



CENTRE FOR LAW  
AND DEMOCRACY

## **Kyrgyz Republic: Comments on the Proposed Constitution**

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### **1. Introduction**

The Interim Government of Kyrgyzstan has published a draft Constitution, which is intended to be put to a referendum on 27 June 2010. The draft was prepared very quickly, in the aftermath of the recent removal of Kurmanbek Bakiyev as President in April 2010. These Comments provide an analysis of the version of the draft Constitution which was provided to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) on 28 April 2010.<sup>1</sup> They are based on international standards guaranteeing the right to freedom of expression, including the *Universal Declaration of Human Rights* (UDHR)<sup>2</sup> and the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> a formally legally binding international human rights treaty which has been ratified by 165 States, including Kyrgyzstan.<sup>4</sup>

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<sup>1</sup> The Comments are based on an unofficial translation of the draft Constitution prepared by ODIHR.

<sup>2</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>3</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

<sup>4</sup> As of May 2010. Kyrgyzstan ratified the ICCPR on 7 October 1994.

## 1. Freedom of Expression and of the Media

Article 28 of the draft Constitution is the main article guaranteeing freedom of expression. It states that everyone shall have the right to freedom of “thought, speech and press” and that no one may be forced to express their opinions or beliefs. This is supported by Article 32, which establishes the right to “freely gather, store and use information” and to “disseminate it orally, in writing or by other means”. Finally, Article 52 states that the media, among others, shall “enjoy freedom”.

These are positive guarantees, but it would make more sense to bring them together into one clear and strong article on freedom of expression. Having them spread over different articles is a weakness. For example, Article 32 only covers information, and not necessarily ideas. It is also not clear that it includes the right to disseminate or impart information, as opposed simply to gathering and using it. By contrast, international guarantees protect the right to “seek, receive and impart” both “information and ideas”. And this right is protected “through any media” and “regardless of frontiers”.

### Recommendation:

- The various statements on freedom of expression and of the media in Articles 28, 32 and 52 should be brought together into one main provision which includes the following elements:
  - the right to seek, receive and impart;
  - both information and ideas;
  - to do this through any media; and
  - to do it regardless of frontiers.
- To achieve this, consideration should be given to building a constitutional guarantee based on Article 19(2) of the ICCPR, which states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

## 2. The Right to Information and Data Protection

As noted, Article 32 of the draft Constitution protects the right to gather, sort and use information. Article 30 also recognises the right to learn of information held by public bodies relating to oneself, as long as this is not covered by a secrecy rule established by law.

The gathering, storage, use and dissemination of confidential information about a person without their consent is prohibited by Article 32, which also gives individuals a right to apply to a court to have “false information” about themselves or members of their family “refuted and withdrawn” and to obtain damages for “material or moral damage caused by the gathering, storage and dissemination” of such information.

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None of these provisions appear to protect the right to access information held by public bodies, sometimes referred to as freedom of information or the right to information. This is a right which it is now accepted is included in international guarantees of freedom of expression. Kyrgyzstan has given effect to this right through its 2007 Law on Access to Information held by State Bodies and Local Self-Government Bodies of the Kyrgyz Republic, although this has yet to be implemented formally.

The Article 30 right to access information held by public bodies about oneself is commendable but it does not go far enough. In most countries, one has a right not only to access this material, but also to correct it, where appropriate. Article 32 does allow for court applications to have false information withdrawn, but this is cumbersome and does not appear to be directed at correcting wrong information held by public bodies.

The Article 32 protections for personal information are extremely broad and may come into conflict with the rights of others to freedom of expression. It may be noted that they are not restricted to public bodies but apply to false information held by anyone. Furthermore, damages may be claimed for simply gathering false information, regardless of whether or not it has been disseminated. This may undermine the ability of the media to undertake investigations (theoretically, a media outlet could be subject to sanction just for collecting information about someone which happened to be false, even if they did not publish this information).

Protection against the dissemination of false information should be dealt with through the law on defamation. It may be noted that reputation is already protected by Article 15 of the draft Constitution.

