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**Analysis of the Draft Mass Media Law for the Republic of Kazakhstan**

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Kazakhstan

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# **Analysis of the Draft Mass Media Law for the Republic of Kazakhstan**

## **I. Introduction**

The draft Mass Media Law of the Republic of Kazakhstan is an improvement over existing Soviet-era legislation<sup>1</sup> but fails to provide an adequate legal framework for the development of an independent mass media. An independent mass media is vital to the functioning of a civil society in which there is no monopoly on truth, freedom of expression is strongly protected, and the dissemination of diverse views remains uninhibited by state authorities. Democracies clearly function most effectively when individuals have access to information from across a wide spectrum of sources and are free to engage in public debate. A true independent mass media facilitates a marketplace of ideas in society and strengthens the capacity of individuals to engage in self-government. Therefore, legislation governing the mass media should embrace these concepts and establish a clear legal framework aimed at fostering the growth of an independent media that disseminates a free flow of ideas and information.

While the draft law supports freedom of speech, political expression, and public discourse through the mass media to a certain extent, in its present form the draft law suffers from significant shortcomings diminishing the possibility of a truly independent media in Kazakhstan. Provisions in the draft referring to freedoms of speech, art, and expression, as well as a ban on censorship, are essential components of any mass media legislation. These provisions, however, are reduced to meaningless phrases by an overall scheme that chips away at these fundamental rights. Any attempt to ensure an independent media and the free flow of ideas is encumbered by organizational, registration, and accreditation requirements or is subject to unknown laws not provided for in the draft. As a result, the draft law as it is currently constructed may hinder its stated objectives of guaranteeing freedom of speech and promoting an independent mass media.

Before making more specific comments about the proposed law, it would be helpful to review current laws in the United States relating to freedom of expression and the potential hazards that arise when government powers interfere with this right. Freedom of expression in the United States is guaranteed by the First Amendment to the Constitution. The amendment provides, in part, that “Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble.”<sup>2</sup> The legal framework protecting freedom of expression stems from this short statement of principle. The basic concept of “free expression” embraces within it a collection of individual rights, each of which is an essential component of the freedom of expression. These rights include:

- The right of an individual to hold a set of beliefs,
- The right to communicate freely on any subject,
- The right to remain silent,

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<sup>1</sup> Law of the Kazakh SSR on the Press and Media, 1991.

<sup>2</sup> United States Constitution, Amendment I.

- The right to receive communication from others,
- The right to solicit and obtain information from all sources, and
- The right to associate with others.

At its core, the concept of freedom of expression embraces the broad principle that the media has a right to disseminate information free from excessive government regulation and control.

## **A. Government Control of the Content of Expression**

Freedom of speech and freedom of the press have been assailed throughout the world through the use of governmental controls restricting the dissemination of information based on the information's content. Historical examples of such content-based restrictions include the doctrine of seditious libel and the use of licenses and other prior restraints on publication. While some government regulation of speech and publication may be necessary to protect against the immediate outbreak of violence or to protect individuals from unwarranted intrusions into their privacy or reputation, the concept of free expression demands that such government restrictions be strictly and narrowly limited and that protected categories of speech be broadly defined to avoid necessary and improper suppression of speech.

## **B. Proper and Improper Regulation of the Content of Expression**

### **1. Political Speech**

Political speech is the most broadly protected category of expression under the First Amendment to the United States Constitution. This broad-based protection arises from a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”<sup>3</sup> and the idea that “public discussion is a political duty.”<sup>4</sup> Cases interpreting the First Amendment contemplate that not all speech expresses popular ideas but that the proliferation of different ideas and open discussion are fundamental to a democratic society: “repression breeds hate;...hate menaces a stable government;...the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”<sup>5</sup>

Political speech, even speech that is unpopular or advocates against the government, lends to the public debate and should not be suppressed unless it is imperative to prevent immediate physical harm. Under American free speech jurisprudence, the government may restrain expression advocating “rebellious” political change only when the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>6</sup> Essentially, the test allows the suppression of speech only if the speech poses or intends to pose a

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<sup>3</sup> *New York Times Co. v. Sullivan*, 376 United States Reports 254 (1964).

