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GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

The Draft Law of the Republic of Kazakhstan "Concerning Mass Media"

by

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Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses a draft copy of the government of Kazakhstan's draft law "Concerning Mass Media" (draft Law) for compliance with international standards regarding the right to free expression. The comments are based on an unofficial English translation of the draft Law[1] and have been prepared following a request from the Open Society Institute.

ARTICLE 19 has serious concerns with the draft Law. A number of its provisions impose significant restrictions on freedom of expression and the general scope of the law is extremely broad. One problem lies in the attempt to regulate every aspect of the media, and every media sector, in a single piece of legislation. This leads to legal regimes for registration, licensing, accreditation and access to information that are vaguely delineated

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

and often inappropriate. More importantly, the imposition of registration, licensing and accreditation systems, all overseen by bodies which are not independent of government, represents an excessive exercise of State control over the press, inconsistent with international guarantees of freedom of expression. These and other shortcomings of the draft Law are discussed in more detail below, following an overview of Kazakhstan's international and constitutional obligations regarding freedom of expression.

II. International Standards

Freedom of expression, a fundamental human right, is protected by Article 19 of the *Universal Declaration of Human Rights* (UDHR),[2] binding on all States as a matter of customary law. Article 19 of the UDHR states:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Freedom of expression is also guaranteed by a number of legally binding international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR),[3] widely seen as an authoritative elaboration of the rights set out in the UDHR. Freedom of expression is also protected in all three regional treaties on human rights, specifically at Article 10 of the *European Convention on Human Rights* (ECHR),[4] at Article 9 of the *African Charter on Human and Peoples' Rights*,[5] and at Article 13 of the *American Convention on Human Rights*.[6] Although the decisions and statements adopted under these systems are not directly binding on Kazakhstan, at the same time they provide persuasive evidence of the scope and implications of the right to freedom of expression which is of universal application.

Kazakhstan is a member of the OSCE and signatory to the *Final Act of the Conference on Security and Co-Operation in Europe* (Final Act),[7] which sets out human rights obligations of Members. The Final Act declares that the participating States, "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development." The Final Act also states that the participating States will, "act in conformity with the purposes and principles" of the UDHR.[8]

International law does permit limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. For example, Article 19(3) of the ICCPR states:

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[2] UN General Assembly Resolution 217A(III), 10 December 1948.
[3] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[4] Adopted 4 November 1950, in force 3 September 1953.
[5] Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.
[6] Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.
[7] OSCE, Helsinki, 1 August 1975.
[8] *Ibid.*, Clause VII.

> The exercise of the rights provided for in paragraph 2 of this article [the rights to seek, receive and impart information and ideas] 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 and reputation of others; (b) For the protection of national security or of public order, or of public health or morals.

This article subjects any restriction on the right to freedom of expression to a strict three-part test. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.[9]

To be "provided by law" implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility. The third part of the test, the requirement of necessity, means that even where measures seek to protect a legitimate interest, the government must demonstrate that there is a "pressing social need" for the measures. Furthermore, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.[10]

III. Domestic Obligations

Freedom of expression is protected, subject to certain restrictions, by Article 20 of the Constitution of Kazakhstan, which states:

> 1. The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.
> 2. Everyone shall have the right to freely 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 the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence shall not be allowed.

Article 18 of the Constitution provides:

> 1. Everyone shall have the right to inviolability of private life, personal or family secrets, protection of honour and dignity.
> …
> 3. State bodies, public associations, officials and the mass media must provide every citizen with the possibility to obtain access to documents, decisions and other sources of information concerning his rights and interests.

Additional grounds for restrictions are set out in Article 39, which states:

> 1. Rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system,

[9] For an elaboration of this test, see *Mukong v. Cameroon*, 21 July 1994, No. 458/1991 (UN Human Rights Committee), para. 9.7.

[10] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.

defence of the public order, human rights and freedoms, health and morality of the population.

2. Any actions capable of upsetting interethnic concord shall be deemed unconstitutional.
3. Any form of restrictions to the rights and freedoms of the citizens on political grounds shall not be permitted.…

Freedom of expression as protected by Article 20 of the Kazakh Constitution does not apply "regardless of frontiers". More importantly, not all the restrictions imposed on freedom of expression and to the right of information (Articles 18 and 20) satisfy the three-part test for restrictions required under international law and described in Section II, above. For instance, Article 20(2) states that the right to receive and dissemination information may be limited by law, but there is no further requirement that such a law serve a legitimate interest or that it be necessary to protect that interest. Article 20(3) provides simply that certain forms of expression shall not be allowed, without setting any conditions on these restrictions. Article 39(1) is consistent with international law, but it is general in nature and so cannot be expected to override Article 20, dealing specifically with freedom of expression.

Article 18(3) provides for access to public information by citizens concerning their "rights or interests." International law regarding freedom of information recognizes that government bodies have an obligation to provide the public with access to the information in its possession, subject to certain limited exemptions (discussed in more detail below in Section IV.7). Such a right should not be conditioned upon the individual in question demonstrating an interest in the information, as implied by this provision.

Furthermore, the imposition of a duty to provide information on the media amounts to an interference with editorial independence and is a violation of the right to freedom of expression. It is certainly the role of the media to provide citizens with information of public interest, but making this a legal obligation is open to serious abuse. In particular, practically every media outlet could, at one point or another, be charged with failing to transmit some information of public interest. The concept is simply too broad to be the subject of a positive obligation on the media.

