



Update of Analysis of Proposed Amendments to the Republic of Kazakhstan's Law on Freedom of Religion and Religious Associations

Prepared by the
Advisory Panel of Experts on Freedom of Religion and Belief
of the OSCE /ODIHR
16 January 2002

In March of 2001, the OSCE, through its Office for Democratic Institutions and Human Rights, requested the Advisory Panel of Experts on Freedom of Religion and Belief to offer an advisory opinion on proposed amendments to the Republic of Kazakhstan's 1992 law "On Freedom of Religion and Religious Associations" (the "1992 Religion Law"). Based in part on these recommendations, the proposed amendments have been revised. Advice from the Advisory Panel has again been sought, and has given rise to this interim "Update."

Executive Summary

While the currently proposed amendments to Kazakhstan's 1992 Religion Law mark a substantial advance over prior drafts, for example in its tighter definition of "religious extremism" and its "recordkeeping registration" approach to dealing with foreign missionaries, many problems remain. Many of these seem to flow from the Prime Minister's expressed aim in recommending the legislation: to achieve stricter control of non-traditional religions. This inherently discriminatory approach leads all too naturally to a series of provisions that violate international human rights standards, Kazakhstan's OSCE commitments, and its own constitution. In the

aftermath of September 11, and the international response that has followed, it is important to find ways to deal with terror and religiously-motivated violence, but it is important to find ways to do so while maintaining protection of human rights standards. Without addressing all the problems in the draft, this Update Analysis notes the following salient issues:

1. The new amendments, by substituting the notion of “freedom of conscience” for “freedom of religion,” may have narrowed protection of religious freedom. Use of the internationally recognized terminology, “freedom of religion or belief,” would be preferred.
2. While much improved, the definition of “religious extremism” in Article 1-1 and application of this notion in Article 4 still suffers from the inherent vagueness of the term, opening up possibilities for bureaucratic violations of human rights.
3. Foreign missionary provisions, also much improved, may still be too restrictive.
4. Provisions dealing with minors need refinement. Fear of coercion and manipulation of minors may be resulting in Article 5(3) in the imposition of unrealistic burdens on legitimate groups as they attempt to deal with the sometimes competing interests of parents and children in religious matters.
5. The requirement that all Muslim groups be cleared by the Kazakhstan Moslem Spiritual Administration risks violation of freedom of religion by failing to take into account the pluralism within the Muslim tradition and by failing to protect the religious freedom of distinctive Muslim voices.
6. Similar requirements that other religious groups, particularly those with foreign ties, organize at the Republic level violate the autonomy rights of such organizations, particularly those whose theology calls for organization at the congregational level.
7. The proposed requirement of 50 members for registration is excessive, and will result in the violation of freedom of religion and freedom of association when smaller religious communities are involved.
8. Provisions that permit dissolution merely because some members of a religious community may have committed repeated violations of the law are problematic. They can result in disruption of religious life of an entire community merely because of a small number of wrongdoers. They also permit disproportionate or discriminatory responses by state officials.
9. Violations of Religious Freedom associated with Article 375 of Kazakhstan’s Administrative Code ought to be rectified at the same time revisions to the 1992 Religion Law are made.

Other problems could be raised, but the foregoing suggest the need for caution in rushing toward adoption of the currently proposed amendments. Additional analysis and refinement is necessary in this sensitive area. The OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief would welcome the opportunity to provide technical assistance as consideration of the proposed amendments moves forward.

