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**FREEDOM OF EXPRESSION AND FREEDOM OF MEDIA AS VITAL TOOLS FOR
DEMOCRACY AND PROTECTION OF RIGHTS IN KAZAKHSTAN**

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INTRODUCTION

After the collapse of the USSR in 1991, the newly independent republics of Central Asia – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan have become a largely experimental way to democracy. The Republic of Kazakhstan is located in central Asia and shares its northern border with Russia. While Kazakhstan is an independent country, Russia has strong influences over social, economic, and political factors of Kazakhstan. All countries sought to establish themselves as law obedient members of the international community, joining to international organizations such as the UN and OSCE and ratified international treaties on the protection of human rights. Fifteen years later, the Central Asian republics are still trying to get rid of the heritage of the Communist regime and respect the previously taken international obligations. Human rights in the region are not always and everywhere protected. Perhaps, any leader in our world (including my country - Kazakhstan) opening a newspaper, once discovered things that he would not like to see. The wisest of them understand that it is very important to protect the right of their critics to express their opinions and print the unpleasant truth. At the heart of these problems, there is incomplete compliance with international law and restriction in internal laws of the country. Freedom of expression is not just an ideological concept and not a figure of speech. This is a specific, statutory right, established by the Constitutions of the countries of Central Asia and international treaties to which they are a party.

The right to freedom of expression is guaranteed by law and the constitutions of almost all states, including Central Asian countries. However, the frequent facts of censorship confirm that legislative guarantees are not always backed by a genuine awareness of the significance of free speech. This introductory chapter outlines the general content of the rights and an attempt is made to explain why the right is free to state their beliefs is considered as one of the strongest supports of modern democracy. Freedom of expression contributes to the quality of statecraft in many ways. First of all, through freedom of expression, power will not be with dictatorial direction. Because, in a democracy, unimpeded discussions between different political parties reveal their strengths and weaknesses, and in result, voters can decide which one of them is most suitable to rule the country. Coverage of the activities of the government and the opposition in the media reveals cases of corruption and other violations, which prevents the establishment of dishonest practices. Second, freedom of speech promotes good governance. When citizens can openly express about the real situation in the country without

fear and authorities can learn more about the problematic issues and will be able to respond adequately. In addition, freedom of expression is essential for social progress and for the intellectual and moral development of individuals. Freedom of expression ensures a possibility for thorough consideration of all proposals for a new law amendment or a government programmed. Public debate creates a kind of marketplace of ideas from which politicians can draw the best offer. Free discussion of future laws can also generate support to laws amongst the population and may also contribute to future compliance with these laws. Finally, freedom of speech contributes to the enjoyment of other human rights. The activities of the state in all spheres; journalists and public activists draw attention to pressing human rights issues and to their violations, forcing governments to accept the required measures. For all these reasons, the international community has come to accept freedom of speech as a fundamental human right. At the first session of the UN General Assembly in 1946, Resolution 59(I) was adopted, which states that "Freedom of information is a fundamental human right ... and the cornerstone of all freedoms to which the work of the Organization is devoted United Nation." ¹

While Kazakhstan is an independent country, Russia has strong influences over social, economic, and political factors of Kazakhstan. The country is known for its mistreatment of human rights and limitations on free expression and press. According to the statistics which published by website Reporters Without Borders Kazakhstan is number 158 out 180 countries in 2018 (higher number means less freedom) of expression in a country) on the basis of World Press Freedom ranking.² Nowadays, Kazakhstan has “achieved” two rankings lower on the freedom scale than it was in 2015. But it is hard to say that it is a huge improvement in three years. The rankings of countries are based on evaluations of the level of independence the media has in that country compared to the number of violent incidents involving journalists and other media professionals. While Reporters Without Borders shows a positive change in Kazakhstan’s free speech and press, other sources show a decline. Freedom House has given to Kazakhstan a freedom score of 5.5 on a 7 point scale, 7 being the worst, since 1998³. However, in 2018 the number rose to 6 on the basis that there was a severe lack of political choice and a rise in government efforts to silence dissenting opinions. It is clear that while Kazakhstan claims to be a republic, civilians have limitations on freedom and expression.

¹ Resolutions adopted by the General Assembly during its first session No .59(I), 14.12.1946.

² World Press Freedom Index. 31.12.2018.

³ Freedom in the World, (05.11.2018). Available: <https://freedomhouse.org/report/freedom-world/2018/kazakhstan>.

Republics of Kazakhstan is a member of the international community and must respect universal human rights, including the right to freedom of expression. These countries have made official commitments on how to reflect the International Bill of Human Rights principles, values and guarantees of freedom of speech and press in their domestic legislation and to ensure their observance in daily practice. One can argue that journalists in the region are experiencing difficulties due to the heritage of the Soviet media system (when the whole media controlled or works under the leadership). Consequences of the USSR system, the old structures, still impede independent journalism. It noticeably limits freedom in different areas of Central Asia. These considerations are relevant in examining the current state of freedom of the media in the Central Asian region. The state party should promote or implement individual rights, i.e. take the necessary measures to create the necessary and enabling environment in which the rights in question are could be implemented in full. It is also a "positive" obligation that may require the state party to take significant measures, including the allocation of adequate resources, to fulfill its obligations under the treaty.⁴

The primary research problem is that Kazakhstan has applied administrative and criminal sanctions (while some articles of national law are contradictory to ICCPR) specifically on those who peacefully exercised their right to freedom of expression. The Republic of Kazakhstan is a party to both international covenants (ICCPR), which imposes on the state increased obligations in the field of respect, protection, promotion, and promotion of human rights and freedoms. But recent cases which happened in Kazakhstan shows vice versa. Kazakhstan must fulfill its obligations to promote the rights to freedom of expression of opinion, in accordance with international law and the Constitution. The Authorities of Kazakhstan must stop using the Administrative and criminal codes to silence critics who openly express their opinions, both online and offline. Objective based on establishing main inconsistencies between Kazakhstani domestic law and ICCPR.

The primary research questions are:

- Whether Kazakhstan's media legislation promotes and protects freedom of expression; respect for and promotion of freedom of expression?

⁴ United Nations high Commissioner for human rights. Commentary on ICCPR. No. 15 (Rev.1).. 15.10.2004, p. 6

- Are existing laws and regulations sufficiently effective in the name of freedom of expression?
- What are the inconsistencies between national law of Kazakhstan and ICCPR?
- Does the legal system need any changes in order to better meet the standards and obligations of article 19 of the ICCPR, as well as other international obligations of the Republic of Kazakhstan in the field of freedom of expression?

The hypothesis of the study is that both the law and practice in Kazakhstan are not in compliance with its international commitments and specifically with the ICCPR in the field of freedom of expression. The Republic of Kazakhstan is a party to international covenants, which imposes on the state increased obligations in the field of respect, protection, promotion, and promotion of human rights and freedoms. The recent (in 2009) entry into force of the provisions of the first Optional Protocol to the ICCPR for Kazakhstan makes it possible for Kazakhstanis to use the mechanisms of the international human rights institution-the HRC - in the case when national structures have not ensured the protection of rights and freedoms. But below I will analyze cases and legislations which show vice versa. Freedom of expression is one of the fundamental rights enshrined in the ICCPR is not an absolute right, is in the list of rights and freedoms that may be restricted, but only under certain, few in number, clearly defined grounds set out in article 19 (3), and in other articles of the Covenant (V. 4, 20). As a state party, Kazakhstan must guarantee the rights and freedoms at a level not lower than that provided for in the ICCPR, which requires the state to develop an appropriate legislative framework, create an appropriate administrative and political infrastructure, as well as adequate funding.

This paper analyzes the current situation of freedom of expression in Kazakhstan through the prism of article 19 of the International Covenant on Civil and Political Rights. But the analysis is not limited to the provisions of the ICCPR, as Kazakhstan is a member of other regional organizations. Therefore, I use in my analysis and rely on the interpretation of norms, concepts, and principles on other Treaty and non – treaty standards, primarily the OSCE as well as the decisions of the quasi-judicial body dealing with individual complaints on human rights-the UN human rights Committee. Despite the fact that Kazakhstan is not a member of the Council of Europe and many of its treaty standards are not binding on Kazakhstan, these documents, as well as non-treaty standards and decisions of the ECHR, are an important source for the interpretation of the norms and provisions of international law in the field of

freedom of expression. This study contains information, data, links to materials and documents relevant to January 2019.

The study consists of three parts. This study begins with the explanation of freedom of expression more deeply in terms of role and meaning in national and international law. In order to answer the first research question, I scrutinize national legislation of Kazakhstan and its international commitments. Also, will be mentioned about implementation of international legal guarantees of freedom of expression, both in national courts and under international mechanisms. The second chapter will be dealing with research and cases with regard to the reputation of officials in Kazakhstan which is protected under “special protection”. I will continue with Freedom of expression on the Internet, specifically with judicial and extrajudicial blocking of sites by officials as an obvious consequence of the key problem of Kazakhstan`s media legislation. The second part will be concentrated more on analyzes of ICCPR and Kazakhstani nation legislation to find out main contradictions in legislation. The third chapter of the paper will analyze the problems of the interpretation and application in the national law of article 19 of the ICCPR freedom of expression in Kazakhstan. Analysis of problems related to the provision and protection of the constitutional right to freedom of expression based on the study of generally accepted principles and norms of international law. The last chapter will concentrate more on practical cases and implementation.

Analytical legal methods are mainly used in the study and mainly used to ascertain the reasons for the situation of non-compliance with international obligations and which legislation is contradicting to it. A systematic method is used in the second and third chapter to analyze the legislation collected from published articles related to a topic in order to provide an analytical framework and give an answer to the research questions. Mostly work deal with analyzing the current situation freedom of expression in Kazakhstan through the prism of ICCPR. As Kazakhstan is a party to both International Covenants, which imposes increased obligations on the state in the field of respect, protection, In addition analysis of the how obligations are followed will be provided.

Main sources are national legislation and ICCPR. This work is important because there is no analyses and recommendations comparing freedom of expression with ICCPR and national law of Kazakhstan.

The keywords for this thesis are access to information, international law, human rights, constitutional law.

1. GENERAL PROVISIONS ON THE LEGAL AND JUDICIAL SYSTEM OF KAZAKHSTAN

1.1. Role and meaning of freedom of expression and information in building a civil society

One of the main slogans of the democratic movement is the public call for freedom of the expression. Democracy is always associated with the people, their will and interests-with democracy. Freedom of opinion is a natural and inalienable human right, which belongs to his inner world, is the basis of all spiritual life, not allowing any incursions and interventions without the consent of the person himself. Along with such rights as the right to life, liberty, dignity, personal integrity, and others, freedom of thought and expression are necessary to the prerequisite for the vital activity of a civilized society and must be unconditionally recognized and protected by the state.

Freedom of expression is one of the basic conditions for the progress of society and human development. This concerns not only ideas and information that are perceived favorably or neutral but also those that offend, cause anxiety on the part of the state or any part of the population. Without broadmindedness, tolerance towards the opinions of others, there is no democratic society. These seemingly obvious truths were not immediately elevated to the high rank of international standards and fundamental norms in the field of human rights in the legislation of individual states. The historically long development and development of human rights, including the right to freedom of expression, was accompanied by fierce confrontation and the difficult search for the best way to relationships between individuals and power in a state-organized society. It is not completely free to a citizen to express feelings and thoughts while being limited by the government. The ability to express itself, perhaps, is the main property of a free person, distinguishing him from a slave. Freedom of expression refers to the most important rights and freedoms of an individual in a democratic state. It is enshrined in existing international legal acts relating to human rights, as well as in most constitutions of various countries of the world. In the constitutional law of Kazakhstan, freedom of expression is one of the fundamental personal and political rights of a person and a citizen. The form of expression has a linguistic, verbal expression (oral or written), other sign systems of communication, such as artistic forms. Guaranteeing the freedom of expression by the Constitution to everybody means, from the point of view of legal requirements, non-interference of the state in the process of shaping a person's own opinions and beliefs,

protecting him from any other interference, preventing any ideological dictate, violence or control of the person.⁵

Freedom of expression is one of the necessary conditions for the democratic development of society and the state, the protection of democratic values, including human rights and freedoms. It provides freedom of ideas, opinions, their unhindered public expression, is one of the necessary conditions for the realization of the right to freely seek, receive, transmit, produce and disseminate information in any legal way. The exercise of competence in the field of mass media contributes to the establishment of both direct and feedback links in the public administration system, provides an opportunity to realize the right to participate in managing the affairs of the state, taking into account what its value increases during the exercise of the electoral right and the right to participate in the referendum. If a thought can be hidden from others, not expressed verbally or in print, and remain only the property of the person himself, then the freedom of speech guaranteed by the Constitution makes it possible to freely express their thoughts, pass them on to other people. Freedom of expression can be realized only under a democratic regime that is interested in the manifestation of the diversity of opinions on various issues of the life of society and the state. Freedom of speech is the human right to express one's thoughts freely. It now includes freedom of expression, both orally and in writing (freedom of the press and the media). This right is mentioned in a number of international and Kazakhstani documents, including the Universal Declaration of human rights (article 19), the European Convention for the protection of human rights and fundamental freedoms (article 10) and the Constitution of Kazakhstan (article 29).

In the Comments to the Constitution of Kazakhstan clearly spelled out the goals of freedom of expression and the tasks of a democratic society in which this right develops. So, according to the document, freedom of expression is needed to "free people could govern themselves", speaking openly, publicly and repeatedly.⁶ It is further noted that freedom of expression cannot be absolute, for example, it cannot be used to justify violence, slander, subversion or the use of obscene language. And the society should fight against statements that encourage this violence, intimidate or undermine someone's activities. Simultaneously, the society for the preservation of equilibrium must protect freedom of expression. In turn, "the principles of

⁵ K.N.Sarsenbayev. Scientific and practical commentary to the Constitution of Kazakhstan, Spark Publishing House, 2010.

⁶ M. Baturin, R. Orekhov. Comments on the Constitution of the Kazakhstan. 1995, pp 177.

freedom of expression should be protected by the Constitution of democracy and prevent the legislative or executive branches from resorting to censorship".⁷ For Burlakova R. I. the definition of freedom of the press (as part of freedom of expression) includes three main elements:

- freedom of the press is the right to freely seek, receive, use and disseminate information through the press and other media;
- freedom of the press is the prohibition of censorship;
- freedom of the press is the right to establish, own, use and dispose of media.

