Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

MEMORANDUM ON THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN ON THE MASS MEDIA

Commissioned by the Office of the OSCE Representative on Freedom of the Media from Mr. Andrei Richter, Doctor of Philology (Moscow State University Faculty of Journalism), Director of the Media Law and Policy Institute (Moscow)

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SUMMARY, BRIEF RECOMMENDATIONS

Having analyzed the draft law of the Republic of Kazakhstan on the Mass Media, the explanatory note thereto, the draft law of the Republic of Kazakhstan on Amending Certain Legislative Acts of the Republic of Kazakhstan on the Mass Media in the context of the Constitution of the Republic of Kazakhstan, the current media legislation of the Republic of Kazakhstan, as well as international standards on freedom of expression, and the best practices of other post-Soviet OSCE participating States, the expert has come to a conclusion that this draft law, in spite of certain obvious merits, contains provisions that jeopardize development of media freedom in Kazakhstan and is in need of follow-up revision in light of recommendations based on international law.

The draft law contains the following main advantages:

- Considering that it was accepted for consideration by the Majilis of the Parliament of the Republic of Kazakhstan in one package with amendments to the Criminal Code of the Republic of Kazakhstan, the draft law has obvious merits, such as decriminalization of libel and insult. The process is not, however, carried through to the end: alongside the removal of other articles on criminal liability for libel and insult, the article establishing punishment for infringement upon the honour and dignity of the President of the Republic of Kazakhstan should also have been removed as unjustifiably restricting the activities of journalists.

- Another positive example of the proposed amendments is the introduction of administrative liability for wrongful refusal to provide information to journalists and for violation of the deadlines for providing the requested information.

- Of practical importance, also, is the proposed ban on confiscation of media products in a number of cases of administrative offences. At the same time, the possibility remains for suspending the issue (broadcast) of media products for a period of up to three months.

- The lifting of the ban on foreigners to hold the office of editor-in-chief of a media outlet is a positive step envisaged by the draft law on the Mass Media.

- A major advantage of the draft law on the Mass Media is the provision of Article 31.5, which restricts the statute of limitations on claims for refutation of information harming one's honour, dignity and business reputation or for publication of a response in a media outlet to one year from the date on which this information appeared in the media outlet.

- A major merit of the draft law on the Mass Media consists in the provision of Article 30.10, which requires state authorities and their officials, whose activities have been criticized in the media to provide written explanations, within a period of ten days, to the editorial board of the media outlet on the substance of the circumstances subjected to criticism. This will help make media statements more effective and authoritative, and strengthen the media as an institution of civil society.

- The provision of Article 31.6 and corresponding amendments to the Tax Code of the Republic of Kazakhstan should be perceived as another merit of the draft law on the Mass Media. These determine the size of the state duty levied for applying to a court of law for compensation for moral damage as a percentage of the amount of the claim entered.

- Also worthy of support is the shortening of the period allowed for state authorities and other organizations to reply to requests for information on the part of media editorial boards from one month (for requests "requiring additional study and verification") in the current law

(Article 18.2-1) to 10 days in the draft law (Article 30.5). This innovation will facilitate the work of the mass media, strengthen public control and comply with the practice in other post-Soviet states.

- The novel provision of the draft law on the Mass Media on freeing journalists of liability for quoting persons verbatim (Article 39.1.4) cannot but be welcomed. At the same time, it should be specified whether this applies to statements by *anyone* or only, for example, state officials.

- Also to be welcomed is the intention to introduce into the legislation provisions banning media monopolization, but these provisions should not be merely declarative in nature.

- A major positive effect will be derived from the draft law provision (Article 31.1) to the effect that "information expressed as personal views, convictions, opinions or critical judgments shall not be subject to refutation".

<u>The draft law fails to create an adequate legal framework for reforming the media system in Kazakhstan to bring it into line with the OSCE-accepted guarantees of freedom and independence of the media, democracy and civil society:</u>

- This applies above all to the absence from the draft law of provisions opening up the way for creating public service media, namely, public service television as a forum for free discussion of the country's most topical problems, for conducting dialogue with the political opposition, with national and other communities, as well as a platform for educating the population in the interests of unity and prosperity of Kazakhstan.

- This also applies to the draft law securing the legal conditions for domination in the media market of state-run media, which, by virtue of its very existence, violates the principles of a free market for information and ideas. State organizations and authorities should be prohibited not only from dominating, but even from being serious players in this market.

- The draft law does not establish any legal guarantees for the independence of the television and radio broadcasting licensing authority from the institutions of state power. It does not provide for accountability of this authority to civil society or for openness of the licensing and control procedures. No guarantees are established against a possible conflict of interests between the members of the licensing authority and business and political interests. Not even the basic criteria are determined for choosing the winners of tenders for broadcasting rights.

- The draft law does not take account of the impending technological changes in the mass media of Kazakhstan, such as the potential creation of a multitude of digital broadcasting channels, and the legal problems arising in connection with this, such as the licensing of these channels.

- In spite of the comments made by the Office of the OSCE Representative on Freedom of the Media, the draft law preserves the previously introduced system of restrictions on use in the media (including the privately owned media) of languages other than Kazakh, on broadcasting of foreign television and radio programmes and on foreign ownership of the media.

- The draft law does not remove the restrictions on freedom of speech already criticized by the Representative on Freedom of the Media, such as the special registration procedure required

of media outlets, engendering the possibility of forcible termination (suspension) of their activities.

- Despite assurances made previously by the authorities, the draft law fails to create the legal framework for introduction into journalistic practice of the principle of independence of editorial policy from the media owners and from the state. The draft law makes mention of this, but does not, in fact, create any conditions for limiting media concentration.

- The draft law suffers from the inaccuracies listed below, which are fraught with the possibility of varying interpretations of its provisions in interests contrary to those of freedom of speech.

Below is a summary of the recommendations proposed in relation to this draft law:

- *All the restrictions on freedom of speech in the draft law should be reviewed in the light of compliance with international law standards. By virtue of this, the volume of Article 3 of the draft law "Inadmissibility of abuse of freedom of speech, receipt and dissemination of mass information" should be restricted to the scope Article 20.3 of the Constitution of the Republic of Kazakhstan.*

- *Special registration of media outlets should be abolished as superfluous and restricting media freedom.*

- *The possibility of forcible termination (suspension) of media activities should be excluded from the draft law.*

- *The "truthful information" principle mandatory for all media under the draft law (Article 4) should be abolished. The newly introduced provision on liability for dissemination of any "false information" should be removed from Article 38 of the draft law. The obligation of the journalist "not to disseminate false information" should be removed from the draft law.*

- *There should be no restrictions on the right to express one's opinion through the media on the grounds of statelessness or a record of previous convictions.*

- *The restriction on use in the media of languages other than the state language should be removed. The restriction on re-broadcasting of programmes in other languages should be reviewed and replaced by obligations to place state orders for local media products and products in the Kazakh language.*

- *The restriction on re-broadcasting of foreign television and radio programmes should be reviewed. The intention of the Government of Kazakhstan to promote domestic media products would be better implemented within the scope of the existent successful system for placing state orders for such products.*

- *The restriction on the share of foreign ownership deprives the media sector of essential foreign investments and experience and should be reviewed.*

- *It would be desirable to provide guarantees of editorial independence either by including provisions on the editorial charter into the law on the Mass Media or by creating a system of agreements between journalists and media owners.*

- *The draft law should define the concept of "protection of the public interest", very important in journalistic practice. Other circumstances allowing hidden cameras to be used should be specified.*

- *The draft law should clearly specify legal guarantees of the independence of the television and (or) radio broadcasting licensing authority from the institutions of state power and its accountability to civil society, and openness of the licensing and control procedures. There should be legal safeguards against any possible conflict of interest between the members of the licensing commission and business and political representatives.*

- *The conditions for licensing of television and radio broadcasting as a factor behind the development of freedom of the media are: impartiality, competence and non-application of political criteria by the national licensing authority, as well as predictability of the rules for obtaining a licence, consideration of viewer/listener interests, and extended licence validity. The draft law should provide legal guarantees of these conditions.*

- *The draft law requires revision in order to ensure that it not only in word but also in practice restricts monopolization of the media and ensures the transparency of media outlets necessary for this purpose.*

- *The provision of the draft law on the right of journalists not to reveal their sources of information should be specified, making this the measure of last resort which a court might apply. The rights of the editorial board to secrecy and to protection of editorial premises from search and seizure of journalistic materials without a court order, issued only in cases of absolute necessity, should be added to the draft law.*

- *The accreditation procedure should apply automatically with respect to all applicants. Withdrawal of accreditation should be permitted only for serious and repeated violations of the public order. Measures should be taken to specify the provisions of Article 35 in order to apply the rules governing accreditation of journalists in full, as envisaged by the draft law and in accordance with the objectives of the ICCPR.*

- *Alongside exclusion of other articles on criminal liability for libel and insult, Article 318 "Infringement upon the honour and dignity of the President of the Republic of Kazakhstan and obstruction of his activities" should be removed from the Criminal Code of the Republic of Kazakhstan as it creates unjustified restrictions on journalistic activities.*

- *The possibility of suspending the issue (broadcast) of a media outlet should be removed from the Code of Administrative Offences of the Republic of Kazakhstan.*

- *The provisions of the draft law concerning the hierarchy of legislative sources of the Republic of Kazakhstan on the mass media (Article 5), the definition of "information" (Article 1), and the use of images of people without their consent (Article 2) should be revised. The provisions of Article 20 "Publisher's imprint", Article 31 "The right of refutation and reply" and other articles of the draft law should be specified to add clarity to the provisions of the law and exclude the possibility of their varying interpretations.*

- *The danger that, in contrast to the current Civil Code of the Republic of Kazakhstan and the law on the Mass Media, a possibility will arise for anyone to demand refutation of and reply to information about anyone, not only about oneself (as is the case in other countries), should be eliminated from the wording of the draft law. The procedure for applying the provisions of Article 31 in relation to the procedure for publication of a reply or refutation*

should be clarified. A provision should be introduced into the draft law stipulating that the amount of moral damages levied should not entail a restriction of media freedom.

