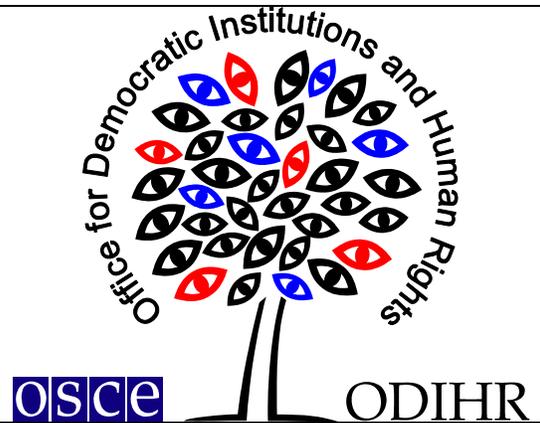


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Comments
on the Draft Laws of the Republic of Kazakhstan
“On counteractive measures against extremist activities”
and “On amendments to several legislative acts with regard
to counteractive measures against extremist activities”

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I. Introduction

On 1-2 July 2004, a Round Table on Combating Extremism was organized by the OSCE ODIHR in order to exchange views on issues such as national and international responses to the threat of “extremism”. On this occasion, the Deputy Minister of Justice of Kazakhstan, Mr. Baimamgabetov, made a brief presentation on new legislation being developed in Kazakhstan with a view to combating all forms of “extremism”. All participants were invited to submit their observations or comments on the two draft Laws, namely the Draft Law “On counteractive measures against extremist activities” (adopted as a Draft on 10 April 2004) and the Draft Law “On amendments to several legislative acts with regard to counteractive measures against extremist activities” (adopted as a draft on 12 April 2004).

In response to that request and in co-ordination with the OSCE Centre in Almaty, the OSCE ODIHR prepared preliminary comments which have been finalized on 20 October 2004 and thereafter shared as a working paper with the relevant Kazakhstani authorities. They have been made public on 15 December 2004 in Astana at a Public Forum co-organized by the OSCE Centre in Almaty and the Commission on Human Rights under the President of the Republic of Kazakhstan.

On 20 October 2004, both draft Laws were adopted in first reading by the Mazhilis. They were then submitted to the Senate, which proposed several amendments. On 9 February 2004, these amendments were approved by the Mazhilis and both draft Laws have been adopted as amended by the Senate. They are now to be sent to the President of Kazakhstan for signature. Pursuant to Article 62.2 of the Constitution of Kazakhstan, “Law of the Republic shall come into effect after they are signed by the President of the Republic”.

These comments present the views of the OSCE ODIHR on the above-mentioned draft Laws. They elaborate on the OSCE ODIHR preliminary comments and take into consideration the amendments proposed by the Senate and now approved by the

Mazhilis. This is not a comprehensive review, but consolidated comments¹ on the Draft Law Nr 400 of the Republic of Kazakhstan “On counteractive measures on extremism” (“Draft”) and the Draft Law Nr 406 of the Republic of Kazakhstan “On amendments to several legislative acts of the Republic of Kazakhstan with regard to counteractive measures on extremist activities” (“Draft Amendment”).

Attention of the reader is drawn to the fact that not all pieces of Kazakh legislation, which have relevance to the two drafts - such as the Presidential Decree Nr 332 “On the prevention and suppression of terrorism and extremism” (adopted 10 February 2000), regulations on freedom of religion or belief, freedom of association, freedom of the media and/or freedom of assembly – have been taken in consideration. It is therefore likely that not all aspects of both draft laws with regard to human rights and fundamental freedoms are covered by these comments.

II. Executive Summary

1. While the two draft Laws examined hereafter pursue an objective (the fight against “extremism”), the legitimacy of which cannot be questioned, several of their key provisions raise serious concerns as so their potential far-reaching implications on a wide range of fundamental freedoms protected under the Constitution of Kazakhstan.
2. Legislation defining and criminalizing “extremism” is ultimately about restricting human rights in order to protect certain so-called general public interests. While this is permissible under international law and specifically foreseen in the Constitution of Kazakhstan², certain conditions for doing so must be met. For these conditions to be met, there needs to be a clear and unambiguous definition of the offences established under the draft Laws. Because “extremism” is not a legal term, is not defined in any international instrument³ and thus can not meet the requirements of legality, certainty

¹ These comments have initially been prepared on the basis of a Russian version of both Draft Laws, which was provided by the OSCE Centre in Almaty. The present consolidated version of the comments have been prepared on the basis of an English translation of the amendments proposed by the Senate in December 2004.

² Article 39 (Constitution of Kazakhstan, adopted by national referendum on 30 August 1995) [unofficial translation].

³ Obviously, not all concepts used in domestic jurisdictions need to be defined in international instruments. However, considering the lack of a precise definition in the legislation proposed, any international

and foreseeability in the application of the law, it can not be excluded that the legislation considered would not be applied in a coherent and uniform manner, would result in arbitrary decisions by those responsible for implementing its provisions and would ultimately jeopardize a wide range of fundamental freedoms (particularly the freedom of religion and belief, the freedoms of association and assembly, the freedom of the media, the freedom of information) that lie at the core of the rule of law and a pluralistic democracy.

3. The definition of “extremism” would gain in precision if it were linked to a means rather than focused on so-called “extremist goals”. It should depart from the emphasis inherent in such a term on the nature of opinions and beliefs. Instead, a clear connection should be made to the threat of, incitement to, or use of violence.
4. Another crucial aspect, which is not adequately addressed in the proposed legislation, is the requirement of the element of intent. This should be part of the definition and be explicitly referred to in the provisions which impose liability on internet service providers as well as those concerning the financing of extremism.
5. From the lack of precise definitions, it ensues a great deal of uncertainty and ambiguity with regard to the procedural safeguards applicable to the instances addressed in the law. It is of the utmost importance to be as specific and explicit as possible when the rights and freedoms that may be affected are protected by the Constitution. It may be worth considering having the draft legislation subject to a constitutional review, which would allow for a review of all of its implications and ramifications across the Kazakhstani legal system with more precision than can actually be achieved in these comments.
6. Furthermore, the scope of powers granted to law enforcement agencies and local executives should be defined with precision. It is not clear what such powers entail particularly with regard to those provisions referring to religious organizations. The wording used (study, analyze, submit recommendations, examine matters of

instrument providing for such a definition, would have served as a useful reference for interpretation of the domestic provisions.

violations, etc) leaves a wide margin of discretion. The provisions where this formulation is used should be reconsidered.