Recommendations:

- Article 20 should be amended so that the guarantee applies "regardless of frontiers".
- All restrictions to freedom of expression should be required to satisfy the three-part test recognized under international law, namely that restrictions be prescribed by law, pursue a legitimate aim and be necessary to achieve that aim.
- Article 18(3) should be amended to remove the reference to the mass media.
- The right to information as protected by Article 18(3) should not be conditional upon demonstrating a right or interest.

IV. Analysis of the Laws Regulating Mass Media

IV.1 Definitions

Article 1 of the draft Law contains no fewer than 45 definitions, a number of which are repetitive, unnecessary and/or confusing.

Information is defined at Article 1(9) as "information about people, subjects, facts,…" and so on. This is circular and, furthermore, the definition is repeated again at Article 1(30).

The attempt to define "public morals", at Article 1(14), as a system of dominant norms and customs is also problematic. It is very difficult, and almost always controversial, to determine what customs dominate within a society at any given time and the draft Law does not suggest a test for arriving at such a conclusion. ARTICLE 19 suggests that this definition should be removed since it is overly vague.

The definitions of "products of an erotic nature" and "products of a sexual-erotic nature" (Articles 1(20) and (21)) together cover a very large body of expression. This is particularly true of the first concept, which covers information which in general "exploit the interest to sex". This could cover depictions of hand-holding or the reading of love poetry, although the actual wording of the definition is confusing. This is problematical given that these are used as a basis for restricting the distribution of media products in Chapter 4 of the draft Law (discussed below in Section IV.3).

"Mass media company" is defined at Article 1(34) as "periodically updated result of intellectual or other activity produced in the form of the periodic prints, tele – or radio program, the network of any mass media company within the accessible telecommunication networks (Internet and others) or other forms of the periodic or steady public dissemination of mass information.." It is well established that different regulatory approaches are required for different media in accordance with the guarantee of freedom of expression. As the European Commission of Human Rights has stated:

> Article 10 of the [European Convention on Human Rights] clearly distinguishes between the degree of control that the State may legitimately exert over broadcasting, television or cinema enterprises, precisely by regulating access to these commercial activities by licensing procedures in which a wider margin of discretion is left to the States, and control over forms of exercise of freedom of expression, including the press and other printed media, which are subject only to the limitations laid down in para.2 of Article 10.[11]

Mass media on the Internet, for example, cannot be regulated in the same way as print or broadcast media. The Internet is clearly very different than either the print or broadcast media and any regulatory mechanism needs to take this into account. For this reason, ARTICLE 19 is of the view that the Internet should not be subject to specific statutory regulation, at least at the level of contents. The desirability of avoiding statutory content

[11] *Gaweda v. Poland*, Commission Report of 4 December 1998, Application No.26229/95, para.49.

regulation on the Internet has achieved some recognition at the international level. For example, the Committee of Ministers of the Council of Europe adopted a Declaration in May 2003 which lays down a number of basic principles to promote the use of the Internet as a means of expression, including that States should encourage self-regulation of the Internet.[12]

The print and broadcast media also cannot be regulated in an identical manner as important considerations that apply to one do not apply to the other. For instance, in most, if not all, established democracies, the impetus to regulate broadcasting stems from the finite nature of the frequency spectrum, thus necessitating a competitive licensing process, whereas resource limitations of this sort do not apply to the print media.

Finally, the definition of "censorship" at Article 1(45) is very confusing, at least in translation.

Recommendations:

- The definition of "information" should either be elaborated in a manner which is not circular or removed from the law as unnecessary. The second definition of information at Article 1(30) should be removed.
- Attempts to define in legislation what constitutes the dominant public morality should be avoided and this definition should be removed from the law.
- The definition of "products of an erotic nature" should be removed from the law due to its vagueness and overbreadth and replaced with the definition suggested below in Section IV.3.
- The Internet should not be included in the definition of mass media company.
- The definition of "censorship" should be clarified.

IV.2 Basic Concepts

Article 2 of the draft Law sets out a number of protections for freedom of expression, including a prohibition on censorship. These are welcome. The same article states that activities related to the exercise of freedom of speech which are not prohibited by the law will be protected by the Constitution. While the intention behind this is probably postive, it implies that constitutional guarantees are of inferior legal status to the provisions of the draft Law. Also, Article 2(3) repeats Article 18(3) of the Kazakh Constitution and thus suffers from the same defects as the constitutional provision, discussed above in Section III.

Recommendation:

- Article 2(1) should be amended so that it is clear that the Constitutional guarantees are paramount.
- Article 2(3) should be amended in line with the recommendations for Article 18(3) of the Constitution.

[12] *Declaration on freedom of communication on the Internet*, adopted 28 May 2003, Principle 2.

IV.3 Content Restrictions

Abuse of Freedom of Mass Information

Article 3 sets out a number of content restrictions for the mass media. A general criticism of almost all of these restrictions is that, although most serve legitimate aims, they are not sufficiently narrowly drafted to meet the condition that they be necessary to protect these aims. In particular, most are overbroad in nature, covering speech that is not harmful, as well as that which is legitimately proscribed.

Article 3(1) prohibits use of the media for 'propaganda' and 'agitation' for various ends. These terms are vague and could be abused, for example to prohibit a discussion in the media about the illegal activities of a third party. A better approach would be to prohibit only direct incitement to the illegal ends.

