



COMMENT

on
the provisions concerning
the right to freedom of expression
in the Draft Code of Administrative
Offences of Kazakhstan

May 2010

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: <http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

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KEY RECOMMENDATIONS

- **Article 403 (registration):**

No administrative responsibility should be sought for publication, manufacturing, replication or distribution of periodic mass media publications as well as reports and materials of news agencies without registration or re-registration with “the authorized agency”.

Moreover, the media registration scheme, set in Article 10 of the Law on Mass Media, should be abandoned.

- **Article 403 (re-broadcasting of foreign programs)**

Administrative responsibility for violation of the rules of re-broadcasting should be sought if the rebroadcasting of foreign programmes is more than 50% of the total amount of programming carried out by the broadcaster.

- **Article 404 and Article 405 (content restrictions)**

Articles 404 and 405 of Draft Code should include definitions of the content restrictions or refer to such legal definitions in other laws.

The Draft Code should require that the content restrictions meet the three-part test established in Article 19 (3) and set out the principle that they should be interpreted and applied in the least restrictive for freedom of expression manner.

- **Article 403 para 2 (restriction on broadcasting in non-State languages)**

The administrative liability in Article 403 (2) for violations of the restriction on broadcasting in concerning non-State languages should be removed.

- **Article 406 (restriction on influencing the court)**

The administrative liability for media speculations about the outcome of trials or for influence upon the court before the entry into a force of a judicial act should be removed.

- **Article 407 (restriction on passing on false reports and material to the media)**

The administrative liability set out in Article 407 for passing on false reports and materials to the media should be removed.

- **Article 408 (violations on the obligations to deposit mandatory copies of publications)**

The administrative liability for violation of the obligations to deposit free copies of periodical set out in Article 408 is overbroad and should apply only for violation of the obligation to provide mandatory copies of publications to the National Library.

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- **The nature and amount of sanctions for the media**

The Draft Code should incorporate the principle that any sanctions on the right to freedom expression must be necessary and proportionate. Judges should ensure that the harm to freedom of expression caused by a restriction do not outweigh its benefits to the legitimate interest.

The Draft Code should incorporate the principle the sanction should impair the right of freedom of expression as little as possible. In this regard warnings should be also used with respect to individuals and the media for violation of the media and information regulations.

The administrative arrest should be abolished as a sanction.

Confiscation of publications and suspension and termination of broadcasting services should not be imposed cumulatively with other administrative sanctions. Judges should be able to determine when these measures should be applied taking into account the circumstances of each case.

The amount of the administrative fines should be decreased.

I. Introduction

On 30 September 2009, the Government of the Republic of Kazakhstan submitted a draft Code of Administrative Offences (“the Draft Code”) to the national Parliament.¹ The Draft Code is expected to replace the Code of Administrative Offences, adopted on 30 January 2001.

This Comment contains an ARTICLE 19’s analysis of various provisions in the Draft Code that are relevant to the right to freedom of expression, with the aim of contributing to public debate on the administrative law reform in Kazakhstan. The key articles analysed by ARTICLE 19 are contained in Chapter 24 on administrative offences concerning the press and information.

This Comment analyses the relevant provisions of the Draft Code from the viewpoint of their compatibility with international human rights standards on freedom of expression, in particular *International Covenant on Civil and Political Rights* (“ICCPR”).² The Constitution of Kazakhstan recognises the binding character of international human rights treaties ratified by Parliament and proclaims their supremacy over domestic law in Article 4 (3). Therefore the Kazakhstani authorities are obliged to comply with the provisions of the ICCPR against which the Draft Law is analysed.

The right to freedom of expression has long been regarded as a crucial human right for its fundamental importance to the functioning of democracy and for the exercise of other rights. It has been recognised by the *Universal Declaration of Human Rights* (“UDHR”) at Article 19³ and by the ICCPR at Article 19⁴. Freedom of expression is also guaranteed in various OSCE documents agreed to by Kazakhstan, such as the Helsinki Final Act,⁵ the Final Document of the Copenhagen meeting of the human dimension of the OSCE,⁶ the Charter of Paris agreed in 1990,⁷ the final document of the 1994 Budapest CSCE Summit,⁸ and the Istanbul Summit Declaration.⁹

¹ A copy of the Draft Code is available on request from ARTICLE 19.

² Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A, (XXI), 16 December 1966, entered into force 3 January 1976. Kazakhstan ratified the Covenant in January 2006.

