ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the draft

Law of the Republic of Kazakhstan "On Publishing"

London
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TABLE OF CONTENTS

1. INTRODUCTION

This Memorandum analyses the draft Law of Kazakhstan "On Publishing" (draft Law), as promulgated in December 2006, in light of international standards on the right to freedom of expression.

We have serious concerns with regard to the compatibility of the draft Law with international standards on freedom of expression. The draft Law proposes a licensing scheme for all printing presses, something not found in democratic countries, and it entrenches a series of vague restrictions on what may be published. As a recent party to the *International Covenant on Civil and Political Rights* (ICCPR),[1] Kazakhstan has taken upon itself a legally binding obligation "to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to … the right to freedom of expression."[2] Freedom of expression includes the right to "impart information and ideas of all kinds … in writing or in print",[3] and although it may be restricted, any restrictions must be strictly "necessary" for the achievement of a legitimate aim. Under international law, this establishes a high threshold which restrictions must overcome in order to be legitimate. We believe that neither the licensing scheme nor the majority of the publishing restrictions proposed in the draft Law meets this threshold, and we are concerned that the draft Law as a whole will hinder rather than promote the right to freedom of expression. We note that the licensing requirement for printing presses was included in a ministry proposal to revise the Law on Mass Media in July last year, which was rejected by Kazakhstan's parliament.[4] We recommend that the current proposal be abandoned as well.

The following sections of the Memorandum elaborate on our concerns. Section II sets out briefly key international standards on freedom of expression and Section III analyses the draft Law against those standards.

[1] *UN General Assembly Resolution 2200A (XXI),* adopted 16 December 1966, in force 23 March 1976. Kazakhstan ratified the ICCPR on 24 January 2006.
[2] ICCPR, Articles 2(2) and 19(2).
[3] *Ibid.*, Article 19(2).
[4] As reported by Adil Soz on 11 December 2006: http://www.ifex.org/20fr/content/view/full/79871.

2. INTERNATIONAL STANDARDS

2.1. Freedom of expression in international law

The right to freedom of expression has long been recognised as a fundamental human right. It is of crucial importance to the functioning of democracy, a necessary precondition for the exercise of other rights and freedoms and, in its own right, it is central to human dignity. The *Universal Declaration of Human Rights* (UDHR), the flagship human rights instrument adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in the following terms, at Article 19:

> 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 and regardless of frontiers.[5]

The *International Covenant on Civil and Political Rights*, a legally binding treaty ratified by Kazakhstan in January 2006, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also at Article 19. Pursuant to Article 4(3) of Kazakhstan's Constitution, the provisions of this treaty take precedence over incompatible domestic legislation. Kazakhstan's Constitution also protects the right to freedom of expression, in Article 20.

Freedom of expression is also guaranteed in various OSCE documents agreed to by Kazakhstan, such as the Helsinki Final Act,[6] the Final Document of the Copenhagen meeting of the Human Dimension of the OSCE,[7] the Charter of Paris agreed in 1990,[8] the final document of the 1994 Budapest CSCE Summit,[9] and the Istanbul Summit Declaration adopted in 1999.[10] The Charter of Paris states:

> Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person … We affirm that, without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, freedom of expression, freedom of association and peaceful assembly, freedom of movement (...).[11]

The Istanbul OSCE Charter for European Security states, similarly:

> We [The participating States] reaffirm the importance of independent media and free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.[12]

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[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] OSCE, Helsinki, 1 August 1975.
[7] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular paragraphs 9.1 and 10.1.
[8] Charter of Paris for a new Europe, CSCE Summit, November 1990.
[9] Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paragraphs 36-38.
[10] OSCE Istanbul Summit, 1999, paragraph 27. See also paragraph 26 of the Charter for European Security adopted at the same meeting.
[11] Note 8.
[12] Note 10, paragraph 26.

The Moscow OSCE Human Dimension meeting agreed explicitly that "independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms"; and that any restrictions on the exercise of the right to freedom of expression should be "in accordance with international standards."[13]

Global recognition of the importance of freedom of expression is reflected in the three regional systems for the protection of human rights, the *American Convention on Human Rights*,[14] the *European Convention on Human Rights* (ECHR)[15] and the *African Charter on Human and Peoples' Rights*,[16] all of which guarantee the right to freedom of expression. While neither these instruments nor judgments of the courts and tribunals operating under them are directly binding on Kazakhstan, they are important comparative evidence of the content and application of the right to freedom of expression and may be used to inform the interpretation of Article 19 of the ICCPR, which is binding on Kazakhstan.