Furthermore, many of the ends are themselves cast too broadly. For example, Article 3(1)(1) prohibits using the mass media for 'forced change' of the constitutional order. A prohibition of this sort should be restricted to illegal or violent overthrow of the constitutional order; some constitutional change may be quite legal and therefore proper for the media to advocate. Article 3(1)(3) prohibits agitation to disrupt State safety. While this is a legitimate interest, the prohibition should apply only to material which threatens to cause imminent violence. As drafted, it could be held to apply to a wide range of speech. Similarly, the prohibition relating to promoting superiority in Article 3(1)(4) should, in accordance with Article 20 of the ICCPR, which deals with hate speech, apply only to expression which incites to hatred, discrimination or violence.

Article 3(1)(5), which prohibits the dissemination or advertising of materials that cultivate "the cult of brutality, violence and pornography" is problematic due to scope of both the term cultivate and the term 'pornography'. To highlight how such terms may be more carefully defined in a law, we provide some detail on how some legislators and courts in established democracies have tried to provide more detailed definitions of precisely what is prohibited. All of the restrictions in Article 3(1) would benefit from more detail of this sort.

For example, in *Miller v. California*, the United States Supreme Court set down what it deemed to be the appropriate standard in relation to "obscenity":

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest…; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[13]

Courts in many jurisdictions have distinguished *offensive* material from material that is actually *harmful*, only allowing restrictions which have as their objective the prevention of harm. The European Court of Human Rights, for example, has stated that freedom of

[13] *Miller v. California*, 413 US 15, p. 24.

expression is applicable "to 'information' or 'ideas' that… offend, shock or disturb the State or any other sector of the population."[14]

To give effect to this distinction, the Canadian Criminal Code, for example, defines obscene material as follows:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[15]

The Supreme Court of Canada has held that the meaning of "undue exploitation" in this section is a community standards one, but "it is a standard of tolerance, not taste… not what Canadians think is right for themselves to see [but] what the community would [not] tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."[16] The Court distinguished between three types of sexually explicit material, classifying each in terms of the test for "undue exploitation":

> [T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that it not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.[17]

The Canadian Supreme Court has specifically held that the State could not restrict expression simply because it was distasteful or did not accord with dominant conceptions of what was appropriate. It upheld the legislation, however, on the basis that it was designed to prevent harm to society, by rooting out material which undermined basic human rights, such as equality between men and women:

> [Earlier legislation on obscenity's] dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered inherently undesirable, independently of any harm to society…. [T]his particular objective is not longer defensible in view of the Charter…. [T]he overriding objective of S.163 is not moral disapprobation but the avoidance of harm to society.[18]

ARTICLE 19 believes that the law should only restrict sexually explicit materials which can be shown to be harmful and which lack serious literary, artistic, political, or scientific value.

Article 3(2) also goes beyond what is necessary to protect social interests. Article 3(2)(1) prohibits the disclosure of "information containing the state secrets or other secrets safeguarded by the law." The problems with this type of restriction are discussed in more detail below, in Section IV.7, regarding freedom of information.

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[14] *Handyside v. the United Kingdom*, 7 December 1976, Application No.5493/72 (European Court of Human Rights).
[15] S.163(8) of the Criminal Code, RSC 1985, c. C-46.
[16] *R. v. Butler* [1992] 1 SCR 452, pp. 477, 485.
[17] *Ibid.*, p. 485.
[18] Note 16, paras. 492-3.

Article 3(2)(2) prohibits the popularization and justification of terrorism and extremism, while Article 3(2)(3) prohibits the dissemination "during the course of anti-terrorism operations in the Republic of Kazakhstan, the information disclosing technical principles, tactics of these operations." Both terrorism and extremism are extremely broad, undefined terms (notwithstanding the 45 other definitions provided in Article 1) and hence fail to meet the standards of the first part of the test, that restrictions be 'provided by law'. The risk posed by insufficiently defined, and hence vague, restrictions to freedom of expression lie in the chilling effect that these have on communication and public discussion. Without knowing what kind of information constitutes "extremist materials", the media may hesitate before engaging in a discussion about controversial topics. This will result in a stifling of political debate and the exclusion of minority viewpoints, two outcomes which are inimical to the development of a healthy democracy.

Furthermore, the prohibition in Article 3(2)(3) is so broad that even a news items about an attack might be in contravention, and yet there is an obvious and justifiable public interest in this type of information.

Finally, Article 3(2)(4) makes it illegal to "disseminate and popularize drugs, psychotropics and precursors". Again, this fails to satisfy the "necessity" branch of the three-part test for restrictions, which requires such restrictions to be proportionate to the legitimate aim pursued. This provision is overbroad, effectively precluding any public discussion regarding psychotropic substances and narcotics. This result is in contrast to the international legal perspective that wide latitude must be given to freedom of expression when the information at issue is related to a matter of public importance.[19] Drug use and the criminal activity associated with drug trafficking are both issues of significant public interest, the discussion of which should not be silenced. The harm caused by this provision far exceeds any limited gains that might be achieved in terms of preventing drug use.

Recommendations:

- The restrictions in Article 3 should be amended to be brought into line with the three-part test for restrictions on freedom of expression, which requires all such restrictions to be prescribed by law, to protect a legitimate aim and to be necessary to protect that aim. Specifically, the following amendments should be made:
  - the prohibitions should generally be made conditional upon 'incitement' to the harm sought to be avoided;
  - the prohibition relating to the constitution should be restricted to inciting illegal or violent constitutional change;
  - the prohibition on disrupting State safety should apply only to expression which incites imminent disorder;
  - the provision on hate speech should be restricted to speech which incites to hatred, discrimination or violence;
  - the term "pornography" should be replaced with a prohibition on "sexually

[19] See, for example, *Castells v. Spain*, 23 April 1992, Application No. 11798/85 (European Court of Human Rights), para. 42.

explicit material which is harmful and lacks serious literary, artistic, political or scientific value";
- the terms "terrorism" and "extremism" should either be defined clearly and narrowly or be removed from the law altogether.
- Articles 3(2)(3) and (4) should be removed from the draft Law.

