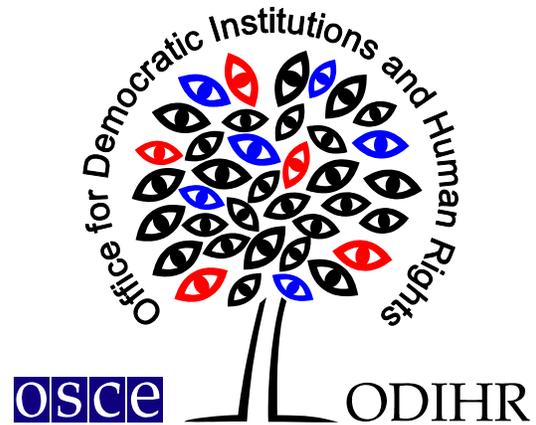


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Preliminary Comments
on the Draft Laws of the Kazakh Republic
“On counteractive measures against extremist activities”
and “On amendments to several legislative acts with regard
to counteractive measures against extremist activities”

1. Scope of Review

This is not a comprehensive review, but rather a preliminary comment on the Draft Law Nr 400 of the Kazakh Republic “On counteractive measures against extremist activities” (“**Draft**”) adopted 10 April 2004 by the Kazakh Government and the Draft Law Nr 406 of the Kazakh Republic “On amendments to several legislative acts of the Republic of Kazakhstan with regard to counteractive measures against extremist activities” adopted 12 April 2004 by the Kazakh Government (“**Second Draft**”)¹. Both Draft Laws are pending in the Mazhilis (Parliament of the Republic of Kazakhstan).

The analysis has been conducted with a tight time schedule. 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 16 February 2002), regulations on freedom of religion, freedom of association, freedom of the media and/or freedom of assembly – have been taken in consideration.

The OSCE ODIHR would like to make mention that the comments provided herein are without prejudice to any further comments or recommendations that the ODIHR may wish to make on the Draft Laws under consideration.

2. Background: Laws on “extremism” – a new generation of legislation?

2.1. After the attacks on 9 September 2001 in New York and Washington the fight against terrorism has become a top issue on national and international agendas. In Central Asia and other CIS countries this has been reflected by several legislative acts on counteractive measures on terrorism such as the Decree by the Kazakh President Nr. 332 “On the prevention and suppression of terrorism and extremism” (adopted 16 February 2002), the Russian Law “On the fight against terrorism” (adopted 25 July 1998 as amended 21 November 2002) and the Turkmen Law “On the fight against terrorism” (adopted 14 December 2003).

2.2. After most countries having passed legislation or amended existing legislation to combat terrorism, it can not be excluded that “the fight against extremism” could or already has led to a new generation of legislative acts on this issue in the region. One indicator for this development might be the Shanghai Convention “On the fight against terrorism, separatism and extremism” (“**Convention**”) signed on July 2001. With this document the Republic of Kazakhstan, People’s Republic of China, Kyrgyz Republic, Russian Federation, Republic of Tajikistan and Republic of Uzbekistan have agreed to fight “extremism” (cp Article 1 of the Convention). In accordance to the Convention the contracting states have

¹ This review has been conducted on the basis of a Russian version of both Draft Laws, which was provided by the OSCE Centre in Almaty

promised to pass all necessary legislation aimed at counteractive measures to combat “extremism” (cp Article 3 of the Convention).

- 2.3. Kazakhstan has ratified the Shanghai Convention on 18 April 2002 (cp Law on the ratification Nr. 316-II adopted on 18 April 2002). Kazakhstan might also be willing to fulfill its obligations according to the Convention by presenting the two Draft Laws on “extremism”.

3. General comments on the Draft Laws

- 3.1. It is a very challenging task for legislators to balance between the necessities of state security and human rights standards. The Kazakh legislator attempts to manage this tightrope walk².
- 3.2. Both Draft Laws cover a very broad range of issues related to “extremism” such as the banning of associations, education and international co-operation in the field of policing. The Draft contains general statements, which are rather declarative (cp Article 6 [3] of the Draft) as well as far reaching limitations on fundamental freedoms and human rights (cp Article 13 of the Draft).
- 3.3. “*Religious extremism*” seems to be the major focus of the legislator.
- 3.4. At this stage not all provisions of the drafts are clearly defined and consistent (cp Article 8 [2] of the Draft). Some of them are not posted in a systematic order (cp Article 9 of the Draft).

4. Legislative approach on the issue “extremism”

- 4.1. The Draft provides “*the legal and organizational basis for the counteractive measures against extremism in order to protect human rights and freedoms, the constitutional order, the unity and national security of the Kazakh Republic*” (cp introductory note of the Draft).
- 4.2. It is questionable whether or not a single law on “extremism” is the adequate legislative approach. “Extremism” is not a legal term and a coherent definition should be very difficult, if not impossible. “Extremism” is rather a political and social phenomenon which affects state and society on numerous issues – such as associations, media, public services, religion, political parties, education etc.

² European Court of Human Rights has ruled with regard to counteractive measures on terrorism: “The Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.” (cp *Klass and Others v. Germany*, EHCR, 6 September 1978 para. 49).

