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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KYRGYZSTAN

OPINION

ON THE DRAFT AMENDMENTS TO THE CODE OF ADMINISTRATIVE OFFENCES INTRODUCING PENALTIES FOR INSULT AND SLANDER

Adopted by the Venice Commission
at its 139th Plenary Session
(Venice, 21-22 June 2024)

on the basis of comments by

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I. Introduction

1. By letter of 22 April 2024, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic requested an opinion of the Venice Commission on the draft amendments to the Code of Administrative Offences of the Kyrgyz Republic introducing penalties for insult and slander (CDL-REF(2024)018 hereinafter "the draft amendments").

2. Ms Veronika Bílková, Ms Herdis Kjerulf Thorgeirsdóttir and Mr Cesare Pinelli acted as rapporteurs for this opinion.

3. On 30 May 2024, Ms Veronika Bílková, Ms Herdis Kjerulf Thorgeirsdóttir accompanied by Mr Vahe Demirtshyan and Ms Martina Silvestri from the Secretariat of the Venice Commission had online meetings with the representatives of the Ministry of Justice, as well as with the representatives of civil society and international organisations.

4. This opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 30 May 2024. The draft opinion was examined at the joint meeting of the Sub-Commissions on Fundamental Rights and on Non-Discrimination on 20 June 2024. It was adopted by the Venice Commission at its 139th plenary session (Venice, 21-22 June 2024).

II. Background

A. Overview of draft amendments

6. The draft amendments[1] which were published on 31 March 2024 propose changes to the 2021 Code of Administrative Offences of the Kyrgyz Republic (hereinafter "Code"). Specifically, they introduce a new provision, Article 107-1, titled "Slander and Insult contained in the media, on a website on the Internet or on a page of a website on the Internet" within Chapter 15 of the Code, which addresses offences against procedures related to the protection of morality, historical and cultural heritage, and legislation on languages.

7. The administrative offence of insult is defined in the draft amendments as the "deliberate humiliation of the honour and dignity of another person, expressed in an indecent form, contained in the media, on a website on the Internet or on a page of a website on the Internet." The commission of this offence will result in a fine of 75 minimum monthly wages for individuals and 230 minimum monthly wages for legal entities.

8. The administrative offence of slander is defined as the "dissemination of knowingly false information discrediting the honour and dignity of another person or undermining his reputation, contained in the media, on a website on the Internet or on a page of a website on the Internet." The commission of this offence will result in a fine of 100 minimum monthly wages for individuals and 280 minimum monthly wages for legal entities.

9. Additionally, draft amendments change Article 471 of the Code, which defines the Ministry of Culture, Information, Sports, and Youth Policy of the Kyrgyz Republic (hereinafter "the Ministry of Culture") as the "authorised body" with the competence to adjudicate on offences and impose penalties as specified in certain provisions of the Code, including the newly introduced Article 107-1.

10. The explanatory report to the draft amendments highlights the increasing relevance of freedom of speech and expression amidst the rapid development of information technology and expanding Internet access. It is noted that the surge in insults and the spread of deliberately false information through various media and online platforms threaten public morals and interpersonal

[1] See CDL-REF(2024)018

relationships. Observations by the authorities indicate that the existing civil law mechanisms inadequately address the issues related to insult and the spread of false information. These incidents negatively impact societal harmony, leading to escalated conflicts and undermining trust in information sources and the media. Thus, the amendments are deemed crucial for maintaining the quality of public discourse and protecting public confidence in information dissemination.

11. The Code of Administrative Offences details various types of administrative offences and establishes procedural mechanisms for the adjudication of administrative cases. This includes outlining the types and scopes of penalties, the statute of limitations, and identifying the authorised bodies for handling such offences.

B. National legal framework

Constitution

12. On 11 April 2021, the Kyrgyz Republic adopted a new Constitution[2] through a national referendum which upholds several fundamental rights, including the right to freedom of expression (Article 32), the rights of the mass media and the prohibition of censorship (Article 10), and the right to privacy along with the protection of honour and dignity (Article 29). These rights are not absolute and may be subject to restrictions under specific conditions outlined in the Constitution (Article 23). Article 63(1) of the Constitution, states that "it is prohibited to enact laws that restrict the freedom of speech, press, and mass media". By Article 29(3), the Constitution explicitly states that "no one can be subject to criminal prosecution for disseminating information that discredits or humiliates the honour and dignity of an individual".