The importance of proper emphasis in the understanding of this combination of words. Complicating it with additional semantic load, she writes that "freedom of the press is always connected with absence of censorship, but at all does not mean simply its absence, at the same time" censorship as the state supervision over the contents of publications, radio, television programs, theatrical performances and other messages receiving public publicity is not admissible in democratic society".⁸

The European Court of Human Rights also emphasized the importance of freedom of expression for a society that aspires to become democratic. "Freedom of expression is the Foundation of a democratic society, represents one of the basic conditions for its progress and for the development of each person...".⁹ The main reason why freedom of expression is so important is that it is necessary for citizens to participate in the democratic process. Justice in its decisions emphasized the importance of media freedom as absolutely necessary for the protection of political democracy. Among the political rights and freedoms of citizens, freedom of expression occupies a special place, being one of the most important constitutional human rights. Defending the idea of the primacy of this fundamental freedom, the ideologist of the French Enlightenment Voltaire wrote: "...people have no freedom, no freedom to express their thoughts." Ideological pluralism, that is, the richness and diversity of political, economic, moral and other ideas and values, contributes to the introduction of fundamental democratic principles into the political life of society. Freedom of expression the right of all citizens. If we analyze them nowadays in connection with the election processes in accordance with both national and international citizen's practical experience, the

⁷ Ibid.

⁸ T.Scanlon, A theory of freedom of expression. Routledge 1972.

⁹ Jr,T. M .Scanlon. Freedom of expression and categories of expression. University of Pittsburgh School of Law.1978.

implementation of the freedoms of expression of citizens during preparation and implementation of this important social and political events is particularly important. In return, freedom of expression means the exercise of the right without political censorship, intimidation, or any political pressure on representatives and other opponents. The word of a journalist is a qualitative result of this freedom, in most cases can radically change social thought. The responsibility that falls on the shoulders of journalists determines the need for objective coverage of all reforms ongoing in society in the media with information in accordance with applicable law. Clarity of all ongoing reforms and processes in most of the cases depends on ensuring freedom of expression and information by the press and other media because freedom of expression of action the media is a special sign of democracy. As the previous head of our government, Nursultan Nazarbayev states: "Democracy is freedom for all stages of management. The most important thing is to have strong laws giving the right to freedom of expression." Freedom of expression and democratic principles ensuring openness, clarity of reforms in society should not exist in words and on paper but should be in practical life and being the priority direction of quality updates and development of society, since freedom of expression, freedom of the press, freedom of thought is in essence consonant with the concepts of openness, clarity, justice, and democracy completely revealing the essence of all reforms carried out in society.

Freedom of expression is a guaranteed by the state possibility to freely express one's opinion and beliefs on various issues of public, state, or other nature through oral or printed words, at meetings, rallies, and other means. The right to freely express one's opinion, as set forth in international legal acts, includes the freedom to hold one's opinion and the freedom to seek, receive and impart information and ideas by any means without any interference from public authorities and regardless of state borders (Art. 19 Universal Declaration of Human Rights, Article 10 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). Freedom of expression lies at the basis of many other rights and freedoms, primarily such as, for example, the right to participate in elections, the right to petition, freedom of conscience, the right to education, freedom of creativity, etc. The 1995 Constitution of Kazakhstan declares Kazakhstani republic to be social, whose legislation guarantees the rights and freedoms of a person and citizen in accordance with generally accepted principles and norms of international law, and the policy is aimed at creating conditions that ensure a decent life and free development of a person. In accordance with Part 1 of Art. 20 of the Constitution of

Kazakhstan everyone is guaranteed freedom of thought and expression. Recognizing this freedom, the Constitution establishes that no one can be forced to express or reject their opinions and beliefs.

The new model of Kazakhstani society, formed at the turn of the XX - XXI century, is characterized by the increasing role of the information sphere. Information, information infrastructure; subjects collecting, shaping, distributing and using information, as well as the system for regulating the social relations that arise in this process, have become increasingly active in influencing the economy, domestic and foreign policy, culture and all other areas of public life. The interests of the individual in the information sphere are in the implementation of the constitutional rights of a person and a citizen to access information, to use information in the interests of activities not prohibited by law, physical, spiritual and intellectual development, as well as to protect information ensuring personal security. The interests of society in the information sphere are to ensure the interests of the individual in this area, consolidate democracy, create a legal social state, achieve and maintain social harmony, and update Kazakhstan spiritually. The interests of the state in the information sphere are to create conditions for the harmonious development of the Kazakhstani information infrastructure, to exercise the constitutional rights and freedoms of a person and citizen in obtaining information and using it in order to ensure the inviolability of the constitutional order, sovereignty and territorial integrity of Kazakhstan, political, economic and social stability, in the unconditional maintenance of law and order, the development of an equal and mutually beneficial international of labor. National interests in the information sphere have their own specifics in the economy, domestic and foreign policy, in the spiritual life, in science and technology, the defense complex, in law enforcement and judicial activities, as well as in emergency situations. So, for example, in the normative documents on human rights, the content of the right to freedom of expression is disclosed ambiguously. The Bill of Rights of 1689 states that “freedom of speech, judgment and acts in Parliament should not be constrained or subject to consideration in any court or place other than Parliament itself”} In Art. 10 of the French Declaration of the Rights of Man and the Citizen of 1789 states that no one should be oppressed for their views, even religious ones, provided that their expression does not violate the public order established by law. Article 11 reads:

“The free expression of thoughts and opinions is one of the most precious human rights; therefore, every citizen can freely speak, write, print, and is responsible only for the abuse of this freedom in cases provided for by law”¹⁰.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms proclaims two interrelated freedoms - freedom of expression and freedom of information: “Everyone has the right to freedom of expression. This right includes the freedom to hold opinions, to receive and impart information and ideas without interference from state bodies and regardless of state borders.” Article 20 of the Constitution of Kazakhstan proclaims and guarantees the freedom of ideas, opinions, beliefs, their unhindered public expression. The article operates in conjunction with the provisions of Art. 13, 24, 28, 43, 44 of the Constitution. Thinking as its result, product is a natural and inalienable property of a person, associated with the process of posing and solving practical and theoretical issues. Thought cannot be unfree. Constitutional securing freedom of thought guarantees everyone the freedom to form their own opinions and convictions without state intervention, the exclusion of any ideological violence against a person. The vital question is that what aspects freedom of speech includes from the view of international standards? According to the terms contained in Article 19 UDHR and Article 19 of the ICCPR, the right to freedom of speech includes 6 main aspects: 1. "Everyone has the right ..." The right to freedom words belongs to everyone; no differences allowed due to the level of education, race, color skin, gender, language, religion, political or other preferences, origin, property or any other status. 2. "... to seek, receive and distribute ..." The right to "spread information and ideas" is the most obvious aspect of free speech. It the right to tell others what you know or think –either in private conversation or with the help of mass communications. At the same time, freedom of speech pursues more an extensive goal is - to give every citizen a chance not only speak out but also get access to the widest possible range of ideas and opinions of other individuals.

Therefore, Article 19 of ICCPR states that freedom speech includes the right to seek and receive information - writing and reading newspapers, listening to the radio, visiting the Internet, attending in open public discussions and debates, and last but not least, undertaking scientific research or journalistic investigations. It is now increasingly recognized that the

¹⁰ Some other fundamental rights: freedom of thought, religion opinion, speech, association and assembly. (26.02.2019), Available: <https://www.ohchr.org/Documents/Publications/training9chapter12ru.pdf>

right freedom of information also includes the right to become acquainted with data held by state organs. Therefore, the authorities must publish important information and satisfy citizens' requests for access to their databases. "... information and ideas ...". Freedom of speech extends beyond on information and ideas which are generally considered useful or correct, but also on any other facts or beliefs that can be conveyed to others. The Human Rights Committee (HRC) of the UN is the body following the implementation of the ICCPR, especially emphasize that: Clause 2 of Article 19 shall be interpreted as covering any form of subject ideas or opinions, which can be transferred to other persons and not contrary to clause 20 of the Covenant, any form of news and information, including commercial and advertising character, any form of artwork, etc. The provisions of this paragraph shall not be limited, by means of political, cultural or artistic expression.¹¹ These forms include verbal and written speech, sign language as well as such non-verbal means communications, like images and art objects¹², books, newspapers¹³, brochures¹⁴, posters, banners¹⁵, uniform and materials, not prohibited by law¹⁶. These include all types. audiovisual, electronic and Internet-based means of expression.¹⁷ In addition, the right freedom of speech is also extended to contradictory, incorrect and even shocking information; the fact that some kind of idea to someone does not like or is considered erroneous, cannot justify a refusal to express this opinion. International judicial bodies are also have repeatedly indicated that, in accordance with international standards, freedom of expression embraces ideas of conflicting content. European Human Rights Council (ECHR) emphasized that: Freedom of expression applies not only to "Information" or "ideas" that are received legally or deemed non-offensive or insignificant but also those that insult or cause outrage. These are the requirements of tolerance, pluralism, and breadth of views, without which a democratic society could be impossible.¹⁸ 4. "... regardless of state borders ...". The words "regardless of state borders" present in the UDHR and the ICCPR. It is clear from this that the right to freely express belief is not limited by the territory of one country. The state should allow to their citizens "to seek, receive and distribute information ", both on its territory and for its beyond.

¹¹ Ballantyne, Davidson. McIntyre v. Canada, communications 359/1989 and 385/1989.1993.

¹² Communication No. 926/2000, Shin v. Republic of Korea.

¹³ Communication No. 1341/2005 Zundel v. Canada.

¹⁴ Communication No. 1009/2001, Shchetko v. Belarus.

¹⁵ Communication No. 412/1990 Kivenmaa v Finland.

¹⁶ Communication No. 1189/2003 Fernando v Sri lanka

¹⁷ United Nations Human Rights Committee. General comment no. 34, Article 19 on Freedoms of opinion and expression. 12.01.2011.

¹⁸ Judgement of Handyside v United Kingdom. Merits, App No 5493/72, ECtHR 07.12.1976.

5. "... by any means ..." Citizens should have the right to express their opinions by any means - both traditional and the most modern, which include newspapers, magazines, books, brochures, radio, television, internet, works arts, public meetings, but not limited of this list.

6. "... respect and ensure ..." The right to freedom of expression implies not only the so-called negative but also positive state obligations. In other words, the state must not just refrain from interfering with the exercise of this right, but must also take active measures to remove obstacles to freedom of speech. This is clearly indicated in Article 2 of the ICCPR, according to which all States Parties undertake to "respect and ensure to all persons ... the rights recognized in this Covenant." States Parties to the Covenant should consider the extent of changes in information and communication technologies such as electronic Internet-based information distribution systems and mobile communications that have significantly changed the methods of communication all over the world. Today, a new global network for the exchange of ideas and opinions, which is not necessarily, relies on traditional media. States Parties to the Covenant should take all the necessary measures to strengthen the independence of these new media and provide access to them for the public.¹⁹

1.2. Legal Framework in Kazakhstan

The constitutional guarantees of freedom of speech and the right to disseminate information are enshrined in Article 20 of the Constitution of the Republic of Kazakhstan:

- Freedom of speech and creativity is guaranteed. Censorship is prohibited.
- Everyone has the right to freely receive and disseminate information in any way not prohibited by law. The list of information constituting state secrets of the Republic of Kazakhstan is determined by law.
- Propaganda or agitation of violent change of the constitutional order, violation of the integrity of the Republic, undermining the security of the state, war, social, racial, national, religious, estate and tribal superiority, as well as the cult of cruelty and violence are not allowed.

Article 18 (3) states that: State bodies, public associations, officials and the mass media are obliged to provide every citizen with the opportunity to familiarize themselves with documents, decisions, and sources of information affecting his rights and interests. Article 39

¹⁹ United Nations Human Rights Committee. General comment No. 34, Article 19 on Freedoms of opinion and expression. Supra note 17.

of the Constitution of the Republic of Kazakhstan states that: Human and citizen rights and freedoms may be limited only by laws and only to the extent necessary for the protection of the constitutional order, protection of public order, human rights and freedoms, and public health and morality. The guarantees of freedom of expression provided by the Constitution of the Republic of Kazakhstan are below the level of similar guarantees. In accordance with the provisions of Article 2, Article 19,

Despite the fact that the Constitution of the Republic of Kazakhstan guarantees everyone the freedom of speech and creativity, freedom of information, in general, these guarantees are lower than the level of guarantees of freedom of expression that is provided for in international law. In particular, restrictions on the right to freedom of speech in the Constitution of the Republic of Kazakhstan do not comply with the three-part test, that is, the procedure for restrictions on freedom of speech, which is set out in paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights. The Constitution of the Republic of Kazakhstan simply permits any restrictions on rights and freedoms provided for by laws.²⁰ Constitutional and legal norms should be developed in legislative acts that are developed and adopted in order to implement and ensure the rights and freedoms established and guaranteed by the Constitution of the country. There are several factors that seriously impede the realization or ensuring the rights and freedoms guaranteed by the Constitution in everyday life. These factors can be divided conditionally into (1) system-forming and (2) right-establishing ones. (1) The system-forming factors that impede the realization of guaranteed rights and freedoms include the absence of constitutional and supranational institutions for the protection of human rights and freedoms:

1. As it is known, there is no independent judicial body in Kazakhstan that considers complaints and cases on violation of the articles of the Constitution of the Republic of Kazakhstan, in the order of constitutional legal proceedings. Meanwhile, constitutional justice is considered an important institution for the protection of the rights and freedoms of citizens. The Constitutional Court of the Republic of Kazakhstan, as the body of constitutional oversight, ceased to exist in 1995. In connection with the adoption of the new Constitution of

²⁰ The Constitution of the Republic of Kazakhstan, adopted 30.08. 1995. e.i.f 5.09. 1995.

the Republic of Kazakhstan, a new state body of constitutional control was formed - the Constitutional Council.²¹

The Constitutional Council reviews, before signing by the President, the laws adopted by the Parliament for their compliance with the Constitution of the Republic; consider, prior to ratification, international treaties of the republic for compliance with their Constitution; gives an official interpretation of the norms of the Constitution; resolves, in the event of a dispute, the question of the correctness of the conduct of the election of the President of the Republic, the deputies of Parliament and the conduct of a republican referendum; considers decisions of the Parliament and its Chambers for compliance with the Constitution of the Republic; carries out other powers determined by the Constitution. These issues are considered by the Constitutional Council only at the request of the President, the Prime Minister, the Chairman of the Senate, the Chairman of the Majlis, or at least one-fifth of the total number of deputies of the Parliament. In connection with this provision, citizens have lost the opportunity to directly appeal to the Constitutional Council of the Republic of Kazakhstan as one of the parties in constitutional proceedings. Thus, the possibility of direct appeal of citizens to the body of constitutional control and supervision in case of violation of their constitutional rights and freedoms was lost, and this important mechanism for restoring and protecting rights and freedoms ceased to operate for the country's population.

2. Kazakhstan is not a member of the Council of Europe, therefore its citizens are not subject to the jurisdiction of the European Court of Human Rights and do not have the opportunity to appeal to this supranational court in case of violation of their rights and freedoms by the national justice system.