Therefore far reaching intersections of a law on “extremism” with already existing legislation can not be avoided and the added value – speaking from a legal focus – might be rather low.

- 4.3. Alternatively all counteractive measures against “extremism” could be integrated in the already existing legislation – such as for example the Code of civil procedure, Criminal Code, Code on administrative violations. The Second Draft presented by the Kazakh government follows this concept by proposing several amendments to existing Kazakh laws.

5. Definitions of the Draft

- 5.1. The Draft defines the following terms: “*organization of extremist activities*”, “*counteractive measures on extremism*”, “*prevention of extremist activities*”, “*completion of extremist activities*”, “*extremist activities (extremism)*”, “*extremist organization*” and “*extremist publishing material*” (cp Article 1 of the Draft).
- 5.2. All definitions are very broad and rather descriptive. For example the term “*Religious extremism*” is defined as “*adherence in religious denomination to radical persuasion expressed in acts aimed at the promotion of tension between religious groups, destruction of the human personality, threats to human health and life*”.
- 5.3. Terms and respectively the definitions are not or not applied in a consistent manner through out the draft. For example the terms “*national extremism*” and “*political extremism*” are not referred to at all in the Draft (cp Article 1 of the Draft). It should be considered, whether or not to include them in the Draft.
- 5.4. All definitions of the Draft must be narrowly interpreted in the light of international human rights standards, because some definitions trigger far reaching consequences for human rights - for instance a derogation on the freedom of religion, freedom of association and freedom of assembly.

While Article 2 (2) of the Draft declares the prerogative of international conventions with regard to the provisions of the Draft, it should be made clear in Article 1 of the Draft or in direct relation to it that fundamental freedoms and human rights must be respected, when these definitions are applied.

6. Counteractive measures on “extremism”

- 6.1. General principles for all counteractive measures against extremism are stated in Article 4 of the Draft. Inter alia the Draft declares the principle of non-discrimination and legality as well as a “*priority for national security*” (cp Article 4 of the Draft). The use of the word “*priority*” in the Draft can be

misleading from a legal standpoint, because it might lead to the conclusion for state authorities that security interest must be valued higher than human rights. This provision should be reconsidered.

6.2. The Draft distinguishes between preventive measures against extremism, counteractive measures against extremism and international co-operation in the combat against extremism (cp Article 5 of the Draft).

6.3. While fundamental freedoms and human rights can be restricted, these restrictions must be defined as precisely as possible, be necessary and proportionate³. Whether or not this requirement is fulfilled, must be further elaborated. At this stage the following provisions (among others) of the Draft with regard to fundamental freedoms and human rights ought to be carefully reviewed:

- a state organ for relations with religious organizations “*studies and analyzes*” the activities of all religious organizations on the territory in Kazakhstan (cp Article 6 [1] of the Draft)
- a state organ for relations with religious organizations conducts “*informational-propagandistic activities*” (cp Article 6 [1] of the Draft)
- education program against “extremism” which will promote an “*anti-extremist ideology*” (cp Article 6 [3] of the Draft)
- an association, which does not have to be a legal entity, can be banned by a courts decision, furthermore this association is not entitled anymore to organize and conduct mass meetings, conduct “*propaganda and agitation*” (cp Article 10 [2] of the Draft)
- “*networks and means of communications*” may not be used for extremist activities (cp Article 11 of the Draft)
- Organizers of mass meetings are responsible, that no extremist activities occur while the meeting is taking place (cp Article 13 of the Draft)

7. Conclusions

7.1. The “fight against terrorism” has resulted in a broad and international discussion - not only in jurisprudence – on the relationship between human rights and security matters⁴. This discussion should also take into consideration the development of legislation, which focus is on the issue of “extremism”. Counteractive measures so labeled may well have the potential to engender more

³ Guidelines on human rights and the fight against terrorism, Section III 2 (adopted by the Committee of Ministers of the Council of Europe on 11 July 2002)

⁴ Amongst others: Guidelines on human rights and the fight against terrorism (adopted by the Committee of Ministers of the Council of Europe on 11 July 2002); Conclusions of the Committee of experts on special investigation techniques in relation to acts of terrorism (adopted at the 3rd meeting on 22-24 September 2003); 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).

serious restrictions of human rights than those focused on the “fight against terrorism”.

While the term “terrorism”⁵ refers to a mean (the use of terror), the term “extremism” has broader connotations, among which an emphasis on the nature of the opinions or beliefs. It follows that legislation on “extremism” may have even more serious implications on a broader spectrum of fundamental freedoms and human rights (such as freedom of religion, freedom of expression and freedom of association).

- 7.2. In light with the above, the compliance of both Kazakh Draft Laws with international human rights standards should be closely reviewed. Some provisions trigger far reaching consequences for the freedom of religion, freedom of expression and freedom of association. It can not be excluded at this stage that the Draft-Laws are not compliant to international human rights standards in respect of these fundamental freedoms. This is especially true for Article 6, 10, 11 and 13 of the Draft.

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⁵ 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