Right of Refutation

Article 32(1) of the draft Law grants a right of refutation to a citizen or legal entity following the publication of information "that does not represent the facts, or defames their honor, dignity and business reputation." The right of refutation also applies in the context of publication of "inadequate information" if it "derogates a person or organization's honor, dignity and business reputation in public opinion in respect to the observance of laws and social morality".

The scope of the refutation may not exceed the scope of the original publication or broadcast. Periodicals are required to print the refutation with a headline that states "Refutation" and television and radio must broadcast the refutation in the same time slot as the offending information was originally broadcast. If the offending information was contained in a publication from an organization, then that publication has to be replaced or withdrawn along with notification to all recipients of the document that the information is false (Article 32(3)). In all other cases, the procedure for refutation will be established by the courts.

If the mass media refuses to publish or broadcast a refutation, the matter may be heard by the court. Applicants have one year to appeal a refusal to publish or broadcast. A mass media may refuse to publish or broadcast a refutation if the request was received more than a year after the original dissemination of the information (Article 32(6)).

Anyone who claims that information has been disseminated that defames his or her honour, dignity or business reputation is entitled to claim monetary compensation. This provision in essence provides for an action in defamation (Article 32(5)).

Analysis

Article 32 combines both a right of refutation and an action for defamation. The defamation action at Article 32(5) should be removed from the draft Law. The Criminal Code of Kazakhstan already penalizes libel, slander and insult, and the Civil Code already provides protection for honour, dignity and business reputation in much more detail than in the present draft. To reproduce such a provision within the media law is unnecessary and confusing, and could lead to abuse.

As regards the remainder of Article 32, the right of refutation constitutes a highly disputed area of media law. In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.[20] In Europe, in contrast, the right of reply (as it is known) is the subject of a resolution of the Committee

[20] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

of Ministers of the Council of Europe.[21] In many Western European democracies, the right of reply is provided for by law and these laws are effective to a varying extent. The purpose of a right of reply is to provide an individual with an opportunity to correct inaccurate facts which interfere with his or her right to privacy or reputation. 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 incorrect facts, not 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
- it should not be taken as an opportunity to introduce new issues or comment on other correct facts.

Article 32 of the draft Law does not provide the mass media with adequate grounds for refusing to publish or broadcast a refutation, such as if the refutation is itself illegal or contains abusive language. Furthermore, the scope of Article 32 is not limited to the correction of erroneous facts, but clearly covers expresions of opinion as well.

Recommendations:

- Article 32(5) should be removed from the draft Law.
- Article 32 should be amended to ensure that the right of refutation only applies to incorrect facts, not to opinions, correct facts or unrelated issues.
- The mass media should be afforded additional grounds for refusing to publish or broadcast a reply, including that the reply goes beyond the scope of the original story and introduces commentary on other correct facts, or is abusive in tone.

"Must-Carry Provisions"

Article 29(1) of the draft Law states: "Official communications from state authorities are placed in mass media in accordance with the legislation of Kazakhstan." Article 30 provides: "The owner involved in mass media releasing and broadcasting shall freely and duly publish and broadcast the effective court decision that contains a requirement to publish and broadcast the decision via the mass media."

While it is certainly important that the public broadcaster should carry news of important government policies and judicial decisions, provisions such as these are both unnecessary and susceptible to abuse. They are unnecessary because any responsible media outlet will carry information of public importance without being required to do so by law. Experience in countries all over the world shows that both public and private media provide ample coverage of government policies in various areas of activity even when they are not bound by a legal duty. The provisions are open to abuse because officials

[21] Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).

may use it in circumstances for which it was not intended. And finally, independent media may be harassed, and even closed, for allegedly failing to fulfil these vague requirements.

Even in relation to State and public service broadcasters, the Committee of Ministers of the Council of Europe has voiced concern over "must-carry" requirements, stating:

> The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.[22]

The must-carry provisions in the draft Law constitute a violation of freedom of expression because they limit editorial independence. The severity of the infringement is aggravated by the vague wording of both provisions, and in particular Article 29, which essentially grants the government *carte blanche* to use the mass media as a propaganda tool. There is no requirement, for instance, that government use of the media be restricted tp national emergencies.

Recommendation:

- The "must-carry" requirements in Articles 29 and 30 should be removed from the draft Law.

IV.4 Registration System

Articles 8 and 14-16 of the draft Law set out the mechanics of a media registration system. Article 14(1) states that "the mass media disseminated in the territory of the Republic of Kazakhstan regardless of the form of ownership shall be subject to registration with the authorized body." "Mass media" is not defined, although presumably it refers to "mass media companies" as defined in Article 1. The implication of the provision is that all media, including the foreign press, must register with the "authorized body".

To register, the owner of a mass media company must submit an application to the authorized body. The contents required in the application are specified by Article 15 and include, among other things, the name and address of the compnay, the type of mass media company, the geographic scope of the media, the sources of financing, the address of the editorial office and the main topical direction. Article 15(3) provides that the applicant must attach a document to the application confirming its right to engage in entrepreneurial activities.

Article 14 lists the grounds under which the authorized body may refuse registration, including failure to comply with Article 15, violation of trademark, filing of an application by a company that does not have the right to establish a mass media operation, or inclusion of a name and/or topics which constitute an abuse of freedom of information as specified by Article 3.