7. Of particular concern is the provision of the Draft Amendment increasing the penalties that may be inflicted upon public associations. The connection between this provisions and the fight against extremism is not apparent from the text of both draft laws. It seems that associations may be subject to such increased penalties even if their activities have no “extremist” character whatsoever.
8. All these considerations may call into question the need for a special law on combating ‘extremism’. A technical justification for a special law might be that individual laws currently containing ‘anti-extremist’ provisions are not coordinated with one another, are in part obsolete, have in part not stood up in practice, and offer extremist organizations rather broad opportunities to evade liability. However, one may question whether such coordination or consolidation be better achieved through legislation centered around a concept (“extremism”), which is *prima facie* alien to the legal system and culture of Kazakhstan. This may ultimately undermine the workability of such legislation. Considering also the little added value of the draft laws over some constitutional provisions, it may be worth considering another strategy such as a national action plan or a more comprehensive or inclusive legislative reform, which would include preventive and educational measures.

III. Comments on the Legislation under Consideration

1. Scope of Review

9. This is not a comprehensive review, but consolidated comments⁴ on the Draft Law Nr 400 of the Republic of Kazakhstan “*On counteractive measures on extremism*” (“**Draft**”) and the Draft Law Nr 406 of the Republic of Kazakhstan “*On amendments to several legislative acts of the Republic of Kazakhstan with regard to counteractive measures on extremist activities*” (“**Draft Amendment**”). The comments built upon the initial OSCE ODIHR comments completed on 20 October 2004 and made public on 15 December 2004⁵. They have been prepared on the basis of an English translation of the amendments proposed by the Senate in December 2004. Attention of the reader is drawn to the fact that at the time of writing this report, it has not yet been possible to obtain the text of the draft Laws as adopted by the Mazhilis on 9 February 2005.
10. The initial comments had been prepared within a tight time schedule. These comments expand some key observations and arguments presented in the initial comments. However, not all pieces of Kazakh legislation, which have relevance to the two drafts - such as the Presidential Decree Nr 332 “On the prevention and suppression of terrorism and extremism” (adopted 10 February 2000), regulations on freedom of religion or belief, freedom of association, freedom of the media and/or freedom of assembly – have been taken in consideration. It is therefore likely that not all aspects of both draft laws with regard to human rights and fundamental freedoms are covered by these comments.

⁴ These comments have initially been prepared on the basis of a Russian version of both Draft Laws, which was provided by the OSCE Centre in Almaty.

⁵ Press release by the Mazhilis (Parliament of the Republic of Kazakhstan) on 21 October 2004 (cp website of the Mazhilis www.parlam.kz - last visit on 21 October 2004)

2. Analysis

2.1 Definition of “extremism”

11. The Draft aims to introduce a specific Anti-Extremism Law into Kazakh legislation and attempts to define the term “extremism” in its first article⁶. “Extremism” however is not a legal term. It is not defined neither specifically addressed in any international treaties, conventions or other instruments. This stands in contrast to “terrorism”, which has been addressed in numerous international treaties and other documents although its definition still remains problematic on several accounts; there is however a growing consensus that a definition of “terrorism” is to be primarily linked to a means⁷ (the use of terror). Conversely, the term “extremism” has broader connotations, among which an emphasis on the nature of the opinions or beliefs in view of their criminalization should they harm certain interests.
12. The behaviors, beliefs or activities that may fall under the label “extremism” can not be objectively identified. Article 1.5 provides a broad definition focused on a range of purposes with poor characterization of the categories of misconduct associated with these purposes. Vague and overextended definitions raise serious constitutional issues and affect the underlying principles of the rule of law. Among them, the principle of legality requires that criminal conduct be defined in law before an offence can be committed, and with sufficient precision so as to prevent arbitrary enforcement. All the ingredients of the offence need to be identified and defined as precisely as

⁶ Article 1, para 5 of the Draft: “*Extremist activities (extremism) refer to the organization and/or commission:*

By an individual, group of persons or an organization of actions in the name of organizations declared, in the prescribed manner, to be extremist organizations;

by an individual, group of persons or organization of any actions in pursuit of the following extremist goals:

A violent change in the constitutional order; the violation of the sovereignty and integrity of the Republic of Kazakhstan or the unity of its territory; the undermining of the State’s security and ability to defend itself; the forceful seizure of power or the forceful retention of power; the creation and direction of, and participation in, an illegal paramilitary formation; the organization of armed rebellion and participation in it; the inflaming of social and class discord (political extremism);

The incitement of racial, ethnic or clan discord (ethnic extremism);

The incitement of religious hostilities or discord, including violence or calls for violence, as well as the application of any religious practice which presents a threat to security, life, health, morals or human rights or freedoms (religious extremism)”

⁷ On the definition of terrorism: Digest of jurisprudence of the United Nations and regional Organizations on the protection of human rights while countering terrorism (compiled by the Office of the United Nations High Commissioner for Human Rights / New York and Geneva 2003) p. 1

possible in order to avoid abuses and arbitrariness in the manner in which such provision may be enforced. Additionally a broad, abstract and vague definition of the offence may be detrimental to a uniform and coherent application of the law. The term “extremism” does not meet any of these requirements. It can not be defined as precisely as required to secure legal certainty and foreseeability in the application of the law. Neither can it be defined with such precision to prevent abuses of power and arbitrary decisions.