INTRODUCTION

This memorandum contains an analysis[1] of the submitted draft law of the Republic of Kazakhstan on the Mass Media, the explanatory note thereto, the draft law of the Republic of Kazakhstan on Amendments to Some Legislative Acts of the Republic of Kazakhstan on the Mass Media in light of the Constitution of the Republic of Kazakhstan, the current media legislation of the Republic of Kazakhstan, as well as international standards on freedom of expression. The texts of the Kazakh laws and draft laws were studied in their Russian-language versions.

This draft law of the Republic of Kazakhstan on the Mass Media, developed by journalistic non-governmental organizations, was initiated by a group of deputies of the Majilis of the Parliament of the Republic of Kazakhstan. At the 18 April 2007 plenary session of the Majilis, the deputies accepted it for consideration.

The draft law was first brought to the public eye in the spring of 2005. Subsequently, it has been repeatedly revised by representatives of journalistic NGOs, discussed at public hearings with the participation of parliamentary deputies and representatives of the mass media, considered by the National Commission for Democratization and Civil Society under the President of the Republic of Kazakhstan, and sent to international human rights organizations for expert review. The draft was introduced to the Majilis of the Parliament for the first time in June 2006, but it was recalled after receiving a negative assessment by the Government. The draft law was submitted for a second time in November 2006 and was again recalled, this time "for technical reasons".

The issue of amending Kazakhstan's media legislation has been on the agenda for several years. The current law of the Republic of Kazakhstan on the Mass Media was passed in 1999; since then, it has been repeatedly amended (most recently in July 2006). Thus far, however, these amendments have mainly served to tighten state control over the media rather than to strengthen media freedom. For example, on 5 July 2006, Kazakhstan's President Nursultan Nazarbayev signed the law on Amendments to Some Legislative Acts of the Republic of Kazakhstan on the Mass Media, initiated by the Ministry of Information and passed by Parliament. This law introduced media registration fees, toughened registration requirements, set a three-year ban on holding the office of editor-in-chief for anyone previously held responsible for termination of the media outlet, stiffened media name requirements, prohibiting new publications from taking the names of the ones that had been closed down by court ruling, established mandatory re-registration of media outlets in the event of change of their editor-in-chief, editorial office address or frequency of publication, introduced harsher sanctions for administrative offences to the point of revocation of the registration certificate and a ban on the issue.

The RFOM, as well as a number of international nongovernmental organizations, protested at the time and called on the Parliament not to pass these amendments and on President Nazarbayev – not to sign this law.[2]

After the law was signed by the President of the Republic of Kazakhstan, the OSCE Representative on Freedom of the Media, Miklos Haraszti, proposed that the Constitutional Council of Kazakhstan,

[1] The author of the memorandum is Andrei Richter, Doctor of Philology (Moscow State University Faculty of Journalism), Director of the Media Law & Policy Institute (Moscow), Member of the International Commission of Jurists (ICJ, Geneva), Co-Chairman of the law section and member of the International Council of the International Association for Media and Communication Research (IAMCR).

[2] See the text on the website of the Office of the OSCE Representative on Freedom of the Media: "OSCE Representative on Freedom of the Media asks Kazakhstan to withdraw media law amendments" (http://www.osce.org/item/19551.html).

even though the law had been signed, intervene in the situation because it impaired conditions for the media.

Even without these amendments, the current law on the Mass Media contains a number of vague restrictions as to what can and cannot be published, for example, the obligation not to promote "*disruption*" of state security or violation of the integrity of Kazakhstan (Article 13); it limits the range of people who can be owners or editors-in-chief of media outlets (Articles 7 and 10), imposes a number of "obligations" on journalists, including the requirement that they do not disseminate information that subsequently turns out to be false and that they "fulfil other obligations in accordance with the legislation of the Republic of Kazakhstan" (Article 21).

The expert believes that this approach cannot be regarded as complying with the right to freedom of expression. Kazakhstan is a party to various OSCE commitments that establish the right to freedom of speech and it has ratified the International Covenant on Civil and Political Rights – the principal United Nations treaty on human rights. In accordance with the Covenant, Kazakhstan is required to "adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".[3] This means that Kazakhstan should not only refrain from encroaching on these rights, but should also adopt positive measures to ensure respect for them, including freedom of expression.

The Message of the President to the people of Kazakhstan dated 4 April 2003 (section "Democratization and good governance") notes: "there is now a need for passing a new law on the mass media that would take account of modern reality in ensuring freedom of speech, as well as protection of journalists against pressure exerted by owners, and would tighten the liability of officials for interfering in the activities of the free press". The Explanatory Note to the draft law on the Mass Media adjusts these objectives somewhat. It states that the development of the new law is "dictated by the need to improve media legislation to ensure compliance of media regulation with modern requirements". Section 1 of this memorandum is devoted to the international obligations of Kazakhstan in the sphere of human rights and sets out the international standards with respect to the right to freedom of expression. These standards are established in international law, including the International Covenant on Civil and Political Rights, as well as in various agreements within the framework of the OSCE and the UN, to which Kazakhstan is party. They are contained in decisions of international courts and human rights tribunals, in statements made by representatives of international agencies, the OSCE Representative on Freedom of the Media, as well as in comparative constitutional law on issues of freedom of expression.

Section 2 of the memorandum contains an analysis of the draft law on the Mass Media in light of these standards and provides comments on the current version of this draft law. In addition to the draft law on the Mass Media, amendments are considered to the Code on Taxes and Other Compulsory Payments to the State Budget of the Republic of Kazakhstan, the Criminal Code and the Civil Code, and the Code on Administrative Offences.

The recommendations of the section are based on international law and offer examples of and suggestions for improvement of the draft law.

[3] Article 2 of the International Covenant on Civil and Political Rights. Adopted by resolution 2200 A (XXI) of the General Assembly on 16 December 1966. Came into effect on 23 March 1976. See the full official text on the English-language website of the UN High Commissioner for Human Rights: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

1. INTERNATIONAL STANDARDS IN THE SPHERE OF FREEDOM OF EXPRESSION AND MEDIA REGULATION

1.1. The importance of freedom of expression

The right to freedom of expression has long been recognized as one of the most essential human rights. It is of fundamental importance for the functioning of democracy, a necessary condition for the exercise of other rights and itself constitutes an inalienable element of human dignity. The Universal Declaration of Human Rights (the UDHR), a fundamental document on human rights adopted by the General Assembly of the United Nations in 1948, defends the right to freedom of expression in the following wording of Article 19:

> 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.[4]

The International Covenant on Civil and Political Rights (ICCPR)[5] – a treaty with mandatory legal force that was ratified by Kazakhstan in January 2006 – guarantees the right to freedom to hold and express opinions in a wording very similar to that of the UDHR, also in Article 19:

1. Everyone shall have the right to hold opinions without interference.

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

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

According to Article 4(3) of the Constitution of Kazakhstan, the provisions of this treaty have priority over provisions of the domestic legislation that are incompatible with it. The Constitution of Kazakhstan, in Article 20, defends the right to freedom of expression of opinion.

Freedom of expression is also guaranteed by various documents of the Organization for Security and Co-operation in Europe, with which Kazakhstan has expressed its agreement, such as the Helsinki Final Act of the Conference on Security and Co-operation in Europe,[6] the Final Document

[4] Resolution 217A (III) of the General Assembly of the United Nations Organization, passed on 10 December 1948. A/64, page 39-42. See the full official text in the English language on the website of the United Nations Organization at: http://www.un.org/Overview/rights.html.

[5] The International Covenant on Civil and Political Rights. Adopted by resolution 2200 A (XXI) of the General Assembly on 16 December 1966. Came into effect on 23 March 1976. See the full official text in the English language on the website of the UN Office of the High Commissioner for Human Rights: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[6] Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975. See text in English on excerpts concerning freedom of expression and information on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

of the Copenhagen Meeting of the Conference of the Organization for Security and Co-operation in Europe on the Human Dimension,[7] the Charter of Paris (agreed in 1990)[8], the closing document of the Budapest CSCE Summit of 1994,[9] the Declaration of the Istanbul OSCE Summit.[10] The Charter of Paris, in particular, states:

> Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person… We affirm that, without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, freedom of expression, freedom of association and peaceful assembly, freedom of movement (...).[11]

A similar statement is included in the Istanbul Charter on European Security of the Organization for Security and Co-operation in Europe:

> We [participating States] reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded trans-border and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.[12]

The participants of the Moscow meeting of the Conference of the Organization for Security and Co-operation in Europe on the Human Dimension unambiguously agreed that "independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms", as well as that any "restriction in the exercise of the right of expression of opinion will be prescribed by law and in accordance with international standards".[13]

Global recognition of the importance of freedom of expression has been reflected in three regional systems for protection of human rights – the American Convention on Human Rights,[14] the European Convention on Human Rights (ECHR)[15] and the African Charter on Human and Peoples'

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[7] Copenhagen session of the OSCE Conference on the Human Dimension, June 1990. See, in particular, clauses 9.1 and 10.1 in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[8] The Charter of Paris for a New Europe. Summit within the framework of the OSCE, November 1990. See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[9] Towards a Genuine Partnership in a New Era. Summit within the framework of the OSCE, Budapest, 1994, clauses 36-38. See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[10] Summit within the framework of the OSCE in Istanbul, 1999, clause 27. See also clause 26 of the Charter on European Security, adopted at the same meeting. Text in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[11] See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf, note 11.

