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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KYRGYZSTAN

OPINION

ON THE DRAFT LAW OF THE KYRGYZ REPUBLIC

ABOUT THE MEDIA

Adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023)

On the basis of comments by

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I. Introduction

1. By letter of 19 May 2023, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic, requested an opinion of the Venice Commission on the Draft Law of the Kyrgyz Republic about the media (CDL-REF(2023)029,hereinafter referred to as “the Draft Law”).

2. Ms Herdis Kjerulf Thorgeirsdottir, Ms Veronika Bílková, Mr Cesare Pinelli and Mr Ben P. Vermeulen acted as rapporteurs for this opinion.

3. On 11 September 2023, a delegation of the Venice Commission composed of Ms Thorgeirsdottir and Ms Bílková, accompanied by Mr Vahe Demirtshyan from the Secretariat, visited Bishkek and held meetings with representatives of the Ministry of Justice, the Ministry of Culture, Information, Sports, and Youth Policy, the deputy Ombudsperson (Akyikatchy) and the staff, the Head of the Legal Department of the Administration of President as well as with representatives of non-governmental organisations (NGOs) and international partners. The Commission is grateful to the Kyrgyz authorities for the organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the Draft Law. 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 meetings on 11-12 September 2023. Following an exchange of views with the Minister of Justice of the Kyrgyz Republic Mr Baetov, it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background

A. National legal framework and reactions to the Draft Law

6. On 11 April 2021, the Kyrgyz Republic adopted a new Constitution[1] (hereafter referred to as "the Constitution") through a national referendum, which established a presidential model of governance. Following the parliamentary elections held on 28 November 2021, the new parliament (Jogorku Kenesh) embarked on a process of aligning the existing legislation with the new Constitution. Consequently, the authorities have been undertaking extensive revisions of multiple branches of legislation. In particular, the structure of the state authorities and their responsibilities, functions, and powers are being changed.

7. The Constitution incorporates provisions that regulate the activities of mass media and includes guarantees aimed at protecting freedom of speech and of media in Kyrgyzstan. Article 32 (1) and (2) of the new Constitution explicitly guarantee the rights to freedom of thought, opinion, and expression. Article 10 of the new Constitution guarantees the right to receive information of state and local government bodies and to disseminate it, and the right to freedom of expression. Unlike the previous Constitution,[2] the current Constitution explicitly prohibits censorship, while allowing for restrictions to protect the younger generation and on activities that are contrary to “the moral and ethical values and the public conscience of the people of the Kyrgyz Republic” (Article 10 (2) and (4) of the Constitution). Furthermore, the Constitution prohibits criminal prosecution for the dissemination of information that discredits or degrades the honour and dignity of an individual (Article 29(2)). It also prohibits the enactment of laws “that restrict freedom of speech, the press, and the media” (Article 63).

8. Regarding the protection of private life, the Constitution prohibits the collection, storage, use, and dissemination of confidential information and information about a person's private life without

[1] See CDL-REF(2023)009 Constitution of the Kyrgyz Republic.
[2] See 2010 Constitution of Kyrgyz Republic, Articles 29, 31 33.

their consent, except as established by law. It guarantees protection to everyone, including judicial protection, against the unlawful collection, storage, and dissemination of confidential information and information about a person's private life (Article (29) and (4) (5) and Article 63(2). Furthermore, it provides the right to compensation for both material and moral damages caused by unlawful actions (Article 29(5)).

9. In relation to state-held information, the Constitution guarantees the right of every individual to receive information about the activities of state bodies, local self-government bodies, their officials, legal entities with state and local government participation, and organisations financed from the national and local budgets. It also ensures access to information held by state bodies, local self-government bodies, and their officials. The specific procedure for providing information is established by law (Article 33). However, the Constitution does not govern matters pertaining to the state registration of mass media, the criteria for the termination and suspension of mass media activities, or issues related to the accreditation of journalists, including those representing foreign media organisations.

10. Furthermore, according to Article 6 (1)-(2) of the Constitution, the Kyrgyz Constitution has the highest legal force and direct effect in the Kyrgyz Republic and all other legal acts are adopted on the basis of the Constitution. Laws may not establish restrictions on human rights and freedoms for other purposes and to a greater extent than is provided for by the Constitution (Article 23(4) of the Constitution).

11. The Draft Law, introduced on 28 September 2022, is intended to replace the current Mass media Law (referred to as "the Current Law"), which was enacted in 1992. On 7 December 2022, the President of the Kyrgyz Republic established a working group to finalise the work on the Draft Law. After several rounds of revisions, the Draft Law was submitted to Parliament on 14 May 2023 and published on the official site, for public consultation, one day later.[3] Representatives from the civil sphere who participated in this revisory work claim their input was to a large extent ignored and that the working group met only two times. According to its Preamble, the Draft Law aims to ensure the implementation of the right to freedom of expression, freedom of speech and press, receiving and disseminating information as established and guaranteed by the new Constitution of the Kyrgyz Republic. It regulates public relations related to these rights. In general, the Draft Law imposes more stringent requirements concerning the registration of mass media, accreditation of foreign mass media, and grounds for refusing registration than the Current Law.

12. Civil society organisations and the media community have expressed concerns regarding the Draft Law, particularly in relation to media freedom. They believe that if this law is passed, it could severely impact independent journalism in the country. According to them, the Draft Law grants the state disproportionately extensive powers to regulate and interfere with media activities, without sufficient justification. The imposed restrictions, not least on journalistic conduct, are vaguely formulated, and the registration procedures, including those for online publications, are becoming increasingly complex.[4] On 10 October 2022, the Public Foundation Legal Clinic Adilet published a comprehensive analysis of the text, criticising many of its provisions.[5] On 27 October 2022, a similarly critical analysis was published by the Bishkek-based Institute Media Policy.[6] The professional journalist company Factcheck.kg labelled the Draft Law as an instance of plagiarism, establishing that it showed a 66-100% similarity to the Law on the

[3] Official website of the Single Portal for Public Discussion of Draft Legal Normative Legal Acts of the Kyrgyz Republic, online in Kyrgyz and Russian at http://koomtalkuu.gov.kg/ru/view-npa/2669.
[4] Draft law on media to reduce space for work of independent media - | 24.KG.
[5] Analysis of the draft Law of the Kyrgyz Republic "On Mass Media", *Legal Clinic Adilet,* online at https://docs.google.com/file/d/1EFlbE9NiyyN5Fxsowv4V152aHODiw41Q/edit?filetype=msword.
[6] Analysis of the Draft Law "On Mass Media", Media Policy Institute, online in Russian at https://media.kg/news/analiz-zakonoproekta-o-sredstvah-massovoj-informaczii/.

Mass Media of the Russian Federation.[7] On 7 December 2022, the President of the Kyrgyz Republic established a working group to finalise the work on the Draft Law. After several rounds of revisions, the Draft Law was submitted to the Parliament on 14 May 2023 and published on the official site, for public consultation, one day later.[8] Representatives from the civil sphere who participated in this revisory work claim their input was to a large extent ignored and that the working group met only two times.

13. In recent years, alongside the Draft Law, there have been additional proposed legislative changes that have sparked strong debates in civil society. Among these proposed changes are amendments to the "Law on Non-Commercial Organisations" (enacted on 17 June 2021), aiming to impose new onerous obligations on all non-commercial organisations (NCOs), both domestic and foreign. Furthermore, the "Law on Protection from Inaccurate (False) Information" (enacted on 28 July 2021), which prohibits the dissemination of unreliable (false) information on the internet and establishes responsibility for providers and owners of websites, has also given rise to extensive criticism. Additionally, a draft law pertaining to foreign representatives has been introduced in November 2022 and currently awaits adoption. The draft law would grant state authorities the right to compel NCOs that receive foreign funding to register as "foreign representatives," and introduce new rules regarding the criminal liability of NCOs. Within the framework of all these legislative amendments there are growing concerns in the civil sector about the future of freedom of expression and the public discourse in the country where self-censorship appears already to be a widespread problem.