3. The Optional Protocol to the International Covenant on Civil and Political Rights was ratified by Kazakhstan and entered into force on September 30, 2009, two years after it was signed in 2007 by the President of the Republic of Kazakhstan. As is known, the ICCPR provides for the creation of a UN Human Rights Committee, and a state that becomes a party to the protocol recognizes the competence of the Human Rights Committee to receive and consider communications from persons subject to its jurisdiction who claim to be victims of a violation of this State party of the rights set forth in the International Covenant on Civil and Political Rights. The decisions of the UN Human Rights Committee are not binding on the state, in view of the fact that “the Committee submits its views to the relevant State party and

²¹ Constitutional Law of the Republic of Kazakhstan «On the Constitutional Council of the Republic of Kazakhstan», No. 2737, adopted 29.12.1995.

the person ... and includes in its annual report a brief report on its activities”.²² Another backbone factor that impedes the realization of the freedom of speech, creativity, and freedom of information guaranteed by the constitution is the insufficient powers of national human rights structures - the Commission on Human Rights under the President of the Republic of Kazakhstan and Commissioner for Human Rights. The powers and procedural guarantees of these two human rights institutions are not in line with the 1993 UN Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).²³ According to these Principles, the national human rights institution is vested with the broadest possible powers, which are clearly set out in the constitutional or legislative act defining its composition and its terms of reference. In contradiction with these Principles, the above institutions - the Commission on Human Rights under the President of the Republic of Kazakhstan and the institution of the Commissioner for Human Rights are not established by laws, but by decrees of the President. Also, the current procedure for the formation of national human rights institutions does not meet the requirements of the Paris Principles, since they are formed (appointed) by the President of the Republic of Kazakhstan, and not during a transparent procedure with respect for the principle of pluralism.

At the same time, in accordance with the Regulation on the Commissioner for Human Right²⁴ This national institution is limited in its competence: “The Commissioner does not consider complaints against the actions and decisions of the President, the Parliament of the Republic of Kazakhstan and its deputies, the Government of the Republic of Kazakhstan, the Constitutional Council, the General Prosecutor’s Office, the Central Election Commission, and the courts of the Republic of Kazakhstan.” (2) The following group of factors concerns gaps in the legal system, that is, for one reason or another, there is no legislative act adopted in order to implement human rights and freedoms guaranteed by the Constitution of the Republic of Kazakhstan. In particular, in the legal system, there is no legislation on guarantees of freedom of speech in the Republic of Kazakhstan. At present, more or less detailed regulation of those rights and freedoms that are listed in Article 20 of the Constitution of the Republic of Kazakhstan has received the freedom of the media. It is believed that the main source of receiving and disseminating information is the media. The normative

²² Optional Protocol to the International Covenant on Civil and Political Rights. New York 16.12.1966, e.i.f 30.06.2009. Clause 4 of Article 5, 6.

²³ Paris principles on the status of national institutions for the promotion and protection of human rights Paris 20.12.1993.

²⁴ The decree of the President of the Republic of Kazakhstan “On the institution of the Commissioner for Human Rights” No 947, 19.09.2002.

regulation of the absolute majority of issues covers the Law of the Republic of Kazakhstan “On Mass Media”, the preamble of which states that it “regulates social relations in the field of mass media, establishes state guarantees of their freedom in accordance with the Constitution of the Republic of Kazakhstan”. But it is obvious that the legal framework of freedom of speech, guaranteed by the Constitution of the Republic of Kazakhstan, is much broader than just freedom of the media. In essence, freedom of the media is only one of the ways to ensure freedom of speech. Another factor complicating the implementation and enforcement of constitutional rights to freedom of information is the absence of a law on freedom of information (or access to information). The latter circumstance damages the image of Kazakhstan in the international arena since Kazakhstan is practically the only country - the OSCE member, where the law on the freedom to information is not adopted.²⁵

1.3. The system of legislation of the country

Kazakhstan belongs to the Romano-Germanic legal family, which implies the existence of written law, i.e. legally binding legal rules formulated in state legislation. In this regard, the legislator is obliged not only to identify and summarize the existing legal relations but also to work out a specific policy in the sphere of regulation to which a given regulatory act is dedicated. The law enforcer (and this, as a rule, the court), in turn, should be guided by the norms of the law, and not by judicial "precedents". That is why when assessing legal regulation, the system of legislation, that is, an interrelated set of laws and other regulatory acts regulating the activities of journalists and the media, is primarily considered.

The general hierarchy of regulatory legal acts is as follows: the Constitution of the Republic of Kazakhstan has the highest legal force, it is also the pinnacle of the legislation system. The ratio of the legal force of other regulatory acts of the Republic of Kazakhstan, in addition to the Constitution of the Republic of Kazakhstan, follows in descending order:

- 1) Laws amending and supplementing the Constitution;
- 2) Constitutional laws of the Republic of Kazakhstan and decrees of the President of the Republic of Kazakhstan, having the force of constitutional law;
 - 2-1) Administrative or Criminal codes of the Republic of Kazakhstan;

²⁵ Access to Information and Data Protection, in country: Kazakhstan. (28.03.2019). Available: <https://www.legislationline.org/legislation/section/legislation/topic/3/country/21>.

3) The laws of the Republic of Kazakhstan, as well as decrees of the President of the Republic of Kazakhstan, having the force of law;

4) Regulatory resolutions of the Parliament of the Republic of Kazakhstan and its chambers;

5) Regulatory decrees of the President of the Republic of Kazakhstan;

6) Regulatory resolutions of the Government of the Republic of Kazakhstan;

7) Regulatory legal orders of ministers of the Republic of Kazakhstan and other heads of central state bodies, regulatory legal resolutions of central state bodies, regulatory resolutions of the Central Election Commission of the Republic of Kazakhstan and the Accounts Committee for monitoring the implementation of the Republican budget;

8) Normative legal decisions of maslikhats²⁶, normative legal resolutions of akimats²⁷, normative legal decisions of akims. Each of the regulatory legal acts of a lower level must not contradict the regulatory legal acts of the higher levels. Outside this hierarchy are normative decisions of the Constitutional Council of the Republic of Kazakhstan, the Supreme Court of the Republic of Kazakhstan.²⁸ The President of the Republic, deputies of the Parliament, the Government is vested with the right of legislative initiative in Kazakhstan, and this right is exercised exclusively in the Majilis (the lower house of the Parliament).²⁹ The basic document directly regulating the activities of the media is the Law of the Republic of Kazakhstan “On the Mass Media”, a kind of mini-constitution that regulates relations between the media, the state and society by recognizing the rights and defining the terms of reference for journalists and the media. In turn, the Law of the Republic of Kazakhstan “On Mass Media” states that:

The legislation on mass media is based on the Constitution of the Republic of Kazakhstan, consists of this law and other regulatory legal acts of the Republic of Kazakhstan.³⁰

The system of Kazakhstan legislation on mass media consists of the following regulatory legal acts (including those indicated, but not limited to them):

1. Norms of constitutional laws of the Republic of Kazakhstan (constitutional law of the Republic of Kazakhstan "On elections in the Republic of Kazakhstan);

²⁶ Maslikhat is the local representative agency in Kazakhstan.

²⁷ Local authority, city administration

²⁸ Law of the Republic of Kazakhstan “On regulatory legal acts”. Adopted 24.03.1998. Article 4.

²⁹ The Constitution of the Republic of Kazakhstan. Supra note 30. Clause 1 of Article 61.

³⁰ Law of the Republic of Kazakhstan . Adopted 23.07. 1999. Clause 1 of Article 4.

2. Norms of codes of the Republic of Kazakhstan relating to the activities of journalists and the media, as well as their relations with third parties and the state (Civil, Civil Procedure, Code of Administrative Offenses, Criminal, Labor, Tax Codes);
3. Norms of laws of the Republic of Kazakhstan and decrees of the President of the Republic of Kazakhstan having the force of law (laws of the Republic of Kazakhstan "On Communications", "On Advertising", "On Licensing", "On State Secrets", "On Languages", "On Culture", etc. .);
4. Provisions of regulatory resolutions of the Governments of the Republic of Kazakhstan ("On the establishment of the Commission for the Development of Television and Radio Broadcasting in the Republic of Kazakhstan", "On Approval of the Rules for Accounting for Foreign Mass Media Distributed in the Republic of Kazakhstan", etc.);
5. Regulatory legal orders of ministers of the Republic of Kazakhstan ("On approving the Rules for holding a competition for obtaining the right to television and (or) radio broadcasting in the Republic of Kazakhstan", etc.), resolutions of the Central Election Commission of the Republic of Kazakhstan ("On approving Rules for implementing election campaigns through mass media and information support of the election of deputies of the Mazhilis of the Parliament of the Republic of Kazakhstan, elected by party lists, and elections of deputies of maslikhats of the Republic of Kazakhstan);
6. Regulatory legal decisions of maslikhats, resolutions of akimats, decisions of akims ("On approval of retail trade rules for periodicals, publishing erotic materials", etc.)

An integral part of the system of legislation of the Republic of Kazakhstan on mass media is the normative decisions of the Constitutional Council of the Republic of Kazakhstan ("On verification of the Law of the Republic of Kazakhstan "On mass media „for compliance with the Constitution of the Republic of Kazakhstan" and others), as well as regulatory decisions of the Supreme Court of the Republic of Kazakhstan (for example, "On the application by courts legislation on moral damages"). When reviewing the legal system of RK in general, it is obvious that adherence to the principle of legality comes to the fore: this means that de jure general-use legislation is more powerful than subordinate governmental acts. De facto, Kazakhstani laws are oversaturated with blanket and reference rules for subordinate government acts, which are sometimes issued with a large margin from the main legislative act, and in some cases directly contradict it. And this situation was the result of serious flaws in the legislative process. With the adoption of the Concept of the legal policy of the Republic

of Kazakhstan,³¹ there was hope that a number of proposed measures would improve the efficiency of both the rule-making activities of the state and law-enforcement practice. In particular, such measures are:

- application of international standards for the assessment of regulatory legal acts, which will more fully take into account the interests of citizens, society and the state, ensure efficiency, economy, and rationality of the rule of law;
- normative consolidation of all types of scientific examinations of draft acts by defining their criteria, tasks, as well as the stages of their conduct, which will make it possible in the course of the legislative process to fully take into account the financial, economic, social and political consequences of the adoption of regulatory legal acts;
- regulation of relations connected with the development, discussion and adoption by the Parliament of draft laws, and the establishment of legal frameworks for such a socio-political institution as lobbying;
- Involvement of representatives of the public, non-governmental organizations and associations representing the interests of private entrepreneurship in lawmaking activities;
- improvement and improvement of the level of legal engineering, which determines the quality of regulatory legal acts and, in general, the level of culture of working with documents in the state apparatus.

However, practice confirms that most of the problems and negative factors that determine the legislative process in Kazakhstan are still not eradicated. In 2011, amendments and additions were made to the legislation of the Republic of Kazakhstan on rule-making activities.³² In short, legislative changes are as follows:

- legislative regulation of the requirements of a unified legal technique for all normative legal acts, which should lead to an improvement in the quality of the developed legislative acts and reduce the number of reference rules in the laws;
- creation of the Institute of legal monitoring of all regulatory legal acts, including legislative ones;
- according to the introduced amendments, the placement of draft laws developed by them on Internet resources by state bodies became mandatory;

³¹ Decree of the President of the Republic of Kazakhstan. The concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 No 858, 24.08. 2009.

³² Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving Rule-Making Activities”. Adopted 01.04. 2011.

- it became obligatory for government bodies to involve representatives of public and non-governmental organizations, business associations in law-making activities, as well as coordination with the business associations accredited to government bodies of the draft legislation on private entrepreneurship;
- the requirement of the development and submission of draft by-laws adopted for the development of legal norms, together with the draft basic law, became mandatory.

1.4. The judicial system of the country

In accordance with the Constitution of the Republic of Kazakhstan, justice in the country is carried out only by the court. Judicial power is exercised through civil, criminal and other forms of legal proceedings established by law in order to protect the rights, freedoms and legitimate interests of citizens and organizations, ensure the implementation of the Constitution, laws, other regulatory legal acts, international treaties of the Republic. Decisions, sentences and other rulings of courts are binding throughout the territory of the Republic.

The country's judicial system consists of the Supreme Court of the Republic of Kazakhstan, local and other courts established in accordance with the Constitution of the Republic of Kazakhstan and the Constitutional Law of the Republic of Kazakhstan "On the judicial system and the status of judges in the Republic of Kazakhstan".³³ Local courts include regional and equivalent courts (city court of the capital of the republic, city courts of cities of republican significance), as well as district and equivalent courts (city court, interdistrict court). In the Republic of Kazakhstan, other courts may be established, including specialized courts (military, financial, economic, administrative, juvenile, and others). Specialized courts are formed by the President of the Republic of Kazakhstan, they are assigned the status of a regional or district court.

All judges, except for judges of the Supreme Court of the Republic of Kazakhstan, are not elected but are appointed by the President of the Republic of Kazakhstan on the recommendation of the Supreme Judicial Council. The judges of the Supreme Court of the Republic of Kazakhstan are elected by the Senate (upper chamber of the Parliament of the

³³ The Constitutional Law of the Republic of Kazakhstan "On the Judicial System and the Status of Judges in the Republic of Kazakhstan". Adopted 25.12.2000.

Republic of Kazakhstan) on the proposal of the President of the Republic of Kazakhstan, based on the recommendation of the Supreme Judicial Council. On average, the term of office of judges appointed to the office of chairpersons of judicial boards of courts of various levels is 5 years. The Chairman of the Supreme Court is elected by the Senate on the proposal of the President of the Republic of Kazakhstan, based on the recommendation of the Supreme Judicial Council, for a term of five years. Chairmen of local and other courts are appointed by the President of the Republic on the recommendation of the Supreme Judicial Council of the Republic of Kazakhstan for a term of five years. The Supreme Court of the Republic of Kazakhstan is the highest judicial body in civil, criminal and other cases, the jurisdictional local and other courts, in the procedural forms provided by law, oversees their activities and gives explanations on matters of judicial practice. The Supreme Court of the Republic of Kazakhstan issues regulatory decisions on the analysis of judicial practice, which are part of the country's legal system. The Supreme Judicial Council of the Republic of Kazakhstan is established in order to ensure the constitutional powers of the President of the Republic of Kazakhstan on the formation of courts, guarantees of the independence of judges and their inviolability³⁴. Chapter I has already indicated that there is no Constitutional Court in Kazakhstan, its limited functions are performed by the Constitutional Council of the Republic of Kazakhstan. The competence of the Constitutional Council of the Republic of Kazakhstan includes:

- the resolution in the case of disputes about the correctness of the elections of the President of the Republic of Kazakhstan, deputies of the Parliament of the Republic of Kazakhstan, the republican referendum;
- official interpretation of the articles of the Constitution of the Republic of Kazakhstan;
- consideration of laws adopted by the Parliament of the Republic of Kazakhstan for compliance with the Constitution of the Republic of Kazakhstan prior to their signing by the President of the Republic of Kazakhstan, resolutions adopted by the Parliament and its chambers, international treaties of the Republic of Kazakhstan before ratification;
- consideration of the appeal of the courts to declare the act unconstitutional, if the court finds that the law or other regulatory legal act to be applied infringes the rights and freedoms of a person and citizen enshrined in the Constitution;

³⁴ Law of the Republic of Kazakhstan “On the Supreme Judicial Council”. Adopted 17.11. 2008.

