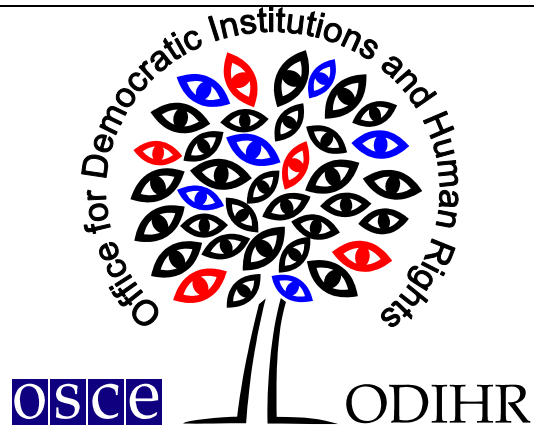


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**COMMENTS**  
**ON THE DRAFT LAW OF THE REPUBLIC OF**  
**KAZAKHSTAN ON BENEFACTION AND CHARITABLE**  
**ACTIVITY**

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## **1. INTRODUCTION**

1. *On April 5, 2006, the OSCE/ODIHR was requested by the OSCE Center in Almaty to review the draft Law of the Republic of Kazakhstan on Benefaction and Charitable Activity.*
2. *These Comments have been prepared on the basis of the Russian translation of the draft Law.*

## **2. SCOPE OF REVIEW**

3. These Comments analyze the draft Law of the Republic of Kazakhstan on Benefaction and Charitable Activity (hereinafter referred to as the “draft Law”) from the viewpoint of its compatibility with the relevant international human rights standards, including the OSCE human dimension commitments. The Comments also examine the draft Law in the light of international best practices with regard to non-profit organizations, philanthropy and volunteerism. The international standards referred to by the Comments may not only be those legally binding upon the Republic of Kazakhstan, but may also include international instruments not binding upon Kazakhstan as well as documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties. The comments may also refer to good practices from other OSCE participating States.
4. These Comments do not purport to provide a comprehensive review.
5. The OSCE/ODIHR would like to mention that the opinion provided herein is without prejudice to any further opinions or recommendations that the ODIHR may wish to make on the issue under consideration.

## **3. EXECUTIVE SUMMARY**

6. The analysis of the draft as a whole shows that there may not be sufficient justification for having a separate law on charities (or at least the legislative intent needs to be clearer

defined). If passed, the law may prove to be redundant and even conflict with the extant Kazakhstani legislative framework, which already encompasses a number of acts specifically related to the regulation of freedom of association and NGOs in particular.

7. Furthermore, the definitions – including the key definition of “charitable activities” – are vague and incomplete and may result in arbitrary and abusive application of the Law, if passed.
8. At the same time, it is welcome that an attempt is made to regulate the issues involved in volunteer work. However, the purposes pursued by the draft Law would need to be explicitly and clearly stated in the text of the law. It may be worth considering that the component of the draft Law concerning volunteerism be further developed and strengthened, in particular as it concerns safeguards against the exploitation of volunteer labor. An option of enacting a separate Law on Volunteerism may be considered.
9. A full list of recommendations follows below.
  - a) It is recommended that the draft Law be revised to incorporate an intent clause expressly stating the general purpose of the law. It is also recommended that the issue of expediency of having a specific law on charities be revisited and a comprehensive assessment of the impact of the draft be carried out. If it is found that there is indeed need to pass legislation on charities specifically, it is recommended that its future implementation be carefully considered (including drafting a package of amendments to relevant legislation and of supporting regulations). In general, it is essential to bear in mind that “charities” and “charitable activity” are notions which are by no means congruent with the notion of NGOs and freedom of association, but rather present a convenient categorization of NGOs for a limited range of purposes, first and foremost taxation (“charities” thus often – although not necessarily -- coinciding with the category of tax-exempt organizations). [see paras 11 and 13]