³ Article 19 of the UDHR states:

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 Article 19 of the ICPPR states:

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.

⁵ OSCE, Helsinki, 1 August 1975.

⁶ Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular paragraphs 9.1 and 10.1.

⁷ Charter of Paris for a new Europe, CSCE Summit, November 1990. Note 11 of the Charter of Paris 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

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously provided legal analyses in the area of media law to government and civil society organisations in over 30 countries.¹⁰ Regarding Kazakhstan, ARTICLE 19 has analysed a number of the freedom of expression and freedom of information-related laws and draft laws, including the 2002 version of the draft law on advertising, the regulations for allocation on domain names, the legal framework for media coverage of elections, the 2002, 2003, 2004 and 2006 draft amendments to the Mass Media Law and 2007 and 2008 versions of the draft law on publishing activities.¹¹

The Comment raises numerous concerns relating to the clarity of the proposed provisions, the nature of administrative offences and the harshness of the envisaged sanctions. The Comment ends with recommendations aiming at bringing the domestic legislation in compliance with international standards.

II. Overview of the freedom of expression provisions in the Draft Code

The Draft Code contains a number of provisions which relate to the right to freedom of expression. Some provisions relate to the right to freedom of expression due to the nature of the act of the offence. Examples of these are Article 65 (sanctioning the acts of swearing and insulting in the field of family relations) and Article 418 (sanctioning the acts of insulting officials from the prosecutor's office, the police and a number of other enforcement bodies). Other provisions examined here relate to the right to freedom of expression due to character of the alleged offender. These are offences committed by journalists, media outlets, information agencies and publishers relating to the regime of registration, the production and broadcasting of materials and programmes with a certain content, the influencing of the court by the media, the regime of depositing free copies of publications to state bodies, the legislation on advertisement, and the rules relating to imprint pages and TV channel logos. These offences are included in Chapter 24 of the Draft Code on administrative offences concerning the press and information.

Inasmuch as that the above provisions of the Administrative Code interfere with the right to freedom of expression they should be in line with Article 19 para 3 of the ICCPR laying down the narrow parameters within which freedom of expression may legitimately be restricted. It states:

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;

peaceful assembly, freedom of movement (...).

⁸ Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paragraphs 36-38.

⁹ OSCE Istanbul Summit, 1999, paragraph 27. See also paragraph 26 of the Charter for European Security adopted at the same meeting.

¹⁰ These analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

¹¹ The analyses of Kazakhstani media legislation are posted on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

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

This has been interpreted as establishing a three-part test, requiring that any restrictions of the right to freedom of expression (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.¹²

Below, we examine whether the provisions of the Draft Code which amount to interference with the right of freedom of expression satisfy the three-part test set out by Article 19 (3) of the ICCPR. Bearing in mind that both the banning of a certain form of expression and the penalty for violation of the ban amount to interference with the right to freedom of expression first we examine the compliance of the restrictions of particular forms of expression with the three-part test. Thereafter we turn our attention to the sanctions provided in the Draft Code. Cognisant of the position of the Human Rights Committee that, “the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect,”¹³ we review the proportionality of the sanctions taking into accounts both their character and amount.

III. Problematic areas

a. Violations of the registration regime - Article 403 of the Draft Code

Overview

Article 403 of the Draft Code provides sanctions in cases of distribution of periodic mass media publications and well as reports and materials of news agencies without registration. The media registration regime is set out in Article 10 of the Law on Mass Media, according to which all mass media outlets in Kazakhstan including internet resources must be registered with “the authorized agency”. The “authorised agency” is defined in Article 1 as “a state body”; but there is no further elaboration of its status, and no requirement that this “agency” be independent from the state, or from political or commercial pressures.¹⁴ The registration requirement applies for all periodic print publications with circulation more than 100 copies. A registration fee must be paid, and information provided on matters including the area of distribution and the proposed ‘thematic direction’. Applicants must also submit certified documents showing the “right to entrepreneurship”, a certified copy of incorporation, and evidence of payment of the fee.

Registration may be refused on one of five grounds:

1. that the name of the mass media outlet is similar to that of an outlet already registered;
2. that incorrect or incomplete registration details have been submitted;
3. that the fee has not been paid;
4. that documentation regarding ownership has not been submitted;
5. that a publication of a same name and thematic direction has previously been banned, or that the application has been submitted by an owner or editor whose previous publication has been banned, unless more than three years has passed since the imposition of the ban.