B. International legal framework

14. The International Covenant on Civil and Political Rights (ICCPR)[9], ratified by Kyrgyzstan in 1994, guarantees 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 reputations of others, ensure national security, maintain public order, safeguard public health, or protect public morals.[10] Moreover, as the Human Rights Committee has indicated with respect to Article 19 of the ICCPR, any restrictions on freedom of expression "must conform to the strict tests of necessity and proportionality." [11] 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."[12]. It is noteworthy to underline that the freedom of expression and the rights that are connected with it in Article 19 ICCPR not only are rights of individuals but also of collectivities, organisations, companies including 'mass media' outlets as defined in Article 3 (2) and 9(1) of the Draft Law.

[7] Снова плагиат: Администрация президента скопировала закон «О СМИ» с российского законодательства, *Factcheck.kg*, online at https://factcheck.kg/snova-plagiat-administracziya-prezidenta-skopirovala-zakon-o-smi-s-rossijskogo-zakonodatelstva/.
[8] Official website of the Single Portal for Public Discussion of Draft Legal Normative Legal Acts of the Kyrgyz Republic, online in Kyrgyz and Russian at http://koomtalkuu.gov.kg/ru/view-npa/2669.
[9] International Covenant on Civil and Political Rights | OHCHR.
[10] Ibid., Article 19.
[11] See Human Rights Committee, General Comment No. 34, Article 19 freedoms of expression and opinion, § 22.
[12] See UN Human Rights Committee's 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.

15. For the purposes of Article 19 (3) of ICCPR, a legal act, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly[13] 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.[14]

16. The Venice Commission has emphasised in its previous opinions the paramount importance of freedom of the media within the ICCPR system. [15] According to the UN Human Rights Committee, "a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."[16]

17. Kyrgyzstan is a state party to the Vienna Convention on the Law of Treaties, which establishes that all treaties are legally binding upon their Parties, which are obliged to fulfil their treaty obligations in good faith (Article 26). Furthermore, a Party cannot invoke its domestic laws as a justification for failing to uphold a treaty commitment (Article 27).

18. According to Article 6 of the Constitution, the generally recognised principles and norms of international law, as well as international treaties that have entered into force in accordance with the legislation of the Kyrgyz Republic, form an integral part of the legal system of the Kyrgyz Republic. Article 55 of the Constitution indicates that the Kyrgyz Republic recognises and guarantees the rights and freedoms of individuals in accordance with the generally recognised principles and norms of international law, as well as international treaties that have entered into force in the manner prescribed by law and to which the Kyrgyz Republic is a party. Furthermore, Article 2(4) of the Draft Law stipulates, that treaties providing for the organisation and activities of mass media – for instance Article 19 ICCPR - have priority over this (Draft) Law.

19. The Kyrgyz Republic is not a state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but the Explanatory Report to the Draft Law refers to this instrument, as well as to the Declaration of the Council of Europe on the Media and Human Rights (1970).[17]

III. Scope of the opinion

20. In a letter dated 19 May 2023, the Minister of Justice requested the Venice Commission to provide an opinion on the entire Draft Law. In this Opinion, the Venice Commission will primarily focus on certain key issues. The fact that this Opinion does not explicitly address other aspects of the Draft Law 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. Similarly, this Opinion will refrain from providing extensive commentary on sections of the Draft Law that do not give rise now to special concerns.

21. The Venice Commission furthermore notes that although the Draft Law has been accompanied by the Explanatory Report, this Report is rather short and provides neither a detailed justification for the adoption of a new media law, nor an explanation of individual

[13] See UN Human Rights Committee’s communication No. 578/1994, de Groot v. The Netherlands, Views adopted on 14 July 1995.
[14] General comment No.34 on Article 19: Freedoms of opinion and expression, para. 25.
[15] Venice Commission, CDL-AD(2017)007, Opinion on the Measures provided in the recent Emergency Decree Laws of Türkiye with respect to Freedom of the Media, par. 24.
[16] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 13.
[17] See CDL-REF(2023)029.

provisions of this law. According to the Report, the need to adopt a new law on media stems from "obsolescence of the current Media Law of 2 July 1992".[18] The Report fails to explain what has brought about this obsolescence. In the meetings held in Bishkek, the authorities maintained that the existing law, which was put in place in 1991, is now outdated. This is allegedly so given the widespread use of the internet, which was not a factor back in 1991. They also argued that the introduction of the new law is necessary for national security reasons, aiming to prevent potential acts of terrorism and extremism. They further clarified that the decision to enact the new media law is tied to the broader context of Kyrgyzstan's legal reforms following the 2021 adoption of the new Constitution. In light of this constitutional change, Kyrgyzstan initiated a thorough review and updating of its legislation to align it with the newly established constitutional requirements.

22. To date, the Venice Commission has not rendered any opinion on the law governing mass media in Kyrgyzstan. It has however dealt with such legislation adopted in other countries (e.g., Azerbaijan,[19] Georgia,[20] Hungary,[21] Türkiye[22] and Albania[23]). The international standards identified in this field by the Venice Commission are contained in the 2020 Compilation of Venice Commission opinions and reports concerning freedom of expression and media.[24] The questions are examined in consideration of international standards and through comparative analysis.

IV. Analysis

A. General provisions

1. Unspecified references to Kyrgyz laws in Article 1 of the Draft Law

23. According to paragraph 1 of Article 1(1) of the Draft Law, in the Kyrgyz Republic, everyone has the right to freedom of expression of their opinion, to freedom of speech and press, to receive and disseminate information, which is realised through free expression of one's opinion in any way not prohibited by the Constitution of the Kyrgyz Republic and the legislation of the Kyrgyz Republic. According to paragraph 2 of the same provision, this right can be realised through free search, selection, receipt and dissemination of information in any way not prohibited by the legislation of the Kyrgyz Republic.

24. In this context, the Venice Commission emphasises that the legislation of the Kyrgyz Republic comprises not only the Constitution and constitutional laws but also encompasses codes, ordinary laws, resolutions of the Zhogorku Kengesh (Parliament), resolutions of the Government, and various other legal instruments.[25] It is crucial to underline that these legal acts must not impose more substantial limitations on the rights to freedom of thought, opinion, and expression than those mandated by the internationally ratified obligations of the country.

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[18] See CDL-REF(2023)029.
[19] Venice Commission CDL-AD(2022)009 Azerbaijan - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on Media.
[20] Venice Commission, CDL-AD(2021)011 Georgia - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the recent amendments to the Law on electronic communications and the Law on broadcasting.
[21] Venice Commission CDL-PI(2015)017, Opinion on the Act CLXXV of 2010 on Media Services and Mass Media; Act CIV of 2010 on the Freedom of Press and the Fundamental Rules of Media and Content, and on the Hungarian tax Laws on progressive Tax on Advertising revenue of media.
[22] Venice Commission, CDL-PI(2022)032, Türkiye - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Penal Code regarding the provision on "false or misleading information".
[23] Venice Commission, CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service.
[24] Venice Commission CDL-PI(2016)011 Compilation of Venice Commission opinions and report concerning freedom of expression and media.
[25] Law of the Kyrgyz Republic on Normative Legal Acts of the Kyrgyz Republic, Article 4.

25. As regards Article 1(1), sub-paragraph 3 of the Draft Law, which withholds access to information encompassing state secrets and "other secrets protected by law", the Venice Commission underlines that as enshrined in the General Comment No. 34, extreme care must be taken by States parties to ensure that treason laws[26] and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of Article 19 (3) of the ICCPR. [27] It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[28] Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.[29] The authorities must furnish justifications for any denials of information access.

26. Regarding "other secrets protected by law," the Venice Commission finds this term overly broad. It fails to adequately encompass the various grounds for limitations outlined in Article 19(3) of the ICCPR. Additionally, the use of the term "secrets" suggests an unconditional ban, lacking any requirement for a proportionality assessment. This also grants a blanket competence to designate any information as "secrets" through legislation.

27. Consequently, the Venice Commission recommends a revision of Article 1 (1) of the Draft Law, replacing general reference to undetermined laws with a specific reference to the relevant ones and to the principle of proportionality and to align it with the restrictions delineated in Article 19(3) of the ICCPR.

