ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Note

on

NGO Proposals to Amend Various Kazakh Laws Governing Mass Media Activity

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August 2004

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

OSCE

We have been asked by the Organization for Security and Co-operation in Europe (OSCE) to comment on two sets of proposals for reform of legislation relating to the media in Kazakhstan. One proposal, by Internews-Kazakhstan, is a full new draft Law on Mass Media. The other proposal, by Adil Soz, includes proposals for amendments of a range of different laws, including the following:

- Criminal Code;
- Civil Code;
- Code on Administrative Violations;
- Law on Licensing; and
- Law on Mass Media.

The two sets of proposals overlap most significantly in relation to the Law on Mass Media, although this law also overlaps with the civil code in relation to a right of refutation or reply.

This Note will treat the proposals in order of the legislation addressed. We note that we do not have all of the original provisions at our disposal and, to that extent, we cannot always comment on proposals.[1]

We understand that NGOs in Kazakhstan need to be practical and that it is not always feasible to seek to attain the very highest international standards immediately. Indeed, this point is made in the Explanatory Memorandum to the Adil Soz proposals. At the same time, it is often appropriate for NGOs to put forward even unrealistic proposals, as an initial bargaining position, with the understanding that some of their proposals will not be realised. In this regard we note that if NGOs do not even make these proposals, there is simply no chance of their ever being considered.

Regardless of the above, this Note is based on ARTICLE 19's understanding of international law in this area. It is up to local NGOs to determine the extent to which they will seek to promote these standards in Kazakhstan.

1. The Criminal Code

The Adil Soz proposals provide for the complete repeal of the two general Criminal Code provisions dealing with defamation, namely Article 129, addressing the dissemination of false information, and Article 130, addressing insults or non-factual statements which undermine honour or reputation. ARTICLE 19 fully endorses these proposals.

The Adil Soz proposals also call for the retention of an amended Article 318 of the Criminal Code as a sort of amalgamated version of previous Articles 318-320 and 343, which shall otherwise be repealed. The proposed Article 318 addresses the issue of insulting the President, a parliamentary deputy or 'other authority' when they are discharging their official duties, providing for a penalty of between 100 and 400 monthly calculating indicators, 1-6 months of the accused salary, public works of up to 240 hours or correctional works for up to one year. A note to the proposed article makes it clear that critical remarks will not attract liability under this provision.

The proposed Article 318 represents an improvement over the existing provisions in a number of ways, including the elimination of the possibility of imprisonment and a general reduction in penalties. At the same time, ARTICLE 19 has serious concerns about the proposal to retain this provision, albeit in amended form. We are of the view that all criminal defamation laws represent a breach of the right to freedom of expression and that they should be repealed in favour of civil defamation laws. The OSCE Representative on Freedom of the Media, jointly with his UN and OAS counterparts, the

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

UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression, has stated:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[2]

As the Adil Soz Explanatory Note makes clear, their proposals, and more generally the issue of defamation, do not relate to the concerns raised in Article 20(3) of the Constitution, which concern statements advocating violent overthrow of the constitutional order, incitement to war and hatred and the like. The very fact that defamation laws do not concern these issues is a key reason why they should not be criminal in nature.

The arguments against criminal defamation are strongest precisely where the Adil Soz proposals seek to retain this offence, namely in relation to officials conducting official business. This is at the very heart of the protection afforded by the right to freedom of expression and should, as a result, be the first, or at least not the last, area to be decriminalised. The protection of unfettered public discourse about the activities of officials is a core means of promoting democracy, accountability and good governance generally.

Finally, we note that the proposed Article 318 does not meet the standards set out in the leading ARTICLE 19 document in this area, namely *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*.[3] Article 4(b) of these standards, which have been endorsed, among others, by the OSCE Representative on Freedom of the Media and his UN and OAS counterparts,[4] states:

> As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:
>
> i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
> ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
> iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
> iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal

[2] Joint Declaration of 10 December 2002.
[3] (London: ARTICLE 19, 2000).
[4] See his Joint Declaration of 30 November 2000.

> penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

It is unclear whether and to what extent the proposed Article 318 meets these standards but we have serious reservations as to whether point (ii) is met under Kazakh criminal defamation law and the proposal does not conform to point (iv). While the penalties have been reduced, they are still distinctly criminal in nature and still unduly harsh.

We believe that it is of particular importance that NGOs, as well as IGOs and others working in this area, take a clear position in support of the core principle that defamation laws should be civil, and not criminal, in nature.

