



**The Representative
on Freedom of the Media**

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Analysis of the draft law of the Republic of Kazakhstan On the Mass Media (as revised on 18 April 2005)

This analysis is performed to establish the compliance of the draft law with international standards in the sphere of freedom of expression of opinion and information, secured by Article 19 of the UN Universal Declaration of Human Rights¹, with the principles of the role of the press in a democratic society, as worked out by relevant international organisations Article 19², Interights, Human Rights Watch³, Freedom House, the International Federation of Journalists and the Committee for Protection of Journalists⁴.

Considerable attention was also focused on whether the provisions of the draft law being analyzed comply with the basic principles of the Constitution of the Republic of Kazakhstan.

For the purposes of the analysis, the following texts were used:

- (1) the Constitution of the Republic of Kazakhstan, dated 30 August 1995, as amended on 7 October 1998;
- (2) the Civil Code of the Republic of Kazakhstan as revised on 27 December 1994;
- (3) the Universal Declaration of Human Rights⁵;
- (4) Resolutions of the Committee of Ministers of the Council of Europe
 - On the right of reply (No. 74) 26

¹ Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.

² www.article19.org

³ www.hrw.org

⁴ www.cpj.org

⁵ Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.

- On the portrayal of violence, cruelty and pornography in the electronic media (No. R (89) 7
- On approaches to transparency in the mass media No. R (94) 13
- On guarantees of independence of public radio and television broadcasting No. R (96) 10
- On the right of journalists not to disclose their information sources No. R (2000) 7.

It should be noted that the work on analyzing the draft law was complicated by the combination in a single draft law of provisions concerning printed publications (press) and electronic media (television and radio broadcasting companies).

Such a combination has undermined the opportunities of the draft law as a whole to regulate in detail the activities of television and radio broadcasting organisations in the sphere of mass communications. The inclusion in the draft law of Chapter 5 "Organisation of Television and Radio Broadcasting" and Chapter 6 "Licensing of Activities to Organise Television and (or) Radio Broadcasting " has not resolved the problem.

Many material aspects of the organisation of television and radio broadcasting (the status and legal nature of the licensing authority, the status of the founders of the television and radio broadcasting companies (channels), the procedure and rules for the placement of advertising, and so on) have remained outside the scope of the draft law.

Introduction

Article 19 of the Universal Declaration of Human Rights⁶ reads:

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.

This article does not obstruct states in licensing television and radio broadcasting or film production.

Since exercise of freedom of opinion and expression, of speech and information is accompanied by obligations and liability, this right may be a subject to formalities, terms and conditions, restrictions or sanctions that are envisaged by law and are practised in a democratic society only in the interests of national security, territorial integrity or public order, for preventing disorder or crime, for protection of health and morals, for protection of the reputation or rights of other entities, for preventing disclosure of confidential information and for maintaining the independence and impartiality of justice.

In accordance with Clause 3 of Article 20 of the Constitution of the Republic of Kazakhstan, freedom of speech may be restricted because propaganda of or agitation for a forcible change in the constitutional system, destruction of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, birth status or tribal superiority, as well as the cult of cruelty and violence shall be prohibited.

Basic principles of freedom of the press

During many years of practical work the human rights agencies under the United Nations Organisation and the UN High Commissioner for Human Rights have worked out standards which

⁶ Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.

include a set of principles and rules guaranteeing the press a special status in the exercise of freedom of speech.

It is generally known that it is most often journalists who are persecuted by state authorities for exercising freedom of speech. The Committee for Protection of Journalists (New York) keeps daily record of and analyses their professional problems⁷, repeatedly stressing the recognised role of the press as a public watchdog, especially during political discussions and debates.

Freedom of the press guarantees the public the best way of finding out and forming their own opinions about the ideas of political leaders and, correspondingly, ensures freedom of political debate, which is the essence of the concept of a democratic society.

The press is one of the main sources of information every person needs to make decisions about vitally important issues.

In order to fulfil this mission, the press must enjoy statutory guarantees in relation to

- (1) freedom of editorial policy
- (2) protection against censorship
- (3) economic self-sufficiency
- (4) pluralism of ideas and opinions on its pages (on air).

In order to comply with these criteria, it is very important in the information policy of every state to strive to achieve the goals of:

- protecting everyone's right, irrespective of frontiers, to seek and receive information;
- eliminating censorship or any arbitrary control over or restrictions with respect to the participants in information processes, the mass media content and information dissemination and transfer;
- pursuing an open information policy in the public sector, including access to information for assisting everyone in their perception of political, social, economic and cultural problems and encouraging open discussion of these problems;
- ensuring the existence of a wide range of independent and autonomous mass media, which would provide an opportunity to reflect the diversity of ideas and thoughts;
- ensuring effective use, when necessary, of new information and communications technologies and services for the purpose of increasing the opportunities for freedom of expression of opinion and information.

