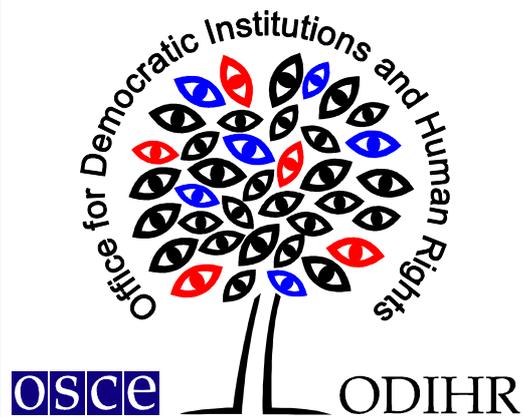


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COMMENTS

ON THE DRAFT AMENDMENTS TO SELECTED LEGISLATIVE ACTS OF KAZAKHSTAN CONCERNING PUBLIC ORDER AND SAFETY

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1. INTRODUCTION

1. *On 1 November 2006, the OSCE/ODIHR was requested by the OSCE Centre in Almaty to review the Draft Amendments to Selected Legislative Acts of Kazakhstan Concerning Public Order and Safety.*
2. *These Comments have been prepared on the basis of the unofficial English and Russian translations of the Draft Amendments.*

2. SCOPE OF REVIEW

3. These Comments analyze the Draft Amendments to Selected Legislative Acts of Kazakhstan Concerning Public Order and Safety (hereinafter referred to as the “Draft”) from the viewpoint of their compatibility with the relevant international human rights standards, including the OSCE human dimension commitments. The international standards referred to by the Comments also include documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties. The Comments may occasionally refer to good practices from the OSCE participating States.
4. The Comments also draw upon the OSCE/ODIHR Draft Guidelines for Drafting Laws Pertaining to Freedom of Assembly (2004) which demarcate a minimum baseline in relation to these standards, thereby establishing a threshold that must be met by national authorities in enacting legislation concerning the right to freedom of peaceful assembly.¹
5. The Comments do not purport to provide a comprehensive review of the Kazakhstani legal framework concerning freedom of assembly. The opinion provided herein is also 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 amendments suggests that the drafters’ intent may have been to specifically address offenses against public order and/or safety committed during or in connection with public assemblies, and to give the police extended powers of crowd control. While protecting public order and safety does constitute a compelling state interest, special attention should be paid to ensuring specificity and predictability of the law so that it cannot be used in an overbroad and arbitrary manner. It is also essential to ensure that the law is enforced in a uniform and non-discriminatory manner.
7. The draft in question would also benefit from enhanced proportionality and narrow tailoring of its provisions to avoid encroachment on the constitutionally protected right to

¹ The OSCE/ODIHR Draft Guidelines are currently being consolidated through broad consultations with government officials, legal professionals, judges, law enforcement officers, and civic organization members from across the OSCE region. The Guidelines are expected to be released in 2007.

peaceably assemble. In particular, this concerns the issue of the imposition of custodial sentences for relatively minor, non-indictable offenses impinging on public order or safety. The considerations of proportionality call for either entirely abandoning the possibility to impose a custodial sentence for similar offenses, or revision of the relevant provisions to only permit it where there is clear and convincing evidence that the threat to public order and/or safety would continue to persist unless the perpetrator is temporarily isolated from society.

8. Furthermore, it is recommended that the legislator introduce a set of specific restrictions and strong safeguards on the permissible use of force in policing of public assemblies, as well as a set of principles concerning assembly dispersal.
9. Below follows the full list of recommendations:
 - 1) It is recommended that the draft amendments to Articles 55(1), 373(3) and 373(4) allowing for the imposition of a custodial sentence (“*administrative arrest*”) for non-indictable offenses impinging on public order or safety be either entirely abandoned or revised to only permit the imposition of a custodial sentence where there is clear and convincing evidence that the threat to public order and/or safety would continue to persist unless the perpetrator is temporarily isolated from society. It is also recommended that draft amendments to Article 55(1) be revised to refer to Section 24 of the Code of Administrative Violations to ensure consistency between the said Article and the provisions of the Code that deal with assembly-related offenses. [see paras 15 and 17, also para 25]
 - 2) It is recommended that draft Articles 373(3) and (4) clarify the exact scope and meaning of a “breach” so that to minimize the risk of arbitrary interpretation of the law. [see para 20]
 - 3) It is recommended that draft Articles 373(3) and (4) be revised to exempt organizers from liability for failure to perform their responsibilities if they made reasonable efforts to do so but the situation went out of their control. [see para 21]
 - 4) It is recommended that the organizers be exempted from liability for any unlawful conduct by third parties. [see para 22]
 - 5) The draft provisions relieving organizers of “*authorized assemblies*” of liability “*should they take timely actions to terminate the activities*” are confusing and need to be clarified. If the assembly has been authorized, then the organizers have a license to proceed and it is unclear why liability should be imposed on them in the first place. [see para 23]
 - 6) It is recommended that the draft provide for the “reasonable excuse” defense. In practical terms, this would mean that responsibility shall only ensue where the otherwise illegal act has been committed “without reasonable excuse.” The defense of “reasonable excuse” shall not be interpreted as reversing the burden of proof. [see paras 27-28]