2. Prohibition of using the mass media

28. Article 5 (1) of the Draft Law establishes a series of prohibitions regarding the use of mass media. Among other prohibitions, it forbids distribution of materials on pornography and same sex marriages that are harmful to the health and morals of the population (sub-paragraph 4), dissemination of materials that discriminate against citizens on the basis of gender, race, language, disability, ethnic and regional identity, religion, age, political or other opinions, education, origin, property or other status (sub-paragraph 5); interference in the privacy of citizens, infringement on their honour and dignity, business reputation (sub-paragraph 6).

29. Regarding the materials on pornography and same sex marriages, the Venice Commission is aware of the sensitivity of this topic in many countries yet emphasises that these general prohibitions which do not foresee any exception, may contradict the right to seek, receive and impart information and ideas of all kinds. It is important to underline that General Comment No. 34[30] enumerates the various spheres of expression which Article 19 (2) requires States parties to guarantee as aspects of the right to freedom of expression, seeking, receiving and imparting information and ideas, subject to Article 19 (3) and Article 20, including political discussion and discussion of human rights. The Venice Commission furthermore notes that it is unclear which materials would meet the definition of *"materials promoting same-sex marriage"* and whether, for instance, materials informing about the legalisation of such marriages in many European countries would do so. As regards the "materials that are harmful to the health and morals of the population" it should be highlighted that such a terminology is very general. The Venice Commission recalls that, as the UN Human Rights Committee has repeatedly stressed, "the

[26] Concluding observations on Hong Kong (CCPR/C/HKG/CO/2).
[27] See General comment No.34 on Article 19: Freedoms of opinion and expression, § 30.
[28] Concluding observations on the Russian Federation (CCPR/CO/79/RUS).
[29] Concluding observations on Uzbekistan (CCPR/CO/71/UZB).
[30] See General comment No.34 on Article 19: Freedoms of opinion and expression.

concept of morals derives from many social, philosophical and religious traditions; consequently, limitations /…/ for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".[31] Furthermore, it is not compatible with the ICCPR for a restriction to be "enshrined in traditional, religious or other such customary law."[32]

30. Moreover, sub-paragraph 5 of Article 5 (1) of the Draft Law restricts *inter alia* coverage of the political opinions of citizens, not even excluding public figures where politicians are always subject to scrutiny of their opinions. The political debate, crucial for the evolution of democracy, enjoys the highest protection under Article 19 ICCPR. The scope of freedom of expression as protected under Article 19 of ICCPR embraces expressions that may be regarded as deeply offensive. The media must be able to comment on public issues without censorship or restraint and to inform public opinion, subject to the permissible restrictions in Article 19 (3) of ICCPR. The public also has the corresponding right to receive such material. The value placed by ICCPR upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.[33] Media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views.[34]

31. Sub-paragraph 5 of Article 5(1) further prohibits the dissemination of material which can be discriminating on the basis of gender, race, language, disability, ethnic and regional identity, religion, ages, education, origin, property or other status. This prohibition is overly broad, confining the scope of journalistic conduct and the public debate beforehand. The law may not confer unfettered discretion for the restriction of freedom of expression and opinion of all kinds. The right to freedom of expression under Article 19 (2) of the ICCPR requires States parties to guarantee the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in Article 19(3) and article 20 which prohibits *inter alia* any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The Venice Commission emphasises that freedom of expression is the norm with the aim *inter alia* to guarantee a robust public debate. Any restriction must be an exception such as to prevent incitement to violence prohibited under criminal law. It is for the courts to decide when the potential harm of incitement to violence is high enough to justify interference with freedom of expression.

32. Sub-paragraph 6 of Article 5 (1) prohibits the interference with the "business reputation". The Venice Commission is concerned that this provision may be used in a way to deter media coverage of potential corruption. One of the main responsibilities of the media as a public watchdog is exposing corruption which goes hand in hand with respect for the rule of law and human rights. The Venice Commission has emphasised that restrictions that constitute prior restraints on the dissemination of information may not provide a subterfuge for repressive measures against media critical of authorities.[35] Therefore it finds that the wording of this provision may constitute a prior restraint not least on investigative journalism focusing for instance on the impact of oligarchs in the political sphere, a relevant topic in political discourse.

33. The explanatory note affirms that "the draft Law relies on universally recognised principles and norms of international law declaring that it is permissible to restrict by law the freedom to

[31] UN Doc. CCPR/C/21/Rev.1/Add.4, General Comment No. 22, 27 September 1993, para. 8; UN Doc. CCPR//C/GC/34, General Comment No. 34, 12 September 2011, para. 32.
[32] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 24.
[33] See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.
[34] Venice Commission, CDL-AD(2005)017, Opinion on the compatibility of the laws 'Gasparri' and 'Franttini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, paragraphs 37 and 40.
[35] Venice Commission CDL-AD(2022)009 Azerbaijan - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on Media, para. 22.

receive and impart information and ideas if this is necessary for national security or public order, for the prevention of crime, for the protection of health or morals or for the protection of the reputation or rights of others".[36] Moreover, during the meetings in Bishkek the authorities conveyed that these restrictions also serve the purpose of preventing "black PR"[37] and defamation. However, the above-mentioned restrictions laid down in Article 5 seem excessive compared to legitimate aims enshrined in Article 19 (3) of the ICCPR. In this context, it is worth adding that, according to Article 2 (4) of the Draft Law, "If an international treaty that has entered into force in accordance with the legislation of the Kyrgyz Republic provides for the organisation and activities of mass media other rules than those established by this Law, the rules of the international treaty shall apply".

34.The Venice Commission finds that the wording of above-mentioned provisions of Article 5 of the Draft Law, which constitute prior restraints as they demarcate the scope of permissible speech beforehand, is drafted in a very vague manner, thus leaving too much room for arbitrary interpretation and thereby lacking foreseeability. Furthermore, it is imperative to underscore that these restrictions may potentially exert a chilling effect on the operation of the mass media. As emphasised by the UN Human Rights Committee the law may not confer unfettered discretion for the restriction of freedom of expression on those charged with the execution.[38] The Venice Commission underlines that the restrictions may not jeopardise the right itself and must conform to the strict test of necessity and proportionality and in the context of the mass media, they are only allowed on grounds specified in Article 19 (3) of the ICCPR (rights or reputations of others, national security or public order, public health or morals). In view of the deficiencies outlined above, the Venice Commission recommends the revision of Article 5(1) of the Draft Law which should encompass the removal of all excessive, limitations, thereby ensuring the compatibility of this article with established international standards.

2. Cases of non-disclosure of information

35. Article 6 (1) of the Draft law, restricting the media from disclosing information provided by legal entities and individuals under conditions of confidentiality, raises concerns.

36. This provision appears to treat the media as a mere repository of undisclosed knowledge, in contradiction with its essential constitutionally protected purpose, to disseminate information. Moreover, this particular provision is susceptible to misuse by entities seeking to suppress information of public importance. Thus, impeding the capacity of media to disseminate crucial information undermines the transparency vital for a well-informed society. The Venice Commission underscores the significance of safeguarding confidential sources as a vital tenet of journalism serving the public interest. This principle serves as a conduit for exposing corrupt practices through the courageous actions of whistle-blowers. Forcing journalists to withhold sensitive information poses a direct threat to their watchdog function, thereby compromising their ability to hold power to account.

37. Given these considerations, it is imperative to reconsider and amend the content of Article 6 (1). The current form of this provision fails to conform with the essential concept of freedom of expression.

[36] See CDL-REF(2023)029.
[37] Negative PR that intentionally aims to harm a political adversary or competitor.
[38] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 25.

B. Types of mass media, the right to create mass media and rights and obligations of owners of mass media

1. Types of mass media

38. In Article 9 of the Draft Law, a definition of the term "mass media" is provided, even though the definition of this term is provided already in Article 3(1)(2). This repetition not only lacks necessity but also introduces confusion, particularly given the potential variance between the two definitions. In light of this observation, the Venice Commission advises the removal of Article 9 from the text. This measure is proposed to streamline clarity and coherence within the legislation.