<sup>4</sup> *Whitney v. California*, 274 United States Reports 357 (1927).

<sup>5</sup> *Whitney v. California*.

<sup>6</sup> *Brandenburg v. Ohio*, 395 United States Reports 444 (1969).

clear and imminent physical danger but not if the speech constitutes mere advocacy of violence. Political speech or criticism of a government or public official promotes the public debate of various issues and clearly should not be subject to government interference.

## **2. Licensing and Registration of Journalists**

Governments sometimes avoid having to make controversial case-by-case analyses of the content of speech by using licensing, registration, and other requirements that essentially ban whole categories of speech in exchange for the privilege of participating in mass media. In the United States, such registration or licensing requirements are presumed invalid and undermine the exchange of ideas that is fundamental to the democratic process. Registration requirements, however, are valid insofar as they regulate media and non-media businesses indiscriminately and for purposes not aimed at suppressing speech.

## **3. Libelous Statements and Obscene Speech**

In the United States, content-based restrictions on speech are presumptively invalid and are generally struck down unless the restrictions serve a compelling government interest. Such categories of constitutionally unprotected speech include defamation and obscenity. These classes of unprotected speech are regarded as having little or no social value and are not considered part of the free exchange of ideas at the core of the First Amendment. For speech to be restricted under one of these categories, the speech must pass the applicable test, as devised by the Supreme Court, which narrowly defines these categories of restricted speech.

The United States Supreme Court has defined libelous speech in a way that distinguishes between libel of a public official or public figure and libel of a private individual. In the case of a public figure, for a libel claim to be actionable, the plaintiff must show “actual malice”—that the false statement was published with knowledge of its falsity or with reckless disregard as to its truth or falsity. Private individuals need only show that the defendant was negligent in ascertaining the truth or falsity of the statement. If the allegedly libelous statement does not meet the requirements of the applicable test, then the speech is not libelous and is considered constitutionally protected speech. This narrow definition of libelous speech is especially important in the case of statements critical of public officials, which are by nature political and, therefore, deserving of the highest protections afforded to speech in a democratic society.

Obscene speech is not provided constitutional protection. To determine whether speech is obscene and, therefore, deserving of First Amendment protection, the Supreme Court has devised a three-part test:

- That the dominant theme of the work taken as a whole appeals to a prurient interest,
- That the material depicts sex in a patently offensive way by contemporary community standards, and
- That the work taken as a whole lacks serious, literary, artistic, political, or scientific merit.

If the expression in question does not meet all three elements of this test, then the speech is not considered obscenity and is constitutionally protected.

## II. General Drafting Issues

Taken as a whole, the draft law suffers from an overabundance of vague language and repeated references to unspecified parallel legislation. A law is vague if persons of “common intelligence must necessarily guess at its meaning and differ to its application.”<sup>7</sup> Examples of vagueness are cited in this section and throughout the report. The law is also overly ambitious in scope. Consequently, the state will possess a variety of tools to regulate the activity of the mass media and free expression. At a minimum, these shortcomings in drafting may have a chilling effect on free speech and increase the likelihood that the medium will be subject to undue influence by the state. A far worse scenario may be envisaged whereby state authorities use the current draft to intimidate and control the mass media and stifle the dissemination of information based upon its content.

### A. Need for More Precise Language

Imprecise language in legislation is often susceptible to abuse by state authorities. Several of the terms in Article 1, for example, are so loosely defined that the terms may apply to personal day-to-day activities, activities that would not normally be governed by mass media legislation. For example, a *mass medium* may be interpreted to include any “audiovisual recording...or other form of periodic or continuous public dissemination of information.” To illustrate how pervasive this regulation could be, a person who exercises their fundamental right to freedom of speech by periodically addressing public gatherings could possibly be subject to the regulations of this law. Likewise, the same person may fall within the broad parameters of the definition of *journalist* and therefore be subject to the various restrictions and accreditation requirements accorded to journalists. Given the advent of the Internet, any private individual who has access to a computer may be considered an electronic journalist and subject to the duties contained in the draft law.