[22] Recommendation No. R (96)10, adopted by the Committee of Ministers on 11 September 1996.

Pursuant to Article 14, the authorized body has 15 days to review the application and it may request additional documents. Upon receiving its certificate of registration, the print media has six months to commence operations and broadcasters have one year, otherwise registration will be nullified (Articles 14(6) and (7)). A registration certificate may also be invalidated if there has been "stoppage" resulting from an order made under Article 17 of the draft Law regarding suspension of cessation (discussed below in Section IV.6).

Article 14(9) states: "The registration of any foreign mass media company disseminated in the Republic of Kazakhstan shall be realized in the order determined by the government of the Republic of Kazakhstan."

Article 16 exempts the following mass media from the registration regime:
- periodicals with a circulation of 100 copies;
- regulatory legal and other acts;
- bulletins of judicial practice;
- TV programs, radio programs broadcasted via cable and satellite networks, if only one building or a group of buildings are covered; and
- network mass media.

Article 8 lists the duties and power of the authorized body, which include awarding registration certificates and broadcast licences. The draft Law is, however, silent regarding the composition of the body, its relationship to the government, the appointments process, its source of funding and the policy guidelines it is required to follow. Article 1(44) defines the 'authorized body' simply as "the central executive body carrying out the state regulating activities of mass media and information agencies of the Republic of Kazakhstan."

Analysis
Under international law, *license* requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing (discussed below in Section IV.5).

On the other hand, *technical registration* requirements for the print media do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:
- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries. ARTICLE 19 therefore recommends that the

media not be required to register. As the UN Human Rights Committee has noted: "Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[23]

In any case, the registration system established under the draft Law fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression.

First, the system imposes substantive conditions upon mass media outlets by requiring that the title of the mass media and their "topical direction" not constitute an abuse of freedom of mass information. Restrictions on content, to the extent that they are legitimate, should be imposed through laws of general application, not the registration process. The illegitimacy of this provision is compounded by the fact that some of the "abuses" of freedom of mass communication listed in Article 3 are themselves illegitimate restrictions on the right to freedom of expression (discussed above in Section IV.3).

Second, the registration system is administered by a body that appears not to be independent of government.[24] Independence is particularly necessary where the body has substantive powers. The draft Law empowers the authorized body to suspend the operations of mass media outlets (Articles 17 and 26) without providing for an appeal. (See Section IV.6, below, for a discussion of penalties, which are also applicable to the registration system.)

Third, the registration requirement under the draft Media Law applies to broadcasters, as well as to print media and the Internet. Given that broadcasters are also required to obtain a license pursuant to the provisions of the draft Law (see below), there is no reason to impose this additional administrative requirement on them.

ARTICLE 19 is of the view that requiring Internet content providers to register is a breach of the right to freedom of expression. The Internet comprises an extremely wide range of forms of communication and it is simply not legitimate to subject all of these to registration requirements. For example, the UN Human Rights Committee has held that it is not legitimate to require small-scale publications to register. Many Internet content providers fit this description.[25]

Finally, the draft Law fails to specify whether any registration fees will be charged. If there are no fees, then this should be explicitly stated in the law. If there will be fees, then these should be clearly set out and should not exceed the costs associated with administering the system.

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[23] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

[24] See Section IV.4, below, for comments regarding independent regulatory bodies in the broadcast context. The same principles apply to other regulatory bodies, including print registration bodies.

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

Recommendations:

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
  - the system should be administered by an independent body;
  - the authorized body should not be allowed to refuse registration based on the subject matter of the media, as presently provided for in Article 14(3)(4); and
  - the law should explicitly state either that there are no registration fees or that these fees will reasonable and limited to covering the costs of administering the registration system.
- Broadcasters should not be required to register in addition to obtaining a license.
- Internet content providers should not be required to register.

IV.5 Broadcasting

'Arranging' Broadcasting

Chapter 5 of the draft Law is entitled "Arranging TV and Radio Broadcasting" and it addresses technical issues such as broadcast schedules, billing, transborder broadcasting, reception of broadcasts, and the packaging of broadcast programmes.

Article 23(1) states: "Trans-border broadcasting from the territory of the Republic of Kazakhstan shall be conducted upon agreement with the authorized body in the area of communications." This provision requires substantial elaboration or removal from the draft Law. This is the first reference to an "authorized body in the area of communications". The definition of "authorized body" presumably remains the same as that for the registration system, but this should be clarified. The issue of independence is relevant here, as with all regulatory powers. Furthermore, there is no indication of how an agreement for trans-border broadcasting might be reached. Such matters could simply be dealt with through the licensing process.

Recommendation:

- The process for obtaining permission for trans-border broadcasting should be clearly set-out in the draft Law or removed altogether from it.

Licensing

Chapter 6 sets out the skeleton of a broadcast licence regime. Article 25(1) states that all broadcasting shall be licensed, even if it doesn't use radio frequency. The permission to use the spectrum will be granted by an "authorized communications body", presumably the same body referred to in Article 8 of the draft Law, which has the power to award broadcast licences. The actual procedure for issuing licences will be approved by the Government of Kazakhstan (Article 25(6)).

Article 26 provides for the suspension or revocation of broadcast licenses (discussed below in Section IV.6) and Article 27 lists the circumstances under which broadcasting without a license will be permitted.

Analysis
Chapter 6 on broadcast licensing is wholly insufficient. It should either be expanded to provide for a full licensing regime or these provisions should be moved to a different law focusing only on broadcasting.