Analysis

Briefly stated, it is clear that several of the most troubling provisions have been revised and significantly improved in the latest version of the proposed amendments. For example, the vague provision defining “reactionary fundamentalism” has been replaced with a provision that defines religious extremism. This definition tracks the Constitution of the Republic of Kazakhstan (Article 5(3)) and focuses more on potentially violent conduct than on mere belief. Similarly, the provisions that previously allowed missionary activity only “with permission of the authorized public body” have been replaced by a provision that **applies only to foreign citizens and persons without citizenship** and allows **their** missionary activity “after record-keeping registration in the authorized governmental agency.” The notion appears to be that missionaries merely need to register in the sense of notifying the government of their presence in the country. This is a significant step forward. The only uncertainty on this point is that the revised amendments indicate that the procedure for this “record-keeping registration . . . shall be stipulated by the government of Kazakhstan,” and it is of course not yet clear what problems might be involved with the more detailed implementing regulations. Many other improvements could be noted.

At the same time, the proposed amendments and the apparent urgency with which they are being pressed raise strong concerns. The Prime Minister’s cover letter accompanying the new set of proposed amendments indicates that a major purpose is to strengthen state control functions with respect to non-traditional religions. The apparent unequal treatment of traditional and non-traditional religions is itself a matter of concern. As the U.N. Human Rights Committee has noted in its official General Comment No. 22(48) on Article 18 (the religion article) of the International Covenant on Civil and Political Rights (the “ICCPR”),

Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.

As stated in the analysis submitted by the OSCE/ODIHR Advisory Panel in March,

The panel understands that the Republic of Kazakhstan has a number of legitimate concerns about terrorism and other illegal activities that may be committed by groups that operate under the guise of religious associations.

Such concerns have obviously been underscored by the events of September 11, and the subsequent efforts to address challenges. These events and the subsequent reaction, however, have not supplanted the ongoing concern for human rights, and in particular, freedom of religion and belief. The following comments made in March remain a vital concern:

Although the Panel does not question the legitimacy of states taking reasonable actions to curb dangerous activities by religious groups, it is the Panel's belief that the draft amendments to the 1992 religion law . . . [are aimed not at] *illegal activities*—which could properly be curbed under Kazakhstan's OSCE commitments and under international law—but *instead the draft amendments impermissibly target groups that are identified on the basis of their beliefs*. If adopted as currently drafted, the amendments will place significant burdens on individuals and groups who are not responsible for any illegal activities, thereby causing Kazakhstan to violate its OSCE commitments and to fall far short of compliance with international human rights standards.

Having reviewed the various revisions that have been proposed, and while recognizing and welcoming the significant progress that has been made, the Panel continues to have many of the same concerns with the current draft amendments as it had with the amendments it analyzed earlier this year. Many of the problems noted in the earlier analysis remain, either in whole or in part. This Update Analysis, without mentioning all remaining problems, emphasizes major residual concerns.

Major Continuing Concerns.

1. The Amendments Narrow Protections by Focusing on Conscience Alone. The Amendments propose substituting the term “freedom of conscience” for “freedom of religion” in Article 1. The drafters may have thought this was a change without a difference, or that because conscience covers both religion and belief, they were actually broadening protections. The difficulty, as suggested by the definition of “freedom of conscience” added in Article 1-1, is that freedom of conscience is “freedom to have or not to have theistic, non-theistic or atheistic beliefs.” The difficulty is that conscience is sometimes understood as a primarily “internal” matter, not extending to external “manifestation” of belief in action. It is true that Article 22 of the Kazakh Constitution uses the term freedom of conscience rather than freedom of religion or belief. But the fact that the Constitution uses an arguably narrower term does not preclude implementing legislation from providing broader protection, or from concluding that the term “conscience” should be construed broadly to include the entire range of freedom of religion or belief. Moreover, it should be remembered that Article 8 of the Kazakh Constitution requires that “The Republic of Kazakhstan shall respect principles and norms of international law,” and it has now become standard to guarantee protection of “freedom of religion or belief,” which includes both the inner demands of conscience and the outer manifestations of belief that conscience requires. We would recommend use of the now standard international term, “freedom of religion or belief” in the first sentence of Article 1. Manifestations of this freedom can be restricted only by limitations that are “prescribed by law” and are strictly “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR, Article 18(3).