In Article 2, which purports to ban censorship, Section 3 specifically censors advocating a change in the constitutional structure if that change is considered “forced.” The use of the word *forced* as a descriptive adjective is so vague that the state could use the law to suppress mere advocacy of change in the constitutional structure.

In addition, Article 16 fails to adequately define what constitutes erotic material. The failure to define this term increases the possibility that information, for example, on how the AIDS virus is transmitted, as well as artistic material, could be marginalized or banned completely. This vagueness similarly may have a chilling effect on free speech. If no adequate definition is provided, a media outlet may forego questionable material rather than run the risk of a suspension.

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<sup>7</sup> *Connally v. General Construction Co.*, 269 United States Reports 385 (1926).

## **B. Need for Clear References to Other Legislation**

Another weakness in the law is the incorporation by reference to unidentified parallel legislation. A failure to specifically identify parallel legislation has the effect of providing inadequate notice to concerned parties, such as media outlets and journalists, about their rights and responsibilities under the law as well as what behavior is subject to sanction. For example, Article 3 provides in part that mass media legislation is not limited to this law but is subject to “other normative legal acts of the Republic of Kazakhstan.” The draft law, however, fails to identify which normative legal acts are relative. It is not even clear whether this parallel legislation presently exists.

In addition, the provision in Article 2 that censorship will not be allowed is preceded with qualifying language permitting freedom of speech and the expression of one’s opinion and conviction “via any lawful way.” Another example is that of Chapter 5, which provides that information agencies are required to be registered in compliance with “the legislation of the Republic of Kazakhstan” but nowhere in the draft is this legislation provided. Such references to undefined laws and the use of ambiguous language may otherwise subject protected activity to subjective standards and, thereby, raise the possibilities for censorship and suppression of information and ideas. Open-ended provisions create the recipe for arbitrary and capricious application and raise the likelihood that the principles of free expression upon which an independent media is based will be abused by the state. A significant improvement in the draft may be achieved by identifying the parallel legislation and clearly spelling out what the other laws entail.

## **C. Removal of Overbroad Provisions**

In its current form, the draft law is overly ambitious and attempts to address a variety of issues only tangentially related to the mass media and freedom of expression. A great deal of the law outlines guidelines for founding and operating a media outlet or publication as well as the organizational structure of such an entity. Because the law covers such a wide-ranging area, it is difficult to identify the law’s theoretical underpinnings. Furthermore, in its ambition to address many and various issues, the law may chill free expression and hinder effective newsgathering and the dissemination of information. Article 5 and Article 6, for example, set forth the activities in which the owner and editorial office of a mass medium may engage. While there is nothing inherently wrong with this, the provisions could be considered overreaching. There is no compelling reason for the state to concern itself with how a media outlet chooses to structure itself. If the aim of the law is to narrow the parameters of the state’s involvement in media activities and limit the state’s capacity to interfere with freedom of expression, then these provisions may be considered out of place and should be present in another code, such as the code governing commerce.

# **III. Free Expression and an Independent Media**

## **A. Constitutional Guarantees**

Freedom of speech and the right to receive and distribute information in Kazakhstan are guaranteed by the 1995 Constitution, which provides that these and other human rights are

“absolute and inalienable.”<sup>8</sup> Notably, the draft law itself provides positive principles concerning freedom of speech and the independence of the mass media by referring to these constitutional guarantees of free speech, art, and expression in Article 2. Although use of this language indicates a well-intentioned effort to ban censorship and protect the rights of individuals to express diverse viewpoints, the law, unfortunately, does contain certain provisions limiting these very same principles.