Regardless of where the legal framework is finally set out, it should adhere to some basic characteristics. Of relevance here are the principles adopted by ARTICLE 19 on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19 Principles),[26] which set out standards in this area based on international and comparative law. The following discussion is drawn from those sets of principles, as well as other authoritative standards in this area.

The Regulatory Body
It is well established under international law that bodies with regulatory or administrative powers over the media should be *independent* of government. For instance, the Committee of Ministers of the Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states that Member States should establish "independent regulatory authorities for the broadcasting sector" and "include provisions in their legislation… which enable them to fulfil their missions in an effective, independent and transparent manner."[27] The ARTICLE 19 Principles state that the institutional autonomy and independence of such bodies should be guaranteed and protected by law in the following ways:

- explicitly in the legislation which establishes the body;
- by a clear statement of broadcast policy as well as of the powers of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.[28]

The draft Law provides no information about the 'authorized' body responsible for issuing registration certificates and broadcast licenses, and for applying sanctions, other than that it shall be the central executive body responsible for media and information. We assume that this is, in fact, a government body, which is under the control of the executive organs of government and hence fails to meet the standards of independence required under international law. Regardless, this should be clarified and, if our assumption is correct, the draft Law should be amended so as to establish a fully independent body to exercise these regulatory powers.

In particular, members of the governing bodies of public bodies which exercise powers in the area of broadcast regulation should be appointed in a manner which minimises the risk of political or commercial interference.[29] Appointments should be made by a representative body, such as an all-party parliamentary committee, rather than the

[26] (London: March 2002).
[27] Recommendation No. R (2000) 23, adopted 20 December 2000.
[28] *Access to the Airwaves*, note 26, Principle 10.
[29] *Ibid.*, Principle 13.1.

executive. A shortlist of candidates should be published, to ensure transparency and so that members of the public may comment upon them. Furthermore, only individuals who have relevant expertise and/or experience should be eligible for appointment and membership overall should be required to be reasonably representative of society as a whole.[30] Finally, the financial independence of the regulatory body should be protected.

The Licensing Process

Under international law, licensing processes must be open and fair, and based on clear processes and criteria for deciding between competing applications. The draft Law, or a separate broadcasting law, should set out in some detail the substantive criteria for deciding between competing license applications. These criteria should include, among other things, promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership. The law should also provide that license application hearings are public and that decisions are subject to either judicial review or appeal.

Recommendations:

- The entire broadcast licensing regime should be brought together in one law, whether this is the current draft Law or a separate broadcasting law.
- Any body which exercises regulatory powers over broadcasters, or any other media, should be independent of government and provisions effectively guaranteeing this independence should be set out in law.
- Substantive criteria for deciding between license applications, including promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, should be set out in law.
- The law should require license application hearings to be public.
- Licensing decisions should be subject to either judicial review or appeal.

IV.6 Sanctions

Article 17 of the draft Law, just after the registration provisions, permits the suspension and revocation of either the "issue" or "airing" of mass media . Article 17(1) states that the suspension or cessation of a publication or broadcast "shall take place at the owner's or court's decision." According to Articles 17(3) and (4), a court may order suspension for violation of freedom of information (Article 3), for failure to abide by the language provisions of the draft Law (Article 6), for failure to re-register if there has been a change of circumstances (Article 14(8)), for a violation of the rules regarding distribution (Article 19), or for a violation of the "Data Out" rules regarding the information that must be provided with each publication or broadcast (Article 20). Cessation may be ordered where there are repeated violations of these provisions. The draft Law is silent regarding the right to appeal.

Article 26 of the draft Law, in the chapter on broadcast licensing, states that broadcasts may be suspended either as provided for in the licensing law or in case of failure to respect the terms of the license, if this failure "might result in aggrieving the rights,

[30] *Ibid.*

lawful interests, ethics and health of individuals". The provision does not specify which body is responsible for finding a violation of the license conditions.

The law does clarify that broadcast revocation will occur "according to a lawsuit filed by the authorized body, as specified by the legislation." Article 26(2) states that revocation of the broadcast license may occur as provided for in the license law or if the licensee:
(1) repeatedly, within one year after an administrative sanction has been applied, violates the provisions of this Law or the terms of granting such license;
(2) fails to broadcast for 6 months within the period of validity of the license; or
(3) broadcasts without permission during the period of license suspension.

Revocation may be appealed in a judicial procedure.

Finally, Article 8(2)(6) states that the authoritative body may "make decisions to issue, suspend the activities, or recall the certificates on registration of any mass media company, as well as the license for the activities to organize the television or radio broadcasting in the manner established by the legislations in the area of mass media."

Analysis
The draft Law is consufing regarding the imposition of sanctions. It is unclear whether the power granted to the authorized body by Article 8 is supplemental to Articles 17 and 26, or whether the powers are subordinate to the sanctions provided for in these two other articles. This needs to be clarified. If Article 8 foresees a regime of suspension and revocation in addition to those provided for in Articles 17 and 26, then this constitutes a delegation of significant discretionary power, and a body that exercises such power, without a range of sanctions to draw upon, without any criteria and which is not independent of government, poses a serious risk to freedom of expression.

ARTICLE 19 is of the view that the print media should never be subject to suspension, banning or revocation of permission to publish, which would in any case be in breach of the rules regarding registration, set out above. In our view, fines, along with the applicable criminal law for crimes by individuals, are sufficient to achieve any legitimate regulatory goals.