[12] See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf, note 13, clause 26.

[13] Moscow meeting of the Conference of the OSCE on the Human Dimension (October 1991), clause 26. See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[14] Adopted on 22 November 1969, coming into effect on 18 July 1978.

[15] ETS Series No. 5, adopted on 4 November 1950, coming into effect on 3 September 1953. Status as of 7 July 2003.

Rights.[16] All of them guarantee the right to freedom of expression. Although neither of these documents or rulings of courts and tribunals based on them enjoy mandatory enforcement in Kazakhstan, they do serve as major comparable examples of the meaning and application of the right to freedom of expression and may be used in interpreting Article 19 of the ICCPR, which is binding on Kazakhstan.

International organizations and courts clearly indicate that the right to freedom of expression and freedom of information constitutes one of the most important human rights. At its first session in 1946, the General Assembly of the United Nations Organization adopted Resolution 59 (I), which, concerning freedom of information in the very broadest sense, states:

> Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.[17]

In this and all subsequent resolutions, freedom of information is understood by the supreme UN authority as "the right to gather, transmit and publish news anywhere and everywhere without fetters" to promote the peace and progress of the world. The key principle of freedom of information from the point of view of this UN resolution is "a moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent". As can be seen from resolution 59 (I), freedom of expression is of fundamental importance in itself and also serves as the basis for the exercise of all other human rights. This has also been reflected in judicial decisions on human rights. For example, the Human Rights Committee (since 3 April 2006 – Council) of the United Nations – an authority set up as an auxiliary body to the General Assembly for supervising observance of the ICCPR – established:

> The right to freedom of expression is of paramount importance in any democratic society.[18]

Declarations of this type abound in decisions of courts and tribunals on human rights throughout the world. The European Court of Human Rights, for example, has stressed that "Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man".[19] As noted in this provision, freedom of expression is of fundamental importance both in itself and as a basis for all other human rights. Full democracy is only possible in societies where information and ideas are allowed and guaranteed to flow freely. In addition, freedom of expression is of decisive significance in revealing and disclosing violations of human rights and combating such violations.

The guarantee of freedom of expression is particularly important with respect to the mass media. The European Court of Human Rights invariably stresses the "pre-eminent role of the press in a State governed by the rule of law"[20]. It goes on to say:

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[16] Adopted on 26 June 1981, coming into effect on 21 October 1986.

[17] United Nations Organization. Sixty-fifth plenary session, 14 December 1946. Official text in English published on the UN website at: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement.

[18] Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.

[19] Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=4647705&skin=hudoc-en.

[20] Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=thorgeirson&sessionid=4691853&skin=hudoc-en.

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[21]

Moreover, free mass media, as stressed by the Human Rights Committee of the United Nations, play a vital role in the political process:

> … the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[22]

In turn, the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality".[23] The European Court of Human Rights has also declared that the media bear the obligation to disseminate information and ideas concerning all spheres of public interests:

> Although the press should not cross the boundaries set for [protection of the interests defined in Article 10(2)[24]]… it is, nevertheless, assigned the mission of disseminating information and ideas of public interest; if the press is set the task of disseminating such information and ideas, the public, for its part, has the right to receive them. Otherwise, the press would be unable to fulfil its function as society's watchdog.[25]

1.2. Restrictions on freedom of expression

The right to freedom of expression is not absolute: in a few specific circumstances, it may be restricted. In view of the fundamental nature of this right, however, the restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. Moreover, the restrictions must pursue legitimate goals; the right to freedom of expression cannot be restricted merely because a certain statement or expression is viewed as being offensive or because it casts

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[21] Castells v. Spain, 24 April 1992, Application No. 11798/85, para. 43. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=castells&sessionid=4648759&skin=hudoc-en.

[22] General comment No. 25 of the Committee of the United Nations Organization for Human Rights, 12 July 1996.

[23] Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism", Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

[24] Article 10 (part 2) reads: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[25] See Castells v. Spain, note 25, para. 43; The Observer and Guardian v. UK, 26 November 1991, Application No. 13585/88, para. 59; and The Sunday Times v. UK (II), 26 November 1991, Application No. 13166/87, para. 65. The texts of the judgments on these cases are to be found in English on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=observer&sessionid=4648759&skin=hudoc-en and http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sunday%20%7C%20times&sessionid=4648759&skin=hudoc-en, respectively.

doubt on accepted dogmas. The European Court of Human Rights has stressed that it is precisely such statements as these that deserve protection:

> [Freedom of expression] applies not only to "information" or "ideas" that are received favourably or are considered as harmless or neutral, but also to those that offend, shock or concern the state or some part of the population. Such are the requirements of pluralism, tolerance and liberalism, without which there is no "democratic society".[26]

Article 19 (3) of the ICCPR sets strict limits to admissible and legitimate restrictions on freedom of expression. It reads:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

This is interpreted as the setting of a three-tier criterion, requiring that the restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[27] This means that vague or not clearly formulated restrictions or ones allowing excessive freedom of action for the executive authorities are incompatible with the right to freedom of expression. An interference should pursue one of the aims set out in Article 19 (3); this list is exhaustive and, consequently, any other interference constitutes a violation of Article 19. An interference must be "necessary" for achieving one of these aims. The word "necessary" has a special meaning in this context. It means that there must exist "an urgent social need"[28] for the interference; that the reasons presented by the state as grounds for the intervention must be "relevant and sufficient" and that the state must demonstrate that the intervention is proportionate to the aim being pursued. As the Committee for Human Rights declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect".[29]

In this connection, it should be recalled that Article 39.1, of the Constitution of the Republic of Kazakhstan reads:

> "Rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system, defence of the public order, human rights and freedoms, health and morality of the population".

1.3. Media regulation

For the purposes of protecting the right to freedom of expression, it is vital that the media have an opportunity to perform their activities independently of state control. This ensures that they function as "the watchdog of society" and gives the population access to a broad range of opinions,

[26] Ibid.

[27] See, for example, resolution of the UN Committee for Human Rights in Rafael Marques de Morais v. Angola, Communication No. 1128/2002, 18 April 2005, para. 6.8.

[28] See, for example, Hrico v. Slovakia, 27 July 2004, Application No. 41498/99, para. 40.

[29] Rafael Marques de Morais v. Angola (note 31, para. 6.8).

especially on issues affecting public interests. Thus, the primary goal of regulating the activities of the media must be to promote development of independent and pluralistic media, thereby ensuring the population's right to receive information from different sources.

Article 2 of the ICCPR makes the state responsible for "adopting such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". This means that it is required of states not only to refrain from violating rights but also to take positive steps to guarantee respect of rights, including the right to freedom of expression. In reality, states are required to create the conditions under which diverse and independent media might flourish, thereby satisfying the population's right to information.

An important aspect of the positive obligations of states to promote freedom of expression and freedom of the media consists of the need to develop pluralism within the media and ensure equal access for all to them. The European Court of Human Rights has noted: "[Dissemination] of information and ideas of general interest…cannot be successfully accomplished unless it is grounded in the principle of pluralism".[30] The Inter-American Court of Human Rights has stated that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media".[31]

The Human Rights Committee of the United Nations for stressed the role of pluralistic media in the process of national construction, noting that attempts to compel the media to engage in propaganda of "national unity" violate the right to freedom of expression:

> The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.[32]

The obligation to promote the development of pluralism also presupposes that there should be no legislative restrictions on those engaged in journalism,[33] and that systems for licensing or registration of independent journalists are incompatible with the right to freedom of expression. In their Joint Declaration of December 2003, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative of the Organization for Security and Co-operation in Europe on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression noted:

> Individual journalists should not be required to be licensed or to register.
>
> …
>
> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by

[30] Informationsverein Lentia and Others v. Austria, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38. The text of the resolution in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=&sessionid=4648759&skin=hudoc-en.

[31] Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism", (note 27, para. 34).

[32] Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.7.

[33] Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism", note 27.

> an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.[34]

Similarly, the three special representatives on freedom of expression criticized the system for registration of the media, since it can easily be subject to abuse for the purpose of suppressing media freedom. The same Joint Declaration of 2003 states:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[35]

In this connection, it is nowadays generally recognized that any state regulatory authorities in the sphere of the media or telecommunications must be completely independent of and protected from interference on the part of political and business circles. Otherwise, the media regulation system may easily be abused for political or commercial purposes. The three special representatives noted:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointment process for members which is transparent, which allows for public input and is not controlled by any particular political party.[36]

[34] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003, see on the website of the Office of the OSCE Representative on Freedom of the Media at: http://www.osce.org/documents/rfm/2003/12/27439_en.pdf.

[35] Ibid.

[36] Ibid.

2. ANALYSIS OF THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN ON THE MASS MEDIA

The draft law under review contains 11 chapters and 40 articles. Below, comments are given on the chapters, with corresponding recommendations for improving the text of the draft law in accordance with the international obligations of the Republic of Kazakhstan and international standards on democracy and freedom of speech, for the purpose of adopting a law that would be enforceable in practice.

