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## Analysis of the Draft Law of the Republic of Kazakhstan **On Mass Media**

The Draft Law has been analyzed from the point of view of the provisions of Article 19 of the Universal Declaration of Human Rights, international standards and principles of freedom of information circulation, freedom of expression and press in democratic society developed by profile international organisations Article 19<sup>1</sup>, Interights, Human Rights Watch<sup>2</sup>, Freedom House, International Federation of Journalists, Committee for Defence of Journalists<sup>3</sup>, and other organisations.

### **Introduction**

Pursuant to Article 19 of the Universal Declaration of Human Rights and Fundamental Freedoms<sup>4</sup> “Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

*According to this Article, states may license TV and radio broadcasting companies or cinema production.*

However, freedom of opinion and expression, and freedom of opinion and information is not absolute. Since the exercise of this right involves duties and responsibility, it is also subject only to formal aspects, conditions, limitations or punishments as are determined by law solely for the purpose of national security, territorial integrity or public order in a democratic society. Therefore, the right is limited in order to prevent disturbances or crime, protect health or morality, protect reputation or rights of other persons, prevent disclosure of confidential information and keep justice independent and impartial.

### **Basic Principles of Freedom of Press**

#### Freedom of Press.

Fundamental right of freedom of expression guaranteed by Article 19 of the Universal Declaration of Human Rights concerns not only words written or said, but also covers works of fine arts and other acts expressing ideas or presenting information.

Moreover, the Article champions not only the meaning of information or its ideas, but also the form of their expression. So, both printed documents, and radio programs, as well as artistic works, paintings, films or electronic informational systems are protected by this Article.

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<sup>1</sup> [www.article19.org](http://www.article19.org)

<sup>2</sup> [www.hrw.org](http://www.hrw.org)

<sup>3</sup> [www.cpj.org](http://www.cpj.org)

<sup>4</sup> Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948.

It follows from this that the operation of the Article covers generation, transfer and dissemination of information and ideas.

Throughout their existence and many years' practice, human rights institutes of the United Nations system and UN High Commissioner for Human Rights have developed standards including a group of principles and rules, which guarantee to the press a special status in respect of exercise of the right to freedom of expression.

It is a common knowledge that it is journalists that in exercise of human rights are most often exposed to attacks by governmental bodies.

Committee for the Protection of Journalists (New York, US), which daily monitors and analyses professional problems of journalists<sup>5</sup>, more than once stressed recognition of mass media role as "a watchdog guarding public interests", particularly in the course of political discussions and debate.

Freedom of press offers to the public an optimal opportunity to obtain information and form its opinion of the ideas and attitude towards political leaders, thus ensuring freedom of political discussion, which is a basis of the democratic society concept.

Without free press realization of other human rights is jeopardized. Atmosphere of free and strong press encourages enhanced activity of civil society, which results in stable unshakable democracy and robust social, political and economic development.

We stand up for the right of the press to do its job. As long as information and ideas circulate freely both within the boundaries of the states and globally, the world will be stable. Under conditions of censorship democracy and development always loose. Free and independent press is a vivifying blood of a strong efficient society and a token of its progress.<sup>6</sup>

#### Freedom of TV and Radio Broadcasting

International standards recognize the right of the state to establish a broadcasting licensing system provided, however, that authority of the government in regulation of such licensing will not lie outside the technical scope and, in no way, will be carried out in a manner which would encroach the freedom of expression.

The states are allowed to control the licensing system using a number of ways, for example, TV broadcasting should be organized in a certain area and, what is most important, depends upon certain technical aspects.

However, taking into account technical advance of the last decade, number of available radio frequencies and information channels has ceased to pose a problem. Satellite and cable TV provides unlimited number of available frequencies.

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<sup>5</sup> How CPJ Investigates and Classifies Attacks on the Press, [www.cpj.org](http://www.cpj.org)

<sup>6</sup> REMARKS BY DEPUTY SECRETARY-GENERAL, LOUISE FRÉCHETTE, ON WORLD PRESS FREEDOM DAY, 2 May 2003

In this context the right of the state to license mass media acquires new sense and purpose, which mainly are in guaranteeing freedom and pluralism of circulation of information subject to the needs of the society.

The international community considers governmental monopoly in the sphere of audiovisual mass media as being in contradiction to the spirit of Article 19 of the Universal Declaration of Human Rights and humane practice mostly because it cannot ensure pluralism of information sources.