## **B. Censorship of Political Expression**

Article 2(3) forbids the use of a mass media for an uncomfortably large number of reasons. Included among the list are “propagating or agitating a forced change of the constitutional structure, violation of the integrity of the Republic of Kazakhstan, undermining of the state safety, ... [or a] national, religious, group” and other vague acts, such as use for a “cult of violence and cruelty.” Unfortunately, the law provides no standards as to what such prohibitions mean or what constitutes abuse. These prohibited uses are ambiguously phrased and may be interpreted as meaning, for example, that general criticisms of the government and specific government officials in particular are simply not allowed. In addition, how is *state safety* defined and who, specifically, determines what undermines state safety? In this respect, the law is notably silent. Similarly, under Article 2, general remarks concerning a religious or ethnic group may be subject to state sanction. It is unclear what criteria would be used to determine whether an ethnic group has been undermined. At the very least, these broad prohibitions should be reconsidered in light of the important distinction between political advocacy and speech inspiring imminent violence or lawless action. At worst, these prohibitions are blanket bans on any political speech criticizing the government or various ethnic groups—prohibitions that are clearly overbroad. Because such prohibitions are subject to multiple interpretation, and thereby grant the state unbridled discretion in determining what is prohibited of a mass medium, this language should either be removed or substantially narrowed.

Furthermore, the explicit prohibition of censorship in Article 2 may be circumvented by allowing the state to suppress dissenting political views under the guise that such speech violates the “integrity” of the republic or encroaches on the “honor and dignity of a citizen or organization.” Criticism of the government or political speech should not be subject to government interference unless the criticism advocates imminent lawless action and is likely to produce such action. The draft law fails to adequately distinguish legitimate and protected political speech from unprotected speech aimed at inciting violence. This failure increases the likelihood that state authorities may censor and suppress the type of political dissent that mass media laws and freedom of expression guarantees are meant to protect. The doctrines of free speech and free press demand that, unless it is imperative to do so, political speech should not be suppressed and open dialogue on public issues should be encouraged. In a democratic society, the answer to controversial expression that does not lead to immediate violence should be more speech, not less.

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<sup>8</sup> Constitution of the Republic of Kazakhstan, Article 12(1) and Article 20(1) and (2).

## C. Content Regulation

Article 23 prohibits the “[a]buse of freedom of speech, dissemination of false information encroaching on the honor and dignity of a citizen or organization” and “influence by mass media on a court.” Although restricting the dissemination of false information is conceptually helpful, the danger posed by false information does not justify the enactment of overbroad restrictions on speech. Providing punishment for speech that abuses some “honor and dignity” or that influences people improperly allows the government the discretion to punish a speaker whom the government simply does not like or agree with. This is the very definition of improper content regulation.

Similarly, Article 12(2) provides restrictions on “erotic reports and materials.” Although obscenity may not be a protected form of speech, not all pornography is legally obscene, and the broad term *erotic* may be susceptible to abuse. Reasonable time, place, and manner restrictions can be an adequate means to ensure that only appropriate audiences see such material. However, restrictions that would effect the content of erotic material in contrast to obscene expression are contrary to guaranteed free expression. Although the restrictions described in subsection 3 of the draft law appear reasonable, it is important that the restrictions of the time, place, and manner of disseminating erotic material be narrowly tailored to that purpose.

Article 16 states that official reports of state agencies “shall be placed in mass media” according to the Republic’s legislation. The voluntary publication of the official reports themselves are not troublesome, but any requirement that a mass medium publish or broadcast material against its will is contrary to a system of guaranteed free expression. Any time the government requires a news organization or media outlet to publish official reports, the government is in effect seizing editorial space for governmental purposes. This provision provides the state with the potential to dominate information disseminated in the mass media. As such, this article violates the principles of free speech and free press by interfering with the judgement exercised by editors in deciding what, how, and when to print.

## IV. State Control and Regulation of the Mass Media and Press

As a general principle, government involvement or oversight of the internal activities of a mass medium or the activities of journalists constitutes an impermissible prior restraint on freedom of expression and the flow of information. The draft law gives the government considerable power to control ownership and operations of media outlets by requiring official registration, prohibiting substantial ownership by foreign parties, imposing duties on journalists, and specifying what ownership information must be published.