¹² See, for example, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005, para. 6.8.

¹³ *Rafael Marques de Morais v. Angola*, note 12, para. 6.8.

¹⁴ See Section **Error! Reference source not found.** for further commentary on the “authorised agency”.

Analysis

ARTICLE 19 views all registration requirements for the media, with the exception of broadcast media, with great suspicion.¹⁵ We have commented on several versions of various Kazakhstan's media laws before,¹⁶ and on the media laws of other countries in the region, and each time we have recommended the abolition of registration regimes as they are open to abuse on political grounds.

Even though, unlike licensing, registration has not been declared as illegitimate per se by international bodies, international press freedom watchdogs, including the OSCE's own Representative on Freedom of the Media, have already warned of the danger posed by registration laws. In a Joint Declaration issued in December 2003, the UN, OAS and OSCE special mandates on freedom of expression and media freedom stated:

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.¹⁷

Moreover, the UN Human Rights Committee has already ruled that imposing registration requirements on media outlets with a print run as low as 200 constituted a violation of the right to freedom of expression.¹⁸ We also point to the decision in the case of *Mavlonov and Sa'di v. Uzbekistan*, in which the UN Human Rights Committee found that the Uzbek authorities violated Article 19 para 3 of the ICCPR as a result of their refusal to re-register Mr. Mavlonov's newspaper.¹⁹ The Committee members took into account that the refusal amounted to a *de facto* ban of Mr. Mavlonov's newspaper because without the registration he could not continue publishing the newspaper. At the same time, in addition to the violation of Mr. Malvonov's right to freedom of expression, the Committee found that the decision of the authorities to refuse the re-registration violated the right of the readers of the newspaper to receive information and ideas in print.

Our overriding recommendation is, therefore, that the registration scheme be abandoned. We oppose it in principle, because of its potential for abuse; as well as in practice, to the extent that it illegitimately restricts the rights of various individuals to set up publications (including, for example, the editors and owners of previously banned media).

The registration regime in Kazakhstan is problematic because without registration persons cannot exercise media activities. In this respect, the registration regulation is not very different from the one of Uzbekistan (subject of the Human Rights Committee's scrutiny in *Mavlonov* case). Further, it is troublesome that the authorities can refuse registration to

¹⁵ The rationale for accepting registration of broadcast media is that the usable spectrum for broadcasting is a limited public resource; licensing is therefore universally accepted as necessary. This 'limited airwaves' argument does not, however, apply with regard to the print media. Democratic countries therefore do not require print media to be licensed, or even registered.

¹⁶ See, for example, ARTICLE 19, Summary of Concerns on Proposed Amendments to Kazakhstan's Media Law, June 2006, available at <http://www.article19.org/pdfs/analysis/kazakhstan-media-law.pdf>

¹⁷ Joint Declaration, December 2003.

¹⁸ *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

¹⁹ *Mavlonov and Sa'di v. Uzbekistan*, Decision of 19 March 2009, Communication No. 1334/2004 (UN Human Right Committee)

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owners or editors whose previous publications have been banned or on the ground that the thematic direction of the publication was previously banned. These grounds are unnecessary restrictions on the right to freedom of expression and are open to abuse on political grounds to repress media freedom. Therefore, we recommended in our reviews of the Mass Media Law that the registration regime is abolished pointing, among other things, that such regimes are non-existent in democratic countries.²⁰

In view of the foregoing, any sanction of the media for failure to observe the problematic registration regime will amount to a violation of the right to freedom of expression. We recommend that no administrative responsibility be sought for publication, manufacturing, replication or distribution of periodic mass media publications as well as reports and materials of news agencies without registration or re-registration with “the authorized agency”.

Recommendations:

- The registration scheme, set in Article 10 of the Law on Mass Media, should be abandoned.
- No administrative responsibility should be sought for publication, manufacturing, replication or distribution of periodic mass media publications as well as reports and materials of news agencies without registration or re-registration with “the authorized agency”.

b. Violations of the rules of re-broadcasting of programs of foreign media - Article 403 para 6

Overview

Article 403 para 6 of the Draft Code provides for administrative liability for violations of the rule of re-broadcasting of programs of foreign media. The rule is set out in Article 14 para 3-1 of the Mass Media Law which limits the amount of foreign language re-broadcasts to 20% of the total amount of programming carried by a broadcaster.