- 7) It is strongly recommended that the draft amendments to the Law on Law Enforcement Agencies clearly spell out the principle of proportionality in the provisions governing the use of force and non-lethal weapons by the law enforcement bodies. [see para 33]
- 8) It is strongly recommended that the law allow assembly dispersal exceptionally as a measure of last resort and only in the case of violence or a direct and immediate threat of violence, rather than in response to merely procedural violations. [see para 35]
- 9) It is strongly recommended that the law provide for the accountability of the law enforcement bodies in their policing of public assemblies, as well as for their liability for abuse. [see para 36]
- 10) It is strongly recommended that the law extend protection to assemblies where the only element of unlawfulness concerns a failure to satisfy lawful notification requirements, and prohibit their dispersal as long as they are peaceful. The initiators of such assemblies should be required to appear in court afterwards to present any evidence in support of circumstances that have legitimately prevented timely filing of a notification. Appropriate penalties may apply in cases where no such evidence has been presented. [see para 40]

4. ANALYSIS AND RECOMMENDATIONS

4.1 “Administrative arrest” and the right to liberty and security

10. The Draft, if passed, would provide for the so-called “administrative liability” for breaches of public assembly related legislation that are not otherwise covered by criminal liability, and make these breaches punishable by “*administrative arrest*.”² In particular, the sentence of “administrative arrest” may be imposed on assembly organizers and/or participants for violations of the procedure of organizing and

² Draft amendments to the Code of Administrative Offenses, Article 55(1) (“*The sentence of administrative arrest shall be imposed by the judge in exceptional cases for a term not exceeding 15 days for administrative offenses impinging on public safety and public health, as well as, for a term not exceeding 30 days, for administrative offenses related to corruption and/or violations of orders placed into effect under the state of emergency.*”), Article 373(3) (“*Violation of the laws of the RK stipulating for the procedures of organization and carrying out of peaceful gatherings, rallies, processions, picketing and demonstrations or other public activities related to manifestation of public, group or individual interests, should they carry no features of criminal acts – shall lead to sanction of fine imposed on organizers of the gathering, rally, picketing, demonstration or other public activity in the amount of 20 to 50 monthly salary units or administrative arrest for the term of up to 10 days, on other participants – sanction of fine in the amount of 15 to 20 monthly salary units or administrative arrest for the term of up to 5 days.*”) and 373(4) (“*Performance of the actions provided for in section 3 of the article repeatedly within 1 year from the moment of administrative sanctioning – shall lead to sanction of fine imposed on organizers of the gathering, rally, procession, demonstration or other public activity in the amount of 100 monthly salary units or administrative arrest for the term of up to 15 days, on other participants – sanction of fine of 20 to 50 monthly salary units or administrative arrest for the term of 5 to 10 days.*”)

conducting public assemblies as stipulated by the domestic law. Interference with a lawful assembly committed by a government official would also entail administrative liability, punishable by a fine.

11. Before analyzing the draft provisions in question, it is essential that the exact meaning and scope of “administrative liability” and “administrative offense” in the Kazakhstani legal system be correctly understood. What the Kazakhstani law refers to as “administrative offenses” are in fact non-indictable criminal offenses which can be tried summarily. “Criminal offenses,” respectively, is the traditional term for the more serious, indictable criminal offenses.
12. Since “administrative arrest” as a sanction for a non-indictable offense may only be imposed through a judicial intervention, it does not constitute administrative detention *stricto sensu*, conventionally understood as deprivation of liberty where “it has been ordered by the executive and the power of decision rests solely with the administrative or ministerial authority, even if a remedy *a posteriori* does exist in the courts against such a decision.”³
13. Even though the power to order “*administrative arrest*” rests with the court – which is clearly welcome – the draft provisions still raise concerns. Imposition of a custodial sentence for a relatively non-serious, non-indictable offense raises a serious concern, especially in the light of the general trend to promote and encourage the use of non-custodial measures throughout the criminal justice system, from pretrial to post-sentencing dispositions. While proportionality in sentencing is not expressly required by international law, it is an important corollary of both the right to liberty and security⁴ and the prohibition of torture,⁵ and as such may be inferred from the relevant

³ See Louis Joinet, *Report on the Practice of Administrative Detention*, UN Doc. E/CN.4/Sub.2/1990/29.