A democratic state does not need such monopoly and it can be justified only by extreme public need.

The content of broadcasts should not be subject to any censorship by governmental or regulatory agencies. Any sanctions due to violations in the broadcasting procedures can be applied only after the material has been aired<sup>7</sup>.

Neither the government, nor regulatory agencies, nor commercial structures, save for the broadcasting company itself, may determine the content of its broadcasts, not abusing this right, however<sup>8</sup>.

### **Analysis and Comments**

The writers have used in the system of terms of the Draft Law approaches, which are in contradiction to the basic principles of freedom of press and journalism.

The term “Accreditation” is understood here as a procedure of appointment of a journalist and acknowledgement of his powers by a state or other agency, while accreditation is, on the one hand, a form of journalist’s admission to gathering of information about activities of such agencies, and, on the other hand, a system of obligations of such agencies ensuring appropriate conditions for normal work of a journalist.

In the text, the term “Broadcaster” means “owner of a mass medium”, **and not who holds a broadcasting license.**

The term “Journalist” means an individual who is engaged in gathering, handling and preparation of communications for a mass medium **just on the basis of contractual relations.**

The term “Source of Information” is understood as an individual or legal entity which has submitted information to mass media (**such wording ignores various documents, information of other mass media, etc., which, of course, can be and often are sources of information for journalists**)

The term “Pornographic Products” means cynical or extremely obscene representation of anything related to sexual relations (**an evaluative judgment is used here that does not have clear-cut criteria, and it is fraught with unjustified sanctions against mass media**).

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<sup>7</sup> Principles of Access to Broadcasting, Series: International Standards, Article 19, London, March 2002. Principle 1.3,

<sup>8</sup> Principles of Access to Broadcasting, Series: International Standards, Article 19, London, March 2002. Principle 2.1,

The term “Data” is interpreted as information on persons, things, facts, events, occurrences and processes, though according to the laws of logics and by implication **the concept of “data” is a narrower concept**, since data can be a component of information, rather than the reverse, as information, as a concept (in addition to data / communications on facts), might also include evaluative judgments.

The term “Authorised Agency” is understood as an agency that carries out **state regulation** of the activities of mass media and information agencies in Kazakhstan.

**Article 2.3** contains strange for a draft law on mass media clause concerning an obligation of mass media to ensure that each individual has access to any documents, decisions, and sources of information that affect such individual’s rights and interests. Apparently, the writers of the Draft Law had in view the individuals’ right to obtain via mass media information, which they need to exercise their rights and freedoms, including decisions of state authorities and agencies. In such context, any mentioning in this clause of state authorities is off the point.

No doubt that state authorities and agencies must to inform individuals of their decisions affecting the rights, freedoms and legal interests of the population, including through mass media.

The writers of the Draft Law should differentiate between mass media and state authorities, clearly defining (it is desirable to do that in different clauses) such approaches.

Use of the concept “**sources of information**” in this rule may be confusing and potentially may become legal grounds for demands towards mass media by the audience to disclose sources of information, which have provided the journalists with the information on a confidential basis.

To avoid variant reading, it is better to delete this term or specify what sources of information are meant (apparently, the writers had in view regulatory documents of state authorities).

### **Article 3**

It needs to be elaborated in respect of coordination of structure and terminology.

Thus, it is more logical to indicate in Part 1 that use of mass media shall not be allowed for

#### **A) calls for**

1. violent change of the constitutional form of government in the RK
2. violation of territorial integrity of the RK
3. undermining of national security of the state

#### **B) propagation and agitation of**

1. war, terrorism and extremism
2. social, racial, national, religious, class and tribal superiority
3. cult of cruelty and violence
4. drugs, psychotropic substances and precursors.

#### **B) dissemination of information containing**

1. state or other secrets protected by law

## 2. pornography.

As for the information on methods and tactics of anti-terror operations in the RK, the former is included into information under clause B.1.

### Article 4.

**Clause 1:** add to the phrase “**freedom of speech**” the words “**gathering and storage**” (of the information).

**Clause 3:** after the word “**reliability**” a phrase “**fullness and objectivity**” can be added.

### Article 7

It contains a good idea of freedom of mass media and their subjects from interference with their activities by state agencies and their officials. However, the reservation made in the draft of this clause undermines this idea.