- annual sending to the Parliament a message on the state of constitutional legality in the republic based on the results of generalizing the practice of constitutional proceedings³⁵

Accordingly, the right to apply to the Constitutional Council of the Republic of Kazakhstan has a limited category of senior officials and structures: the President of the Republic; Chairman of the Senate of Parliament; Chairman of the Mazhilis of Parliament; deputies of Parliament numbering at least one fifth of their total number; Prime Minister; courts of the republic; state bodies and officials whose constitutionality of acts is verified³⁶.

Regarding the status of judges of the judicial system, the Constitution of the Republic of Kazakhstan guarantees them independence in the administration of justice and non-accountability in specific cases³⁷. But, despite the constitutional guarantees, the judicial system of Kazakhstan demonstrates, firstly, the dependence of judges on the executive authorities, both central and local, when considering specific cases and making decisions on them. Constitution of Kazakhstan provides independence and separation of the powers but de facto executive power dominates judicial power; secondly, the corruption of both ordinary judges (local courts) and high-ranking ones (the Supreme Court of the Republic of Kazakhstan); thirdly, the opacity of the entire judicial system, ranging from the impossibility of the presence of citizens and journalists in open court sessions, ending with difficulties in obtaining information about a particular court case in the archive. In 2017, the UN Human Rights Committee established that Kazakhstan violated the right to fair trial (Vladislav Chelakh vs. Kazakhstan³⁸, Dmitry Tyan vs. Kazakhstan³⁹), the right not to be subjected to torture or to cruel, inhuman or degrading treatment (Dmitry Tyan vs. Kazakhstan⁴⁰, Zhaslan Suleimenov vs. Kazakhstan⁴¹), adequate detention conditions (Zhaslan Suleimenov vs. Kazakhstan), and the right to freedom of expression (Andrei Sviridov vs. Kazakhstan⁴²). Kazakhstan has yet to implement the recommendations made by the Committee⁴³. In recent years, investigatory and trial processes in Kazakhstan have become progressively non-

³⁵ The Constitutional Law of the Republic of Kazakhstan “On the Constitutional Council of the Republic of Kazakhstan”. Supra note 31. Section 17.

³⁶ Ibid., section 20.

³⁷ The Constitution of the Republic of Kazakhstan. Supra note 30. Clauses 1, 2 of Article 77.

³⁸ Vladislav Chelakh v. Kazakhstan, ICCPR Case Digest. Communication No. 2645/2015, 02.02.2015

³⁹ Dmitry Tyan v. Kazakhstan, ICCPR Case Digest. Communication No. 2125/2011, 01.04.2011.

⁴⁰ Ibid.

⁴¹ Zhaslan Suleimenov v. Kazakhstan, ICCPR Case Digest. Communication No. 2146/2012, 14.01.2011.

⁴² Andrei Sviridov v. Kazakhstan, ICCPR Case Digest. Communication No. 2158/2012, 23.01.2012.

⁴³ The UN Human Rights Committee requires the UN Security Council chairman to observe the rights of an unjustly convicted person. (15.03.2019). Available: https://bureau.kz/novosti/sobstvennaya_informaciya/komitet_oon_po_pravam_cheloveka_trebuot/

transparent. According to Evgeny Zhovtis, a prominent human rights defender, “almost all participants in criminal processes sign a pledge of secrecy of the investigation. Every other case concerning ‘extremism’ or ‘high-profile’ cases, especially against high-ranking officials, turn into unpublished and unknown.”⁴⁴ In September, two lawyers representing Muratkhan Tokmadi – a businessman captured on extortion and homicide charges, the latter “on the instruction of Mukhtar Ablyazov” – were imposed by the prosecutor’s office for refusing to sign off a pledge of secrecy of the investigation⁴⁵.

The country's judicial system is exposed to a number of problems, which are widely talked about both internationally and nationally. The key reason is the lack of an electoral system (with the exception of judges of the Supreme Court of the Republic of Kazakhstan) and the appointment of judges of all levels on the recommendation of the Supreme Judicial Council of the Republic of Kazakhstan by the President of the Republic of Kazakhstan. It is worth noting two important factors that have a direct impact on the state of the judicial system of the country and the quality of administration of justice. The first factor is that members of the Supreme Judicial Council of the Republic of Kazakhstan, the structure that is responsible for selecting candidates for the position of judge, are appointed by the head of state; therefore, it is impossible to speak about the independence of this body. The second - the process of selecting candidates for the position of judge is a very closed process⁴⁶ for the public, it is characterized by extreme non-transparency, vague and non-objective criteria for the selection of candidates for the position of judge. The consequence of this reason is a high level of corruption in the courts, administrative pressure on judges to get the necessary decisions on specific cases, as well as the lack of transparency in the administration of justice.

In order to eradicate or reduce the impact of these causes on the activities of judges, it is necessary that the administrative management of the court, including the budget and appointment to the posts, be in the hands of the judges themselves, and not remain in the power of the government. As a general rule, in countries where there is a formal mechanism for appointing judges to positions, this leads to the appearance of some kind of corporatism

⁴⁴ Criminal trial in Kazakhstan: a mystery with seven seals, (25.02.2019). Available: https://bureau.kz/novosti/sobstvennaya_informaciya/taina_za_semyu_pechatyami/.

⁴⁵ Jokhar Utebekov: The Prosecutor General's Office suspended me from the Tokmadi case, (12.03.2019). Available: <https://informburo.kz/novosti/dzhohar-utebekov-genprokuratura-otstranila-menya-ot-dela-tokmadi.html>

⁴⁶ Joint opinion on the constitutional law on the judicial system and status of judges of Kazakhstan. Opinion No. 629/2011. (12.01.2019). Available: [file:///C:/Users/615/Downloads/Joint Opinion on the Constitutional Law on Judicial System and Status of Judges June 2011 en.pdf](file:///C:/Users/615/Downloads/Joint%20Opinion%20on%20the%20Constitutional%20Law%20on%20Judicial%20System%20and%20Status%20of%20Judges%20June%202011%20en.pdf).

and consultation between the courts and the executive branch. Is the judicial system able to ensure that citizens realize the freedom of speech, creativity, freedom of information guaranteed by the Constitution of the Republic of Kazakhstan?

A certain category of court cases (as Bigeldy Gabdullin⁴⁷ which was arrested after publishing reports critical of government officials' business dealings), both in civil and in administrative and criminal proceedings, constitute cases where one of the parties is either a journalist or the media. The most frequently encountered categories of lawsuits are claims for the protection of honor, dignity, business reputation, defamation charges against journalists and the media; and on the part of the media - challenging the refusals to provide information by officials of state bodies and commercial structures. When resolving court disputes with the participation of journalists and the media and when deciding on specific cases, the Kazakh courts, as a rule:

1. Do not apply those norms of international treaties on human rights ratified by the Republic of Kazakhstan, which have priority over the norms of national legislation, despite the existence of a normative Resolution of the Supreme Court of the Republic of Kazakhstan "On the application of the norms of international treaties of the Republic of Kazakhstan" dated July 10, 2008. (see Chapter 2), and do not refer to those norms of international law that are part of the national legal system.
2. Do not apply in judicial practice the norms of the Constitution of the Republic of Kazakhstan, which has the highest legal force and direct effect on the entire territory of the state, is the pinnacle of the law in force. Practically, regulatory decisions of the Constitutional Council of the Republic of Kazakhstan, which is also part of the legal system, are not used in court practice in cases involving journalists and the media.
3. Unjustifiably widely and not uniformly interpret the norms of the law in force, including regulatory decisions of the Supreme Court of the Republic of Kazakhstan and the Plenum of the Supreme Court of the Republic of Kazakhstan, often not in favor of journalists and the media, on defamation (compensation for moral damage, recognition of information damaging and not true, separation of information from opinions, recognition of the fact of libel, etc.). This circumstance has a negative, "cooling" effect for journalists and the media, which is expressed in the fact that the law itself contains provisions of the Civil Code of the Republic of Kazakhstan on the protection of personal non-property rights (honor, dignity, business

⁴⁷ Bigeldy Gabdullin, Status convicted. (17.12.2018). Available: <https://pen.org/advocacy-case/bigeldy-gabdullin/>.

reputation) and articles of the Criminal Code of the Republic of Kazakhstan (Art. 129 “Slander, Article 130“ Insult ”, and other articles) makes journalists think about the adverse consequences that may possibly come after the publication of this or that socially significant information and make a choice not in favor of distribution wounds that information.

1.5. International commitments of Kazakhstan

The Republic of Kazakhstan is a full member of the international community, a member of the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Commonwealth of Independent States (CIS) and a number of other regional associations and organizations (OIC, EurAsEC, SCO, CICA, etc .d.) As part of membership in these organizations, Kazakhstan has acceded to many universal and regional treaties and agreements, including on human rights, such as:

- International Covenant on Civil and Political Rights,⁴⁸
- International Covenant on Economic, Social and Cultural Rights;⁴⁹
- Optional Protocol to the International Covenant on Civil and Political Rights;⁵⁰
- Universal Copyright Convention;⁵¹
- Vienna Convention on the Law of Treaties;⁵²
- Berne Convention for the Protection of Literary and Artistic Works;⁵³
- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters;⁵⁴
- European Cultural Convention, etc.⁵⁵

⁴⁸ International Covenant on Civil and Political Rights, New York 16.12.1966, e.i.f. 24.04. 2006.

⁴⁹ Ibid.

⁵⁰ Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16.12.1966, .e.i.f. 30.09.2009.

⁵¹ Universal Copyright Convention, Geneva 06.09. 1952, e.i.f. 06.09.1992.

⁵² Vienna Convention on the Law of Treaties, Vienna 23.05, 1969, e.i.f. 04. 01.1994.

⁵³ Berne Convention for the Protection of Literary and Artistic Works, Bern 09.09. 1886, e.i.f. 12.04. 1999.

⁵⁴ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus (Denmark) 25.06.1998, e.i.f. 11.01.2001.

⁵⁵ European Cultural Convention, Paris 19.12. 1954, e.i.f.05.05.2010.

Since 1992, the Republic of Kazakhstan is a member of the OSCE, during its membership, the country has signed or acceded to the following outcome documents, which contain basic principles and standards in the field of human rights:

- Final Act of the Conference on Security and Cooperation in Europe (1975);
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990);
- Document of the Moscow meeting of the Conference on the Human Dimension of the CSCE (1991);
- The Paris Charter for a New Europe (1990);
- The final document of the Helsinki meeting (1992);
- Budapest document "Towards a true partnership in a new era" (1994);
- Charter of European Security. Istanbul Summit Declaration (1999);
- Astana Commemorative Declaration of the Summit "Towards a Security Community" (2010), etc

As a member of the CIS and EurAsEC, the Republic of Kazakhstan has joined and signed over 200 treaties, conventions, agreements in the field of human rights, including documents on guarantees to ensure and implement freedom of expression, freedom of information. Kazakhstan's accession to international and regional human rights treaties and agreements naturally imposes on the country a number of obligations on the implementation of international human rights law in national legislation, including freedom of expression and information. As a party to the Vienna Convention on the Law of International Treaties, the Republic of Kazakhstan recognizes and shares the principle of "pacta sunt servanda": every valid treaty is binding on its parties and must be faithfully implemented by them.⁵⁶

Paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan establishes that "international treaties ratified by the Republic take precedence over its laws and are applied directly, except when the international treaty indicates that its application requires the issuance of a law". The adherence to this principle is also reflected in the Law of the Republic of Kazakhstan "On international treaties", which establishes that "every valid contract of the Republic of Kazakhstan is subject to mandatory and fair implementation."⁵⁷ However, the

⁵⁶ Vienna Convention on the Law of Treaties, Vienna 23.05.1969, e.i.f. 05.01.1994.

⁵⁷ Law of the Republic of Kazakhstan "On International Treaties". Adopted 30.05.2005, Clause 1 of Article 20.

above legal rule of the Constitution of the Republic of Kazakhstan on the priority of international treaties has repeatedly become the subject of consideration and official interpretation of the Constitutional Council of the Republic of Kazakhstan. In 2000, the Constitutional Council of the Republic of Kazakhstan in its resolution determined that: International treaties concluded by it in accordance with the Constitution of the Republic, in accordance with the procedure established by legislation, and ratified by the Parliament of the Republic by means of the adoption of the relevant law, shall prevail before the legislation of the Republic.⁵⁸

In 2009, the Constitutional Council of the Republic of Kazakhstan adopted a normative Ordinance No. 6 of November 5, 2009 “On the official interpretation of the norms of Article 4 of the Constitution of the Republic of Kazakhstan in relation to the order of execution of decisions of international organizations and their bodies”⁵⁹The following important points were noted in this document:

- decisions of international organizations and their bodies to which the Republic is a party may acquire the legal properties of a ratified international treaty, in the case of direct indication of the binding nature of these decisions for Kazakhstan in an international treaty ratified by it.
- at the same time, they cannot be recognized as binding on Kazakhstan by decisions of international organizations and their bodies that violate the provisions of the Constitution on the extension of the sovereignty of the Republic over its entire territory, and on the inadmissibility of changing the unitarity established by the Constitution and the territorial integrity of the state, the form of government of the Republic.
- in the event of a conflict between a mandatory decision of Kazakhstan of an international organization and (or) its body and the regulatory legal acts of the Republic, the decision of the international organization and (or) its body will be effective until such a conflict is resolved.
- decisions of international organizations and their bodies that infringe constitutional rights and freedoms of a person and citizen cannot be directly applied and, accordingly, have priority over the regulatory legal acts of the Republic of Kazakhstan.

⁵⁸ Resolution of the Constitutional Council of the Republic of Kazakhstan "On the official interpretation of paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan". Adopted: 11.10. 2000.

⁵⁹ Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan “On the official interpretation of the norms of Article 4 of the Constitution of the Republic of Kazakhstan in relation to the order of execution of decisions of international organizations and their bodies”. Adopted 05.11. 2009.