2. Article 4's Prohibition of “Extremist” Religious Associations Permits Excessive Intervention in Legitimate Religious Activity. The major difficulty with

outlawing “extremist religious associations” is that the terminology is inherently vague and risks abuse by enforcement officials. The definition of religious extremism in Article 1-1 is an improvement over earlier versions in that it appears to put the emphasis on action rather than belief. Thus, it limits the term to “views *and* actions” (i.e., thoughts alone are not enough) that are directed to actual harms that threaten *violent* change of the constitution, actual *undermining* of state security, *inciting* social, racial, religious and tribal enmity, and actual harms to individuals. The point is that the emphasis is on actual and imminent wrongful actions—not just on the group’s beliefs. If construed in this way, the revision of part one of Article 4 is defensible. On the other hand, to the extent the inherent vagueness of the notion provides officials with excessive discretion to harass legitimate groups that do not threaten violent action, it could be problematic. The proposed revision of part 3 of Article 4 for the most part tracks the definition of Article 1-1, and thus has the same strengths and weaknesses as part 1. One phrase is particularly problematic: “using inter-confessional differences for political goals.” There may be a translation difficulty here, but it appears that this could constitute a violation of the draft law even if imminent action threatening the constitutional order or other significant concrete harms is not involved. It is important to remember that religious groups have freedom of speech just as political groups do. This right is reinforced by freedom of religion. Political activity by religious groups is permissible so long as such activity does not threaten imminent harm to the constitutional order. The legitimate need to deal with groups which seriously threaten constitutional order, national security, public order, or public health or morals can be reconciled with protection of religious freedom.

3. Foreign Missionary Provisions are Much Improved but May Still Be Too Restrictive. As noted earlier, the revised provisions of Article 4-1 dealing with missionary activity mark a substantial improvement over earlier proposals, in that they require only “record-keeping registration” as opposed to the presumably more burdensome requirement of “accreditation.” In light of the provisions of Article 12 of the Kazakh Constitution, which proclaims that “Human rights and freedoms shall belong to everyone by virtue of birth, be recognized as absolute andinalienable, and define the contents and implementation of laws and other regulatory legal acts,” and that “Foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for the citizens unless otherwise stipulated by the Constitution, laws and international treaties,” it is not clear why foreigners should be subject to burdens that are not imposed on normal citizens engaging in peaceful missionary work. Efforts to engage in religious persuasion are protected not only by freedom of religion norms, but also by freedom of speech and association. This is not to say that the state cannot impose sanctions on an individual missionary who is actively inciting violence along the lines specified in the definition of religious extremism, but the entire class of foreign missionaries should not be subjected to sanctions because a few members of the class engage in conduct which extends beyond the permissible limits of religious freedom that are set forth in international instruments. A simple requirement, however, that missionaries must give notice to the state of their activities and location, does not seem unreasonable so long as this requirement is not used in obstructive ways.

4. Provisions Dealing with Minors Need Refinement. The revision to Article 5(3) provides that “It is not allowed to draw people under age into religious associations and give them religious education against their will, against the will of their parents or guardians.” A first problem is that the first half of this sentence could be read to ban taking or attracting minors to religious organizations altogether. In situations where parents want their child to attend religious services with the family, but the child objects, this provision might interfere with the rights of parents to raise their children in accordance with their religious beliefs. On the other hand, where a child—particularly a mature minor—seeks to learn about alternative religious outlooks, but the parents object, imposing liability could violate the rights of the child as spelled out in Article 14 of the Convention on the Rights of the Child. It must also be remembered that a religious group should not be subjected to sanctions where a child seeks to participate in its activities and the group is not aware of objections from parents or guardians. Of course, subject to these considerations, care should be taken to avoid subjecting anyone to compulsion in matters of religion. *See* Article 18(2) of the International Covenant on Civil and Political Rights.