Criminal Code

13. The 1997 Criminal Code of the Kyrgyz Republic initially included provisions on slander (Article 127) and insult (Article 128). These articles were ultimately removed following the adoption of the 2010 Constitution,[3] after the Constitutional Chamber's 2013 ruling declared it inconsistent with Articles 20(4)(6) and 33(5) of the 2010 Constitution. The Constitutional Chamber established the need to consider an effective mechanism to protect the honour and dignity of a person by making changes to the Civil Code of the Kyrgyz Republic, including protective measures against insult.[4] The newly enacted Criminal Code of 2021 does not include any relevant provisions. Additionally, the suggestion to categorise slander and insult as administrative offences was considered in 2014 but was not adopted at that time.[5]

Civil Code

14. Article 18 of the 1996 Civil Code of the Kyrgyz Republic addresses the protection of honour, dignity, and the business reputation of individuals and legal entities.[6] Under this article, individuals can seek a court order to refute information that discredits their honour, dignity, or business reputation; similarly, legal entities can challenge information damaging their business reputation. This provision is applicable to information disseminated by any means, including through mass media. Courts may order the correction or removal of the discrediting information and may also award compensation for financial losses and moral damages to the affected parties. If court orders are not complied with, an additional fine may be imposed. Moreover, if the source of the discrediting information is unidentifiable, the court can officially declare the information as false.

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[2] See CDL-REF(2023)009 Constitution of the Kyrgyz Republic.
[3] See Media Policy Institute, Decriminalisation of libel in the Kyrgyz Republic, 6 June 2007, available in Russian at https://media.kg/news/dekriminalizaciya-klevety-v-kyrgyzskoj-respublike-3/
[4] Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic of 6 November 2013 No. 8-R on the case of verification of the constitutionality of Article 128 of the Criminal Code of the Kyrgyz Republic in connection with the appeal of citizen Madinov Orozobek Kaparbekovich.
[5] Media Policy Institute, Comment on the Ministry of Justice Insult Bill, 26 August 2014, available in Russian at: https://media.kg/news/v-kyrgyzstane-predlagayut-vvesti-administrativnuyu-otvetstvennost-za-oskorblenie-2/
[6] Civil Code of the Kyrgyz Republic dated 8 May 1996 No. 15, available in Russian at: https://cbd.minjust.gov.kg/3-2/edition/1281648/ru

15. In adjudicating cases under Article 18 of the Civil Code, courts adhere to Resolution No. 4 “On the Judicial Practice in Resolving Disputes on the Protection of Honor, Dignity and Business Reputation” of the Plenum of the Supreme Court of the Kyrgyz Republic, dated 13 February 2015. This resolution defines key terms such as honour, dignity, and business reputation.[7]

Law on the Protection against Inaccurate (False) Information

16. In 2021, the Kyrgyz Republic enacted the Law on the Protection against Inaccurate (False) Information.[8] This law specifically targets the spread of inaccurate or false information within the Internet space of the Kyrgyz Republic, as outlined in Article 3(1). Article 2(7) defines such information as that which “is contained on a website or a webpage on the Internet and does not correspond to reality, thereby discrediting the honour, dignity, and business reputation of another person”.

17. Under this legislation, individuals who contend that false information has been published against them have the right to request the website owner to remove and refute this information promptly—within 24 hours. Should the website owner fail to comply, affected individuals can refer the issue to the Ministry of Culture. The Ministry has the authority to mandate the removal and refutation of the information or to suspend the operation of the website for up to two months. Additionally, individuals may seek legal recourse to claim compensation for damages incurred due to the dissemination of such false information.

18. This law has attracted extensive criticism for empowering authorities to instruct Internet service providers to block access to websites containing information deemed false without judicial oversight which raised concerns about the potential suppression of free speech and the bypassing of due legal processes.[9] The EU has expressed concern in their human rights dialogue with Kyrgyzstan over the shrinking space for civil society and the implementation of the law on false information,[10] as well as on reported crackdown on the media and freedom of expression in Kyrgyzstan.[11]

Draft law About the Media

19. In October 2023, the Venice Commission issued an opinion[12] on the Draft law of the Kyrgyz Republic about the media.[13] In the explanatory report to this draft law the authorities argued that the Media Law of 1992 was outdated and emphasised the necessity for the authorities to “shape the social responsibility of journalists”. The Venice Commission highlighted that, as a signatory to the International Covenant on Civil and Political Rights (ICCPR), the Kyrgyz Republic is obligated to ensure that its media regulatory framework conforms with Article 19 of the ICCPR enshrining the right to freedom of expression. It stressed that any state-imposed restrictions on freedom of expression must not compromise the right itself. The Commission cautioned against reversing the relationship between rights and restrictions, and norms and exceptions, and called for a thorough revision of the draft law incorporating its recommendations.

20. Also, the Venice Commission has emphasised the necessity for a thorough review of the provisions concerning responsibility in the draft law. This revision should involve the explicit delineation of distinct forms of responsibility and the corresponding actions that may give rise

[7] Amendments to the Law "On the Supreme Court of the Kyrgyz Republic and Local Courts" in 2016 stated that all resolutions of the Supreme Court's Plenum are binding on all courts within the Kyrgyz Republic. https://media.kg/news/postanovleniya-verxovnogo-suda-kr-teper-imeyut-obyazatelnyj-xarakter-primeneniya/
[8] Law of the Kyrgyz Republic date 15 August 2021 No. 15 On protection against inaccurate (false) information, available in Russian at: cbd.minjust.gov.kg
[9] https://www.hrw.org/world-report/2023/country-chapters/kyrgyzstan
[10] Kyrgyz Republic: 12th EU-Kyrgyz Republic Human Rights Dialogue takes place
[11] MOTION FOR A RESOLUTION on crackdown on the media and freedom of expression in Kyrgyzstan
[12] Venice Commission, CDL-AD(2023)040, Opinion on the Draft Law of the Kyrgyz Republic about the media.
[13] See, CDL-REF(2023)029, Draft Law about the media and explanatory note.

to such responsibility. Additionally, it recommended to incorporate precise and unambiguous references to other laws related to responsibility, if applicable.

