ARTICLE 19

Kyrgyzstan: Law On Guarantees for Activity of the President of the Kyrgyz Republic

August 2017

Legal analysis

Executive summary

In this analysis, ARTICLE 19 reviews the Law On Guarantees for activity of the President of the Kyrgyz Republic (the Law) for its compliance with international human rights standards, in particular related to the right to freedom of expression.

Under the Law, the Kyrgyz Prosecutor General (the Prosecutor General) is obligated to protect the honour and dignity of the President of the Kyrgyz Republic in the case of dissemination of information considered to be discrediting to the honour and dignity of the President. Where other measures taken by the Prosecutor General have failed, the Prosecutor General is obliged to protect the President's honour and dignity by pursuing civil action in court.

The Law recognises the Prosecutor General as a legitimate representative of the President of the Kyrgyz Republic, and the Prosecutor can exercise the rights of plaintiff, defendant, or injured party, as defined by the relevant underlying legislation, in the President's stead and without any special authorisation. The Prosecutor General also has the right to delegate his authority to other persons.

ARTILE 19 finds that the Law fails to meet international standards on the right to freedom of expression. We recall that under international standards, public officials by their nature should tolerate a greater degree of criticism. The unfettered discretion given to the Prosecutor General to protect the President's reputation is in direct opposition of this principle.

ARTICLE 19 recommends that the Law be abolished in its entirety. We encourage the Kyrgyz government to create an environment that is conducive to free expression, and especially to free and open debate on matters of public interest. We also express our ongoing support to civil society in Kyrgyzstan to advocate for the elimination of the Law.

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Introduction

In this analysis, ARTICLE 19 reviews the Law on Guarantees for Activity of the President of the Kyrgyz Republic (the Law)[1] for its compliance with international freedom of expression standards. The Law allows the Prosecutor General of the Kyrgyz Republic (the Prosecutor General) to initiate legal action to protect the honour and dignity of the President of the Kyrgyz Republic, as well as the Ex-President.

ARTICLE 19 is concerned that the Law is likely can be applied against journalists, given the significantly deteriorating situation for freedom of expression in the country. We believe the Law will have a chilling effect on the right to freedom of expression and will prompt self-censorship among journalists and media workers.

We are also aware of several cases being pursued by the Prosecutor General against journalists and human rights defenders under the Law. For instance:

- The Prosecutor General filed five cases against local media organisation ProMedia, which runs a popular online news agency. Zanoza and its co-founder Naryn Idinov were accused of insulting the President in their reporting. In June 2017, the Bishkek Court ruled against four defendants: it ordered Zanoza to pay the President damages of 15 million som (approx. £169,500) and ordered Zanoza's editor-in-chief to pay 3 million som (approx. £33,900).[2] In July 2017, the Bishkek court also found Zanoza and Idinov liable in another case and ordered each of them to pay the President damages of 3 million som (approx. £33,900).[3] A further two cases are still pending.

- In April 2017, the Prosecutor General filed a suited against Cholpon Djakupova, head of the Adilet Legal Clinic and former member of Kyrgyzstan's parliament, for a speech she made during a roundtable on the right to peaceful assembly, organised by the Kyrgyz human rights ombudsperson.[4]

- In July 2015, the Prosecutor General filed a civil claim against journalist Dayirbek Orunbekov to protect the honour of the President, in relation to an article in which Orunbekov implied that the President was criminally implicated in the ethnic violence in Osh in 2010, in which hundreds of people died. In December 2015, the Chui regional appeals court ordered Orunbekov to pay KGS 2,000,000 (approx. £21,000) in moral damages and publish a refutation in 11 mass media and 3 information portals.[5] Orunbekov now faces criminal charges, having not paid the fine, which is exorbitant given local salaries.