### A. Founding and Registering a Mass Medium

Article 4 establishes the right to found a mass medium but limits this right to citizens and authorized entities of Kazakhstan. While foreign entities or persons are not prohibited from mass media ownership, the draft law does limit foreign parties from holding, using, governing, or disposing of more than twenty percent of stock in a mass medium. It is clearly understandable that Kazakhstan would want to have some national connection to the media, but this provision could prevent foreign investment from spurring the growth of an independent media. Given the

present financial constraints on independent media outlets in Kazakhstan, the draft law should be more concerned with encouraging foreign investment in the mass media rather than discouraging such investment. By limiting ownership of media outlets to Kazakhstanis only, the authorities in Kazakhstan risk discouraging foreign investment and isolating the media from the benefits of the information age.

Apart from normal business registration requirements, mass media outlets are also subject to official registration requirements set forth in Article 8 and Article 9 of the draft law. Although such a registration requirement may seem benign on the surface, registration does in fact have a negative impact on the development of mass media and the exercise of free expression. Moreover, the registration requirements seem to apply only to the mass media and not to other industries. Not only does the failure to register prevent a mass medium from gathering and disseminating information but many of the registration and application requirements have a chilling effect upon free speech activities. The drafters are strongly recommended to consider either deleting the registration requirement in whole or at least removing specific aspects of the registration requirement from the current version of the law.

Several provisions in Article 9(1) are especially contradictory to a system of guaranteed free expression and should be removed. Requiring the applicant to include information regarding the “planned frequency of publication,” “thematic orientation,” and “territory of distribution” of the medium is particularly troublesome. If the draft law’s purpose is to promote freedom of speech and public debate, the frequency, content, or theme of the mass medium are irrelevant and should not be a requirement of the application. As it currently stands, the registration requirement serves only to restrict free expression and may be used by the state to regulate activities that otherwise should be part of the free marketplace of activities and ideas. Registration, and the fact that such registration may be suspended or revoked, clearly puts media outlets at mercy of state authorities. Registration is simply an anathema to a free press.

Although Article 8 outlines the registration process and provides for a fifteen-day review period, there is no provision for appeal, either administratively or through the judicial process. If the authorities are not held accountable to a separate judicial power, for example, there is the possibility of denying registration for grounds other than those stipulated. The inclusion of an appeal process in response to the denial of an application for registering a mass medium would be a significant improvement in the law. Such a provision should include the power to order the authorities to grant an application that has been unjustifiably denied.

Article 8 does establish an “Authorized Agency” as the authority on matters of mass information. Having one government entity in charge of this area may be a good idea, as broadcast companies and the public need to be assured that whatever rules and decisions are made have the force of law behind them and are not arbitrary. For a government to fairly regulate mass media, however, the body charged with that responsibility should be official in nature, should act in a public manner, and should be accountable to the people of the country.

## **B. Suspension and Termination of Mass Media Activities**

Article 11 provides for the suspension and termination of a mass medium’s registration in certain circumstances. This provision is troubling in that the article goes well beyond the realm

of reasonable government interference in media activities. Not only does the law fail to provide any procedural guidelines for suspension but the law also fails to provide for any mechanism of due process. The draft indicates that a court may suspend mass media activities for violations of Article 2, Article 12, Article 13, and Article 14 yet does not set forth what vehicle gives the court jurisdiction to intervene or what standard of review applies. As written, a court could suspend and terminate the activities of a mass medium based upon terms that could ostensibly stifle political criticism, aggressive reporting, and unpopular views. Moreover, the draft law lacks a provision for appealing a court-ordered suspension or termination.

Finally, the revised draft provides for termination of mass media activities if the owner terminates his or her activities according to legislation of the Republic of Kazakhstan. The rationale behind a provision mandating that mass media activities be officially terminated simply because an owner unilaterally terminates his or her activities is unclear. Without more specific terms supporting such a drastic result, this provision should be deleted from the draft.

### **C. Journalist Accreditation**

Minimal state involvement in the flow of information is fundamental to freedom of speech and the freedom of the press. When the state holds the power to accredit a journalist as well as the power to suspend accreditation, the journalist is in effect at the mercy of the state. A journalist's freedom of expression is often the first casualty in a relationship of this type. In most democratic countries, the state plays no role in determining who may work as a journalist or gain access to information about government operations. Furthermore, democracies are loath to enact state-approved qualifications to report the news, including news about the government. Rather, all citizens are presumed to have the right to access information about the operation of government without being accredited. Accreditation at best should be a voluntary procedure—not a requirement established and implemented by the state.