- b) It is recommended that the draft Law be revised to include express reference to charitable purposes and means in the definition of “charitable activity.” Deletion of the words “*other support*” from the mentioned definition may be considered. It is recommended that the draft expressly provide for a catalog of prohibited activities, including a prohibition on partisan political activity by charities. It is also recommended that the promotion and protection of human rights be added to the list of charitable purposes. [see para 26]
- c) It is recommended that Articles 9 and 11, which set forth the procedures for charity registration and for dissolution/termination of operations, respectively, as well as Article 19, which concerns the government monitoring and control of charitable activities, be either removed from the draft altogether or replaced by a mere reference to the relevant provisions concerning registration, dissolution and monitoring of activity of non-profit organizations in general. [see para 28]
- d) It is recommended that Article 6(2) be revised to enable charities to engage in ancillary or incidental activities. Reference may be made to the specific provisions further in the draft which set the disbursement quotas. [see para 31]
- e) It is recommended that the definition of the volunteer be reviewed to provide for free will as its necessary element. [see para 34]
- f) The draft provision allowing the non-profit to reimburse legitimate expenses incurred from the voluntary activity may be further improved by extending to volunteers additional protections such as accident and health insurance. Reimbursement for the expenses arising from voluntary activity may be made mandatory rather than optional. [see para 35]

- g) The draft in question needs to provide for additional safeguards against exploitation. It is particularly recommended that the draft include an express prohibition against employing volunteers in positions formerly held by paid staff of the organization. It is also advisable that an agreement be drawn up between the volunteer and the employing non-profit specifying the nature of the work performed and the number of hours committed. [see para 37]
- h) The option of regulating volunteerism through a separate law may be considered by the legislator. [see para 38]

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### ***4.1 General observations. Intent.***

10. The draft Law lacks a definitive intent clause and its general purpose is not clear. In the absence of such intent clause, there does not seem to exist a sufficient justification for having a separate law on charities as opposed to legislation regulating non-profit organizations in general, and if this is the case, there is a risk that the draft, if passed, would prove redundant. However, should the drafter have any compelling reasons for preparing and enacting a separate law on the regulation of charitable activity, these reasons should be stated clearly in the intent clause of the draft.
11. In general, it is essential to bear in mind that “charities” and “charitable activity” are notions which are by no means congruent with the notion of NGOs and freedom of association, but rather present a convenient categorization of NGOs for a limited range of purposes, first and foremost taxation (“charities” thus often – although not necessarily -- coinciding with the category of tax-exempt organizations). The international experience shows that the countries that have chosen to introduce a legal definition of “charitable” (and which include Canada, the United Kingdom, and the United States) have largely done so for taxation purposes (to introduce better criteria for tax exemption). Should, however, the Kazakhstani legislator wish to follow this approach, a package of

amendments to the tax legislation and supporting regulations would need to be drafted to make the law enforceable.

12. As regards the legislative intent, it should be borne in mind that effectiveness in legislation – which is commonly understood as compliance of implementation with the legislative intent – is a key criterion of quality in lawmaking. Lack of clarity about the legislative intent thus minimizes the impact of the norm in question by reducing its chances for implementation. In practical terms, this means that once a particular problem that needs to be addressed has been identified by the legislator, and before the appropriate policy instrument – such as a decision to draft and pass a law – is eventually selected and approved, it is of paramount importance that there be a comprehensive prospective assessment of the impact of the intended instrument, including a cost-and-benefit analysis. While there are no international standards on this issue, the international experience shows that informed policymaking has generally allowed both to prevent spending time and resources to pass legislation that is not needed and to improve the enforceability and effectiveness of the resulting legislation.
13. It is recommended that the draft Law be revised to incorporate an intent clause expressly stating the general purpose of the law. It is also recommended that the issue of expediency of having a specific law on charities be revisited and a comprehensive assessment of the impact of the draft be carried out. If it is found that there is indeed need to pass legislation on charities specifically, it is recommended that its future implementation be carefully considered and suitable implementation mechanisms devised (including drafting a package of amendments to relevant legislation and of supporting regulations).