[1] ARTICLE 19's analysis is based on an unofficial translation of the Law and other relevant legislation into English. ARTICLE 19 does not take responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.
[2] The case concerned comments made by Dzhakupova in March, reported by Idinov in Zanoza, stating "that the president was a 'personality with maniacal inclinations' who should 'read the constitution.'" See, The Diplomat, Guilty Verdicts Crash in on Kyrgyz Media Outlet, 3 July 2017.
[3] *Ibid.* The case concerned the October 2015 article titled "The President's Millions: Who Really Paid For The Banquet?", about the President's "lavish lifestyle."
[4] The case alleges that Djakupova made "unjustified attacks on the president, alleging his ignorance and of breaking laws, while also accusing him of abuse of power for personal gain, and of putting pressure on free speech by selectively applying laws." See, Human Rights Watch, Kyrgyzstan: President Targets Critics: Drop Lawsuits Against Rights Defender, Media Workers, 12 May 2017.
[5] See, e.g. OSCE, Excessive fines for defamation a threat to media freedom in Kyrgyzstan, says OSCE Representative, 16 December 2015; available at http://www.osce.org/fom/210251.

- In March 2010, the General Prosecutor filed a defamation lawsuit against Ravshan Zheenbekov, chief editor of the newspaper Achik Sayasat, on behalf of former President Kurmanbek Bakiyev. The charges stemmed from an article entitled 'The crimes of Bakiyev and his family'. A Bishkek court ordered a temporary ban on the production and dissemination of the newspaper until the court had considered the merits of the case. The court ruling was cancelled following the April 2010 revolution.[6]

The Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Network for Eastern Europe and Central Asia recommended in a recent report on anti-corruption reforms in Kyrgyzstan that "[the] duty of the Prosecutor General to protect [the] honour and dignity of the President [be abolished]."[7] The report stated that:

> The Prosecutor General's acting as the President's personal attorney does not fit into democratic standards. The honour and dignity of the President should be protected in a civil court following a general legal procedure and without any privileges. The existence of such provision, even if it is not vigorously enforced and provisions on criminal responsibility for defamation/insult have adverse effect on the freedom of expression and investigative journalism.[8]

This analysis first outlines international standards related to freedom of expression and the nature of Kyrgyzstan's obligations under international law to protect and promote the right to freedom of expression. Subsequently, we analyse individual provisions of the Law for their compatibility with these standards. The analysis also makes reference to other legislation and judicial practices that relate to some provisions of the Law.

Our analysis draws upon the jurisprudence of international bodies, including the UN Human Rights Committee (HR Committee) and the European Court of Human Rights. It is also based on the standards developed by ARTICLE 19, in particular *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*[9] (Defining Defamation), that 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.[10]

ARTICLE 19 is of the opinion that the Law violates the Kyrgyz Republic's obligations under international law to protect the right to freedom of expression and recommends that the Law be abolished in full. In particular, the wide discretion given to the Prosecutor General to take legal action against anyone considered to have "discredited" the "honour and reputation" of the President and former President(s) of Kyrgyzstan is prone to abuse.

We believe that this will inevitably have a considerable chilling effect on free expression in the country. In particular, this chilling effect will have an impact precisely in the sphere where debate should be flourishing: being able to address and vigorously debate matters of public

[6] *Ibid.* See also, Kyrgyzstan will establish a special kind of democracy, RU.Delfi, 24 March 2010 (in Russian); available at http://bit.ly/2ho8Ok8.
[7] OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Anti-Corruption Reforms in Kyrgyzstan*, Round 3 Monitoring of the Istanbul Anti-Corruption Plan, 24 March 2015, p. 82; available at http://bit.ly/2hj8pzr.
[8] *Ibid.*, p. 80.
[9] ARTICLE 19, Defining Defamation, London, 2000, available at http://bit.ly/2cY9M0N.
[10] See the Joint Declaration of 30 November 2000, available at http://bit.ly/1N3D6kJ.

interest, including the functioning of public officials and heads of State, is the cornerstone of a democratic society.