Analysis

The restriction on foreign re-broadcasts can be justified as “necessary”. Pluralism, including the right of an individual to access information from a diversity of sources, is an important aspect of freedom of expression. Inasmuch as local content rules offset homogenisation and promote diversity of expression, they may actually promote freedom of expression and, as a result, they are not a restriction on freedom of expression. However, where local content quotas are unreasonably high, where they do not distinguish between different types of broadcasters (e.g. national, local, radio, television), where they fail to take into account the type of programming a broadcaster airs, and where they do not include phasing in periods for quotas, they may not only restrict foreign programming but actually undermine the ability of local broadcasters to survive. In such cases, these rules do not contribute to diversity. In view of this, we regard the local content quota very high, and respectively the 20% limit on all foreign re-broadcasts as unrealistically low, hindering the pluralism and amounting to a restriction of freedom of expression.

²⁰ See ARTICLE 19’s Memorandum on Kazakhstan’s Mass Media Law, commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe, available on the Internet at: <http://www.article19.org/pdfs/analysis/kazakhstan-media-la.pdf>

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With this in mind, the seeking of administrative liability for violation of this restriction is unnecessary interference with the right to freedom of expression. Noting that normally the rule of local content in other countries amounts to 50%²¹, we recommend that administrative responsibility for violation of the rules of re-broadcasting be sought if the rebroadcasting of foreign programmes is more than 50% of the total amount of programming carried out by the broadcaster.

Recommendations:

- Administrative responsibility for violation of the rules of re-broadcasting should be sought if the rebroadcasting of foreign programmes is more than 50% of the total amount of programming carried out by the broadcaster”.

c. Content restrictions - Articles 404 and 405

Overview

Articles 404 and 405 of the Draft Code provide for administrative liability for violations of some content restrictions. The first article sets out sanctions for giving permission to publish in the media materials aiming to

- incite national hatred,
- war propaganda,
- violations of the territorial integrity and forcible change of the constitutional order.

Article 405 imposes administrative liability for production, storage, imposition, transportation, distribution of mass media products containing reports and materials aiming to promote or propagate advocacy to

- change the constitutional order,
- violations of the integrity of the Republic, undermining of state security,
- war,
- incitement to social, racial, ethnic, religious, class and clan hatred,
- the cult of cruelty and violence and pornography,
- propaganda and justification of extremism and terrorism.

Analysis

The above content restrictions follow the content restrictions set out in Article 2,²² Article 13 (3)²³ and (4)²⁴, and Article 14 (3)²⁵ in the Mass Media Law. Like the content restrictions in

²¹ In the European Union, Article 4 of the 1989 “Television without Frontiers” Directive provides that Member States make sure when possible and by appropriate means that radio and television broadcasting organizations reserve a majority portion of their broadcasting time for European works. For instance the local content requirement in France stipulates that television stations maintain a minimum of 60% European works, with 40% of that being original French works; it is also the case with Spain, which reserves 51% of television broadcasting time of European production.

²² Article 2 bans the distribution of following:

- disclosure of state secrets or other secrets protected by law;
- propaganda or justification of extremism or terrorism;
- propaganda or calls for the forcible change of the constitutional order;
- disclosure of “technical principles” and tactics of ongoing anti-terrorism operations;
- calls for violation of the integrity of the Republic of Kazakhstan;
- propaganda of drugs, psychotropic substances and precursors and also the cult of cruelty and violence.

²³ Article 13 (3) introducing few content restrictions which were not mentioned in Article 2, stating that the

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the Mass Media Law, we find the restrictions introduced by Articles 404 and 405 of the Draft Code very broadly defined. In this respect, we note that according to international law, broadly defined restrictions of freedom of expression are problematic because they fail to satisfy the first prong of the three-part test of Article 19 (3), according to which the restrictions should be “provided by law”. International courts have stated that this requirement means that all restrictions are “accessible and formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁶ This means that vague or broadly worded restrictions, or restrictions that leave excessive discretion to enforcement authorities, are incompatible with the right to freedom of expression.

The content restrictions do not satisfy the requirement to be formulated with sufficient precision because they are stated in absolute terms failing to distinguish between cases when the restriction of expression is not necessary. For example:

- A call for segregation of part of Kazakhstan, or any other state for that matter, is a legitimate exercise of the right to freedom of expression, so long as the call does not incite to violence;
- The prohibition on divulging state or other secrets should allow for publication of these materials when it is in the public interest – for example, when they reveal corruption;
- The prohibition on the disclosure of anti-terror tactics would make it impossible for the media to have any discussion over whether the army or police used the correct tactics in any given case, including, for example, when police “anti-terror” actions result in the deaths of civilians.