13. Connotations as to the nature of opinions and beliefs are inherent in the term “extremism”. A trend in criminal legislation across the OSCE region and beyond has been the enactment of so-called hate crime laws which may be regarded at first sight as holding a degree of resemblance to anti-extremism legislation. However, hate crimes laws are primarily geared towards punishing - or enhancing punishment for – the selection of a victim because of a status characteristic such as race or sexual orientation. While the categories of crimes targeted may be broad, the focus is on the individual and societal harm beyond the offenders’ beliefs or biases that have motivated the crimes. The criminality does not hinge solely on the idea expressed, but on a combination of elements, which includes the level of threat, the damage caused to the victim, the level of intentionality. In contrast, “extremism” refers to an opinion or a belief in the first place. Article 1.5 of the Draft does not allow for distinctions based on the reason why the crime was committed. It does not adjust culpability for conduct according to the level of intentionality. It does not rely on other factors, particularly material elements, besides broadly defined motives. In terms of punishment, it does not permit any distinction based on these motives. Finally, for all these crimes there can only be one victim, namely the state, an approach which fundamentally departs from that underlying hate crime legislation.

14. In Article 1.5 of the Draft, the definition of “extremism” refers to any act committed by an individual, a group of individuals or an organization in pursuit of limitatively enumerated aims. Most of the aims enumerated in that Article can also be found in Article 5.3 of the Constitution of Kazakhstan, which pertains to public associations, political parties and religious groups. There are however differences, some of which

may be significant. These differences are addressed separately in the subsequent sections of the present Comments.

15. Broadly speaking and without prejudice to the comments made in paragraphs 11 through 13 as well as in Section 2.2, the goals enumerated in Article 1.5 of the Law do not raise concerns by themselves. As indicated above, it is actually their articulations to other factors and elements that are missing, which raise concerns. Most Constitutions across the OSCE region contain similar provisions and refer to similar concepts (public order, territorial integrity, national sovereignty, etc) and despite the differences in formulation they can not by themselves be considered problematic. What is much more important is the way the rights and freedoms which they aim at restricting are protected in practice by independent courts, and particularly by special constitutional courts. Having said that, there is still the need to examine the connection between these goals, the means by which they might be pursued and the potential offenders. The offence is made up of these three elements which have to be found cumulatively. A legitimate aim is not sufficient to justify an interference by a public authority with the exercise of human rights as enshrined in the Constitution.

2.2 “Extremism” and Restrictions to Human Rights

2.2.1 *General observations*

16. The purpose of the Draft is to fight “extremism”. Defining and penalizing “extremism” amount to determining to which extent and in which circumstances certain human rights, particularly the freedom of expression, the freedom of association and assembly and the freedom of religion and belief, may be restricted.
17. In other words, defining “extremism” is mostly about drawing distinctions between criminal and political activities or more specifically between generally criminal activities and other activities, which may be considered or perceived as political, but which, because of violence or other reprehensible means, are no longer justifiable and therefore may have to be criminalized.

18. Therefore, it seems clear that the Draft primarily deals with limitations to human rights. This is not an unusual approach. Many States have either passed specific legislation or a wide range of texts, which, taken together, delineate the scope of restrictions and limitation to human rights. The issue is often addressed in the Constitution. A similar approach is used with regard to laws on state of emergency which elaborate on the constitutional provisions. That such legislation is passed under the name ‘extremism’ does not fundamentally alter the legislative strategy and drafting techniques used by the legislator⁸. What is important is to look at the substantive and procedural issues involved in limitation clauses and how such clauses can be limited in law, be it national or international.
19. The review of limitation clauses under international human rights protection systems refers to a three-phase test to examine whether any interference by the State is in compliance with the requirements set out in these clauses. The requirements are the following: (1) the interference must be prescribed by law; (2) it must be necessary in a democratic society in order to achieve a number of listed objectives; (3) it must be proportionate to these objectives.
20. Regarding the first test, it is required that there is a basis in domestic law for the restriction, that the law is accessible and that it is foreseeable. It further requires that those affected by the law are clearly identified, that the circumstances in which the restriction is made are defined as precisely as possible and that there is also precision related to the procedures to be followed.
21. The second part of the limitation clause combines two elements: the necessity text (“necessary in a democratic society”) and the legitimate goals (public safety, public order, protection of health or morals, national security, territorial integrity, protection of the rights and freedoms of others). Those goals are to be found under limitations clauses for all fundamental freedoms in regional and international human rights instruments with only minor differences in the wording. There is only one significant

⁸ In the past most legislation addressing these matters used to be labeled “Law on State Security” or “Law on Repression of Violent Activities”. Kazakhstan has actually passed such legislation in the past.

difference common to all those instruments: “national security” does not appear under limitations clauses related to the freedom of religion and belief.

22. The necessity test can itself be sub-divided in three distinct elements: there has to be an existing pressing social need, there must be a reasonable relationship between the restriction and the pursued legitimate aim and there also has to be relevant and sufficient reasons to support the restriction.
23. The proportionality test refers to the requirement to assess how the restriction is proportionate to the legitimate aim pursued. There are multiples factors affecting the equation: the nature of the right in question and which area of the right is affected by the restriction, the legitimate aim involved, the severity of the restriction.
24. Obviously another requirement is that the procedures used to prosecute such crimes as defined in the proposed legislation offer law as all guarantees of due process, openness and a fair trial. It is not clear whether it is intended that only the proposed legislation would be guiding court procedures in relation to those crimes. If alternatively the intention is to make general rules of procedures before the courts applicable to procedures concerning those crimes, it should be stated clearly, either by a reference in the text of the proposed legislation to the applicable general rules of procedure or by some other clarifying legislation.
25. Article 1.5 of the Draft contains limitations to human rights that are modeled upon Article 5.3 of the Constitution⁹. It is worth noting that the latter article is seemingly narrower in its scope than Article 1.5 since it refers to ‘public associations’ only. The bill or rights inserted in the Constitution under Section II “the individuals and the citizens” contains an Article¹⁰ limiting the scope of restrictions to and derogations

⁹ “Formation and functioning of public associations pursuing the goals or actions directed toward a violent change of the constitutional system, violation of the integrity of the Republic, undermining the security of the state, inciting social, racial, national, religious, class and tribal enmity, as well as formation of unauthorized paramilitary units shall be prohibited” (Article 5.3 – Constitution of Kazakhstan, adopted by national referendum on 30 August 1995) [unofficial translation]

¹⁰ 1. Rights and freedoms of an individual and citizen may be limited only laws and only to the extent necessary for protection of the constitutional system, defense of the public order, human rights and freedoms, health and morality of the populations. 2. Any actions capable of upsetting interethnic concord shall be deemed unconstitutional. 3. Any form of restrictions to the rights and freedoms of the citizens on political grounds shall not be permitted. Rights and freedoms stipulated by articles 10-11; 11-15 paragraph 1 of article 16; article 17; article 19; article 22; paragraph 2 of article 26 of the Constitution

from human rights. This limitation is formulated in a manner consistent with the three-phase test described above. It also includes a paragraph referring to freedoms and rights that can not be derogated from. The list of rights included in that paragraph actually exceeds what is required under international law.