Article 20, in contrast, requires that journalists be accredited by state agencies and public associations and organizations in order to gain access to government information. Provisions in the draft law dealing with the accreditation of individuals are flawed in several respects. First, the draft provides virtually no standards of accreditation. If, however, the Kazakhstani authorities require an accreditation requirement for journalists, then it is vital that accreditation standards be clearly established. Since access to the government in any form is predicated on accreditation, these standards must also be objective and as minimal as possible. Second, empowering state agencies with the authority to accredit those journalists covering the agency borders on censorship. State agencies should have no say over who reports on their activities. Third, the draft law makes no mention of due process for a journalist who wishes to contest the denial or termination of his or her accreditation. This article is clearly too restrictive and contrary to a guaranteed system of free expression. The right to know what a democratic government is doing should not exist solely at the whim of a legislature that may choose to amend the right in the future.

### **D. Rights and Duties of Journalists**

It is common for mass media laws in democratic countries to enumerate the rights guaranteed to journalists. Kazakhstan's draft Mass Media Law is, for the most part, similar in

this regard. Article 19 identifies a litany of rights journalists enjoy in their professional capacity. At the same time, however, many of these rights are vaguely spelled out or subject to modification by unspecified legislation. Consequently, these rights remain more illusory than real. For example, one provision grants accredited journalists access to meetings at government agencies except when a decision has been made to close such meeting. The law, however, does not give any guidance about when and under what circumstances an official may declare a meeting closed. As currently written, there is nothing in the law to prohibit a decision to close all meetings, thereby effectively barring the ability of journalists from carrying out one of the most important functions of their profession—reporting on government policies. Journalists are also guaranteed access to all governmental records except those records containing state secrets. Unfortunately, the draft law is silent as to what constitutes a state secret and who is to make such a determination. As a result, the state need only designate a document as a state secret if the state wishes to deprive the public or a journalist access to the document. Finally, Article 19 protects a journalist’s right to maintain the confidentiality of a source unless ordered to do otherwise by a court but fails to provide guidance as to under what circumstances a court may make this decision.

While it is appropriate for the state to protect the rights of journalists, the state should not define what a journalist must do. Imposing duties on journalists is inherently contradictory to the concept of an independent media and threatens the free flow of information. Regulation of journalists should be an internal matter, a question of professional ethics, or possibly part of the provisions set forth in an employment contract. This should not be considered an area of state oversight. A journalist should be at liberty to determine his or her own method of operation. In contrast, Article 19 requires journalists to abide by a series of vaguely worded professional duties that undermine the entire foundation upon which newsgathering and freedom of speech are based.

The duties required of journalists in Article 19 are troublesome for a number of reasons. For example, the article restricts journalists from disseminating information that contradicts “reality.” It is unclear how the term *reality* is defined and who is charged with determining this definition, whether a court, parliament, or another entity. At present, this issue remains unclear. As a result, the state may prevent a journalist from reporting on an issue if the state determined that the information involved contradicts the state’s version of reality. The drafters would be well advised to delete this language or substantially refine it.

Article 19 also requires journalists to “carry out the program of activities of the mass medium...guided by the legislation of the Republic of Kazakhstan.” It is unclear who is to decide whether a journalist is carrying out the program of activities of the mass media. The draft law is silent on this issue and fails to identify the specific legislation by which the journalist is to be guided. Furthermore, the duty to “respect legal rights and interests of physical and legal entities” borders on censorship. Unless certain safeguards are introduced, the state may stifle free speech or curtail any investigative reporting that the state feels may prove unflattering.