21. On 13 March 2024, the draft law was withdrawn,[14] having been subject to significant criticism, both domestically and internationally, despite several amendments since 2022.[15]

C. International legal framework

22. The International Covenant on Civil and Political Rights (ICCPR), ratified by Kyrgyzstan in 1994, enshrines the right to freedom of expression for every individual. This includes the freedom to seek, receive, and communicate information and ideas, regardless of geographical boundaries. The right to freedom of expression can be exercised through various means, including oral, written, or printed communication, artistic expression, or any other preferred media. However, it should be noted that certain restrictions on this right are permissible, but only if they are lawful and necessary to uphold the rights and reputation of others, ensure national security, maintain public order, safeguard public health, or protect public morals.[16] Moreover, as the UN Human Rights Committee has indicated with respect to Article 19 ICCPR, any restrictions on freedom of expression "must conform to the strict tests of necessity and proportionality".[17] They "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[18] Furthermore, the UN Human Rights Committee (UN HRC) recalled that the relationship between right and restriction and between norm and exception must not be reversed.[19]

23. For the purposes of Article 19 (3) ICCPR, a legal act, to be characterised as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[20]

24. Article 17 ICCPR explicitly distinguishes between the protection of "honour and reputation" and "privacy". It states that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, or to unlawful attacks on their honour and reputation. Furthermore, it affirms that everyone has the right to the protection of the law against such interference or attacks, thereby underlining the legal safeguards intended to uphold these fundamental human rights.[21]

25. According to the General Comment No. 34 of the UN HRC, "Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the decriminalisation of defamation, and, in any case, the application of the criminal law should only

[14] Kyrgyz 'Mass Media' Law Withdrawn by Presidential Request
[15] Analysis of the Draft Law "On Mass Media", Media Policy Institute, online in RussianDraft law on media to reduce space for work of independent media 24.KG.
[16] International Covenant on Civil and Political Rights | OHCHR, Article 19.
[17] See Human Rights Committee, General Comment No. 34, Article 19 freedoms of expression and opinion, para 22.
[18] See UN Human Rights Committee, communication No. 1022/2001, Velichkin v. Belarus, Views adopted on 20 October 2005 and the Committee's General Comment No. 22, Official Records of the General Assembly, Forty eighth, Session, Supplement No. 40 (A/48/40), annex VI.
[19] UN Special Rapporteur Expresses Concerns on the Draft Mass Media Law in the Kyrgyz Republic
[20] General Comment No.34 on Article 19: Freedoms of opinion and expression, para. 25.
[21] International Covenant on Civil and Political Rights | OHCHR. Article 17.

be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[22]

26. The Venice Commission has adopted several opinions pertaining to the legislation on defamation.[23] It has noted that "the prohibition of defamation raises the issue of the appropriate balance to be struck between freedom of expression… and the right to respect for private and family life."[24]

27. While the Kyrgyz Republic is not a state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Venice Commission's extensive references to the standards and rulings of the European Court of Human Rights (ECtHR) demonstrate their applicability as common reference standards, relevant also to those member states of the Venice Commission that are not party to the ECHR.

28. The ECtHR has acknowledged that Article 8 protects one's reputation against defamatory statements, at least of a certain level of gravity. Also, it has not proscribed criminal provisions on defamation stressing that penalties imposed in defamation cases need to reflect the severity of the offence and must not be disproportionate. In its view, it remains open to the competent state authorities to adopt, where appropriate, even measures of a criminal law nature. The Court has however stressed the chilling effect of the mere fact that a sanction is of criminal nature and criticised the excessive use of criminal provisions.[25] Moreover, it has held that "the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired as, for example, in the case of hate speech or incitement to violence".[26] It has also noted that "a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest presents no justification whatsoever for the imposition of a prison sentence".[27] When assessing the proportionality of damages the Court may take into account the consequences of the amount of damages for the applicant's economic situation.[28] The Court may also refer to reference values, such as the minimum salary in force in the respondent State in question.[29]

29. The Kyrgyz Republic is a State party to the Convention on Human Rights and Fundamental Freedoms of Commonwealth of Independent States (CIS), Article 11 of which guarantees the right to freedom of expression. Under this provision, this right "may be subject to such formalities, conditions and restrictions as are prescribed by law and are necessary in a democratic society, in the interests of national security, public safety or public order or for the protection of the rights and freedoms of others".[30]