2. The Civil Code

The Adil Soz proposals regarding the Civil Code relate to its defamation and privacy provisions.[5] The main proposal regarding Article 143(1) seeks to limit the timeframe for bringing defamation actions to one year, to limit defamation to cases of false statements and to protect opinions. These are all positive proposals.

One further amendment to this provision that we recommend is that, in cases of statements relating to matters of public concern, the onus of proof be reversed, so that in such cases, the plaintiff must prove that the statements were false. We are of the view that this provides for a better balance between the need for a free flow of information and ideas about matters of public concern, on the one hand, and the importance of protecting reputations, on the other. It should also be made clear that the following provisions in Article 143 are limited by the scope of the first paragraph, so that the right to seek a refutation/reply or damages is engaged only in the circumstances envisaged by the first para., that is, by false statements of fact.

The proposal does not address some other concerns we have with the right of refutation/reply. Article 143 appears to give plaintiffs a right to both a correction and a reply (paragraphs (2) and (3)). This is clearly not justified. Indeed, given that this article is restricted to false information, we are of the view that a correction is the appropriate, and a sufficient, remedy. If a right of reply is retained, it should be limited in length and restricted to addressing the false statements defaming the claimant, not to introducing new comments or commenting on other facts.

We strongly recommend that consideration be given to introducing a defence of reasonable publication in cases of defamation that involve statements of fact on a matter of public concern, even where such statements have been shown to be false. The media, in particular, are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and

[5] ARTICLE 19 does not have a copy of Article 49 and so are unable to comment on the proposal relating to that article.

reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not.

The defence of reasonable publications should be admitted if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, courts should take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

The existing Article 145 provides that consent is required before anyone may use another person's depiction. The Adil Soz proposals provide that such consent is not required for officials carrying out public duties or where a fee has been paid for the depiction. These proposals are positive but they do not go far enough. First, it is widely recognised that this rule must be restricted to cases where a privacy interest of the individual in question has been breached. A picture of a crowd in a public place, for example, will rarely engage such an interest and it would seriously limit reporting in the public interest if the media were not able to take such pictures. Second, it is also widely recognised that the general rule must be subject to a general public interest override. There are many cases where this might be engaged. For example, in a situation where an official is apparently on private business but where corruption is involved, the public interest clearly outweighs the privacy one.

3. The Code on Administrative Violations

By-and-large, the proposals here are both positive and comprehensive as far as we are able to assess.[6] We have only one comment. We are of the view that Article 53(1), providing for closure of media outlets, is inappropriate in relation to print media outlets, assuming it might apply to such media. In our view, it is never appropriate to close a print media outlet, although it might be appropriate to bring criminal charges against various individuals working for it. In any case, it should be made clear that suspension or banning is an extreme sanction which should be applied only in the very most egregious situations where other, less harsh, sanctions have failed to remedy the problem.

4. The Law on Licensing

Unfortunately, we only have part of Article 22 of this Law, so our comments under this section are necessarily limited and are similar to the comments above in relation to the Code on Administrative Violations. Much of Article 22, even with the proposed amendments, is about depriving licensees of their licences. As noted, this is an extreme penalty that should be applied only in the most extreme cases (apart from formal flaws relating to the obtaining of a broadcasting licence in the first place, such as providing false information). Without having the full text before us, it is difficult to provide full

[6] ARTICLE 19 does not have a copy of Articles 60, 342, 345 and 541 and so are unable to comment on the proposal relating to those articles.

comments but it seems that the proposals envisage licences being withdrawn in a number of different cases. We would advocate that, as regards licences for media outlets, the provisions all be provided in one place (if necessary by suspending the general laws and providing instead specific rules for the media) and that they provide for the withdrawal of a licence only in very rare situations and, ideally, never for print media outlets, as noted above.

5. The Mass Media Law

Adil Soz

We have not comprehensively reviewed the original legislation to assess whether or to what extent the proposals by Adil Soz comprehensively address our concerns with that legislation. However, we strongly suspect that the Adil Soz proposals do not address a number of concerns, some serious, that we have with the original law. This is apparent, for example, from our concerns with a number of provisions in the Internews draft, noted below, which parallel provisions in the original law and yet which the Adil Soz proposals do not address. Also, our 2002 Memorandum noted a number of problems with the registration system in the Mass Media Law which do not appear to have been addressed by the Adil Soz proposals.