2. The right to create mass media and internal organisation of mass media

39. Article 10 grants all citizens of the Kyrgyz Republic, associations of citizens and certain other entities the right to create mass media. It denies the same right to citizens under the age of 18, citizens having been declared legally incompetent by courts, citizens in prison installations, citizens having a criminal record for committing a crime using the mass media or the Internet information and telecommunication network, prohibited associations or legal entities and non-citizens (foreigners and stateless persons). By means of Article 23(5) of the Draft Law, foreigners and foreign legal entities are also prevented from acting as founders of a TV or radio channel, TV, radio or video programs, a website in the information and telecommunication network Internet.

40. During the meetings in Bishkek, the authorities justified the prohibition on foreigners and foreign legal entities from establishing mass media outlets on grounds of national security concerns. The Venice Commission acknowledges that the right to create mass media was reserved for the citizens of the Kyrgyz Republic under the 1992 Law on Mass Media as well. It however recalls that under the ICCPR as well as under the Constitution of the Kyrgyz Republic, the right to freedom of expression is granted to *everyone.* It is important to note that in accordance with Articles 32 and 33 of the Constitution, the rights to freedom of thought, opinion, expression, speech, and press are unequivocally guaranteed for all individuals and everyone has the right to freely seek, receive, store, use information and disseminate it orally, in writing or in any other way.

41. Additionally, as stipulated in Article 49 of the Draft Law, the authority to grant permission for foreign periodical printed publication under paras. (4) and (5) is entrusted to the Minister of Justice, without delineating any specific criteria for granting or refusing such permissions. The Venice Commission finds that this unfettered discretion might effectively manifest as a form of censorship in practice. This situation also appears to be in contradiction with the principles outlined in Article 10(2) of the Constitution and Article 8 of the Draft Law, both of which emphasise the prohibition of censorship, as well as with the provisions of subparagraph 8 of Article 1 (1) of the Draft Law, which aims to prevent monopolistic control over mass media. Moreover, the power to grant such permission without any specific criteria stands at odds with the rules set forth in Article 23(3) of the Constitution, a provision designed to prohibit adoption of by-law acts restricting the rights and freedoms of a person and a citizen.

42. In its Recommendation CM/Rec(2018)1on media pluralism and transparency of media ownership, the Council of Europe Committee of Ministers suggested that “any restrictions on the extent of foreign ownership of media should be implemented in a non-arbitrary manner and should take full account of States’ obligations under international law and, in particular,

the positive obligation to guarantee media pluralism".[39] Moreover, the Position on the procedure for state registration of legal entities, branches (representative offices), adopted in 2003 by the Cabinet of Ministers of the Kyrgyz Republic,[40] does not set the citizenship criterion for registration of any other legal entities.

43. The Venice Commission recalls that the right to establish a media entity is intrinsically linked with the right to freedom of expression, which belongs to everyone. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others and their means of dissemination, subject to the restrictions permitted under Article 19 (3) of the ICCPR, hence laws may not violate the non-discrimination provisions of the ICCPR. Owning a property like a media entity by a foreign citizen cannot be a threat to society unless abused and/or being in a monopoly situation threatening the democratic discourse.

44. Moreover, such limits on founding and participating in media entities may unnecessarily restrict access to the media market in the country and limit the possibility of various individuals from exercising their right to freedom of expression through founding (or participating in) a media entity, by reference to their nationality and citizenship. It is the obligation of authorities in Kyrgyzstan to promote pluralism with diversity of views in the media landscape and prevent undue media dominance whether stemming from privately owned media or state-run media.

45. As regards the denial of the right to create mass media to citizens in prison installations and citizens having a criminal record for committing a crime using the mass media or the Internet information and telecommunication network, the Venice Commission notes that there is no reference to the severity of the crime and the time passed since the criminal sanction. Moreover, the reference to "a criminal record for committing a crime using the mass media or the Internet information and telecommunication network" is very vague and carries a high risk of abuse.

46. In light of the above-described situation Article 10 of the Draft Law may create obstacles for the establishment of new media outlets and, as such, might not be conducive to maintaining plurality of views, essential for the evolution of a democratic society. The Venice Commission recommends revising this article.

47. The Draft Law (Articles 11-13, 21-27, 40, and 42) contains an excessive number of internal operational rules of mass media outlets which are generally expected to be organised as associations or enterprises. These organisations are established based on the fundamental right of freedom of association which can only be restricted within the limits set by Article 19(3) of the ICCPR and Article 23(2) of the Constitution. The necessity of these extensive regulations thus is not clear. The Venice Commission finds that having one or two provisions specifying the responsible person or body in case of violations of the law within the mass media outlet would be sufficient.

3. Rights and obligations of owners of mass media

48. Articles 11-13 of the Draft Law define the legal status and the rights and obligations of owners (founders) of mass media, editorial office (editors) of mass media and of the editorial board. The Venice Commission welcomes that the provisions explicitly stipulate that the owner "shall not have the right to interfere in the activities of the mass media /…/, except for the cases established by this Law and (or) the agreement of the owner (founder) with the editors (editor)" (Article 11(4) of the Draft Law). The Venice Commission also appreciates the inclusion of provisions within the

[39] See Recommendation CM/Rec(2018)1 of the Committee of Ministers to member states on media pluralism and transparency of media ownership, para. 3.7.
[40] See the document in Russian.

Draft Law (Article 14) designed to counteract the monopolisation of mass media. Simultaneously, it acknowledges that these measures are already outlined within a specialised legislation, the Law on Competition. [41]

C. State registration of mass media

49. Chapter 3 of the Draft Law sets the conditions for state registration of mass media. Except for instances indicated in Article 19, all mass media can carry out their activities only after state registration decided upon by the Ministry of Justice or the Ministry of Digital Development. Registration may be denied, if the application is submitted by an incompetent person, if the submitted information is incomplete, or in case of a previous registration of a mass media outlet with the same name (Article 20). The application shall be returned without consideration, if it has been submitted in violation of the requirements of the Draft Law or by a non-authorised person or if the state fee has not been paid (Article 20(3)). In those cases, the applicant may eliminate violations and re-submit the application.

50. Article 17 of the Draft Law lists the information to be submitted for the registration of mass media, that is information about the owner, the name of the mass media, language of dissemination of mass information, address of the editorial office, the form of periodic distribution of mass information, the intended territory for the distribution of products, approximate topics and (or) specialisation, the expected frequency of release, the maximum volume of the media, sources of financing, information about other mass media in which the applicant is the founder, owner, editor, publisher or distributor, domain name of the website.

51. The Venice Commission emphasises at the outset that the act of state registration of mass media does not inherently contravene international standards. However, this assertion holds true only under the condition that the registration process remains free from cumbersome, ambiguous, or superfluous prerequisites, and that it does not vest excessive discretion in the hands of state authorities. States must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations, and the criteria for the application of such conditions and license fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise compliant with international human rights standards. [42] Legislation should make the process of notification or registration as simple as possible and, in any case, not more cumbersome than the process created for other entities, such as businesses.[43] Moreover, the European Court of Human Rights made it clear that it disapproves of regulatory regimes that place unnecessary restrictions or administrative burdens on the media. In particular, it found that although Article 10 ECHR does not in terms prohibit the imposition of prior restraints on publications, the relevant law must provide a clear indication of the circumstances in which such restraints are permissible, especially when the consequences of the restraint are to block publication completely.[44]

52. In this context the requirement of Article 17 of the Draft Law to provide information on “the form of periodic distribution of mass information” or “approximate topics and/or specialisation”, as well as information about the “the intended territory for the distribution of products” might be difficult to assess in case of online mass media. Demanding a prior demarcation of topics to be covered constitutes prior restraints in direct contrast with the freedom of the media to inform public opinion without censorship or restraint.[45] This requirement invites the risk of having the registration removed if coverage is deemed outside the declared area of

[41] See the law on Competition in Russian.
[42] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 39.
[43] See The joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, para. 156.
[44] ECtHR Gaweda v. Poland, 26229/95, 14 March 2002, § 40.
[45] See General Comment No. 34, para. 20.

specialisation. Additionally, the requirement to provide information on intended periodicity of publication, maximum volume of a media outlet, sources of financing, and on what other media outlets the applicant is a founder (owner, editor, publisher, or distributor) appears excessive and disproportionate when considering the simplicity requirement for registration procedures, especially when the Draft Law does not specify goals for providing this type of information.[46] In the light of the above-mentioned, the Venice Commission recommends revising Article 17 of the Draft Law.