30. As regards the criminalisation of slander and insult, a comparative study conducted in 2017 on Defamation and Insult Laws across the OSCE Region, commissioned by the OSCE Representative on Freedom of the Media,[31] revealed prevalent criminal defamation legislation in most OSCE member states. Notably, there were 15 exceptions to this trend at the time of the study, with the Kyrgyz Republic being among them. The study highlighted divergent global trends, including the gradual decriminalisation of defamation in several common law and post-Soviet

[22] Ibid. para. 47.
[23] E.g. CDL-AD(2013)024, Opinion on the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan; CDL-AD(2013)038, Opinion on the Legislation on Defamation of Italy; CDL-AD(2016)00, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey.
[24] Venice Commission, CDL-AD(2013)038, Opinion on the Legislation on Defamation of Italy, para 13.
[25] Venice Commission, CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, paras 29 and 59.
[26] ECtHR, Cumpana and Mazare v. Romania, Application No. 33348/96, 17 December 2004, para 115.
[27] Ibid. para 106.
[28] ECtHR, on the absence of harmful effects of a pecuniary sanction, see Delfi AS v. Estonia [GC], para 161; C8 (Canal 8) v. France, paras 101-102; on the disproportionate nature of a pecuniary award in the light of the applicant's economic situation, see Kasabova v. Bulgaria, para 43, and Tolmachev v. Russia, paras 53-55.
[29] ECtHR, Tolmachev v. Russia (42182/11), para 54.
[30] Convention on Human Rights and Fundamental Freedoms of Commonwealth of Independent States
[31] Scott Griffen, Defamation and Insult Laws in the OSCE Region (March 2017) - ipi.media: A Comparative Study (Commissioned by the OSCE Representative on Freedom of the Media).

nations, juxtaposed with a reinforcement of defamation laws in select jurisdictions. The recent transition of the Kyrgyz Republic from decriminalising slander and insult to reintroducing them as administrative offences reflects a convergence of these evolving legal landscapes.

D. Scope of the opinion

31. In conformity with the above-mentioned principles, the Venice Commission observes that classifying insult or slander as administrative offences *per se* does not contradict international standards. However, the relevant legislation and its application must strictly fulfil the criteria for lawful restrictions on human rights as delineated in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR). These criteria include *legitimacy*, requiring that the law pursues a legitimate aim; *legality*, mandating that the law must be duly enacted and accessible; and *necessity/proportionality*, ensuring that any restrictions are necessary for a democratic society and proportionate to the aim pursued. The Venice Commission's opinion will assess whether the modifications to the Kyrgyz Republic's legal framework concerning insult and slander align with these international legal standards, including the competency of the authorised body to decide on the cases of insult and slander and the proportionality of sanctions.

32. The Venice Commission underlines that it does not assess the draft amendments in light of the Constitution of the Kyrgyz Republic. It is the role of the Constitutional Court of the Kyrgyz Republic to determine the compatibility of the draft amendments with Article 29(3) of the Constitution, which stipulates that "no one can be subject to criminal prosecution for disseminating information that discredits or humiliates the honour and dignity of an individual."

33. The Venice Commission also emphasises that the fact that this opinion does not explicitly address other aspects of the draft amendments should not be interpreted as an endorsement by the Venice Commission or as an indication that these aspects will not be raised in the future.

III. Analysis

A. The principle of legitimacy (legitimate aim)

34. According to the explanatory report,[32] the primary aim of the draft amendments is to "protect the legitimate interests of the victims and ensure justice within the legal system". The report notes that the rise in cases of insults and the dissemination of deliberately false information through various media and internet resources have emerged as significant threats to public morals and interpersonal relationships. Such developments may lead to increased conflicts, further deterioration of interpersonal relationships, and disruption of social stability. The report also mentions that observations by the authorities indicate that the existing civil law mechanisms inadequately address the issues of insults and the spread of false information.

35. Article 19(3) ICCPR permits restrictions on the right to freedom of expression when deemed necessary for the "respect of the rights or reputations of others", "protection of national security or public order (ordre public)", or "public health or morals".[33] These grounds provide a legal framework within which States may impose certain limitations on freedom of expression, provided such restrictions are justified and proportionate to the aims pursued.

36. The Venice Commission underscores that, at first glance, the proclaimed aims of the draft amendments appear to align with permissible restrictions outlined in international law instruments. The Commission acknowledges that defending "constitutional order", "public morals", or the "dignity" of individuals constitutes a legitimate aim that the State may pursue.