⁴ International Covenant on Civil and Political Rights, Article 9 (“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”)

The Covenant was ratified by the Republic of Kazakhstan on 24 January 2006. The full text of the Covenant is available at <http://www.ohchr.org/english/law/ccpr.htm> (last visited on 25 October 2006).

⁵ *Id.*, Article 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or

provisions of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”).

14. The intrinsic relationship between the principle of proportionality in sentencing and the right to liberty and security lies with the prohibition of arbitrary detention, since a disproportionately severe penalty for a relatively minor offense (such as a custodial sentence for a non-indictable offense whereas there are alternatives to imprisonment available for much more serious indictable crimes under the Kazakhstani law) will inevitably raise concerns as arbitrary.
15. A disproportionately severe penalty may also be regarded as cruel and inhuman, and as such violating the prohibition of torture.
16. It may be argued that custodial measures may not only be imposed as punishment but for preventative purposes as well.⁶ While preventing a continued threat to public order and/or safety does constitute a compelling state interest, the provisions of the law must be narrowly tailored to be sustained as compatible with international law and the Constitution. That is to say, in order to serve a legitimate aim the draft provisions in question should be revised to only permit the imposition of a custodial sentence where there is clear and convincing evidence that the threat to public order and/or safety would continue to persist unless the perpetrator is temporarily isolated from society.
17. On another note, the draft intends to amend the Code of Administrative Offenses in the part that provides for the general grounds for the imposition of the “administrative arrest” by substituting “*administrative offenses against person*” as a permissible ground for arrest with “*administrative offenses impinging upon public safety and public health.*”⁷ This proposed amendment creates certain inconsistency within the Code of Administrative Violations as well as across the array of other applicable legislation concerning public assemblies, since offenses impinging upon public safety and public health are dealt with by Section 21 of Code which is only remotely relevant to the public assemblies issue (for instance, provisions concerning fire safety may theoretically be applicable, albeit in very limited circumstances). At the same time, Section 24 of the Code (Offenses Against Governance) is likely to be routinely invoked to prosecute those committing assembly-related offenses, as it, for instance, establishes as an “administrative offense” “*willful failure to follow a lawful order or instruction by a law enforcement officer.*”⁸

punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”)

⁶ See the European Court of Human Rights judgment on the case of *Weeks v. the United Kingdom* (Application no. 9787/82), where the Court ruled that “*the applicant’s recall to prison in 1977 and the period of his subsequent detention as in issue in the present proceedings ... were not incompatible with Article 5 para. 1*” since “*the restrictions to which Mr. Weeks’ freedom outside prison was subject under the law are not sufficient to prevent its being qualified as a state of “liberty” for the purposes of Article 5.*”

⁷ Draft amendments to the Code of Administrative Offenses, Article 55(1). See *supra* footnote 2 for the exact wording of the provisions in question.

⁸ Code of Administrative Offenses, Article 355.

18. It is therefore recommended that draft amendments to Article 55(1) be revised to refer to Section 24 of the Code of Administrative Violations to ensure consistency between the said Article and the provisions of the Code that deal with assembly-related offenses.

4.2 Liability of organizers

19. As mentioned in the previous subsection, the Draft creates administrative liability for assembly organizers for “breaches” of assembly related legislation.⁹ However, the provisions in question are worded rather vaguely and do not specify whether only the committal of the offense by the organizer himself/herself shall trigger liability or liability shall ensue also if the offense has been committed by a participant or a third party to the event.
20. The vagueness of the Draft law presents a major concern as it is incompatible with the principles of legality and of legal security. These principles require that the law be clear, ascertainable and the consequences of a breach foreseeable.
21. The provisions in question do not comply with the principle of legality in that the exact scope and meaning of a “breach” is left at the discretion of those applying the law and thus provides opportunity for arbitrary interpretation. It is recommended that they be revised to minimize the risk of arbitrary interpretation.
22. Moreover, if the law is to be interpreted as imposing liability on organizers for any illegal conduct by the persons present regardless of whether or not the organizers made reasonable efforts to prevent such conduct, this would be a manifestly disproportionate response to such conduct. It is therefore recommended that the provisions in question be revised to exempt organizers from liability for failure to perform their responsibilities if they made reasonable efforts to do so but the situation went out of their control. Not only would this solution be highly desirable from the purely legal standpoint, but it would also help the law better serve its policy objective by encouraging the organizers to take greater care in preventing unlawful conduct and to better cooperate with the police.
23. Furthermore, in order to comply with the principle of legality, organizers should not be imputed responsibility for acts by any third parties (i.e. those who are not participants of the assembly), since the very fact of their presence – and, consequently, any unlawful act they may commit – could not be reasonably foreseen by the assembly organizers. The category of “third parties” is rather broad and would include, among others, any accidental bystanders. The imposition of liability with regard to acts by “third parties” may also create an additional risk, opening a door for *agent provocateurs* infiltrating assemblies.