Article 19 of the Universal Declaration of Human Rights protects not only the meaning of information or ideas, but also the form in which they are expressed. Thus, printed documents, radio programmes, fiction, pictures, films and electronic information systems are also protected by it.

It follows from this that the production and communication, transmission and dissemination of information and ideas are covered by the text of this article.

International standards in the sphere of television and radio broadcasting recognise the right of the state to establish a system of broadcast licensing on the condition, however, that the powers of national governments in regulating the licensing do not go beyond technical aspects and are in no way exercised in a way that infringes on freedom of expression of opinion.

States are allowed to exercise control over the licensing system by organising television and radio broadcasting on a specific territory, especially the technical aspects thereof.

⁷ How CPJ Investigates and Classifies Attacks on the Press, www.cpj.org

Considering the technical progress that has been achieved over the last decade, the availability of radiofrequencies and channels for transmitting information has ceased to constitute a problem. Satellite transmitters and cable television provide an unlimited number of accessible frequencies. In this context, the state's right to license media companies is acquiring a new meaning and purpose, in particular that of guaranteeing freedom and pluralism of the information flow in consideration of society's requirements.

A state monopoly in the sphere of the audiovisual media is considered by the international community as contradicting the spirit of Article 19 of the Universal Declaration of Human Rights and humanitarian practice mostly because it precludes pluralism of information sources.

Since the frequencies available in any country are part of its national endowment and are limited in number on a certain territory, it is important that their distribution for organising television and radio broadcasting should be fair and serve the ultimate interests of society. The international community has formulated basic criteria for ensuring transparency and fairness in the distribution of frequencies:

- by means of licensing;
- licensing on a competitive basis;
- precisely established procedures for applying for a license, organising and holding a tender;
- issue of licenses by a body independent of any branch of authority;
- judicial control over the process of licensing by the independent body.

Analysis of the draft law

The draft law consists of 38 articles, divided into 11 chapters

Chapter 1 "General provisions", Articles 1-7

Chapter 2 "Mass media bodies", Articles 8-11

Chapter 3 "Organisation of the activities of the mass media", Articles 12-15

Chapter 4 "Distribution of the mass media", Articles 16-18

Chapter 5 "Organisation of television and radio broadcasting", Articles 19-22

Chapter 6 "Licensing of activities to organise television and (or) radio broadcasting", Articles 23-25

Chapter 7 "Relations between the mass media bodies and individuals",
Articles 26-29

Chapter 8 "Journalists' rights and obligations", Articles 30-32

Chapter 9 "Accreditation of journalists", Articles 33-35

Chapter 10 "Responsibility for violating the legislation on the mass media",
Articles 36-37

Chapter 11 "Concluding provisions", Article 38

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Article 1 contains the conceptual structure of the text of the draft law.

The authors have taken account of certain recommendations from the previous analysis and this has not failed to improve the quality of the draft law. At the same time, certain aspects have remained and certain new ones appeared that should be taken into account in completing the work on the draft law.

The definition of the concept "Broadcaster" (1) still does not cover license holding. And this is a fundamental omission. Since the rules of Article 19 of the draft law contain a list of requirements to the broadcaster and not the license holder, the latter might ignore these requirements with impunity, so introduction into the concept of "Broadcaster" of the license holding attribute is fundamental and this gap must be filled by the authors.

Clause 4 of Article 1 gives a definition of the "service area" as the area covered by an existing or planned television and radio transmitter. Given the essence of the concept, the "broadcast area" would be a more suitable definition.

Regrettably, the legislators have ignored previous recommendations on expanding the concept of "source of information". This wording leaves outside the bounds of the definition various types of document, announcements by other media and the like, which often constitute sources of information for journalists.

Restriction of the given concept to the definition of an entity – individual or legal – providing information for the mass media narrows the potential opportunities for journalists to exercise their professional rights under Clause 13 of Article 30 of the draft law.

In Clause 32, the definition of a "television programme" and in Clause 33, that of a "radio programme" unjustifiably use the concept of "mass media" and in each of these definitions the words "**live or recorded**" should be added after the word "**transmitted**".

It is important to supplement and change around the wording of the definition of censorship given in Clause 37 as follows:

Censorship is a requirement imposed on participants in information processes to seek preliminary approval of government authorities, other organisations or financial groups of announcements and materials disseminated in the mass media, with a view of exercising control over, restricting or prohibiting the dissemination of announcement or materials or parts thereof.