37. However, the Commission emphasises that the aims set forth in the explanatory note lack substantiation by further details. Notably, no statistical and substantive data or analyses have been provided to justify the need for classifying slander and insult as administrative offences. Additionally, there is no explanation as to why the existing civil remedies are insufficient to

[32] CDL-REF(2024)018.
[33] International Covenant on Civil and Political Rights | OHCHR, Article 19.

achieve the proclaimed aims of the draft amendments, or how the proposed administrative remedies will better achieve these aims. The necessity for detailed justification and explanation of the aims of the draft amendments was reaffirmed during the online meetings and is even more pertinent given critical reports by international organisations concerning the state of freedom of expression in Kyrgyzstan.[34]

38. The Venice Commission has consistently highlighted in its opinions the importance of comprehensive explanatory notes or memoranda.[35] These documents must reveal the rationale behind the adoption of a Law, explain its purposes, and outline the methods to achieve them. They should also comprehensively demonstrate the primary changes the draft law will introduce compared to the current situation. The Commission reiterates that law-making is not only an act of political will, it is also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not substantiated and put forward.[36] It is also crucial to consider that the lack of proper and detailed explanations for the aims of the draft amendments may lead to misinterpretation or incorrect application, resulting in overly broad or abusive restrictions of human rights and fundamental freedoms.

39. Consequently, the Commission strongly recommends that the necessity of the draft amendments be justified, substantiated, and clearly explained in the explanatory report. The latter should detail the aims of the draft amendments, the methods for achieving those aims, the introduced changes compared to the current situation, thereby upholding the principle of legitimacy.

B. The principle of legality

40. The draft law introduces and defines two new administrative offences (slander and insult) contained in the media, on a website on the Internet or on a page of a website on the Internet.[37] These definitions use terms such as “deliberate humiliation”, “discrediting honour and dignity”, “indecent form”, and “knowingly false information”. It is important to note that some of these terms are further elaborated in Resolution No. 4 of the Plenum of the Supreme Court of the Kyrgyz Republic “On the Judicial Practice in Resolving Disputes on the Protection of Honor, Dignity, and Business Reputation”.[38] However, this resolution is pertinent exclusively to judicial proceedings and does not extend to administrative procedures. It is important to underline that the provision outlined in Article 107-1 of the Code is comprehensive, applying uniformly to entities within the media and internet environment, encompassing both established online media platforms and individual bloggers.

41. According to draft amendments to Article 471 of the Code, the Ministry of Culture will be the “authorised body” with the competence to adjudicate on cases concerning offences contained in the media and the Internet and to impose penalties.

42. Article 547 of the Code stipulates that decisions made by the “authorised body” regarding offences can be contested before the district (city) court. Furthermore, Article 554(1) of the Code provides that any ruling by a district (city) court judge on an appeal against a decision of an authorised body is subject to appeal by the involved parties through an appellate procedure.

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[34] E.g. MOTION FOR A RESOLUTION on crackdown on the media and freedom of expression in Kyrgyzstan, 2023 report of Human Rights Watch on Kyrgyzstan available at : https://www.hrw.org/world-report/2023/country-chapters/kyrgyzstan#eaa21f, https://monitor.civicus.org/globalfindings_2023/

[35] See for example, Venice Commission, CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria, CDL-AD(2008)042, Opinion on the Draft Law on protection against discrimination of “the former Yugoslav Republic of Macedonia,

[36] Venice Commission, CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, para 17.

[37] Insult is deliberate humiliation of the honour and dignity of another person, expressed in an indecent form, contained in the media, on a website on the Internet or on a page of a website on the Internet. Slander the dissemination of knowingly false information discrediting the honour and dignity of another person or undermining his reputation, contained in the media, on a website on the Internet or on a page of a website on the Internet.

[38] Resolution of the Plenum of the Supreme Court of the Kyrgyz Republic dated 13 February 2015 No. 4 On Judicial Practice on Resolution of Disputes on Protection of Honour, Dignity and Business Reputation.

43. Article 19(3) ICCPR provides that any restrictions to freedom of expression must be provided by law. For a norm to be considered "law", it "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. 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".[39]

44. The Venice Commission recalls that "[…] The requirement of "lawfulness' implicitly refers to a certain quality of the law in question. A limitation would not be "lawful" if the law is not sufficiently clear, accessible or if its application is unforeseeable. […]".[40] National laws on defamation must be formulated with sufficient precision to enable citizens to regulate their conduct: they must be able - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the given circumstances, the consequences which a particular action may entail.[41]

45. It is problematic, thus a matter of concern, whether an administrative body such as the Ministry of Culture, which lacks judicial authority based on impartiality to resolve disputes, is adequately equipped to interpret and apply complex legal terms associated with insult and slander.[42] Thus there exists a considerable risk that the "authorised body" will not be able to manage effectively the adjudication process, particularly in assessing complex questions which is essential for providing a proper justification for the necessity of interference. Moreover, it is not clear who exactly will be responsible for this adjudication, whether they would have the necessary qualifications and competence, and if relevant procedural guarantees are in place. These serious questions were underlined during the online meetings held by the rapporteurs.

46. The Venice Commission finds that categorising slander and insult as administrative offence in its current form might entail greater risks than treating them as criminal offences, since the latter typically fell under the jurisdiction of judicial bodies, whereas the former should be adjudicated by administrative entities. In this context it is to be noted that the assessments that the "authorised body" will be called on to carry out may include determining whether the alleged offence was committed in good and fair faith, distinguishing between derogatory value judgments and untruthful, defamatory statements of fact. It is not clear whether an administrative authority such as the Ministry of Culture has the capacity and expertise to carry out such adjudication, taking fully into account and in conformity with domestic case-law and international human rights standards.