2.2. The importance of freedom of expression

International bodies and courts have made it very clear that the right to freedom of expression and information is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[17] which refers to freedom of information in its widest sense and states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. This has been frequently echoed by human rights courts. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society.[18]

Similarly, the European Court of Human Rights has noted, for example: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[19] As this statement notes, freedom of expression is fundamentally important both in its own right and also as the cornerstone upon which all other human rights rest. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations.

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[13] Moscow Meeting of the Conference on the Human Dimension of the CSCE (October 1991), paragraph 26.
[14] Adopted 22 November 1969, in force 18 July 1978.
[15] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953.
[16] Adopted 26 June 1981, in force 21 October 1986.
[17] 14 December 1946.
[18] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
[19] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law." [20] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[21]

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[22]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[23] The media as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[24]

2.3. Restrictions on freedom of expression

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim; freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or because it challenges established doctrines.

Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[20] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[21] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[22] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[23] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[24] *Thorgeirson v. Iceland*, note 20, para. 63.

This has been interpreted as requiring restrictions to meet a strict three-part test.[25] First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[26] This also means that broad or vague phrased laws, or laws that leave implementing agencies excessive discretion are illegitimate. Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[27]

3. ANALYSIS OF THE DRAFT LAW

3.1. Overview of the draft Law

The draft Law proposes to regulate the printing and publishing industry in Kazakhstan by imposing a strict licensing requirement, by prescribing certain matters concerning the internal organization of printing and publishing houses, by barring certain persons and organizations from owning or running printing and/or publishing houses, and by imposing a number of restrictions on what may be printed and published in Kazakhstan.

Chapter 1 contains a set of general provisions and definitions, and makes it clear that the draft Law is restricted to regulating the production and distribution of "printed output", which is defined as "printed periodicals, books, brochures, albums, posters, booklets, postcards and other products of polygraphic production, regardless of their circulation and way of their production" (Article 1). Articles 2-5 include a number of general statements including an affirmation of the right to freedom of expression and the prohibition of censorship, while Article 6 addresses "abuse" of the right to freedom of expression by prohibiting the publication of state secrets, calls to change the constitutional order, propaganda for war and similar matters.

Chapter 2 of the draft Law prescribes a number of organizational matters for publishing houses and restricts ownership for, among others, under-18s, persons found to be mentally incapable and non-citizens who "do not live in the state constantly". Article 9 requires that free copies of every publication are sent to the National Book Chamber and the National Library, and Article 11 sets out a number of functions of the National Book Chamber. Article 10 – in many ways the heart of the draft Law – states, briefly: "A polygraphic enterprise (a printing house) has the right to exercise its activity after being granted a license to exercise the activity of rendering polygraphic (typographical) services in the order set by the law of the Republic of Kazakhstan."

[25] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).
[26] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[27] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

Chapter 3 concerns the distribution of printed matter, and Article 13 requires every print publication to provide a range of information, including the name of the printers and publishers, and the circulation.

Chapter 4 includes two final provisions. Article 14, provides that anyone who contravenes publishing legislation shall "incur a liability provided by the law of the Republic of Kazakhstan". Article 15, states that the Law will come into force on the tenth day after its official publication.

3.2. The proposed licensing regime

Under Article 10 of the draft Law, a licence would be needed to produce any printed matter in Kazakhstan – including newspapers and magazines, books, brochures, albums, posters, booklets and postcards – regardless of the size of the print run and regardless of the manner of production.[28] This establishes a sweeping licensing requirement that extends, in theory, even to a home-produced magazine with a print-run of ten printed on a desktop printer. The draft Law does not provide any detail on who would administer the licensing, stating merely that this will be regulated through an "order set by the law of the Republic of Kazakhstan".

Under international law, licensing requirements for print media are viewed with deep suspicion. The requirement that permission should be needed before, for instance, a newspaper may start publishing is akin to a form of prior censorship, particularly when the body that grants the licence has discretion to refuse it. For this reason, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression have stated, in a Joint Declaration issued in December 2003:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[29]

A licensing regime for printing presses goes even further than the kind of registration scheme for publishers deemed "particularly problematical" by the special rapporteurs: it would provide an additional layer of state control on the print media, on top of the existing licensing requirements for the media imposed under the Law on Mass Media.[30]

It is worth noting that licensing regimes for printing presses were first introduced in mediaeval Europe, when governments and religious leaders began to fear that the power of the press might lead their populations to rebel against their authority. In 1501, Pope Alexander VI issued an edict against unlicensed printing, which was soon followed by the English, German and French authorities, amongst others. These licensing orders were instruments of censorship, issued by governments who feared the power of the spoken word. Liberal philosophers such as John Milton argued against this saying that there should be

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[28] As read together with the definitions in Article 1.