#### **Recommendations:**

- The constitution should provide explicit protection for the right to access information held by public bodies, in line with better international practice. A possible formulation for this might be:

The right to freedom of expression shall include the right to access any information held by or on behalf of a public body or body that undertakes a public function, subject only to limited exceptions in accordance with the test for restrictions on fundamental rights.

- Individuals should have a right to access, and then also to correct through an administrative procedure, information about them held by public bodies.
- Consideration should be given to removing the part of Article 32 dealing with false information about an individual.

### **3. Restrictions**

The draft Constitution contains a number of potentially contradictory provisions on restrictions on freedom of expression. Article 28 provides that everyone shall enjoy the right to “unimpeded expression” of their thoughts and beliefs. Article 36(2) adds that no

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laws “abolishing human rights” shall be passed. And Article 81(7) precludes the adoption of laws restricting “freedom of speech and freedom of the press”.

These strong, largely unqualified, statements appear to be significantly modified by Article 36(3), which allows restrictions on rights pursuant to the Constitution and other laws for the purposes of protecting “the rights and freedoms of others, public safety and order, territorial integrity and the constitutional order”. Any such measures shall not affect constitutionally protected rights and freedoms “in their essence”. Finally, pursuant to Article 35(2), no one shall, through the exercise of their own rights and freedoms, restrict those of others.

The apparent contradiction between the absolute statements in Articles 28, 36(2) and 81(7) may be contrasted with the more nuanced approach of Article 36(3). This is unfortunate as it may mislead readers and may also lead to a lack of confidence in the constitution. It would be preferable to modify the Article 28, 36(2) and 81(7) statements to make it clear that they are subject to the rules set out in Article 36(3).

Under international law, restrictions on freedom of expression must meet three conditions. First, they must be provided for by law. Article 36(3) incorporates this requirement by envisaging only restrictions found in the Constitution or another law. Second, they must serve the limited list of legitimate aims set out in international law, namely the rights and reputations of others, national security, public order (ordre public), or public health or morals (see Article 19(3) of the ICCPR). The list of aims in Article 36(3) of the draft Constitution is not identical to that of Article 19(3) of the ICCPR, but is largely consistent with it.

Finally, under international law, restrictions must be necessary to protect the legitimate aim. This is in many ways the most important part of the test, and most international cases on freedom of expression hinge on an analysis of necessity. Unfortunately, this is the one part of the test that is clearly missing from Article 36(3) of the draft Constitution, which would appear, as a result, to allow practically any restrictions on rights that are provided by law and claim to serve one of the interests listed. This does not sufficiently protect the right to freedom of expression.

#### **Recommendations:**

- The rules set out in Articles 28, 36(2) and 81(7) should be modified to make it clear that they apply subject to the restrictions that are permitted by Article 36(3).
- A requirement of necessity should be imposed on any restrictions on rights. Article 36(3) could be amended as follows to achieve this:

Restrictions of rights and freedoms are permitted only as established by the Constitution or another law, and solely as necessary to protect the rights and freedoms of others, public safety and order, territorial integrity and the constitutional order. Where such measures are taken, constitutional rights and freedoms shall not be affected in their essence.

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#### 4. Other Issues

Many constitutions go beyond outlining basic protections for freedom of expression and include other provisions to bolster this protection. For example, it is not uncommon to find rules prohibiting prior censorship of the media. Although formally this should be covered by a general prohibition on restrictions on freedom of expression that are not necessary – since prior censorship of the media cannot be justified as necessary – it is useful to spell it out specifically.

The rule that bodies with oversight powers over the media should be independent, in the sense that they are protected against interference of a political or commercial nature, is well-established. Many constitutions specifically provide for such independence, for example for the bodies that regulate private broadcasters and/or the governing bodies of public broadcasters.

#### **Recommendations:**

- Consideration should be given to adding a provision to the constitution prohibiting the imposition of prior censorship on the media. A possible formulation is as follows:

There shall be no prior censorship of the media.

- Consideration should also be given to adding a provision to the constitution requiring the broadcaster regulator and the governing body of the public broadcaster to be independent. A possible formulation is as follows:

The independence of all media, including media which are owned or substantially funded by the State, shall be guaranteed by law and respected. The independence of bodies which exercise regulatory powers over the media shall be guaranteed by law and respected in practice.