International standards on freedom of expression

Right to freedom of expression and information

The right to freedom of expression is a fundamental human right, recognised in international human rights law. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.[11]

The right to freedom of expression is recognised in nearly every national constitution and in most international human rights treaties including the Universal Declaration of Human Rights (UDHR),[12] the International Covenant on Civil and Political Rights (ICCPR),[13] the European Convention on Human Rights (European Convention),[14] the African Charter on Human and Peoples' Rights,[15] and the American Convention on Human Rights (American Convention).[16]

In General Comment No. 34, the HR Committee, the treaty body that authoritatively interprets the scope of States' obligations under the ICCPR, re-affirmed that freedom of expression is essential for the enjoyment of other human rights and confirmed that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all electronic and Internet-based modes of expression.[17]

The right to freedom of expression is not absolute. International standards make clear that freedom of expression is a qualified right which may be limited, provided the restriction complies with a three-part test. This test consists of the following, cumulative, requirements:

- The restrictions must be "**provided by law"**: this requirement will be fulfilled only where the law is accessible and formulated with sufficient precision to enable people to regulate their conduct;[18]

- The restrictions must **pursue a legitimate aim**: namely the restrictions may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 of Article 19: respect for the rights or reputations of others or the protection of national security, public order (*ordre public*), public health or morals;[19] and

- The restrictions must be **necessary and proportionate** to the aim pursued: necessity requires that there must be a pressing social need for the restriction; the party invoking

[11] HR Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 2-3, available at http://bit.ly/1xmySgV.
[12] Universal Declaration of Human Rights (UDHR), 10 December 1948, GA res. 217A (III), UN Doc A/810 at 71 (1948), Article 19.
[13] ICCPR, 16 December 1966, UN Doc. A/6316 (1966), Article 19.
[14] European Convention, 4 November 1950, ETS 5, Article 10.
[15] African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc.CAB/LEG/67/3, Article 9.
[16] American Convention on Human Rights (American Convention), 12 November 1969, OAS Treaty Series No. 36, Article 13.
[17] General comment No. 34, *op.cit.*, para 12.
[18] *Ibid.*, para 25.
[19] ICCPR, Article 19(3).

> the restriction must show a direct and immediate connection between the expression and the protected interest.[20] Proportionality means that if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.[21]

International law thus allows that freedom of expression may be subject to certain restrictions for the sake of other legitimate interests including, among other things, the rights or reputations of others.

Right to privacy and protection of reputation

The right to privacy is also recognised in international human rights treaties including the UDHR,[22] the ICCPR,[23] the European Convention,[24] and the American Convention.[25] Under these treaties, privacy is a broad concept relating to the protection of individual autonomy and the relationship between an individual and society, including governments, companies and other individuals. It is commonly recognised as a core right that underpins human dignity and other values, such as freedom of association and freedom of opinion. It is also understood to be essential to maintain private breathing space for individuals to fully realise their other rights, including the right to freedom of expression.

The wording of Article 17 ICCPR prohibits "arbitrary and unlawful" interferences with the right to privacy. Under international human rights law, restrictions to the right to privacy can only be permissible if the same test is met as that applicable to Article 19.[26]

The European Court of Human Rights has found that the right to privacy, as protected by the European Convention, in some circumstances creates positive obligations to protect privacy not just against public authorities but also to ensure rights are protected in relationships with other members of society. It established the right to reputation as one encompassed by Article 8 in the case of *Pfeiffer v. Austria*:

> The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has

[20] General comment No. 34, *op.cit.*, para 35.
[21] *Ibid.*, para 34.
[22] UDHR, Article 12.
[23] ICCPR, Article 17.
[24] European Convention, Article 8.
[25] American Convention, Article 11.
[26] UNHRC, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 1999, A/HRC/13/37; UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988; UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.

> to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.[27]

Freedom of expression and privacy

Freedom of expression and privacy are intertwined rights in human rights law. They appear together in international instruments, national constitutions and laws. Together they ensure the accountability of the State and other powerful actors to citizens.

The rights are mutually supportive: freedom of expression and information allow individuals to investigate and challenge abuses to human rights including violations of privacy.

As two equal human rights, it is essential that governments and courts balance the two in a fair manner without giving precedence to one over the other. International human rights law does not recognise a hierarchy of rights, in which one trumps the other.