26. It is not clear how Article 5.3 and Article 39 of the Constitution interact and have an effect upon one another. The list of aims which may justify that a public association is banned under Article 5.3 includes more items than those referred to under Article 39 as legitimate grounds for restricting human rights in general. There seems to be a contradiction between both Articles.
27. Hereafter are examined the provisions of the Draft and Draft amendments pertaining to each fundamental freedom. Attention is also given to the connection and consistency between these provisions and the constitutional provisions.

2.2.2 Criminalization of Religious, Ethnic and Political Extremism

28. The Draft refers to three broad categories of “extremism”: religious, ethnic and political “extremisms”. All three categories are criminalized.

a) Religious extremism

29. In international human rights law the right to freedom of religion or belief is generally accorded higher priority than the freedom of expression and the freedom of association. This appears from article 4(2) of the International Covenant of Civil and Political Rights (hereafter ‘ICCPR’), which provides that States may make no derogation from the right to freedom of religion or belief, including in times of public emergency¹¹. This does not mean though that other State interests may never override freedom of religion or belief. But it does mean that even during times of public emergency, this fundamental right can be overridden only if this is warranted under the applicable limitations clause.

shall not be restricted in any event”. (Article 39 – Constitution of Kazakhstan, adopted by national referendum on 30 August 1995) [unofficial translation]

¹¹ Unlike Article 18 of the ICCPR, the freedom of religion and belief is not included in the European Convention of Human Rights (Article 9) among the rights that cannot be derogated from in times of war or public emergency. According to Article 15 of that Convention, this may be done only to “*the extent strictly required by the exigencies of the situation*”. The limitations prescribed by law have to be interpreted restrictively.

30. International human rights instruments and State constitutions typically identify the circumstances in which a State legitimately may limit the manifestation of the freedom of religion or belief. While the right to freedom of thought, conscience or religion within the *forum internum* is absolute and may not be subject to any limitations of any kind, manifestation of these rights may be limited, but only under strictly limited circumstances set forth in the limitation clauses.
31. Under these limitations clauses, the standard international analysis makes three basic inquiries:
- Is the limitation prescribed by law, meaning is it sufficiently clear as to give notice of what is and is not prohibited ?
 - Is the purported basis for the limitation identified in the limitation clause ? (note that “national security” is not a permissible limitation under both ICCPR and European Convention of Human Rights [hereafter ‘ECHR’])
 - Is the limitation proportionate to the public interest that is served ?
32. Laws must satisfy all three inquiries. Both the European Court of Human Rights and the UN Human Rights Committee, in its General Comment 22, state that limitation should be construed strictly.
33. The final draft of the Law no longer includes the reference to “*the establishment in the State of the supremacy of one religion*” proposed by the draft.¹² This is a welcome move since the reference to the “*establishment of the supremacy of one religion*” is not sufficiently clear and, if accepted, might have served as a legal basis for criminalization of proselytism and missionary activities.
34. The formulation proposed by the Senate is an improvement. However, it would be worth considering a formulation, which would put emphasis on the proscription of the dissemination of ideas of religious superiority, and of organized activity likely to incite persons to religious violence. More precision and certainty in the law would for instance be achieved if the Draft would specify the following four categories of misconduct:

¹² Draft Law, Article 1 para 5.

- (i) dissemination of ideas based upon religious superiority or hatred;
- (ii) incitement to racial hatred;
- (iii) acts of violence against any religion or group of persons of another religion; and
- (iv) incitement to such acts.

35. The prohibition of the dissemination of all ideas based upon religious superiority or hatred is compatible with the right to freedom of opinion and expression. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate ideas based on religious hatred is of particular importance. Furthermore, article 20 of the International Covenant on Civil and Political Rights states that “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*”

36. In light of the above, it is recommended that the legislator merge both phrases referring to religion and ethnicity in one single and broader phrase, which may also include other grounds such as race and nation (see also paragraph 41).

b. Ethnic Extremism

37. Article 1.5 of the draft Law makes reference to “*the incitement of racial, ethnic or clan discord, including violence or calls for violence*” as “extremist goals” penalized under the Law. This provision needs to be read in conjunction with Article 39.2 of the Constitution, which stipulates that “Any actions capable of upsetting interethnic concord shall be deemed unconstitutional”.

38. It is welcome that the draft Law no longer makes reference to the “*establishment of the supremacy of one ethnic group*” as this was not sufficiently clear. The same comments as those made in respect of religious extremism applied here. Emphasis should rather be on the proscription of the dissemination of ideas of racial or ethnic superiority, and of organized activity likely to incite persons to racial or ethnic violence. More precision and certainty in the law would for instance be achieved if the Draft would specify the following four categories of misconduct:

- (i) dissemination of ideas based upon racial or ethnic superiority or hatred;
- (ii) incitement to racial hatred;
- (iii) acts of violence against any religion or group of persons of another religion; and
- (iv) incitement to such acts.

39. The prohibition of the dissemination of all ideas based upon racial or ethnic superiority or hatred is compatible with the right to freedom of opinion and expression. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate ideas based on racial or ethnic hatred is of particular importance. Furthermore, article 20 of the International Covenant on Civil and Political Rights states that “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*” A similar line of thought is reflected in Article 39.2 of the Constitution of Kazakhstan.

c. Political Extremism

40. When it comes to essentially and typically political activities any legislation penalizing those activities which are not acceptable and justifiable in a democratic society has to be drafted with regard to human rights protection in this field. Freedom of association, freedom of opinion and other fundamental freedoms and human rights as enshrined in the Constitution of Kazakhstan and international documents, have to be respected.