47. Moreover, the Venice Commission notes that while the Ministry of Culture will be tasked with interpreting and applying various provisions of the Code of Administrative Offences, these typically concern violations directly related to its competences, such as the violation of the legislation on television and radio broadcasting (Article 406) and the violation of antitrust restrictions in the field of television and radio broadcasting (Article 407). However, the inclusion of slander and insult, under Article 107-1 of the Code, relates only to offences committed via media and the Internet, with which the Ministry has a tenuous connection. Furthermore, there is a real risk of conflicts of interest if the Ministry of Culture is called on to adjudicate on possible cases related to criticism of government or other public officials, to whom the Ministry of Culture is accountable, a situation that raises issues of independence and impartiality of the ministry as an adjudicating body.

48. The Venice Commission further observes that Article 107-1 of the Code applies to both private individuals and public figures. It underscores that in the context of public debate involving public figures and institutions, the ICCPR places high importance on freedom of ("uninhibited")

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[39] UN Doc. CCPR/C/GC/34, General Comment No. 34 Article 19: Freedoms of opinion and expression, 12 September 2011, para 25.

[40] Venice Commission, CDL-AD(2008)026-e, Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, para 50.

[41] Venice Commission CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, para 18.

[42] See also, Adilet "Analysis of the Draft Law of the Kyrgyz Republic "On Amendments to the Code of the Kyrgyz Republic on Administrative Offences", Bishkek, 11 April 2024.

expression.[43] Furthermore, private individuals, who are not public figures and can justifiably claim protection of their private lives, merit stronger privacy safeguards. Conversely, individuals who play active roles in public contexts, whose actions are pertinent to societal, financial and political discourse, necessitate a different level of scrutiny given their influence and the public's legitimate interest in their conduct.

49. The Commission therefore emphasises that the interpretation and application of these legal provisions require a nuanced approach, which can be exercised by independent and trained judges rather than an administrative authority such as the Ministry of Culture. The Venice Commission reiterates that the issue "whether damage has been suffered and, if so, the extent of such damage, is for the courts to determine (including the matter of whether the action is possibly barred by parliamentary immunity). Courts are well placed to enforce rules of law in relation to these issues and to consider the facts of each situation; they must reflect public opinion in their decisions, or the latter risk not to be understood and accepted, and to lack legitimisation".[44]

50. The Venice Commission finds that while there exists an option to appeal the decisions of the "authorised body" to the courts, it is more appropriate for such cases to be adjudicated already at first instance by courts as provided for by Article 454 of the Code. In principle, courts inherently possess a greater capacity to interpret the nuances of these laws and to effectively balance competing rights and interests. Alternatively, the high-quality adjudicating requirements concerning the "authorised body", including those of independence and impartiality as well as strong procedural guarantees of fairness, should be provided in law and practice.

51. In light of these considerations, the Venice Commission recommends removing the authority of the "authorised body" (the Ministry of Culture) to adjudicate cases concerning insult and slander. Instead, this competence should be directly conferred upon the courts, which are better equipped to handle the legal complexities inherent in these cases and ensure a fair and balanced decision, unless the high-quality adjudicating requirements concerning the "authorised body", including those of independence and impartiality, as well as robust procedural guarantees of fairness, are firmly established in law and practice.

C. The principles of necessity and proportionality

1. Civil and administrative remedies

52. The explanatory note to the draft amendments notes the necessity of adopting new provisions under the Code of Administrative Offences, adding that "the civil legislation of the Kyrgyz Republic does not respond effectively enough to cases of insults and the dissemination of deliberately false information in the media and on Internet platforms." However, the brevity of this explanation hinders a clear understanding of the specific inadequacies in the civil law and complicates the assessment of whether the introduction of new administrative offences is the most appropriate solution to address this issue.

53. The Commission believes that "the draft amendments should explain how the "complaints procedure" (which is of an administrative character) relates to any criminal and/or civil proceedings which may arise out of the same facts. Thus, criminal law issues may arise in such cases and may relate, for example, to hate speech, protecting children, and/or public order. On the other hand, protection of honour and dignity of individual private persons should be governed

[43] "In circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties /…/. Moreover, all public figures, /…/ are legitimately subject to criticism and political opposition". UN Doc. CCPR/C/GC/34, General Comment No. 34 Article 19: Freedoms of opinion and expression, 12 September 2011, para 38.

[44] Venice Commission, CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, paras 74-75.

by civil law, meaning that affected individuals would primarily demand protection (including any claims for financial indemnification) from civil courts".[45]

54. In this context, the Venice Commission recalls that the civil remedy under Article 18 of the Civil Code and the administrative remedy to be introduced into the Code have different legal ratios. The former is a civil law instrument, initiated by the relevant natural or legal person harmed by certain information and adjudicated by a judicial body. The latter is a public law instrument, which may be used *ex officio* by the competent state body and adjudicated by the same state body (the Ministry of Culture). It remains thus unclear how these two remedies are intended to operate in conjunction with one another.

