MEMORANDUM

on

The Laws in Kazakhstan Regulating Mass Media

by

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Global Campaign for Free Expression

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Introduction

This analysis provides comments on the extent to which the legislation in force in the Republic of Kazakhstan regulating mass media is in accordance with international law and standards. These comments are based on English translations of the following laws and regulations:

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

The comments have been prepared by ARTICLE 19, Global Campaign for Free Expression, based on the request of the OSCE in Almaty. They are intended to supplement to the proposals of Adil Soz, International Fund for the Protection of

Freedom of Speech, on the Improvement of the Legislation in Force in the Republic of Kazakhstan Regulating Mass Media.

International and Domestic Obligations

Freedom of expression, a fundamental human right, is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[1] binding on all States as a matter of customary law. It is also guaranteed by a number of legally binding international human rights treaties, including the European Convention on Human Rights (ECHR),[2] Article 10(1) of which states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.[3]

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 10(2) of the ECHR states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.[4]

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.[5]

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessity". Although

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[1] UN General Assembly Resolution 217A(III), 10 December 1948.
[2] E.T.S. No. 5, in force 3 September 1953.
[3] See also Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976, which states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice."
[4] See also Article 19(3) of the ICCPR which states: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights and reputation of others; (b) For the protection of national security or of public order, or of public health or morals."
[5] For an elaboration of this test see *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123 (European Court of Human Rights), paras. 28-37.

absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.[6]

Freedom of expression is protected, subject to certain restrictions, in 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.

Further grounds for restrictions and conditions on those 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, 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.…

Analysis of the Laws Regulating Mass Media

Content Issues

Defamation

Article 18(1) of the Constitution provides that everyone has the right to protection of honour and dignity. Under international law, freedom of expression may be restricted for purposes of protecting reputations, but any such restrictions must meet the test outlined above. ARTICLE 19 has published a set of principles, based on international law and comparative jurisprudence from around the world, setting out the appropriate balance between these two interests, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.[7] These Principles have been endorsed by, among others,

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[6] *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.

[7] ARTICLE 19, (London: July 2000).

the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media.[8]

According to the ARTICLE 19 Principles, any restrictions on freedom of expression to protect reputations must have the genuine purpose and demonstrable effect of protecting a legitimate reputation interest. Furthermore, a restriction cannot be justified unless it can be convincingly established that it is necessary in a democratic society. In particular, it cannot be justified if:

i. less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or
ii. taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.[9]

Criminal Defamation

The Criminal Code has provisions on libel, slander and insult. Article 129 states:

> **Libel**
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> 1. Libel, which is the distribution of knowingly false information defaming the honour and dignity and discrediting the reputation of another person,
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>   shall be punished by a fine in the amount of one hundred up to two hundred fifty monthly calculation indices, or in the amount of wages or other income of a given convict for a period up to two months, or by engagement in public works for a period from one hundred twenty up to one hundred eighty hours, or by correctional labour for a period up to one year.
> 2. Slander, which is contained in a public speech, or in a publicly displayed work, or in mass media,
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>   shall be punished by a fine in the amount from two hundred up to five hundred monthly calculation indices, or in the amount of wages or other income of a given convict for a period from two to five months, or by engagement in public works for a period from one hundred eighty up to two hundred forty hours, or by correctional labour for a period form one year up to two years, or by restraint of freedom for a period up to two years, or detention under arrest for a period up to six months.
> 3. Slander combined with an accusation of a person in the commission of a heinous or a particularly heinous crime,
>
>   shall be punished by restraint of freedom for a period up to three years, or imprisonment for the same period.

Article 130 states:

> **Insult**
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> 1. An insult, that is the debasement of the honour and dignity of another person, expressed in an obscene form,
>
>   shall be punished by a fine up to one hundred monthly calculation indices, or in the amount of wages or other income of a given convict for a period up to one month, or by

[8] See International Mechanisms for Promoting Freedom of Expression, Joint Declaration, 30 November 2000.
[9] Note 7, Principle 1.

engagement in public works for a period up to one hundred twenty hours, or by correctional labour for a period up to six months.