According to accepted standards of freedom of press in a democratic state, immediate interference by state agencies is prohibited.

In cases when mass media abuse their freedom, the authorised agency must not interfere with the activities of mass media, and may (only!):

(A) apply sanctions stipulated by the law with subsequent judicial control of relevance of such sanctions; or

(B) file a claim against the mass media with the court of justice.

**So, in order to conform to the international standards, the reservation must be deleted from the Article.**

### Article 8 State Regulation in the Sphere of Mass Media

Already the heading of the Article gives impression of dependence of mass media from the state, which is advisable to be avoided. An option may be the heading of the type \* **State Powers in the Sphere of Mass Media\***

In **clause 1** of this Article, the term “**record keeping of mass media**” appears for the first time. The term “**state registration of mass media**” is used in international documents and practice, and this option is preferable for this Law. The term “**state registration of mass media**” is much broader in its meaning. It means that the state

- 1) recognises the fact of creation (establishment) of a mass medium;
- 2) authorises its activities;
- 3) has information on its founders and owners, which is very important from the point of view of avoiding excess concentration of mass media in one hands and preventing monopoly.

The term “**record keeping**” does not have such meaning and is more suitable for such operations as record keeping of cars with the State Road Police Inspectorate or of a tuberculosis patient with T.B. prophylactic centre. The writers of the Draft Law must decide whether they should change the terminology subject to ideas, which they put into an act of registration of mass media.

It is not clear in **clause 2** what state purchases are meant here, and state purchases of what specifically.

What is the connection between mass media and state purchases? If it is a question of placing ads by a state agency in mass media concerning state purchases, it requires more detailed regulation and interpretation.

**Clause 5** – control over compliance with the conditions of the TV and radio broadcasting license.

Proceeding from the principle of independence of the agency engaged in licensing of TV/radio broadcasting, this agency and not the central executive authority must have such function. If there is no such independent agency, everything must be resolved only through the court of justice.

**Clause 6** – powers pertaining to suspension and withdrawal of the certificate of record keeping (state registration of mass media), as well as the same acts pertaining to the TV/radio broadcasting license, are inconsistent with the role and status of mass media in a democratic society, if the procedure established by the legislation of the Republic of Kazakhstan (to which the rules refers) does not provide for a warning about remedying / subsequent avoiding of violations, or a judicial control over decisions to suspend/withdraw a certificate/license.

## **Chapter 2. Subjects of Mass Media**

This Chapter needs conceptual rethinking and revising of some approaches, unless its provisions, instead of regulating the issues of creation of mass media, organising mutual relationships between the subjects, etc., will be subject to constant legal conflicts and misunderstandings.

There are well known civil concepts, the meaning and essence of which must not be transformed and must remain common for any situations.

Such concepts include the concept of “**owner**”. “Owner” is a holder of title (right of ownership), which possesses, uses and disposes of its property.

For the purposes of the Draft Law under review, an owner of mass media shall be a person (natural or legal person) that invested its funds in the creation of a mass medium, formed its Charter Fund, or deposited to the mass medium’s account with a bank monetary funds to ensure its operations (paying wages to personnel, purchase of paper, printing the newspaper at the printers’, paying for distribution, etc.). While having funds, the owner shall not necessarily establish mass media. He can authorise any third parties to do this. Those persons (or a person) will be founders. The owner and the founder decide among themselves how they will build their relations, but according to civil law, it is difficult to imagine a situation when a founder would prevail over the owner.

This is the case in **clauses 1, 2, 4 and 6 of Article 10**.

A thought may appear that the owner cannot be a mass media founder, but is wholly responsible for the mass media. If so, then why is it? Does it mean that the writers of the Draft Law a priori do not recognize mass media as the sphere where business may develop?

**In order to avoid any confusion and to create a harmonious system, these aspects should be elaborated conceptually.**

This Chapter also suffers from lack of clear-cut provisions concerning what legal status mass media can have and whether they can have any status at all.

It looks like the issue has been overlooked whether mass media can on its own (as a newspaper, magazine, TV company, etc.) have a legal entity status. If yes, then in what corporate form?

State registration of mass media ("record keeping" according to the terms of the draft Law) is only a part of its legal activities. Can a mass media engage in business? Does it need another state registration with local authorities and according to what rules?