55. Additionally, it should be mentioned that Article 107-1 of the Code only focuses on slander and insult carried out through media or online. The reason for this limitation is not very clear. Article 18 of the Civil Code offers legal remedies against any information discrediting honour, dignity, or business reputation, regardless of the means through which such information is communicated. While the explanatory report notes that "there is an increase in the number of cases of insults and the dissemination of deliberately false information through various media and Internet resources", this itself does not explain why only slander and insult carried out through media or online shall be considered as sufficiently serious to warrant the introduction of special public law remedies.

56. Moreover, this ambiguity in application of public and civil remedies raises concerns regarding the potential granting of disproportionate powers to the executive to regulate and adjudicate on cases concerning online public discourse. This, in turn, could impede the free flow of information, ideas, and opinions contributing to an informed public debate, crucial for the democratic process. It is noteworthy that the current wording of draft Article 107-1 extends beyond media outlets to encompass all types of websites, including online discussions involving both ordinary citizens and journalists in their public watchdog capacity. Such an expansion carries the risk of fostering a chilling effect, thereby exacerbating self-censorship within the media and among social media users. Additionally, similar concerns have been voiced by the Media Policy Institute which noted that "as a punishment for slander and insult, the Ministry imposes a fine, the payment of which will go to the state budget. Consequently, it appears that the state replenishes its treasury at the expense of the interests of the private, i.e., offended, person".[46]

57. It is recalled that the Committee of Ministers of the Council of Europe has expressed concern about the chilling effect on freedom of expression, public debate and public participation caused by legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation, which are often referred to as strategic lawsuits against public participation ("SLAPPs"). Although SLAPPs are often civil law actions, they appear in the administrative and criminal law context as well, and when such proceedings provide for administrative measures and criminal sanctions, they can be particularly restrictive and more easily weaponised against public watchdogs, resulting in a more severe impact on the individual and a greater chilling effect.[47]

58. During the online meetings, it was explained that administrative proceedings might be triggered solely by decision of the "authorised body", without any claim or application from the alleged victim. This appears to be a failure to exercise due restraint in encroaching the rights to privacy and freedom of expression. Furthermore, there is no provision for closing the case if a friendly settlement is reached between the parties. Additionally, it is not excluded that parallel

[45] Venice Commission, CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, para 53.
[46] Commentary of "Media Policy Institute" to the draft law "On Amendments to the Code of Offences of the Kyrgyz Republic", which introduces the article "Libel and insult contained in the mass media, on a website on the Internet or on a page of a website on the Internet" into the Code of Offences of the Kyrgyz Republic, available in Russian at : http://koomtalkuu.gov.kg/ru/view-npa/3637 .
[47] Recommendation CM/Rec(2024)2 on countering the use of strategic lawsuits against public participation (SLAPPs), 5 April 2024.

proceedings in both administrative and civil aspects could be initiated based on the same facts and against the same person, which may result in double jeopardy.

59. The Venice Commission underscores that it is not uncommon for an incident to prompt a criminal or administrative reaction from the authorities to protect public interest, irrespective of the victim's wishes, and for the victim to seek civil proceedings against the person concerned. However, insult and slander primarily pertain to the subjective dimensions of social relations, where the role of the alleged victim is essential for determining the occurrence of the offence and the appropriate legal qualification.

60. Also, the Venice Commission is convinced that the vagueness in the interrelation between civil and administrative remedies significantly weaken clarity of the legal framework. This potentially paves the way for abuse of laws by creating favourable conditions for abusive behaviours of the executive, leading to extensive restrictions on freedom of expression and the public discourse. Additionally, this may pose a serious risk that the authorities may monitor the civic space where defamation laws may become a tool to keep a tight rein on social media users and journalists, fostering an environment of self-censorship.

61. The Venice Commission underlines that the law shall provide clear and precise guidelines for the application of these legal instruments which will help to mitigate any confusion and uphold the proportionality of restrictions, thus fostering trust in the legal system and safeguarding the rights of all individuals involved. Hence, the Commission finds, that even if the Kyrgyz authorities opt to retain the administrative remedy, it should be invoked solely upon the complaint of the alleged victim and should be discontinued in the event of a friendly settlement. Furthermore, the application of civil and administrative remedies must be mutually exclusive concerning the same facts or incident.

62. The Venice Commission thus recommends that the administrative remedy be invoked solely upon the complaint of the alleged victim, be discontinued in the event of a friendly settlement, and not be pursued concurrently with the civil remedy.