2. An insult contained in a public speech, or in a publicly demonstrated work, or in the mass media,

    shall be punished by a fine from one hundred up to four hundred monthly calculation indices, or in the amount of wages or other income of a given convict for a period from one to four months, or by engagement in public works for a period up to one hundred eighty hours, or by correctional labour for a period up to one year, or by restraint of freedom for the same period.

The ARTICLE 19 Principles state that criminal defamation laws are inconsistent with the guarantee of freedom of expression. The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal measures when restricting fundamental rights. In many countries, the protection of one's reputation is treated primarily or exclusively as a private interest and experience shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations.

In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. For these reasons, the criminal defamation laws in Kazakhstan should be repealed.

If criminal defamation laws remain in force, they should 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 penalties should never be available as a sanction for breach of

> defamation laws, no matter how egregious or blatant the defamatory statement.[10]

Public Officials

The Criminal Code also provides specific protection for three types of public officials – the President, Deputies of Parliament and State Officers – and the penalties for defaming such officials are higher than for ordinary citizens. Article 318 provides:

> **Offences Against the Honour and Dignity of the President of the Republic of Kazakhstan and Obstruction of His Authority**
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> 1. A public insult or other offence against the honour and dignity of the President of the Republic of Kazakhstan,
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>   shall be punished by a fine in the amount from two hundred up to seven hundred monthly calculation indices, or in the amount of wages or other income of a given convict for a period from two to seven months, or by engagement in public works for a period from one hundred eighty up to two hundred forty hours, or by correctional labour for a period up to one year, or by detention under arrest for a period up to five months, or by imprisonment for a period up to one year.
> 2. The same act committed with the use of the mass media,
>
>   shall be punished by a fine in the amount from five hundred up to one thousand monthly calculation indices, or in the amount of wages or other income of a given convict for a period from five to ten months, or by correctional labour for a period from one year up to two years, or by detention under arrest for a period up to six months, or by imprisonment for a period up to three years.
> 3. Exerting influence in any form upon the President of the Republic of Kazakhstan or his close relatives for the purposes of obstructing him from the execution of his authorities,
>
>   shall be punished by restraint of freedom for a period up to five years, or by imprisonment for the same period.
>
>   **Note.** Public speeches containing critical remarks concerning the policy pursued by the President of the Republic of Kazakhstan shall not entail criminal liability under this Article.

Similar provisions, but with gradually lower penalties according to status, are set out in Article 319. Offences Against the Honour and Dignity of a Deputy and Obstruction of his Functions and Article 320. Insult of a State Officer.

Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. It is now well established in international law that such officials should tolerate more, rather than less, criticism.[11] It is clear that the special protection for public officials in the Criminal Code falls foul of this rule.

[10] *Ibid*., Principle 4.

[11] See, for example, the rulings of the European Court of Human Rights in *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, 8 EHRR 407, para. 42 and *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, paras. 63-64.

Civil Defamation Laws

Reputations are also protected in the Civil Code. Article 143 states:

> **Protection of Honour, Dignity and Business Reputation**
> 1. A person or a legal entity shall have the right to seek in court refutation of information discrediting his honour, dignity or business reputation, unless the disseminator of such information can prove that such information is true.
> 2. If the information discrediting the honour, dignity or business reputation of a person or a legal entity has been disseminated through mass media, it shall be refuted by the same mass media free of charge.
>   If such information is contained in a document issued by an organization, such a document shall be replaced or recalled and the addressees shall be informed that the information contained therein is not true.
>   The procedure for refutation in other cases shall be defined by court.
> 3. A person or a legal entity with respect to whom the mass media have published information prejudicing his rights or lawful interests, shall be entitled to the publication of his response in the same mass media free of charge.
> 4. The claim by a person or a legal entity to publication of a refutation or response in the mass media shall be considered by court if mass media refused such publication, or failed to place such publication within one month or was liquidated.
> 5. If a court decision has not been executed, the court shall be entitled to impose a fine on the offender, to be recovered to the budget. The fine shall be imposed in the procedure and in the amount established by the laws of civil procedure. The payment of such fine shall not release the offender from the obligation to perform the action required by the court decision.
> 6. A person or a legal entity with regard to whom information has been disseminated which discredits his honour, dignity or business reputation, shall be entitled to seek, apart form the refutation of such information, compensation for losses and the moral damage incurred as a result of the dissemination of such information.
> 7. If it proves impossible to identify a person who disseminated the information discrediting the honour, dignity or business reputation of a person or a legal entity, the person with respect to whom such information has been disseminated shall have the right to seek in court that such information be adjudicated as untrue.