2.1. Comments on and proposals to Chapter 1 of the draft law: General provisions

2.1.1. Ban on media monopolization

The authors of the draft law stress, among its merits, the provision envisaging a ban on media monopolization. Indeed, Article 2.8 indicates that

> "Monopolization of any type of media (print periodicals, television or radio programmes or other types of media) shall not be permitted".

The intention to introduce legislative provisions banning media monopolization should be welcomed, but these provisions should not be merely declarative.

It is believed that, in a democratic state, the media should not be used to promote the economic and personal interests of anyone. In addition, one proceeds from the assumption that, in the long run, such "promotion" restricts pubic access to information countering or not complying with these interests, leads to suppression of socially important information, to so-called "information wars" and, as a consequence, is detrimental to the development of media freedom and democracy in general. It is generally accepted that, in order to consolidate media pluralism, it is necessary in a democratic society to guarantee both absolute transparency of ownership and maintenance of a healthy competitive climate. The latter should include not only normative (statutory) measures to restrict concentration and unfair competition, but also organizational measures to promote decentralization of the market.[37] Here, one proceeds from the assumption that media freedom is a personal right, while the owners of the media enjoy only additional rights of ownership to a specific media product.

Recommendation. *The draft law requires revision in order to ensure that it not only in words but also in practice restricts monopolization of the media and ensures the transparency of media outlets necessary for this purpose.*

2.1.2. Abuse of media freedom

In the explanatory note to the draft law, the authors stress among its merits the fact that "the grounds for forcible suspension and termination of media activities are reduced to cases of grievous socially dangerous actions. This rule is the principal incentive to creation of the institution of freedom of speech in our society".

Articles 18.3 and 18.4 of the draft law indicate that the grounds for suspending production and distribution of media is a violation of the requirements of Articles 3.1 and 3.2 of the draft law, while

[37] See, for example, the corresponding resolution of the European Parliament: Resolution on Media Takeovers and Mergers, OJ C68/137-138. 15 February 1990.

those for termination – their repeated violation in the course of a year. The above clauses of Article 3, in turn, prescribe:

> "1. It shall not be permitted to use the media for propaganda and advocacy of forcible change of the constitutional system, of social, racial, national, religious, birth or tribal supremacy or of cruelty and violence.
>
> 2. It shall not be permitted for the media to disclose information constituting state secrets or other secrets protected by law, to advertise or justify terrorism and extremism, narcotic drugs, psychotropic substances and precursors, as well as pornography".

Indeed, the list of grounds for termination (suspension) of media activities has been shortened in comparison with the current law on the Mass Media (Article 13), primarily through the exclusion of such grounds as propaganda and advocacy of war, violation of the integrity of the Republic of Kazakhstan and undermining of state security; re-transmission of television and radio programmes from the foreign media; violation of the procedure for publishing imprint data, sending mandatory free copies of periodicals and storing recordings of a company's own broadcasts. This cannot but alleviate the conditions under which the media function.

On the other hand, the list of grounds for termination (suspension) of media activities has been extended. First of all, there is a ban on *justification* of terrorism and extremism. The concept of "justification" is a vague one and makes it possible for regulatory authorities to take decisions which unjustifiably restrict freedom of expression. Second, grounds for *termination* of activities now include "disclosure in the media of information constituting official secrets or other secrets protected by law", while the current law envisages only *suspension* of the activities of the media in such a case. Such grounds for termination (suspension) of media activities most definitely run counter to the major and undoubtedly positive rule under Article 39 of the draft law:

> "Liability for dissemination in the media of information constituting state secrets or other secrets protected by law shall be borne by the source of the information. The media owner, editor-in-chief (editor) or journalist shall be held liable for disseminating information constituting state secrets or other secrets protected by law in the event that they have received a written notification from the source of the information of the presence in the information provided of data constituting state secrets or other secrets protected by law".

This potential conflict should be removed by eliminating the clause on disclosure of information constituting secrets protected by law from the list of grounds for termination (suspension) of media activities.

In itself, Article 3 of the draft law "Inadmissibility of abuse of freedom of speech, receipt and dissemination of information" might be acceptable in such a law. Yet its application in combination with the article on the grounds for termination (suspension) of media activities presents an unjustified restriction on freedom of the media.

Although freedom of speech is not an absolute right, any restrictions on this right must satisfy the three-tier criterion mentioned in section 1.2 of this memorandum: they must be clearly defined by law pursue a legitimate aim and be necessary in a democratic society. As noted in this section, imprecise restrictions that are formulated too broadly constitute an unlawful violation of freedom of expression. Importantly, moreover, some of the restrictions are defined in the draft law in ambiguous terms and undermine the essence of freedom of expression.

Many definitions in the draft law do not comply with the given criteria of international law. For example, the ban on dissemination of information constituting state secrets or other secrets protected

by law should allow for publication of such materials if this is done in the public interest, such as when they reveal corruption.

To the extent that these restrictions are lawful and necessary, they should be included in the general purpose legislation, such as the civil and criminal codes. Liability of some sort for violating the law may be borne and shall be borne by journalists, editors-in-chief, media owners and outlets, but this liability should be fair and proportional to the offence.

Closure of a media outlet is an excessive form of liability. Forcible termination (suspension) of media activities, even by court ruling, is a procedure that is not permissible in a democratic society.

In this connection, it should be noted in particular that the entire text of the draft law should remind us of the provision of Article 2.6, which is so important for understanding the essence of the new law:

> "Mass media are recognized as an essential public institution for the exercise of everyone's constitutional right to freedom of speech, creativity, receipt and dissemination of information and are under state protection".

Recommendations. *All the restrictions on freedom of speech in the draft law should be reviewed in the light of compliance with standards of international law. By virtue of this, the volume of Article 3 of the draft law "Inadmissibility of abuse of freedom of speech, receipt and dissemination of mass information" should be restricted to the scope Article 20.3 of the Constitution of the Republic of Kazakhstan. The possibility of forcible termination (suspension) of media activities should be excluded from the draft law.*

2.1.3. Language requirements in the mass media

The draft law replicates the current law of the Republic of Kazakhstan on the Mass Media in restricting the use of languages other than the state language.

According to Article 6 of the draft law, "the weekly volume of television and radio broadcasts in the mass media … in the state language shall not be less in terms of time than the volume of broadcasts in other languages. Television and radio broadcasts in the state language shall be distributed evenly in the daily broadcasting grid". Article 19 restricts the volume of re-transmission in a foreign language to 20 percent of the total weekly volume of domestically produced television and radio programmes transmitted by the broadcaster.

These rules have already been subjected to criticism on the part of the Representative on Freedom of the Media. To repeat, restrictions on the use of non-state languages are incompatible with the right to freedom of expression. The choice of the broadcast language – especially by private broadcasters – constitutes an integral part of freedom of expression of opinion, as protected by Articles 19 and 27 of the International Covenant on Civil and Political Rights (ICCPR); it is also the subject of special instructions by the OSCE High Commissioner on National Minorities. In conjunction, Articles 19 and 27 signify that the state is not entitled to restrict use of languages other than the state language in any sphere, with the exception of courts and parliament.

Such an approach corresponds with the position of the UN Committee for Human Rights, which in its resolution on the case of Ballantyne, Davidson, McIntyre v. Canada (1989), concerning the introduction in Quebec Province of legal restrictions on the use of the English language in outdoor commercial advertising, resolved: "The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial

advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression in a language of their choice".[38]

Attention should also be paid to the Guidelines on the Use of Minority Languages in the Broadcast Media and the Explanatory Note thereto, adopted under the auspices of the OSCE High Commissioner on National Minorities. These documents were elaborated with the active participation of the OSCE Representative on Freedom of the Media and were approved at a conference in October 2003 in Austria. The Guidelines state:

> "In regulating the use of language in the broadcast media, States may promote the use of selected languages. Measures to promote one or more language(s) should not restrict the use of other languages. States may not prohibit the use of any language in the broadcast media. Measures to promote any language in broadcast media should not impair the enjoyment of the rights of persons belonging to national minorities".[39]

It is seen here that the restrictions proposed by the draft law on the Mass Media do not comply with the above principle. The objective of the government of Kazakhstan to promote local media products would be better achieved within the framework of the already successful system of placing state orders for products in the Kazakh language.

Recommendations. *The restriction on use in the media of languages other than the state language should be removed. The restriction on re-broadcasting of foreign programmes should be reviewed and replaced by obligations to place state orders for local media products and products in the Kazakh language.*

2.1.4. The requirement to provide "truthful information"

The "truthful information" principle for media activities introduced in the draft law (Article 4) leaves much room for doubt. It should not be forgotten that the media system in a modern society consists not only of quality media, but also of mass tabloid and "yellow" publications and programmes inclined towards exaggeration, sensationalism, provocation and shocking of the public. Introduction into the draft law of a mandatory "truthful information" principle for all media constitutes an unjustified restriction on a large segment of the media. Readers and viewers are quite sceptical about scandalous materials in the first place, treating them as an entertainment component of the media.

At the same time, scandalous exaggerations can and do promote discussion in society of various socially important issues. In its resolution on the well-known case of *The New York Times v. Sullivan* (1963),[40] the US Supreme Court resolved that a lie cannot be protected by the Constitution, however important the material might be for exercising the right to freedom of speech. Yet the Court also introduced and distinguished between two concepts – libel in the interest of the public and "libel per se". It defined libel per se as libel for libel's sake, which is, indeed, not protected by the Constitution. At the same time, free discussion of socially significant issues is important for the country and should be protected.