53. Moreover, it appears that all publicly accessible websites are subject to registration, cf. Article 16(2) of the Draft Law and irrespective of their intended audience – be it family and friends, businesses, or social media platforms – could potentially fall under the categorisation of 'mass media' as defined by Article 3(1) and (2) of the Draft Law. This would entail an obligation to register with the Ministry of Justice or the Ministry of Digital Development through a complex procedure subject to rejection. Such an excessive requirement might abolish the online public discussion forum which is vital for any society that aims to be democratic. Considering that a wide range of actors can engage in journalistic activities, including so called “citizen journalists” and bloggers, generalised systems of registration and licensing of journalists are not compatible with Article 19 (3) of the ICCPR. The Human Rights Committee has clarified that only limited accreditation schemes are permissible, in case this is necessary to provide journalists with privileged access to certain places and/or events and provided that such schemes are applied in a non-discriminatory manner and in accordance with article 19 and other provisions of the ICCPR.[47] It is essential that the draft law narrows the scope of its application by explicitly excluding any non-professional online media outlets, individual bloggers, users of social networks and alike.[48] Additionally, as outlined in Article 19 of the Draft Law, state-run media are exempted from the registration process, potentially giving rise to a discriminatory practice.

54. As underlined by the Committee of Ministers of the Council of Europe, member States should exercise similar vigilance to ensure that administrative measures such as registration, accreditation and taxation schemes are not used to harass journalists and other media actors, or to frustrate their ability to contribute effectively to public debate.[49] Furthermore, despite the repeated declaration that “censorship” or other “interferences” in the mass media activities are prohibited, the combination of provisions contained in Article 5 of the Draft Law which sets some ambiguous restrictions for the right to use mass media, Article 16 (5) which stipulates a mandatory decision by the authorities for the registration of the mass media and paragraph 1 of Article 20 (1) which foresees the denial of state registration those that do not have the right to establish a mass media in accordance with this Law, contains some elements of prior censorship, contrary to international standards regarding freedom of expression.

55. Additionally, Article 16 (5) of the Draft Law, states that “A mass medium is considered registered from the day the decision on registration is made by the Ministry of Justice or the Ministry of Digital Development.”, consequently it requires a “decision”, that under Article 20 can be denied not only because of the incompleteness of the request or because a media with the same name has already been registered, but also when “the application is submitted on behalf of an individual, an association of citizens, a legal entity that does not have the right to establish

[46] The ECtHR concluded that the law applicable in the present case was not formulated with sufficient precision to enable the applicant to regulate his conduct. Therefore, the manner in which restrictions were imposed on the applicant's exercise of his freedom of expression was not “prescribed by law” within the meaning of Article 10 § 2 of the Convention, see Ibid., § 40.
[47] See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Letter OL KGZ 3/2023, 20 June 2023, page 2.
[48] Venice Commission, CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, para. 56.
[49] See Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, para. 13.

a mass media in accordance with this Law". The Draft Law makes thus sufficiently clear that the governmental authorities, while checking whether each mass media complies with the numerous content-based restrictions listed in Article 5, are entrusted with a discretionary power of registering the mass media. Whereas the fact that a mass media "shall submit the application for registration" to those bodies, does not entail that the latter are provided with a discretionary power on the matter. The registration of such authorities may simply consist in certifying that a certain mass media is going to initiate its activities. The same can be said of Article 49 (3), requiring the registration of a foreign TV channel or a foreign radio channel "in accordance with the requirements of this Law." In this context, it shall be underlined that as mentioned in the General Comment No. 34, "Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with [the right to freedom of expression]".[50]

56. As to the procedural issues, Article 16 (3) of the Draft Law stipulates that "an application for registration of a mass media outlet is submitted to the Ministry of Justice of the Kyrgyz Republic /…/ or to the Ministry of Digital Development". It is not clear whether the provision offers an alternative (i.e., any application can be submitted to either of the two ministries) or whether there is a division of tasks, with online mass media being subject to registration with the Ministry of Digital Development and all the other mass media with the Ministry of Justice. Additionally, there is no legal remedy against the denial of registration of a mass media, which is guaranteed by Article 2 (3) of the ICCPR.

57. Mass media have to be re-registered upon the change of the owner (founder), the change of the composition of owners (co-founders) or the change of the name. Re-registration is carried out in the same way as the registration (Article 18 of the Draft Law). During the meetings in Bishkek, the Kyrgyz authorities indicated that re-registration was needed especially due to the fact that the current register of mass media has not been regularly updated and might contain inaccurate information. Since however re-registration under Article 18 is only linked to three specific situations indicated in the provision and since it requires activity on the side of mass media, it is not obvious how it could help track non-functioning or defunct mass media.

58. In consideration of the points highlighted above, the Venice Commission recommends a comprehensive review of the relevant provisions within Chapter 3 of the Draft Law, excluding from the registration requirement all individual websites, independent of the number of their followers, who are not part of established media companies. The objective should be the removal of any burdensome and excessive prerequisites and requirements, as well as the reduction of any risk of excessive discretion held by state authorities during the mass media registration process and an explicit stipulation of effective remedies against the denial of registration of a mass media.

D. Organisation of Mass Media Activities

1. Relationship between the owner of mass media, the editorial office and the publisher

59. Chapter 4 of the Draft Law governs the legal standing and interplay among the mass media's owner (founder), editorial office, and publisher (Articles 22-24 and 26-27). Additionally, it outlines the prerequisites for the charter of the editorial office (Article 25) and delineates the circumstances warranting suspension or termination of mass media activities (Article 29).

[50] Human Rights Committee, General Comment No. 34, Article 19 freedoms of expression and opinion, para. 44.

60. The Venice Commission notes that certain provisions appear to redundantly reiterate content already stipulated in earlier chapters of the Draft Law, notably Chapter 2 (e.g., Article 23(3) reiterates what is already articulated in Article 11(4)). This repetition, in the view of the Commission, serves no substantive purpose and it is therefore recommended to remove it from the text.

2. Termination and suspension of activities of mass media

61. Article 29 (1) of the Draft Law stipulates that "the activities of a mass media outlet may be terminated or suspended only by decision of the owner (founder) or by a court in civil proceedings at the suit of an authorised state body". The owner (founder) is entitled to terminate or suspend the activities of the mass media in the cases and in the manner provided for by the charter of the editorial board or the agreement between the owner (founder) and the editorial office (editor).

62. The court may suspend the activities of a mass media outlet on the grounds of a) the need to secure the claim provided for by paragraph 1 quoted above; b) violation of the Constitution and legislation of the Kyrgyz Republic (paragraph 4). The court may terminate the activities of a mass media outlet based on "repeated violations by the editorial office of the requirements of this Law within twelve months, in respect of which the Ministry of Justice, the Ministry of Digital Development or the General Prosecutor's Office of the Kyrgyz Republic issued written warnings to the founder and (or) editorial office (editor), as well as non-execution of the court act on the suspension of the activities of the mass media" (paragraph 3).

63. The Venice Commission accepts that suspension or termination of the activities of the mass media outlets is only possible by the decision of the owner or by the decision of a court. The Venice Commission hence recalls that only serious violations of the most important requirements of the Law may serve as a ground for termination or suspension and shall always be a measure of last resort. However, in the Draft Law some cases of both suspension and termination are described vaguely, hence will not conform with the test of necessity and proportionality.

64. The Venice Commission additionally observes that the initial basis for suspension (Article 29(4)(1)) grants the court the authority to suspend the operations of a mass media outlet while proceedings are underway. These proceedings are intended to ascertain whether the continued activities of a media warrant suspension or termination. This mechanism seems to be tautological. Moreover, it is essential to acknowledge that the legal action itself might not lead to sanctions as the liability of the mass media is yet to be established. However, in practice, the prolonged court examination could result in the preliminary suspension effectively acting as a termination of activities.