Article 2. Freedom of speech, receipt and dissemination of public information

For the purpose of logical exposition of the provisions in this article, the authors of the draft law should pay attention to its structure. Thus, Clauses 1 and 2 may be combined or placed consecutively. Then Clause 3 might absorb the provision from Clause 1 concerning prohibition of censorship.

The provision of Clause 4 of this article on the liability of owners of mass media "**to ensure everyone an opportunity to familiarise themselves with documents, decisions and information sources affecting their rights and interests**" still seems out of place in the text of the given article.

The authors of the draft law evidently still adhere to the recognition of a citizens' right to receive through the mass media information they need in order to exercise their rights and liberties, including resolutions of government authorities and agencies. This meaning and content of the rule is usually characteristic of the text of a law on information or access to information, but certainly not of a law on the mass media.

The reservation included in the text of this rule: "**in accordance with the procedure established by the legislation of the Republic of Kazakhstan**" does nothing to change the situation.

Retention of the concept of **sources of information** in this rule will be misleading and may potentially serve as legal grounds for requirements on the part of the audience/readership that the mass media reveal the sources of information provided to journalists on confidential terms.

In order to avoid discrepancies of interpretation, it is, as before, recommended that this term be deleted from the text or the sources of information mentioned here be specified (the authors evidently meant regulatory documents of government agencies).

A potential threat is concealed in the reservation in Clause 5 of this article (prohibition on interference in the activities of the mass media), specifically "**with the exception of cases when their activities are performed in violation of the legislation of the Republic of Kazakhstan...**". In other words, in this case the authors are deliberately allowing for interference by government agencies, organisations and their officials in the activities of owners of mass media and all entities engaged in information activities.

In all events, even when the mass media (the owner and other entities thereof) violate the regulations, this should be subject only to judicial control, rather than subjective evaluation on the part of officials. According to the recognised standards of freedom of the press in a democratic society, direct interference by government agencies in the activities of the press is not permissible. Even in cases when the mass media abuse their freedom, an authorised body (only!) should not interfere in the activities of the mass media, but may

- (A) apply statutory sanctions followed by judicial control over the legality of the imposition of such sanctions;
- (B) enter a suit in a court of law against the mass media.

For this reason, the given provision (reservation) should be deleted from the text of Clause 5.

Article 3. Inadmissibility of abuse of freedom of speech

The list of restrictions on use of the mass media under this rule exceeds the list of restrictions in Clause 3 of Article 20 of the Constitution of the Republic of Kazakhstan in that it is supplemented by a provision on propaganda and justification of terrorism/extremism, dissemination of information constituting state secrets and other secrets protected by law, as well as information on methods and tactics of anti-terrorist operations.

The provision on the inadmissibility of monopolising the mass media (Clause 3) has no logical connection with the first two paragraphs and it would be advisable to include it into Article 2 and delete it from Article 3. In addition, since the draft law does not specify the concept of monopolisation or contain a mechanism for protection against it, this provision remains an empty declaration.

Article 4. Principles governing the activities of the mass media

Regrettably, the authors of the draft law demonstrate profound reluctance to expand the text of the article in the interests of the public by adding, in Clause 1, following the words **freedom of speech**, the words **collection and storage** (as applied to information) and in Clause 3, after the word **reliability**, the words **completeness** and **objectivity**.

Article 6. Language of the mass media

Given the Soviet past and all-out russification of the countries of the former Soviet Union, the main stress in this article is laid on establishing a timescale for reinstating the state language and thus overcoming the consequences of the previous imperial policy. This approach, which is common to all the FSU countries (apart from the Russian Federation), pursues the goal of developing and returning into everyday life the state language, which is, as a rule, the language of the ethnic majority. At the same time, in light of current trends, it would be correct to secure in this article the idea of using the languages of national minorities in the mass media as guarantees for national minorities.

Article 7. State regulation in the sphere of the mass media

The list of functions of the authorised government agency vested with regulation in the sphere of the mass media effectively illustrates that the terms of reference of such a body greatly exceed the sphere of regulation and that they come down, in essence, to control over the activities of the mass media (incentives to and support for the mass media, monitoring of output).

The provision concerning equal access of mass media owners, irrespective of the forms of ownership, to participation in a tender to receive a government order (Clause 3) is misleading and creates the illusion of equal conditions, though not in the development of the mass media themselves in the competitive environment, but in the struggle for state support.