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[38] Ballantyne, Davidson, McIntyre v. Canada. Communications Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47/D359/1989 and 385/1989/Rev.1 (1993).

[39] See clause 10 of *Guidelines on the Use of Minority Languages in the Broadcast Media* (elaborated and adopted in October 2003 by the international group of experts under the auspices of the OSCE High Commissioner on National Minorities). For the full text in English (including the Explanatory Note), see the website of the Office of the Representative on Freedom of the Media: http://www.osce.org/documents/hcnm/2003/10/2242_en.pdf.

[40] See the full text of the ruling in English at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=376&invol=254.

Moreover, this innovation might run counter to the generally known requirement (from the resolution of the European Court of Human Rights) for protection of shocking information (see section 2.1.).

Recommendation. *The "truthful information" principle mandatory for all media and provided for under the draft law (Article 4) should be abolished.*

2.1.5. Other comments on Chapter 1: General provisions

Certain comments on Chapter 1 might appear to be purely stylistic, but they may be of fundamental importance for freedom of the media in the Republic of Kazakhstan.

(1) Notably, the provision of Article 5 of the draft law on the Mass Media, states:

"The legislation of the Republic of Kazakhstan on the mass media is based on the Constitution of the Republic of Kazakhstan and consists of this Law and other normative-legal acts of the Republic of Kazakhstan regulating relations in the media sphere".

In order to prevent the updated law on the Mass Media from getting bogged down in contradictions with other laws and other normative-legal acts of the country, the wording should be changed to: "The legislation of the Republic of Kazakhstan on the mass media is based on the Constitution of the Republic of Kazakhstan and consists of this Law and other normative-legal acts of the Republic of Kazakhstan *issued in accordance therewith* and regulating relations in the media sphere". Otherwise, conflicts will arise that will far from always be resolved in favour of the rules included under the future law on the Mass Media.

(2) Clause Article 1.22 of the draft law on the Mass Media defines information as information about persons, subjects, facts, phenomena, processes and other events, expressed "in assertive form". The question arises as to whether details expressed in negative or interrogatory form become information. Possibly, the words "in assertive form" should be replaced by "in the form of an assertion" or "in the form of an unambiguous assertion".

(3) Article 2.9 of the draft law on the Mass Media states that images of persons may be used in the media without their consent "without denigration of their honour and dignity, if the depicted person holds a public office, is depicted during public events, at public gatherings or posed for a payment".

For the purposes of clarity of this new rule in media legislation, its meaning should be specified more precisely. It should evidently be a matter of permission to use images of people without their consent "without *intentional* denigration of their honour and dignity, if the depicted person holds public office *or* is depicted during public events, at public gatherings or posed for a payment". Otherwise, it would only be possible to depict people during the holding of public events and at public gatherings. The danger would also arise of abuse of the right to protection of honour and dignity in the event of dissemination *of any hard-hitting images.*

Recommendation. *The provisions of the draft law concerning the hierarchy of legislative sources of the Republic of Kazakhstan on the mass media (Article 5), the definition of "information" (Article 1), and the use of images of people without their consent (Article 2) should be revised.*

2.2. Comments on and proposals to Chapter 2 of the draft law: Mass media

2.2.1. Restrictions on foreign ownership of mass media

As before, the ban on foreign individuals and legal entities and stateless persons directly and (or) indirectly owning, using, disposing of and (or) managing more than 20 percent of the shares (ownership interests, participation shares) in legal entities owning media in the Republic of Kazakhstan or performing activities in this sphere (Article 11.2 of the draft law) still evokes serious doubts.

Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights speak of the right *of every person* to freedom of opinion and freedom of expression (see section 1.1 of this memorandum). It is equally important that Article 2 of the ICCPR (see section 1.3) enjoins every state to ensure respect for the rights guaranteed in it "within its territory and subject to its jurisdiction" without any distinction, including on the basis of national origins. The restriction concerning "citizens" deprives non-citizens, such as refugees or stateless persons, of the right to publish information, which is not affirmed in international law.

Also dubious is the appropriateness of the envisaged 20 percent restriction on the share of foreign ownership of the media. Although restrictions on foreign ownership do sometimes exist in laws on television and radio broadcasting, the given draft applies to *all* media. Broadcasting is a special form of the media, where stricter rules are sometimes justified, above all in connection with the fact that the frequency spectrum allows for a very limited number of broadcasters, although digital broadcasting will, in the future, permit a substantial increase in the number of available earth-based broadcasting channels. The argument of the limited spectrum of frequencies does not appear valid, however, in relation to print media. Besides, even in the television and radio broadcasting sphere, restricting the share of foreign ownership seems inexpedient from the point of view of the inflow of vital foreign investments and knowledge in the sphere of organization of media operations.

While noting the positive character of the abolishment proposed by the draft law on the Mass Media of the prohibition on foreigners from holding the position of editor-in-chief in the media (Article 7.2-1 of the current law on the Mass Media), the following should be remarked: The processes of economic globalization involve also globalization of the mass media, including co-operation and acquisitions of publishing and broadcasting organizations. The development of new technologies operating "above" national rules and restrictions deprive these prohibitions of any sense – foreign persons can, in any case, affect the Kazakh citizens' information field. In view of this, it is held here that the given restrictions on freedom of the media are pointless.

In line with this tendency, restrictions on foreigners creating and owning television and radio broadcasting organizations were abolished in 2006 when the legislation of Moldova on television and radio broadcasting was revised and a new version of the law on television and radio broadcasting of Ukraine was adopted.

Recommendations. *There should be no restrictions on the right to express one's opinion through the media on the grounds of statelessness or a record of previous convictions. The restriction on the share of foreign ownership might deprive the media sector of essential foreign investments and experience and should be reviewed.*

2.2.2. Issues of editorial independence

In order to ensure freedom of the media, the independence of editors' and journalists' creative activities must be guaranteed. Only editorial teams free in their work from interference by owners can satisfy people's requirements for unimpeded receipt and dissemination of information and ideas. Editorial independence does not mean that the editors should not be held judicially liable – above all for violation, in journalistic materials, of various legitimate rights – and primarily in relation to the rights of citizens to private life and respect for their reputation.

The draft law on the Mass Media eliminates from the legislation the reference to the editorial charter of media as the regulator of relations between the owner and the editorial team (Article 7.3 of the current law on the Mass Media). The draft law replaces this with a reference to the right (not obligation!) of a media owner to adopt an internal document "determining the conceptual provisions for the editors' activities, rules of journalistic ethics, staff liability, and demands concerning their cultural level and professionalism". Relations between the owner and journalists are regulated in the draft law "by an agreement in accordance with the labour or civil legislation of the Republic of Kazakhstan" (Article 14.6). The draft law on the Mass Media also speaks of the owner's charter (Article 14.5), i.e. the charter of the legal entity, in no way related to editorial independence and in the elaboration and adoption of which the editorial staff do not participate.

Yet, the editorial charter and the special procedure for adopting it constitute the main mechanism for ensuring independence of journalistic activities.

The adoption in 1999 of a second-generation media law entailed in Kazakhstan the replacement of traditional founder by media owners with greater powers and responsibility; this was accompanied by elimination of legal guarantees for the main elements of professional editorial independence, above all editorial charters. At the same time, the adoption of collective bargaining agreements has not become the norm in the country and the traditions of respect for the independence of the editor-in-chief and of editorial independence that exist in the West have not arisen.

It is noteworthy that introduction into the relations between journalists and media owners (founders) of agreements guaranteeing independence of editorial policy in Kazakhstan would allow to update the mechanisms for protecting the independence of journalists under the new market conditions, incentives to be established for journalists to fulfil their professional obligations, and an optimal solution to be found for ensuring freedom of the media in the prevailing complex relations between owners and editorial teams in the interests of society as a whole. This would also help implement the wishes expressed in the Message of the President to the people of Kazakhstan, dated 4 April 2003, that a new law on the media be passed "that would take into consideration modern reality with respect to ensuring… protection of journalists against pressure exerted by owners". After all, greater journalistic freedom promotes greater information pluralism and ideological diversity in journalism.

Recommendation. *It would be desirable to provide guarantees of editorial independence either by including provisions on the editorial charter into the law on the Mass Media or by creating a system of agreements between journalists and media owners.*

2.3. Comments on and proposals to Chapter 3 of the draft law: Organization of media activities

2.3.1. The requirement for media registration

Articles 15-17 of the draft law on the Mass Media regulate issues of media registration and re-registration. In fact, they prolong the registration regime, the need for which has repeatedly raised serious doubts among OSCE experts. Their comments on the media laws of Kazakhstan and other countries of the region proposed that the registration regime be reviewed, since it provides grounds for abuses to political ends.

The UN Committee for Human Rights has also resolved that to demand registration of media with a circulation of only 200 copies is an infringement on freedom of expression.[41] The registration regime established by the current law on the Mass Media and proposed again in the draft law (Article 17) is applicable to publications with a circulation of merely 100 copies.

The Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression states:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[42]

In addition, in his Special Report, the OSCE Representative on Freedom of the Media also warns of the danger posed by rules on registration.[43]

Thus, the recommendation that the registration system envisaged by the law on the Mass Media should be abolished is confirmed here. The registration system is objectionable because it creates grounds for abuses and, in practical terms, leads to unlawful restrictions on the right to issue periodical publications (including, for example, for refugees and stateless persons – see also section 2.2.1).