41. As stated above, limitations and restriction upon these rights and freedoms under given circumstances and for special purposes are permissible. States enjoy a certain margin of appreciation in imposing restriction on qualified rights. Nevertheless, these restrictions and limitations shall be narrowly defined and interpreted in such a manner as to not harm other legitimate interests which are disproportionate to the objects to be achieved by the restrictions. The need for those restrictions shall be convincingly established.

42. If it is the case that any definition of ‘extremist activities’ would result in the restriction of non-violent political dialogue or protest with the aim of constitutional change, this would not be deemed necessary in a democratic society and would violate fundamental rights and freedoms as they are enshrined in the national Constitution.
43. The formulation of Article 1.5 draws upon Article 5.3 of the Constitution of Kazakhstan. Its scope is however broader than that of the constitutional clause since it refers not only to “public associations” but also to individuals and groups of individuals. Both provisions in the Draft and in the Constitution have to be read in conjunction to Article 39.1, which stipulates that “rights and freedoms [as laid down in Section II of the Constitution] may be limited only by laws and only to the extent necessary for protection of the constitutional order, defense of the public order, human rights and freedoms, health and morality of the population”.
44. As it currently stands the text refers to “any actions” with no further precision. It would add precision if it were supplemented by a reference to the threat or use of violence or serious violence (which may include serious damage to property) as a means to pursue the goals state in Article 1.4. Incitement to violence could also be included. These additions would make the adjective ‘violent’ before ‘change of the constitutional system’ unnecessary. The instance where ‘violent change of the constitutional system’ would be advocated by peaceful means could still be criminalized under ‘incitement to violence’.
45. It is important that the Draft be formulated with sufficient precision to enable persons likely to be affected by it to understand what is permitted and what is not permitted under the law. The current drafting creates the impression that political speech in general may well be prosecuted on any of the grounds listed therein. However legitimate these aims are they can only be formulated in general terms that do not allow persons who can be affected by the law to foresee with a reasonable degree of accuracy the consequences of their actions¹³. It is therefore crucial that the precision,

¹³ See case of Sunday Times v. United Kingdom, judgment of 26.04.1979.

which can not be achieved with regard to the goals, is regained by further characterizing the means used to pursue these goals.

46. From the Draft it is not entirely clear whether Article 1.5 does also apply to political parties. However there is a presumption drawn from Article 5 of the Constitution, which obviously refers to political parties and public associations indiscriminately, that Article 1.5 and the remainder of the Draft apply to political parties too. Clearly prohibition or dissolution of political parties is a particularly far-reaching measure, which should be used with utmost restraint. The Draft as it stands does not offer sufficient safeguards in this regard.

2.2.3 Criminalization of the Financing of Extremism

47. The provisions¹⁴ banning the financing of “extremism” are vague and therefore present a problem in terms of their enforcement.

48. First, the scope of “financing of extremism” is unclear. A parallel may be drawn here to the financing of terrorism. Relevant international standards adopt a very clear stance as to which activities fall within the scope of terrorist financing. Thus, the Financial Action Task Force (FATF) Special Recommendation II,¹⁵ sets as a standard the criminalization of terrorism, terrorist acts and terrorist organizations.

49. Second, the issue of intent becomes very relevant in regard of “extremist financing.” It is essential that law make the offense applicable only when committed willfully, to ensure compliance with the International Convention for the Suppression of the Financing of Terrorism.¹⁶ Moreover, considering a generally lesser degree of clarity

¹⁴ Draft Law of the Republic of Kazakhstan on Countering Extremism, Article 14.

¹⁵ FATF Secretariat, Special Recommendations on Terrorist Financing, [available at http://www.fatf-gafi.org/document/21/0,2340,en_32250379_32236947_34030933_1_1_1_1,00.html, last visited on 22 March 2005].

¹⁶ International Convention for the Suppression of the Financing of Terrorism, Article 2 (“Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and **wilfully**, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature

inherent in the very notion of “extremism” (see para 3 above for the discussion of this issue), it is recommended that the law apply an even higher standard with regard to “extremist financing,” i.e. make the applicability of the offense contingent on the knowledge of the alleged offender that the funds will be used for “extremist activities” or by an organization listed as “extremist.”

50. It is therefore recommended that the draft Law be amended to specify the scope of “extremist financing,” as well as to ensure that the offense only apply when committed willfully, and, ideally, with the knowledge of the alleged offender that the funds will be used for “extremist activities” or by “extremist organizations.”

2.3 Specific Implications on Fundamental Freedoms

2.3.1 Freedom of Religion and Belief

51. The Draft entitles the State agency for relations with religious organizations to “*study and analyze*” religious organizations, which exist on the territory of the Republic of Kazakhstan. A reference to any other legislative act is not stated (cp Article 6 (1) of the Draft)¹⁷.

52. This provision should be reconsidered. It is too vague. “*Study and analyze*” may include for example the following measures: examinations, informal questioning, observations, registration in databases or even arrest of members of religious organizations. This lack of clarity in wording is in particular not solved by the introductory statement of this provision according to which all State agencies act

or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” [Emphasis added.] Full text of the Convention is available at <http://www.un.org/law/cod/finterr.htm> [last visited on 22 March 2005.]

¹⁷ Article 6 Nr. 1 of the Draft: “*The State agency responsible for relations with religious organizations shall study and analyze the activities of religious organizations established on the territory of the Republic of Kazakhstan and of foreigners engaged in preaching and/or disseminating any religious teaching; shall implement information and propaganda measures concerning issues falling within its competence; shall examine matters concerning violations of the laws on freedom of religion and religious associations; and shall submit recommendations on the banning of the activities of religious organizations guilty of violating the laws of the Republic of Kazakhstan on countering extremism;*”

within the range of their competencies (cp Article 6 of the Draft)¹⁸. It remains unclear which legislative act defines these competencies. If these competencies are defined by another legislative act, this other legislative act shall be explicitly referred to in the Draft.