Despite the fact that the national legislation gives priority to the norms of international treaties ratified by the Republic of Kazakhstan, the resolution of the Constitutional Council of the Republic of Kazakhstan dated May 18, 2006 No. 2 “On the official interpretation of subparagraph 7) of Article 54 of the Constitution of the Republic of Kazakhstan raises serious concern⁶⁰. Thus, in the reasoning part of this decree, the Constitutional Council referred to its decree No. 18/2 of October 11, 2000, which states that the Vienna Convention on the Law of International Treaties "does not determine the procedure for the execution of contracts. This refers to the constitutional and legislative prerogatives of states and derives from the generally recognized principle of international law - the sovereign equality of states. ” And further, “based on this, the Constitutional Council believes that if an international agreement of the Republic of Kazakhstan or its individual provisions is found to be contrary to the Constitution of the Republic, according to paragraph 2 of Article 4 of the Basic Law, the agreement fully or in the part recognized as not conforming to the Constitution, it is not enforceable”. Finally, in the operative part of this resolution, the Constitutional Council states: “4. In the case of recognition in the prescribed manner of an international treaty of the Republic of Kazakhstan or its individual provisions contradicting the Constitution of the Republic, such an agreement or its relevant provisions are not enforceable. ”This decision of the Constitutional Council is contrary to the Vienna Convention on the Law of International Treaties of 1969⁶¹, in particular, Article 27 of the Convention, according to which: "A party may not invoke the provisions of its domestic law as an excuse for its failure to comply with a contract." In connection with this interpretation of international and constitutional legal norms, the process of implementing the norms of international legislation on human rights and freedoms into the system of national law is considerably complicated. Judicial practice in the Republic of Kazakhstan shows that the courts in their decisions practically do not refer either to the norms of the Constitution of the Republic of Kazakhstan or the norms of international human rights treaties ratified by Kazakhstan, not to mention the priority of the norms of international law over the norms of national legislation. This practice exists despite the existence of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated July 10, 2008 “On the application of the norms of the international treaties of the Republic of

⁶⁰ Resolution of the Constitutional Council of the Republic of Kazakhstan “On the official interpretation of subparagraph 7) of Article 54 of the Constitution of the Republic of Kazakhstan”. Adopted 18.05. 2006.

⁶¹ Resolution of the Supreme Council of the Republic of Kazakhstan “On the accession of the Republic of Kazakhstan to the Vienna Convention on the Law of International Treaties of 1969” No. 2059-XII, 31.03. 1993.

Kazakhstan”,⁶² which is part of the national legal system. For example, the International Covenant on Civil and Political Rights is binding and does not require separate legislation on its implementation, therefore the guarantee of freedom of speech specified in Article 19 of the Covenant is subject to direct application by the courts of the Republic of Kazakhstan. This is accentuated in the Law of the Republic of Kazakhstan "On Mass Media":⁶³ If an international treaty ratified by the Republic of Kazakhstan establishes other rules than those contained in this Law, then the rules of the international treaty shall apply. At present, still relevant international obligations in the field of freedom of expression and freedom of information for Kazakhstan are: incorporation of international norms into national legislation on defamation, development and adoption of a law on freedom or access to information, exclusion of principles governing Internet resources in national law, non-compliant international standards, as well as the direct use of the norms of international law contained in judicial proceedings.

⁶² Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan “On the application of the norms of international treaties of the Republic of Kazakhstan” No. 1, 10.07. 2008.

⁶³ Law of the Republic of Kazakhstan “On Mass Media”. Supra note 40. Clause 2 of Article 4.

2. CONTRADICTION OF THE MEDIA LEGISLATION OF KAZAKHSTAN WITH ARTICLE 19 OF THE ICCPR

2.1 Protection of the reputation of officials

The international and pan-European approach to protecting the reputation of public officials is based on the principles set out in the Declaration on Freedom of Political Discussion (2004):⁶⁴

Principle 1. Society has the right to know information on all matters of society, which implies the right of the media to disseminate negative information and critical opinions about politicians and government officials;

Principle 2. The state, the government and any other institutions of the executive, legislative and judicial authorities may be criticized in the media. Due to their position, these institutions should not be protected by criminal law from defamatory and insulting statements. Persons representing these institutions retain the right to individual protection.

Principle 3. Politicians and government officials should agree to become subject to public scrutiny and criticism, as this is necessary to ensure publicity and responsible execution of their powers.

Principle 4. Politicians and government officials should not enjoy greater protection of their reputation and rights than other citizens, so national legislation should not contain rules that impose more severe penalties for criticizing political activity in the media.

These principles are not applied in the legislation on the mass media of the Republic of Kazakhstan, but, on the contrary, it directly contradicts them, since it generates and cultivates special legal protection, which is endowed with certain categories of government officials, officials, and employees. The mechanisms of this special legal protection are as follows:⁶⁵

- special legal protection of reputation is extended to the following categories of persons: First President of the Republic of Kazakhstan - Leader of the Nation⁶⁶ President of the Republic of Kazakhstan, deputies of the Parliament of the Republic of Kazakhstan, representatives of the authorities, representatives of the judicial corps (judges, jurors, prosecutors, investigators, persons conducting an inquiry, experts, bailiffs, bailiffs);

⁶⁴ Declaration on Freedom of Political Discussion in the Media. Adopted 12.02.2004.

⁶⁵ Criminal Code of the Republic of Kazakhstan. Adopted 16.07. 1997.

⁶⁶ The Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning the Improvement of Legislation in the Field of Ensuring the Activities of the First President of the Republic of Kazakhstan - Leader of the Nation”. Adopted 14.07. 2010.

- The Criminal Code of the Republic of Kazakhstan⁶⁷ contains several articles on the protection of the reputation of persons of these categories, in particular: Art. 318, 319, 320, 343. The punishment provided for in these articles includes fines, involvement in public and correctional work, restriction of freedom. Punishment in part 2 of the above compositions, which provides for the commission of the same acts only with the use of the mass media, entails, in addition to the sanctions already mentioned, a punishment involving imprisonment. All of the above compositions impose more severe types of punishment than is provided for ordinary citizens;

- Art. 318, 319, 320 of the Criminal Code of the Republic of Kazakhstan stipulates that public speeches containing criticism of a certain subject of the protected category on a specific subject of its activity do not entail criminal liability under these articles. However, it is not clear in what context “public speeches” are considered here, do they include publications in the press or stories, interviews on television and radio? Also, the criteria by which “critical statements” can be separated from any other, including those on the basis of which criminal prosecution under these articles can be initiated, are not incomprehensible. The subject of critical statements is not definitely formulated: in relation to the President of the Republic of Kazakhstan, this is “the policy pursued by him”, in relation to deputies of the Parliament of the Republic of Kazakhstan, “deputy activity”, and in relation to a representative of the authorities, “official activity”.

It is worth noting that in recent years, Kazakhstan not only does not take any action to exclude these articles from the scope of the Criminal Code of the Republic of Kazakhstan but also expands the categories of persons covered by special legal protection of reputation. On June 14, 2010, amendments and additions were made to some legislative acts of the Republic of Kazakhstan in connection with ensuring the activities of the First President of the Republic of Kazakhstan - the Leader of the Nation. In particular, Article 317-1 was included in the Criminal Code of the Republic of Kazakhstan, which provides for punishment (from fines to imprisonment for 1 year) for public insult and other encroachment on the honor and dignity of the First President of the Republic of Kazakhstan - Leader of the Nation, desecration of images of the First President of the Republic Kazakhstan - the Leader of the Nation, impeding the legitimate activities of the First President of the Republic of Kazakhstan - the Leader of

⁶⁷ The Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning the Improvement of Legislation in the Field of Ensuring the Activities of the First President of the Republic of Kazakhstan - Leader of the Nation”. *Supra* note 76.

the Nation. The same acts committed with the use of the mass media provide for imprisonment for up to 3 years.

International Organization for Freedom of Expression Article 19, in its special statement, indicated ⁶⁸ that the provisions of the criminal legislation of Kazakhstan on defamation do not comply with the principles of freedom of speech. In many countries, including Kazakhstan, defamation legislation is used to suppress dissent and limit criticism. Sentences to imprisonment, conditional imprisonment, a temporary restriction of the right to self-expression through any type of media, prohibition on engaging in journalistic activities, disproportionately large fines should not be used as a punishment for violating defamation provisions, no matter how harsh the defamatory statement. These sanctions cannot be justified, especially in view of the existence of adequate non-criminal sanctions aimed at restoring damage to the reputation of an individual. At the same time, in international practice, there is a firmly established provision that legislative provisions on defamation should under no circumstances provide “special protection” to public persons, regardless of their rank or position.⁶⁹ The recent case of reporter of Valeriy Surganov⁷⁰ shows how special protection for officials is working in Kazakhstan. The case shows that the defendant got a criminal lawsuit from Aliev (financial police officer). Medeu (local) district court sentenced Valery Surganov, a journalist of the Gulzhan.org website, on a private criminal charge, to Sanzhar Aliyev, a financial police officer, for defamation of one and a half years of “restriction of freedom”. Kazakhstani officials promised to decriminalize defamation and insult prior to assuming the 2010 chairmanship of the Vienna-based Organization for Security and Cooperation in Europe, but have yet to live up to their commitment. Obviously, internal criminal laws prohibiting insult to courts and other court officials. The criminal codes of 14 OSCE participating States (Albania, Armenia, Azerbaijan, Belarus, Belgium, Estonia, Kazakhstan, Kyrgyzstan, etc.) contain such provisions. While these provisions are sometimes rendered in English as ‘contempt of court’, they may also be compared to the narrower common law concept of ‘scandalizing the court’. The regardless obvious contradiction in a

⁶⁸ Joint statement “Kazakhstan: obligations remain unfulfilled”. (19.11.2018). Available: <https://www.osce.org/home/73750?download=true>.

⁶⁹ Defining defamation. Principles on Freedom of expression and protection of reputations. Article 19, London, 2000, pp. 7, (12.01.2019). Available: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf>.

⁷⁰ Kazakh reporter sentenced to 'restriction of freedom', (17.02.2019). Available: <https://cpj.org/2011/11/kazakh-reporter-sentenced-to-restriction-of-freedom.php>.

democracy of offering special protection to the reputation and honor of the head of state, 24 OSCE participating States do so, including Kazakhstan.

In early 2011, within the framework of the humanization reform, amendments and additions were made to the criminal law, providing for the introduction of the institution of administrative prejudice (the possibility of criminal prosecution of certain types of crimes only after their re-commission within a year after imposing an administrative penalty) and replacing sanctions related to imprisonment, on softer ones. The Institute of administrative prejudice was introduced into some articles of the Criminal Code of the Republic of Kazakhstan, providing for the special legal protection of the honor and dignity of certain categories of officials. In particular, Part 1 of Article 317-1⁷¹, Part 1 of Article 318⁷², Part 1 and 2 of Article 319.⁷³ Part 1 and 2 of Article 343⁷⁴. It is noteworthy that for some criminal structures, where the spread of slander in the media is the qualifying attribute, the effect of administrative law does not apply (Article 317-1, part 2, Article 318, part 2). Amendments have also been made to Part 2 of Article 129 (Libel). Now, the types of penalties for defamation, contained in a public speech or in the media, exclude arrest for up to six months. Responsibility for defamation, coupled with the accusation of a person committing a serious or especially serious crime of corruption (Article 129 § 3) is not changed, this crime is still punished by restriction of liberty for up to three years or imprisonment for the same term. The UN Human Rights Committee, in its concluding observations on the consideration of the initial report of the Republic of Kazakhstan on the implementation of the provisions of the ICCPR ⁷⁵in July 2011, noted that:

The Committee is concerned about the existence of provisions in the Criminal Code on defamation of public officials, and the recent adoption of the Law on the Leader of the Nation, which introduces a new article 317-1 in the Criminal Code, which penalizes public insult or other infringement on honor and dignity of the president.⁷⁶

In addition, the UN Human Rights Committee considers that:

⁷¹ Criminal Code of the Republic of Kazakhstan. Adopted 16.07.1997, Article 317-1.

⁷² Ibid., Article 318

⁷³ Ibid., Article 319

⁷⁴ Ibid., Article 339

⁷⁵ UN Human Rights Committee. List of issues in relation to the second periodic report of Kazakhstan. 04.12.2015, (12.02.2019). Available: <https://www.refworld.org/publisher,HRC,,KAZ,5783a5234,0.html>.

⁷⁶ Ibid, p.25.

”The State party [Kazakhstan] should ensure that journalists, human rights defenders, and individuals are free to exercise the right to freedom of expression in accordance with the Covenant. In this regard, the State party should review its legislation on defamation and insult so that it fully complies with the provisions of the Covenant. In addition, the State party should refrain from using its law on defamation solely for the purpose of harassing or intimidating individuals, journalists, and human rights defenders. In this regard, any restrictions on the exercise of freedom of expression must comply with the strict requirements of paragraph 3 of Article 19.”⁷⁷

2.2 Freedom of expression on the Internet

The international community has long formulated principles⁷⁸. The principles provide for comprehensive legislative and institutional decisions on the Internet.

Principle 1. States must not be subject to restrictions.

Principle 2. It is supposed to encourage self-regulation and joint regulation.

Principle 3. Regardless of the rules of public relations should not be prohibited, by public ordering.

Principle 4. It is important to ensure that you have access to the Internet.

Principle 5. The freedom to provide services over the Internet should not be restricted.

Principle 6. Understand the elements of joint responsibility.

Principle 7. The principle of anonymity will be respected, along with others, to facilitate freedom of expression

In addition, the OSCE Representative on Freedom of the Media expressed his recommendations to the participating countries on freedom of the media on the Internet, on which it is necessary to rely when implementing the legal regulation of the national segments of the Internet:

⁷⁷ Ibid. p.2.

⁷⁸ Declaration of the Council of Europe Committee of Ministers on Human Rights and the Rule of Law in the Information Society, 13.05.2005.