We outline here two areas where we have concerns or questions about the Adil Soz proposals. The others are either clearly positive in nature or appear to be related to linguistic issues which do not come through clearly in translation. It is not clear whether proposal 1) envisages that other laws might provide for registration of the Internet. If so, we think this would be unfortunate. The Internet, while a medium for mass communication, is quite different from traditional mass media and it is not appropriate to apply the same rules to it. Attempts to do so by other States have resulted either in failure or in serious restrictions on the use of this key modern tool for realising the right to freedom of expression.

Proposal 3) addresses the issue of media ownership providing, first, that no individual or entity shall own more than 20% of the "information services in the area of dissemination of the respective mass media" and, second, that owners must publish various information about ownership on an annual basis. Regarding the first point, we note that it would be preferable to specify that the 20% limit applies to each particular media sector (e.g. national newspapers, radio, television, etc.), rather than to information services as a whole. A 20% industry-wide rule would allow for significant concentration in key sectors, such as television, contrary to the public interest. See the comments below on the Internews draft regarding the second point.[7]

Internews

We include here reasonably detailed comments on the Internews draft Law on Mass Media. In addition to our own comments, we recommend to Internews for their

[7] We support the general thrust of these proposals, and recommend them to Internews for their consideration, but our view is that they should apply to media outlets themselves and not to owners as individuals.

consideration the following of the Adil Soz proposals relating to the Law on Mass Media: 3), the second part, subject to our comments below, 10), 11), inasmuch as it precludes refutation of opinions, and 17), inasmuch as it provides a limited good faith defence to the obligation to report only true information (see also our comments below).

ARTICLE 19 is of the view that it would be preferable if there were no specific legislation governing the mass media as a whole, as opposed to broadcasting legislation, which is necessary. At the same time, we are aware that the political, and perhaps even legal, context in Kazakhstan makes this extremely unlikely and our comments below take this into account.

In general, the draft Law on Mass Media represents a commendable attempt to ensure that a law of this nature does not unduly restrict the media despite a longstanding tradition of unreasonable fetters on media freedom, including through the existing Law on Mass Media. In a number of cases, the draft specifically transforms previously repressive provisions into ones that are compatible with the right to freedom of expression. Due to the length of the draft Law, we do not detail all of these positive provisions here but, instead, provide comments on those provisions which we feel could be further improved.

Authorized Body

The draft refers in various places to the authorized body, for example, in Article 7, regarding the obligation of owners to provide ownership information, Article 9, regarding licensing of electronic media, and Article 12, regarding registration. We note that, under international law, it is quite clear that any bodies which exercise regulatory powers over the media, including registration and certainly licensing, must be independent of government in the sense that they are protected against government interference. The three special mandates for the protection of freedom of expression at the OSCE, UN and OAS have stated:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[8]

The draft does not itself clarify which body it refers to in this regard but we have serious doubts as to whether a body authorised either by other legislation or in some other way would have the necessary degree of independence. We therefore recommend that, to the extent that such a body is necessary, it be provided for as a statutory body in the legislation itself, with appropriate guarantees of independence.

Articles 3 and 5

The first para. of Article 3 provides that the aim of mass media activities is to realise the public's right to receive and disseminate mass information. While we do not disagree with this as a general aim for the media, we question whether it should be set out in law.

[8] Joint Declaration of 18 December 2003.

We are, in particular, concerned that it might be abused to harass the independent media on the (specious) grounds that such media are not serving the public's right to know. This risk is reinforced by the first para. of Article 5, which states that private citizens have the right to receive information from the media, indeed accurate information, about various bodies and officials.

Article 7

The last para. of this article requires owners to provide information about other mass media they own or have shares in. We have already noted that it would be worth considering the Adil Soz proposals on this. Also, it would for various reasons make more sense to require mass media outlets, through the registration process, to provide details of their ownership structures rather than requiring owners to do this. For example, it might be possible for someone, while not an owner, to have considerable shareholdings in a wide range of media enterprises. Such information could be required to be updated as it changes.

Consideration might also be given here to including a specific provision, like the one relating to information agencies, to the effect that the right to found a media outlet means that licensing of the print media is not permitted.

Article 9

The penultimate para. in this article provides that the owner of an electronic media outlet shall set the volume of retranslation (retransmission?) of programmes from other mass media. This is not appropriate as a general statement. It might well be appropriate for the authorities to set limits – either generally in a broadcasting law or through the licensing process for individual broadcasters (overseen by an independent body) – on how much programming should be original as opposed to rebroadcast. It is certainly appropriate to set rules relating to the amount of local programming that must be provided.

