MEMORANDUM

on

the Draft Law of the Republic of Kazakhstan

on Mass Media

by

ARTICLE 19
Global Campaign for Free Expression

February 2004

I. Introduction

This Memorandum analyses the draft "Law of the Republic of Kazakhstan on Mass Media" (current Draft). Our comments are based on an unofficial English translation of the draft Law which was returned to the Mazhilis (lower house) on 5 February 2004, including the amendments recently introduced by the Senate.[1]

ARTICLE 19 has already analysed an earlier version of this draft Law (we will refer to this as the previous Draft) and our earlier Memorandum, from September 2003 (2003 Memorandum),[2] expressed serious concerns regarding the implications of this draft for freedom of expression. Unfortunately, these concerns have not been addressed in the current Draft. Indeed, in our view, the current Draft actually represents a retrograde step, retaining virtually all the defects of the previous Draft,[3] and adding to these a number of serious new defects, inimical to freedom of expression. The onerous systems for accreditation, licensing and registration, overseen by government bodies that lack the independence required of bodies which

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

[2] The 2003 Memorandum can be found on the ARTICLE 19 website at: http://www.article19.org/docimages/1669.zip.

[3] We do note one positive change. While the previous Draft limited the right of refutation to citizens (and legal entities), the current Draft extends the right to all "individuals".

exercise powers over the media, have all been retained. The current Draft, however, also creates new obstacles for the mass media in covering certain matters of clear public interest, such as pre-trial activities, requires the mass media to provide a right of refutation to government agencies and officials in inappropriate circumstances, foresees the possibility of journalists losing their accreditation, and has withdrawn certain fundamental protections contained in the previous Draft relating to the tender process for broadcast licenses. We detail these and certain other matters of concern below.

We are aware that the Kazakh authorities claim that their country is in transition to democracy and that time is needed to bring their laws and practices fully into line with international standards. Regardless of the merits of this argument, the current Draft not only fails to move Kazakhstan in the right direction in this regard, but actually seriously exacerbates the situation regarding the right to freedom of expression. As such, it represents an extremely unfortunate step backwards, particularly in light of the fact that Kazakhstan signed the *International Covenant on Civil and Political Rights* (ICCPR)[4] in December 2003, Article 19 of which guarantees freedom of expression. We therefore urge the Kazakh authorities to abandon this law altogether and, instead, to work on developing legal mechanisms which protect and promote the right to freedom of expression.

This Memorandum is divided into two parts. In Section II, we briefly review the most fundamental of our criticisms from the 2003 Memorandum. As noted, the criticisms articulated in that Memorandum apply virtually in full to the current Draft. In Section III, we analyse the new material in the current Draft. In both cases, our analysis is based on international standards regarding the right to freedom of expression.[5]

II. Key Concerns Retained from the Original Draft

A number of concerns which we noted in the 2003 Memorandum remain in the current Draft. The draft Law, in conjunction with an apparently wide range of other legislation adopted by reference, attempts to regulate every aspect of all media. It does so without taking into account the very different requirements and characteristics of the various media, ranging from the Internet to print to television and radio broadcasters, and from private to public media. The result is an unwieldy, inappropriately delineated and improperly restrictive regime.

First, the draft Law imposes unacceptable restrictions on content in certain vaguely delineated categories. For example, it prohibits publication of information that could "undermin[e] the security of the state" without requiring the degree of nexus to a specific harm that is required under international law. An appropriate nexus requirement in this context would restrict any prohibition to information which threatens to cause imminent violence or other harm. It prohibits the publication of information constituting "an excuse for … terrorism" without giving any guidance as to what is covered by the term "excuse", thereby inviting substantially and abusively overbroad interpretations of this term. It prohibits the dissemination of "pornography"

[4] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

[5] Section II of the 2003 Memorandum outlines these standards, with special focus on the *International Covenant on Civil and Political Rights* and the related commitments of OSCE member countries, including Kazakhstan. Reference may be made to that Memorandum for these standards.

as well as the dissemination of information relating to a "cruelty or violence cult" – but it provides definitions of these broad terms which potentially include much legitimate expression. Finally, it appears to prohibit *any* discussion of drugs, notwithstanding the obvious public interest in an objective discussion of such matters.

