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**STATEMENT**

**Kazakhstan: Defamation Still Problematic Despite Changes of the Criminal Code**

**Throughout 2010, the Kazakhstan Government made several promises to decriminalise defamation. However, the legal regime of defamation in the country remains largely unchanged, despite diplomatic and media attention to freedom of expression situation in Kazakhstan during its one-year chairmanship of Organisation for Security and Cooperation in Europe and despite some legislative amendments in January 2011. The situation of journalists and the media is equally problematic. ARTICLE 19 is concerned about the lack of progress in this area and calls on the Kazakhstan Government to revise the defamation legislation.**

In 2010, Kazakhstan headed the Organization for Security and Cooperation in Europe (OSCE). The chairmanship was deliberately sought by the authorities in view of their ambition to gain international recognition of the country as a regional leader in Central Asia. The strong democratic objectives of the OSCE predetermined the serious democratic pledges which Kazakhstan made to gain support for its candidacy. Some of the promises related to improvement of the freedom of expression situation and in particular freedom of the media.

Throughout 2010, the Kazakh authorities made several pledges to decriminalise defamation. The Kazakh Criminal Code includes several provisions concerning defamation and insult. Articles 129 and 130 of the Criminal Code provide for fines, prohibition to engage in public work, correctional labour, arrest and imprisonment for the crimes of libel and insult. In separate provisions, the Criminal Code incriminates defamation and insult of public officials: Article 318, 319 and 320 provide special protection for the dignity and honour of the president, MPs and state officials by setting out higher penalties than for ordinary citizens. Article 343 incriminates defamation of a judge, prosecutor, investigator, interrogator, court marshal, or court executioner, and provides for imprisonment up to four years.

The severe sanctions for defamation and special protection of public officials provided by the Criminal Code suppress free speech and debate on issues of public interests in Kazakhstan. Even more problematic is the fact that these provisions are frequently used against journalists and editors critical of the government. Kazakhstan is of the few countries in Europe and Central Asia where people are imprisoned for defamation.

Since criminal defamation provisions and their application are very problematic from freedom of expression perspective, the pledges of the authorities as well as the draft

amendments to the Criminal Code presented by them at different forums were welcomed by the media and free speech activists

### **The revision of the Criminal Code in January 2011**

ARTICLE 19 notes with concern that various pledges for media freedom seem to have been forgotten by the Kazakh authorities after the end of the OSCE chairmanship. The amendments to the Criminal Code, adopted on 18 January 2011, do not correspond with these pledges and differ from the official draft proposals discussed earlier with national and international experts. Despite the proclaimed aim of the amendment to “further humanise” criminal legislation, ARTICLE 19 believes that the amendments failed to introduce necessary changes to the legal regime of defamation and insult.

The amendment law introduced two changes to the legal regime of defamation. The major change is the establishment of administrative responsibility for defamation and insult and the setting up of a hierarchy in the regimes of criminal and administrative responsibilities for these acts. Criminal responsibility for defamation and insult is not removed from the Criminal Code, but it can be sought only after an administrative penalty has been imposed for the same offence.<sup>1</sup> This means that complaints for defamation and insult should be first examined under the regime of the Code of Administrative Offences. If an individual conducts again the same offence within one year after having been found administrative liable for the same act, he/she can be prosecuted under the Criminal Code.

The minor change concerns the system of sanctions for defamation and insult. While fines, prohibition to engage in public work, correctional labour and imprisonment remain, arrest for libel and insult is removed for the general form of defamation.<sup>2</sup> With respect to the special form of defamation - insult of the president, and defamation of judges and other representatives of the judiciary - arrest is replaced with “restriction on liberty” for up to one and two years respectively, or deprivation of liberty for the same period.<sup>3</sup> “Restriction on liberty” consists in imposition on the person convicted by the court of certain duties which restrict his freedom and is carried out in the place of one’s residence under the supervision of the specialised body without isolation from the society for a period from one year up to five years.<sup>4</sup>

### **Failure to improve the protection of media**

Although designed to be applied in place of criminal responsibility, the introduction of administrative liability for defamation and libel does not improve the situation of journalists and media for the following reasons:

- ***Peculiar legal regulation:*** The current legal regime requiring imposition of administrative penalty before recourse to criminal liability, known as *administrative praejudicium* (prior administrative judgment) is a peculiar legal regime existing only in few former Soviet Union states. This regime does not set a clear distinction between crimes and administrative offences because it focuses on level of danger to

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<sup>1</sup> Item 1 of the amendment law introducing new Article 10-1 of the Criminal Code.

<sup>2</sup> Paragraph 40 of the amendment law introducing changes to Article 129, paragraph 2 of the Criminal Code, paragraph 158 of the amendment law Article 319 paragraph 2 of the Criminal Code and paragraph 159 of the amendment law introducing changes to Article 320, paragraph 2 of the Criminal Code.