65. The Venice Commission therefore recommends a revision of Article 29 of the Draft Law, aiming to eliminate the potential for any suspension of mass media activities throughout the duration of court proceedings and enshrining the proportionality requirement for termination and suspension of activities of mass media.

E. Rights and obligations of a journalist

1. Limitations and Prohibitions on Journalistic Activities

66. The Draft Law entails a Chapter 5 on the rights and obligations of a journalist. The Venice Commission notes that these rights and obligations are already subject to the 1997 Law on the

Protection of the Professional Activity of a Journalist.[51] The relationship between the two pieces of legislation thus is not clear.

67. Moreover, the detailed list appears to constrict the scope of journalistic activities with numerous rules on conduct rather than enhance their protection. Whereas Article 32 (4) grants certain rights to an accredited journalist unless deciding otherwise, Article 34 contains a closed listing of what constitutes abuse of journalistic rights such as "spreading rumours" and discrediting individuals in connection with their "position or political opinion". These wide-ranging and imprecise concepts and restraints may interfere with the right to freedom of expression as granted by Article 19(3) of the ICCPR and are open for potential abuse, as they can readily be applied to any form of political expression. The Venice Commission, therefore, recommends amending Article 34 of the Draft Law.

2. Accreditation of journalists and mandatory media reports

68. Article 32 of the Draft Law stipulates that journalists can only carry out their activities, if they are accredited. Accreditation shall take place "in accordance with the procedure established by this Law" (paragraph 2) and based on the accreditation rules established by state bodies and local self-government bodies carrying out the accreditation. By virtue of Article 32(5), "a journalist may be deprived of accreditation if he or the editorial office of the media violates the established rules for accreditation or disseminates untrue information discrediting the honour and dignity, business reputation of the state body, local government body that accredited the journalist, which is confirmed by a decision that has entered into legal force court".

69. This regulation is hardly compatible with international standards. Under these standards, the law must not only, be proclaimed in advance of implementation and be foreseeable as to its effects, but it must also have a certain level of precision[52] to enable legal subjects to regulate their conduct in conformity with it.[53] The Draft Law fails to regulate the procedure of accreditation, leaving it to (unspecified) state bodies and local government bodies to establish specific rules in this area. This carries the risk of diversity of accreditation requirements, with each body establishing somewhat different rules, as well as the risk of misuse and arbitrariness. The risks are exacerbated by the lack of any fixed terms set for the accreditation. Moreover, the two situations in which a journalist may be deprived of accreditation are described in very vague and imprecise manner, which, again, carries the risk of divergent standards and of abuse.

70. The Venice Commission recommends the Kyrgyz authorities to revise the content of Article 32 in the Draft Law, specifically redrafting all provisions that are vague, lack precision.

71. Chapter 6 of the Draft Law requires that any materials disseminated by news agencies be accompanied by the name/title of the agencies and any materials disseminated by mass media outlet must indicate the registration body and number (Article 35). It, furthermore, in Article 37, imposes on mass media the obligation to publish free of charge and within prescribed period: a) a court decision in force containing a requirement to be published in this mass medium; and b) a message received from the registration body regarding the activities of the editorial board.

72. The latter sentence is drafted in very general way, as it can hardly be so that the newspaper shall be under the obligation to publish just any message from the registration body that regards the activities of its editorial board. Hence, the Venice Commission recommends adding some

[51] See The Law on the Protection of the Professional Activity of a Journalist in Russian.
[52] UN Human Rights Committee's call for comments on the revised draft General Comment 35 on article 9 of the International Covenant on Civil and Political Rights, chapter V.
[53] ECtHR, The Sunday Times v. the United Kingdom (No. 1), 6538/74, 26 April 1979, § 49.

specification in this provision, for instance by adding the phrase “a requirement to be published in this mass medium” to the message received from the registration body.

F. Relations of the Mass Media with Citizens, State Bodies, Local Self-Government Bodies and Legal Entities

1. Right to receive information

73. Article 39 provides for the right of citizens to promptly receive reliable information about the activities of state bodies, local self-government bodies, enterprises, organisations, voluntary associations and their officials through the mass media (paragraph 1). Those entities shall provide information about their activities at the requests of editors or through direct channels, such as press conferences (paragraph 2). The provision of information when requested by mass media may be refused only when “it contains information constituting a state, commercial or other secret specially protected by law” (Article 41).

74. This Article is confined to “reliable” information about official activities and appears to constrain the information flow to formal requests or press conferences. Inserting the adverb ‘promptly’ into the first sentence of Article 39 appears to oblige the mass media to publish immediately information from the authorities. Furthermore, it is unclear whether mass media have an obligation to impart and, also actively seek such information. If so, there would be a high risk that mass media would lose a large part of the control over the editorial policy, being *de facto* turned into press service of state bodies and other public entities. It must be left to the editorial discretion of independent media what information is regarded of public interest. States should proactively put in the public domain government information of public interest and should make every effort to ensure easy, prompt, effective and practical access to such information. They should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[54] Moreover, states should ensure that public broadcasting services operate in an independent manner and should guarantee their independence and editorial freedom.[55]

75. Moreover, the Venice Commission notes that according to Article 39 (2) the obligation to actively provide information about their activities to mass media applies not only to state bodies and other public entities but also to other any organisations, voluntary associations and enterprises, most likely including private ones. Such an extensive duty might interfere with the right to respect for private life, the right to freedom of expression and association and certain other rights. This is even more so in that the provision does not specify what type of information shall be provided. Hence, within the realm of the private sector, sharing information about their activities should be formulated not as an obligation, but as a right, unless the relevant information concerns the public interest.[56] The same applies to requests for information from mass media (Article 40 of the Draft Law) to the private sector.

76. According to Article 40 of the Draft Law, the mass media has the right to request information about the activities of state bodies and other public organisations and may be even of the private sector. Such requests may be refused when the information constitutes secrets specially protected by law (Article 41 of the Draft Law). This clause is too vague. On the one hand, the competence to refuse may be too restricted, in that only such secrets are protected, on the other hand, this competence is too wide, in that the mere legal qualification as “secret” is sufficient to refuse a request. The Venice Commission advises to rephrase Article 41 along the lines of Article 19(3) of the ICCPR.

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[54] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 19.
[55] Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).
[56] ECtHR, Guerra and Others v. Italy, judgment no. 14967/89, 19/02/1998, § 60.

2. Confidentiality of information

77. According to Article 42 (1) of the Draft Law, "the editorial office of the mass media is not entitled to disclose in the disseminated messages and materials information provided by individuals or legal entities on condition that they be kept secret". In this context, the Venice Commission emphasises that journalists and editorial offices shall have a right to protect the confidentiality of their sources, but they cannot be obliged to withhold information supplied by individuals or legal entities under the condition of secrecy.

78. The Venice Commission underscores that the press not only have the duty to inform the public about the information which is of public interest but the public also has the right to be properly informed[57] and no individual, official, or entity holds the prerogative to pre-emptively restrain the media and seize control over such information. Consequently, the Venice Commission recommends a revision of Article 42 of the Draft Law in order to remove the requirement for journalists to withhold information disseminated to them on condition that they be kept secret.

79. Regarding the editorial aspects in this chapter, the Commission wishes to highlight certain unnecessary repetitions. Article 40 expounds on the obligation of state organs and other entities to furnish information. These bodies are already mentioned in Article 39, rendering this provision of Article 40 somewhat redundant. Furthermore, Article 42 prohibits the dissemination of information that could lead to the identification of a minor who has committed a crime or is suspected of committing it. This provision duplicates the content of Article 6(4) of the Draft Law, thereby lacking necessity. Lastly, Article 43 pertains to intellectual property rights, an area that would benefit from more comprehensive regulation and may be more suitably addressed in distinct, specialised laws or regulations.

80. In order to enhance the quality of the text of the Draft Law, the Venice Commission advises addressing these editorial issues.