⁹ Draft amendments to the Code of Administrative Offenses, Article 373(3) and 373(4). *See supra* footnote 2 for the exact wording of the provisions in question.

24. Finally, the draft provisions relieving organizers of “*authorized assemblies*” of liability “*should they take timely actions to terminate the activities*”¹⁰ are confusing and need to be clarified. If the assembly has been authorized, then the organizers have a license to proceed and it is unclear why liability should be imposed on them in the first place.

4.3 Liability of participants and the “reasonable excuse” defense

25. As mentioned above, the Draft creates administrative liability for assembly participants for “breaches” of assembly related legislation.¹¹

26. Again, it is recommended that the exact meaning and scope of a “breach” be clarified for the law to be clear and foreseeable and thus compatible with the principle of legality.

27. While it is welcome that the draft relieves assembly participants from liability for participating in an illegal assembly where there is evidence that they complied with the lawful requests of the State officials and/or the assembly organizers,¹² the draft would still benefit from amendments to ensure the proportionality of response and general compatibility with the human rights standards.

28. In particular, it is recommended that the draft incorporate the so-called “reasonable excuse” defense. In practical terms, this would mean that responsibility shall only ensue where the otherwise illegal act has been committed “without reasonable excuse.” For instance, where the law provides for liability for the participation in unauthorized assemblies, an individual who takes part in such an event should only be held liable if he/she had prior knowledge that the assembly had not been authorized. The absence of such knowledge constitutes a “reasonable excuse” and a ground for exemption from liability. Likewise, if a properly authorized demonstration turns out to be non-peaceful, individual participant who does not himself or herself commit any violent act cannot be prosecuted solely on the ground of participation in an illegal gathering.¹³

29. It is of central importance that the defense of “reasonable excuse” be not interpreted by the prosecution and the court as reversing the burden of proof. The accused will have a full defense if he/she can prove the ingredients of the defense on a balance of probabilities which the prosecution must rebut if he/she is to be convicted. The

¹⁰ *Id.*, Commentary to Article 373(4) (“*Organizers and other persons responsible for adhering to the procedures of carrying out authorized gatherings, rallies, processions, demonstrations shall be relieved of administrative liability should they take timely actions to terminate activities stated above in cases stipulated for by the laws of the RK.*”).

¹¹ See *supra* footnote 9.

¹² Draft amendments to the Code of Administrative Offenses, Commentary to Article 373(4) (“*Other participants of gatherings, rallies, processions, demonstrations shall be relieved of administrative liability should they fulfill the demands of the officials as well as the organizers and other responsible persons related to termination of activities stated above in cases stipulated for by the laws of the RK.*”)

¹³ See European Court of Human Rights, *Ezelin v. France*, Judgment of the Court, 18 March 1991, para 50.

burden of proving the case to the required evidentiary standard remains with the prosecution.

4.4 Responsibilities of the police and the use of force

30. The draft, if passed, would allow the police to use force and/or non-lethal weapons for the dispersal of public assemblies in the instances of breaches of “the procedure” of assembly conducting.¹⁴
31. The provision in question touches upon two related but still separate issues: (a) the permissible use of force in assembly dispersal and the policing of public assemblies in general; (b) the permissible grounds for assembly dispersal (with or without use of force). The implications of the draft provision for these issues are discussed separately.