The authors of the draft law should also streamline functions exposition. For instance, it would be more logical if Clause 2.3 (shall register the mass media...) were followed, as Clause 2.4, by the text from Clause 8 (shall make a decision on issuing certificates of registration...). Besides, the authors have also failed to replace the term "**registration**" with the term "**state registration of the mass media**", which would be preferable in the text of the given law. The term **state registration of the mass media** is much broader in meaning. It means that the state

- (1) recognises the fact of the foundation (creation) of the given mass media
- (2) sanctions its activities
- (3) records information about founders and owners, which is very important from the viewpoint of precluding excessive concentration of the media in the same hands and preventing the emergence of monopolies.

The comment on Clause **2.7 of this article – control over the observance of licensing conditions in television and radio broadcasting** – is still relevant. Considering the international standards on the legal nature of the independent body engaged in licensing of television and radio broadcasting, this function should belong to it, rather than to the central executive authorities. If such an independent body is absent, everything should be decided exclusively in a court of law.

Chapter 2. Mass media entities

Article 8. The right of production of mass media

It should be stated with satisfaction that the authors of the draft law have taken into account previous recommendations for changing certain approaches, but there has been no conceptual rethinking. The legal nature of mass media entities remains ambiguous.

Within the structure of the given article, there is no legal clarity of the terms used. The right of production of mass media requires interpretation. Is this the right to found mass media or to produce them or both?

The provision on limiting the foreign interest is general in nature and apparently applies to both printed and electronic media. Whereas in the sphere of television and radio broadcasting, regulation of foreign participation is admissible, provided the frequencies available are limited, and is a form of protection of the interests of the national television and radio broadcaster, in the sphere of printed media, it is, on the one hand, a manifestation of discrimination and, on the other, a restriction on society's real opportunities for obtaining information from media that are independent of the authorities.

Article 9. A mass media owner

The provisions of this article still give no answer to the question as to what the authors of the draft law mean by the concept of "owner" here.

As follows from the text of the draft law (Clause 1), the owner has the exclusive right to use and dispose of (1) the name under which the media was registered and the output and the information resources created in the process of its production (Clause 2.3). In order to eliminate potential conflicts and misapprehensions in the enforcement of this rule, the authors should supplement the definition in Article 1 in such a way as to regulate ownership relations precisely.

The wording of the concept of "owner" in Article 1 does not cover the structure of ownership rights in the civil law sense, since "**to take the initiative, including financial**" does not mean to become the owner.

For clarity's sake, this article should contain a definition of the initial origin of ownership (founding, investment, sale and purchase agreement, and so on).

Attention should also be focused on the provision of Clause 3 concerning invalidation of a certificate of registration of a mass media entity by virtue of termination of the owner's citizenship. The definition of the concept of "owner" in Article 1 does not contain restrictions by virtue of citizenship.

In addition, Article 12 (4) of the Constitution of the Republic of Kazakhstan guarantees foreigners and stateless persons the same rights and freedoms as citizens of the Republic of Kazakhstan. In accordance with Article 3 of the Civil Code of the Republic of Kazakhstan, foreign individuals and legal entities, as well as stateless persons, are entitled to acquire the same rights and are required to bear the same responsibilities as are envisaged by the civil legislation for citizens and legal entities of the Republic of Kazakhstan.

In consideration of the above, the conflict must be eliminated by the legislators in light of the constitutional guarantee (Article 26 of the Constitution of the Republic of Kazakhstan) to ensure respect of ownership rights, irrespective of the citizenship status of the entity.

This is particularly true since the entrepreneurial nature of media production activities is indirectly perceived from Clause 2.2, Article 13, which indicates that, when applying to register media, individuals should attach a copy of the document confirming their right to engage in business.

According to Article 10 of the Civil Code of the Republic of Kazakhstan (protection of the rights of entrepreneurs and consumers), the state guarantees freedom of enterprise.

Article 10. Editorial boards of mass media

The authors of the draft law have taken into account some of the previous recommendations by stating explicitly that editorial boards of mass media do not enjoy the status of legal entities. There would be no problem in this if the liability of the editorial board were imposed on the legal entity that is the owner.

The rule contains, however, a potential threat for individuals – the editor-in-chief and journalist – who might find themselves in the position of being held liable under civil, criminal or administrative law for the activities of the entire editorial board, together with the owner or individually. In order to resolve this problem, the authors should either delete the editor-in-chief and the journalist from the text as those liable for the activities of the editorial board or specify that these individuals will be liable for their own personal activities resulting in a conflict, but not for the activities of the editorial board.

The provision on the legal nature of the owner and the editor-in-chief also need to be expanded (Clauses 3-4). It is not enough to have the owner appointing or dismissing the editor-in-chief. It is understandable that such relations arise and are based on a contract but it is the nature of the contract (employment, civil law) that determines the stability of the individual's position and the results of the editorial board's activities.