The last para. in this article provides that electronic media are not responsible for the content of rebroadcast programmes. Again, this is not appropriate. It would, for example, allow a broadcaster to carry clearly offensive or sexual programming during peak times when children are watching, or to carry clearly defamatory programmes. While certain protections may be appropriate in this regard, a blanket immunity is not.

Article 12

This article sets out the general requirement for mass media to be registered. We question whether this is either necessary or appropriate in the Kazakh context. While it is clear that an effort has been made to ensure that these provisions are not abused, this cannot ever be fully guaranteed. More importantly, registration is simply unnecessary and not practised in many countries. ARTICLE 19 therefore recommends that the whole idea of registration be reconsidered. We also note that for the broadcast media it represents a double burden, as they are already required to be licensed, and is, therefore, both unduly onerous and particularly unnecessary. As the three official mandates for protection of freedom of expression have 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.[9]

Para. 5 of this article provides for re-registration in case of change of owner, legal form or other details. It would be far preferable if this were transformed into an obligation simply to provide updated details, rather than to have to go through the whole registration process again from the beginning.

Article 15

One of the grounds for refusal of registration listed in this article is if an application does not meet the requirements of the law. It would be preferable if this were restricted to cases where an application did not include all of the required information as set out in the law. The present formulation, based on meeting the requirements of the law, is excessively general and could be subject to abuse.

The third para. of this article provides that suspension/termination may be appealed to the courts, apparently implying that registration may be suspended or terminated by the authorized body. The first para. of Article 16 does makes it clear that suspension/termination may only be by decision of a court but Article 15(3) could be amended to make that perfectly clear.

Chapter 4

Chapter 4 sets out detailed rules for the internal organisation of media outlets, including what the bylaws of the editorial office must include. While none of this is specifically objectionable, ARTICLE 19 questions whether it is necessary to provide for such prescriptive detail on internal organisation in a law. We would generally prefer to let these matters be dictated by market considerations, while also being aware of the problem of possible owner interference with editorial independence. As with other provisions, a concern is that these provisions might be abused to harass independent or critical media.

Article 20

Article 20 requires, among other things, that a print media outlet contain its circulation figures. It is not clear why this is necessary but we note that such figures vary both from day-to-day and on weekends. What, exactly, needs to be provided should be clarified to prevent this requirement from being abused as a means to interfere with media outlets.

Article 21

This article requires print media outlets to provide deposit copies to, among others, the authorized body. It is perfectly legitimate to require copies to be provided to public information depositaries, such as libraries, but not to regulatory bodies. Such an obligation would seem to suggest that the authorized body has some regulatory role in relation to the content of the media outlet, which it does not.

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[9] *Ibid.*

Chapter 5

This chapter provides generally for an access to information regime for the mass media, along with some rules relating to accreditation. We note that including access to information here is based on a mistaken conception of this right, which should apply to everyone, not just the media. It is inappropriate to include this right in a media specific law but even more inappropriate to restrict it, as this draft does, to the media.

Another serious problem with this chapter is that it provides for an unduly general and broad regime of exceptions in two ways. First, it defers to other laws, providing that information which has been made secret by another law does not have to be disclosed. This effectively leaves in place the existing secrecy regime, no matter how broadly defined or how seriously it runs counter to the principles of freedom of information.

Second, Chapter 7 defines State and non-State secrets in a manner that is very seriously overbroad. It defines State secrets, for example, include information the disclosure of which *may* entail serious consequences. There is no requirement that this be likely or even probable. In addition, the envisaged consequences include harm to the political interests of Kazakhstan, a category that is almost certain to be abused in practice and which is of dubious legitimacy in any case. Similarly, a military secret includes information the disclosure of which *may* harm the armed forces. Not only is the test again too weak but the harm should surely relate to national security and not the armed forces as such. Non-State secrets are also defined in an excessively broad manner.

International standards dictate that a restriction on the right to information – in particular, the refusal by a public body to release information pursuant to a request – will be justified only if (a) disclosure of the information would, or would be likely to, cause substantial harm to a legitimate interest, and (b) the harm caused by the disclosure of the information outweighs the public interest in the disclosure.