3. Right to refutation and right to reply

a. Right to refutation

81. Article 44 (1) of the Draft Law gives a citizen, an association of citizens, a state body, a local self-government body, an official, an enterprise, an organisation, an institution, regardless of the form of ownership, the right "to demand from the editorial office of the mass media refutation of the information that is not true and discredits their honour, dignity and business reputation, which was distributed in this media". If the editorial board of the mass media does not have evidence that the information disseminated by it is true, it must refute it.

82. A refutation may be refused if the request or the submitted text of the refutation: 1) is an abuse of freedom of the mass media under this Law; 2) contradicts the decision or other act of the court that has entered into legal force; or 3) is anonymous. It also may be refused: 1) if information is refuted that has already been refuted in this mass media; 2) if it was received by the editorial office after one year from the date of dissemination of the refuted information in this mass media. By means of Article 46(3), "refusal to refute or violation of the refutation procedure established by this Law may be appealed to the court within 6 months from the date of dissemination of refuted information in accordance with the civil and civil procedural legislation of the Kyrgyz

[57] ECtHR, Sunday Times v. the United Kingdom (No. 1), 6538/74, 26 April 1979, § 66.

Republic". The refusal must be done within ten days from the receipt of the request. If the refutation is not refused, it has to take place according to the procedure described in Article 45.

83. The Venice Commission welcomes the possibility of judicial review foreseen by Article 46(3); it is unclear, however, whether the review could only be triggered by the applicant or also by the mass media and which "violations of the refutation procedure established by this Law" could trigger it. Furthermore, the Venice Commission recognises the importance of striking a right balance between the right to freedom of expression and other protected human rights, including the right to privacy and the right to the protection of honour and reputation, as protected by Article 17 of the ICCPR and Article 8 of the ECHR. It also recalls that the ECtHR in its case-law has set forth specific criteria for this balancing exercise,[58] encompassing the contribution to a debate of general interest, the status of the person subjected to criticism and that person's prior conduct, as well as the content, form and the consequences of the publication.

84. Nonetheless, the Venice Commission observes that Article 44 (1) which states that "If the editorial board of the mass media does not have evidence that the information disseminated by it is true, it is obliged to refute them in the same mass media" does not appear to achieve a fully suitable balance. The allocation of the "burden of proof" to confirm the accuracy of disputed information in this case rests upon the relevant mass media outlet. This provision potentially opens the door to misuse, as it necessitates the media to furnish proof, whereas the onus should lie with the party requiring refutation to offer evidence supporting its assertion. Furthermore, requiring the media to provide proof may jeopardise the right of journalists not to reveal their sources. Protection of journalistic sources is one of the basic conditions for press freedom[59] and without such protection potential informants would be discouraged from disclosing important information to the media in adhering to its public watchdog role. There is, moreover, an absence of a designated procedure outlined for determining the accuracy of such disputed information.

85.The Venice Commission therefore finds that the right of refutation is excessive and not consistent with the meaning of the term. The way it is regulated in the Draft Law may grant powerful actors license to block coverage of matters of public concern.

b. Right to reply

86. Article 47 of the Draft Law grants the right to reply, by means of which "a citizen, an association of citizens, a state body, a local self-government body, an official, an enterprise, an organisation, an institution, regardless of the form of ownership, in respect of which information is disseminated in the mass media that does not correspond to reality or infringes on the rights and legitimate interests of a citizen, have the right to the answer (comment, remark) in the same mass media".

87. The Venice Commission previously held that "the right to reply should be applicable only to untrue factual information which damages someone's reputation, and not critical opinions which cannot give rise to the right to reply. /…/ It should be borne in mind that ensuring individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. As a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals".[60] However, Article 47 establishes an automatic right to reply. Moreover, no mechanism is put in place to objectively and

[58] Venice Commission, CDL-AD(2014)040, Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, paras. 23-24.
[59] ECtHR, Goodwin v. the United Kingdom, judgment no. 17488/90, 27/03/1996, §39.
[60] Venice Commission, CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, para. 49.

impartially assess, whether the information concerned correspond to reality or whether it infringes upon the rights or legitimate interests of citizens. This situation, bringing about the risk of media being flooded by replies, is at odds with the standards identified above.

88. Certainly, the right to reply, as a significant facet of media freedom, should be adequate in addressing the situations outlined in Article 47, moreover, it can contribute to a wider dissemination of information and can equalise the relationship between media and its news subjects. It is however subject to abuse as a tool suppressing journalism and restricting the exercise of editorial control and shall hence not give unfettered right to have access to the media.[61] In this context, the provision on the right to reply in Article 47 is flawed as it provides scope for those deeming that their "legitimate interests" have been affected by journalistic coverage, which is a foregone conclusion when the media is tackling controversial issues. "Legitimate interests" is furthermore a much broader concept than individual reputation as it can also cover business interests.

89. Consequently, the Venice Commission recommends a comprehensive re-evaluation and rephrasing of the provision, aiming to eliminate the potential for an unlimited right to reply. The objective is to establish a framework for the impartial and objective evaluation of information, while also considering editorial discretion of the media.

G. International Cooperation in the Field of Mass Media

90. Chapter 8 of the Draft Law seeks to promote and facilitate international cooperation in the field of mass media. It grants citizens of the Kyrgyz Republic unimpeded access to materials of foreign mass media. It stipulates that foreign mass media may be distributed in the Kyrgyz Republic upon registration (TV channels and radio channels) or with a permission of the Ministry of Justice (printed mass media). Foreign mass media may also establish representative offices in the Kyrgyz Republic, with the permission of the Ministry of Foreign Affairs. The same permission is necessary for accreditation of correspondents of foreign mass media.

91. The Venice Commission notes that so far, the activities of foreign TV and radio as well as the accreditation of foreign journalists have been regulated by the 2008 Law on Television and Radio Broadcasting[62] and the 2000 Decision No 215 of the Government.[63] The Draft Law seems to take inspiration from these legal acts, which moreover should remain in force after the entry into force of the Draft Law. This duplication is once again deemed unnecessary and undesirable.

92. Simultaneously, currently, these other legal acts provide a more comprehensive framework for addressing matters that are only briefly outlined in the Draft Law, such as for example the accreditation procedure. And yet, the Draft Law indicated that "accreditation of correspondents of foreign mass media in the Kyrgyz Republic is carried out by the Ministry of Foreign Affairs of the Kyrgyz Republic in accordance with the requirements of this Law" (Article 50(3). In this instance, the Draft Law fails to refer to other pertinent legal acts, creating the impression that the accreditation procedure's regulation is exhaustively covered by Article 50(3) of the Draft Law. That however would leave the design of the procedure entirely to the Minister.

93. The Venice Commission therefore recommends the removal of duplicative or overlapping regulations pertaining to the same issue across different legal acts. Additionally, it urges a more

[61] ECHR, Melnychuk v. Ukraine Decision, 28743/03, 5 July 2005, § 2.

[62] See 2008 Law on Television and Radio Broadcasting in Russian.

[63] See Regulation of the Government of the Kyrgyz Republic dated April 19, 2000 No. 215 on accreditation of correspondents of mass media of foreign states in the territory of the Kyrgyz Republic in Russian.

precise regulation of the accreditation process for foreign mass media correspondents, with the aim of eradicating any potential for ambiguity or conflicting interpretations.

H. Responsibility for Violation of the Legislation of the Kyrgyz Republic on Mass Media and Aspects related to the legal technique of the text of the Draft Law

1. Responsibility for Violation of the Legislation of the Kyrgyz Republic on Mass Media

94. Chapter 9 of the Draft Law regulates the consequences of violations of the legislation of the Kyrgyz Republic on Mass Media. Article 51 stipulates that "owners (founders), editorial offices, editors, publishers, distributors, state bodies, local governments, officials, journalists, authors of disseminated messages and materials are liable for violations of the legislation of the Kyrgyz Republic on mass media" (paragraph 1) and that "the broadcaster is responsible for the compliance of the disseminated information and materials of the TV channel, radio channel with the requirements of the legislation of the Kyrgyz Republic" (paragraph 2).