The relations between the owner and the editorial board are regulated by a contract or the Articles of Association or by-laws of the owner (Clause 5). Considering that the editorial boards of mass media cannot enjoy the status of a legal entity, there is little likelihood of a full-fledged and equal agreement. In this situation, the best option may still be Articles of Association, duly registered when the media entity is set up and notarised.

Article 11. Information agency

The categorical wording of the status of an information agency as a mass media owner is confusing. The authors of the draft law are consistent in avoiding precise regulation of the origin (formation) of an information agency.

It apparently appears from nowhere and acquires its legal status on the basis of this law. We still believe it doubtful that mass media and information agencies are one and the same thing. As agents of information relations, information agencies are essentially a factory producing news and other information, while mass media disseminate the news and information.

Article 12. Mass media registration

It is important to **supplement** the text of this article with a **provision** on the right of the parties concerned to appeal in court against a resolution by an authority to refuse to register a mass media entity.

Article 15. Suspension and termination of the production and distribution of mass media

Clause 6 of the given article needs its wording altered. It is not clear whether a court ruling to halt production and distribution of mass media is sufficient for an authorised agency to recognise a certificate as null and void on the basis of Clause 11.5 of Article 12 or whether such a court ruling provides grounds for a subsequent court ruling declaring the certificate invalid.

Article 18. Mandatory copies...

Clause 4 should be supplemented with a provision to the effect that, in addition to the authorised agency, other individuals and legal entities concerned are entitled to demand copies of audio and video materials in the event that false information has been distributed about them and in order for them to exercise their right of reply or give their own interpretation of the situation.

Article 23. Licensing of activities to organise television and (or) radio broadcasting

It is a satisfaction to state that the authors agreed with the previous recommendations and have considerably improved the provisions of the entire article.

Article 27. Official announcements

A positive fact deserving of mention in this article is the establishment of the shortest possible deadlines (3 days) for government agencies and officials to respond to enquiries for information on the part of representatives of the mass media (Clause 5).

The provision of Clause 7 (prohibiting courts from refusing to allow journalists to take videos and photographs in the courtroom) is extremely useful for journalists and the mass media. After all, a courtroom is a public place and courts cannot exist in a vacuum.

At the same time, such an unequivocal approach (there is no practical sense in a reservation) is fraught with the danger of violating of the rights of the parties to/participants in court proceedings and may violate the right to a fair court hearing.

This provision should take into account the rule of the Civil Code of the Republic of Kazakhstan (Article 144 "the right to protection of the confidentiality of private life" and Article 145 "the right to one's own image").

Clause 10 of the given article would be better deleted from the body of the text. The authors of the draft law require government agencies and officials whose activities are criticised by the mass media to give written explanations to the media within a set period of time (10 days). If the criticisms are published in a newspaper or broadcast, the situation is fully covered by the procedure for exercising the right of reply, as embodied in Article 29 of this law.

Article 29. The right of rebuttal and reply

The provision of Clause 5 of the given article should be modified, because it restricts a maligned person in exercising its right of reply and right to compensation for moral damage inflicted on its good name/reputation by the dissemination of false information. The words "instead of rebuttal" should be deleted from the text of this clause.

Article 32. The special status of the journalist

In comparison with well-worded provisions on the professional rights and obligations of the journalist (Articles 30 and 31), Clause 1 of the given article is not well-defined.

Considering the mission of the press in a democratic society, its role consists in providing relevant, objective and full information to citizens/society about all the processes and problems. Thus, **providing information** is the key phrase. This process includes collection, receipt and processing of information obtained both directly from sources and through access to documents, journalistic investigations, and so on. To ensure fulfilment of these functions, journalists enjoy the legally guaranteed professional privilege of not disclosing their information sources other than under the court order.

Considering the situation in the former Soviet republics with respect to the problems of professional solidarity of journalists and the absence of traditions of recognising and observing ethical standards, the right granted by the authors of the draft law in Clause 1 to journalists "**to interfere in the activities of any persons for the attainment of socially relevant goals**", even on justified and lawful grounds, is fraught with the danger of abuse on the part of journalists. This is particularly likely since the concept of a socially relevant goal is, in the absence of a precise definition of the latter, a moral rather than legal category.

The proposed wording of Clause 1 in Article 32 of the draft law being analysed is unacceptable from the viewpoint of guarantees of the rights of the persons in whose activities journalists might wish to interfere.

International experience of fostering freedom of the press has always been based on asserting the freedom of the press to fulfil its role while respecting the rights of other persons: to personal and family privacy, inviolability of property rights and presumption of innocence.