53. According to Article 6.1 of the Draft¹⁹, the State agency for relations with religious organizations “*shall submit recommendations on the banning of activities of religious organizations which violate the laws of the Republic of Kazakhstan on countering extremism*” (cp Article 6 (1) of the Draft).
54. This provision should be reconsidered. It is not clear to which State body this recommendation shall be submitted. It is also not clear what are the consequences of such a recommendation.
55. Local executive authorities are entitled to “*study*” the activities of religious organizations on their territory. In addition, they can establish a database with regard to these organizations (cp Article 6 (6) of the Draft)²⁰.
56. This provision should be reconsidered. As already mentioned above the term “*study*” is too vague and may include numerous measures. In addition precise reference to another legislative act is missing. Purpose and access of the database are also not defined.

2.3.2 The Freedom of Association

¹⁸ Article 6 of the Draft: “*State agencies implement within the range of their competence following preventive measures aimed at preventing extremism.*”

¹⁹ Article 6 Nr. 1 of the Draft: “*The State agency responsible for relations with religious organizations shall study and analyze the activities of religious organizations established on the territory of the Republic of Kazakhstan and of foreigners engaged in preaching and/or disseminating any religious teaching; shall implement information and propaganda measures concerning issues falling within its competence; shall examine matters concerning violations of the laws on freedom of religion and religious associations; and shall submit recommendations on the banning of the activities of religious organizations guilty of violating the laws of the Republic of Kazakhstan on countering extremism.*”

²⁰ Article 6 Nr. 6 of the Draft: “*The local executive authorities of the regions (cities of Republic-wide significance and the capital) and the local executive authorities of the districts (cities of regional significance) shall co-operate with public associations; shall study the activities of religious associations established on the territory of a region, city of Republic-wide significance, or district (city of regional significance) and of foreign citizens engaged in preaching and/or disseminating any religious teaching by means of educational activities of a religious nature; shall set up a database on these associations or persons; shall implement information and propaganda measures at the regional level regarding issues falling within their competence; and shall study and analyze the religious situation in the region.*”

57. Well-established international norms, including OSCE commitments, provide strong international protection for the right to establish legally recognized non governmental organizations or associations and the right of those organizations to operate with a minimum of limitations and restrictions. It has also been held that the freedom of association would be largely theoretical and illusory if it were limited to the founding of an association. Under all existing human rights treaties and conventions, the freedom of association can be restricted by State parties only in the interests of national security and public safety, for the prevention of disorder or crime, for the protection of public health or morals, of for the protection of the rights and freedoms of others. Any restrictions must be “prescribed by law”, and they must be “necessary in a democratic society” to achieve one of the four listed objectives (see below). In the European case-law, it is emphasized that exceptions must be “construed strictly”, that only “convincing and compelling” reasons can justify restrictions, that any restrictions must be “proportionate to the legitimate aim pursued”, and there must be “relevant and sufficient” evidence for “decisions based on an acceptable assessment of the relevant facts” before a restriction can be justified.
58. Against that backdrop it is clear that the involuntary termination or dissolution of a public association can only be a last resort measure and that intermediate sanctions for various types of violations ought to be given priority over any such radical measure. Furthermore, the notion of “extremism” as defined in the Draft law does not provide for the precision needed for courts to identity “convincing and compelling” reasons to justify a decision to terminate an association. Arbitrary measures can not be excluded. Furthermore, the use of the wording “promoting extremism” in Article 8.1 adds ambiguity to that of the notion of “extremism” itself. Provisions in the law affording every person the right to file complaints may actually help civil society exercise its watchdog function as well as help promote minority rights by giving voice to individuals and groups whose concerns are not likely to be raised by any other group – thus offering a solution in cases of “government-tolerated extremism.”
59. Finally, there is nothing in particular in Article 1 of the draft law which makes it unquestionable that the proposed texts may or not be applicable to political parties. If

this was the case, the concerns raised above with regard to public associations would be even more serious both from both the procedural and substantive perspective.

60. Article 8 of the Draft Law on Extremism states that association can be banned if “only one of its subdivisions (branches and representations) promotes extremism with knowledge of one of the leading bodies of the association”. Seemingly this provision does not explicitly make public associations responsible for the behavior of its individual members, but rather circumscribes such responsibility to the behavior of “branches and representations” as sub-divisions of the organization. However, this provision should still be narrowed down to include only instances where it is supported by evidence that these “sub-divisions” acted with, or could not have acted without, the support of the association in question or that such behavior was the result of the association’s programme or statute. Where these links are missing or cannot be established the responsibility should fall entirely on the “sub-division”.
61. The Draft does not include any reference to the requirement that a Court decision to ban an association be accompanied by a statement of reasons that can be appealed to a higher Court. Although this particular issue might well be explicitly or implicitly addressed in other Acts, including those amended by the second draft Law, a cross-reference to these Acts in that Article would add clarity to the text.
62. Concerning the matter of increasing the penalties to be inflicted upon associations as provided for in Article 2 of the Draft law on Amendment, the connection between the increased penalties and the fight against extremism is not apparent from the texts. It seems that the proposed amendment is disconnected from the “extremist goals” or activities referred to in the draft law on extremism and that non governmental organizations may be subject to increased penalties even if their activities have no “extremist” character whatsoever or do not pursue any “extremist” goals as defined in the draft law on extremism. For the sake of clarity and consistency if these two texts are to be considered part of an “extremism package” any amendments or new provisions proposed therein should address the issues of “extremism” exclusively.
63. The Draft and the Draft Amendment contain specific regulations with regard to foreign and international organizations. They can be banned if they promote

extremism. A relevant decision by the city court in Astana upon application by the public prosecutor is necessary (cp Article 8 (3) of the Draft)²¹. The evidence contained in such application can include “*factual data obtained from the competent agencies of foreign States, including the judicial rulings of international courts and courts of foreign States.*” (cf. Article 1 of the Draft Amendment)²².