Apart from this fundamental problem, doubts also arise with respect to the need to provide information about the publication's main topics, language and distribution territory and the need for re-registration in the same manner in the event of a change in the name of its owner or language (Article 15.9). The requirement that individual applicants submit a document "confirming their right to engage in entrepreneurial activities", and that companies must submit a certificate of state registration as a legal entity, creates additional bureaucratic barriers for future publishers (Article 16.3). In doing so, the legislator was not concerned with, by using application for registration, ensuring fulfilment of the provisions of clause Article 11.2 (ban on foreign individuals and legal entities and stateless persons directly and/or indirectly possessing, using, disposing of and/or managing over 20 percent of the shares of an entity with media ownership) or the provisions of Article 2.8, prohibiting monopolization of the media. If, as they claim, this were merely a

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[41] *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

[42] Joint Declaration, December 2003. See the text on the website of the Office of the Representative on Freedom of the Media: http://www.osce.org/documents/rfm/2003/12/27439_en.pdf.

[43] See "Registration of Print Media in the OSCE Area. Observations and Recommendations". See in English on the website of the Office of the OSCE Representative on Freedom of the Media: http://www.osce.org/documents/rfm/2007/03/23735_en.pdf.

technical procedure, all it would require would be the full name or publication title and contact details. The requirement to provide detailed information about content, including about "the range of topics" covered by the publication, as well as all sorts of bureaucratic barriers, is proof that the registration regime is used for exercising supervision over the media.

The situation is not changed by the fact that, according to the draft law, the media registration procedure is somewhat improved in that, if the relevant authority does not issue a media registration certificate by the legislated deadline or does not deny registration, then on expiry of a specific term a certificate of media registration is deemed to have been received, as it were. This does not make this a mere notification procedure, as might appear at first glance.

Recommendation. *Special registration of media outlets should be abolished as superfluous and restricting media freedom.*

2.3.2. Suspension and termination of media activities and distribution

The possibility of suspending and terminating media activities, as envisaged by the provisions of Articles 18 and 3 of the draft law on the Mass Media, has already been commented on in section 2.1.2.

Recommendation. *The possibility of forcible termination (suspension) of media operations should be excluded from the draft law.*

2.4. Comments on and proposals to Chapter 4 of the draft law: Media distribution

2.4.1. Restriction on re-broadcasting of foreign programmes

Article 19.4 of the draft law on the Mass Media repeats the current prohibition in Kazakhstan (under Article 14 of the current law on the Mass Media) on re-broadcasting of foreign media products in a volume of over 20 percent of the total weekly volume of domestically produced television and radio programmes. The comments on these rules are covered by the scope of those already expressed above (see 2.2.1 and 2.1.3).

A restriction on re-broadcasting cannot be justified as necessary in a democratic society. The Kazakh Government's objective to promote domestically produced media products would be achieved more appropriately within the scope of a licensing system, for example, by including a licence provision enjoining a station to broadcast a minimum volume of domestically produced programmes, as well as by providing non-discriminatory subsidies for domestic broadcasting output. Even if the quotas for domestically produced content are introduced as a condition for obtaining a licence, the 20 percent limit on all foreign rebroadcasts may prove to be unrealistically low: such a limit would prevent a station from re-broadcasting foreign media programmes even between midnight and 7:00 am.[44]

Recommendations. *The restriction on re-broadcasting of foreign television and radio programmes should be reviewed. The intention of the Government of Kazakhstan to promote domestic media products would be better implemented within the scope of the existent successful system for placing state orders for such products.*

[44] Memorandum to the Republic of Kazakhstan Law on the Mass Media (2006) http://www.article19.org/pdfs/analysis/kazakhstan-media-la.pdf.

2.4.2. Other comments on Chapter 4

It would be desirable to specify the meaning of Article 20.2 of the draft law on the Mass Media. Is it possible to distribute radio programmes accompanied by an identification announcement no less than four times a day *in a row*, or should this programme identification be spread out *evenly* during airtime? Considering that the radio airtime of a given radio channel may consist of a set of radio programmes (in the sense of the main concepts of the draft law), would it not be better to leave in place the rule stipulating announcement of the programme's name (identification) each time it comes on air, as prescribed in Article 15.2 of the current law on the Mass Media?

Recommendation. *The provisions of Article 20 "Publisher's imprint" should be specified to add clarity to the provisions of the law and exclude the possibility of their varying interpretations.*

2.5. Comments on and proposals to Chapter 5 of the draft law: Organization of television and radio broadcasting

There are no substantive remarks on the articles of Chapter 5 of the draft media law. It is peculiar that the entire chapter and the individual Article 22 have the same title: "Organization of television and radio broadcasting". To facilitate enforcement of the law, one of these titles should probably be changed.

2.6. Comments on and proposals to Chapter 6 of the draft law: Licensing of television and (or) radio broadcasting

2.6.1. Licensing authority

Article 26.2 of the draft law on the Mass Media reads that "licensing of television and (or) radio broadcasting using the radio frequency spectrum shall be performed by an authorized body", which corresponds to the provision of Article 4.3 of the current law on the Mass Media. Currently, this "authorized body" is the Committee for Information and Archives of the Ministry of Culture and Information of the Republic of Kazakhstan. The draft law proposes that tenders for receiving frequencies will be held by a specially created Commission. The Commission is, accordingly, to consist of an equal number of representatives of state bodies, media and public organizations. The procedure for the creation, operation and termination of the Commission shall be established by the Government of the Republic of Kazakhstan (Article 26.3).

Of serious concern is the fact that the main instrument for licensing television and (or) radio broadcasting is and, as the draft law proposes, will remain in the hands of a government department, without any guarantees of its independence. The members of the body determining the winners of tenders to receive licences will, most likely, be appointed by a minister – a member of the Government. The term in office, selection criteria, appointment and dismissal from the relevant positions are not established; the criteria for awarding licences are vague; openness of the work of the licensing authority is not guaranteed; licensing activities are financed out of the state budget; accountability of the licensing authority to parliament and the public is not regulated and, most likely, does not exist. The wording of the draft law on the special commission (Article 26.3 and 26.4) does not specify its status within the system of state bodies, its powers and the procedure for its composition of "an equal number of representatives of state bodies, media and public organizations".

Proceeding from the letter and spirit of international treaties,[45] it is considered here that, in a democratic state, licensing does not, in itself, hamper freedom of the media. Moreover, licensing could and should develop media freedom. It is in the public interest to allocate frequencies to those applicants offering the best selection of services. In addition, the granting of licences makes it possible to ensure that the activities of broadcasters comply with certain social objectives, such as protection of the interests of minors and guarantees of political and informational pluralism. This means there is a need to ensure effective regulation of this sector, which would guarantee both freedom of the media and observance of a balance between this freedom and other legitimate rights and interests.

An important condition for independence of the licensing authority is *openness* of its activities. Openness of meetings and accessibility of their minutes for the public and (or) journalists comprise a major component of public control over decisions made by such an important body. All resolutions, decisions, orders, notes and other documents of this body must be open for familiarization.

Recommendations. *The draft law should clearly specify legal guarantees of the independence of the television and (or) radio broadcasting licensing authority from the institutions of state power and its accountability to civil society, openness of the licensing and control procedure. There should be legal safeguards against any possible conflict of interest between the members of the licensing commission and business and political representatives.*

2.6.2. Licensing procedure and principles

Article 26.2 of the draft law on the Mass Media states that "the procedure for issuing licences for television and (or) radio broadcasting shall be approved by the Government of the Republic of Kazakhstan". In connection with this provision, it should be noted that, first of all, it repeats, word for word, the provision of Article 8.3 of the draft law and is therefore superfluous.

Second, without objecting to this authority of the Government of the Republic of Kazakhstan, *the principles and criteria* for licensing television and radio broadcasting in accordance with which the Government is to approve the licensing *procedure* should be introduced into the future law on the Mass Media. The criteria that the licensing authorities use in awarding licences are an important indicator of the licensing procedure serving the public interest and freedom of the media. The criteria must always be clearly and unambiguously spelled out in the law. This will prevent subjectivism and any political or economic pressure being brought to bear on the licensing authority.

In international practice of media licensing, the following criteria are applied for determining tender winners:

- Diversity of media ownership on the given market.
- Consideration of the interests of the audience.
- The proposed programme concept.
- Previous work experience.

[45] See, for example, Recommendation No. Rec (2000) 23 of the Committee of Ministers to the member states of the European Union on the independence and functions of regulatory authorities for the broadcasting sector on the website of the Institute for Problems of Information Law at: http://www.medialaw.ru/laws/other_laws/european/rec2000-23.htm

- Effective use of the frequency.
- Availability of its own autonomous power generator (for radio stations).
- Maintenance of existing broadcasting.
- Initiative on the part of the applicant.
- Previous broadcasting on the given frequency.

In addition to the criteria for selecting licensees, methods for controlling the use of licences and independence of the licensing authority, the *term* for which licences are issued and the terms and conditions for its extension are of importance.

A short term not only hampers television and radio companies in recovering their initial investment, but also in the event of indeterminacy over extension (prolongation) of their licence for a new term, makes them excessively dependent on the licensing authority. Considering that the licensing authority in Kazakhstan is dependent on the state authorities, the licensing criteria are vague, and advantages of existing broadcasters are not specified in the legislation, a short term of licence validity will make private broadcasters entirely dependent on the political situation and the interests of the ruling circles.

A short licensing term will have an adverse effect not only on the economic interests of the broadcasters, but also, more importantly, on the development of freedom of the media. What is meant here is not only the dependence of broadcasting on the state authorities. Long-term planning of broadcasting and substantial investments in production and purchase of programmes help to maintain stable relations with the audience. In striving to preserve confidence in these relations, the broadcaster tries to satisfy fully its demand, above all by means of developing informational and ideological diversity and high professional journalistic standards.