In any case, sanctions, like other restrictions on freedom of expression, must be proportionate. This implies that the authorities should have at their disposal a range of graduated sanctions for breach of the law, so that a sanction corresponding to the nature and level of the breach may be applied. A range of sanctions, which are set out in the law, should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. Furthermore, all sanctions should also be open to review by the competent courts, according to national law.[31]

[31] On this topic, see for example: Council of Europe, Committee of Ministers, Recommendation R(2000)23, adopted on 20 December 2000, Guideline IV.

Finally, all sanctions should be provided for in the same law, not spread out among different laws as implied by Article 26.

Recommendations:

- The relationship between Article 8(2)(6) and Articles 17 and 26 needs to be clarified. The authoritative body should not be granted significant discretionary powers without explicit criteria, a range of sanctions, and subject to a right of appeal.
- The print media should not be subject to suspension, banning or the revocation of permission to publish.
- A more graduated system of penalties should be established for broadcasters, including mandatory airing of decisions that find a violation, fines, suspension of a fixed duration and, only in case of repeated and gross breaches which other sanctions have failed to address should suspension or revocation be considered.
- Appeal should be available from decisions made under Articles 17 and 26.

IV.7 Freedom of Information

Articles 29(3) to (8) set out a partial access to information regime, for exclusive use by members of the mass media. Article 29(3) states:

> In the event of applying by mass media representatives, state authorities shall be obliged to provide information on equal terms, irrespective of patterns of ownership and affiliation, except for information constituting state secrets of the Republic of Kazkhstan and other sectrets protected by law.

State officials are required to provide information within three days of receiving a request, to reply to the applicant with an indication of how long it will take to provide the information, or to provide a reason for refusing the application (Article 29(4)). Applications requiring "additional study" must be responded to within one month from the date the application was received (Article 29(5)). If the application is sent to the wrong authority, then this authority must forward it to the correct body within five days (Article 29(6)), with notice having been given to the mass media. Refusals to release information may be appealed first to the relevant superior authority or official and then to a court (Article 29(7)). Wrongful refusals to provide information will "entail responsibility established by the laws of the Republic of Kazahstan" (Article 29(8)).

Analysis

These moves towards greater openness are positive and ARTICLE 19 welcomes the commitment behind them. However, they fail fully to meet Kazakhstan's obligations in this regard. The government should enact separate legislation implementing the constitutional right to freedom of information. The limited regime provided for in the draft Law is deficient in many regards and needs to be heavily supplemented in order to fully implement the right to information. Furthermore, this legislation should apply to everyone, not just to members of the media.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart,

information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[32]

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, India, Japan, Mexico, Nigeria, Pakistan, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and many East and Central European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Expression elaborated in detail on the specific content of the right to information:

> 44.[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
> - The law should establish a presumption that all meetings of governing bodies are open to the public;
> - The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for

[32] 14 December 1946.

in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[33]

Most of these minimum requirements are missing from the draft media law, including possibly the most important element, namely a limited regime of exemptions. As stated in ARTICLE 19's *Principles on Freedom of Information Legislation* (ARTICLE 19 Principles), based on international law and comparative practice:

> All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meeds a strict three part test.[34]

The three part test is as follows: the information requested must relate to a legitimate aim listed in the law, for example the protection of national security; the disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.

Article 29(3) of the draft Law allows public authorities to label virtually any information as constituting a "state secret"; there is no legal obligation on the public bodies to satisfy the "harm" or "public interest" tests. This alone seriously undermines the legitimacy of the freedom of information regime.

Recommendations:

- A full law guaranteeing everyone the right to freedom of information should be passed to replace the access provisions in the draft Media Law, in accordance with the following principles:
  - "information" should be defined to include all records held by a public body, regardless of the form in which the information is stored;
  - the list of bodies covered by right to information should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos, judicial bodies, and private bodies which carry out public functions;
  - the law should contain a comprehensive regime of exceptions, each of which should be subject to a harm test and a public interest override provision;
  - a three-level process for deciding requests should be provided for, including an internal appeal within the public body, an appeal to an independent review body and an appeal to the courts;
  - any system of fees should not deter requests for information;

[33] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
[34] (London: June 1999), Principle 4.

- public bodies should be required to publish key categories of information;
- public bodies should be under an obligation to maintain their records in good condition and to prevent the destruction of information;
- whistleblowers should be protected; and
- the law should provide for a system of promotional and educational activities for the public and public sector employees regarding the right to information the access regime.

IV.8 Journalists Rights and Obligations

Articles 33 and 34 of the draft Law set out, respectively, the rights and obligations of journalists. While generally uncontroversial, there are some that are problematic vis-à-vis freedom of expression.

First, Article 33 grants journalists the right to keep secret the names of their sources, unless a court orders disclosure of the information. While positive in principle, the right could be better protected by limiting the circumstances in which the court may order disclosure of the source's identity. The Committee of Ministers of the Council of Europe Recommendation R (2000)7 On the Right of Journalists Not to Disclose Their Sources of Information suggests the following guidelines to be followed by a court prior to making such an order:

> (b) the diclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:
>
> *i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
>
> *ii.* the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
>
> - an overriding requirement of the need for disclosure is proved,
> - the circumstances are of a sufficiently vital and serious nature,
> - the necessity of the disclosure is identified as responding to a pressing social need, and
> - member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.[35]

Second, Article 33(1)(11) grants journalists the right to use pictures of persons without their consent unless they "derogate their honor, dignity and business reputation, if the pictured person holds public office, is pictured at public events, or poses for money." It is unclear why journalists would not have the right to use pictures of public officials or of people at public events, or even of those who pose for money. This consitutes a restriction on freedom of expression that appears to satisfy no conceivable legitimate aim and that seriously undermines the public interest in the free flow of information. Furthermore, to the extent that these provisions relate to honour and dignity, they should be dealt with through defamation law, not the law on freedom of information.