Defences

Article 143(1) presumes that any defamatory statement is false, subject to proof by the defendants that such information is true. In a number of countries, requiring the defendant to prove that defamatory statements are true has been held to place an unreasonable burden on the defendant, at least in relation to statements on matters of public concern,[12] on the basis that it exerts a significant chilling effect on freedom of expression. In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.[13]

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[12] The term 'matters of public concern' includes all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.

[13] *Defining Defamation*, note 7, Principle 7.

Furthermore, even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication.[14] 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 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.

Finally, the ARTICLE 19 Principles state that no one should be liable for the expression of an opinion.[15] The precise standard to be applied in defamation cases involving the expression of opinions – referred to by a variety of names such as value judgements or fair comment – is still evolving but it is clear from the jurisprudence that opinions deserve a high level of protection. In some jurisdictions, expressions of opinion are afforded absolute protection while in others they are afforded substantial, but not absolute, protection.

Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one. The ARTICLE 19 Principles define an opinion as a statement which either (i) does not contain a factual connotation which could be proved to be false or (ii) cannot reasonably be interpreted as stating actual facts given all the circumstances including the language used.[16]

The Civil Code fails to establish the defence of reasonable publication and does not appear to distinguish opinions from statements of fact.

Right of Reply

[14] *Defining Defamation*, note 7, Principle 9.
[15] *Defining Defamation*, note 7, Principle 10.
[16] *Ibid.*

Article 143(2)-(5) of the Civil Code provides for a right of reply (translated as a right of refutation) in defamation cases. The right applies whenever information which discredits someone's honour, dignity or business reputation has been disseminated and the procedure in such cases is to be set by the courts. A right of reply is also provided for in similar wording in Article 19 of the Law on Mass Media.

A mandatory right of reply is a 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.[17] In Europe, by contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe.[18] In many Western European democracies, the right of reply is provided 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. In most countries that recognise a right of reply, the offended party may seek a court order if the media outlet refuses to publish it.[19] Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law.

Regardless of the above, certain conditions should always apply to a right of reply if it is not to be open to abuse by the authorities. ARTICLE 19 believes the following restrictions should be applied to any right of reply:
1. The right should only be available where a legal right of the claimant has been breached. It should not be allowed to be used to comment on opinions that the reader or viewer doesn't like.
2. The reply should be required to receive similar prominence to the original article or broadcast, not identical prominence.
3. The reply should be required to be proportionate in length to the original article or broadcast.
4. The reply should be restricted to addressing the incorrect or misleading facts in the original text. It should not be taken as an opportunity to introduce new issues or comment on other correct facts.

Article 143 of the Civil Code fails to provide for these safeguards against abuse of the right of reply. In particular, it is available wherever reputation has been discredited, regardless of the legitimacy of the original expression.

Other Remedies

Article 143(6) of the Civil Code and Article 19(4) of the Law on Mass Media provide that a person or legal entity who has been defamed shall be entitled to seek, in addition to the right of reply, compensation for losses and moral damages. Article 951(3) of the Civil

[17] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
[18] 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).
[19] This is the case in France, Germany, Norway and Spain.

Code provides that where defamation is established, moral damages shall be compensated, regardless of the guilt of the defendant.

International standards regarding pecuniary damages, as set out in the ARTICLE 19 Principles, include the following:

1. Pecuniary compensation should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.
2. In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.
3. Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.
4. The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.
5. Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[20]

According to these principles, Article 951 should establish a fixed ceiling for moral damages. Furthermore, no one should be required to pay damages for defamation in the absence of a finding of liability, contrary to Article 951(3).