***4.2 Definition of “charitable activity.” Charitable purposes and charitable means.***

14. The draft Law defines “charitable activity” as “*transfer of property, provision of works or services or other support by citizens or legal entities to other citizens or legal entities, which is voluntary or gratuitous or on preferential terms.*”<sup>1</sup>

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<sup>1</sup> Draft Law on Benefaction and Charitable Activity, Article 1.

15. Central elements of charitable activity – i.e. the charitable purpose and the charitable means – that are defined in further provisions<sup>2</sup> of the draft are not included in the definition clause.<sup>3</sup> It would be necessary to have these elements expressly mentioned in this Article so as to ensure adequate clarity and consistency.
16. Second, the words “other support” in the definition clause are vague and yield uncertainty as to the exact scope of the definition. This vagueness becomes even more critical if considered in conjunction with the absence of reference to charitable means in the same article as pointed out above. As a result, the provision may provide a ground for arbitrary application and various kinds of abuse from partisan political activity to corporate bribery.
17. The U.S. and Canadian legislation may well serve as a source of inspiration for the Kazakhstani legislator in this regard, as both of these countries have long-standing provisions preventing charitable organizations from, for instance, giving dinners to benefit politicians or corporate tycoons under the guise of “advocacy” or “donor relations.” Such safeguards against abuse are mostly based on the extremely clearly delineated range of both charitable and prohibited means, which issue is discussed below in paragraphs 22-25, as well as under the Subsection 4.4.
18. For instance, the U.S. legislation specifically provides that in the case of organizations otherwise eligible for the tax-exempt status, “*exemption ... shall be denied because a*

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<sup>2</sup> *Id.*, Article 2(2) (“Charitable activities shall be conducted to pursue the purposes of: (1) social support and protection of citizens, including the improvement of social conditions of the indigent population, social rehabilitation of the unemployed or disabled persons or persons who due to their physical or mental special needs cannot promote and protect their own rights and lawful interests; (2) preventive activities related to the mitigation of consequences of natural, environmental, industrial or other disasters as well as to the prevention of accidents; (3) support to victims of natural, environmental, industrial or other disasters, social, ethnic, religious conflicts as well as to victims of repressions, refugees and internally displaced persons; (4) promotion of interethnic peace, friendship and accord and prevention of social, ethnic and religious conflicts; (5) promotion of the role of family in society; (6) protection of motherhood, childhood and fatherhood; (7) promotion of education, science, culture, the arts and spiritual development; (8) promotion of public health, healthy lifestyles and the improvement of the moral and psychological status of citizens; (9) promotion of physical education and mass sports; (10) environmental and animal protection; (11) protection and maintenance of buildings, structures and areas of historical, religious, cultural or environmental significance, as well as of cemeteries.”)

<sup>3</sup> In the absence of international standards referring specifically to the issue of “charities” and “charitable activity,” the subsection in question proceeds from the experience of those countries (including Canada, the United Kingdom, and the United States) which have come up with legal definitions of “charitable” (primarily in connection with taxation), as well as from the body of academic work on the issue.

*substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation” (however, making a provision for ancillary or incidental activities by providing that “but only if such organization normally (a) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or (b) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year”).<sup>4</sup>*

19. Similarly, the Canadian Income Tax Act<sup>5</sup> specifically mentions that political activities by charities must be ancillary or incidental and must not include the direct or indirect support of, or opposition to, any political party or candidate for public office.
20. In this connection, it is noteworthy that the possibility the draft in question provides for both natural and legal persons to be both providers and recipients of charitable donations and services adds to the risk of abuse. While this possibility is not problematic *per se*, it reinforces the need for clear and enforceable provisions setting limits on the activities that can be conducted by “charities.”
21. As already noted above, Article 2(2)<sup>6</sup> of the draft provides for a catalog of acceptable purposes, which includes an array of goals from social support to indigent population to the promotion of public health, education and mass sports to the protection of national treasures (however, this catalog does not include the promotion and protection of human rights as a valid charitable purpose, which may be problematic).
22. A more general problem seriously affecting the future implementation of the law as a whole, however, is rooted in a blurred line between what charitable purposes shall be deemed as acceptable and what shall be not. The draft as it stands now is silent on whether or not a charity can be established for or pursue other purposes than provided for by Article 2(2), nor does it provide for a catalog of prohibited objectives and activities.