Article 33. Accreditation of journalists

The article has problems with Clause 5 concerning withdrawal of a press accreditation "**for disseminating information denigrating the business reputation of the government agencies/organisations that granted accreditation**". Such an approach is not compatible with international standards, for it is, in fact, a form of censorship of the content of the materials/information obtained at the place of accreditation.

Under Article 29, such agencies and organisations may demand a rebuttal and may go to law for protection of their business reputation. There is simply no other way to decide whether the information publicly disseminated did, indeed, denigrate their reputation.

To retain the above-mentioned provision in the text of the law is tantamount to sanctioning abuse by officials of their positions and threatening the professional freedom of journalists and the freedom of the mass media in general. This provision contradicts journalists' freedom to make a professional evaluation of and to comment on the events they cover⁸.

The presence of this provision in the body of the law will, apriori, restrain accredited journalists in making potentially critical commentaries, in order to avoid losing their accreditation.

Article 35. Activities of foreign mass media representatives in the Republic of Kazakhstan

The same comments remain in force with respect to Clause 3 – a more detailed procedure is required for imposing a judicial ban on the distribution of the output of foreign mass media.

Will this be a one-off decision with respect to a specific issue or a blanket ban?

⁸ Principles of Defamation. Series: International Defamation Standards, Article 19, London, March 2001, principle No. 7.

Who would initiate such a case in the court of law?

Who, before appealing to the court of law, would decide that the media had violated the Constitution of the Republic of Kazakhstan and the law on the mass media?

Article 36. Grounds for liability for violation of the laws on the mass media

It should be noted that the disposition of Article 155 of the Criminal Code of Kazakhstan "**obstruction of the lawful professional activities of journalists**" is limited to compulsion to disseminate information or refusal to disseminate it and is not applicable to restriction on collecting information, obstructing access to places of information-generating events and so on.

As already emphasised, in light of international standards and principles, freedom of speech/press is not an absolute freedom and may be subject to restriction, but in strict accordance with the law and exclusively for a legitimate purpose, such as protection of the rights and reputation of other persons, as well as supporting the independence and impartiality of justice.

Conclusion

A careful analysis of the draft law prompts the conclusion that its current version has been considerably improved by the authors and leaves fewer reasons for concern relating to the professional activities of journalists and the mass media in general.

The progress achieved by the authors eloquently confirms their positive perception of the role of the mass media in post-totalitarian society in general and the importance of legal guarantees for journalists.

Ideally, there should be issued different laws regulating printed and electronic media, since this draft law has missed out many important aspects of the organisation of television and radio broadcasting.

Regrettably, the civil law aspects of the issues of ownership rights in relation to the mass media remain either incomplete or contradictory in nature.

The question of the admissibility of commercialisation of media activities, as envisaged in the text, is vulnerable and a political decision is probably required to resolve this issue. However, such a decision has to be taken, considering the trends evolving in the world, where market processes and healthy competition stimulate progress and development. The media sphere is no exception.

In some places, the draft law excessively favours journalists by granting them privileges, which is inadvisable if society has perceived the value of a free and independent press.

In a democratic society, journalists cannot and should not have special rights. The guaranteed professional rights and secure environment in which journalists discharge their duties are in themselves a pledge of their successful work to the benefit of their fellow citizens.

This approach is in harmony with the standards generally accepted in world practice and will serve the interests of Kazakh society.

The draft law will benefit still more if, during follow-up work on its text, the authors improve the legislative techniques and focus on the structure of the law.

Analysis of draft laws of the Republic of Kazakhstan

(1) On the Mass Media (as revised on 18 April 2005)

(2) On the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan Relating to the Mass Media

This analysis is performed to establish the compliance of the draft laws with international standards in the sphere of freedom of the press and freedom of expression, in consideration of the relevant provisions of

- (1) the Constitution of the Republic of Kazakhstan, dated 30 August 1995, as amended on 7 October 1998;
- (2) the Civil Code of the Republic of Kazakhstan as revised on 27 December 1994;
- (3) the Criminal Code of the Republic of Kazakhstan as revised on 16 July 1997, as amended on 8 July 2005.