At the same time, both rights can be limited under certain circumstances, subject to the three-part test outlined above. This means, for example, that States are not required to adopt measures that would protect the right to privacy where that would constitute an undue restriction on freedom of expression.[28] Further, under international human rights law, States are obliged to provide remedies for violations of either right.

Protection of reputation

Protection of reputation is guaranteed by Article 12 of the UDHR (together with a number of related rights):

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The corresponding provision in the ICCPR is Article 17, which is virtually identical except that it prohibits only "unlawful attacks" on honour and reputation. This qualification was inserted as an additional safeguard for freedom of expression and to allow States some scope to decide what sort of attacks they wish to make unlawful.

The use of the word "attacks" makes it clear that only deliberate and serious interferences with individuals' honour and reputation are covered. During the negotiations leading up to the adoption of the ICCPR, several States stressed that fair comments or truthful statements can never constitute "attacks."

Broadly speaking, the term "defamation law'" is used to refer to any law related to the protection of individuals' reputation or feelings. All countries have defamation laws, although a range of terms are used to describe these, including libel, slander, insult, and so on. The form and content of these laws differs widely from country to country. In some places, there is a dedicated "defamation code", but in most countries articles dealing with the subject can be found in more general laws, such as the civil code or criminal code.

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[27] European Court of Human Rights (ECtHR), *Pfeifer v. Austria*, App. 12566/03 (2007), pars 37.

[28] For example, a requirement for newspapers to notify the subjects of a news article before its publication; see ECtHR, *Mosley v. the UK*, App. 48009/08 (2011).

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 by the three-part test (see above), or they are unnecessarily harsh, thereby failing the 'necessary in a democratic society' requirement.

A "good" defamation law – one which lays the groundwork for striking a proper balance between the protection of individuals' reputation and freedom of expression – could be defined as follows: a defamation law is a law that aims to protect people against false statements of fact which cause damage to their reputation. This definition contains four elements. In order to be defamatory, a statement must:

- be false;
- be of a factual nature;
- cause damage; and
- this damage must be to the reputation of the person concerned, which in turn means that the statement in question must have been read, heard or seen by others.

ARTICLE 19 also notes that in some countries, defamation laws explicitly seek to discourage debate about official institutions by broadly prohibiting criticism of the head of State, the flag, or other public bodies and symbols, or by imposing higher penalties when a defamatory statement targets one of these entities. The mere existence of laws of this type may encourage self-censorship amongst the media and individual citizens, even if they are applied with restraint. In other cases, poorly drafted laws may be exploited by officials and other public figures to silence their critics and to prevent debate about issues of legitimate public concern.

Another common flaw that facilitates the abusive application of a defamation law is a definition which addresses the protection of feelings rather than reputation. Words like 'insult', 'affront' or 'aspersion' may be used in such laws. Since feelings do not lend themselves to definition but are, rather, subjective emotions, these laws can be interpreted flexibly to suit the authorities' needs, including in order to prevent criticism. Moreover, the subjective nature of what constitutes an insult means that a charge of this sort is very difficult to defend against.

Public figures – privacy and reputation

Public figures, especially leaders of States, have a lesser expectation of privacy than private figures. The Committee of Ministers of the Council of Europe stated in 2004:

> Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions.[29]

International human rights courts have also consistently held that public officials should tolerate *more*, not less, criticism than ordinary citizens. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their

[29] Council of Europe, Committee of Ministers Declaration on freedom of political debate in the media, 12 February 2004.

words and deeds by the media and the public at large.[30] Moreover, vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. In general, the more senior the public official, the more criticism he or she may be expected to tolerate, including of his or her behaviour outside of official duties. Politicians come at the top of this seniority scale, due to the importance of facilitating free debate about candidates for election.