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<sup>4</sup> United States, 26 USC 501(h).

<sup>5</sup> Canada, Income Tax Act, Subsection 149.1(6.1).

<sup>6</sup> See footnote 2.

23. It is essential to avoid the conflation of “charity”-related legislation with freedom of association legislation, and to realize that “charities” are not an essentially new or distinct group within the NGO sector (and, actually, “charities” may often include non-profit organizations not normally treated under the NGO law, such as cooperative health providers, as it is the case in the U.S.), but a group that is afforded preferential treatment in terms of, for instance, taxation. Therefore, the charity-related legislation should not discuss whether or not a certain type of activity can be prohibited as incompatible with the internationally recognized restrictions on the exercise of freedom of association (this is left to the NGO legislation which is applicable to all NGOs irrespective of whether or not they are recognized as charities), but should instead proceed from the premise that charities as non-profit organizations working for public benefit should be afforded additional benefits. It is therefore necessary to introduce clear criteria of eligibility for those benefits.
24. A provision further down in the text of the draft that “*no restrictions shall be imposed on freedom to choose from the purposes of benefaction and charitable activity as defined by this Law nor on the ways to achieve them*”<sup>7</sup> (emphasis added) further blurs the already vague criteria by reinforcing the conflation between charities and NGOs.
25. While no international standards address the issue of charitable purpose specifically, some useful guidance can be drawn from the best practices in non-profit regulation. There is a general consensus internationally that a charity can engage in activities not specifically pursuing charitable purposes only insofar as these are connected and subordinate to the charity’s main purpose.<sup>8</sup> For example, advocacy for a change in the law is a legitimate political activity as long as it is connected to the primary charitable purpose.<sup>9</sup> There is, however, a clear and universally shared understanding that a charity can under no circumstances engage in partisan political activity.

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<sup>7</sup> Draft Law on Benefaction and Charitable Activity, Article 4(3).

<sup>8</sup> This statement draws on the analysis of the general body of legislation, regulations and caselaw pertaining to the topic. The regulatory framework referred to is the Canadian Income Tax Act and CCRA regulations in the case of Canada; the U.K. Charities Act and the Charities Commission’s guidance on Political Activities and Campaigning by Charities in the case of the U.K., and the various IRS regulations concerning political campaign intervention by the tax-exempt organizations in the case of the U.S..

<sup>9</sup> See footnote 5.

26. In summary, it is recommended that the draft Law be revised to include express reference to charitable purposes and means in the definition of “charitable activity.” Deletion of the words “*other support*” from the mentioned definition may be considered. It is recommended that the draft expressly provide for a catalog of prohibited activities, including a prohibition on partisan political activity by charities. It is also recommended that the promotion and protection of human rights be added to the list of charitable purposes.

#### ***4.3 Registration, termination/dissolution and government monitoring of activities.***

27. The draft sets forth the procedure for registration of “charitable organizations.”<sup>10</sup> It is however questionable that “charitable organizations” be subject to a distinctive procedure while “charitable organization” is not a separate form of legal entity<sup>11</sup> and is already covered under the NGO-related legislation and the Civil Code. Moreover, by way of its ambiguity this provision may result in arbitrary and potentially abusive application (as a general consequence of vagueness and non-transparency). The same concerns apply to the procedure of dissolution/termination of operations,<sup>12</sup> and to the provisions concerning the government monitoring and control charitable activities.<sup>13</sup>

28. It is therefore recommended that Articles 9 and 11, which set forth the procedures for charity registration and for dissolution/termination of operations, respectively, as well as Article 19, which concerns the government monitoring and control of charitable activities, be either removed from the draft altogether or replaced by a mere reference to the relevant provisions concerning registration, dissolution and monitoring of activity of non-profit organizations in general.