Second, the draft Law includes onerous registration and licensing schemes. For example, it requires virtually all media (including, particularly inappropriately, Internet publishers) to obtain registration certificates. Among many other things, a mass medium must, as part of the process of applying for registration, disclose such substantive matters as its source of funding and the main topical area that it will cover.[6] In addition to the obligation to register, *broadcasters* are subject to a further requirement of acquiring a license.[7]

It is generally recognised that it is appropriate to require broadcasters to obtain a licence to operate. However, any such scheme – as well as any registration scheme – must, among other things, contain a range of safeguards, none of which is present in the draft Law. The most important of these safeguards relate to the administrative body or bodies which oversee the registration and licensing regimes, in this case, the so-called "authorised agency".

It appears that the authorised agency is responsible for both the registration and licensing regimes.[8] Article 8 would seem to vest in the agency wide-ranging powers, including the power to grant or refuse registration, to suspend or revoke registration certificates,[9] to license television and radio broadcasters, to "control compliance by a licensee with the license terms and conditions and make decision to suspend the licence", and to "monitor the compliance of products of mass media with the existing legislation".[10]

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[6] As noted in the 2003 Memorandum, a modest registration scheme, restricted to purely technical matters such as name, address and details about the founder, may not run afoul of international law. Even so, such a scheme is generally unnecessary and is almost always subject to abuse. For this reason, many countries do not require registration in any form, at least as regards print media.

[7] As we noted in the 2003 Memorandum, it is inappropriate and unnecessary to subject broadcasters to both a registration and a licensing regime.

[8] Article 23(3) of the current Draft refers to the "Commission set up for conducting open tenders for television and radio broadcasting", members of which are "subject to the approval by the Government". The current Draft does not specify whether this Commission is different from the authorised agency or not. In any case, the need for independence applies to all bodies with regulatory powers over the media.

[9] As noted in the 2003 Memorandum, revocations of registration, at least as regards print media, are, in our view, never appropriate.

[10] We say that Article 8 "seems" to vest in the agency such powers. We note, however, that there is considerable confusion in the current Draft, carried over from the previous Draft, as to whether the authorised agency is in fact empowered to revoke or suspend registrations and licences. On the one hand, as just noted, current Article 8 appears to grant the agency suspension and revocation powers. Moreover, according to our sources, the national legislation on licensing empowers the authorised agency to suspend a licence for as long as six months in the event that it finds that a mass medium has violated any of the licence conditions. On the other hand, Article 12(11) of the current Draft provides that only a court may "invalidate" a registration (upon petition filed by the authorised agency). Article 15(3) further provides that the "[i]ssuing or broadcasting of a mass medium may be suspended or terminated by the owner's decision *or court judgment except for cases provided for by this Law*" (emphasis supplied). And Article 24(4) provides that a license "shall be revoked if sought so by an action duly brought by the authorized agency" pursuant to the established procedure.

As we explained in detail in the 2003 Memorandum, a body with such far-reaching powers should be fully independent of government if it is to comply with international law. Otherwise, there is the risk that the actions of this body will be subject to political manipulation rather than being based on the public interest.[11] Despite this clear need, the draft Law signally fails to ensure the real independence of the authorised agency.

This lack of independence is exacerbated by the fact that the draft Law fails to include any substantive criteria for the revocation or suspension of registrations, or to choose between competing licence applications.[12] Accordingly, the current Draft fails to protect the media against abuse of power by this body and leaves open the possibility that its decisions will be "engineered" to make sure that only mass media who do not criticise the government are allowed to operate.

The same point applies to the system by which journalists are accredited. While international law mandates that accreditation decisions must be taken by independent bodies, subject to clear criteria set out in law, the draft Law provides for accreditation of journalists by State authorities and organisations – none of which possess the requisite independence – and fails to provide criteria for accreditation.

Other significant problems with the draft Law include the following:

- Current Article 28 requires mass media to publish official communications. As we pointed out in the 2003 Memorandum, while it is to be expected that mass media (and particularly public broadcasters) will publish of their own accord official information of significant importance, it is critical that editorial decisions of this sort remain within the firm control of the mass media themselves. "Must-carry provisions" of the sort contained in Article 28 are unnecessary and subject to considerable abuse, and, as a result, breach the right to freedom of expression.

- The draft Law contains certain freedom of information provisions which are generally positive (with one important exception noted in Section III.2). As we pointed out in the 2003 Memorandum, however, they fall short of the kind of full freedom of information regime which is required under international law. In particular, (1) they fail to provide for a limited range of exceptions; (2) they do not subject all such exceptions to a harm requirement; and (3) they fail to provide for a public interest override whereby the information should still be disclosed unless the harm from disclosure outweighs the public interest in the release of the information.

- Both drafts contain so-called "false news" provisions – for example, current Article 31(1)(2) prohibits journalists from "disseminat[ing] information on misrepresented facts". Such false news provisions, it is well recognised, have a substantial chilling effect, and have been held to breach the right to freedom of expression by courts around the world.