95. Articles 53-54 of the Draft Law delineate two categories of actions that would give rise to legal liability within the legal framework of the Kyrgyz Republic. These actions encompass the infringement of freedom of expression, freedom of speech and press, reception and dissemination of information (Article 53), and abuse of freedom of speech and of the press (Article 54). During the mission to Bishkek, the Kyrgyz authorities indicated that Article 53 applies to public organs and public officials, whereas Article 54 primarily applies to mass media and journalists. The latter provision pertains to various types of liability (civil, administrative, criminal), as foreseen in the legal order of the Kyrgyz Republic. This, however, is not completely clear from the wording of the two provisions. The language is excessively vague, rendering Article 53-54 insufficient as a legal basis for any form of accountability.

96. The designated actions are either inadequately defined (Article 54) or are merely illustrated through examples (Article 53), without accompanying sanctions. Curiously, the Draft Law does not propose any alterations to existing legal instruments related to liability, such as the Criminal Code of the Kyrgyz Republic or the Code of Administrative Offences of the Kyrgyz Republic. The Venice Commission underlines that, lacking such modifications, the provisions within the Draft Law will remain ineffectual.

97. Article 52 of the Draft Law exempts the entities identified in Article 51 from responsibility for instances of "the dissemination of information that does not correspond to reality and discredits the honour and dignity, business reputation of citizens and legal entities, or infringes on the rights and legitimate interests of citizens or harms the health and (or) development of children and minors or representing an abuse of freedom of the media and (or) the rights of a journalist". It is unclear whether these acts are supposed to fall under the acts described in Articles 53-54 or whether they constitute alternative acts giving rise to responsibility. The exemption shall take place if the dissemination of the relevant information is somehow made mandatory for mass media. A similar, albeit less extensive provision features in Article 45 of the Law on Television and Radio Broadcasting.

98. Article 55 foresees the compensation for moral harm caused to a citizen "a result of the dissemination by the mass media of information that does not correspond to reality, discrediting the honour, dignity and business reputation of a citizen or causing him other non-property harm". The compensation shall be established by a court decision. The legal ground for this procedure is again unspecified.

99. In conclusion, the Venice Commission recommends a revision of the provisions concerning responsibility. This revision should encompass the explicit delineation of distinct forms of responsibility and the corresponding actions that may give rise to such responsibility. Additionally, it is advised to incorporate precise and unambiguous references to other laws pertaining to responsibility if any.

2. Aspects related to the legal technique of the text of the Draft Law

100. Chapter 10, consisting of a single provision (Article 56) regulates the entry into force of the law (the day of the publication) and invalidates the 1992 Law on Mass Media. It also requests the Cabinet of Ministers, within three months, to bring its regulatory legal acts in line with the new law and submit to the Jogorku Kenesh draft laws arising from the law. The provision does not specify which legal acts and draft laws are concerned.

101. Furthermore, certain articles within the draft law lack titles, while others possess them. From a legal drafting perspective, having articles solely identified by numbers without distinct titles remains a permissible approach. However, combining articles with titles alongside those lacking titles contradicts principles of legal technique. To ensure a cohesive and technically accurate draft, the Venice Commission recommends either assigning titles to all articles or removing titles from every article within the Draft Law.

V. Conclusion

102. On 19 May 2023, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic requested an opinion of the Venice Commission on the Draft Law of the Kyrgyz Republic about the media. The Venice Commission underlines that, as a state party to the ICCPR, the Kyrgyz Republic must align the media regulation legislative and administrative frameworks with Article 19 of the ICCPR. When a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.[64] Therefore, the Venice Commission highlights that the relation between right and restriction and between norm and exception must not be reversed.[65] If the current version of the Draft Law is adopted, it could lead to violations of the rights to freedom of expression and have grave consequences for the media as the public watchdog in the country. Thus, the Venice Commission recommends a comprehensive revision of the Draft Law, encompassing the recommendations provided in this opinion.

The Venice Commission makes the following key recommendations:

1. Article 1 (1) of the Draft Law should be revised replacing the general references to undetermined laws with specific references to the relevant ones and to align it with the restrictions delineated in Article 19(3) of the ICCPR. Article 5 of the Draft Law should be amended, removing all excessive restrictions for using the mass media and Article 6 (1) of the Draft law should be amended by allowing the media to disclose information provided to it under conditions of confidentiality. Regarding the right to establish mass media, detailed in Article 10, the Venice Commission recommends reconsidering the restriction on ownership and the establishment of media entities based on citizenship and previous conviction, as well as to reduce excessive number of rules about the internal operation of mass media.
2. As regards the registration of mass media (Chapter 3), and the termination of the activities of a mass media (Article 29), the Venice Commission recommends that in the relevant

[64] See General comment No.34 on Article 19: Freedoms of opinion and expression, para. 21.
[65] See the Committee's general comment No. 27 on article 12, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A

provisions, unclear, excessive requirements for the registration of the mass media be removed (Article 17), the risk of undue discretion by state authorities during the mass media registration process be reduced (Article 16 (5)), as well as explicit stipulation of legal remedy be enshrined (Article 16 (3)). The Venice Commission also recommends enshrining in Article 29 that only serious violations of the most important requirements of the Law may serve as a ground for termination of the activities of a mass media, it furthermore recommends eliminating the potential for suspension of mass media activities throughout the duration of court proceedings (Article 29(4)(1)).

3. As regards the accreditation of journalists (Article 32), the Venice Commission recommends elimination of the possibility for unspecified state bodies and local government bodies to establish specific rules regarding accreditation, it also recommends fixing terms for accreditation. The Venice Commission also recommends a more precise description of situations in which a journalist may be deprived of accreditation. Regarding limitations and prohibitions on journalistic activities (Chapter 5), the Venice Commission recommends the removal of certain vague constraints, such as granting certain rights to an accredited journalist “unless deciding otherwise” (Article 32 (4)) or denying such rights because of “spreading rumours” or “discrediting individuals in connection with their position or political opinion” (Article 34).
4. Regarding citizens' right to receive timely and accurate information about state bodies, local self-governments, enterprises, and associations through mass media (Article 39 (1)), the Venice Commission recommends safeguarding that mass media would not lose control over the editorial policy while providing information about official activities. The Venice Commission also recommends specifying that, for the private sector, providing information about their activities to mass media be formulated as a right and not as an obligation (Article 39 (2)), unless the information is vital for the public interest. As regards the requirement to withhold information disseminated to the media on the condition that they be kept secret, the Venice Commission recommends removing from Article 42 of the Draft Law paragraph 1 requiring journalists to withhold information provided to them on such condition.
5. As regards the right to refutation and the right to reply, the Venice Commission recommends revising Article 44 (1) aiming to release the mass media from the "burden of proof" to confirm the accuracy of disputed information. It also recommends a re-evaluation and rephrasing of Article 47, aiming to eliminate the potential for an unfettered right to reply in the mass media by considering the editorial discretion of the media.
6. The Venice Commission recommends revising Articles 51-55 concerning the responsibility for violation of mass media laws which should encompass the explicit delineation of distinct forms of responsibility and the corresponding actions that may give rise to such responsibility.

103. In addition to the aforementioned key recommendations, the Venice Commission also advises addressing certain confusing and repetitive provisions within the Draft Law. For instance, Article 9 redundantly defines the term "mass media," despite its prior explanation in Article 3(1)(2). Similarly, the measures outlined in Article 14 against media monopolisation find duplicative coverage in a distinct legislation, the Law on Competition. Furthermore, the rights and obligations of journalists, which are regulated in Chapter 5 of the Draft Law, are already addressed by the 1997 Law on the Protection of the Professional Activity of a Journalist. Additionally, the actions of foreign TV and radio entities, along with the accreditation of foreign journalists, are already governed by the 2008 Law on Television and Radio Broadcasting and the 2000 Government Decision No. 215. Lastly, for the sake of a harmonised and technically precise draft, the Venice Commission suggests either assigning titles to all articles or alternatively, omitting titles from every article within the Draft Law.

104. The Venice Commission remains at the disposal of the authorities of the Kyrgyzstan for further assistance in this matter.