#### ***4.4 Use of positive income. Disbursement quotas.***

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<sup>10</sup> *Id.*, Article 9.

<sup>11</sup> *See id.*, Article 7 (“Charitable organizations shall be established as civil society organizations (associations), foundations, institutions or other forms of legal entities as provided for by the legislation of Kazakhstan.”)

<sup>12</sup> *Id.*, Article 11.

<sup>13</sup> *Id.*, Article 19.

29. The draft Law provides that “*where the income received by a charitable organization exceeds the expenses incurred by it, the remaining balance shall not be distributed among the organization founders (members) but shall be used for the pursuit of the purposes that the organization was established for.*”<sup>14</sup>
30. The draft provision as it stands now is vague and, as a result, not necessarily enforceable. It is not exactly clear how “the pursuit of the purposes” should be interpreted. If this means that any positive income should be used to fund charitable activities, then this would virtually deprive charities from engaging in any ancillary<sup>15</sup> or incidental activities such as advocacy or public awareness raising. On the other hand, if the drafter envisages a wider, more inclusive meaning, the charities would be able to spend most of their positive income on such collateral purposes. In addition, Articles 16(4)<sup>16</sup> and 17(3)<sup>17</sup> do provide for a minimum 80% threshold of income that must be used to fund charitable activities, which makes Article 6(2) not only redundant but also to a certain extent misleading.
31. It is recommended that Article 6(2) be revised to enable charities to engage in ancillary or incidental activities. Reference may be made to the specific provisions further in the draft which set the disbursement quotas.

#### ***4.5 Volunteerism***

32. It is welcome that the draft Law addresses the issue of volunteerism, which by itself is a very complex topic with implications across a broad array of issues, as it concerns freedom of association and freedom of expression on the one hand and economic and social rights on the other. It is noteworthy that there are very few international standards

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<sup>14</sup> *Id.*, Article 6(2).

<sup>15</sup> Ancillary activities are commonly understood as serving and subordinate to the charity’s purposes. For instance, the Charity Commission for England and Wales provides the following definition of “ancillary”: “*To be ancillary, activities must serve and be subordinate to the charity’s purposes. They cannot, therefore, be undertaken as an end in themselves and must not be allowed to dominate the activities, which the charity undertakes to carry out its charitable purposes directly.*”

<sup>16</sup> *Id.*, Article 16(4) (“*Unless provided otherwise by the philanthropist or the charitable program, no less than 80 per cent of the charitable donation shall be expended to fund charitable purposes within 1 year since the receipt of the donation by the organization.*”)

<sup>17</sup> *Id.*, Article 17(3) (“*No less than 80 per cent of all non-operating gains and revenue from lawful entrepreneurial activities of the organization accrued within 1 fiscal year shall be used to fund charitable programs (including purchases, operating costs, program staff salaries and other similar expenses.)*”)

in regard of volunteerism specifically, therefore the body of best practice remains the most important basis for reasoning and recommendations.

33. The proposed regulation of volunteerism would fill in the current gap when actual volunteering is relatively common but no legislation – including the most relevant laws such as the Law on Non-Commercial Organizations, the Law on Civil Society Associations, and the Law on Work in Kazakhstan<sup>18</sup> – provides for a definition of volunteer nor for a set of respective rights and obligations, thus leaving the growing corps of Kazakhstani volunteers in a legal limbo.
34. First, the draft law provides for a definition of volunteer as “*a citizen who performs charitable activity in the form of unpaid labor benefiting the recipient, which may be the charitable organization itself.*”<sup>19</sup> The definition as it stands now misses the key element of voluntary activity – that it should not be a result of coercion but arise from the individual’s free will. It is central to regulating volunteerism that a volunteer should be given the discretion to define the scope, timeline and other modalities of his/her involvement without negative repercussions. It is therefore recommended that the definition of volunteer be reviewed to provide for free will as its necessary element.
35. Second, the draft includes a provision allowing the non-profit organization that employs volunteers to reimburse legitimate expenses incurred from the voluntary activity such as per diem when on field trips or transportation expenses.<sup>20</sup> This is a welcome provision which could, however, be further improved by extending to volunteers additional protections such as, for example, accident and health insurance, drawing on the best practice examples from other OSCE participating States.<sup>21</sup> This approach would also be consistent with the International Labor Organization (ILO) Employment Injury Benefits Recommendation, which includes specific reference to the provision of benefits to volunteers by recommending that “(1) *Each Member should, subject to prescribed conditions, secure the provision of employment injury or analogous benefits, if necessary*