Moreover, neither the Draft Code nor the Mass Media Code provides any definitions of content restrictions. This gives to the authorities a big scope for action and makes it easy to abuse their powers for political purposes. The main concern in this respect are the very vague terms of promotion to incitement to social, racial, ethnic, class and clan hatred and the cult of cruelty and pornography.

We recommend that Articles 404 and 405 of Draft Code include definitions of the content restrictions or refer to such legal definitions in other laws. At the same time the Draft Code

release of mass media or the distribution of mass media production shall be suspended inter alia for:

- advocacy or propaganda of social, racial, national, religious, class and patrimonial superiority;
- distribution of radio and TV programs as well as the demonstration of cinema and a video production of pornographic and special is sexual and erotic character;
- use of mass media with a view of infringement of conditions of carrying out of pre-election campaign by foreigners, persons without citizenship, foreign legal persons and the international organizations of the activity hindering and (or) supporting the promotion and election of candidates and political parties;
- election propaganda during its prohibition,
- compulsion for participation or for refusal to participate in strike;
- infringements of the legislation of Republic Kazakhstan about the order of the organization and carrying out of peace assemblies, meetings, processions, pickets and demonstrations.

²⁴ Further content restrictions are indirectly set out by Article 13 (4) of the Mass Media Law which provides for termination of the mass media or distribution of its production advocacy not only for the content restrictions enlisted in Article 2 but also for

- propaganda of war,
- the publication of materials and distribution of the information directed on kindling;
- interethnic and interreligious hatred.

²⁵ Article 14 (3) of the Mass Media Law bans the airing of TV and radio programmes as well as the demonstration of cinema and video production of pornographic and special sexual or erotic character, the propaganda of the cult of cruelty and violence.

²⁶ *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87 (European Court of Human Rights).

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should require that the content restrictions meet the three-part test established in Article 19 (3) and the principle that they should be interpreted and applied in the least restrictive for freedom of expression manner.

Recommendations:

- Articles 404 and 405 of Draft Code should include definitions of the content restrictions or refer to such legal definitions in other laws.
- The Draft Code should require that the content restrictions meet the three-part test established in Article 19 (3) and set out the principle that they should be interpreted and applied in the least restrictive for freedom of expression manner.

d. Violations of the restrictions on broadcasting in non-State - Article 403 para 2

Overview

Article 403 para 2 of the Draft Code provides sanctions for broadcasting of programmes in the official language less than the summary volume of transfers in other languages. The broadcasting restrictions concerning non-State languages are established in the Mass Media Law. Article 3 (3) of it stipulates that the “weekly volume of television and radio-programs of the media in the official language ... must not be less than the summary volume of transfers in other languages.”

Analysis

ARTICLE 19 points out that the restrictions on the use of non-State languages are incompatible with the right to freedom of expression. The choice in which language to broadcast is an integral part of the right to freedom of expression, protected under Articles 19 and 27 ICCPR²⁷; it is also the subject of specific guidance by the OSCE High Commissioner on National Minorities. Read together, Articles 19 and 27 mean that a State may not restrict the use of languages other than the State language, except in key public venues such as courts or parliament.²⁸

We also point to the OSCE “Guidelines on the Use of Minority Languages in the Broadcast Media”,²⁹ which 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.

In view of the incompatibility with international standards of the broadcasting restriction concerning non-State languages, the sanctions for violations of this restriction cannot be justified as “necessary” in a democratic society and thus violate the right to freedom of

²⁷ Article 27 of the ICCPR states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

²⁸ *Ballantyne and Others v. Canada*, 31 March 1993, Communication Nos. 359/1989 & 385/1989.

²⁹ October 2003: Office of the High Commissioner on National Minorities.

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expression. We recommend that the administrative liability for violations of the restriction on broadcasting in concerning non-State languages be removed.

Recommendations:

- The administrative liability in Article 403 (2) for violations of the restriction on broadcasting in concerning non-State languages should be removed.

e. Violations of the integrity of the court - Article 406

Overview

Article 406 of the Draft Code prohibits speculations by the media regarding the outcome of trials or the influence upon the court before the entry into a force of a judicial act.