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Thus, the Constitution of the Republic of Kazakhstan guarantees:

Article 12

- 1. Human rights and freedoms in the Republic of Kazakhstan shall be recognised and guaranteed in accordance with this Constitution.*
- 2. Human rights and freedoms shall belong to everyone by virtue of birth, be recognised as absolute and inalienable, and define the contents and implementation of laws and other regulatory legal acts.*
- 3. Every citizen of the Republic shall have rights and bear responsibilities by virtue of his/her citizenship.*
- 4. **Foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for the citizens, unless otherwise stipulated by the Constitution, laws and international treaties.***
- 5. The exercise of rights and freedoms of man and citizen shall not violate the rights and freedoms of other persons, infringe on the constitutional system and public morality.*

Article 13

- 1. Every person shall have the right to be recognised as a legal personality and to protect his/her rights and freedoms by all means not in contravention of the law, including necessary defence.*
- 2. Everyone shall have the right to judicial protection of his/her rights and freedoms.*
- 3. Everyone shall have the right to receive qualified legal assistance. In cases stipulated by law, legal assistance is provided free of charge.*

Article 14

- 1. All people shall be equal before the law and the court.*

2. *No person shall be subjected to any discrimination for reasons of origin, social, official or property status, sex, race, ethnicity, language, attitude to religion, convictions, place of residence or any other circumstances.*

Article 18

1. *Everyone shall have the right to personal privacy, personal or family secrets, protection of his/her honour and dignity.*
2. *Everyone shall have the right to secrecy of personal deposits and savings, correspondence, telephone conversations, post, telegraph and other communications. Limitation of these rights shall be permitted only in cases and according to the procedure expressly established by law.*
3. *Government agencies, non-governmental organisations, officials and the mass media shall provide every citizen with the possibility to familiarise himself/herself with documents, resolutions and sources of information affecting their rights and interests.*

Article 20

1. *Freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.*
2. *Everyone shall have the right freely to receive and disseminate information by any means not prohibited by law. The list of items constituting state secrets of the Republic of Kazakhstan shall be determined by law.*
3. *Propaganda of or agitation for a forcible change in the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, ethnic, religious, birth status or tribal superiority, as well as the cult of cruelty and violence, shall be prohibited.*

Article 24

1. *Everyone shall have the right to freedom of labour, free choice of occupation and profession. Involuntary labour shall be permitted only as a court sentence or under state of emergency or martial law.*
2. *Everyone shall have the right to working conditions meeting the requirements of safety and hygiene, to remuneration for labour without any discrimination, as well as to social protection from unemployment.*
3. *The right shall be recognised to individual and collective labour disputes using the means of settling them provided for by law, including the right to strike.*
4. *Everyone shall have the right to rest. People working under employment contracts shall be guaranteed the length of working time, days off and holiday days provided for by law and annual paid leave.*

Article 26

1. *Citizens of the Republic of Kazakhstan may hold in private ownership any lawfully acquired property.*
2. *Property, including the right of inheritance, shall be guaranteed by law.*
3. *No one may be deprived of his/her property other than by a court ruling. Involuntary alienation of property for the public use in exceptional cases stipulated by law may be exercised on condition of its equivalent compensation.*

4. *Everyone shall have the right to freedom of entrepreneurial activity and free use of his/her property for any lawful entrepreneurial activity. Monopolistic activities shall be regulated and limited by law. Unfair competition shall be prohibited.*

Article 39

1. *Rights and freedoms of man and citizen may be limited only by laws and only to the extent necessary for the purpose of protecting the constitutional system, public order, human rights and freedoms and health and morality of the population.*

2. *Any actions capable of upsetting interethnic concord shall be deemed unconstitutional.*

3. *No restrictions on the rights and freedoms of the citizens on political grounds shall be permitted. The rights and freedoms stipulated by Articles 10, 11, and 13-15, Clause 1 of Article 16, Article 17, Article 19, Article 22 and Clause 2 of Article 26 of the Constitution shall not be restricted under any circumstances.*

The draft law on the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan Relating to of the Mass Media is designed to

- (1) liberalize the effective legislation with respect to freedom of speech and strengthen professional guarantees for journalists;
- (2) bring certain rules of the effective legislation into compliance with the rules of the draft law of the Republic of Kazakhstan on the Mass Media (as revised on 18 April 2005).

It is a satisfaction to state that the goal of liberalizing the effective legislation with respect to freedom of speech has been achieved by the authors of the draft law by excluding from the Criminal Code of the Republic of Kazakhstan a number of constituent elements of a crime that undoubtedly limit freedom of speech and chill media freedom to exercise public control over the actions of representatives of various branches of power.

The draft law decriminalizes:

- **libel** (Article 129 of the Criminal Code),
- **infringement on the honour and dignity of a parliamentary deputy and obstruction of his/her activities** (Article 319 of the Criminal Code),
- **insulting of a representative of the authorities** (Article 320 of the Criminal Code),
- **libel in relation to judges, prosecutors, investigators, examining authorities, court bailiffs and court and law enforcement officers** (Article 343 of the Criminal Code).

The introduction of amendments into certain articles of the Code of the Republic of Kazakhstan on Administrative Offences makes it impossible to administratively confiscate media print-runs (**Articles 349 and 350**) and printing equipment (**Article 350**).