- A right of refutation is confusingly and inappropriately mixed together in a single article with a brief defamation provision of general application. We continue to

[11] See 2003 Memorandum, pp. 16-17.
[12] Assuming it has the power to do these things. See note 10.

believe that the latter provision has no place in a media law, particularly in light of the fact that Kazakhstan has criminal and civil defamation provisions in its criminal and civil codes respectively.

III. Concerns with the Current Draft

III.1 References to Other Legislation

One difficulty with the current Draft, carried over from the previous draft, is the prevalence of references in it to other legislation. These include, to give just a few examples:

- Article 2(1), providing that national legislation with respect to mass media will consist of the current Draft "and other regulatory legal acts" of Kazakhstan;
- Article 7(2), providing that no-one may force the editorial staff of a mass medium to disclose any material that "it rejected, unless otherwise provided by the legislation of the Republic of Kazakhstan";
- Article 8(1), already noted, providing, *inter alia*, that the authorized agency will deal with matters of registration, licensing, and monitoring of the compliance of mass media products, in the context of existing national legislation;
- Article 16, providing that the mass media will be used during election campaigns and during periods of martial law as provided for in national legislation;
- Article 17(9), providing that publication materials may be seized and destroyed as provided for in national legislation;
- Article 24(1), providing that broadcasting licenses may be suspended in accordance with Kazakhstan's licensing laws; and
- Article 28, also noted, providing that official communications must be carried by the mass media in accordance with national legislation.[13]

The fundamental concern with these references to other legislation is that there is no guarantee that such other legislation complies with the international standards on freedom of expression. Indeed, ARTICLE 19 provided an analysis of some of these laws in June 2002 and found that most of those analysed included provisions in serious breach of the right to freedom of expression.[14] As a result, even if the current Draft were to be fully in compliance with international law on its own terms, which, as we have already explained, it is not, it would still breach the right to freedom of expression to the extent that these other legal acts do.

Article 2(2) of the current Draft does provide that where there is a conflict between any rule "provided herein" and any rule of an international treaty ratified by Kazakhstan, "the rules of the treaty shall apply". But it is not clear that this reference to the rules "provided herein" would cover *other* legislation to which the current Draft refers.

[13] Other significant references to legislation or nationally mandated procedures include Articles 7(2), 9(9), 10(5) and (3), 12(9), 15(4), 17(2), 17(6), 24(4), 27(3), 28(2), 30(3), 31(1) and (6), 33(5), 35 and 36(3).

[14] This Memorandum can be found on the ARTICLE 19 website at: http://www.article19.org/docimages/1307.doc.

The practical result is that the current Draft, by allowing so many of its substantive provisions to be governed by other legislation, runs the very serious risk of further fundamentally infringing the freedom of expression.

Recommendation:

- All legislation affecting the media and freedom of expression should be reviewed and amended as necessary to bring it into line with international and constitutional guarantees of freedom of expression.

III.2 New Provisions

We restrict ourselves in what follows to the most serious new problems with the current Draft.

Prejudging Trials

Article 4(4) contains a new content restriction that is particularly objectionable in its overbreadth. It provides: "No mass medium may be used [to] prejudge trial results, i.e., to disseminate such communications intended to form the public opinion concerning the rightfulness of any litigant and lawfulness and fairness of forthcoming court decree".

While certain carefully and narrowly drawn restrictions on media coverage, to ensure the fairness of trials, may be appropriate, this provision goes far beyond what is necessary to protect trial fairness. By terms, for example, this article could be read as prohibiting the mass media from reporting on the detention or indictment of a journalist accused of improperly disseminating information, because the information might be interpreted as "intended to form public opinion" as to the rightfulness of any "forthcoming court decree". Yet, the arrest and detention of journalists for what they write is clearly a matter of high public interest, about which the public has a right to know. Equally, this provision could prevent the media from reporting on the mistreatment of detainees in violation of international and national law; again, such reports could easily be interpreted as "intended … to form public opinion" as to the ultimate justice of the charges against the detainees. Here too, however, information relating to the mistreatment of detainees is of high public importance, and its dissemination must be protected in a compliant freedom of expression regime.

Right of Refutation

Article 29(7) extends the right of refutation as contained in the previous Draft, which is in any case quite controversial,[15] far beyond permissible bounds. According to the Article: "When publishing information containing analysis or evaluation of imperfect activities of public agencies or officials, the mass media, who published above information, shall provide opportunity to such public agencies or officials to publish a response".