The Draft Law has many contradicting provisions, which should be elaborated conceptually. Thus, editorial office may not, according to the Draft Law, be a legal entity (**Article 12.1**), but it carries out its activities based on the Charter. Chief Editor represents the mass media in relations with third parties and in court (**Article 12.4**).

Proceeding from these rules, mass media appears to be a legal entity, but, alas, it does not follow from the Draft Law.

The writers overlooked what is the legal status of the Charter, apart from the fact that it is approved by the owner (**Article 11.4**).

The charter of the editorial office as described in the Draft Law is the most important document. It regulates mutual relations between the founder, owner and editorial office, powers of Chief Editor, legal consequences of the change of the founder, or reorganization of the owner (**Article 12.2**).

**In order to prevent arbitrary changes of the charter, it must be legalized with state agencies, or, at least, notarised.**

The editorial office of mass media prepares and issues or broadcasts the mass medium in accordance with the owner's instructions (**Article 12.3**). This rule places responsibility for the activities of the editorial office on the owner and Chief Editor of the mass media. The relations between the owner and journalist and between the owner and editorial staff are labour legal relations (**Article 12.6**).

Therefore, the owner is directly involved in the activities of mass media.

The founder has a purely formal role of creating the mass media, and journalists, while not having any direct legal relations with the Chief Editor, have them with the owner.

### **Article 13.**

In this Article, accuracy of definition of legal status of a news agency is agreeable, though the provision to the effect that a news agency has the status and rights of the mass media is confusing. As noted above, the status of mass media is disputable; or rather mass media according to this Draft Law do not have any status in the legal sense of the word. Putting mass media and news agencies on the same footing is not quite justified. If the news agency is, essentially, a factory of news and other information, then mass media disseminate the news and information.

## **Chapter 3. Organisation of Activities of Mass Media**

## Article 14

As noted above, it is better to change the terminology from “record keeping of mass media” to “state registration of mass media”.

Clause 3.4 of this Article: to avoid subjective evaluations for refusal in record keeping, it is feasible to change the wording as follows: “the name, approximate subject-matter and/or specialization of the mass medium fall under the wording of Article 3 of this Law”.

**In part 2 of clause 4 provision** “*on the right of interested parties to appeal in court the authorized agency’s decision to refuse state registration*” should also be **added** to this Article.

It is feasible to amend **Clause 9 of Article 14** on the rules of registration in the RK of foreign mass media and regulate this in this Law, and not leave it for the discretion of the Government.

## Article 15

The scope of information, which the state must possess when registering mass media, is sufficient.

**It is necessary to clarify who submits the application for registration (founder, owner, editor).** In conjunction with clause 3 of this Article it is important and if not elaborated is fraught with ambiguous interpretation.

**Clause 9** requires an applicant for registration to indicate the proposed sources of funding. Considering the above noted lacunae in the mass medium status and vagueness as to whether it can earn money itself, this provision is particularly important for keeping the status of financial/economic independence of every separate mass medium.

**Article 17** contains in clause 3 a rather large and mostly not always justified list of grounds for suspension of issuance or airing of mass media. It is overlooked who may initiate and how the judicial procedure.

It is feasible to turn **subclauses 1 and 2 of clause 3** of this Article into conditions, and not additional grounds for such sanction.

**Clause 7 of Article 19** (re-broadcasting of films) should be deleted from clause 3 of Article 17. It must be considered as one of violations of the license conditions, and not as an independent ground for suspension of broadcasting.

**Article 18** contains a potentially dangerous provision on the possibility of establishing state control over the content of broadcasting and suspension of TV and radio broadcasting in emergency period (**clause 3**)

According to the “General Principles of Access to Broadcasting”<sup>9</sup>, legal regulation of broadcasting does not empower the state to establish state control over it (over the equipment and content of broadcasts) in case of emergencies. If such situations occur when such measures are indeed necessary, for this period a special legislation must

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<sup>9</sup> Principles of Access to Broadcasting, Series: International Standards, Article 19, London, March 2002. Principle 4,



apply, which would conform to the emergency requirements, as is stipulated in the international legislation.

**Article 19** contains normal provisions concerning the rules for dissemination of periodicals and programs of erotic or sexual-and-erotic nature, but clause 4 of this Article not so much protects the interests of minors and children, as encroaches on the freedom of entrepreneurship of distributors of such periodicals, burdening them with checking the age of buyers.