This has two specific consequences:

- First, public bodies as such should not be allowed to sue for defamation and governments should tolerate a very high degree of criticism.[31] The European Court has said that "[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician."[32] This means, amongst other things, that the State as such should not be allowed to sue for defamation.[33]

- Second, there should be no laws that grant special protection for heads of state or other public functionaries.[34] The European Court in *Lingens v. Austria* observed that it is detrimental to democracy to allow politicians to sue the media for defamation as a way of suppressing criticism. The Court held that:

> [T]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[35]

This reasoning has been recognised by other human rights courts.[36] It also applies to public officials, though the range of acceptable criticism against public servants is narrower than it is for politicians.[37]

The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the "fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises."[38]

Politicians must tolerate not only criticism, but particularly harsh words as well. Freedom of expression also protects offensive speech.[39] This is particularly true in the context of an ongoing political debate. In *Brosa v. Germany*, the European Court held that:

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[30] ECtHR, *Bodrozoc and Vujin v. Serbia,* App. 38435/05 (2009), para 34.
[31] *Ibid.*
[32] ECtHR, *Incal v. Turkey*, App. 22678/93 (1998), para 54; or *Petropavlovskis v. Latvia,* App. 44230/06 (2015), para 85.
[33] HR Committee, *Consideration of reports submitted by States Parties under Article 40 of the Covenant: Concluding observations,* UN Doc. No. CCPR/C/79/Add.109, 27 July 1999, para 14.
[34] ECtHR, *Pakdemirli v. Turkey*, App. 35839/97 (2005).
[35] ECtHR, *Lingens v. Austria*, App. 9815/82 (1986), para 42.
[36] Inter-American Court of Human Rights, *Canese v. Paraguay*, Ser. C No. 111 (2004); African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. Burkina Faso,* App. 004/2013 (2014).
[37] ECtHR, *Thoma v. Luxembourg*, App. 38432/97 (2001), para 47; or *Stankiewicz and Others v. Poland,* App. 48723/07 (2014) and *Ungvary and Irodalom KFT v. Hunagry,* App. 64520/10 (2013).
[38] ECtHR, *Dichand and others v. Austria*, App. 29271/95, (2002), para 51.
[39] ECtHR, *Handyside v. UK*, App. 5493/72 (1976) par. 49; or *Bodrozic v. Serbia*, App. 32550/05 (2009) para 56;

> Considering that F.G. was a politician at the local level at the material time and that the ongoing debate was being conducted in public and with relatively harsh words from all sides, and given the political context of the upcoming local elections, the Court finds that the applicant's statement [that the politician's organisation was a neo-Nazi organisation] did not exceed the acceptable limits of criticism.[40]

or *Sokolowski v. Poland*, App. 75955/01 (2005).
[40] ECtHR, *Brosa v. Germany*, App. 5709/09 (2014), para 51.

Analysis of the Law

Article 4 of the Law, entitled "Protection of honour and dignity of the President of the Kyrgyz Republic" reads as follows:

> President of the Kyrgyz Republic is under state protection. The honour and dignity of the President of the Kyrgyz Republic are protected by law.
>
> The Prosecutor General of the Kyrgyz Republic, in cases of dissemination of information discrediting the honour and dignity of the President and if other measures of prosecutor's response did not bring the desired results, is obliged to go to the court and on behalf of the President to protect his honour and dignity. The Prosecutor General in this case is recognized as a legitimate representative of the President of the Kyrgyz Republic and exercise the rights of plaintiff (or defendant, or injured party), defined by the procedural legislation, including the right to delegate the Prosecutor General's authority to other persons. The Prosecutor General's authority to conduct a case in the court does not request any special certificate (letter of authority).

While this provision arguably pursues a legitimate aim, namely the protection of reputations of others, it does not meet the criteria of legality, necessity and proportionality, set out in the light of international freedom of expression standards.

- From the outset, we question the **key premise of the Law** allowing the Prosecutor General to initiate civil proceedings on behalf of the President. Moreover, it seems that the Law fails to take into account that under the Civil Procedure Code of the Kyrgyz Republic, prosecutors are not to serve as representatives of other individuals in civil proceedings (with certain defined exceptions).[41]

  We note that as a matter of definition, civil law (which the Law is a part of) is concerned with private disputes between individuals or organisations. It covers disputes in matters that are considered to be issue between *individuals* involved, and not those matters in which the State has an interest and takes action. Those involved in a civil law dispute can take the matter to court, but must do so at their own expense. The purpose of the civil law is not to punish on behalf of society, but to restore the wronged party to their rightful situation.