Article 26

The second para. of this article provides that journalists may be in private places as long as the owner has not fenced them in or put up signs saying entry is prohibited. This would appear to put an obligation on anyone who does not want journalists tramping around their property to put up signs to this effect. Clearly this is inappropriate. Journalists should be subject to laws relating to trespass in the same way as everyone else.

Article 33

This article places restrictions on the dissemination of material by erotic and pornographic mass media. It seems to imply, however, that these restrictions do not apply where the percentage of erotic material is less than 20%. It should be clear that this does not mean that erotic materials may be broadcast during times when children are expected to be awake, just because the percentage is less than 20% of the overall programme schedule.

Article 36

The first para. of this article prohibits advertising that is, among other things, insulting, without defining what this might mean or even whether the insult needs to be personal. This is not appropriate. Advertisements, like all published material, are subject to the right of refutation and defamation law but a general restriction of this sort may well be open to abuse.

Article 38

This article sets out various duties of journalists, most of which are problematical. The first para. requires journalists to implement the programme of activities of his or her media outlet. While this will normally be part of the contract of employment, subject to labour laws of general application, there is no need to set it out separately here and this may be problematical, for example, if the individual in question has moral concerns about a particular editorial line.

The second para. states that journalists shall not distribute information that is not true, although a number of exceptions to this general rule are provided in Article 48. It is well established that false information is protected by the guarantee of freedom of expression and that, outside of limited cases, it should not attract liability. It is obviously a professional obligation to strive to be as accurate as possible but perfect accuracy is not attainable even for the very best journalists. The Adil Soz proposals partly address this by providing for another exception, namely where the journalist acted in good faith and in the public interest. It would, however, be preferable if the legal requirement of truth were dropped altogether.

The fourth para. of this article requires journalists to respect the rights and legitimate interests of State agencies and organisations. It is not clear what these might be but this appears to be completely unwarranted. A special obligation on journalists to respect State bodies, over and above laws of general application, can hardly be justified as a restriction on freedom of expression.

The fifth para. requires journalists to obtain consent before distributing private information. While a general obligation to respect privacy may be appropriate, it must at least be conditioned in a number of circumstances, some of which are noted above in relation to the Adil Soz proposals in this area. At a minimum, this obligation should be able to be overridden where the public interest so demands.

Article 40

This article addresses the right of refutation. It is not clear from the text whether what is envisaged is a right of correction, whereby a media outlet is required to correct mistaken information, or a right of reply, whereby a media outlet is required to carry a statement by a person offended by incorrect and insulting information it has published. A right of reply is, for obvious reasons, far more intrusive and should, as a result, be subject to greater constraints. Put differently, a right of correction is far less problematical from the perspective of freedom of expression.

Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- The reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn't like.
- It should receive similar prominence to the original article or broadcast.
- It should be proportionate in length to the original article or broadcast.
- It should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
- The media should not be required to carry a reply which is abusive or illegal.

A right of correction, as noted above, does not need to be subjected to such stringent requirements.

Para. 3 of this article gives a newspaper one month to print a correction/reply. This seems unnecessarily long, particularly for daily newspapers. A better rule would require them to print it as soon as reasonably possible.

Article 41
This article allows a refutation to be refused if it is received over a year after the material was printed/broadcast. This is an unduly long period for requesting a refutation; a month, in accordance with the time period that broadcasters are required to keep programmes after they have been broadcast, is more appropriate. It also prohibits government employees from requesting refutations. This is too broad an exclusion; a narrower exclusion, restricted to material relating to the public functions of an official, could be considered instead.

Article 44
The third para. of this article prohibits officials from imposing restrictions on the mass media relating to State support. While the intention behind this is entirely positive, as presently worded, it would seem to exclude placing special public service obligations on publicly funded public broadcasters as part of their mandate. Clearly this is perfectly legitimate; consideration should be given to redrafting the provision more carefully.

Article 47
The second para. of this article makes it an offence to breach other laws protecting various public interests, such as the constitutional order and security. This is both unnecessary, inasmuch as those other laws by definition already protect those interests, and also inappropriate, inasmuch as at least some of those other laws are likely to be problematical from the perspective of freedom of expression.

Article 48
This article sets out exceptions to the general rule of liability for publishing or broadcasting untrue information. Paras. (4) – (6) provide for exceptions where the

information was originally produced or provided by information agencies, a live interview or another mass media outlet. These exceptions are too broad. While some protection may be warranted in all three of these cases, a media outlet should at least not be protected when they knowingly broadcast illegal material, simply because it was produced by someone else.