64. This provision should be reconsidered. It can be misleading from a legal standpoint, since its wording suggests that a Kazakh court could declare a foreign or international organization as extremist exclusively on the basis of either evidence collected by foreign enforcement agencies or a foreign court decision. It is generally recognized that as a condition for recognition of a foreign court decision that decision must have

²¹ Article 8 (3) of the Draft: “3. *International or foreign organizations, which are active on the territory of the Republic of Kazakhstan and (or) other States, can be declared extremist by the court of the city of Astana upon application by organs of the prosecutor according to proceedings prescribed by the legislation of the Republic of Kazakhstan.*”

²² Article 1 of the Draft Amendment: “To the Code of Civil Procedure of the Republic of Kazakhstan of 13 July 1999 (Gazette of the Parliament of the Republic of Kazakhstan, 1999, No. 18, article 644; 2000, Nos. 3–4, article 66; No. 10, article 244; 2001, No. 8, article 52; Nos. 15–16, article 239; Nos. 21–22, article 281; No. 24, article 338; 2002, No. 17, article 155; 2003, No. 10, article 49; No. 14, article 109; No. 15, article 138; Law of the Republic of Kazakhstan of 10 March 2004 on Amendments and Additions to Several Legislative Acts of the Republic of Kazakhstan regarding Financial Leasing, published in the newspapers *Yegemen Kazakstan* of 16 March 2004 and *Kazakhstanskaya pravda* of 18 March 2004) add a chapter 36–2 and articles 317–6, 317–7 and 317–8 reading as follows:
Chapter 36–2. *Procedure following application to have a foreign or international organization engaged in carrying out extremist activities on the territory of other States declared to be an extremist organization*
Article 317–6. *Filing the application*
The application to have a foreign or international organization engaged in carrying out extremist activities on the territory of other States declared to be an extremist organization shall be filed by the offices of the public prosecutor to the court of the city of Astana.
Article 317–7. *Content of the application*
The application must set out the circumstances confirming the fact of the carrying out by a foreign or international organization on the territory of any State of activities that, were they to be carried out on the territory of the Republic of Kazakhstan, could be found to be extremist activities under the laws of the Republic of Kazakhstan.
The proof contained in the application filed by the offices of the public prosecutor to have a foreign or international organization declared to be an extremist organization may also include factual data obtained from the competent agencies of foreign States, including the judicial rulings of international courts and courts of foreign States.
Article 317–8. *Court ruling on the application*
The court ruling shall serve as the basis for the inclusion of information regarding a foreign or international organization engaged in carrying out extremist activities on the territory of other States in the special records-keeping system of the authorized agency with responsibility for legal statistics and special records-keeping.
The offices of the public prosecutor shall be exempt from the payment of court costs incurred in connection with the examination of the case to have a foreign or international organization engaged in carrying out extremist activities on the territory of other States found to be an extremist organization”.

been rendered in full observance of the fundamental principles of fair trial and due process of law. In general, this provision seems problematic: how Kazakhstani courts would be able to secure the reliability of the evidence collected from foreign sources? How about foreign cases involving acts that are not punishable under Kazakhstani law ? Would a foreign court decision be sufficient in itself or would the Kazakhstani court be require to look into the facts upon which basis a sentenced was handed down? This provision is problematic on several other accounts. Its potential implications on the freedom of association are far-reaching.

2.3.3 Freedom of Assembly

65. Organizers and other persons, responsible for holding mass events, must ensure that no extremist activities take place at this occasion. If they fail to comply with this obligation, the mass event will be terminated by the competent State agencies according to the laws of the Republic of Kazakhstan (cp Article 13 of the Draft)²³.
66. This provision should be reconsidered. It assigns core duties of law enforcement agencies -- the protection of public order -- to ordinary citizens²⁴. This is in particular concerning from a human rights perspective in a situation where a mass meeting is disturbed by demonstrators who directly oppose the political intentions of the organizers. According to the Draft, it is possible to deny the freedom of assembly to the organizers, even if they are themselves threatened by extremists. In addition in most cases organizers will simply not have the resources to prevent extremist activities.
67. The Draft prohibits involving “extremist organizations as participants” during mass events (Art. 13). How do we define the involvement of extremist organizations? Wouldn't this ultimately mean that individuals suspected of participation in an extremist group would be barred from attending an assembly which does not concern an extremist cause, and, moreover, the assembly organizers would be held liable for that? Also, what about an assembly that does not promote an extremist goal *per se* but is to a certain extent connected with an extremist cause, e.g. demonstration in support of release of an individual detained on extremist charges? Should it be banned?

²³ Article 13 of the Draft: *“Inadmissibility of extremism in connection with mass events*
Extremism shall not take place in connection with holding of mass events. Organizers of mass events shall be responsible for observing the requirements established by the laws of the Republic of Kazakhstan regarding the holding of mass events. Organizers of a mass event shall be warned in advance in writing of their responsibility in this regard by the local executive body in a city of Republic-wide significance, or in a capital or in a district (city of regional significance).

When holding mass events, it shall not be permitted to involve in them extremist organizations or to use their symbols or to disseminate extremist material.

If the circumstances which are stated in this article occur, organizers of the mass event or other persons responsible for holding the event shall be required to take measures without delay for the purpose of eliminating the violations in question. Failure to meet this obligation shall result in the termination of the mass event and in the holding of its organizers responsible on the grounds and in the manner provided for by the laws of the Republic of Kazakhstan.”

²⁴ Document of the Copenhagen meeting of the conference on the Human Dimension of the CSCE 29 June 1990 – Commitment Nr. 9 (2): *“The participating States reaffirm that everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards”.*

68. Furthermore, it is not clear from the Draft how the above mentioned provision interacts with the Decree of the President “On the procedure for organization and conducting of peaceful meetings, matchers, pickets and demonstrations in the Republic of Kazakhstan” (1995).

2.3.4. Freedom of the Media

69. Pursuant to the Draft, a competent State agency for affairs with regard to mass information “*conducts a monitoring*” of the products of the mass media with regard to extremism (cp Article 6 (2) of the Draft)²⁵. In addition, activities of an owner or distributor of mass media can be prohibited if they promote extremism. A court decision is required (cp Article 15 (1) of the Draft)²⁶.