Analysis

ARTICLE 19 finds the provisions of Article 406 of the Draft Code problematic because it imposes a content restriction is not necessary for the pursuit of any of the legitimate interests justifying interference with the right to freedom of expression, and in particular the protection of the right to fair trial to persons charged with offences and the impartiality of the judiciary.³⁰

In contrast to public officials, ordinary persons and the media are not likely to influence judicial proceedings with their opinions and affect the presumption of innocence of persons charged with crimes. The fairness of court proceedings as well as the seeking of justice is a matter of public concern in every state. Hence every ordinary person including the media should be able to discuss every aspect of the court proceedings including their outcomes. In this respect we refer to the position of the European Court of Human Rights which stated in the case of *Sunday Times v. UK*³¹, concerning the ban of a newspaper to publish information about a settlement being negotiated out of court:

“[The principles of freedom of expression] are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.”³²

Neither is the restriction in Article 406 necessary for maintenance of the impartiality of the judiciary. It is patronising and unfair to consider that professional judges in Kazakhstan unlike their colleagues abroad can be influenced easily by public opinion. Instead of restricting the

³⁰ Article 14, para. 2 of the ICCPR states:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 10 (2) of the European Convention of Human Rights includes the maintains of the authority and impartiality of the judiciary as one of the legitimate aims permitting restrictions on freedom of expression.

³¹ *The Sunday Times v. The United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74 (European Court of Human Rights).

³² *Ibid.* para. 65.

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media, the legislation should set out an obligation for professional or lay judges to withdraw alone or be replaced by the court if there are doubts as to their impartiality.

Consequently, we recommend that Article 406 of the Draft Code be removed.

Recommendations:

- The administrative liability for media speculations about the outcome of trials or for influence upon the court before the entry into a force of a judicial act should be removed.

f. Liability for passing on false reports and materials to the media - Article 407

Overview

Article 407 of the Draft Code provides for administrative liability for passing on false reports and materials to the media.

Analysis

Passing on truthful information to the media is no doubt important and useful for journalists. However, we note that Article 19 para 3 of the ICCPR does not permit restrictions on the right to freedom of expression aiming at protection of the interest of the media for receiving truthful information. In this regard, the administrative liability fails to meet the second prong of the three-part test setting out that the restrictions on the right to freedom of expression should pursue one of the set of legitimate interests recognised by international law.

Further protecting by law the truthfulness of information presents several unacceptable dangers. *First*, Article 407 can have a serious chilling effect on everybody who wishes to discuss information of public interest. Bearing in mind that in reality, it is often far from clear what the 'truth' on a particular matter is, the wording of Article 407 is unclear and as such violates the first part of the three-part test for restrictions on freedom of expression. *Second*, if people have the sword of administrative liability for false reports hanging over their head, they might simply decide not to report anything unless they are completely certain of it. As a result not only the media but citizens will be deprived of potentially vital information on current developments. *Third*, reports and opinions are not always easily separated. In view of this, an administrative liability for passing on false reports can thus easily become a ban on opinions not favoured by the authorities.

Having regard of the above, we find the administrative liability for passing on false reports and materials unnecessary and recommend that it is removed from the Draft Code.

Recommendations:

- The administrative liability set out in Article 407 of the Draft Code for passing on false reports and materials to the media should be removed.

g. Violations of the obligation to deposit free copies of periodicals, recording, and storage of materials, television and radio productions

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Overview

Article 408 of the Draft Code provides for administrative liability for violation of the obligation to deposit free copies of periodicals. This obligation is established in Article 16 of the Mass Media Law, which stipulates that copies of all periodic publications that are published in Kazakhstan, including small print-runs that are exempted from registration, should be lodged with the National Book Chamber, the National Library, the Library of Parliament and the “Authorised Agency on the Matters of the Mass Media”.

Analysis

ARTICLDE 19 finds the requirement of Article 16 very rigorous and facilitates censorship: all periodicals, even if only a print-run of 10 or 20 was produced, must be lodged with no fewer than three libraries and cultural archives, as well as with the State body that regulates the media. In contrast to other counties where deposit requirements have a purely cultural purpose such as to help maintain a national library, the purpose of Article 16 is obviously different. The requirement to deposit copies of all publications with the regulatory agency, in particular, implies that this measure is at least in part control-oriented. Further, if state institutions such as the National Book Chamber, the Library of Parliament and the “Authorised Agency on the Matters of the Mass Media” want to receive periodicals they should subscribe to them, rather than receive them for free. Otherwise they violate the right to property of media owners.