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<sup>18</sup> The mention of the Law on Work in this context should not be construed as a recommendation that volunteer-beneficiary relations should be regulated by the labor legislation.

<sup>19</sup> Draft Law on Benefaction and Charitable Activity, Article 5.

<sup>20</sup> *Id.* (“*The charitable organization may reimburse volunteers for the expenses incurred from their voluntary activity for the organization (travel subsistence allowance, transportation expenses, etc.)*”)

<sup>21</sup> See Spain, Law 6/1996 on Volunteerism (15 January 1996).

*by stages and/or through voluntary insurance, to [...] (c) certain categories of persons working without pay, which should include [...] (ii) members of volunteer bodies charged with combating natural disasters, with saving lives and property or with maintaining law and order; (iii) other categories of persons not otherwise covered who are active in the public interest or engaged in civic or benevolent pursuits, such as persons volunteering their services for public office, social service or hospitals.”<sup>22</sup>*

36. Reimbursement for the legitimate expenses arising from voluntary activity may be made mandatory rather than optional. The Spanish Law on Volunteerism<sup>23</sup> may be given close consideration by the Kazakhstani legislator as an example of good practice in this regard. The Spanish law extends to volunteer labor a broad range of protections, including an obligation for the organization employing the volunteer to cover him/her with appropriate insurance against risks of accident and illness directly related to the execution of the volunteer activity, as well as reimburse costs volunteers may incur while fulfilling their duties, and guarantee volunteers the proper conditions of security and hygiene.
37. Finally, the draft includes a provision categorizing provision of unpaid works or services by a legal entity as a subtype of charitable activity.<sup>24</sup> There is no similar provision for (unregistered) groups of individuals, therefore it is assumed that this provision may have been envisaged as a safeguard against exploitation, as it is presumably easier to monitor working conditions in legal entities due to their higher visibility. The actual potential of this provision for effective implementation is however rather debatable since organizations may as well exploit unpaid labor unless the law extends to volunteer workers the same range of essential protections as to regular paid workers – which is not the case in Kazakhstan where no legislation up to now has mentioned volunteers nor does the volunteer status need to be formalized in any way. Moreover, the international experience shows that volunteer labor can be successfully used and adequately protected

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<sup>22</sup> Full text of the ILO Employment Injury Benefits Recommendation is available on the web at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=122&chapter=2&query=%23subject%3D13&highlight=&querytype=bool&context=0#Link> (last visited on May 18, 2006).

<sup>23</sup> Spain, Law 6/1996 on Volunteerism (15 January 1996).

<sup>24</sup> Draft Law on Benefaction and Charitable Activity, Article 5 (“*Philanthropists are persons who perform charitable activity in the following forms: ... (5) voluntary and gratuitous or on preferential terms provision of works or services by legal entities.*”)

when the beneficiary is an unregistered group of individuals. In the absence of specialized legislation on volunteerism, the draft in question needs to provide for additional safeguards against exploitation. It is particularly recommended that the draft include an express prohibition against putting volunteers in positions formerly held by paid staff of the organization. It is also advisable that an agreement be drawn up between the volunteer and the employing non-profit specifying the nature of the work performed and the number of hours committed.

38. The draft volunteerism-related provisions are certainly a step forward but may be insufficient to regulate this highly complex issue in its entirety. It is noteworthy that as a growing number of OSCE participating States have chosen to regulate volunteerism through a separate law and this option may be considered by the Kazakhstani legislator as well (i.e. changing the emphasis of the current law and drafting a law on volunteerism instead of a law on charities).