4.4.1 Permissible use of force in policing of public assemblies

32. The draft amendments to the Law on Law Enforcement Agencies may also create a risk of virtually unrestrained use of force by the police. As already mentioned above, a vague law opens a wide door for arbitrary implementation and abuse since it leaves the implementators (in this case, the police) with a discretionary authority to interpret what may constitute a “breach” serious enough to trigger the use of force.
33. It is recommended that the drafters closely consider the U.N. Code of Conduct for Law Enforcement Officials¹⁵ and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹⁶ and follow the main standards as set forth by these two documents.
34. In particular, it is strongly recommended that the draft provide for safeguards to ensure that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”¹⁷ Note that the Commentary to the Code of Conduct clarifies that this provision is intended to “emphasize that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in

¹⁴ Draft amendments to the Law on Law Enforcement Agencies, Article 13 (“*Law-enforcement officers shall be sanctioned to use physical force and special means, including military combat techniques, handcuffs, rubber clubs, tear substances, light and sound disrupting devices, special opening tools, tools for forced stopping of vehicles, water guns, specially trained animals, armored vehicles and other special and transportation means the list of which shall be defined by the Government for the following purposes: [...] 5. Termination of gatherings, rallies, processions, picketing and demonstrations in case of the organizers and participants violating the procedure of conducting activities stipulated for by the legislation of the RK and resisting lawful demands of the representatives of local executive power bodies.*”)

¹⁵ Full text of the U.N. Code of Conduct is available at http://www.unhchr.ch/html/menu3/b/h_comp42.htm (last visited on 6 November 2006).

¹⁶ Full text of the U.N. Basic Principles is available at <http://www.ohchr.org/english/law/firearms.htm> (last visited on 6 November 2006).

¹⁷ U.N. Code of Conduct for Law Enforcement Officials, Article 3.

effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.”

35. As far as the use of firearms is concerned, the U.N. Basic Principles provide that “[l]aw enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”¹⁸ Note that standards concerning the use of firearms are equally applicable to the use of other techniques of crowd control that are potentially harmful, such as batons, dogs, tear gas and water cannons.
36. With respect to the draft in question, the above considerations would mean clearly spelling out the principle of proportionality in the law governing the use of force and non-lethal weapons by the law enforcement bodies. It is strongly recommended that the law allow assembly dispersal exceptionally as a measure of last resort and only in the case of violence or a direct and immediate threat of violence, rather than in response to merely procedural violations.
37. Finally, the law should provide for the accountability of the law enforcement bodies in their policing of public assemblies, as well as for their liability for abuse.

4.4.2 Assembly dispersal: Permissible grounds

38. The restrictions on the permissible use of force are intrinsically related to the issue of assembly dispersal, since the proportionality principle requires that both be essentially applied in response to violence or a direct and immediate threat of violence. It is a well-established corollary of the proportionality principle that assembly dispersal may only be ordered as a measure of last resort, when all previous efforts to prevent an unlawful event from occurring have yielded futile. Where the assessment of the situation shows that the assembly should be dispersed to prevent major disorder, use of force should be avoided as far as possible. The U.N. Basic Principles unequivocally state that “[i]n the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”¹⁹
39. It has to be mentioned that “unlawful” assemblies present an extremely wide category of events ranging from assemblies which are clearly illegal (e.g. violent assemblies) to peaceful events for a purportedly illegal purposes (e.g. an assembly advocating war; the regulation of such assemblies will to a great extent depend on the particularities on the domestic criminal law) to assemblies which are peaceful but do not comply with the requisite preconditions as established by the law (e.g. this would be the case of a peaceful assembly that proceeds despite a ban).

¹⁸ U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

¹⁹ *Id.*, Principle 13.

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40. The latter group of assemblies requires especially close attention as the international body of good practice suggests that in most cases such assemblies would not require dispersal. Rather than proceeding with dispersal, it is more appropriate to request that those present leave the site and warn of the liability for non-compliance. However, if those present fail to follow the request, it is more appropriate to take retrospective measures rather than proceed to disperse the assembly by force. Retrospective measure may include prosecuting the organizer(s) of such an assembly for failing to observe the applicable laws, and participants for taking part in an unlawful assembly.
41. Note that spontaneous peaceful assemblies, i.e. assemblies where the only element of unlawfulness concerns a failure to satisfy lawful notification requirements, deserve special protection under the law and under no circumstances should their dispersal be deemed necessary. The special status of spontaneous assemblies is justified by the very same considerations as apply to the above-discussed importance of ensuring that participants and organizers of assemblies benefit from the “reasonable excuse” defense. Since in some cases the circumstances may not allow for the timely filing of the notification, and these circumstances may not be reasonably confirmed or disproved until after the assembly is over, the law should allow spontaneous assemblies to proceed as long as they are peaceful, however, requiring that the initiators of the assembly appear in court afterwards to present any evidence they may have in support of circumstances that have legitimately prevented timely filing of a notification. Appropriate penalties may apply in cases where no such evidence has been presented.

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