[29] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003, online at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument

[30] For commentary and text of the law, see http://www.article19.org/pdfs/analysis/kazakhstan-media-la.pdf.

freedom to publish. In his *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (an appeal to Parliament to rescind the licensing laws, and itself an unlicensed book) Milton famously wrote: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties".[31] With time, licensing laws in Europe were indeed rescinded and nowadays no democratic country requires printing presses to be licensed.[32]

It is also worth noting that while the UN Human Rights Committee, the body that oversees implementation of the ICCPR, has not to date issued an express condemnation of licensing requirements for printing presses, it has on several occasions asked critical questions concerning the issue and has been satisfied only when country representatives confirmed that such requirements were no longer in place.[33] The Committee has also ruled out licensing, and even registration, schemes which were imposed on small print run publications.[34]

In light of this, and considering the history of licensing regimes such as the one proposed, there is no legitimate purpose for the attainment of which licensing printing presses would be "necessary" in the sense of Article 19(3) of the ICCPR. Articles 3 and 4 of the draft Law appear to suggest that licensing is necessary in order to boost the publishing industry and satisfy the public's right to know but, if this were so, democratic countries around the world would have similar laws in place. The fact that they do not is telling of the illegitimate nature of the licensing regime proposed in Article 10 of the draft Law. The proposed regime can only be seen as censorious, or at the very least as having significant scope for censorious abuse, despite the stipulation to the contrary in Article 5.

Recommendations:
- The proposed licensing regime for printing presses of all kinds should be abandoned.

3.3. Content restrictions

Article 6 of the draft Law prohibits publication and distribution of the following materials:
- information that represents a State or another secret specially protected by law;
- calls to violent overthrow or change of the existing constitutional regime;
- war propaganda;
- advocacy for violence and cruelty;
- statements of racial, national, religious uniqueness and intolerance;
- pornography; and
- calls to committing other criminal action.

[31] J. Milton, *Areopagitica: a Speech for the Liberty of Unlicensed Printing*, 1644. As published – without the need for a licence – on http://www.dartmouth.edu/~milton/reading_room/areopagitica/index.shtml.
[32] See, amongst others, Article 1 of the French Law on Freedom of the Press of 1881 and Article 13 of the Dutch Constitution. In England, licensing was abolished in 1694, when Parliament refused to renew the legislation under which the Stationers' Company used to control the publication of newspapers and pamphlets. See W.S. Holdsworth, "Press Control and Copyright in the Sixteenth and Seventeenth Centuries" (1920) 29 Yale LJ 841, pp. 855 et seq.
[33] See, for example, the summary record of the consideration of Azerbaijan's State report, 5 November 2001, CCPR/C/SR.1975, par. 50; and the record of the consideration of Uruguay's State report, CCPR A/48/40, para. 483.
[34] See *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

No definitions are given of any of these terms and phrases and there is no reference to similar existing offences in the penal code.

We have two basic concerns with regard to these proposed content restrictions. First, most if not all of these restrictions presumably duplicate existing prohibitions already found in the civil or criminal law, or create subtle variations on existing prohibitions. For example, existing laws presumably already restrict publication of hate speech, pornography and state secrets. Repeating or slightly varying these provisions in the draft Law creates a confusing legal situation whereby two sets of rules are applicable to the same offence. It also sends a signal to the media that they are being singled out for special scrutiny, which is likely to have an illegitimate chilling effect on their right to freedom of expression. For this reason, the UN, OAS and OSCE special mandates on freedom of expression have stated: “Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse.”[35]

Our second concern is that a number of the restrictions are so broadly phrased that they are open to abuse for political purposes. While freedom of expression is not an absolute right, restrictions on it must pass the three part test described in Section 2.3 of this Memorandum: they should be clearly and narrowly stated in law, pursue a legitimate aim and be “necessary”. As stated in Section 2.3, vague and broadly worded restrictions constitute an illegitimate interference with the right to freedom of expression. It is also important that restrictions are not themselves stated in absolute terms which strike at the heart of the right to freedom of expression. Many of the restrictions in the draft Law fail these international law tests. To give just two examples:

- The prohibition on divulging state or other secrets should allow for publication of these materials when it is in the public interest, for example because they reveal corruption.[36]
- A call for the change of the constitutional regime is a legitimate exercise of the right to freedom of expression, so long as the call does not incite to violence.