## V. Libel and Remedies

### A. Establishing Libel and Defamation

While freedom of expression and the free flow of information are central to democratic self-government, individuals do have the right to protect their reputations from defamatory and libelous statements. Laws governing libel and the freedom of expression must contend with the struggle between these interests. The goal should be to strike a balance between promoting robust reporting and protecting individuals from the dissemination of false information in either a malicious or a negligent fashion. Freedom of the press is not absolute but may be limited to protect the reputational interests of society. At the same time, libel should not be so broadly applied that it quashes freedom of expression and limits press freedoms. In American jurisprudence, for example, libel is (1) the publication of (2) a statement of fact (3) that is false and (4) that reasonably refers to the plaintiff (5) in a manner that tends to injure his or her reputation or to discredit him or her in the estimation of the public, (6) and which is published with the requisite degree of fault.<sup>9</sup>

The draft law treats the question of libelous statements in Article 23 by making punishable the “dissemination of false information encroaching on the honor and dignity of a citizen or organization.” Although the inclusion of such an anti-libel provision is clearly important to protect individuals from overly aggressive reporting, this language is excessively broad and does not do enough to discourage the bringing of libel claims against journalists exercising their freedom of expression in a non-negligent or malicious fashion. As it is currently drafted, this article opens the door to countless complaints and charges against which the mass media must constantly defend. One option for the drafters is to narrow this language by clearly distinguishing between the dissemination of false statements aimed at injuring an individual’s standing in the community and statements that constitute a journalist’s professional right to engage in aggressive reporting of public issues, including the activities and policies of state officials.

A related area of concern involves the failure of the draft law to draw a distinction between public officials, such as politicians, and private individuals. Disseminating information about public officials should be held to a different standard than private individuals for the purpose of assessing potentially libelous statements. Generally, a news medium is prohibited from negligently publishing defamatory statements in the case of private individuals or from exhibiting actual malice in the case of a public figure. The rationale for such a distinction is because public figures have greater access to the media and may more effectively respond to malicious statements. In addition, by seeking prominent roles for themselves, public officials knowingly accept the fact that their conduct is the subject of frequent news reporting, coverage that may sometimes include the misstatement of facts or erroneous assertions. Under Article 23, there appears to be little margin for error for journalists in reporting on public officials. Virtually any criticism of a politician may subject a journalist to official retribution or to the closure of a media outlet by state authorities. At the very least, failure to protect a journalist’s freedom to criticize public officials may lead to self-censorship among journalists fearful of harassment.

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<sup>9</sup> For more on libel and defamation, see The American Bar Association Central and East European Law Initiative, Concept Paper on Media Law (1996), at 22.

Furthermore, abuses of freedom of speech and dissemination of false information provided for in Article 23 are also subject to undefined, ambiguous legislation. Any law that provides for undisclosed liability without setting forth any objective standards of conduct creates a profound restraint to engage in free speech and political activity. Only under extreme circumstances where political speech poses or intends to incite imminent lawless conduct, and such speech is likely to produce such conduct, should state intervention be tolerated. All references to undefined legislation as the basis for determining freedom of speech should be removed.

## **B. The Right of Refutation and Other Remedies**

Article 17 establishes several remedies to libel, including a right of refutation for citizens and legal entities whose “honor, dignity, or business reputation” has been discredited by information disseminated by the mass media. While on its face this article appears to protect the rights of individuals from being defamed or libeled, the article has the consequence of placing an unnecessary burden on media outlets and may have a chilling effect on free speech.

First, the draft law does not require a libel plaintiff to prove the falsity of the statement at issue. Rather, the burden of proof is imposed on the media. Not only is this an undue burden on the media, such a requirement does little to encourage the robust debate necessary in a democracy. The drafters should consider shifting this burden to the libel plaintiff instead. In a landmark case on libel in the United States,<sup>10</sup> the United States Supreme Court held that journalists are protected from a successful libel suit unless a plaintiff can show that the journalist knew the material was false when published or acted with reckless disregard of the truth or falsity. The burden placed upon a news distributor is not realistic because often what constitutes the truth is elusive and subject to differing interpretations. Furthermore, making the press liable for defamatory statements on a per se basis, *i.e.*, without proof of fault, will invite libel claims and improperly discourage the reporting of public issues and information.