As far as known, the licensing term for television and radio broadcasting in Kazakhstan is set for 3 years.

The issue of the term of licence validity would not, of course, be so important if its *extension* were not associated with excessive or indeterminate requirements. By virtue of this, clear and unambiguous rules for prolonging licences set in the law on the Mass Media should be included in the principles of licensing for the sake of media freedom.

Unfortunately, the discussed issues were not reflected in the draft law.

Recommendation. *The conditions for licensing of television and radio broadcasting as a factor behind freedom of the media are: impartiality, competence and non-application of political criteria by the national licensing authority, as well as predictability of the rules for obtaining a licence, consideration of the interests of the audience, and extended licence validity. The draft law should provide legal guarantees of these conditions.*

2.7. Comments on and proposals to Chapter 7 of the draft law: Relations between the mass media and individuals and organizations

2.7.1. Protection of honour and dignity

Under international law, publication of a refutation or a reply is seen as a major instrument for protecting honour and dignity and as a basic element of the right to full and objective information. According to the United Nations,

> "…as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been demonstrated to be false or distorted, follow the customary practice of transmitting through the same channels, or of publishing, corrections of such dispatches".[46]

Article 31.1 of the draft law on the Mass Media states:

> "Everyone shall have the right to demand refutation of information denigrating the honour, dignity or business reputation of an individual and the business reputation of a legal entity, as well as to demand publication of a reply in the event of dissemination of information that is false but does not denigrate the honour, dignity or business reputation of the person".

Along with the adoption of the new law on the Mass Media, law-makers propose to amend the Civil Code of the Republic of Kazakhstan, in particular the provision of Article 143.1 of the Civil Code corresponding to Article 31.1 of the draft media law.

These amendments seem dangerous since, in contrast to the current Civil Code of the Republic of Kazakhstan and the law of the Republic of Kazakhstan on the Mass Media, they create the possibility for *anyone* to demand refutation and reply in relation to information *about anyone*, and not only *about oneself*, as is the case in other countries. In this sense, the current version of Article 143.1 ("Any citizen or legal entity shall have the right to demand in court refutation of information denigrating its honour, dignity or business reputation unless the disseminator of said information proves that it is true") and the abolished clause Article 143.3 ("Any citizen or legal entity in relation to which the media have published information infringing on its rights or legitimate interests shall have the right to a free publication of reply in the same media") of the Civil Code of the Republic of Kazakhstan appear preferable.

In contrast to printed publications and television and radio programmes (Article 31.2), the draft law does not determine the procedure for placing a refutation in the so-called online media. Neither are there any instructions provided concerning the procedure for or volume of publication (broadcast) of a reply in the media. This results in the lack of legal clarity into the procedure for applying the provisions of Article 31.

The draft law suggests that courts determine the size of moral damages proceeding from the principles of fairness and sufficiency (Article 31.7). As a result, there is a contradiction with the provision of Article 952.2 of the current Civil Code of the Republic of Kazakhstan, which talks of other grounds not mentioned in the draft law. It is evident that the courts will be inclined to make

[46] United Nations General Assembly. A/RES/630 (VII). Seventh session 630 (VII). Convention on the International Right of Correction (Adopted at the 403rd plenary session of 16 December 1952). The official text in English can be found on the website of the United Nations: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/079/73/IMG/NR007973.pdf?OpenElement.

rulings in accordance with the Civil Code in this matter. For the purpose of introducing clarity into the practice of implementation, ambiguity should be avoided with respect to determining the amount of moral damages. At the same time, in the spirit of the objectives of the draft law on the Mass Media, it should be supplemented with a provision in accordance with which the amount of moral damages to be levied should not entail restriction of media freedom. Such a provision would be confirmed by the provisions of Article 31.6 of the draft law and the corresponding amendments to the Tax Code (see below).

A major merit of the draft law on the Mass Media is the provision of Article 31.5, which reduces the limitation period for claiming refutation of information denigrating honour, dignity or business reputation, or publication of a reply in the media, to one year from the original publication of such information in the media. This does not run counter to Article 178 of the Civil Code of the Republic of Kazakhstan ("Statutes of limitations"), which, while establishing a general limitation period of three years, also envisages that "for individual types of claims, legislative acts may establish special statutes of limitations that are shorter than the general one". At the same time, unfortunately, it is not established whether it is possible to file a suit claiming reimbursement for losses and moral damages inflicted by publication of denigrating information within the previous three-year period.

The provision of Article 31.6 and corresponding amendments to the Tax Code of the Republic of Kazakhstan should be recognized as another merit of the draft law on the Mass Media. These provisions determine the amount of the state duty levied on filing statements of claim for moral damages submitted to a court of law as a percentage of the amount of the claim filed.

Finally, the provision of Article 31.1, introduced into the draft law to the effect that "information expressed as personal views, convictions, opinions or critical judgements shall not be subject to refutation", will have a major positive effect.

The three innovations mentioned above will offer more protection to the media against unjustified suits in protection of honour, dignity and business reputation.

Recommendations. *The danger that, in contrast to the current Civil Code of the Republic of Kazakhstan and the law on the Mass Media, a possibility will arise for anyone to demand refutation of and reply to information about anyone, not only about oneself (as is the case in other countries), should be eliminated from the wording of the draft law. The procedure for applying the provisions of Article 31 in relation to the procedure for publication of a reply or refutation should be clarified. A provision should be introduced into the draft law stipulating that the amount of moral damages levied should not entail a restriction of media freedom.*

2.7.2. Relations between the mass media and state authorities

An important merit of the draft law on the Mass Media should be seen in the provision of Article 30.10, which demands that state authorities and officials whose activities are criticized in the media provide the media, within a period of ten days, a written explanation on the essence of criticisms. This will help to enhance the media's efficiency and prestige as an institution of civil society.

The shortening of the time allowed to state authorities and other organizations for providing an answer to a request for information on the part of the media from a month (for issues "requiring additional research and verification") in the current law (Article 18.2-1) to 10 days in the draft law (Article 30.5) should be welcomed. This innovation will facilitate the work of the media, strengthen public control and reflect the practice in other former Soviet republics.

2.8. Comments on and proposals to Chapter 8 of the draft law: The rights and obligations of journalists

2.8.1. The rights of journalists

Journalists' rights listed in the draft law on the Mass Media for the most part replicate the provisions of the current law. These rights naturally facilitate the work of journalists, but the possibility of improving them further should not be overlooked.

It is recommended that the provision concerning the right to confidentiality of information sources (Article 32.1.12) be brought further into line with international standards. In accordance with the draft law, any court may issue a directive to disclose a source of information on any grounds. This violates the minimum standards established by human rights courts and regional human rights bodies, according to which a court may require journalists to reveal their sources as a measure of last resort, i.e. only if this is necessary to investigate a grave crime or for the defence of a person involved in criminal proceedings.

Finally, it must be noted that the provision included in both the draft law and the current law on the Mass Media concerning the right of the *journalist* to keep his/her information sources secret is not supplemented by a provision on the right of the *editorial board* to keep information sources secret; this matters, as the disclosure demand may be addressed to the editors rather than the journalist.

It is also recommended that a similar right be added, indicating that the police are not entitled to search editorial premises or to seize journalistic materials without a court warrant, and that a court may issue a search or seizure warrant only in a case of absolute necessity during an investigation of a grave crime or for the defence of a person accused of committing a crime and if no other materials of equal evidential value can be obtained by other means.[47]

It is important to specify the formulations of other rights of journalists. The verb "refuse" in the continuous form should be replaced by a non-continuous form in the provision of Article 32.1.11: "a journalist shall have the right of refusing to publish materials in his/her own name or pseudonym if its content, after editorial corrections have been introduced, runs counter to the personal convictions of the journalist". It would be desirable to supplement the provision of Article 32.1.10 with the right of the journalist to disseminate information and materials not only in his/her own name or pseudonym, *but also anonymously.*

Recommendations. *The provision of the draft law on the right of journalists not to reveal their sources of information should be specified, making this the measure of last resort which a court might apply. The rights of the editorial board to secrecy and to protection of editorial premises from search and seizure of journalistic materials without a court order, issued only in cases of absolute necessity, should be added to the draft law.*

2.8.2. The obligations of journalists

Journalists' obligations listed in the draft law on the Mass Media for the most part replicate the provisions of the current law. From the point of view of international standards, one cannot agree with some of them. The obligations envisaged by Article 33.1.2 of the draft law "not to disseminate

[47] See resolution of the European Court of Human Rights *Roemen and Schmidt v. Luxembourg*, 25 February 2003, Application No. 51772/99). The text of the judgment in English can be found on the website of the European Court of Human Rights at:
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=roemen&sessionid=4648759&skin=hudoc-en.

false information" seems to impose an absolute legal requirement always to publish "truthful information". This is simply impossible: even the best journalists sometimes make mistakes. The usual practice in democratic countries in this connection is for questions relating to the truthfulness of information to be self-regulated. Serious arguments against this provision are also presented in section 2.1.4 (Requirement to provide "truthful information"), which comments on Article 4 of the draft law.

Article 33.1.5 envisages the obligation not to disseminate information or materials produced using hidden audio or video recorders or cameras, with the exception of cases when this is necessary to protect the public interest and when measures are taken to conceal the identity of individuals and (or) the demonstration of the recording is based on a court order. This obviously and unfortunately leaves no opportunity for the journalist to violate this obligation (1) in the absence of infringement of anyone's rights in the recordings, (2) in any case when measures are taken to prevent identification of the image (voice) of the recorded person, as well as (3) in the event of consent to this on the part of the persons photographed or filmed by a hidden camera.