2. Proportionality of sanctions

63. According to the draft amendments, the prescribed penalty for the offense of insulting an individual entails a fine amounting to 75 monthly wages for natural persons (80 Euros), while legal entities face a penalty of 230 monthly wages (245 Euros). Likewise, the penalty for slander is determined at 100 monthly wages for individuals (105 Euros) and 280 for legal entities (300 Euros).[48]

64. Although the fines may not appear substantial at first glance, they still may be significant considering that the average wage in Kyrgyzstan is approximately 340 Euros. In this context, to ensure proportionality it is crucial to consider the economic situation of the offender and the impact of the financial sanction. Furthermore, given the broad discretion granted to the “public authority” to impose penalties and the risk of abuse, the disproportionality of the fines should not be assessed solely based on their amount, but rather on the imminent threat of repeated interference. Consequently, active bloggers and journalists may be deterred, as they often lack the financial security to repeatedly take such risks and there are no adequate mechanisms to respond. The fear of unwarranted interference will conduce to self-censorship depriving citizens of information vital to an open public debate.

65. The Venice Commission reiterates that to be proportionate, the nature and severity of the fines imposed must be taken into account, inter alia having regard to the size of the media outlet. A distinction surely must be made between the online publications of powerful media houses and

[48] The monetary ramifications of these penalties are calculated based on the value of one monthly wage, equating to 100 Soms; the figures in euros are approximate.

personal blogs.[49] In these circumstances apart from the size of fines, other aspects shall be considered as well, especially the orientation of the administrative measures on media and online platforms and the non-judicial nature of the currently foreseen procedure. Hence in this context, the draft law could create an additional avenue for government officials to readily initiate out-of-court proceedings against government critics which, combined with the imposition of administrative fines, may have a chilling effect on freedom of speech. The aforementioned considerations provide another compelling argument for the judicial adjudication of cases involving slander and insult (see above).

66. In this context it is recalled that the ECtHR's case-law has affirmed that, even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages, it nevertheless constitutes a criminal sanction.[50] Therefore, the seemingly light amount of the fines for the commission of slander or insult, as provided in the draft law, does not exclude the gravity of the infliction of those fines for the persons involved. The Venice Commission recalls that the formal classification of an offence (e.g., as an administrative offence) is not the sole factor in determining its nature. Other factors, such as the nature of the offence and the severity of the penalty, must also be considered.[51]

67. In light of the above, the Venice Commission recommends that, if imposing fines for slander and insult, the economic situation of the offender and the impact of the financial sanction be duly considered, along with that mitigating the risk of repeated unjustified interference.

IV. Conclusion

68. On 22 April 2024, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic requested an opinion of the Venice Commission on the draft amendments to the Code of Administrative Offenses of the Kyrgyz Republic introducing penalties for insult and slander.

69. The Venice Commission has scrutinised the amendments in accordance with the standards articulated in the ICCPR and other pertinent international instruments. It recalls that when a state party imposes restrictions on the exercise of the right to freedom of expression, these may not put in jeopardy the right itself. Therefore, the Venice Commission reiterates that the relation between right and restriction and between norm and exception must not be reversed.[52]

70. The Commission concludes that the introduction of insult and slander as administrative offences does not, in and of itself, contravene international standards, while direct adjudication by the judiciary of these administrative offences would be more consistent with human rights commitments. Moreover, such regulation must meet the three-part test of legitimacy, legality, and necessity/proportionality as mandated by Article 19(3) of the ICCPR. The Commission underscores that the draft amendments exhibit significant deficiencies and without addressing them through the recommendations provided below, the draft amendments will be inconsistent with international standards for fundamental human rights. Hence, the Venice Commission finds that due consideration should be given to the impact of these legislative amendments in furthering an environment of self-censorship, thereby depriving citizens of information vital to an open public debate.

71. The Venice Commission thus makes the following key recommendations:

- The necessity of the draft amendments should be justified, substantiated, and clearly explained in the explanatory report. The latter should detail the aims of the draft

[49] Venice Commission, CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, para 64.
[50] ECtHR, De Carolis and France Télévisions v. France (29313/10), para 63; see also Jersild v. Denmark (15890/89), [GC], para 35; Brasilier v. France, (71343/01) para 43; Morice v. France (29369/10) [GC], para 176.
[51] ECtHR, Engel and Others v. The Netherlands, (5100/71), para 82.
[52] Venice Commission, CDL-AD(2023)040, Opinion on the Draft Law of the Kyrgyz Republic about the media para 102.

amendments, the methods for achieving those aims, the introduced changes compared to the current situation, thereby upholding the principle of legitimacy.

- The authority of the "authorised body" to adjudicate cases concerning insult and slander should be removed. Instead, this competence should be directly conferred upon the courts, which are better equipped to handle the legal complexities inherent in these cases and ensure a fair and balanced decision, unless the high-quality adjudicating requirements concerning the "authorised body", including those of independence and impartiality, as well as robust procedural guarantees of fairness, are firmly established in law and practice.

- The administrative remedy should be invoked solely upon the complaint of the alleged victim; hence it should not be pursued concurrently with the civil remedy and should be discontinued in the event of a friendly settlement.

The Venice Commission also recommends duly considering the economic situation of the offender and the impact of the financial sanction when imposing fines for slander and insult, along with that mitigating the risk of repeated unjustified interference.

72. The Venice Commission remains at the disposal of the authorities of the Kyrgyz Republic for further assistance in this matter.