Second, the right of refutation would require a publisher or broadcaster to disseminate a refutation of any purportedly libelous statement “free of charge in the same mass media.” Such a requirement will ultimately prove untenable. There is very little in the way of aggressive news reporting that would not be subject to this regulation. As a result, the news media would be inundated with demands for refutation and be forced to devote finite resources to providing a platform to others. This requirement would clearly interfere with the ability of a media outlet to disseminate ideas and information of its own choosing. As previously noted, a guaranteed right of free expression includes the right to say nothing. Corrections, like any other information a media outlet disseminates, may be a matter for editorial discretion.

Finally, the provision that the aggrieved party “shall have the right to moral damage compensation” is an unclear category of damages. Most customary types of damages resulting from defamatory falsehoods include impairment of reputation and standing in the community,

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<sup>10</sup> *New York Times Co. v. Sullivan*.

personal humiliation, and mental anguish. Any damage award should be supported by competent evidence.<sup>11</sup>

## **VI. Other Considerations**

### **A. International Obligations**

In Article 3(3), the draft law provides that international treaties to which Kazakhstan is a party shall be binding in the area of the mass media. Kazakhstan is not presently a party to either the International Covenant on Civil and Political Rights or the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, these instruments of international human rights outline broadly accepted practices vis-à-vis protecting freedom of expression and establishing an independent media. The drafters would be well advised to consider bringing the draft law into compliance with these standards if Kazakhstan one day seeks to accede to these agreements.<sup>12</sup>

The drafters should also keep in mind that Kazakhstan is a member of the Organization for Security and Cooperation in Europe and a signatory of the Helsinki Final Act. As such, Kazakhstan is obliged to fulfill its commitments to respect human rights and fundamental freedoms. Chief among these commitments are the commitments to promote media freedoms and to refrain from obstructing media activity through the creation of unfavorable working conditions. While OSCE commitments have no legal status and are not binding under international law, the commitments should be construed as politically binding. Given the fact that Kazakhstan's OSCE commitments regarding freedom of the media have been signed at the highest levels of power, they arguably possess an authority equal to that of any international treaty.

### **B. Preamble**

In its present form, the draft law suffers from the absence of a preamble stating the principles and rationales on which the law is based. A preamble, for example, could include the values the draft law intends to incorporate, such as facilitating individual self-fulfillment, providing access to diverse political views, advancing knowledge, discovering truth, and achieving a stable community.

## **VII. Conclusion**

The dissolution of the Soviet Union brought with it an end to the state's complete monopoly over the dissemination of information. Since emerging as an independent state, Kazakhstan has enhanced guarantees for freedom of expression and has experienced a significant growth in independent media outlets. The 1991 Law on the Press and Media may have functioned well enough during the initial transition from centralized communist rule, but the

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<sup>11</sup> For items of damage recoverable in libel and slander actions in the State of California, *see* excerpts from the 1999 California Civil Jury Instructions in Appendix B.

<sup>12</sup> *See*, for example, International Covenant on Civil and Political Rights Article 19 and European Convention for the Protection of Human Rights and Fundamental Freedoms Article 10.

need clearly exists for a new law on the mass media reflecting Kazakhstan's commitment to democratic values and practices, including freedom of expression.

In its current form, however, the draft law does not provide an adequate legal framework necessary to establish an independent media that promotes, fosters, and disseminates the free flow of ideas. To effectively do so, the drafters should consider limiting substantial regulations and restrictions currently found in the draft law that hinder the establishment and operation of independent media. The drafters should also consider whether content-based restrictions in the draft law are absolutely necessary. Any restrictions placed upon speech should only be those that are narrowly tailored to guard against imminent violence.

In order to avoid the dangers of censorship and the suppression of ideas, the drafters should also consider eliminating vague language. The inclusion of definitive terms would significantly reduce the likelihood of arbitrary government intervention in the mass media. Furthermore, the drafters should eliminate references to undefined laws, which introduces ambiguity into the system of rights that mass media outlets enjoy under the law.

Most of all, the drafters should remind themselves that freedom of expression is not a commodity created and controlled by the state but rather a fundamental freedom to be protected by the state.