[35] 8 March 2000, Principle 3.

Third, Article 34(1) requires a journalist to "implement the action program of the mass media" for which he or she works. This is unclear, perhaps due to translation, but it appears to be something which should be the subject of an employment contract, if anything, and certainly it should not be set out in law.

Fourth, Article 34(2) states that journalists are obligated not to disseminate information contrary to facts. This is what is known as a "false news" provision. False news provisions have a chilling effect well beyond statements which are actually false. Journalists will be deterred from publishing anything they could not prove to be true in a court of law, taking into account the strict rules governing admissibility of evidence. Prohibiting false statements also fails to take into account the fact that language takes many different forms and that it is impossible to draw a clear dividing line between statements of fact and statements of opinion. Examples abound of statements which appear on their face to be false but are actually substantially correct, or really express opinions. Exaggeration, ridicule and sarcasm are some examples.

For these reasons, superior courts around the world have held that false statements are protected by guarantees of freedom of expression.[36] And while Article 40 of the draft Law specifies circumstances in which no liability for the dissemination of false information will arise, these are not adequate to lessen the chilling effect of the provision.

Finally, Article 34(7) states that "while performing professional activities, [journalists are obliged to] immediately produce upon request his press certificate or other document confirming his journalist authority." ARTICLE 19 is concerned that an obligation of this nature could result in the unjustifiable harassment and exclusion of journalists who – for whatever reason – are not carrying their credentials on their person. There is no reason to impose an obligation of this sort of journalists.

Recommendations:

- The circumstances in which a court may order the disclosure of a source's identity should be narrowly delineated by the law. At minimum, a pressing need must exist whch overides the public interest in protecting source confidentiality.
- Article 33(11) should be amended to state simply that journalists have the right to disseminate photographs of individuals subject only to laws of general application, such as privacy laws.
- Article 34(1) should be clarified and probably removed from the draft Law.
- Article 34(2) should be removed from the draft Law.
- Article 34(7) should be removed from the draft Law.

IV.9 Accreditation System

Article 36 of the draft Law provides for the accreditation of journalists by State authorities and organizations. Accreditation grants journalists the right to access the

[36] See, for example, *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgment No. S.C. 36/2000, Civil Application No. 156/99 (Supreme Court of Zimbabwe) and *R. v Zundel* [1992] 2 SCR 731 (Supreme Court of Canada).

authority or organisation and obligates these bodies to provide accredited journalists with certain information. Accreditation may be revoked by court ruling if a journalist violates the rules of accreditation, disseminates false information or defames "the honor and dignity of state authorities, public associations and organizations accrediting him". Accreditation rules, the law provides, "shall be approved by the authorized agency in accordance with the established procedure."

As discussed above in Section IV.5, it is well established that bodies with regulatory or administrative powers over the media should be independent of government. This applies equally to accreditation as to other matters.[37] State organs and local administrative bodies are not independent and therefore should not exercise undue control over accreditation. Furthermore, the criteria for obtaining accreditation should be specified in the draft Law instead of being left to the discretion of each agency, with the possible result of a chaotic regime under which a journalist has to satisfy the unique and varied requirements of potentially dozens of different bodies. Such a situation will clearly hamper the free flow of information. The rules of accreditation should also be specified in the law, and not left to the discretion of individual bodies.

Finally, the provision at Article 36(4) that journalists may lose their accreditation for defaming the honor and dignity of State authorities and so on constitutes a clear violation of freedom of expression. Laws aimed at the protection of reputation cannot be justified if their purpose or effect is either to protect the reputation of the State, or to prevent legitimate criticism of officials or the exposure of official wrongdoing.[38] Furthermore, a provision of this nature is clearly open to abuse, with State authorities cancelling, or threatening to cancel, accreditation whenever a media outlet reports unfavourably on them.

Recommendations:

- Article 36 should be amended to provide for an independent body to accredit journalists and the law should clearly state the criteria for accreditation, which should be of a purely technical nature, and the rules of accreditation.
- Article 36(4) should be removed from the draft Law.

IV.10 Miscellaneous Provisions

Additional Sanctions

Apart from Articles 17 and 26, ARTICLE 19 notes that no sanctions are specified for breach of those provisions of the media law not associated with registration or broadcast licensing. Article 39 states *who* will be responsible for more general violations, but not the nature of the responsibility. The specific sanctions – fines or otherwise – should be stated in the law.

[37] See, for example, the UN Human Rights Committee case holding that Canadian accreditation procedures to parliament breached the guarantee of freedom of expression. *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995.

[38] See ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, 2000), p.5.

Employment

Article 12(4) precludes the following individuals from being employed as chief editor of a mass media company: "foreigners or stateless individuals; citizens recognized as incapable by the court; citizens having as at the date of appointment the unconcealed conviction; the under aged except for periodic prints issued for the under aged." It is well-established under international law that restrictions on who may practise journalism, or certain types of journalism, breach the right to freedom of expression. Although media outlets may well not want to employ certain types of people, it is not for the State to restrict access to the profession in this way.[39]

Recommendation:

- Specific sanctions should be listed in the draft Law for all breaches.
- Article 12(4) should be removed from the draft Law.

[39] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 1985, Inter-American Court of Human Rights (Ser. A) No.5 (1985).