While specifying the wording of Article 33.1.5, it is equally important to define the concept of "protection of the public interest", applied in the draft law. This is particularly important in that Article 39.1.4 relieves from liability if the editor and the journalist acted "in the public interest". Without a definition of what this interest is and what "protection" of the public interest means, the implementer of the law will be unable to apply these provisions and they will become mere empty phrases.

Recommendations. *The obligation of the journalist "not to disseminate false information" should be removed from the draft law. The draft law should define the concept of "protection of the public interest" which is very important in journalistic practice. Other circumstances allowing hidden cameras to be used should be specified.*

2.9. Comments on and proposals to Chapter 9 of the draft law: Accreditation of journalists

The right to accreditation is protected by Article 19 of the ICCPR as one of the integral rights to freedom of expression. As in the case of violation of freedom of expression, any accreditation procedure must be checked for legality according to three criteria. In particular, this procedure must pursue a legitimate aim, must be in accordance with the law and must be necessary in a democratic society. While the accreditation system may be necessary for restricting access on the grounds of security or lack of space, as well as for exercising control in the event of open access, in order that the media may fulfil their functions, it should not allow any infringement on freedom for political purposes. Accreditation should be automatic and the number of journalists may be restricted only in the event of real and obvious problems in accommodating them.

In October 2006, the OSCE Representative on Freedom of the Media presented a Special Report on accreditation of journalists in the OSCE region.[48] The Report contains the following recommendations:

- Accreditation should not be used as a general work permit for journalism, only as facilitator of the work of journalists. Governments should facilitate the work of journalists by adopting procedures that enable journalists to work in the host country, including the timely issue of

[48] Special Report "Accreditation of journalists in the region of the OSCE: Observations and Recommendations." See in English on the website of the OSCE Representative on Freedom of the Media: http://www.osce.org/documents/rfm/2006/10/21826_en.pdf.

visas. Governments should abolish regulations that pose a required further layer of permission to media professionals.

- Accreditation should not be the basis on which governmental bodies decide whether to allow a particular journalist to attend and cover a public event. Further, the threat of revocation of the accreditation for an event should not be used as the means to control the content of critical reporting.

- The guidelines for issuing accreditation should be drawn up with the aim to promote pluralism, should be transparent and available to the public and should be applied impartially and without arbitrary exceptions. Refusal of accreditation should be accompanied by the right on the part of the applicant to dispute the reasons for the refusal.

- Accreditation is the means to promote diverse reporting and should not be made dependent on unrelated factors, such as education or training. Legislation that has a permissive nature over the issuance of accreditation should be re-examined in order to maintain pluralism in the press corps.

The provisions of Chapter 9 of the draft law should be edited in order to ensure their unambiguous interpretation in the interests of freedom of the media. For example, Article 35.3 of the draft law, which repeats Article 22.2 of the current law on the Mass Media word for word, states that:

"State authorities and organizations with which a journalist is accredited must notify him/her in advance of meetings, conferences and other events and provide him/her with verbatim records, minutes and other documents".

It is proposed that it be specified *which specific* documents should be provided to the journalist, wording this part of the provision, for example, thus: "…as well as documents used by participants in these events in their decision-making". It would also be appropriate to replace the words "in advance" with "in good time", to ensure that journalists are notified of the holding of the event not simply *before* it, but in time for them to be present.

Article 35.5 of the draft media law, which introduces the important provision that "A journalist may have his/her accreditation revoked by court ruling if he/she violates the accreditation rules", must be amended. First of all, the word "only" should be added after "accreditation revoked". Otherwise, this rule merely gives an example of the situations in which a journalist may have his/her accreditation revoked and does not close the list of such situations. Second, it must be specified whether a journalist's accreditation can be revoked by *court ruling in connection with his/her violation of the accreditation rules* or by *court ruling per se* (on what grounds?) and whether it can be revoked *without a court ruling* if a journalist has violated the accreditation rules. It should be noted that Kazakhstan has no unified or model accreditation rules, which allows unjustified restrictions to be introduced into the rules used in practice. Perhaps it would be worthwhile to indicate, additionally, in the draft law that the accreditation rules should not contravene the laws of the Republic of Kazakhstan.

The word "own" should be deleted from the provision of Article 35.2 since the right of ownership does not apply in Kazakhstan to journalists (people), but only to the media themselves.

Recommendations. *The accreditation procedure should apply automatically with respect to all applicants. Withdrawal of accreditation should be permitted only for serious and repeated violations of the public order. Measures should be taken to specify the provisions of Article 35 in order to apply the rules governing accreditation for journalists in full, as envisaged by the draft law and in accordance with the objectives of the ICCPR.*

2.10. Comments on and proposals to Chapter 10 of the draft law: Liability for violation of legislation on the mass media of the Republic of Kazakhstan

2.10.1. Grounds for liability

Article 38.1 of the draft law on the Mass Media envisages liability for disseminating any "false information". This provision constitutes an unjustified restriction on media freedom, as mentioned previously (see sections 2.1.4 and 2.8.2) and should be eliminated.

The same article of the draft law, duplicating Article 20 of the Constitution of the Republic of Kazakhstan and Article 3.1 of the draft law word for word, refers to the legal ban on disseminating information and materials constituting propaganda of cruelty and violence. Violation of this ban entails liability under Article 274 of the Criminal Code of the Republic of Kazakhstan. It is unlikely, however, that the law enforcer will be able to determine what specifically constitutes the subject of propaganda of cruelty and violence. By way of Article 1.17, the draft law for the first time strives, albeit without success, to provide such a definition in Kazakhstan's media legislation. Identification of such materials through their ability to "spread among people violent or cruel behaviour" cannot be proven and does not help to combat violence and cruelty in society. Thus, the provisions of the law (and of the Constitution) remain declarative in nature.

Recommendation. *The newly introduced provision on liability for dissemination of any "false information" should be removed from Article 38 of the draft law. Other provisions of this article should be specified.*

2.10.2. Grounds for release from liability

The novel provision of the draft law on the Mass Media releasing journalists from liability for quoting people verbatim (Article 39.1.4) cannot but be welcomed. At the same time, it should be specified whether this applies to statements made by *anyone* or only, for example, state officials.

The provision of Article 39.2 on liability of the media owner, editor or journalist for disseminating information constituting state secrets or other secrets protected by law if they receive a written notification from the information source that the information provided includes state secrets and other secrets protected by law, raises the question as to the extent that such liability complies with the requirements to protect the public interest. How this contradiction might be resolved is discussed in section 2.1.4.

3. COMMENTS ON AND PROPOSALS TO THE DRAFT LAW ON AMENDING CERTAIN LEGISLATIVE ACTS OF THE REPUBLIC OF KAZAKHSTAN ON THE MASS MEDIA

3.1. Decriminalization of libel and insult offences

A major achievement of the draft law consists in decriminalization of libel and insult offences, in line with the global standards for exercise of freedom of speech in a democratic state. Articles 129, 130, 319, 320 and 343 of the Criminal Code of the Republic of Kazakhstan lose their effect. The OSCE Representative on Freedom of the Media and other international organizations insist that libel and insult provisions should be excluded from criminal law. In the former Soviet republics, these provisions have already been completely excluded from the criminal codes of Estonia, Georgia, Moldova and Ukraine.

At the same time, the Criminal Code of the Republic of Kazakhstan retains Article 318 "Infringement upon the honour and dignity of the President of the Republic of Kazakhstan and obstruction of his activities". The note to this article states that public statements containing criticisms of the policy pursued by the President do not entail criminal liability. In spite of this, law enforcement practice has unjustifiably expanded the elements of this crime. A broad sphere is created for subjective assessments in determining its essence, thereby preventing the journalist from seeing the scope of the ban clearly in advance. Moreover, the difference between acceptable criticism, i.e. criticism directed against political actions on the part of the head of state, and insults worthy of condemnation, i.e. insults directed against the head of state as an individual, is difficult to prove, since insults with respect to political actions inevitably affect the individual, too.

Recommendation. *Alongside exclusion of other articles on criminal liability for libel and insult, Article 318 "Infringement upon the honour and dignity of the President of the Republic of Kazakhstan and obstruction of his activities" should be removed from the Criminal Code of the Republic of Kazakhstan as it creates unjustified restrictions on journalistic activities.*

3.2. Amendments to administrative law

Another positive example of the proposed amendments is the introduction of administrative liability for unlawful refusals to provide journalists with information, the dissemination of which is not limited by law, or provision of incomplete or deliberately false information, unlawful violation of the deadlines for providing the requested information, as well as unlawful categorization of information of public significance as information with restricted access (Article 347-1 of the Code of Administrative Offences of the Republic of Kazakhstan).

Another merit of the draft law is elimination of the possibility of confiscating media products when certain administrative offences have been committed (Articles 349 and 350 of the Code of Administrative Offences of the Republic of Kazakhstan) and exclusion of liability of media organizations for violation of the procedure for providing mandatory copies (Article 348 of the Code of Administrative Offences of the Republic of Kazakhstan). At the same time, the possibility remains of suspending publication (broadcasting) of a media outlet for a period of up to three months for violation of Articles 342, 349 and 350 of the Code of Administrative Offences of the Republic of Kazakhstan.

Recommendation*. The possibility of suspending the issue (broadcast) of a media outlet should be removed from the Code of Administrative Offences of the Republic of Kazakhstan.*