5. Treatment of Muslims. Problems still remain with respect to registration of Islamic religious associations. Under the amendments as currently proposed, “Registration of Islamic Religious Associations shall be performed if it is recommended by the Kazakhstan Moslem Spiritual Administration.” Further, “Construction and opening up of Moslem Cultic Buildings and Facilities shall be effected with approval of the Kazakhstan Moslem Spiritual Administration.” The obvious difficulty is that there may be some legitimate Moslem groups who are out of favor with the Kazakhstan Moslem Spiritual Administration. It is well known that there are many subdivisions within Islam, and it is clear that the right to freedom of religion or belief protects the right to adhere to such different divisions of a major world religion. Just as it would be inappropriate to delegate state judicial power to one of the parties to a civil dispute, so it is inappropriate to delegate state approval processes with respect to the establishment of religious communities and approval of places of worship to representatives of one orientation (or a group of related orientations). As the European Court of Human Rights has recently recognized in separate cases from Greece and Bulgaria involving state efforts in those countries to favor appointment of a government preferred Mufti over one chosen by a particular Islamic community in the respective countries,

the Court does not consider that, in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership. . . . It is true that the Government argued that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among [various Muslim and other religious groups] Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that *this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other* *Serif v. Greece*, paras. 52-53, App. No.

38178/97 (Eur. Ct. H.R. 14 Dec. 1999)(emphasis added); *see also Hasan and Chaus v. Bulgaria*, App. 30985/96 (Eur. Ct. H.R. 26 Oct. 2000).

Of course, Kazakhstan is not bound by decisions of the European Court of Human Rights, but the principles articulated are sound expressions of general human rights principles of equality and impartiality in administering state authority.

6. The Requirement that Foreign Religious Groups Operate Through Republic-Level Organizations May Violate Religious Autonomy Rights. The proposed amendment to Article 7 indicates that

activities of foreign religious associations on the territory of the Republic of Kazakhstan as well as the appointment of heads of religious associations by foreign religious centers in the Republic must be carried out through a single republican religious center for each confession, in coordination with appropriate state Agencies. The procedure of this coordination will be determined by the government.

This provision violates fundamental canons of the right of religious organizations to autonomy in their internal affairs that are protected by Principle 16(d) of the OSCE's Vienna Concluding Document. Religious groups must be free "to organize themselves according to their own hierarchical and institutional structure" and to "select, appoint and replace their personnel in accordance with their respective requirements and standards" Principle 16(d) (2)-(3). It is important to remember that as a matter of religious belief, many religious traditions believe in organizing at the congregational level, rather than on a hierarchical and national basis. Requiring groups to organize differently (e.g., at the Republic level) violates their religious freedom in fundamental ways. The OSCE commitments clearly proscribe state intervention (or rights of consent) in such matters.

7. The 50-Member Requirement Results in Unnecessary Violations of Freedom of Religion or Belief. The complexity of registration is increased by requiring at least 50 founding adult citizens (up from 10 in the 1992 religion law). Since Kazakhstan (like many of its neighbors) has only required 10 founding members for years, it is hard to demonstrate that the heightened membership requirement is really necessary. Yet under international standards, a constraint on religious activity is permitted only if it is strictly necessary to further legitimate state objectives in a small number of enumerated categories. (*See, e.g.*, Article 18(3) of the International Covenant on Civil and Political Rights.) It is important to remember that many religious organizations are structured on a congregational basis and may worship in small religious communities that do not have 50 or even 20 adults. Yet these groups have a right under international norms of freedom of religion or belief and freedom of association, as well as under OSCE commitments, to acquire legal entity status. Failure to grant such status when requested clearly impairs the ability of religious groups to acquire or lease places of worship, to obtain bank accounts, to hire employees, and in general to carry out their legitimate religious affairs. Significantly, increasing the minimum membership requirement is likely to be counterproductive from the standpoint of addressing problems issues of public safety and order.

Increasing the minimum membership threshold means that those monitoring such registrations will know less rather than more about smaller religious groups (since fewer groups will be able to register). Moreover, the burdens of this requirement will be felt primarily by legitimate law-abiding groups. Socially dangerous groups will simply go underground.