  Because civil defamation laws impose restrictions on the right to freedom of expression, international law requires them to be formulated in such a way that insulates them against abuse by defining the scope of the law as narrowly as possible, including in relation to who may sue; ensuring that those sued for defamation are able to mount a proper defence; and providing a regime of remedies that allows for proportionate responses to defamatory statements. Hence, several established democracies do not allow public bodies to sue for defamation under any circumstances.

  The rationale for mandating the Prosecutor General to bring civil cases on behalf of the President is unclear. This is certainly an improper use of public money, particularly

[41] *C.f.* Article 55, Civil Procedure Code of the Kyrgyz Republic, Law No 146 of 29 December 1999, As Amended.

given the ample means available to the President who, as a public figure, can respond to criticism using other means (e.g. a public statement).

- The provisions of Article 4 do not meet **the criteria of legality**. As outlined above, in order for a norm to be characterised as "law" for the purpose of legitimately restricting the right to free expression, it needs to be 'formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.'[42]

  Article 4 of the Law contains a number of terms that are formulated in an overly broad manner. For example, the Law does not make clear what is encompassed by the highly subjective terms "honour and dignity" or what qualifies as "discrediting" those qualities. We understand that terms "honour" and "dignity" are defined in the Regulation of the Kyrgyz Supreme Court, which is legally binding on all courts.[43] Under the Regulation:
  - Honour is defined as "a socially significant characteristic of the set of moral, ethical, professional and other personal traits emanating from the positive status of individual in a society and compliance of behavior of individual with social customs and traditions prevailing in the society;" and
  - Dignity is defined as "a reflection of this status in the consciousness of individual, i.e. the subjective evaluation (self-evaluation), based on the socially significant criteria of moral traits, ethical and professional qualities of a person."

  Although these terms are defined in the Regulation of the Supreme Court, the fact that there no definition in the Law and is no reference to the Regulation might result in confusion about the scope of the Law. It also provides an opportunity for wide discretion to the Prosecutor General for the application and implementation of the Law.

  In this regard, we refer to the fact that this Law has been already used to suppress legitimate criticism against public figures. Importantly, the true character of a law depends on how it is interpreted and applied in practice.

  ARTICLE 19 recalls that the HR Committee stated:

  > A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[44]

  This is compounded by the fact that the Prosecutor General's authority to initiate proceedings under Article 4 can be delegated to "other persons" without indicating what qualifications those persons need to have. Nor is there a requirement for such person to operate on the basis of any guidelines provided by the Prosecutor General himself. This in essence opens the door to delegating the authority to initiate legal proceedings on behalf of the Kyrgyz President to an infinite range of actors, regardless of their

[42] General Comment 34, *op.cit.,* para 25.
[43] The Regulation of the Plenum of the Supreme Court of the Kyrgyz Republic, 13 February 2015, No 4., On judicial practice of settlement of disputes on protection of honor, dignity and business reputation. Under the amendments to the Law On the Supreme Court of Kyrgyz Republic and Local courts, adopted on 30 June 2016, provide that all Resolutions of Kyrgyz Republic Plenum of Supreme Court are mandatory for Kyrgyz courts.
[44] *Ibid.*

qualifications, including knowledge and understanding of the legal framework protecting the right to free expression.

- The provisions set **disproportionate and unnecessary restrictions** on the right to freedom of expression.
  - ARTICLE 19 reiterates that international human rights courts have consistently held that **public officials should tolerate more, not less, criticism** than ordinary citizens, in particular officials of the highest rank, such as heads of state. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their words and deeds by the media and the public at large. Moreover, vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. Hence, the ability of the President to bring defamation cases should be limited. We note that this is not the case here as the Law both provides heightened protection to the President and allows the Prosecutor General to initiate cases at the expense of the public purse.