Recommendations:

- Articles 129, 130, 318, 319 and 320 of the Criminal Code should be repealed. If they remain in force, they should conform fully to the conditions set out above.
- Article 143 of the Civil Code should be amended to further provide:
  - in cases involving statements on matters of public concern, the plaintiff bears the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory;
  - even where a statement of fact on a matter of public concern has been shown to be false, the defendant benefits from a defence of reasonable publication; and
  - no one should be liable for the expression of an opinion.
- Article 143 of the Civil Code and Article 19 of the Law on Mass Media should be amended to meet the conditions for the right of reply set out above.
- Article 951 of the Civil Code should amended to establish a fixed ceiling for moral damages and paragraph (3) should be repealed.

[20] *Defining Defamation*, note 7, Principle 15.

Privacy: Ownership of One's Image

There is special protection in the Civil Code against the unauthorized use of photographs or other graphic images of individuals. Article 145 states:

> **Right to Personal Depiction**
> 1. No person shall have the right to use another person's depiction without his consent, and in the event of such person's death, without the consent of his heirs.
> 2. Publication, reproduction and distribution of a graphic image (picture, photograph, film etc.), where another person is depicted, shall only be permitted with the consent of the depicted, and after his death, with the consent of his children and surviving spouse. Such consent shall not be required if established by laws or the person depicted was posing for a charge.

Ownership of one's image has been recognised by courts in several countries but, where it does exist, it is much narrower in scope than the right recognised in the Civil Code of Kazakhstan. In particular, the right to privacy must be subject to an override where a greater public interest is served.

In the United States, the Supreme Court has acknowledged that the collection or dissemination of information about an individual my be limited, recognising four aspects of this aspect of the right to privacy, one of which is the right not to have one's name or likeness "appropriated" for commercial purposes.[21] However, this right is subject to the constitutional guarantee of freedom of expression and to strict limits.

In some cases, French courts have recognised everyone's right to his or her image, including politicians.[22] In these cases, however, the use of the images was purely commercial. In a case where the images were used as part of a story about a famous photographer, thus arguably engaging the public interest, the court weighed the competing interests carefully. In holding that pictures taken while the plaintiff was on a yacht violated a privacy interest, the Court noted that the boat was not on a port or near a beach, so that its occupants had a reasonable expectation of privacy.[23]

A Canadian case, *Aubry v. Éditions Vice-Versa Inc.*,[24] involved a claim based on the right of an artist to publish photographs without the consent of the subject. In that case, the photograph was of a unknown 17-year old in a public place. The majority of the Supreme Court noted:

> The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the expectation of privacy is reduced in certain cases. ... Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the

[21] *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562, 571-72 & nn. 7&8 (1977).
[22] See *Pompidou v. L'Express*, 4 April 1970, *Dorléac v. Sté Presse Office*, 14 May 1975 and *d'Estaing v. M. Ways*, 15 October 1976, all decided by the Paris Court of Appeal.
[23] *Schneider v. Sté Union Editions Modernes*, 5 June 1979, Paris Court of Appeal.
[24] [1998] 1 SCR 591.

> public's right to information can justify dissemination of a photograph taken without authorisation.[25]

The Court noted a number of circumstances in which freedom of expression might prevail, including where the subject is a public figure or "whose professional success depends on public opinion", where a previously unknown individual is called upon to play a high-profile role and where the individual is accidentally or incidentally included in a photograph, for example as part of a crowd.[26] In the circumstances of the case, it would have been relatively simple for the photographer to have obtained the consent of the subject, perhaps by paying him, so the privacy interest prevailed.