The introduction of administrative and legal liability (Article 347-1) for unjustified refusal to provide a journalist with information, for providing incomplete or deliberately false information, for violating the deadline for providing the information and for arbitrarily including socially significant information among limited access information will unequivocally facilitate access for representatives of the press to information owned by government agencies, shorten the time taken to receive such information and thus strengthen professional guarantees for journalists.

Against the background of such positive trends, the proposed draft amendments to Article 143 of the Civil Code of Kazakhstan appear less felicitous:

1. **"A person shall have the right to demand by judicial means denial of information denigrating the honour, dignity and business reputation of the individual, as well as business reputation of the legal person, and also to demand publication of an answer in the event of dissemination of information which is unfaithful, but not denigrating the honour, dignity and business reputation of the individual";**

replacing the current wording with

1. **"A citizen or legal person shall have the right to demand by judicial means denial of information denigrating his/her/its honour, dignity or business reputation if those responsible for dissemination of said information cannot prove that it is true".**

In proposing the rule, the authors of the draft law are probably striving to strengthen a person's right to disassociate himself from false information, even if it does not denigrate his/her honour, dignity or business reputation.

At the same time, this approach is vulnerable from the viewpoint of the standards of freedom of speech and guarantees as to civil liability, since it

- (1) destroys the triad structure of tort (dissemination of information, falsity of information, harm to good name and reputation); and
- (2) deprives the disseminator of such information of an opportunity to prove that it is true or devalues proof of its veracity.

The practical value of replacing the text of Clause 1, Article 143 of the Civil Code of the Republic of Kazakhstan is doubtful, while the potential danger posed by the proposed amendments is evident.

Exclusion from the body of Article 143 of the Civil Code of the Republic of Kazakhstan of Clause 3, Article 143 in its current wording:

"A citizen or legal person in relation to which the mass media have published information infringing on his/her/its rights or lawful interests shall have the right to publish a reply, free of charge, in the same mass media"

is, on the contrary, designed potentially to restrict the rights of the denigrated person to rebut false information, and the authors of the draft law should relinquish the idea of deleting Clause 3 of Article 143 of the Civil Code of the Republic of Kazakhstan.

Replacement of the current wording of Clause 4 of the same article:

"A demand by a citizen or legal person to publish a rebuttal or a reply in the mass media entity shall be considered by the court of law if the media entity denies such a publication or, within a period of one month, has not carried out such a publication, and also in the event of its liquidation"

with the text

"A demand by a person for a rebuttal of information denigrating his/her/its honour, dignity or business reputation or for publication of a reply in the mass media entity shall be considered by court of law in the event that the owner of the mass media entity denied publication of a rebuttal or a reply or, within a period of one month, did not disseminate a rebuttal or reply, and also in the event of a halt to production and distribution of the mass media in which such information was published"

is necessitated by the proposed amendments to Clause 1 of Article 143 and replacement of the term "mass media entity" with the term "owner".

If the authors of the draft law agree that the amendments to Clause 1 of Article 143 are inadvisable, then the need to amend Clause 4 disappears.

The proposed amendment to Clause 6 of Article 143 in the current version:

"6. A citizen or legal person in relation to which information has been disseminated that denigrates his/her/its honour, dignity or business reputation shall have the right, in addition to rebuttal of such information, to claim compensation for losses and moral harm inflicted by said dissemination"

is, in actual fact, designed to limit the right of the denigrated person or eliminate the alternative of the right to rebuttal and the right to compensation for moral harm inflicted by dissemination of (false?) information, which is not permissible in view of Article 12 of the Constitution of the Republic of Kazakhstan.

Exclusion from Subclause 3, Clause 3, Article 951 **"Compensation for moral harm"** of the text

"harm inflicted by dissemination of the information denigrating honour, dignity and business reputation"

is another successful step taken by the authors of the draft law towards strengthening legal guarantees in the sphere of information-related legal relations, since the rule included in the current wording of Article 951 on compensation for moral harm inflicted by dissemination of information denigrating honour, dignity and business reputation, irrespective of the culpability of the perpetrator, was an unjustified burden for all potential respondents in the context of civil law standards.

Thus, the draft law on the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan Relating to the Mass Media contains both well-considered initiatives for liberalizing the current legislation of the Republic of Kazakhstan (in particular, the provisions of the criminal and administrative legislation), and precipitate ideas for amending the body of Article 143 of the Civil Code of the Republic of Kazakhstan.

The authors of the draft law should consider more carefully the essence of the proposed amendments to Article 143 of the Civil Code of the Republic of Kazakhstan and renounce the idea of balancing liberal amendments by restricting anyone's rights (those of journalists or other subjects of legal relations in the information sphere).