<sup>3</sup> Paragraph 157 of amendment law introducing changes to Article 318, paragraph 2 of the Criminal Code.

<sup>4</sup> Article 45 of the Criminal Code.

society. In contrast, in Europe administrative offences are distinguished from crimes on the basis of their consequences whereby the effect of administrative offences is on public governance and order. Since the acts of defamation and insult concern private rather than public relations it is not surprising that nowhere except in Belarus<sup>5</sup> they are regarded as administrative offences. In addition, the regime establishing criminal responsibility for commission of a second administrative offence of defamation and insult is strange. In democratic countries, re-offending is a ground for increase of administrative punishment rather than for a criminal responsibility. Finally, since there is no justification for this regime, the regime violates the constitutional principle of equal treatment before the law in as much as for the same act some individuals can be held responsible under Criminal Code while others are held responsible under the Code of Administrative Offences.

- **Lack of clarity:** The regulation of the new legal regime is very vague. International law requires that restrictions on the right to freedom of expression, such as those related to defamation and insult, are clearly defined. This is not the case with the amendment to the Criminal Code. Although it provides that the new regime of *administrative praejudicium* applies to crimes that do not represent “big danger to society”, it does not specify these crimes. The confusion grows bigger due to the fact the Criminal Code does not contain other similar references. Crimes are classified as “crimes of lesser gravity”, “crimes of medium gravity”, “grave crimes”, and “especially grave crimes”.<sup>6</sup> Furthermore, although the new regime stipulates that individuals responsible for defamation and insult are administratively liable, the Code of Administrative Offences does not define offences of defamation and insult. It means that other administrative offences should be interpreted widely to apply to cases of defamation and insult. This runs against the principle of rule of law and creates risks for abuses and inconsistent application of the law. Finally, it is unclear which body is competent to establish defamation and libel as administrative offences. Administrative offences are typically determined by administrative procedures carried out by administrative bodies. If the same applies to defamation and insult then administrative authorities will be granted with unlimited powers to restrict freedom of expression.
- **Problematic administrative regime for defamation and insult:** In general, administrative responsibility is regarded as less severe than criminal responsibility. However, the Kazakh Code of Administrative Offences, which regulates administrative responsibility, is not in compliance with international standard.<sup>7</sup> The regime of *administrative praejudicium* will not improve the situation of journalists and media in Kazakhstan because the Code of Administrative Offences does not incorporate the principle that any sanctions on the right to freedom expression must be necessary and proportionate to the harm done. Moreover, the penalties stipulated in the Code of Administrative Offences are harsh. They include high fines and

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<sup>5</sup> Article 188 of the Criminal Code of Belarus and article 9.2 of the Belarus Code of Administrative Offences.

<sup>6</sup> Article 10, paragraph 1 of the Criminal Code.

<sup>7</sup> See ARTICLE 19’s Statement *Kazakhstan: OSCE Commitments Remain Unfulfilled*, 28 November 2010 <http://www.article19.org/pdfs/press/kazakhstan-osce-commitments-remain-unfulfilled.pdf> and

*Comment on the provisions concerning the right to freedom of expression in the Draft Code of Administrative Offences of Kazakhstan*, May 2010

<http://www.article19.org/pdfs/analysis/kazakhstan-comment-on-the-provisions-concerning-the-right-to-freedom-of-expr.pdf>

administrative arrest, which according to international law is a disproportionate restriction to freedom of expression in cases of libel and insult.

- ***Failure to remove higher protection for public officials and to reduce the harsh penalties:*** The January 2011 amendment did not address key discrepancies between the Criminal Code and international freedom of expression standards identified by international experts. The president, MPs and state officials are still given higher protection against defamation and insult. The Criminal Code penalties for defamation remain harsh. Some of them like restriction of liberty and deprivation of liberty are clearly in violation with international law.

In view of the foregoing ARTICLE 19 calls on the Kazakhstan Government to address immediately these issues and adopt legislation that fully complies with international freedom of expression standards. In particular, we recommend that:

- The Kazakh Government remove the regime of *administrative praejudicium* and decriminalise insult and defamation. Alternatively, replacement of the new regime of *administrative praejudicium* with release of criminal responsibility with imposition of administrative fine should be considered;
- The Kazakh judicial authorities introduce comprehensive trainings for judges and law enforcement officials to protect freedom of expression when implementing criminal and administrative code;
- International organisations carry out a rigorous analysis of the new regime of *administrative praejudicium* and its affect on freedom of expression;
- National NGOs and media carry out monitoring of the application of the new regime of defamation and libel and report of the situation of journalists and media.

**END NOTES:**

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- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.