Having regard to the above, administrative liability for violation of the obligations to deposit free copies of periodical is overbroad and should apply only for violation of the obligation to provide copies of publications to National Library.

Recommendations:

- The administrative liability for violation of the obligations to deposit free copies of periodical set out in Article 408 of the Draft Code is overbroad and should apply only for violation of the obligation to provide mandatory copies of publications to the National Library.

h. Sanctions

Overview

The Draft Law provides for administrative arrest, confiscation of mass media products, suspension and termination of broadcasting and fines for the different administrative violations in the field of press and information. In addition, administrative arrest and fines are provided in Article 65 for swearing and insulting harassment in the field of family relations and in Article 418 for insulting public officials.

Analysis

According to international law, the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression.³³ In light of this, the state should ensure that measures taken or sanctions on expression should not dissuade individuals and the media from taking part in the discussion of matters of legitimate public concern.

³³ See *Skalka v. Poland*, Judgment of 27 May 2003, Application No. 43425/98, §§ 41-42 (European Court of Human Rights).

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We have several concerns with respect to the sanctions. *First*, we are concerned that the Draft Code does not incorporate the principle that any sanctions on the right to freedom expression must be necessary and proportionate. Judges should ensure that the harm to freedom of expression caused by a restriction do not outweigh its benefits to the legitimate interest.

Second, we are concerned that the Draft Code does not incorporate the principle the sanction should impair the right of freedom of expression as little as possible. In this connection we note that there is not safeguard that maximum sanctions are not used abusively and discriminately to punish journalists and media.

Third, we concerned about the nature of the sanctions and in particular the administrative arrest, the confiscation of mass media products and suspension and termination of broadcasting. The legitimacy of custodial sanctions for expression-related matters has repeatedly been called into question by UN bodies, including the Human Rights Committee. They have a clear view that the imposition of custodial sanctions is disproportionate in most of the cases, particularly when alternative measures – including fines – can effectively address the harm. More specifically, the European Court of Human Rights has stated that custodial sanctions are compatible with journalists’ freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence.³⁴ Furthermore, it is accepted that severe sanctions prescribed by law have a chilling effect on the exercise of freedom of expression also when they are not used. The mere existence of the deprivation of liberty is the law has such an effect. Having this in mind, we consider there is no justification for imposition of administrative arrest for swearing at home (Article 65), insulting public officials (Article 418), giving permission to publish calls for violations of territorial integrity of the Republic (Article 404). It is more appropriate to impose fines in these cases. In addition, we point to a number of sanctions that the Draft Code requires from judges to impose cumulatively with fines: confiscation of media production for distribution for violations of registration regime (Article 403 (1)), the suspension of broadcasting services (for violations of the registration regime (Article 403 (4)), for failure to deposit mandatory copies of periodicals (407) for violations of the broadcasting restrictions concerning non-state languages (Article 403 (2)) and prohibition of broadcasting services (for repeated violations of the registration regime and the broadcasting restrictions concerning non-state languages. This absolute rule does not allow for the sanctions to be determined in the light of the circumstance of any individual case making it possible to disproportionately restrict the right to freedom of expression.

Finally, we consider that the fines are unduly harsh and as such breaching the guarantee of freedom of expression. In extreme cases, the fines can reach to almost an equivalent of 10 000 US dollars. We note that even though the Draft Code envisages warning as administrative sanction warnings are not provided for any of the administrative offences concerning the media. This failure is in violation of the international law principle that less intrusive remedies should be used in cases of restrictions on the press, including as non-pecuniary sanctions such as warnings.

Recommendations:

- The Draft Code should incorporate the principle that any sanctions on the right to freedom expression must be necessary and proportionate. Judges should ensure that the harm to freedom of expression caused by a restriction do not outweigh its benefits

³⁴ *Mahmudov and Agazade v. Azerbaijan*, Judgment of 18 March 2009, Application no. 35877/04, § 50.

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to the legitimate interest.

- The Draft Code should incorporate the principle the sanction should impair the right of freedom of expression as little as possible. In this regard warnings should be also used with respect to individuals and the media for violation of the media and information regulations.
- The administrative arrest should be abolished as a sanction.
- Confiscation of publications and suspension and termination of broadcasting services should not be imposed cumulatively with other administrative sanctions. Judges should be able to determine when these measures should be applied taking into account the circumstances of each case.
- The amount of the administrative fines should be decreased.