  - In addition, the Law fails to clearly delineate which "other measures" the Prosecutor General needs to have pursued, and to what extent, before resorting to legal proceedings. This sets a very low bar to initiate legal proceedings and is likely to violate the principles of necessity and proportionality.

  - Further, the Law does not provide any guarantees for **defences** that can be used in cases of defamation. We recall that defences are legally recognised arguments which, if successful, mean that the defendant is liable for an act which, absent the defence, would be wrongful. A strong system of defences which can be invoked against a defamation claim is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. The Kyrgyz legislation should provide a robust set of defences available in all civil defamation suits, including the defence of truth, the defence of opinion or defence of reasonable publication.

  - As noted above, any **sanctions** for defamatory statements, which are also a form of restriction on freedom of expression, must, under international law, be justifiable as 'necessary'. This means they should be proportionate in the sense that the interference with the right should not outweigh the benefits in terms of protection of reputation. In effect, the authorities have an obligation to put in place a regime of remedies for defamatory statements which, while redressing the harm to reputation, does not exert an unduly chilling effect on freedom of expression.

    Hence, monetary awards (damages) in civil defamation cases should only be imposed if the plaintiff cannot adequately be compensated for the defamatory statement through other means. Where monetary awards are truly necessary, the law should specify clear criteria for determining the size of the award, which should take into account actual damages proven by the plaintiff, as well as any redress already provided through non-pecuniary remedies. A ceiling should be set for the level of compensation that may be awarded for non-financial harm to someone's reputation – that is, harm which cannot be quantified in monetary terms.

> ARTICLE 19 is concerned that practice in the Kyrgyz Republic shows that, in fact, grossly disproportionate sums in damages have been awarded for alleged damage to the honour and dignity of the Kyrgyz President, demonstrating that the Law is indeed leading to an impermissible, disproportionate restriction of the right to free expression in the country.

Moreover, **Article 18** of the Law expands the scope of the Prosecutor General's powers under Article 4 to the "Ex-President of the Kyrgyz Republic", defined in Article 11 as a President of the Kyrgyz Republic who has ceased to carry out their mandate, except in case they were dismissed by Parliament on grounds of, amongst others, treason. Under Article 18 of the Law, Ex-Presidents maintain their title as long as they live.

All those concerns raised above regarding Article 4 equally apply to Article 18. Specific mention should be made of the fact that Ex-Presidents are entitled to financial support (in Article 14), housing (in Article 15), use of government communication systems (Article 16) and security (Article 13), all financed by the State. These all clearly constitute matters of public interest, and should be open to a vigorous public debate. Given the risk of the Prosecutor General bringing suits on behalf of an Ex-President, under Article 4 of the Law, however, such debates are likely to be significantly stifled.

Recommendations

ARTICLE 19 recommends that the Law be abolished in its entirety as it violates international standards on freedom of expression.

The Law is entirely focused on safeguarding the "honour and dignity" of a high-ranking public official, the President and Ex-Presidents of the Kyrgyz Republic. As set out above, international law clearly indicates that public figures must tolerate a higher degree of criticism. Having a law in place that is centred exclusively on protecting a public figure from any statements that can be considered negative is in direct contradiction of this principle.

Moreover, the Law is potentially infinite in scope as the wording of Article 4 is overly broad. This leaves virtually unfettered discretion to the Prosecutor General or anyone they delegate with the enforcement of the Law to determine what type of expression gives rise to the instigation of legal proceedings. Due to its overly broad wording, the Law opens the door to violating the principles of necessity and proportionality by limiting speech considered to fall within the overly broad scope of the law in a heavy-handed manner.

The unfettered discretion given to the Kyrgyz Prosecutor General to protect the President's reputational rights has no place in a democracy. Due to its broad scope and the potential to levy disproportionate amount of damages on anyone considered to have violated its terms, the Law inevitably has a significant chilling effect on free expression, stifling debate on matters of public interest.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about ARTICLE 19's work in Central Asia, please contact Katie Morris, Head of Europe and Central Asia, at katie@article19.org.