Germany is one of the few countries with special statutory protection. Section 22 of the Law for the Protection of Copyrights in Art and Photography of 1907 provides that pictures of a person may be published only with his or her consent. Exceptions apply, however, for photographs of public figures and people attending public gatherings. Court decisions have distinguished between "absolute" public figures, such as politicians and sportsmen, and "others", such as defendants in criminal trials, who are only of public interest because of their involvement in a particular event. Even "absolute" public figures have right to privacy in their homes or even in an otherwise public place where they have removed themselves from public scrutiny to a sphere of privacy (for example, to a table in a dark corner of a restaurant).[27] Pictures of "others" – those who are public figures for limited purposes – in public places may only be published if the public interest outweighs other interests.[28]

ARTICLE 19 believes that restrictions on freedom of expression to protect ownership of one's image should be strictly limited. Such restrictions may apply to the right not to have one's image appropriated for purely commercial purposes and privacy in the home. Any broader protection for individuals in public places should have exceptions for:

- public figures,
- people attending public gatherings,
- individuals depicted in news reports, and
- individuals who are of public interest.

In all cases, special protection should not apply where the public interest in seeing the image of an individual outweighs his or her legitimate privacy interests.

Recommendation: Article 145 of the Civil Code should be amended to incorporate the test set out above.

[25] *Ibid.*, paras. 57 and 61.

[26] *Ibid.*, paras. 58-9.

[27] See the decision of the Federal Supreme Court in *Caroline von Monaco II*, BGH NJW 1996, at 1128-29, which was affirmed in part on constitutional grounds by the Federal Constitutional Court.

[28] 35 FCC 202 (1973) (Lebach).

Administration of Justice

The Code on Administrative Violations has two provisions protecting the administration of justice. Article 86 states:

> **Dissemination of Information on Guilt of a Crime**
> The public dissemination of information on an individual being guilty of a crime prior to a court trial or in the presence of a verdict of acquittal,
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> shall entail a fine payable by individuals in the amount up to ten monthly calculation indices, on officials, in the amount from ten to thirty monthly calculation indices, on legal entities, in the amount up to one hundred monthly calculation indices.

Article 346 also provides:

> **Influence upon Court through Mass Media**
> The pre-determination in mass media of the results of a court trial on any case being tried by the court, or pressure exerted upon the court before a court decision becomes effective,
>
> shall entail a fine on persons in the amount up to ten monthly calculation indices, and on officials, in the amount up to twenty-five monthly calculation indices.

Under international law, freedom of expression may be narrowly restricted to protect the administration of justice. The "rights of others" referred to in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 10(2) of the European Convention on Human Rights (ECHR) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence.[29] Article 10(2) of the ECHR goes even further, explicitly providing that freedom of expression may be restricted as is necessary in a democratic society for "maintaining the authority and impartiality of the judiciary."

The European Court of Human Rights has speculated that prejudicial media coverage of pending legal proceedings may lead to a loss of public respect for and confidence in the courts:

> If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.[30]

The Court has further emphasised that in criminal proceedings such coverage may also undermine the right to a fair trial:

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[29] The right to a fair trial and the presumption of innocence are protected in Article 14 of the ICCPR. Article 6 of the ECHR guarantees to any person charged with a criminal offence or involved in proceedings to determine his or her civil rights and obligations, the right "to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[30] *The Sunday Times* v. *United Kingdom*, note 6, para. 63.

> This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice.[31]

By contrast, in the United States, the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a "clear and present danger" to the administration of justice.[32] The test requires that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[33] In practice, this has allowed the media to report on pending judicial proceedings with little or no restriction.

The American experience appears to contradict the speculation by the European Court of Human Rights that long-term exposure to the "spectacle of pseudo-trials in the news media" will result in a loss of public respect for and confidence in the courts and the rejection of the courts as "the proper forum for the settlement of legal disputes." The American public has now been subject to such exposure for decades but there is no evidence to suggest that people have lost confidence in the court system and are rejecting the courts as the proper forum for settling legal disputes. In fact, Americans are probably the most litigious people in the world.

Furthermore, it is now recognised that the possibility of media coverage prejudicing the right to a fair trial applies only to jury trials or those heard by lay judges rather than professional judges. It is generally accepted that, because of their training, professional judges are not susceptible to being influenced by prejudicial publications. For example, in the English case of *Vine Products Ltd.* v. *MacKenzie & Co. Ltd.*,[34] Buckley J explained: "It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case."[35]

Given that in Kazakhstan trials are conducted by professional judges, rather than juries or lay judges, the restrictions on freedom of expression in Articles 86 and 346 of the Code on Administrative Violations cannot be justified as necessary in a democratic society.