- All Internet-related legislation should be based on fundamental constitutional values, such as freedom of speech and its interpretation in international and European jurisprudence. New legislation should be limited to those cases where its application is absolutely inevitable, and at the same time provide only minimal restrictions with regard to freedom of expression and the rights of users.
- The Internet itself does not guarantee freedom of opinion and expression. The Internet is, first of all, a technology, a network that provides communication. States constantly develop policies and technologies of control that go beyond legitimacy. Freedom of expression on the Internet should be protected, as elsewhere, by the rule of law, and not ensured through self-regulation or codes of conduct. Prior censorship, arbitrary control or unreasonable restrictions on the content, transmission, and dissemination of information are unacceptable. The protection of pluralism of information sources and means of its dissemination, including the diversity of information retrieval systems, is necessary.
- The presence of media on the Internet includes the websites of traditional media, but there are also websites of individual desktop publishers reporting or expressing their views on personal websites. Some of them have many readers, others have few. But, speaking of guarantees of freedom of the media, we must clearly understand that it is not only about the freedom of traditional media, but also about the right of an ordinary citizen to freely express their views through their own website.
- All content on the Internet should be governed by the laws of its country of origin (“download rule”). Any legislation imposing responsibility for content — no matter where it is pumped — to the author or publisher is an excessive restriction on freedom of expression.
- Much of the Internet governing legislation concerns the World Wide Web (WWW), but the content of the World Wide Web is only part of the information resources of the Internet, and different levels of confidentiality are required for different levels of communication. The provider should not be held liable simply for the transfer or placement of content.
- Search engines embody the core idea of the Internet as a means of global access and connectivity to content. Filtering or restricting a search will be contrary to their main purpose, which is to provide comprehensive and reliable results. Automated search engines should not filter data or be responsible for the content of their results.⁷⁹

⁷⁹ Recommendations of the OSCE Representative on Freedom of the Media. (11.11.2018). Available: <https://www.osce.org/fom/13840?download=true>.

Also, vital to mention that, in 1993, the United Nations Commission on Human Rights established the mandate of the Special Reporter on the promotion and protection of the right to freedom of opinion and expression. But in three sections such as Individual complaints, country visits and in annual reports did not find anything related to Kazakhstan for now, for better analyses.

Kazakhstan is a state that has long and purposefully pursued a state policy of legal regulation of the national Internet space. The foundations of this process were laid ten years ago, in 2001, when websites were first equated to the category of mass media.⁸⁰ The media category, besides the traditional ones - print, radio and television programs - also included “web sites on public telecommunications networks (Internet and others)”.⁸¹ And the WEB-site was defined as “an electronic representative page of a physical or legal entity of the Republic of Kazakhstan prepared using special hardware and software, on which the owner places information for mass distribution.”⁸² Despite the legislative initiative, few people treated web-sites as traditional media and, in the first place, the state itself: the law did not require the owners of web-sites to fulfill typical requirements for other media, for example, to register an account. However, the responsibility for violating other requirements of media legislation, primarily to limit content, was assigned to owners, editors of web sites, and authors of published materials in full, as well as owners, editors, and journalists of traditional media. This situation can already be described as a serious interference and restriction of freedom of speech and freedom of information, due to the fact that the distribution of the “newspaper standard”⁸³ on responsibility for the content on information disseminated on the Internet does not have sufficiently substantiated legal grounds. But in 2009, the country's government went even further, adopting a number of legal acts on the regulation of Internet space. The Law of the Republic of Kazakhstan “On Amendments to Some Additional Acts of the Republic of Kazakhstan on Information and Communication Networks”⁸⁴ sometimes referred to as the Law “On the Internet”, is a key legislative act changing the nature of the legal relations of all subjects in the Internet space and confirms the conclusions that in the state, a policy has been taken to restrict freedom of mass information on the Internet, the scope of which is many

⁸⁰ Law of the Republic of Kazakhstan “On Mass Media . Supra note 40.

⁸¹ Ibid. Clause 2 of Article 1.

⁸² Ibid. Clause 15 of Article 1.

⁸³ The “Newspaper Norm” is a legal liability for violation of media legislation stipulated by national legal acts in relation to traditional media (in particular, print media).

⁸⁴ Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Information and Communication Networks”. Adopted 10.07.2009.

times higher than the permissible limits provided for by paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights. The following conclusions provide the basis for this statement:

First, the adopted law replaced the concept of “web site” with the concept of “Internet resource” in all legislative acts where this concept is used, including in the Law of the Republic of Kazakhstan “On Mass Media”. Thus, the scope and content of the concept used in the law have significantly expanded. Under the Internet resource is meant an electronic information resource, technology of its management and (or) use, operating in an open information and communication network, as well as an organizational structure that provides information interaction.⁸⁵ In the explanatory note, the developer of the draft law, the Agency of the Republic of Kazakhstan for Informatization and Communication, notes that “the current concept of “web site” does not cover posting information on the Internet using portals, forums, blogs, Internet TV and other technologies, therefore the draft law provides for a change in the concept of “web site” to a wider “Internet resource”.”⁸⁶

Secondly, as soon as one concept was replaced with another, the status of the media automatically began to be distributed on Internet resources, with all the ensuing and, for the most part, negative consequences. In the Law of the Republic of Kazakhstan “On Mass Media”, Internet resources are included in a special subcategory, which is defined as “another form of periodic or continuous public dissemination of mass media”.⁸⁷ The OSCE Representative on Freedom of Expression noted that “this position is not without serious flaws. The fact that the portal, forum, blog, chat are an Internet resource is beyond doubt. There are doubts and concerns that the forum, blog, chat and other Internet resources [are proposed] to equate to the media with all the ensuing consequences. It is then that the same requirements and restrictions set forth in the Law of the Republic of Kazakhstan “On Mass Media” and other legislative acts of the Republic of Kazakhstan for the mass media will apply to the forum, blog, chat and other [means of communication on the Internet] information.”⁸⁸

⁸⁵ Law of the Republic of Kazakhstan “On Informatization”. Adopted 11.01.2007. Sub-paragraph 18-1 Article 1.

⁸⁶ Explanatory note “On Amendments and Addenda to Certain Legislative Acts of the Republic of Kazakhstan on Information and Communication Networks”. (25.02.2019). Available: https://online.zakon.kz/Document/?doc_id=30209795.

⁸⁷ Law of the Republic of Kazakhstan “On Mass Media”. Supra note 40. Paragraph 2 of Article 1

⁸⁸ Commentary on the draft Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Information and Communication Networks”, Dr. F. Richter, pp 19.

In fact, the existing norms of responsibility for violation of media legislation, including suspension and termination of media production and distribution of mass media products, seriously restrict freedom of speech and freedom of information in traditional media. More than once the international community has called upon the authorities of Kazakhstan to abolish these measures of responsibility as incompatible with international law and obligations of the country, as “cooling” freedom of speech. The application by analogy of the same standards of responsibility to information disseminated on the Internet in Kazakhstan de jure entails the responsibility of any person, regardless of the laws of the country in which it was produced, loaded and stored. In the legal system of each individual state, various measures of responsibility are applied to the media for abusing the freedom of speech. And the application of such measures by analogy to Internet publishers (bloggers, site owners, etc.) will force them to comply with the restrictions on content imposed in almost any country in the world, regardless of whether such content restrictions exist in the countries of residence of publishers, as well as whether the restrictions imposed abroad comply with international standards on freedom of expression.⁸⁹ That is why the application by analogy of the “newspaper standard” in relation to Internet publishers in Kazakhstan is subjected to such serious criticism from the international community.

In addition, the OSCE Representative on Freedom of Expression noted in his comment that:

“Such requirements and restrictions were once established in the legislation of Kazakhstan on mass information due to the special influence and prevalence of the media in society. The word spoken in a television or radio program, printed in the press, has a much greater public resonance than the word pronounced at a rally, in a theater or on a movie screen, printed in a book or on a leaflet.

The statistical data of the International Telecommunication Union (ITU) allows us to doubt that the level of the spread of the Internet in Kazakhstan is equal to or is close to the level of distribution in the country of traditional media. Also needs to be taken into account that the attitude of citizens to statements on the Internet is usually much more skeptical than sources and qualitative in the sense of processing messages on television and radio programs, newspapers and magazines.”⁹⁰

⁸⁹ C. Möller and A. Amur. Handbook of media freedom on the Internet.. Vienna, 2004.

⁹⁰ Ibid, pp, 20.

Thirdly, the application of such measures of responsibility to Internet resources, such as the suspension and termination of the release and distribution of mass information, presents a certain difficulty for the authorities both in relation to Kazakhstani and in relation to foreign resources. In relation to Kazakhstani Internet resources, the difficulty is due to the fact that Internet resources are not required to go through the registration procedure (as opposed to traditional media), which means that the state does not have actual and reliable data about the owner of the Internet resource, its location, and data on its Internet resource. But all this data is with telecom operators, in connection with which the government obliges telecom operators to collect and store service information about subscribers and telecommunications services provided,⁹¹ and providers - information about the placement of server equipment on which information is stored.⁹² After receiving information about the owner of the Internet resource and other official information about its activities, prosecutors have the right to make a decision to suspend the dissemination of mass information in the territory of the Republic of Kazakhstan and go to court with relevant claims. These powers are enshrined in the new provision in the Law of the Republic of Kazakhstan “On Mass Media”, which does not allow “the use of the mass media in order to commit administrative offenses or criminal offenses”. This gives the prosecution authority, as a supervisor, to use such powers in order to prevent offenses. But since the suspension and termination of media release or distribution of media products is possible only by decision of the court or the owner, the claim of the prosecutor's office must be considered in court in compliance with all the principles of civil proceedings, including the principle of adversarial proceedings. The statement regarding the Kazakhstani Internet resources may be considered in a lawsuit procedure, which implies the participation of two interested parties in the lawsuit.

Fourthly, with regard to foreign Internet resources, the difficulty lies in the fact that the judicial process in the absence of the defendant's party can be recognized as illegitimate and the decision illegal. Therefore, the state, adopting the law on regulating the Internet, has provided for a different procedure for consideration in a court of applications for the suspension and termination of the release of foreign media distributed in the territory of Kazakhstan. Such applications will be considered in the order of special proceedings, initially implying the absence of the defendant's party in the judicial process.⁹³ In accordance with

⁹¹ Commentary on the draft Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Information and Communication Networks”, Dr. F. Richter, pp 19.

⁹² The rules of registration, use and distribution of domain space of the Kazakhstani segment of the Internet, No. 220.

⁹³ Civil Procedure Code of the Republic of Kazakhstan. Adopted 13.07. 1999.

Article 317-11 of the Code of Civil Procedure of the Republic of Kazakhstan, “The court, recognizing that the products of a foreign media, distributed in the territory of the Republic of Kazakhstan, containing information that is contrary to the legislative acts of the Republic of Kazakhstan, is illegal, makes a decision to suspend or terminate the distribution in the territory of the Republic of Kazakhstan of foreign media. A court decision that has entered into legal force is sent to authorize bodies within their competence.” It is worth noting that the criteria by which the court may recognize the information disseminated in the country as contradictory to the legislative acts are rather vague and not clearly expressed in the laws themselves. For example, the grounds on which one can limit the freedom of speech specified in the Constitution of the Republic of Kazakhstan do not coincide with those specified in the Law of the Republic of Kazakhstan “On Mass Media”. Given the vagueness of the very criteria for the illegal content of media materials, the introduction of such restrictions could be detrimental to Kazakhstan’s international obligations as an OSCE member. In addition, such provisions limit the access and distribution of all foreign media (and not just Internet resources). The OSCE Representative on Freedom of Expression stated in his commentary that: “... according to the Final Act of the Conference on Security and Cooperation in Europe, the Republic of Kazakhstan has undertaken to” ensure the freer and wider dissemination of all forms of information, encourage cooperation in the field of information and the exchange of information with other countries. „We express doubts that the indicated norms of the Draft Law contribute to the goals set forth in the international treaty of the Republic of Kazakhstan⁹⁴.

Fifth, a court decision on the termination and suspension of media production or distribution of media products involves its execution by government agencies and telecom operators in the form of blocking access from the territory of Kazakhstan to foreign Internet sites or termination of the activities of Kazakhstan's Internet resources. To this, they are directly bound by the amendments and additions to the Law of the Republic of Kazakhstan "On informatization"⁹⁵, which give legitimacy to blocks, although they do not use this term. Such a state policy regarding the restriction of freedom of mass information on the Internet leads to the closure of access (block) to both world-famous resources for Kazakhstani users and popular Kazakhstani Internet resources. In February 2011, the Saryarka district court of Astana city, according to the prosecutor of the capital, imposed a ban on the distribution of

⁹⁴ Commentary On Project The Law Of The Republic Of Kazakhstan “On introducing changes and amendments to some legislative Acts of the Republic of Kazakhstan on information and communication networks”, (13.02.2019). Available: <https://www.osce.org/ru/fom/36861?download=true>.

⁹⁵ Law of the Republic of Kazakhstan “On Informatization”. Supra note 95. p.3 and 4 of Article 21.

Internet resources www.djamal.wordpress.com and www.caucase.wordpress.com as foreign media whose products will gain illegal information. The Committee on the Execution of Judicial Acts of the Ministry of Justice of the Republic of Kazakhstan issued a corresponding resolution, which it sent for execution to Kazakhtelecom JSC. But instead of closing access to these blogs, Kazakhtelecom closed access to the entire blogging platform [Wordpress.com], explaining that it cannot stop distributing individual blogs since they all have identical IP-addresses.⁹⁶

Another example of blocking a website is Livejournal.com The website has been repeatedly blocked in Kazakhstan by the blog — the LiveJournal platform (LiveJournal) for posting information on blogs that do not comply with the legislation of the Republic of Kazakhstan. Currently LJ is also unavailable to Kazakhstani users. According to the Minister of Communications and Information of the Republic of Kazakhstan, Askar Zhumagaliyev, the LiveJournal blog platform has been blocked in Kazakhstan by a court decision. “Access to the site is closed by the decision of the Saryarka court of Astana,” wrote A. Zhumagaliev on Twitter, answering the question of service users. As indicated in the court’s ruling, in the opinion of the prosecutor’s office of Astana, the materials posted on the website “are aimed at promoting and justifying terrorism and religious extremism.” The same definition of the court suspended the activity of 14 sites. The court ordered the Ministry of Communications and Information to suspend the activities of Internet resources in the country for a period not exceeding 3 months. Blocking a popular Internet resource caused a great resonance in the community. The head of the Russian sector of LiveJournal, Svetlana Ivannikova, stated on this occasion: “None of the state bodies of Kazakhstan contacted us, didn’t contact us with a request to remove materials from LiveJournal, the court’s decisions are also not shared, we don’t see the text of the court’s decision, therefore, the reason for blocking is unknown to us. But, nevertheless, it is true, if some blogs or communities were accused of spreading information that is intended to incite national discord or propaganda of violence, then our response is always very fast. ... And the conflict commission responds very quickly, but I repeat, no one has addressed us. ”

⁹⁶ WordPress is blocked because of two blogs, (25.12.2018). Available: <http://www.adilsoz.kz/news/wordpress-zablokirovan-iz-za-dvux-blogov/>.

According to the International Foundation "Adil Soz", in this incident, two aspects can be distinguished, controversial and indisputable. The court's conclusion about the presence of prohibited content in the closed Internet resources is controversial because there is no evidence in the text of the court decision. There is no doubt a violation of the constitutional rights of Internet users who are not related to an illegal content, to unhindered receipt and dissemination of information⁹⁷.