Other restrictions, such as the prohibition on war propaganda, do pursue a legitimate aim but are broadly phrased and as such open to abuse.[37]

We recommend, therefore, that all restrictions in the draft Law are reviewed for compliance with international law standards on freedom of expression. To the extent that they are legitimate and necessary, they should be moved to legislation of general application, such as the civil or criminal code.

Recommendations:

- All content restrictions in the draft Law should be critically reviewed, along the lines suggested above, and, to the extent that this is justified and necessary, moved to laws of general application (such as the Civil Code or Criminal Code). No content restrictions should be included in a law specifically on publishing.

[35] Joint Declaration, note 29.
[36] See the 2004 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression: http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=319&lID=1.
[37] Article 20(1) of the ICCPR requires States to ban propaganda for war. However, in order for such a ban to be compatible with Article 19 of the ICCPR, the national legislation that provides the ban must be clearly defined.

3.4. Miscellaneous

3.4.1. Restrictions on founding publishing companies and printing houses

Article 8(2) of the draft Law excludes five classes of persons from founding a publishing company or a printing house:

- anyone under 18;
- anyone serving a prison sentence;
- "insane" persons found incapable by court;
- any group engaging in activity that is prohibited by law;
- non-citizens who do not live in Kazakhstan permanently.

The law defines "founding" very broadly as including possession, use and disposal.[38]

We do not believe that any of these restrictions can be justified as "necessary" for the attainment of a legitimate aim. Under Article 19 of the ICCPR, the right to express oneself through the print media is a right that belongs to "everyone" and class-restrictions of the kind proposed are rarely if ever legitimate. The European Commission and Court of Human Rights have repeatedly held that laws that strip all convicted persons of their civil rights – including their right to freedom of expression – breach international human rights guarantees.[39] It follows that the proposal in the draft Law to strip such persons of the right to publish is incompatible with Article 19 of the ICCPR. The other proposed restrictions are similarly problematic: to deprive non-citizens who do not permanently live in Kazakhstan of the right to publish will affect a large number of citizens of other CIS countries, and notably Russia, without justification; and the restriction on persons under 18 will limit the right of school children to publish their own magazines.[40]

3.4.2. Mandatory deposit and imprint requirements

Article 9 of the draft Law imposes a broad obligation on every publisher and printer to send two copies of all printed materials produced by them to the National State Book Chamber and to the National Library of Kazakhstan, on the day of production, without exception. Article 13 requires furthermore that all printed matter in Kazakhstan, without exception, should include the following information:

- - the name of the author (authors) and (or) of the compiler (compilers);
- - the name and the legal address of the publisher;
- - the place and the year of publishing;
- - the name and the legal address of the printing house;
- - the number of the order and the circulation.[41]

Books are also required to include ISBN numbers, copyright signs and the price. Failure to do so will incur unspecified liability.[42]

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[38] Article 8(1).
[39] See, for example, *Hirst v. the United Kingdom (No. 2)*, 6 October 2005, Application No. 74025/01 and the Commission's submission to the Court in *De Becker v. Belgium*, 27 March 1962, Application 214/56 (struck out of the list for procedural reasons).
[40] Their right to do this is guaranteed under Article 19 of the ICCPR, as well as under Article 13 of the UN Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989, which entered into force on 2 September 1990 and was ratified by Kazakhstan on 12 August 1994.
[41] Article 13(1).

We are concerned that these obligations are overbroad. The draft Law fails to distinguish between books, newspapers, magazines and similar publications, and more 'trivial' printed matter such as postcards, greeting cards and small brochures, with the result that all publishers of printed material, no matter how small the print run and including home-produced materials, will be placed under onerous obligations to provide free copies of their materials to State institutions and to include various publication data. Failure to do so may incur an unspecified legal penalty. We recommend that, if this sort of obligation is retained, the law distinguish between mass circulation, periodical media publications (newspapers and magazines) and other kinds of publications and impose the obligations mentioned in Articles 9 and 13 only on the former.[43]

We also note that the draft Law ignores recent developments in the copyright field, such as the open content movement,[44] and requires all publishers to assert full rights over their material even if they may not wish to do so. In any event, we recommend that copyright matters are best dealt with under separate legislation, as this is an increasingly complicated issue.

Recommendations:

- The restrictions on founding a printing or publishing house should be remove from the draft Law.
- The imprint and mandatory deposit obligations should apply, if retained, only to true mass media publications.
- The draft Law should not require all publishers to assert full rights over their publications but, rather, leave publishers free to produce open content.

[42] Article 14.
[43] See, for example, the UK Printer's Imprint Act 1961, C. 31.
[44] See http://en.wikipedia.org/wiki/Open_content for more detail.