storing all or part of a website shall not be subject to any liability in relation to that statement unless, in the circumstances, they can be said to have adopted the relevant statement.[49]

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accurately and in good faith, official findings or official statements).
[48] Note 3.
[49] *Ibid.*

Recommendations:

- Defamation defendants should benefit from a defence of reasonable publication, as outlined above.
- In cases involving statements on matters of public concern, the plaintiff should bear the onus of proving the statements are false, rather than the defendant being required to prove they are true.
- Certain statements, as outlined above, should be protected against liability because of the overall public interest in their being made or disseminated.
- Bodies whose function is to provide technical access to the Internet (ISPs) should not attract liability for information to which they provide access, unless they can be said to have adopted the statement as their own.

3.2.3. Limitation period

ARTICLE 19's *Defining Defamation* proposes a limitation period for defamation actions of one year, absent exceptional circumstances. According to our information, such a limitation is not provided for in the Kyrgyz Civil Code. Article 18 suggests that a lawsuit to reinstate or protect a personal non-property right, which includes reputation, can be instituted at any time. We recommend that consideration be given to providing for a limitation period of one year for filing a defamation action, outside of exceptional circumstances (see also our comments in relation to criminal defamation, above). This provision could be placed either in Article 16, specifying its application to a defamation action, or in Article 18 itself.

Recommendations:

- Defamation actions should not be able to be initiated more than one year after the impugned statements were published.

3.2.4. Damages

Article 1027 states that compensation for defamation is awarded 'regardless of guilt', while Article 1028 provides that compensation must always be awarded in monetary form and that it should be proportionate to the harm suffered.

These provisions are highly problematic. First, there is no indication as to the meaning of the statement that compensation will be awarded 'regardless of guilt'. This may refer to the absence of a requirement of intent, but this needs to be clarified.

Second, the right to freedom of expression demands that the purpose of a remedy for defamatory statements is, in all but the very most exceptional cases, limited to redressing the immediate harm done to the reputation of the individual(s) who has been defamed, and that the role of remedies is not to punish the speaker.[50] It is a general principle of law that plaintiffs in civil cases have a duty to mitigate damage. In the area of defamation law, this implies that the plaintiff should take advantage of any available mechanisms which might redress or mitigate the harm caused to his or her reputation, such as those available through

[50] See *Defining Defamation*, note 3, Principle 14.

the right of reply and correction mechanisms discussed below. This means that courts should prioritise the use of available non-monetary remedies to redress any harm to reputation caused by defamatory statements.

Pecuniary compensation for defamation should never be disproportionate and should be awarded only where non-pecuniary remedies are insufficient. To ensure that any sanction for defamation is proportional to the injury to reputation suffered, national defamation laws should include clear rules on the allocation of pecuniary remedies. Pecuniary awards to compensate actual financial loss or material harm should be awarded only where that loss or harm is specifically established

The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases. Monetary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[51]

Recommendations:
- The Civil Code should prioritise non-financial remedies.
- The Civil Code should set rules and provide guidance on the level of damages which may be awarded, in accordance with the above.

3.2.5. Right of reply and correction

Under Article 18 of the Civil Code, a person may demand a refutation of information that "discredits his honor, dignity, or business reputation, if the person publishing such information can not prove that it is true." The procedure for refutation shall be established by court. In addition, Article 18(3) grants a right of reply to any person whose "rights or legally-protected interests" have been infringed by information published in the mass media.

Parallel to these provisions, Article 17 of the Mass Media Act provides a right of refutation for any information that "denigrates" a person's rights or interests, to be published in a special segment of the newspaper concerned.

Analysis

The right of reply or refutation is a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.

Because of its intrusive nature, in the United States a mandatory right to reply with regard to the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment right to free speech. In *Miami Herald Publishing Co. v Tornillo*, the Supreme Court held:

[51] See *Defining Defamation*, note 3, Principle 15.

> [A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[52]

On the other hand, the *American Convention on Human Rights*, covering the entire continent, requires States to introduce a right of reply[53] and in Europe, the right of reply is the subject of a Recommendation of the Committee of Ministers of the Council of Europe,[54] while many countries guarantee some form of a right of reply in law.[55] However, a legally enforceable right of reply constitutes a restriction on freedom of expression as it interferes with editorial decision-making.[56] As such, it must meet the strict three-part test set out in Section 2.2 of this Memorandum and a number of minimum requirements should apply.

A right of reply is quite different from a right of correction or refutation, which are normally limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material. A right of reply, on the other hand, requires the publication to grant space to an individual whose rights have been harmed by a publication based on erroneous facts, to 'set the record straight'. As such, it is a more intrusive interference with editorial freedom than the right to correction. As set out in the draft Law, however, a right of retractions is somewhere between these two, apparently being limited to retracting the information but allowing for direct access by the complainant to present the retraction.

ARTICLE 19, together with other advocates of media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:[57]

(a) A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.
(b) A reply should not be available where a correction or refutation suffices.
(c) A reply should receive similar, but not necessarily identical prominence to the original article.
(d) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
(e) The media should not be required to carry a reply which is abusive or illegal.
(f) A reply should not be used to introduce new issues or to comment on correct facts.

[52] 418 U.S. 241 (1974), p. 258.
[53] Note 11, Article 14. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).
[54] Recommendation R(2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment, adopted 15 December 2004.
[55] This is the case, for example, in France, Germany, Norway, Spain and Austria.
[56] See *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).
[57] See also the conditions elaborated in Resolution (74)26, note 54.

Set against these standards, we have some concerns about the proposed right to reply/retraction scheme in the draft Law. First, the procedures are statutory. This is heavy-handed from the media's point of view, but in the case of the Civil Code, which requires a court order to be obtained, also presents a high-threshold procedure for a claimant. For both reasons, we recommend that a self-regulatory right of reply or correction scheme be explored.

Second, the availability of different procedures under the Civil Code and under the Mass Media Act is confusing. If there is to be statutory regulation, it should be concentrated in one Act.

Third, Article 18(3) of the Civil Code allows for a response to any information that affects a person's rights, including, apparently, information that is true. This would open the possibility of public officials being allowed media time or space to respond to true allegations of corruption, to give but one example. This would be an unacceptable inroad on editorial freedom.

Fourth, there is very little guidance of the form or timing of the refutation or reply; instead the court is left to determine "the procedure for refutation". This grants the court considerable latitude in determining how a refutation or reply is to be published, and in what form. It would be preferable if the legislation gave guidance on these matters, in accordance with the principles elaborated under (a)-(f) above.

Recommendations:

- The right to a refutation or reply should ideally be provided through a self-regulatory regime.
- If a self-regulatory regime is not immediately possible, the right of reply or refutation should be dealt with in a single statutory Act – preferably the Civil Code. The substance of the current provisions should be reformed along the lines indicated above.