In Kazakhstan, not only foreign sites are blocked, but also Kazakhstani analytical Internet resources, newspaper sites. If in relation to foreign media the suspension of activities (blocking) of Internet resources occurs on the basis of a court decision, then a court decision is often not required to block Kazakhstan's Internet resources. Owners of Internet resources about blocking, as a rule, will learn from users. The tendency to extrajudicially block access to Kazakhstani Internet resources has been increasing recently. In 2009, the editors of the Internet publication Position.su reported blocking their site. The editorial board assumes that access to the site is restricted by Kazakhtelecom JSC and is connected, firstly, with the publication of the article "The Nation: Create Yourself" by the head of the Expert Center for National Strategy Adil Toyganbaev. Before this, on July 1, 2008, the site "Position.kz" (now - "Position.su") was suspended for three months at the suit of the prosecutor of the Medeu district of Almaty for inciting ethnic hatred. The publication was also accused of profanity in its publications and, especially, in comments to them. Later the site was moved to the domain zone ".su" and became known as "Position.su".

Access from the territory of Kazakhstan to the Internet resources of the Respublika newspaper was repeatedly stopped. So, on April 29, 2009, the editors reported that the provider Kazakhtelecom had blocked the Internet portal of the Republic in Kazakhstan (<http://www.respublika-kaz.info>, <http://www.respublika-kz.info>, [HTTP: //www.respublika-kaz.net](http://www.respublika-kaz.net)) and the website of the newspaper "Voice of the Republic" (<http://www.respublika-kz.biz>, <http://www.respublika-kz.com> and [HTTP: //www.respublika -d2.com](http://www.respublika-d2.com)). The editorial

⁹⁷ Blocking access to LiveJournal violates the constitutional rights of citizens. (11.02.2019). Available: <http://www.adilsoz.kz/news/blokirovka-dostupa-k-livejournal-narushaet-konstitucionnye-prava-grazhdan-schitaet-fond-adil-soz/>.

board did not receive any warnings or notices from the Kazakhstani provider or other organizations regarding blocking.⁹⁸

The international community has long been looking for ways of universal and reasonable regulation of Internet resources in order to protect users from truly illegal content, recognized as such by international law. No one disputes the fact that unconditional respect for freedom of expression requires the establishment of a different regime for Internet publications. As has been repeatedly noted, the Internet is a means of achieving freedom, through which ordinary people can communicate with each other on the issues of concern to them anywhere in the world, a way to overcome boundaries and existing differences, and first of all, communication technology. The UN Human Rights Committee noted that "States parties should ensure that the legislative and administrative structures established to regulate the media take into account the differences between the print and broadcast sectors and the Internet."⁹⁹

Experts have not yet agreed on a common opinion of what exactly should be the norm on responsibility for online publication. One thing is clear: the norm on which the responsibility of Internet publishers will be established should not be a "newspaper norm".

⁹⁸ Statistic of Violations of Rights For Freedom Of Expression In Kazakhstan. 2018, (01.02.2019). Available: <http://www.adilsoz.kz/politcor/show/id/244>.

⁹⁹ General Comment No. 34. Supra note 17.

3. INTERPRETATION AND APPLICATION IN NATIONAL LAW OF ARTICLE 19 OF THE ICCPR

3.1 Legal restrictions on freedom of expression

Freedom of expression, freedom of speech is not an absolute right and is subject to a few restrictions in the occurrence of special cases established in international human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) refers to such restrictions:

- protection of the rights and reputations of other persons;
- protection of state security;
- protection of public order;
- protection of public health and morals.¹⁰⁰

It also emphasizes that the above restrictions “must be established by law and be necessary”.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), being a binding document in Council of Europe countries, contains a list of restrictions on freedom of expression, including:

- interests of national security, territorial integrity or public order;
- prevention of disorder or crime,
- health and morality,
- protection of the reputation or rights of others;
- preventing the disclosure of information received in confidence,
- ensuring the authority and impartiality of justice.¹⁰¹

Realizing that the state will always strive to establish the priority of public opinion over the opinion of one person, and society will try its best to force the individual to share his point of view, international law has developed principles for interpreting restrictions and derogations

¹⁰⁰ International Covenant on Civil and Political Rights , New York, 16.12. 1966, e.i.f. 24.04.2006.

¹⁰¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 04.11. 1950.

from the provisions of the ICCPR. The so-called Siracusa Principles¹⁰² are a set of rules, non-treaty standards that should be followed by the States Parties to the ICCPR for a uniform interpretation and application of human rights restrictions, including freedom of expression, in order to avoid and prevent their illegal restrictions. With regard to restrictions on freedom of expression, the Siracusa Principles have established several important guidelines: 1. In cases where the Covenant dictates that the restriction is “necessary,” the term “necessary” implies that such a restriction:

- (a) based on one of the provisions whereby such a restriction is permissible in accordance with one of the articles of the Covenant,
- (b) meets the immediate needs of the state or society,
- (c) pursues legitimate goals,
- (d) is proportionate to these objectives.

Any assessment of the need for a restriction should be based on objective factors.¹⁰³

2. With regard to the term “prescribed [established] by law”:

- (a) No restriction on the exercise of human rights is imposed except in accordance with the national law of general application, which does not contradict the Covenant and is in effect at the time the restriction is introduced.
- (b) Laws restricting the enjoyment of human rights should not be arbitrary or unreasonable.
- (c) Legal rules restricting the enjoyment of human rights should be clearly stated and accessible to everyone.
- (d) The law should provide sufficient guarantees and effective remedies for unlawfully or imposing human rights restrictions.¹⁰⁴

3. In relation to the term “national [state] security”:

- (a) A reference to national security interests to justify measures to restrict certain rights is possible only when such measures are taken to protect the existence of a state, its territorial integrity or political independence from the use of force or the threat of its use.

¹⁰² Syracuse principles of interpretation of limitations and deviations from the International Covenant on Civil and Political Rights. 1984.

¹⁰³ Ibid.

¹⁰⁴ Ibid. Principle B (i).

(b) National security interests should not be invoked as grounds for imposing restrictions in order to prevent only a local or relatively isolated threat to the rule of law.

(c) National security interests cannot be used as a pretext for imposing vague or arbitrary restrictions, and can only be invoked if there are adequate safeguards and effective remedies for violations.¹⁰⁵

4. With regard to the term “population morality”, it is noted that the content of such concepts as “morality” and “morality” varies with time and unequally in different cultures, therefore the state has a certain freedom in applying restrictions to protect morality, but this does not detract from the need prove that the restriction to be adopted is extremely important to maintain respect for the fundamental values of society.

5. With regard to the term “rights and reputation of other persons”, it is established that the protection of the reputation of other persons is not allowed as a basis for limiting rights if the restriction is applied in order to protect the state and officials from public opinion or criticism.

6. And finally, in relation to the term “public safety [order]”:

(a) Public safety means protection against a threat to the safety of people, their life or physical health, as well as serious damage to their property.

(b) The restrictions imposed by law may be due to the need to protect public safety.

(c) Public security interests cannot be used as a pretext for imposing vague or arbitrary restrictions and can be invoked only with adequate safeguards and effective remedies for violations.

It underlines several very important principles of interpretation of the provisions of the ICCPR relating to the legality of restrictions of rights by states:

2. The scope of the restriction cannot be interpreted in such a way as to jeopardize the essence of the respective right.

3. The interpretation of any restrictions should be as specific as possible and any doubts should be resolved in favor of the protection of the rights in question.

4. Interpretation of the restrictions should occur taking into account nature and context in which each of the limited rights exists.

¹⁰⁵ Ibid. Principle B (vi).

5. All restrictions of rights recognized in the ICCPR should be fixed in accordance with national law and consistent with the goals and objectives of the Covenant.

6. The restrictions listed in the ICCPR cannot be applied for purposes that do not coincide with those described in the Covenant.

7. The arbitrary application of restrictions is not allowed.

8. The law should provide for the possibility of appeal and effective remedies for the unlawful introduction or application of each of the restrictions. And finally, the restrictions on freedom of expression provided for in paragraph 3 of Article 19 of the ICCPR cannot be considered without taking into account the observance of the prohibitions provided for in Article 20 of the Covenant.

1. All propaganda for war should be prohibited by law;

2. Any statement in favor of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence shall be prohibited by law.

The legality and legality of the restrictions of certain human rights, in particular, the freedom of expression, are not disputed by anyone. Nor is there any doubt about the validity and expediency of the prohibitions imposed by the ICCPR on the propaganda of war and incitement to discrimination, hostility or violence on the basis of national, racial or religious hatred. According to international law, every state acts as a guarantor of human rights: in fact, this is one of the reasons for the existence of a state as such. It follows that when a situation arises that threatens the further existence of a state and (or), as a result, the rights of every person in that state, international law allows for the introduction of restrictions as certain measures to prevent a threat commensurate with its magnitude. Such measures imply a restriction on freedom of expression (freedom of speech). However, more and more often, states resort to using the possibilities of restricting rights not in order to counteract real threats to national security or public order, but when such threats do not exist at all or exist hypothetically. In this case, the restrictions are usually formulated in national legislation unnecessarily broadly and vaguely, which goes beyond the legal framework delineated by international law (ICCPR, Syracuse principles) for possible restrictions on human rights. And this turns them into ideal means of abuse in order to prevent unpopular ideas from walking in society or criticizing the authorities.

The following subchapters will discuss the restrictions on freedom of expression established by the ICCPR as interpreted and applied by the national legislation of Kazakhstan in order to

protect state security, the rights, and reputations of others, health and morals, public order, and the declaration of a state of emergency.

3.2 Protecting the reputation of others

Despite the fact that Kazakhstan is a party to the universal and regional agreements on human rights, so far no principal steps have been taken to bring the law in the field of defamation in line with the standards of the United Nations and the OSCE. The Criminal Code of the Republic of Kazakhstan still contains articles aimed at protecting the honor and dignity of both ordinary citizens and representatives of the authorities. The attempts made in 2010 and 2011 to make changes and additions to the civil and criminal legislation of the Republic of Kazakhstan do not solve the problems of fulfilling international obligations to decriminalize defamation and bring legislation on defamation in accordance with international principles and standards. Firstly, it worth to mention Civil Tort. The Constitution of the Republic of Kazakhstan states “The dignity of the person is inviolable” and enshrines the right of everyone to privacy, personal and family secrets, protection of their honor and dignity.”¹⁰⁶ Constitutional provisions are fixed and detailed in the Civil Code of the Republic of Kazakhstan¹⁰⁷ which establishes the order and legal mechanisms for the protection of personal non-property rights. Civil law determines that the protection of personal non-property rights is carried out by the court, while subject to protection regardless of the guilt of the person who violated the law. The person who has filed a claim for protection must prove the violation of his personal property right. In order for information discrediting the honor, dignity and business reputation of a person and entity to be deemed as such, the following conditions must be met:

- the contested publication must contain information (facts), and not opinions or comments;
- this information (facts) must be verified (checked for authenticity) and recognized to be inappropriate to reality;
- this information (facts) should be disseminated, that is, they should be available from one source to an indefinite and unlimited number of people.

¹⁰⁶ Constitution of the Republic of Kazakhstan. Supra note 21. Paragraph 1 of Article 17

¹⁰⁷ The Civil Code of the Republic of Kazakhstan. Adopted 27.12.1994.

Only if all these conditions are met, information can be deemed to discredit the honor, dignity and business reputation of a natural and legal person and a decision is made to restore the violated right by publishing a refutation of discrediting information. In accordance with the Civil Code of the Republic of Kazakhstan, a citizen, in respect of whom information that defames his honor, dignity or business reputation is disseminated, has the right, along with the refutation of such information, to demand compensation for damages and moral damage caused by their distribution. Due to the imperfection of the civil legislation of the Republic of Kazakhstan, during the judicial review of claims for the protection of honor and dignity of the plaintiffs - legal entities there was a "unique" opportunity to declare "intolerable moral suffering" that they allegedly experience after a critical publication or broadcast.

The courts, realizing the absurdity of the claims, but, guided by the letter of the Law, did accept such claims for consideration. And, moreover, the judges considered them and rendered decisions on compensation for non-pecuniary damage in favor of the plaintiffs - legal entities. Here are just a few of the most notorious cases of the protection of personal non-property rights, where the editors of the media were respondents. Below we will research cases related to protecting the reputation. 2010 JSC Tengizneftestroy against the Ural Week newspaper. On July 8, the court decision No. 2 of Uralsk entered into force, obliging the newspaper and journalist Lukpan Akhmedyarov to pay Tengizneftestroy KZT 20 million for non-pecuniary damage. The reason for the suit was the article by L. Akhmedyarov "Behind the screen of the tender", published in the "Ural week" on August 6, 2009. It was reported that the Tengizneftestroy company had begun construction work at the site of the future Zympity-Karatyub gas pipeline long before the summing up of the tender results. In court, the representative of the plaintiff did not deny this fact, but gave him another explanation: thus, the company "confirmed its readiness to fulfill the scope of work due to the tender." The claimant justified the damage to his business reputation by the moral suffering of a legal entity - Tengizneftestroy Joint-Stock Company.

2011. SPP Metalware LLP against the Ural Week newspaper. On March 3, the Ural City Court issued a decision on the claim of SPP Metalware LLP against journalist Zamira Kosmurzieva and the newspaper Uralskaya Nedelya. The court ordered the defendants to pay LLP 20 million tenges in compensation for non-pecuniary damage.

The reason for the claim for the protection of business reputation and collection of moral damage was the material “What worries the regional akim?”, Published in the “Ural week” on November 11, 2010. directions". The general contractor for the construction of the facility is SPP Metalware LLP. The plaintiff contested several fragments of the article, which refers to the problems of LLP with the tax inspection and questioned the professionalism of the company. SPP Metalware LLP required to publish a refutation and compensate for moral damage in the amount of 30 million tenges. In all the above court cases, the decision on compensation for moral harm in favor of the plaintiffs - legal entities were taken contrary to common sense and in violation of the normative Decree of the Supreme Court of the Republic of Kazakhstan dated June 21, 2001 "On the application by courts of law on compensation for moral harm." It is this regulatory decree that determines that even moral damage is compensated only in monetary terms, but the amount of compensation is determined by the court. And when determining the amount of compensation for non-pecuniary damage, the courts should proceed from the principles of fairness and sufficiency.