**There can be no doubt that clause 4 must be deleted from the Draft Law.**

**Article 21** violates the principle of proportion in respect of mandatory copies. If an obligation of the mass media to send a mandatory copy to the authorized agency is justified, providing same to the National Library, the Central State Archive and the Parliament is absolutely not justified.

In clause 2, electronic mass media are meant, apparently.

**To Clause 4** a provision should be added to the effect that in addition to the authorized agency other interested persons/entities must have the right to demand a copy of audio-TV-video materials in case of dissemination of false information about them and in order for them to exercise their right to respond or to their interpretation of the situation.

Main problem of **Article 25** of the Draft Law is that the same authority is an authorized agency for licensing of TV and radio broadcasting. This contradicts international standards. To be in conformity thereto, such agency must be secured against any outside influences, particularly political and commercial.<sup>10</sup>

The procedure for issuance of licenses shall be approved by the Government (**clause 6**), which is also fraught with lack of transparency and clear-cut rules for issuance of licenses.

**Article 26.5** contributes to the confusion through its provision concerning withdrawal of a certificate of record keeping due to license revocation. As it follows from the terminology of Article 15, printed mass media are subject to record keeping. If in addition to obtaining two licenses (**Article 25.2**), television and radio broadcasters must undergo state registration in terms of record keeping, then was is the purport of licensing, which essentially is a kind of form of State Registration.

### **Article 29. Official Communications**

The Article stipulates the right of state agencies to place in the mass media official communications (it is not clear on what conditions, how frequently, etc.), as well as their obligation to provide information to mass media.

**In Article 30, clause 2 concerning an obligation to publish/broadcast communications pertaining to elections and referendum free of charge** draws attention and put on alert.

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<sup>10</sup> Ibid., Principle 10.

It is important for the writers of the Draft Law to compare this rule against the general principles of equality of mass media and prohibition to use them by the state and political parties free of charge.

**Article 32** unreasonably restricts to individuals potential subjects entitled to demand refutation of the information disseminated by mass media. In all other respects this institute is described well.

It is feasible to concretise or delete **clause 1.8 of Article 34** from the Draft Law.

Article 36.4 contains a potentially dangerous provision concerning cancellation of accreditation of a journalist for dissemination of false data which derogates honor and dignity of the government agencies that accredited him/her and public associations.

Firstly, being artificial entities, authorities and public associations do not have honour or dignity. These categories are characteristic only of individuals. Secondly, who is to determine whether such data were false. This provision restricts journalist's freedom of professional evaluation and comments on the events covered by him/her<sup>11</sup>.

Pursuant to the rules of Article 32, such agencies and associations may demand refutation and go to the court, but cancellation of accreditation on such vague grounds is obvious abuse of office duty, threatening professional freedom of journalists and freedom of mass media in general.

**Article 38** requires elaborating in detail of clause 3.

It is not clear whether judicial injunction to disseminate products of foreign mass media can be one-time in respect of a specific issue, or uniform and forever. Who instigates such cases in the court of justice and who makes decision on violation by such mass media of the Constitution of the Republic of Kazakhstan and the Law on Mass Media prior to going to the court.

The author of the analysis does not have legislative acts of the Republic of Kazakhstan for detail review (in particular the Criminal Code) therefore it is difficult to understand what means for the journalists and mass media clause 1 and 2 of Article 39, and how they are protected by clause 4 of this Article.

As it was already noted, in the light of international standards and principles, the freedom of speech is not an absolute right and can be subject to limitation, but strictly in compliance with the law and solely for legitimate purposes, such as for protection of rights and reputation of other persons, and for supporting of independence and impartiality of justice.

## **Conclusion**

Thorough analysis of the Draft Law allows to conclude that in general it might become a positive legislative act in the sphere of mass media, provided its writers pay attention to eliminating those provisions, which contradict the approaches generally accepted in

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<sup>11</sup> Principles of Defamation. Series: International Standards, Article 19, London, March 2001. Principle 7.

global practice and determine conceptually for themselves, but in the interests of Kazakh society, which press by content (printed and electronic) it needs.

An important component of the Draft Law's success enabling it to become a Law is to determine public values and to base the state's will on them.

The Draft Law will gain if in the process of further work at it the legislative drafting of the structure of the Law and terminology used in it will improve.