Recommendation: Articles 86 and 364 of the Code on Administrative Violations should be repealed.

[31] *Worm v. Austria*, 29 August 1997, Application No. 22714/93, 25 EHRR 454, para. 50.
[32] *Bridges* v. *California*, 314 US 252 (1941); *Pennekamp* v. *Florida*, 328 US 331 (1946); *Craig* v. *Harney* 331 US 367 (1946); *Wood* v. *Georgia* 370 US 375 (1962).
[33] *Bridges*, *ibid.*, p. 263.
[34] [1965] 3 All ER 58.
[35] *Ibid.*, p. 62.

Registration

All mass media, with the exception of Internet websites, are required to register with the Authorised Authority for Mass Media Affairs under the Ministry of Culture, Information and Public Accord.[36] Articles 10 and 11 of the Law on Mass Media set out the procedures and requirements for registration. Article 10 states:

> **Registration of a Mass Media Organization**
>
> 1. With the exception of Internet websites, mass media organizations that are circulated within the territory of the Republic of Kazakhstan shall be registered with the authorized agency regardless their ownership.
>
> …
>
> 2. In order to register a mass media organization its owner or the person authorized by the owner shall file an application in accordance with Article 11 of this Law.
> 3. The application to register a mass media organization shall be reviewed within fifteen days from the date of filing. Based upon the results of the review the authorized agency shall issue a certificate of registration to the mass media organization's owner or shall refuse to do so, the reasons being as follows:
>
>   1) if the authorized agency had already issued a registration certificate to a mass media organization with the same name and for the same territory of circulation;
>
>   2) if the contents of the application contradict Article 11 of this Law;
>
>   3) if the application is filed before the expiry of one year since a court judgment prohibiting the mass media organization from being distributed (broadcasted) has entered into legal force.
>
> …

Article 11 provides:

> **Application to Register a Mass Media Organization**
>
> 1. The application to register a mass media organization shall specify the following:
>
>   1) name, place, organizational and legal form of the mass media organization's owner;
>
>   2) language (languages) of the mass media organization;
>
>   3) anticipated periodicity;
>
>   4) main thematic content;
>
>   5) territory of circulation.
>
>   The following documents shall be attached to the application:
>
>   for individuals – a document confirming the right to engage in business activities;
>
>   for legal entities – a copy of the certificate of state registration of a legal entity.
>
> 2. No other requirements shall be imposed when registering a mass media organization.

[36] See Order No. 175 of the Ministry of Culture, Information and Public Accord on Approval of Instructions of Registration of Mass Media and News Agencies, 3 September 2001.

Under the Law on Licensing, the broadcast media are also required to obtain a license from the Ministry of Transport and Telecommunications.

Under international law, technical registration requirements for the print media do not, *per se*, breach the guarantee of freedom of expression. However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries.[37] ARTICLE 19 therefore recommends that the print 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."[38]

Furthermore, even technical registration requirements breach the right to freedom of expression unless 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.

The main problem with the Kazakh registration system is that mass media are required to register with an authorised authority under a government ministry. The registration system should be administered by a body which is independent of government. Another problem is that the registration requirements also apply to broadcasters. Given that broadcasters are also required to obtain a license pursuant to the Law on Licensing, there is no reason to impose this additional administrative requirement on them.

Recommendations:

- The registration system provided for in the Law on Mass Media should be abolished.
- Alternatively, if the system if retained, it should be administered by a body which is independent of government and broadcasters should not be required to register in addition to obtaining a license.

Penalties

Article 53 of the Code on Administrative Violations and Article 22 of the Law on Licensing set out the procedures for suspension or prohibition of the activities of a mass media outlet and revocation and suspension of the license of a mass media outlet. Article 53 states:

> **Suspension or Prohibition of Activities of an Individual Entrepreneur or Legal Entity**

[37] For example, in Australia, Canada, Germany, the Netherlands, Norway and the United States.