8. The Amendments Would Allow Dissolution of Religious Organizations on Grounds that Would Violate the Rights of Innocent Parties to Freedom of Religion and Equal Treatment. Article 11(3) of the proposed amendments allows dissolution and prohibiting the activities of religious associations if its members are guilty of repeated violations of Kazakh laws that involve criminal or administrative responsibility. There are at least two major objections to this law. First, virtually every religion, whether traditional or new, large or small, has members who have violated some laws. If a religion can be dissolved on the basis of repeated acts of a few of its members, virtually any religion would be eligible for dissolution, and if the dissolution is carried out, the rights of all the members who are law-abiding citizens and who wish to continue availing themselves of the legal entity in question to facilitate their worship and satisfaction of other religious needs would be violated. Second, as phrased, repetition of fairly minor infractions would be sufficient to authorize dissolution of a religious group. Dissolution under such circumstances would be grossly disproportionate. In addition, since such sanctions would in all likelihood be invoked only against smaller and unpopular groups (though virtually every religious community has members who are guilty of repeated minor infractions), dissolution of the smaller groups would be discriminatory.

9. Violations of Religious Freedom Associated with Article 375 of Kazakhstan's Administrative Code. Kazakhstan adopted a new administrative code on January 30, 2001. Article 375 of this Code provides:

Avoidance of leaders of religious associations from registration in governmental administrative agencies, performance by religious association of activity contradicting its goals and objectives stipulated by its respective charter (regulations), participation in activity of political parties and provision of financial support to them [i.e., to political parties], violation of rules for conducting of religious actions away from the place of religious association's location, organization and conducting by religious ministers and religious associations' members of special childhood and youthful meetings and groups not related to manifestation of religion, forcing of citizens to observance of religious ceremonies or to participation in other religious activity . . . [shall be sanctioned].

The Administrative Code is not formally being revised as part of the proposed amendments being analyzed here. However, Article 375 poses several matters of concern that could be appropriately rectified as part of the currently proposed amendments. For example, only the narrowest conception of religion assumes that religious activities are carried out only at "the place of a religious association's location." Charitable activities, missionary activities, care for the sick, visits to prisons, special meetings of members drawn from wider areas, and countless other

legitimate activities occur “offsite.” Subjecting such conduct to punishment clearly violates freedom of religion or belief. Similarly, many religious organizations organize a wide variety of activities for their children and youth. These include athletic activities, camps, retreats, cultural events, special educational opportunities, tours, and so forth. Such beneficial activities should not be subjected to administrative or criminal sanctions. Doing so violates freedom of religion or belief. This provision has caused numerous unfortunate incidents that have been widely reported internationally. It ought to be revised.

Conclusion

Again, we want to emphasize that many significant improvements have been incorporated in the current proposal. But problems remain. In this regard, it should be emphasized that this interim Update Analysis is not intended to be a detailed and comprehensive review, at least in part because it is hoped that further progress on the draft amendments will be made before such a comprehensive review would again be appropriate. There are a variety of additional problems not mentioned here, of both substantive and technical kinds, that could be resolved if additional time were spent in improving the current draft.

The Panel accordingly urges the Government of Kazakhstan to undertake further revisions and improvements of the proposed amendments before they are acted upon by the Parliament. Such action is necessary in order for Kazakhstan to comply with its OSCE commitments. The Panel would welcome the opportunity to provide technical assistance in this process if that is deemed helpful.

Respectfully submitted,

Prof. W. Cole Durham, Jr.
Co-Chair,
OSCE/ODIHR Advisory Panel of Experts on
Freedom of Religion or Belief

**Organization for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights**

**Al.Ujazdowskie 19,
00-557 Warsaw, Poland
Tel.: +48-22-520 06 00,
Fax: +48-22-520 06 05,
<http://www.osce.org/odihr>**