70. This provision should be reconsidered. It is not clear what measures can be considered under “monitoring” and what consequences such monitoring may have. There is also no mention of the legal ground upon which a court decision on prohibition of extremist activities can be obtained. In addition, it seems that the prohibition must not be limited to activities in the field of mass media, but can be extended to other areas completely unrelated to mass media. In addition, it is not required that either owner or distributor of mass media act intentionally. In general, a criminal offence and a related court decision should be precondition for limitations on mass media – if these measures are necessary at all, which is not evidenced in the Draft.

2.3.5. Freedom of Information

71. According to the Draft, “*Communication networks and systems*” can be shut down or prohibited if they are used for promoting extremism (cp Article 12 of the Draft)²⁷.

²⁵ Article 6 Nr. 2 of the Draft: “... *the competent State agency for affairs with regard to mass media conducts a monitoring of products of mass media on the subject of the inadmissibility of propaganda and justification of extremism, on the respect for the legislation of the Republic of Kazakhstan, guarantees the coverage of questions on strengthening inter-ethnic and inter-religious understanding in mass media, which fulfill State requests; ...*”

²⁶ Article 15 (1) of the Draft: “...
Activities of owners or of disseminators of mass media shall be shut down or prohibited by the court in the event that they are guilty of carrying out extremism through the use of mass media. ...”

²⁷ Article 12 of the Draft: “*Prevention of the use of communication networks and systems for carrying out extremism, publishing and disseminating extremist material*

On the territory of the Republic of Kazakhstan it shall be prohibited to use communication networks and systems for carrying out extremism and for publishing and disseminating extremist material.

Following an application by the public prosecutor, a court decides whether or not the disseminated information has extremist content. If the information is related to religious extremism, the court must also engage an external expert who analyzes the disseminated information. If the court declares this information as extremist, the competent State agency shuts down or prohibits the respective communication network or system.

72. This provision should be refined. “*Communication networks and systems*” are not defined. In this regard, other legal acts may need to be referred to. If so, a reference should be inserted in the text of the Draft. The above-mentioned provision does not require that the Internet service provider (ISP) act knowingly or intentionally. This means that an ISP can be held liable for content on the Internet transmitted or posted by a third party without the ISP’s knowledge. There is a high degree of risk that this would lead to disproportional measures. The recommended approach would be not to impose liability on ISPs at all when their function, as defined in the national legislation, is limited to transmitting information or providing access to the Internet, or, in cases where the functions of ISPs are wider and they store content emanating from other parties (e.g. by providing website hosting services), to hold ISPs liable if they do not act expeditiously to remove prohibited content as soon as they become aware of it having been posted.

73. In addition, it is not clear why a court decision should only identify extremist material. A court decision should rather be required in order to shut down or prohibit networks and systems. It is also not clear why external expertise must be considered only with regard to religious extremism.

2.3 Comments on the Legislative Approach

If communication networks and systems are being used to carry out extremism harmful to the interests of the individual, the society and to the State, the State agencies shall, in accordance with the laws of the Republic of Kazakhstan, shut down the activities of any communication networks and systems and to prohibit their use.

The detection of the presence in information material of signs of extremism shall be the responsibility of the court at the place where the organization engaged in the publication of such material is located, acting on the basis of an application from the public prosecutor. In order that the court may determine that the information material contains signs of religious extremism, there must be a finding to that effect by a forensic expert.”

a. General Comment

74. In the absence of explanatory notes, it is not possible to assess the rationale behind the draft and the legal technicalities that might have been at issue when the proposed legislation was first considered. One may note though that for many reasons, states do not always find that the ‘ordinary’ criminal law and procedure, with their delicate balances between preserving public order and respecting the rights of individuals, allows effective responses to the threat of “extremism”. Modifications of the law, including special laws, have been enacted²⁸. These laws inevitably interfere with the human rights of individuals. It is for the state to justify these interferences within the scope of its human rights obligations. Special laws have also been justified on the ground that individual laws currently containing ‘anti-extremist’ provisions “are not coordinated with one another, are in part obsolete, have in part not stood up in practice, and offer extremist organizations rather broad opportunities to evade liability”²⁹.

75. However, one may question whether such coordination or consolidation be better achieved through legislation centered around a concept (“extremism”), which is *prima facie* alien to the legal system and culture of Kazakhstan. This may ultimately undermine the workability of such legislation. Considering also the little added value of the draft laws over some constitutional provisions, it may be worth considering another strategy such as a national action plan or a more comprehensive or inclusive legislative reform, which would include preventive and educational measures.

b. Specific Comments

76. There is an understanding that both Draft laws are tied up to one another, meaning that they may not be adopted separately since they complement one another. However, there seems to be a number of amendments proposed in the Draft Amendment, which has no direct relevance to the Draft. This holds particular truth with regard to the increased penalties to be imposed on public associations as a result

²⁸ To the knowledge of the OSCE ODIHR, three OSCE countries have so far adopted specific laws against extremism: Moldova, Russian Federation and Tajikistan.

²⁹ Excerpts from Explanatory Notes to the Russian Anti-Extremism Legislation [unofficial English translation] (Federal Law No 114 F3 on Counteractive Measures against Extremist Activities (July 2002) – text available in Russian at: <http://www.legislationline.org/view.php?document=60966>).

of some proposed amendments to existing legislation. For the sake of clarity and coherence, it is recommended that only those amendments necessitated by the Draft be considered while those that have no connection with the offences established in the Draft be considered through a separate draft.

77. Alternatively, all counteractive measures on extremism could be integrated to the existing legislation – such as, for example, the Code of Civil Procedure, Criminal Code, Code on Administrative Violations etc. The Draft Amendment already follows this concept by proposing several amendments to existing Kazakh laws.
78. This legislative approach - adoption of a specific Anti-Extremism Law - also leads to numerous references to the existing legislation (cp Article 6, 7, 8, 10, 13, 14, 15 of the Draft). These references must be precise. Otherwise, it can not be excluded that provisions containing important procedural safeguards or preconditions are not taken into consideration whenever the Anti-Extremism Law is applied.

END OF THE TEXT