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

1. Activities of an individual entrepreneur or legal entity may be suspended or prohibited only in the judicial proceedings pursuant to an application of an agency (official) having jurisdiction to decide matters relating to administrative violations.

…

4. Activities of an individual entrepreneur or legal entity may be suspended or prohibited in absence of a court decision only in exceptional cases, but in any event, for not more than three days, and thereafter a statement of claim must be filed with a court within an established time period, in which case the act prohibiting or suspending activities shall be effective until a court decision has been issued.

Article 22 states:

Revocation and Suspension of a License

1. Unless it is otherwise stipulated in laws and regulations, a license may be revoked in a judicial procedure

…

3. A licensor shall have the right to suspend the license for a term up to six months, indicating the reasons for the suspension

….

Suspension of a license of a small business, without a court decision, shall be allowed in exceptional cases as established by the legislation of the Republic of Kazakhstan, for a period not longer than three days, followed by the obligatory submission of a statement of claim to the court within established deadlines. In this case suspension shall be effective until a court decision has been issued.

4. A licensee shall have the right to challenge in court the resolution to suspend the license.

Suspension or prohibition of a mass media outlet is an extreme penalty which should be applied, if ever, only after strict procedural and substantive safeguards have been observed. As with registration, government controlled or politically motivated bodies should never have the power to seek the suspension or prohibition of the activities of a mass media outlet or revocation or suspension of a license of a broadcaster. Furthermore, the three-day window for suspension without a court order in Articles 53(4) and 22(3) is both unnecessary and opens up the possibility of abuse. Suspension should never be possible in the absence of a court order.

Articles 348 and 350 of the Code on Administrative Violations set out the penalties to be applied for procedural violations of the law. Article 348 provides:

Violation of the Procedure for Presentation of Reference and Mandatory Copies

1. The violation of the procedure for presenting reference and mandatory copies of printed matters, as well as the procedure for registration, record, and safe keeping of materials of television and radio broadcast,

   shall entail a fine in the amount up to ten monthly calculation indices.

2. The same acts committed repeatedly during a year after the administrative action as referred to in the first paragraph of this Article has been applied,

   shall entail a fine in the amount up to fifteen monthly calculation indices and the suspension of the release or publication by a mass media agency for a period up to six month.

Article 350 states:

> **Violation of the Procedure for Date-line Announcement**
>
> 1. The broadcasting of television and radio programs, release and distribution of prints or any other products of mass media without established date-line, or with unclear or knowingly false date-line,
>
>   shall entail a fine in the amount up to twenty monthly calculation indices with the seizure of the edition of the products of the mass media.
>
> 2. The same acts committed repeatedly during a year after the administrative action as referred to in the first paragraph of this Article has been applied,
>
>   shall entail a fine in the amount up to fifty monthly calculation indices with or without the seizure of the edition of products and the technical facilities used for the manufacture and distribution of the edition of the product produced by mass media or the suspension of the release of mass media for a period up to six months.

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 any sanction applied corresponds to the nature and level of the breach. For this reason, the Committee of Ministers of the Council of Europe has recommended that broadcasting regulatory bodies should have the following powers:

> A range of sanctions which have to be prescribed by 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. All sanctions should also be open to review by the competent jurisdictions according to national law.[39]

The seizure of editions and technical facilities or suspension of a mass media outlet for procedural violations of the law is disproportionate. Seizure and suspension are very harsh sanctions, which should be applied, if ever, only in extreme cases of repeated and gross abuse of the law. The failure of a mass media outlet to follow the procedures for reference and mandatory copies or dateline announcements – even repeatedly – does not fall into the category of extreme cases.

Recommendations:

- Article 53 of the Code on Administrative Violations and Article 22 of the Law on Licensing should be amended to provide that only an independent body has the power to seek the suspension or prohibition of the activities of a mass media outlet or revocation or suspension of a license of a broadcaster.
- Articles 53(4) and 22(3) should be repealed.
- Article 348 and 350 of the Code on Administrative Violations should be amended to set out a more graduated regime of sanctions which are proportionate to the breach. Seizure and suspension should not available as remedies for procedural violations of the law.

[39] Recommendation R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 20 December 2000, Guideline 23.