In the first place, a true right of refutation, as the current Draft itself appears elsewhere to recognise (see Article 29(1)), should only apply where the information sought to be refuted is *false*. Moreover, any such right, as the current Draft also appears to recognise as a general matter, should be restricted to addressing the incorrect information and should be proportionate in length to the original text.

[15] 2003 Memorandum, pp. 10-11.

Article 29(7) flagrantly violates these principles. Public agencies and officials are given the right to publish a response even if the original "analysis or evaluation of imperfect activities" is justified, is true, and even if it is incontrovertible. The article does not impose any length restriction on the response; nor does it restrict the agency or official to responding to the precise terms of the analysis or evaluation. Finally, the article does not define the term "imperfect activities", and effectively leaves the way open for public agencies and officials to demand print or broadcast opportunities whenever the media elects to say anything about them at all. The potential result will be a chill on the discussion of public agencies and officials by the media. This is perhaps the worst result conceivable in the context of a developing democracy like that of Kazakhstan.

Accreditation

Article 33(4) provides for the accreditation of a journalist to be withdrawn, by court order, where he or she has published information "which derogates honour and dignity of the government agencies, public associations and organizations that accredited him/her". We have already remarked that this kind of defamation provision has no place in a media law.[16] But we are compelled to emphasise that this article has no place *anywhere* in national (or any other) legislation, at least because it is not restricted to *false information*. By terms, a journalist may be disaccredited under the authority of Article 33(4) even for publishing true information regarding, for example, graft or fraud or other illegal activities occurring in agencies that have accredited him or her. Indeed, any allegation of wrongdoing, no matter how fully substantiated by the journalist, will tend to derogate from the "honour and dignity" of such bodies. Furthermore, a provision of this sort almost always invites abuse, with accreditation being withdrawn in response to critical reporting: in effect, the article potentially penalises critical reporting of accrediting government bodies. Again, it is difficult to think of a measure less suited to the development of democracy and accountability in Kazakhstan.

Provision of Official Information

Article 27(8) now prohibits the "deliberate provision of false information related to human safety, as well as information related to natural and man-caused emergencies, by officials". While this provision is welcome, it is far less comprehensive than the second paragraph of Article 29(3) of the previous Draft, which provided that it was "not … admissible for officials to deliberately provide false information". In limiting the kinds of information, the deliberate provision of which is prohibited, the current Draft supports the implication that the dissemination of false information by officials is *not* prohibited, as long as it does not relate to human safety or certain emergencies. The deliberate provision of false information about the economy, about government corruption and other matters of high public importance, therefore, would escape the ban of this article, in clear violation of the right to information that is an integral part of the freedom of expression protected by international law.

Equal Access to State Tenders

We note one deletion from the previous Draft which is troubling. Former Article 8(3) required the state to "ensure the equal access of individuals or legal entities of the mass media, regardless of the form of ownership, for participation in tenders to get

[16] 2003 Memorandum, p. 10.

the state order in accordance with the current legislation of the Republic of Kazakhstan". Eliminating this guarantee opens the way for irregularities in the tender process, with government favourites, or friends or colleagues of State officials, being preferred at the expense of perhaps more deserving and qualified bidders. A likely result is that the broadcast media may not end up representing a wide range of viewpoints fairly reflecting the diversity of national and local populations, even though such diversity is mandated by international standards.

Transparency

Finally, Article 5(2) provides that "publicity and *transparency*" is a principle of mass media activity (emphasis supplied). Yet, it is not clear that mass media should be subject to any more of a transparency requirement than corporations or other private entities. Rather, it is government that should be subject to a requirement of transparency.

Recommendations:

- Articles 4(4) and 33(4) should be removed from the current Draft.
- Article 29(7) should be redrafted to provide for a right of refutation in only those limited circumstances, and subject to the restrictions described in the 2003 Memorandum.
- Article 27(8) should prohibit, *inter alia*, the deliberate disclosure by officials of *any* false information.
- Article 8(3) of the previous Draft should be reinstated in the current Draft.
- The reference to transparency in Article 5(2) should be removed.

IV. Conclusion

ARTICLE 19 is very concerned that the changes to the previous Draft, as described in Section III of this Memorandum, would usher in a regime of control over the mass media that would be even further out of compliance with international standards than the regime envisaged by the previous Draft. We urge Kazakh officials to abandon this attempt to place serious fetters on freedom of the media and to refrain from passing this law. It would be far better for democracy and human rights in Kazakhstan if, instead, energies were devoted to bringing existing law into line with international and constitutional standards guaranteeing freedom of expression.