For many publications, including the newspapers Respublika and Uralskaya Nedelya, making absurd court decisions on multimillion-dollar moral harm compensation to legal entities sometimes means a direct path to bankruptcy and liquidation. On April 16, 2011, amendments and additions were introduced into the Civil Code of the Republic of Kazakhstan, in particular, to Article 143 “Protection of honor, dignity and business reputation”, as well as Article 951 “Indemnification of moral harm”¹⁰⁸. Now a legal entity can protect its business reputation by sending a request to the media editor to publish a response if there has been a distribution of information that infringes the rights and legitimate interests of the legal entity. Or - the requirement to publish a refutation, if we are talking about the dissemination in the media of information discrediting the business reputation of the enterprise. Both the answer and the refutation are published by the media for free. If the editors of the media refused to publish a refutation or did not publish it within one month, or the liquidation procedure was initiated against the enterprise - the owner of the media, the legal entity has the right to file a lawsuit for the protection of business reputation. In addition to the requirements of the refutation of information discrediting the business reputation of a legal entity, an enterprise may file a claim for damages in the manner established by Article 350 of the Civil Code of the Republic of Kazakhstan.

¹⁰⁸ Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning the Improvement of Legislation”. Adopted 25.03.2011.

Clause 6 of Article 143 of the Civil Code of the Republic of Kazakhstan states: A citizen, in respect of whom information that defames his honor, dignity or business reputation is disseminated, shall have the right, along with the refutation of such information, to demand compensation for damages and moral damage caused by their distribution. The rules of this article on the protection of the business reputation of a citizen respectively apply to the protection of the business reputation of a legal entity, with the exception of the requirement of compensation for moral damage. To protect the business reputation of a legal entity, the rules on damages are applied in accordance with the procedure established by this Code. Certainly, amendments to the Civil Code of the Republic of Kazakhstan, which exclude the possibility for legal entities to claim compensation for moral damages when considering claims for protection of business reputation, will positively affect judicial practice regarding the media. In many cases, claims for the media in respect of the protection of the business reputation of legal entities, which also included a claim for compensation for moral harm, are frivolous and unfounded, in effect, interfering with the freedom of speech and freedom of the media. In order for claims on protection of honor, dignity and business reputation to cease to be a real threat to the existence of the media, it is necessary to legally restrict the limitation period for such cases and impose restrictions on the amount of compensation for property and non-property damage. In most legal systems there is a time limit after which a lawsuit against a civil offense, including defamation, becomes impossible. There are many reasons for this. As time passes, evidence disappears, events are erased from the memory of their witnesses, and everyone can live their lives without fear of a lawsuit for the affairs of bygone days. The indefinite period of limitation of actions is fraught with “restrain” freedom of speech, creates difficulties in defending the defendant’s position in court and can fundamentally nip the public discussion of a pressing problem due to concerns about the consequences of opinions expressed. In order to curb abuse of moral damages, civil law should contain clear criteria for determining the number of payments, which should correspond to the extent of the damage proved by the plaintiff, and take into account other non-material measures awarded by the court to correct the damage.

After a discussion of civil tort mechanism it worth to continue with criminal legislation toward it. The concept of defamation is very closely connected with the concept of defamation of honor and dignity, reputation. The essential difference consists only in the fact that in the case of slander, it is primarily a matter of intention to slander (intentionally).

Criminal Code of the Republic of Kazakhstan¹⁰⁹ contains Article 129 (Part 1), according to which slander is the dissemination of false information discrediting the honor and dignity of another person or undermining his reputation. Under the system of law in Kazakhstan, defamation and insults fall into the category of minor cases and are considered as a private prosecution. This crime consists of the following features:

1. distribution;
2. information that defames honor, dignity, or undermines reputation;
3. false information;
4. knowingly false information

With this interpretation of slander, it is not punishable to divulge information, although it is dishonorable but true, or albeit false, but the truth of which is believed by the one who divulges them. However, judicial practice in applying Article 129 of the Criminal Code of the Republic of Kazakhstan is different. Despite the fact that the Civil Code of the Republic of Kazakhstan fully protects the personal non-property rights of citizens, accusations of defamation of journalists is a phenomenon that has become quite common in Kazakhstan. According to statistics from the International Foundation for Protection of Freedom of Speech “Adil Soz”, in 2009 there were 22 cases of accusations of journalists in libel, in 2010 - 9, and for the period January-June 2011 – already 7. In most cases, criminal cases in the order of private prosecution under Art. 129 of the Penal Code of the Republic of Kazakhstan ends with a verdict of not guilty, however, the danger for a journalist to be prosecuted on charges of defamation is considered as one of the forms of self-censorship and reprisals against journalists and disagreeable, disloyal media, and limiting the discussion of public issues. But in court practice in cases of libel, there are also convictions. In 2009, Viktor Miroshnichenko was found guilty of defamation by the verdict of the court correspondent of the newspaper Vremya in the North-Kazakhstan region. The private prosecutor was the deputy head of the Department of Internal Affairs of the same region, Sarsenbay Davletov. On February 6, 2009, the Petropavlovsk City Court of First Instance has already passed a sentence on this case. Judge Zholdasova convicted a journalist under Part 2 of Art. 129 part 2 of the Criminal Code of the Republic of Kazakhstan - “Slander contained in a public speech or in a publicly demonstrated work or in the media” - and sentenced V. Miroshnichenko to a fine of 200 monthly indicators (254,600 tenges). In addition, as a compensation for moral damage, the editors of the newspaper Vremya and V. Miroshnichenko must pay the policeman 100,000

¹⁰⁹ Criminal Code of the Republic of Kazakhstan. Adopted 16.07.1997.

tenges in solidarity. The reason for the criminal proceedings was the article “Roof for the Colonel”, published in the Vremya newspaper on July 10, 2008. It reported on extortion among police officers that took place in the North Kazakhstan region. One of the sources of information for the article was the landlady, who during the trial refused to speak and accused the journalist of slander. Davletov, in support of his accusations, invited witnesses to the court, who unexpectedly confirmed everything written in the article of V. Miroshnichenko. However, the court of first instance convicted Miroshnichenko. The sanction for committing a crime, under Part 1 of Art. 129 of the Criminal Code of Kazakhstan, is:

- fine in the amount of from one hundred to two hundred monthly calculation indicators
- involvement in public works for a period of one hundred and twenty to one hundred and eighty hours,
- correctional labor for up to one year.

Part 2 of article 129 provides for criminal liability for defamation contained in a public speech, or in a publicly demonstrated work, or in the media:

- a fine in the amount of from two hundred to five hundred monthly calculated indicators;
- Attraction to public works for a period of one hundred eighty to two hundred and forty hours;
- attraction to correctional labor for a period of one to two years;
- restriction of freedom for up to two years.

On January 18, 2011, changes and additions were made to Article 129¹¹⁰ of the Criminal Code of the Republic of Kazakhstan, according to which the institution of administrative prejudice was introduced into criminal legislation. Administrative prejudice means that criminal responsibility for a crime that does not represent a great public danger occurs if the act was committed within a year after the imposition of an administrative penalty for the same administrative offense. The same law excludes the possibility of applying this type of criminal punishment as an arrest for up to 6 months for committing a crime, provided for by part 2 of art. 129 of the Criminal Code of the Republic of Kazakhstan.

¹¹⁰ The Law of the Republic of Kazakhstan “On Amendments and Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning the Further Humanization of the Criminal Legislation and Strengthening the Guarantees of Law in the Criminal Procedure”. Adopted 18.01. 2011.

At the end of 2010, the International Organization for Freedom of Expression Article 19 and the International Foundation for the Defense of Freedom of Expression “Adil Soz” issued their joint statement “Kazakhstan: obligations remain unfulfilled”.¹¹¹ In particular, it states that on the eve of the chairmanship in the OSCE (2010), the authorities of Kazakhstan undertook to revise the law on defamation, which was often used to suppress dissent and limit the discussion of public opinion issues. However, these obligations remained unfulfilled, in connection with which Kazakhstan was recommended to reconsider the importance of the reform obligations given to them and to adopt the following changes:

- abolish all provisions of the Criminal Code of the Republic of Kazakhstan on crimes related to insult and slander, including provisions aimed at protecting the president, members of parliament, officials and representatives of the judicial system;
- continue the reform of the Civil Code of the Republic of Kazakhstan, including legal norms on the delimitation of facts and opinions
- to revise the Code of the Republic of Kazakhstan on administrative offenses, including to exclude the provision on insulting officials, clarify offenses with the participation of the media and reduce the penalties;
- exclude administrative arrest as a sanction for any form of expression.

¹¹¹ Joint statement “Kazakhstan: obligations remain unfulfilled”. *Supra* note 68.

Conclusion

I began my research with analyzing national legislation of Kazakhstan and found out that despite the fact that the Constitution of the Republic of Kazakhstan guarantees everyone the freedom of speech and creativity, freedom of information, in general, these guarantees below the level of guarantee of freedom of expression provided for in international law. The restrictions of the rights and freedoms specified in the Constitution of the Republic of Kazakhstan do not fully correspond to the three-part test, which is contained in the ICCPR (Article 19 paragraph 2) Also, implementation and enforcement of constitutional provisions on rights and freedoms, including freedom of speech and information, is hampered due to a number of factors, such as the lack of a Constitutional Court in Kazakhstan and poor public awareness about the possibilities of individual protection of violated rights and freedoms in the UN Committee on Human Rights. Additional factors affecting the insufficient and ineffective state policy to protect human rights and freedoms are the status of the Ombudsman's Office and the Commission on Human Rights, limited by legislation, and gaps in the system of legislation related to the lack of legislation guaranteeing implementation and ensuring freedom of speech and freedom of information. The analysis has shown the answers to the initial questions of the work.

As a response to my second research question (Are existing laws and regulations sufficiently effective in the name of freedom of expression?) It was founded following trends are characteristic of the legislative process in Kazakhstan:

- the presence in the legislation of outdated and duplicate standards,
- the presence of gaps in the legal regulation,
- the presence of internal contradictions in the existing law;
- A large number of reference rules in the laws;
- the lack of practice of adopting laws of direct action within the range of issues on which, in accordance with the Constitution, legislative acts can be adopted. Worth to mention, factors that may adversely affect the legislative process are:

- poor public awareness about the development of draft laws by state structures (only recently the Ministry of Justice of the Republic of Kazakhstan obliged all state bodies to publish draft laws that they are developing on websites);
- insufficient participation of civil society, non-governmental organizations, and business associations in law-making activities of state bodies. Disorder in the development of by-laws leads to their inconsistency with the laws in the development of which they are adopted. Since Kazakhstan laws contain a large number of reference and blanket legal norms, their development requires the issuance of by-laws. Often they are published with a large margin from the date of adoption of the law itself and their legal norms may contradict the norms set forth in the law.

As a part of the fulfillment freedom of expression, research was made on the judicial system. Based on research, was founded several gaps in a system. Firstly it is non-selectivity and the appointment of judges that can lead to the emergence of corporate relations between the judicial system and those authorities who make appointments. To some extent, this is a risk factor for reducing the level of independence and unaccountability of judges in specific cases, as well as a factor in increasing the level of corruption of the judicial system. Furthermore, judges, when considering specific cases, do not perceive the ICCPR as an integral part of the Kazakhstani legislation system, the same applies to the Constitution; therefore, when making decisions, they often draw conclusions based on the legal norms set forth in Kazakhstan laws and regulations. Cases were provided as a statement. In the end of the first chapter, I understood that despite the priority of international treaties adopted in accordance with the Constitution, in accordance with established legislation and ratified by the Parliament of the Republic of Kazakhstan, over the national law, the status of the International Covenant on Civil and Political Rights and other international treaties in the field of human rights and freedoms in the legal system Kazakhstan is still unclear. The provisions of the ICCPR are practically not used by the judicial system and law enforcement agencies in their activities. This makes international human rights treaties ratified by the Republic of Kazakhstan, de jure part of the national legislation, and de facto practically not used in the law enforcement practice of courts and other state bodies

As a response to my research question (Does the legal system need any changes in order to better meet the standards and obligations of article 19 of the ICCPR, as well as other

international obligations of the Republic of Kazakhstan in the field of freedom of expression?) It was found that the presence in Kazakhstani legislation of special legal protection of certain categories of officials in cases of defamation not only does not comply with international norms and principles in the field of freedom of expression, but also has a largely “cooling effect” on journalists, confronting them with a difficult choice to distribute This or that critical information about the activities of persons belonging to the protected categories, or not, given the possible criminal prosecution The humanization of criminal law did not introduce any significant changes to the law on defamation, despite the introduction of the institution of administrative prejudice and the replacement of sanctions providing for punishments related to deprivation of liberty with milder ones. Articles for libel and, especially, for libel against officials are not decriminalized, despite the fact that civil law provides for the possibility of filing defamation claims from both individuals and legal entities.´

The starting point of government policy regarding Internet regulation is the recognition of media status by Internet resources. But, in reality, the government itself determines when to consider Internet media resources, and when it does not. When registering, no, and when applying the rules of responsibility, yes, since the so-called “newspaper norm” is applicable to them. Recognizing Internet resources as mass media naturally entails the “necessity” of exercising all the administrative and legal powers of state bodies to hold the media accountable for violations of the law, including suspension and termination of the distribution of media products (both Kazakh and foreign) in the country. The blocking of sites — judicial and extrajudicial — are only obvious consequences of the key problem of Kazakhstan's media legislation: all Internet resources are mass media and they are subject to the same liability measures as traditional media. If with respect to status for traditional types of media, legislation leaves the owner with the right to choose whether to register as a media or not, then imperative rules apply to Internet resources, which do not leave the owner the opportunity to choose and determine the status of an Internet resource himself - does is he, so that his online resource wore media status or not? It seems that such administrative and governmental powers to confer a certain status on the channel for disseminating information and communicating on the Internet (websites, blogs, forums, chats, etc.) exceed the permissible limits and do not comply with the restrictions on freedom of expression established in Article 19 (3) ICCPR.

Based on the theories and studies analyzed, I found that protecting the rights and reputations of others is one of the few goals for the achievement of which freedom of expression can be

restricted, in accordance with paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights. However, this does not mean that this restriction can be used to protect elected and appointed officials, government officials from criticism and speaking to them. International law does not welcome such a broad and arbitrary interpretation of the above provisions of the Covenant.

Civil defamation legislation is often used in Kazakhstan to suppress freedom of expression. The recent reform of civil law has changed the provision according to which legal entities could make demands on the media to pay compensation for moral damage, due to the spread of information that does not correspond to reality, discrediting honor, dignity, and reputation. However, Kazakhstani legislation still has several legal gaps that allow defamation to be used not for the purpose of real protection of the reputation of other persons, as provided for in the Covenant, but for other purposes, such as settling accounts with journalists and the media for critical publications. These spaces include:

- the possibility of filing defamation lawsuits by government officials;
- lack of legal protection for inadvertently unreliable and reliable defamation;
- the absence in civil law of norms that distinguish facts from opinions;
- no limitation of the limitation period for defamation claims;
- the absence of restrictions on the size of payments from journalists and the media, which would exclude the possibility of their bankruptcy.

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